No. 24-337

IN THE

Supreme Court of the United States

NANTUCKET RESIDENTS AGAINST TURBINES, *et al.*,

Petitioners,

v.

BUREAU OF OCEAN ENERGY MANAGEMENT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

NANCIE G. MARZULLA
Counsel of Record
ROGER J. MARZULLA
MARZULLA LAW, LLC
1150 Connecticut Avenue, NW,
Suite 1050
Washington, DC 20036
(202) 822-6760
nancie@marzulla.com

Counsel for Petitioners

December 20, 2024

120153

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Statutes, Regulations and Other Authorities

Cited Authorities

Cited Authorities

Page

REPLY BRIEF

Congress intended for Section 7, which is the heart of the Endangered Species Act (ESA),[1] to be one of the federal Government's most potent tools in ensuring that our nation's species are protected and preserved. As this Court observed in 1978, "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act."[2]

Yet today, the federal agency specifically charged with the responsibility of ensuring that endangered species are protected by complying with the plain language of Section 7, the National Marine Fisheries Service (NMFS), has promulgated a regulation that nullifies this direct statutory command, interpreting its responsibilities under Section 7 as allowing the agency to ignore known information about other planned federal offshore wind turbine projects. NMFS absurdly argues that agency officials, in preparing a biological opinion for a project, must ignore information about impacts on endangered species from other offshore wind turbine projects that are planned and in various stages of development and governmental review. Perhaps even more bizarrely, NMFS contends that, in preparing a biological opinion for a project, it must consider the cumulative impacts of planned state and local projects but ignore the impacts of planned federal projects.

NMFS tries to sidestep the issue by incorrectly contending that Petitioners did not sufficiently raise this

1. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978).

2. *Id.* at 173.

issue in the First Circuit. But this argument falls flat because the lawsuit below broadly challenged NMFS's failure to consider all the information it should have considered in preparing the Biological Opinion on which the Bureau of Ocean Energy Management (BOEM) relied when approving the Record of Decision (ROD) for the Vineyard Wind 1 Project. That this Petition focuses on only one aspect of the agency's shortcomings in preparing its Biological Opinion—its failure to consider the cumulative impacts of other known, authorized, planned, and soon-to-be-approved projects—does not render this Petition unworthy of review by this Court. And that the First Circuit gave short shrift to Petitioners' arguments, including this one, equally does not render this Petition unworthy of review.

The timing of this petition is propitious. As the first of the over 30 planned offshore wind turbine projects are being approved and constructed, courts facing this issue need guidance and clarification from this Court as to whether the broader interpretation of the Section 7 requirements reflected in the statute and decisions of the Ninth Circuit Court of Appeals applies or whether NMFS's current truncated interpretation of Section 7's requirements applies.

I. The First Circuit's Decision Cannot Be Squared with the Plain Language of the Endangered Species Act

1. Section 7 of the Endangered Species Act requires the National Marine Fisheries Service to consider the "best scientific and commercial data available" to determine if the governmental action will jeopardize an endangered or threatened species: NMFS considered neither

NMFS acknowledges that it must consider the potential effect of an agency action on an endangered species during the Section 7 consultation process, claiming that its review process "tracks" the statutory mandate.[3] But nothing in NMFS's consultation process involves it examining the impacts of known or planned federal projects, which NMFS mischaracterizes as "speculative" impacts.

NMFS begins its impact analysis by creating what it refers to as an "environmental baseline," which NMFS describes as including only the effects that "existing federal actions" have already had on a species within the project area.[4] This environmental baseline also includes the impacts of all past and present federal, state, and private actions that have already "undergone formal

3. Solicitor General's Br. in Opp. (Dec. 10, 2024) at 11; Vineyard Wind's Br. in Opp. (Dec. 10, 2024) at 6.

4. Solicitor General's Br. in Opp. (Dec. 10, 2024) at 11; (referencing 50 C.F.R. § 402.02).

or early section 7 consultation."[5] Using these past and present impacts, the agency then determines whether the proposed agency action will "alter" the baseline. Although recognizing that multiple actions "may combine" and have cumulative effects on a species or its habitat, NMFS's regulations only require it to consider "future State or private activities" that are "reasonably certain to occur" in the area.[6]

Inexplicably, NMFS excludes from its analysis federal activities that are "reasonably certain to occur," dismissing those activities as future or "speculative."[7] Without explaining why future state and private activities are not speculative, but future federal activities are speculative, NMFS tries to rationalize its approach as being necessary to avoid a situation where a "nonjeopardy action" is blocked due to NMFS considering the cumulative impacts of future federal projects. NMFS fails to explain how this would be true and how such a decision, which would protect endangered species, would run counter to the ESA.

More to the point, NMFS fails to justify why federal projects that have been authorized, planned, and in the process of being approved should not be considered in the same way that NMFS considers "future" projects by states and private parties during its Section 7 analysis. To exclude future federal actions from the "look before

5. 50 C.F.R. § 402.02.

6. *Id.*; *see also* 50 C.F.R. § 402.14(g)(4).

7. Solicitor General's Br. in Opp. (Dec. 10, 2024) at 13; *see also* Vineyard Wind's Br. in Opp. (Dec. 10, 2024) at 6.

you leap" analysis that Section 7 requires, cuts out key information that the agency should be using to decide whether to reject or modify projects.

Here, if NMFS had considered the impacts of four of the other up-to-30 planned offshore wind projects on the highly endangered North Atlantic Right Whale, the Vineyard Wind 1 Project might not have been approved. Or dramatically different mitigation measures might have been imposed on the Project to ensure that the impacts on these whales would be curtailed, if not eliminated. NMFS somehow thinks that its later consideration of the impacts of future projects during separate Section 7 consultations remedies the problems and inconsistencies with its regulations that we identify in this Petition. But it does not. For, as NMFS confirms in its brief, "'[f]uture Federal actions proposed for the same area'" are only "'separately'" evaluated under Section 7.[8]

As a result, the Respondent approved the Vineyard Wind 1 Project, knowing fully well that there were at least 29 other coordinated, planned projects to be approved and constructed in rapid succession. To date, NMFS has approved or proposed the "take" of 404 North Atlantic Right Whales in 12 of the 30 projects, which is more than the total number of living Right Whales—NMFS estimates that only 340 individuals remain.[9]

---

8. Solicitor General's Br. in Opp. (Dec. 10, 2024) at 12 (quoting 51 Fed. Reg. 19,333).

9. National Marine Fisheries Service, *2023 Draft Stock Assessment Report* at 1, https://www.fisheries.noaa.gov/s3/2024-01/Draft-2023-MMSARs-Public-Comment.pdf (last visited Dec. 16, 2024).

2. NMFS has read the requirement that it consider the "best scientific and commercial data available" out of Section 7

Like the National Environmental Policy Act,[10] the ESA requires federal agencies to "look before they leap."[11] NMFS acknowledges that the ESA "mandates" that it consider the best scientific and commercial data available to evaluate the impacts of a proposed federal action under Section 7.[12] But here, NMFS quibbles, focusing on the word "data" in the statute, and somehow reaches the conclusion that this provision allows the agency to truncate the scope of what it describes as a "reasonable" information standard to exclude what it identifies as "speculative" information.[13] But NMFS's definition of this "reasonable" information standard, which allows it to ignore the known, contemplated impacts of other planned federal projects, is itself not a reasonable interpretation of the term "speculative."

NMFS claims that, at the time of Vineyard Wind's consultation, all information on other future planned projects was purely speculative and outside of its knowledge. Not so. Revolution Wind, which NMFS should have considered, acquired its lease from the Government

---

10. 42 U.S.C. §§ 4321-4370h.

11. *See generally Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).

12. 16 U.S.C. § 1536(a)(2).

13. Solicitor General's Br. in Opp. (Dec. 10, 2024) at 12–13 (referencing 51 Fed. Reg. 19,926).

in 2013[14] and submitted its Construction and Operations Plan in October of 2020,[15] while Section 7 consultation for Vineyard Wind was still ongoing. Sunrise Wind, another project NMFS should have considered, also acquired its lease in 2013[16] and submitted its Construction and Operations Plan in 2021,[17] while the reinitiated Section 7 consultation for Vineyard Wind was ongoing. Kitty Hawk North, which NMFS should have considered, acquired its lease from the federal government in 2017[18] and issued a Notice of Intent to Prepare an Environmental Impact Statement in July of 2021,[19] when the reinitiated Section 7 consultation for Vineyard Wind was ongoing. Ocean

14. Bureau of Ocean Energy Management, *Record of Decision Approving Revolution Wind* (Aug. 21, 2023) at 3, https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Revolution-Wind-Record-of-Decision-OCS-A-0486_Redacted.pdf.

15. *Id.*

16. Bureau of Ocean Energy Management, *Record of Decision Approving Sunrise Wind* (Mar. 25, 2024) at 4, https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/05579_Record%20of%20Decision_Sunrise%20WindOCS-A%200487.pdf.

17. *Id.* at 5.

18. Kitty Hawk Wind, *Kitty Hawk North Wind Project Construction and Operations Plan* (Sept. 30, 2022), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/KTH%20Section%20ES%20Executive%20Summary_rev7_clean.pdf.

19. Federal Infrastructure Projects, *Permitting Dashboard for Kitty Hawk North Wind Project*, https://www.permits.performance.gov/permitting-project/fast-41-covered-projects/kitty-hawk-north-wind-project (last visited Dec. 16, 2024).

Wind 1, another project NMFS should have considered, acquired its lease in 2015.[20] As the lead consulting agency, NMFS knew that all of these projects had acquired leases and were in the approval pipeline years before Vineyard Wind's Section 7 consultation was underway.

And given that the federal government is pouring billions of dollars into underwriting significant portions of the costs of constructing these massive projects, and these international companies are themselves investing billions of dollars into these projects based on the administration's commitment to supporting offshore wind construction, it is hard to see how NMFS could fail to consider as relevant and reasonable the cumulative impacts of all the planned projects.

3. The issue was both pressed and passed upon by the First Circuit

The Solicitor General argues that the Court should deny certiorari on grounds that the issue on which Petitioners seek review "was neither pressed nor passed on below."[21] But the Solicitor General is wrong on the facts and, at best, vague on the "traditional rule" she cites.

As the Court has explained, the traditional rule operates "in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon," and

---

20. Bureau of Ocean Energy Management, *Record of Decision Approving Ocean Wind 1* (July 3, 2023) at 2, https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Ocean-Wind-1-ROD_0.pdf.

21. Solicitor General's Br. in Opp. (Dec. 10, 2024) at 8.

the Court has "entertained review in circumstances far more suggestive of the petitioner's 'sleeping on its rights' than those we face today."[22] In contrast, *Zivotofsky ex rel. Zivotofsky v. Clinton*,[23] on which the Solicitor General relies, reversed the trial court's dismissal for lack of jurisdiction and remanded for the trial court to exercise that jurisdiction and decide the merits of the case: "Having determined that this case is justiciable, we leave it to the lower courts to consider the merits in the first instance."[24]

Addressing the question Petitioners present—whether the ESA allows the agencies to ignore available scientific and commercial information about the baseline effects of the dozens of offshore wind projects in various stages of agency approvals on the Right Whale—the Solicitor General argues that "petitioners never presented that legal theory below."[25] But the traditional rule does not ask about legal theory (at least not in the abstract), but whether the Court of Appeals "decided the substantive issue presented."[26] This the First Circuit unquestionably did, ruling that "NMFS and BOEM followed the law in analyzing the right whale's current status and environmental baseline."[27] The First Circuit went on to

---

22. *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal citations omitted).

23. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012).

24. *Id.* at 202.

25. Solicitor General's Br. in Opp. (Dec. 10, 2024) at 8.

26. *Stevens v. Department of Treasury,* 500 U.S. 1, 8 (1991).

27. Pet. App. A at 2a.

explain, just as Petitioners do here, that under the ESA, "NMFS must determine if the agency action is 'likely to jeopardize the continued existence' of the endangered species. 50 C.F.R. § 402.14(h)(iv). NMFS must reach this determination after reviewing the 'best scientific and commercial data available.' *Id.* § 402.14(g)(8)."[28]

The First Circuit's opinion belies the Solicitor General's assertion that Petitioners' case was limited to "a factbound challenge to the agencies' supposed failure to adequately engage Quintana-Rizzo's findings."[29] But, as the First Circuit states, Petitioners launched a three-pronged attack on the agency's failure to consider all the best scientific and commercial information available, as the ESA commands. The court below stated:

> The Residents' critiques of the biological opinion upon which BOEM's environmental impact statement relied fall into three buckets. First, the Residents allege that the biological opinion failed to properly analyze the current status and environmental baseline of the right whale. Second, they allege that the biological opinion ignored the effects of the Vineyard Wind project on right whales, while relying on flawed measures to mitigate those effects. Third, they allege that the biological opinion ignored the project's additive effects on the right whale's long-term recovery prospects.[30]

---

28. Pet. App. A at 4a.

29. Solicitor General's Br. in Opp. (Dec. 10, 2024) at 9.

30. Pet. App. A at 13a.

Addressing the very question on which Petitioners seek review by the Court, the First Circuit stated that the agency's biological opinion must correctly evaluate the whales' environmental baseline, using the best available scientific and commercial information available:

> A consulting agency's biological opinion must "[e]valuate the current status and environmental baseline" of the affected endangered or threatened species. 50 C.F.R. § 402.14(g)(2). The phrase "environmental baseline" refers to the "condition of the listed species . . . without the consequences . . . caused by the proposed action." *Id.* § 402.02. NMFS must root this evaluation in the best available commercial and scientific data. *Id.* § 402.14(g)(8).[31]

The Solicitor General finds significance in a word search of Petitioner's appellate briefs, pointing out that they did not "mention[] the phrase 'cumulative effects.'"[32] But the Court of Appeals passed on the question of whether the agency had complied with the ESA and the relevant regulation, which requires the agency to combine the environmental baseline with the cumulative effects to determine whether the proposed action will jeopardize the species. Specifically, the agency must:

> Add the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, formulate the Service's opinion as to

31. Pet. App. A at 13a–14a.

32. Solicitor General's Br. in Opp. (Dec. 10, 2024) at 10.

> whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.[33]

The agency could not have complied with this regulatory requirement (as the Court of Appeals says it did) without evaluating the cumulative effects of the government's action—here, a coordinated and comprehensive program to build hundreds of wind turbines along the Right Whale's migratory path. In short, the court below passed on the issue of compliance with the ESA and the relevant regulation (50 C.F.R. 402.14(g))—satisfying the Court's traditional rule, which "precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'"[34]

II. This Case Is the Perfect Vehicle for Resolving This Split Among the Circuits

Respondents' argument that there is no split between the Ninth Circuit and the First Circuit turns on how to define a project. In *Conner v. Burford*,[35] the Forest Service had opened up a large area for leasing for oil and gas development. The Ninth Circuit rejected the agency's, the U.S. Fish and Wildlife Service,[36] attempt to

33. 50 C.F.R. § 402.14(g).

34. *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal citation omitted).

35. *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988).

36. The U.S. Fish and Wildlife Service and the National Marine Fisheries Service split enforcement of the ESA.

narrow its Section 7 consultation to just the immediate land to be leased.[37] Here, too, there is a large area of the Atlantic Ocean that the Government has identified for the construction of 30 offshore wind projects, and NMFS wants to limit its Section 7 consultation, excluding impacts from other known and planned projects. The Ninth Circuit's decision again in *Wild Fish Conservancy v. Salazar*,[38] rejects a truncated definition of a project under review to limit an agency's Section 7 consultation.[39]

The First Circuit's decision, which cuts directly against the Ninth Circuit's decisions, allows NMFS to ignore the best scientific information available, disregard the cumulative effects of known, planned federal activities, and issue a biological opinion limited in scope even though NMFS has information that, if fully considered, would show that protected species are in jeopardy.

Respondents are also incorrect in their contention that the record is "stale."[40] The operative Biological Opinion, the opinion on which BOEM issued its ROD in May 2021 for the Vineyard Wind 1 Project, was issued in September 2020. NMFS issued an updated Biological Opinion in October 2021, after it had issued the ROD, stating that it was adopting the October 2021 Biological Opinion and further stating that it was not changing any "take" estimates for the Right Whale or mitigation measures.

---

37. *Conner*, 848 F.2d at 1454.

38. *Wild Fish Conservancy v. Salazar*, 628 F.3d 513 (9th Cir. 2010).

39. *Id.* at 521–22.

40. Solicitor General's Br. in Opp. (Dec. 10, 2024) at 17.

NMFS also derides Petitioners for referring to the Government's offshore wind projects as "coordinated."[41] But, again, its argument is inaccurate. The Government described its massive, offshore wind initiative as "coordinated" (contrary to what NMFS incorrectly argues) before the Vineyard Wind 1 Project was approved.[42]

CONCLUSION

Petitioners ask this Court to grant review of the important issue presented in this petition.

Respectfully submitted,

Nancie G. Marzulla
Counsel of Record
Roger J. Marzulla
Marzulla Law, LLC
1150 Connecticut Avenue, NW,
Suite 1050
Washington, DC 20036
(202) 822-6760
nancie@marzulla.com

Counsel for Petitioners

December 20, 2024

41. *Id.* at 14.

42. *See* The White House, *Fact Sheet: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs* (Mar. 29, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-biden-administration-jumpstarts-offshore-wind-energy-projects-to-create-jobs/ (stating the administration was taking "coordinated steps to support rapid offshore wind deployment.").