No. 24-

IN THE

Supreme Court of the United States

SEAFREEZE SHORESIDE, INC.; LONG ISLAND COMMERCIAL FISHING ASSOC., INC.; XIII NORTHEAST FISHERY SECTOR, INC.; HERITAGE FISHERIES, INC.; NAT. W., INC.; OLD SQUAW FISHERIES, INC.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

ROBERT HENNEKE
CHANCE WELDON
THEODORE HADZI-ANTICH*
**Counsel of Record*
CONNOR MIGHELL
TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, TX 78701
(512) 472-2700
tha@texaspolicy.com

Counsel for Petitioners

120240

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

QUESTIONS PRESENTED

In 2021, the federal government launched an ambitious initiative to diminish demand for fossil fuels by approving dozens of wind energy generation projects in federal waters on the outer Continental Shelf ("OCS") off the Atlantic, Pacific and Gulf Coasts. Pursuant to that initiative, the Departments of the Interior, Commerce, and Defense, acting through their sub-agencies and officers ("Federal Respondents"), jointly prepared an environmental impact statement under the National Environmental Policy Act ("NEPA") leading to the approval of the construction and operations plan of the Vineyard Wind 1 project, the first of many such large-scale, industrial offshore wind energy projects slated for the OCS. Prior to this case, no court had ever reviewed such an approval.

Petitioners challenged the Vineyard Wind 1 project approval as contrary to the texts of the Outer Continental Shelf Lands Act ("OCSLA") and NEPA. The record showed the project would result in momentous adverse impacts on marine navigation, public safety, the environment, and national security. The First Circuit rejected the challenge by adopting the lower court's uncritical reliance on the Federal Respondents' presumed discretion to interpret the statutory texts.

The questions presented are:

1. Whether the First Circuit's decision conflicts with *Loper Bright Enters v. Raimondo*, 603 U.S. 369 (2024), which requires courts to independently determine the meaning of federal statutes rather than deferring to agency interpretations.

2. Whether the First Circuit's decision conflicts with *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986), which held that "an agency literally has no power to act . . . unless and until Congress confers power upon it."

PARTIES TO THE PROCEEDING

Petitioners are Seafreeze Shoreside, Inc., Long Island Commercial Fishing Association, Inc., XIII Northeast Fishery Sector, Inc., Heritage Fisheries, Inc., Nat. W., Inc., and Old Squaw Fisheries, Inc.

Respondents are the United States Department of the Interior, Doug Burgum, in his official capacity as Secretary of the Department of the Interior, the Bureau of Ocean Energy Management, Walter Cruickshank, Ph.D., in his official capacity as the Director of the Bureau of Ocean Energy Management, United States Department of Commerce, Honorable Howard Lutnick, in his official capacity as the Secretary of the Department of Commerce, Steve Feldgus, in his official capacity as Principal Deputy Assistant Secretary, Land and Minerals Management, the National Oceanic and Atmospheric Administration, the National Marine Fisheries Service, Vice Admiral Nancy Hann, in her official capacity as Administrator of the National Oceanic and Atmospheric Administration, the United States Department of Defense, Pete Hegseth, in his official capacity as the Secretary of the Department of Defense, the United States Army Corps of Engineers, Lt. Gen. William H. "Butch" Graham, Jr., in his official capacity as the Commander and Chief of Engineers of the U.S. Army Corps of Engineers, Colonel Justin R. Pabis, P.E., in his official capacity as the District Engineer of the New England District of the U.S. Army Corps of Engineers, and Vineyard Wind 1, LLC.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Seafreeze Shoreside, Inc. ("Seafreeze") is a commercial seafood processing company. It has one parent company, namely Yoplant LLC, which holds 100 percent ownership interest in Seafreeze. There are no other publicly held companies that have a 10 percent or greater ownership interest in Seafreeze.

Petitioner Long Island Commercial Fishing Association, Inc. ("LICFA") is an organization of commercial fishermen and fishing companies supporting and advocating for sustainable fishery management, including clean, fishable waters free from pollution and navigational obstruction. It has no parent companies and there are no publicly held companies that have a 10 percent or greater ownership interest in LICFA.

Petitioner XIII Northeast Fishery Sector, Inc. ("XIII Northeast") is a non-profit membership organization of commercial fishermen and fishing companies. It has no parent companies and there are no publicly held companies that have a 10 percent or greater ownership interest in XIII Northeast.

Petitioner Heritage Fisheries, Inc. ("Heritage") is a commercial fishing company. It has no parent companies and there are no publicly held companies that have a 10 percent or greater ownership interest in Heritage.

Petitioner Nat W., Inc. ("Nat W.") is a commercial fishing company. It has no parent companies and there are no publicly held companies that have a 10 percent or greater ownership interest in Nat W.

Petitioner Old Squaw Fisheries, Inc. ("Old Squaw") is a commercial fishing company. It has no parent companies and there are no publicly held companies that have a 10 percent or greater ownership interest in Old Squaw.

RELATED PROCEEDINGS

United States Court of Appeals (1st Cir.):

Responsible Offshore Development Alliance v. United States Department of the Interior et al., No. 23-2051 (Dec. 5, 2024)

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PETITION FOR WRIT OF CERTIORARI

Petitioners Seafreeze Shoreside, Inc., Long Island Commercial Fishing Association, Inc., XIII Northeast Fishery Sector, Inc., Heritage Fisheries, Inc., Nat. W., Inc., and Old Squaw Fisheries, Inc. ("Petitioners') respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

INTRODUCTION

In a rush to replace fossil fuels as this nation's primary source of electricity, the federal government launched an aggressive, nationwide program to approve 30 gigawatts ("GW") of offshore wind energy projects across all three American coasts by 2030. To accomplish this enormous task, the Department of the Interior's Bureau of Ocean Energy Management ("BOEM") led a whole-of-government effort to approve as many offshore wind projects as possible, as quickly as possible. The first approval under this massive program was the Vineyard Wind 1 project ("Project"), located in the North Atlantic off the coast of Massachusetts.

During the approval process, the Departments of the Interior, Commerce, and Defense, acting through their sub-agencies and officers ("Federal Respondents"), acknowledged that the Project would harm safety, the environment, and national security but permitted it anyway—skirting their mandatory duties under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1337(p)(4), to "ensure" offshore wind projects are carried out "in a manner that provides for safety, protection of the environment, [and] . . . national security." In the process,

the Federal Respondents sidestepped their procedural duties under the National Environmental Policy Act ("NEPA").

This Court's recent decision in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), held that courts must "exercise their independent judgment in deciding whether an agency has acted within its statutory authority. . . ." *Id.* at 412. And this Court previously held that "an agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *see also West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (opining that administrative agencies "have only those powers given to them by Congress").

The First Circuit failed to adhere to those precedents and impermissibly deferred to Federal Respondents' interpretations of OCSLA and NEPA, thereby creating conflicts between its ruling in the instant case and prior decisions of this Court. In so doing, the First Circuit unlawfully sanctioned the federal government's approval of the first of many such planned, enormous wind energy projects scheduled to industrialize the pristine waters of America's outer Continental Shelf ("OCS"), a decision that has grave adverse consequences for marine safety, the environment, and national security.

In addition, the First Circuit's decision created a conflict with the D.C. Circuit regarding the validity of regulations issued by the Council on Environmental Quality ("CEQ") under NEPA. Specifically, the D.C. Circuit held that CEQ's NEPA regulations were *ultra vires* and void, while the First Circuit subsequently applied those very regulations to uphold the Federal Respondents' approval of the Project.

OPINIONS BELOW

The opinion of the court of appeals (Appx. at 1a–47a) is reported at 123 F.4th 1.

JURISDICTION

The court of appeals entered judgment on December 5, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the appendix to this petition. Appx. at 114a–140a.

STATEMENT OF THE CASE

A. Legal and Regulatory Background

1. Legal Background

Outer Continental Shelf Lands Act ("OCSLA")

Congress enacted OCSLA, 43 U.S.C. §§ 1331–1356, in August 1953, recognizing "the subsoil and seabed of the outer Continental Shelf" ("OCS") are "subject to [the] jurisdiction, control, and power of disposition" of the United States. 43 U.S.C. § 1332(1)[1]; Appx. at 120a.

1. Unless otherwise specified, all statutes and regulations cited in this petition are from the United States Code or the United States Code of Federal Regulations, as the case may be, as codified in 2020.

Congress directed that the OCS "should be made available for expeditious and orderly development, subject to environmental safeguards," and instructed that "this Act shall be construed in such a manner that the character of the waters above the [OCS] as high seas and the right to navigation and fishing therein shall not be affected." *Id.* at §§ 1332(2), (3). Appx. at 120a.

Until 2005, OCSLA governed the development of oil and gas resources on the OCS but not renewable energy resources. In 2005, Congress amended OCSLA to add mandatory legal obligations for permitting offshore renewable energy leases. It required the Secretary of the Interior to "ensure that any [OCS renewable energy leasing] activity . . . is carried out in a manner that provides for" a list of twelve items, including "safety, protection of the environment, [and] protection of national security interests of the United States. . . ." 43 U.S.C. § 1337(p)(4)(A), (B), (F). Appx. at 121a.

NATIONAL ENVIRONMENTAL POLICY ACT ("NEPA")

NEPA is our "basic national charter for the protection of the environment." 40 C.F.R. § 1500.1(a), Appx. at 135a. It requires agencies to "identify and develop methods and procedures" to ensure "environmental amenities and values may be given appropriate consideration in decision-making. . . ." 42 U.S.C. § 4332(B). Appx. at 118a. Agencies do so by preparing a "detailed statement" for major agency actions "significantly affecting the quality of the human environment" that specifies, among other things, the "environmental impact" of the action and "any adverse environmental effects which cannot be avoided should

the proposal be implemented," along with "alternatives to the proposed action[.]" *Id.* at § 4332(C)(i)–(iii). Appx. at 118a–119a. Such a statement is generally referred to as an environmental impact statement ("EIS").

2. Regulatory Background

The alternatives section is the "heart" of an EIS required by NEPA. 40 C.F.R. § 1502.14; Appx. at 138a. An EIS must (1) "rigorously explore and objectively evaluate all reasonable alternatives" to proposed federal agency actions and (2) "for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." *Id.* at § 1502.14(a). Appx. at 138a.

The D.C. Circuit recently held in *Marin Audubon Soc'y v. FAA*, 121 F.4th 902, 908 (D.C. Cir. 2024), that these NEPA regulations "are *ultra vires*" because they were promulgated by the Council on Environmental Quality ("CEQ"), which had no rulemaking authority. After that decision, the First Circuit relied on those very regulations to hold in this case that the Federal Respondents complied with NEPA when approving the Project. Appx. at 36a. The D.C. Circuit denied rehearing of *Marin Audubon Soc'y* on January 31, 2025. *See* 2025 U.S. App. LEXIS 2280 (denial of panel rehearing); 2025 U.S. App. LEXIS 2237 (denial of rehearing *en banc*). Accordingly, there is a conflict among the First and D.C. Circuits regarding whether the CEQ regulations applied by the First Circuit in this case have any validity. *See infra.* at II.C.

B. Proceedings Below

1. Administrative Proceedings

BOEM awarded a lease in the OCS to the company that would become Vineyard Wind 1, LLC ("Project Developer"). 79 Fed. Reg. 70545 (Nov. 26, 2014). Project Developer submitted a construction and operations plan ("COP") for NEPA review. Well before the completion of the COP's environmental impact statement ("EIS"), Project Developer entered into binding power purchase agreements ("PPAs") to sell electricity generated by the Project to Massachusetts-based electric utility companies. These contracts were intended to meet Massachusetts's efforts to switch from fossil fuels to renewable energy sources for electricity generation.

Federal Respondents issued a Draft Environmental Impact Statement ("DEIS") on Dec. 7, 2018, and a supplemental DEIS on June 12, 2020. Those documents showed that the Project would erect multiple turbine structures that interfere with navigational and defense radar and would pollute the ocean environment. Six months after the issuance of the supplemental DEIS, on December 1, 2020, Project Developer withdrew the COP from federal review. Within two weeks, BOEM published notice that "[s]ince the COP has been withdrawn from review and decision-making, there is no longer . . . a decision pending before BOEM[,]" and because "the preparation and completion of an EIS is no longer necessary, . . . the process is hereby terminated." 85 Fed. Reg. 81486 (Dec. 16, 2020).

The very next month, on January 22, 2021, immediately after a new presidential administration took office in

Washington, D.C., Project Developer asked BOEM to resume the terminated NEPA review and revive the Project. *See* 86 Fed. Reg. 12495 (Mar. 3, 2021). Acting under the new administration, BOEM acquiesced without providing opportunity for public comment. *Id.* Nine days after resuming NEPA review, BOEM published the final EIS. *See* 86 Fed. Reg. 14153 (Mar. 12, 2021).

Two weeks later, on March 29, 2021, that same new administration announced "a set of bold actions that will catalyze offshore wind energy" as part of its environmental agenda. *Fact Sheet: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs*, The White House (Mar. 29, 2021), https://tinyurl.com/str7ymwf ("the Offshore Wind Policy"). The Offshore Wind Policy launched "a shared goal to deploy 30 gigawatts (GW) of offshore wind in the United States by 2030 . . . [and] 110 GW by 2050." *Id.* BOEM pledged as part of this effort "to advance new lease sales and complete review of at least 16 Construction and Operations Plans (COPs) by 2025, representing more than 19 GW" of offshore wind. *Id.*

Approximately six weeks after publication of the Offshore Wind Policy, Federal Respondents issued a Record of Decision ("ROD") approving the Project on May 10, 2021. 86 Fed. Reg. 26541 (May 14, 2021). The Project was the first of many slated for the OCS under the Offshore Wind Policy. The ROD stated that the purpose of the Project was to meet Project Developer's contractual commitments made to Massachusetts' electric generating companies to achieve that state's renewable energy goals and that several alternatives were rejected during NEPA review because they would not meet that

purpose. BOEM_0076823.[2] The ROD also stated that the Project would likely cause commercial fishermen to abandon the entire Project lease area "due to difficulties with navigation." BOEM_0076837. Shortly thereafter, BOEM deferred its requirements that Project Developer provide financial assurance for decommissioning and removal of the Project "until 15 years after construction." BOEM_0077110. To date, no decommissioning plan exists for the Project, and due to BOEM's deferral, no financial assurance exists to implement removal of the Project from the OCS at the end of the Project's useful life. *See* Pet. First Cir. Op. Br. Appx. at 01409.

2. Legal Proceedings

Because the Project is located in prime fishing grounds and represents a threat to their livelihoods, several commercial fishing companies and a shoreside seafood processing business ("Petitioners") sued the Federal Respondents on December 15, 2021. Project Developer joined the lawsuit as a defendant-intervenor.

The parties filed cross-motions for summary judgment in the U.S. District Court for the District of Massachusetts ("the district court") on April 3, 2023, and filed a motion for stay of the construction of the project on May 10, 2023. The district court denied the motion for stay on May 25, 2023, and Petitioners filed an interlocutory appeal with the First Circuit. On October 12, 2023, while the interlocutory appeal was pending, the district court granted summary

2. Citations formatted in this manner reference the administrative record, which was before the district court and the First Circuit.

judgment to the Federal Respondents and Project Developer, holding that the Federal Respondents had discretion to determine whether the statutory criteria found in OCSLA Section 1337(p)(4) were satisfied, and that Petitioners lacked standing to bring their NEPA claims. Appx. at 88a–90a, 103a–109a.

Petitioners voluntarily dismissed their interlocutory appeal and immediately appealed the district court's summary judgment ruling, arguing that the district court impermissibly deferred to the Federal Respondents' reading of OCSLA Section 1337(p)(4), that Petitioners had standing to bring their NEPA claims, and that the Federal Respondents failed to comply with numerous requirements of both OCSLA and NEPA. Pet. First Cir. Op. Br. at 49–64.[3] Petitioners stated the district court's judgment "flies in the face of Supreme Court precedent[,]" *id.* at 54, namely, the holding that "an agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

After briefing but before oral argument, Petitioners notified the First Circuit on July 9, 2024, pursuant to Federal Rule of Appellate Procedure 28(j), of this Court's decision in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024). Specifically, Petitioners advised the First Circuit that *Loper Bright* required courts to "decide all relevant questions of law arising on review of agency action[,]" *Loper Bright*, 603 U.S. at 392 (quotations omitted), rather than relying on agency discretion, as had been done by the district court.

3. When citing to filings on the First Circuit appellate docket, this petition uses the Bates page numbering.

The case was argued before the First Circuit on July 25, 2024. On December 5, 2024, the First Circuit issued its opinion affirming in part the judgment of the district court. Regarding OCSLA, the First Circuit approvingly cited the district court's statement "that the BOEM must have 'discretion' in considering whether each statutory criterion is satisfied, and that the BOEM must 'balance' the statutory mandate to develop energy projects on the Outer Continental Shelf with the twelve statutory criteria [in Section 1337(p)(4)] for which it must provide." Appx. at 44a–45a. Regarding NEPA, the First Circuit found that Petitioners did have standing to bring their NEPA claims but also that Federal Respondents did not violate NEPA. *Id.* at 32a–38a. At no point in its opinion did the First Circuit address this Court's decisions in *Loper Bright* or *La. Pub. Serv. Comm'n*.

REASONS FOR GRANTING THE PETITION

The First Circuit's rulings deal with important and recurring issues of federal law and conflict with rulings of this Court and those of the D.C. Circuit. The issues include protection of public safety, the environment, and national security.

By deferring to Federal Respondents' interpretations of OCSLA and NEPA without conducting independent statutory analyses of the best readings of those statutes, the First Circuit impermissibly failed to adhere to this Court's instructions to "exercise their independent judgment in deciding whether an agency has acted within its statutory authority." *Loper Bright*, 603 U.S. at 412. The First Circuit also failed to follow this Court's instruction that courts must conduct their reviews "*independent* of

the political branches when interpreting the laws those branches enact" and that "the APA . . . bars judges from disregarding that responsibility just because an Executive Branch agency views a statute differently." *Id.* (emphasis in original). Because the First Circuit did not provide independent analysis of the OCSLA and NEPA language central to the issues in this case involving the first of dozens of massive wind energy projects slated for the OCS, certiorari is appropriate. *See United States v. Doe*, 465 U.S. 605, 610 (1984) (granting certiorari to "resolve the apparent conflict between the Court of Appeals' holding and the reasoning underlying this Court's holding" in a prior case).

Moreover, the First Circuit failed to apply this Court's ruling that "an agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n*, 476 U.S. at 374. Instead, the First Circuit assumed that the Federal Respondents had the powers they claimed. But a careful reading of the relevant statutory provisions of OCSLA and NEPA would have shown that the Federal Respondents were not delegated such claimed powers by Congress. *Id.; see also Lambert v. Wicklund*, 520 U.S. 292, 293 (1997) (granting petition where lower court's decision is "in direct conflict with [this Court's] precedents").

Beyond the facts of this case, there are dozens of pending, similar offshore wind projects scheduled to be built on the OCS awaiting approval from the Federal Respondents. Accordingly, the First Circuit's legal errors that conflict with this Court's rulings would have long-lasting, nationwide impact that can only be remedied by this Court's prompt action.

Finally, as indicated in the Regulatory Background section, *supra*, there is a conflict among the courts of appeal regarding whether the CEQ's NEPA regulations are null and void. Because that question is central to the NEPA issues in this case, and would be central to all future COP approval challenges under NEPA, certiorari is appropriate. *See* Justice Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 AUSTL. L. J. 108 (1959) (observing that "a conflict of decisions may safely be relied on as a ground for certiorari . . . [if] the conflict is one that can be effectively resolved only by the prompt action of the Supreme Court").

I. The First Circuit's OCSLA decision warrants this Court's review

The First Circuit impermissibly disregarded *Loper Bright* while deciding issues of national importance. Accordingly, this Court should grant certiorari to ensure that other lower courts adhere to *Loper Bright* in the future.

A. The question presented is of national importance

This case concerns the first step in a massive federal program to industrialize the OCS on all three American coasts. Record evidence establishes that the Project and the planned follow-on projects under the Offshore Wind Policy will degrade marine navigation and military readiness by interfering with marine and defense radar. *See* D. Mass. MSJ at 28, 44; D. Mass. MSJ Reply at 56–57; Pet. First Cir. Op. Br. at 24, 65, 68–69, 71. These projects will also displace vast marine resources by altering the

ocean floor, upending established fisheries, and upsetting the benthic environment across all three American coasts. *See* D. Mass. MSJ at 44–45; Pet. First Cir. Op. Br. at 65–68. They will affect endangered species, especially species that use sound to communicate like the critically endangered North Atlantic right whale ("NARW"), which inhabits the Vineyard Wind 1 project area. *See* D. Mass. MSJ at 22 (referencing Project's effects on NARW).

These impacts are acknowledged in a recently issued executive order. *See Temporary Withdrawal of All Areas on the Outer Continental Shelf From Offshore Wind Leasing and Review of the Federal Government's Leasing and Permitting Practices for Wind Projects*, The White House (Jan. 20, 2025), https://tinyurl.com/bde3dkcz. The executive order recognizes the issues Petitioners raise in this case as significant problems worthy of re-examination. It states that there are "various alleged legal deficiencies" in permitting processes for offshore wind, "the consequences of which may lead to grave harm—including negative impacts on navigational safety interests, transportation interests, national security interests, commercial interests, and marine mammals. . . ." *Id.* And it admits "potential inadequacies in various environmental review required by [NEPA]" in permitting offshore wind projects. *Id.* Accordingly, the executive order calls for a "comprehensive assessment and review of Federal wind leasing and permitting practices" to be carried out by no fewer than seven agencies or sub-agencies. *Id.*

But this presidential decree does not lessen this case's urgency or importance. It provides no deadline for the agencies' reassessment of federal wind leasing. To date,

39 commercial wind leases have been granted on all three coasts, and the executive order does not halt construction at any approved offshore wind projects, including the Project at issue.[4] The threats these projects present to the nation's commercial fishing industry, ocean environment, public safety, and national security capabilities remain. Even if the current administration were to permanently halt all ongoing offshore wind construction, which has not happened, the Offshore Wind Program may continue in a future administration without change unless this Court acts now to clarify the meaning of Section 1337(p)(4) and the limitations that section sets on development of the OCS for renewable energy projects.

Additionally, BOEM impermissibly waived all required decommissioning payments from Project Developer during the first 15 years of the Project's operation. Pet. First Cir. Op. Br. at 76 (quoting administrative record at BOEM_0077110). Furthermore, Project Developer has no approved decommissioning plan, and has never demonstrated that one exists, even in draft form. *See* Pet. First Cir. Op. Br. Appx. at 01409 (cross-examination of Project Developer CEO). Certiorari should be granted so that future wind energy projects are not approved without robust decommissioning plans backed by palpable financial security guarantees.

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4. Offshore wind projects currently in various phases of construction include South Fork Wind (approved 2022), Coastal Virginia Offshore Wind (approved 2023), Revolution Wind (approved 2023), and the instant Project. In 2011, a decade before the Offshore Wind Policy was initiated in 2021, BOEM's predecessor agency approved the Cape Wind offshore wind project, a small project involving only five wind turbines, but Cape Wind was abandoned by its developer in 2017.

This matters because recent events show that the Project already has caused substantial environmental damage and is likely to cause more. One of the Project's blades (the size of a football field) broke apart and fell into the ocean in pieces soon after installation in July 2024, scattering fiberglass debris across Massachusetts beaches and depositing microplastics into the ocean, potentially polluting it forever. Upon reviewing the Project after the blade incident, BOEM's Bureau of Safety and Environmental Enforcement ("BSEE") found that up to 66 already-installed blades of equal size located on 22 of the already-constructed turbines had the same danger of failure and ordered their removal—providing further proof of the Project's unsafe and environmentally perilous nature. *See Vineyard Wind Construction and Operations Plan Addendum*, Bureau of Ocean Energy Management (Dec. 5, 2024) at § 1.0, https://tinyurl.com/5eb8wmr4. The risks of blade failure are well known, yet the Federal Respondents failed to account for such risks in the EIS.[5] Without this Court's intervention, every one of the Project's anticipated 186 turbine blades located on a total of 62 approved wind turbines, each of which is 298 feet taller than the Washington Monument, will hang over America's pristine OCS waters for the foreseeable future, with the potential of dropping into the ocean and causing further environmental harm. And other pending offshore wind projects may well create the same dangers if other lower courts defer to government agency "discretion" regarding the meaning of Section 1337(p)(4), just as the First Circuit did in the instant case. That section is reproduced in full at Appx. 121a-122a and is analyzed *infra* in Section I.B.

5. *See GCube Scrutinizes Blade Breakages*, N. Am. Clean Energy (Sept. 8, 2014), https://tinyurl.com/358e6fsy.

Thus, this case concerns issues of national importance involving the use of public lands on the OCS that only this Court can definitively resolve. The First Circuit's failure to provide independent judicial guidance as to how Section 1337(p)(4) applies in such instances should not be permitted to stand. *See United States v. Coleman*, 390 U.S. 599, 601 (1968) (granting certiorari "because of the importance of the decision to the utilization of the public lands"). Here, due to the First Circuit's deference to the Federal Respondents "discretion" in interpreting Section 1337(p)(4), the Federal Defendants have been given a virtual green light to determine how the public lands of the OCS will be used for renewable energy development. Significantly, all the other approved offshore wind projects undergoing construction have been challenged.[6] *See Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296 (1946) (granting certiorari due to serious hinderance to effective legal administration caused by lower court decision). To ensure uniformity among courts in dealing with the risks posed by these enormous offshore wind energy projects, this Court must provide guidance that will satisfy OCSLA's requirements for all OCS offshore wind development.

B. The decision below is inconsistent with prior decisions of this Court

Contrary to this Court's recent decision in *Loper Bright*, the First Circuit failed to independently determine the best reading of Section 1337(p)(4) but instead uncritically adopted the district court's judgment

6. *See supra* at n.4 for identification of approved offshore wind projects in various stages of construction.

that the Federal Respondents "retain" discretion as to how to apply Section 1337(p)(4). *See* Appx. at 107a. As set forth in detail *infra,* that position matches precisely the view taken in a legal memorandum of the Department of the Interior addressing Section 1337(p)(4)'s meaning. Such uncritical deference to agency interpretation of a statutory provision directly conflicts with *Loper Bright.* The First Circuit's approach is also contrary to this Court's ruling in *La. Pub. Serv. Comm'n*, 476 U.S. at 374 (1986) (opining that "an agency literally has no power to act . . . unless and until Congress confers power upon it").

In *Loper Bright*, this Court rejected the doctrine of assumptive judicial deference to agency readings of ambiguous statutory language prescribed in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). *See Loper Bright,* 603 U.S. at 398 (describing *Chevron* and its progeny as "heedless of the original design of the APA" (quotations omitted)). Not only that, but the *Loper Bright* Court erased *Chevron*'s presumption that ambiguous language always reflects "implicit delegations to agencies." *Id.* at 399. Now, courts must "use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity." *Id.* at 400.

Importantly, this Court did not rule in *Loper Bright* that the duty to independently interpret statutory law only applied in a narrow set of cases. "Courts interpret statutes, *no matter the context*, based on the traditional tools of statutory construction, not individual policy preferences" and "exercise judgment free from the influence of the political branches." *Id.* at 403 (emphasis added). Neither may courts reflexively defer to agency readings of statutes when that agency's technical expertise may be relevant

to a term's meaning. "Congress expects courts to handle technical statutory questions." *Id.* at 402. In any such instance, "the court will go about its task with the agency's body of experience and informed judgment, among other information, at its disposal." *Id.* (quotations omitted).

Independent interpretation of laws matters especially in cases involving the extent of agency authority. *Loper Bright*, *id.* at 394–95, recognizes that some statutes allow agencies "a degree of discretion" in three primary ways:

- Express delegation to determine what a statute's terms mean. *See Batterton v. Francis*, 432 U.S. 416, 425 (1977).

- Rulemaking to fill in a statute's details. *See Wayman v. Southard*, 10 Wheat. 1, 43 (1825).

- Regulation subject to "a term or phrase that 'leaves agencies with flexibility,' such as 'appropriate' or 'reasonable.'" *Loper Bright*, 603 U.S. at 395 (quoting *Michigan v. EPA*, 576 U.S. 743, 752 (2015)).

Other appellate courts recognize that the statutes cited as examples of deference in *Loper Bright* "pair that language with words that expressly empower the agency to exercise judgment." *Moctezuma-Reyes v. Garland*, 124 F.4th 416, 420 (6th Cir. 2024) (citing *Loper Bright* for the proposition that courts must use independent judgment to determine the scope of agency discretion and authority). "When the best reading of a statute is that it delegates discretionary authority to an agency, the role

of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits," *Loper Bright,* 603 U.S. at 395, and to "police the outer statutory boundaries" of delegations of authority from Congress to agencies. *Id.* at 374.

Despite this Court's vacatur of the First Circuit's judgment in *Loper Bright*'s sister case, *Relentless, Inc. v. United States DOC*, 62 F.4th 621 (1st Cir. 2023), the First Circuit refused to apply *Loper Bright* here but instead adopted the district court's pre-*Loper Bright* opinion, which was profoundly deferential to the Federal Defendant's statutory interpretation of Section 1337(p)(4), on the ground that "the APA affords great deference to agency decision-making and agency actions are presumed valid. . . ." Appx. at 62a. But OCSLA does not afford the Federal Respondents "great deference" in reviewing proposed wind energy projects on the OCS.

In relevant part, Section 1337(p)(4) of OCSLA reads as follows:

> *Requirements.* The Secretary [of the Interior] shall *ensure* that any activity under this subsection is carried out in a manner that provides for—
>
> (A) safety;
>
> (B) protection of the environment;
>
> (C) prevention of waste;

> (D) conservation of the natural resources of the outer Continental Shelf;
>
> (E) coordination with relevant Federal agencies; [and]
>
> (F) protection of national security interests of the United States. . . .

Appx. at 121a (emphasis added). As Petitioners explained in their First Circuit briefing, Section 1337(p)(4) sets forth mandatory criteria that must be met before any renewable energy development project is approved on the OCS. The statutory language does not provide the Secretary of the Interior with authority to "balance" or "reasonably" ensure that the requirements of Section 1337(p)(4) are met. On the contrary, it *requires* the Secretary to *ensure*, e.g., safety, protection of the environment, and national security for "any activity" on the OCS involving renewable energy development. If any of the enumerated "requirements" are not met, the Secretary does not have the authority to approve the project. And nothing in the statute provides that the Secretary "retains" discretion regarding the extent to which the criteria of Section 1337(p)(4) must be met. *See* Appx. at 121a–122a (text of Section 1337(p)(4)); *but see* Appx. at 107a (district court opinion); 44a–45a (First Circuit affirming district court).

The mistaken view that Federal Respondents retain discretion under Section 1337(p)(4) stems from the Federal Respondents' misreading of the statute. As indicated *supra,* the Department of the Interior's Principal Deputy Solicitor General issued a memorandum interpreting OCSLA Section 1337(p)(4). *See* U.S. Dept. of

Interior, M-37067, Secretary's Duties under Subsection 8(p)(4) of the Outer Continental Shelf Lands Act When Authorizing Activities on the Outer Continental Shelf (Apr. 9, 2021) ("the M-Opinion"). The M-Opinion rescinded an earlier administration's interpretation of Section 1337(p)(4) and found the section "require[s] only that the Secretary strike a *rational balance* between Congress's enumerated goals. . . . In making this determination, the Secretary *retains* wide discretion to weigh those goals as an application of her technical expertise and policy judgment." *Id.* at 2 (emphasis added). The M-Opinion weakens the mandatory requirements of the statute into aspirational goals, and alters the statute's plain language.

In the district court, the Federal Respondents advocated for the M-Opinion's interpretation of Section 1337(p)(4). *See, e.g.*, Pet. First Cir. Op. Br. Appx. at 01296 (Federal Respondents' counsel referencing M-Opinion); Federal Respondents' MSJ at 44–45. Without independent analysis of Section 1337(p)(4), the district court deferred to the M-Opinion's interpretation (albeit without specific citation) by assuming that "[t]he Secretary still *retains* some discretion in considering whether the enumerated statutory criteria have been satisfied, even when the statute does not state so expressly." Appx. at 107a (emphasis added).

But Congress must speak clearly if it wishes to delegate authority to agencies. *See Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 595 U.S. 109, 142 S. Ct. 661, 665 (2022) (per curiam) (because "[a]dministrative agencies are creatures of statute, [t]hey accordingly possess only the authority that Congress has provided"); *La. Pub. Serv. Comm'n*, 476 U.S. at 374 (1986) ("an agency literally has no

power to act . . . unless and until Congress confers power upon it"). Accordingly, the only discretion permitted is that which the statutory text of OCSLA allows. There is no discretion "retained" by the Federal Respondents under OCSLA that is not found in the statutory language.

The First Circuit skirted this bedrock principle of separation of powers by refusing to reverse the ruling of the district court. Moreover, it profoundly misunderstood the scope of *Loper Bright.*

During oral argument[7], the First Circuit asked the parties to address *Loper Bright*. First Circuit Oral Argument: 23-1853, *Seafreeze Shoreside, Inc. v. US Dep't of the Interior*, U.S. First Cir. Court of App. (July 25, 2024), at https://tinyurl.com/mry68r3p. The court stated the following:

> JUDGE GELPI: And I will say, at least I'm speaking for myself, but it would appear to me . . . that this is not a case where we're not deferring to agency interpretation of a regulation, this is an agency that's granting permits and it's involved in the permit-making process, so it would appear that it's a different scenario. . . .

Id. at 01:05–01:28. But *Loper Bright* is not limited to statutory interpretation in the context of challenges to agency regulations. It applies with equal force to other

7. The First Circuit does not make transcripts of oral argument available to parties but publishes them as audio files on its website.

agency actions, including the issuance of permits. In all such cases, courts must independently interpret the meaning of the relevant statutes that are at issue.

The First Circuit continued during oral argument:

> JUDGE GELPI: Isn't this permit granting that's not like—we're not deferring to agency interpretation. We're reviewing whether, you know, the permit administratively . . . complies with our standard of review.
>
> MR. HADZI-ANTICH [Counsel for Petitioners]: The question is whether the district court deferred to the agency judgment, and the answer is yes, and again—
>
> JUDGE GELPI: Won't that happen in probably every case we affirm an agency, because it's an agency judgment and we're affirming it?
>
> MR. HADZI-ANTICH: But they deferred to the agency's judgment regarding the meaning of 1337(p)(4). That's a statutory interpretation issue that the Supreme Court in *Loper Bright* reserved strictly for courts, for the judicial branch.

Id. at 48:48–49:30.

The First Circuit's opinion does not discuss, cite, or even acknowledge *Loper Bright*. Rather, it simply adopts the district court's ruling that the Federal Respondents retain discretion to decide when their actions meet

statutory requirements. *See* Appx. at 44a–45a. The opinion states:

> The district court held only that the BOEM must have "discretion" in considering whether each statutory criterion is satisfied, and that the BOEM must "balance" the statutory mandate to develop energy projects on the Outer Continental Shelf with the twelve statutory criteria for which it must provide. . . .

Id. But, as set forth in more detail in I.C. *infra*, nothing in OCSLA authorizes BOEM to "balance" the statutory criteria. Nor does OCSLA provide BOEM with any "discretion" regarding whether the statutory criteria must be met. Furthermore, OCSLA does not "mandate" the development of OCS renewable energy projects but merely authorizes such projects *if* BOEM ensures that the statutory criteria are met. Accordingly, the statutory criteria serve as *limitations* on BOEM's authority to approve offshore wind projects.

Moreover, the First Circuit's questioning at oral argument demonstrates that it mistakenly believed *Loper Bright* did not apply to this case because the Petitioners did not challenge a regulation *per se* but only challenged a permit, *i.e.*, the COP approval. Thus, the First Circuit "presum[ed]" that Section 1337(p)(4) contained "implicit delegations to agencies," a presumption that "does not approximate reality." *Loper Bright*, 603 U.S. at 373. Uncritically adopting an agency construal of a statute that is contraindicated by the statute's text elevates the agencies' interpretive power over that of the judiciary. *Id*. at 400–401.

This Court must clarify that *Loper Bright* applies to all cases involving agency action, and that it requires courts to provide the best reading of statutes using the traditional tools of statutory construction—"the reading the court would have reached if no agency were involved." *Id*. at 400 (quotation omitted). The First Circuit's opinion directly conflicts with *Loper Bright's* instructions to lower courts, which provides ample reason for this Court to grant certiorari. *See Lambert*, 520 U.S. at 293.

C. The decision below is wrong

For at least two additional reasons, the First Circuit's decision regarding OCSLA is wrong.

First, the First Circuit ignored the massive amount of data in the record showing that the Project will cause substantial negative impacts on safety and the environment, thereby failing to meet OCSLA's requirement to "ensure" safety and environmental protection. In their First Circuit brief, Petitioners cited to record evidence from the final EIS and other agency documents demonstrating that:

- Pile driving, other construction activity, and the operations of the constructed Project will harm the ocean environment, displace marine species, and adversely impact public safety;

- The Project's turbines are untested in wind speeds exceeding 112 mph and turbine failure will cause environmental devastation;

- The Project will increase vessel collision risk and interfere with marine navigation, with major overall cumulative impacts expected; and

- The Project's turbines will interfere with military radar.

See Pet. First Cir. Op. Br. at 65–66. Declarations from commercial fishermen affirmed these risks. *Id*. at 69–71.

As indicated *supra,* events unfortunately proved Petitioners right. Shortly before oral argument, a turbine blade at the Project broke off and fell into the ocean, scattering fiberglass in all directions at the surface and subsurface. Project Developer failed to contain this debris, which washed up on the shores of nearby communities including Nantucket Island, requiring beach closures and a massive cleanup effort. The impact of the microplastics and harmful industrial materials that polluted the ocean because of a single blade's failure at the Project is still not yet fully understood. BSEE later discovered that up to 66 blades had the same flaw as the one that fell. *See Vineyard Wind Construction and Operations Plan Addendum* at § 1.0.

After this disaster, Petitioners notified the First Circuit of the blade failure and argued that the Federal Respondents' *post facto* investigation and mitigation were too little, too late to halt the environmental harm that even a single blade failure wrought.[8] Unfortunately, the

8. The Federal Respondents did not revoke Project Developer's COP and require them to remove their harmful

First Circuit turned a blind eye to the risks reported by the Petitioners and convinced itself that "the mitigation requirements that the BOEM imposed in response to the safety and environmental concerns raised" were enough to satisfy OCSLA. Appx. at 47a. But as the blade failure incident and the record and declaratory evidence set forth in the Petitioners' First Circuit briefing demonstrate, Pet. First Cir. Op. Br. at 65–66, those mitigation measures are far too few in number and scope to "ensure" safety and environmental protection, as required by Section 1337(p)(4). Accordingly, this Court should grant certiorari to correct this serious error. *See Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) (granting certiorari to correct obviously incorrect legal decision).

Second, as briefly mentioned in I.B. *supra*, by enacting Section 1337(p)(4) Congress specifically limited BOEM's general authority to permit renewable energy development, *see* 43 U.S.C. § 1332(2), by imposing a set of nondiscretionary requirements. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) ("A specific provision controls one of more general application."). Section 1337(p)(4) cannot be read as a list of aspirational goals to be balanced against each other. The statute employs the mandatory term "shall" to make clear that the requirements of Section 1337(p)(4) *must* be met to satisfy the statute. *Nat'l Ass'n of Home Builders v.*

Project when the blade failure occurred. On January 17, 2025, three days before a new administration entered office, BOEM approved Project Developer's COP Addendum without opportunity for comment and allowed construction to continue, provided that up to 66 offending blades were removed. *See* Letter to Ms. Rachel Pachter, U.S. Dep't of Interior (Jan. 17, 2025), https://tinyurl.com/mwnf4x73.

Defenders of Wildlife, 551 U.S. 644, 661–62 (2007) (the term "shall" imposes a mandatory duty). This means that if the criteria are not met, the activity in question may not move forward. Far from an "absolutist argument," Appx. at 46a, Petitioners' interpretation gives effect to every jot and tittle of the statute. Allowing Federal Respondents an implied, amorphous "retained" discretion to balance among Section 1337(p)(4)'s criteria renders its mandatory language meaningless. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (interpretation that renders a term meaningless should be avoided); *see also Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) (holding that "every clause and word of a statute should, if possible, be given effect"). And courts "cannot . . . add provisions to a federal statute." *Alabama v. North Carolina*, 560 U.S. 330, 352 (2010); *see also* Pet. First Cir. Op. Br. at 60 (citing *Alabama*). Given the national importance of this first-of-its-kind case, the First Circuit's erroneous interpretation should be corrected.

II. The First Circuit's NEPA decision warrants this Court's review.

Joining the district court's unquestioning deference to the Federal Respondents' EIS process, the First Circuit permitted the Federal Respondents to cut corners by tightly tethering the purpose of the action to Project Developer's compliance with private contracts. Pursuing that purpose, the Federal Respondents impermissibly (1) ignored reasonable alternatives, (2) segmented the EIS's analysis by neglecting environmental impacts from related projects, and (3) revived a terminated EIS without public comment. The First Circuit's approval of such actions impacts future EISs performed by federal agencies, and

constitutes a novel, indefensible interpretation of NEPA. *See National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 252 (1994) (granting certiorari due to importance of novel interpretation of statute).

A. The question presented is of national importance

The First Circuit's decision allows third-party offshore wind developers like Project Developer to exercise undue control over the wind energy approval process on the OCS. Though this Court has never directly spoken on this issue, "agency capture" is "the undesirable scenario where the regulated industry gains influence over the regulators, and the regulators end up serving the interests of the industry, rather than the general public." *Wood v. GMC*, 865 F.2d 395, 418 (1st Cir. 1988). Congress allowed Americans to sue federal agencies partially because "regulatory agencies are subject to the phenomenon known as 'agency capture.'" *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 499 (7th Cir. 2011).

The Federal Respondents refused to consider certain alternatives because they would require further surveying work from Project Developer, "which . . . could impact the [Project Developer's] ability to meet the requirements of its power purchase agreements" and therefore "would not meet the [Project's] purpose and need." Pet. First Cir. Op. Br. at 50 (quoting DEIS and ROD). Such subservience to Project Developer's priorities goes well beyond the "substantial weight" that the First Circuit found agencies may give to a project sponsor's preferences. *See* Appx. at 37a (relying on *Beyond Nuclear v. U.S. Nuclear Regul. Comm'n*, 704 F.3d 12, 19 (1st Cir. 2013)); *see also infra* at

II.D. (explaining why the First Circuit's ruling is wrong). The type of agency capture at play here will have far-reaching effects over project permitting if allowed to stand because the First Circuit's decision sets a precedent allowing agencies to defer to project sponsors rather than conducting the robust environmental reviews NEPA requires.

The Federal Respondents also unilaterally determined they could restart a previously-terminated NEPA review process for the Project solely because Project Developer falsely claimed the process was still a "decision pending before BOEM." Pet. First Cir. Op. Br. at 52–55. The district court found nothing wrong with this decision, and the First Circuit affirmed and faulted Petitioners for failing to point to a comment they "were precluded from submitting to the BOEM." First Cir. Op. at 42.

Allowing the First Circuit's NEPA procedural decisions to stand would sanction a practice by which agencies may ignore the plain text of NEPA and make decisions that benefit commercial project sponsors without considering full environmental impacts. In its supervisory role over federal courts, this Court should put a halt to this type of agency behavior before it infects other offshore wind project approvals. Indeed, if allowed to stand, the First Circuit's decision could be viewed as a green light for any agency to circumvent NEPA's mandated procedures in order to further the goals of a project sponsor. Such a practice would only serve to invite more NEPA challenges. *Rothensies*, 329 U.S. 296 (granting certiorari due to lower court's decision hindering effective administration of the laws). "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does

not confer discretion to ignore the required procedures of decisionmaking." *Bennett v. Spear*, 520 U.S. 154, 172 (1997).

B. The decision below conflicts with prior decisions of this Court

"An agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n*, 476 U.S. at 374. Administrative agencies' "power to act and how they are to act are authoritatively prescribed by Congress, so that when they act improperly, no less when they act beyond their jurisdiction, what they do is *ultra vires*." *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013). And an agency's authority to regulate in the public interest is limited to that authority which is spelled out in the grant of power. Congress does not broadly confer authority "through an implicit delegation." *West Virginia v. EPA*, 597 U.S. 697, 722 (2022) (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006)); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (holding such regulatory power "must always be grounded in a valid grant of authority from Congress").

NEPA "require[s] that agencies take a hard look at the environmental effects of their planned action. . . ." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989). This "hard look" is accomplished through an EIS. At "the heart" of the EIS is the determination of alternatives to the project, which an agency must "[r]igorously explore and objectively evaluate." 40 C.F.R. § 1502.14(a); Appx. at 138a. The First Circuit found that the following two procedures conducted by BOEM satisfied this requirement. Neither of these procedures were rigorous or objective, as required

by NEPA. As such, the First Circuit's decision that the Federal Respondents had authority not found within NEPA's plain text runs afoul of *La. Pub. Serv. Comm'n* and warrants certiorari. *See Doe*, 465 U.S. at 610.

i. The Federal Respondents impermissibly pre-determined "reasonable alternatives"

The First Circuit authorized the Federal Respondents' decision to eliminate several alternatives from full consideration in the EIS because those alternatives could lead Project Developer to violate its prematurely-signed PPAs. *See infra* at II.C.; Appx. at 36a–37a. The First Circuit found the Federal Respondents' consideration of alternatives under NEPA should be "bounded by some notion of [technical and economic] feasibility." *Id.* at 37a (quoting *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551 (1978)). But alternatives that do not satisfy a project sponsor's contractual commitments are not necessarily technically or economically infeasible. Pointing to those contractual commitments to limit decisionmaking constitutes reliance "on factors which Congress has not intended [the agency] to consider," and is therefore arbitrary and capricious under the APA. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Congress has not conferred power on agencies to ignore otherwise reasonable alternatives during EIS review solely because those alternatives may not fully permit a project developer to meet its pre-EIS contractual obligations. By holding that Federal Respondents could ignore reasonable alternatives that would not assist Project Developer in meeting its contracts, the

First Circuit allowed *ultra vires* action. Appx. at 37a. Accordingly, the First Circuit's decision runs counter to this Court's holding in *La. Pub. Serv. Comm'n*.

ii. The Federal Respondents impermissibly revived the EIS without public comment.

The Federal Respondents decided they could restart a previously-terminated NEPA review process for the Project without providing opportunity for public comment, and the First Circuit assumed the Federal Respondents had such authority under NEPA.

But NEPA does not authorize federal agencies to revive a terminated EIS without any opportunity for public comment. *See, e.g.*, *WildWest Inst. v. Bull*, 547 F.3d 1162, 1169 (9th Cir. 2008) (stating that "NEPA dictates that federal agencies shall *to the fullest extent possible* encourage and facilitate public involvement in decisions which affect the quality of the human environment") (cleaned up) (emphasis added). At the very least, the Federal Respondents should have provided an opportunity for comment before resuscitating the terminated COP. Accordingly, the Federal Respondents "literally ha[d] no power to act" in the manner they did. *La. Pub. Serv. Comm'n*, 476 U.S. at 374.

By foregoing public comment, the Federal Respondents unilaterally and impermissibly revived the terminated Project. That decision resulted in the Project's approval. This is the "taint from the . . . procedural error [that] had a causal effect on the BOEM's ultimate approval of the COP." Appx. at 38a (First Circuit contrafactually ruling that no such taint exists). Petitioners do not need

to demonstrate they would have submitted a comment to BOEM had the comment period been reopened. *See Mock v. Garland*, 75 F.4th 563, 586 (5th Cir. 2023) (finding prejudicial error where "plaintiffs were not on notice, nor could they comment on the expanded rule"). Courts must "hold unlawful and set aside agency action . . . found to be . . . without observance of procedure required by law[,]" including the procedural requirement of public comment. 5 U.S.C. § 706(2)(D); Appx. at 115a; *cf. Bennett*, 520 U.S. at 172. Because it approved *ultra vires* agency action, the First Circuit's decision conflicts with this Court's holding in *La. Pub. Serv. Comm'n*, meriting certiorari. *See Doe*, 465 U.S. at 610.

C. The decision below creates a conflict among the courts of appeal

The First Circuit's decision held that Project Sponsor's compliance with regulations promulgated by the CEQ was enough to satisfy NEPA. It did so despite a prior ruling by the D.C. Circuit that those regulations were *ultra vires* because CEQ has no rulemaking authority granted by Congress. *See Marin Audubon Soc'y*, 121 F.4th at 908. "If any [agency] regulations go beyond what Congress can authorize or beyond what it has authorized, those regulations are void and may be disregarded. . . ." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 410 (1917); *see also* 5 U.S.C. § 706(2) (instructing courts to "hold unlawful and set aside" such regulations). This serious NEPA conflict between circuit courts itself warrants certiorari. *See, e.g.*, *Thompson v. Keohane*, 516 U.S. 99, 106 (1995) (granting certiorari to resolve disagreement between circuit courts "[b]ecause uniformity among federal courts is important on questions of this order").

D. The decision below is wrong

The First Circuit's merits ruling on the NEPA claims was wrong for two additional reasons.

First, because the First Circuit found that the district court erred when it ruled Petitioners lacked standing to bring their NEPA claims, Appx. at 35a, it should have remanded the case to the district court to determine the extent to which Petitioners' NEPA procedural arguments were meritorious. *See Bennett*, 520 U.S. at 172. Because the district court held Petitioners lacked standing, it devoted no appreciable effort to determining whether Petitioners' NEPA arguments had merit. Therefore, the district court's record on those arguments was insufficient for the First Circuit to properly rule on the NEPA issues raised by the Petitioners. Nevertheless, the First Circuit ruled on the NEPA merits. Appx. at 35a–40a. This Court should exercise its supervisory role to correct that serious error made in the context of a challenge to the first of likely many challenges to COP approvals for renewable energy projects on the OCS. *See Bruner v. United States*, 343 U.S. 112 (1952) (granting certiorari because of supervisory role over lower courts).

Second, after confirming the adverse effects the Project would have on the environment in the supplement to the DEIS, the Federal Respondents conveniently excluded that analysis from the final EIS and undercounted planned offshore wind development. *See* Pet. First Cir. Op. Br. at 55–56. In so doing, they failed to account for the Project's "incremental impact . . . when added to . . . reasonably foreseeable future actions." 40 C.F.R. § 1508.7; Appx. at 139a. And in failing to consider the impact of the federal

government's offshore wind program as a whole, the Federal Respondents improperly segmented their NEPA analysis. *See Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (faulting federal agency for "divid[ing] connected, cumulative, or similar federal actions into separate projects" and thus violating NEPA). The First Circuit held Petitioners did not develop this argument and "therefore have not put the correctness of the district court's ruling into issue." First Cir. Op. at 43. But the district court ruled Petitioners could not bring this argument due to a perceived lack of standing. Again, given that the First Circuit found the Petitioners had standing to bring their NEPA claims, it should have remanded the cumulative impacts issue to the district court for a merits ruling.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert Henneke
Chance Weldon
Theodore Hadzi-Antich*
*Counsel of Record
Connor Mighell
Texas Public Policy Foundation
901 Congress Avenue
Austin, TX 78701
(512) 472-2700
tha@texaspolicy.com

Counsel for Petitioners

Date: March 4, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED DECEMBER 5, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 23-1853
No. 23-2051

SEAFREEZE SHORESIDE, INC.; LONG ISLAND COMMERCIAL FISHING ASSOC., INC.; XIII NORTHEAST FISHERY SECTOR, INC.; HERITAGE FISHERIES, INC.; NAT. W., INC.; OLD SQUAW FISHERIES, INC.,

Plaintiffs, Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; HONORABLE DEBRA HAALAND, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF THE INTERIOR; BUREAU OF OCEAN ENERGY MANAGEMENT; LIZ KLEIN, IN HER OFFICIAL CAPACITY AS THE DIRECTOR OF THE BUREAU OF OCEAN ENERGY MANAGEMENT; LAURA DANIEL-DAVID, IN HER OFFICIAL CAPACITY AS PRINCIPAL DEPUTY ASSISTANT SECRETARY, LAND AND MINERALS MANAGEMENT; UNITED STATES DEPARTMENT OF COMMERCE; HONORABLE GINA M. RAIMONDO, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF THE DEPARTMENT OF COMMERCE; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, NATIONAL MARINE

Appendix A

FISHERIES SERVICE; CATHERINE MARZIN, IN HER OFFICIAL CAPACITY AS THE DEPUTY DIRECTOR OF THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; UNITED STATES DEPARTMENT OF DEFENSE; HONORABLE LLOYD J. AUSTIN, III, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE DEPARTMENT OF DEFENSE; UNITED STATES ARMY CORPS OF ENGINEERS; LT. GEN. SCOTT A. SPELLMON, IN HIS OFFICIAL CAPACITY AS THE COMMANDER AND CHIEF OF ENGINEERS OF THE U.S. ARMY CORPS OF ENGINEERS; COLONEL JOHN A. ATILANO, II, IN HIS OFFICIAL CAPACITY AS THE DISTRICT ENGINEER OF THE NEW ENGLAND DISTRICT OF THE U.S. ARMY CORPS OF ENGINEERS; VINEYARD WIND 1, LLC,

Defendants, Appellees,

RESPONSIBLE OFFSHORE DEVELOPMENT ALLIANCE, A D.C. NONPROFIT CORPORATION,

Plaintiff, Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; DEBRA HAALAND, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF THE INTERIOR; BUREAU OF OCEAN ENERGY MANAGEMENT; LIZ KLEIN, IN HER OFFICIAL CAPACITY AS THE DIRECTOR OF THE BUREAU OF OCEAN ENERGY MANAGEMENT; NATIONAL

Appendix A

MARINE FISHERIES SERVICE; RICHARD W. SPINRAD, IN HIS OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; UNITED STATES DEPARTMENT OF THE ARMY; CHRISTINE WORMUTH, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE ARMY; UNITED STATES ARMY CORPS OF ENGINEERS; JAMIE A. PINKHAM, IN HIS OFFICIAL CAPACITY AS THE ACTING ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS; VINEYARD WIND 1, LLC,

Defendants, Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Indira Talwani, *U.S. District Judge*]

Before Gelpí, Montecalvo, and Aframe
Circuit Judges.

December 5, 2024

AFRAME, *Circuit Judge*. These appeals challenge the federal government's process for approving a plan to construct and operate a large-scale commercial offshore wind energy facility.[1] The facility, which began delivering power to the New England grid in early 2024, is located on the Outer Continental Shelf, some fourteen miles south

1. The appeals were briefed and argued separately, but we address them together in this opinion.

of Martha's Vineyard and Nantucket. The plaintiffs are entities involved in or associated with the commercial fishing industry. The defendants are federal departments, agencies, and officials responsible for the plan approval process, as well as the business entity that successfully submitted the proposed plan and is constructing and operating the facility. The plaintiffs sued to obtain declaratory and injunctive relief, asserting thirty-nine claims under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, and several environmental statutes, described below. The district court entered summary judgment for the defendants on all claims. The plaintiffs appeal, arguing that the district court erred in multiple respects. We affirm.

I.

A. The Parties

The plaintiffs in case no. 23-1853 are Seafreeze Shoreside, Inc., a Rhode Island seafood dealer; the Long Island Commercial Fishing Association, Inc., a trade group representing New York's commercial fishing industry ("LICFA"); XIII Northeast Fishery Sector, Inc., a private organization of commercial fishermen located in the Northeast; and three commercial fishing companies: Heritage Fisheries, Inc.; Nat. W., Inc.; and Old Squaw Fisheries, Inc. We refer to these entities collectively as the "Seafreeze plaintiffs" and to case no. 23-1853 as the "Seafreeze appeal."

The defendants in the Seafreeze appeal are the Department of the Interior; the Honorable Debra Haaland,

in her official capacity as Secretary of the Interior; the Bureau of Ocean Energy Management ("BOEM"); Liz Klein, in her official capacity as the BOEM's Director; Laura Daniel-David, in her official capacity as the Interior Department's Principal Deputy Assistant Secretary of Land and Minerals Management; the Department of Commerce; the Honorable Gina M. Raimondo, in her official capacity as Secretary of Commerce; the National Oceanic and Atmospheric Association ("NOAA"); the National Marine Fisheries Service ("NMFS"); Catherine Marzin, in her official capacity as Deputy Director of the NOAA; the Department of Defense; the Honorable Lloyd J. Austin III, in his official capacity as Secretary of Defense; the Army Corps of Engineers ("the Corps"); Lt. Gen. Scott A. Spellmon, in his official capacity as the Corps' Commander and Chief of Engineers; Col. John A. Atilano, II, in his official capacity as the Corps' District Engineer of the New England District; and Vineyard Wind 1, LLC, which submitted the approved plan and is constructing and operating the facility. Vineyard Wind 1 was not initially sued but successfully intervened as a defendant. We use "Vineyard Wind" to refer both to the project and its developer.

The plaintiff in case no. 23-2051 is Responsible Offshore Development Alliance ("Alliance"), a D.C. nonprofit whose membership includes fishing associations, seafood dealers, seafood processors, fishing vessels, and affiliated businesses. We refer to case no. 23-2051 as the "Alliance appeal."

The defendants in the Alliance appeal are the Interior Department; Secretary Haaland in her official capacity;

the BOEM; Director Klein in her official capacity;[2] the NMFS; Richard W. Spinrad, in his official capacity as the NOAA's Administrator; the Department of the Army; Christine Wormuth, in her official capacity as Secretary of the Army; the Corps; Jamie A. Pinkham, in his official capacity as Acting Assistant Secretary of the Army for Civil Works; and Vineyard Wind.

B. Statutory Background

1. The Seafreeze Appeal

The Seafreeze appeal involves claims pursuant to, inter alia, the APA and the following environmental statutes:

a. The Outer Continental Shelf Lands Act

The Outer Continental Shelf consists of all submerged lands beyond those reserved to the States and up to the edge of the United States' jurisdiction and control. 43 U.S.C. § 1331(a)(1). The Outer Continental Shelf Lands Act ("OCSLA") regulates the federal government's leasing of mineral and energy resources on these lands. *See id.* §§ 1331-1356c. The OCSLA establishes the Outer Continental Shelf as a "vital national resource reserve" that "should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." *Id.* § 1332(3).

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2. The case caption lists Amanda Lefton as the BOEM's Director. Director Klein replaced Director Lefton in 2023.

To further these goals, the OCSLA authorizes the Department of the Interior, in consultation with other federal agencies and acting through the BOEM, to grant leases on the Outer Continental Shelf for the purpose of, *inter alia*, renewable wind energy production. *Id.* § 1337 (p)(1)(C); 30 C.F.R. § 585.100. When granting such leases, the BOEM must "ensure that any activity under [the OCSLA] is carried out in a manner that provides for" twelve criteria including, insofar as is relevant, safety; protection of the environment; conservation of natural resources of the Outer Continental Shelf; prevention of interference with reasonable uses of the Outer Continental Shelf (as determined by the Interior Secretary); and consideration of any other use of the sea or seabed, including use for fishing and navigation. 43 U.S.C. § 1337(p)(4); 30 C.F.R. § 585.102(a).

The BOEM's issuance of a lease does not itself authorize development of the site. *See* 30 C.F.R. § 585.200(a). To proceed to development, a lessee must formulate a site assessment plan, obtain the BOEM's approval of that plan, and then obtain the BOEM's approval of a construction and operations plan ("COP"). *See generally id.* §§ 585.600, 585.605-607, 585.610-614, 585.620-622, and 585.626-628. No construction may begin until the BOEM approves the COP. *Id.* § 585.620(c).

The OCSLA contains a citizen-suit provision. 43 U.S.C. § 1349(a)(1).

b. The National Environmental Policy Act

The BOEM must comply with the National Environmental Policy Act ("NEPA") when approving a COP. 30 C.F.R. § 585.628. The NEPA is a procedural statute that requires federal agencies to take a "hard look" at the environmental impacts of and alternatives to a proposed action. *Beyond Nuclear v. U.S. Nuclear Regul. Comm'n*, 704 F.3d 12, 19 (1st Cir. 2013). Generally, the vehicle for the required analysis is an environmental impact statement ("EIS"). *See* 42 U.S.C. § 4332(C). The EIS must analyze, inter alia, the "'reasonably foreseeable environmental effects' of the proposed action, the 'reasonable range of technically and economically feasible alternatives' to the proposed action, and reasonable measures to mitigate the environmental effects of the proposed action." *Nantucket Residents Against Turbines v. U.S. Bureau of Ocean Energy Mgmt.*, 100 F.4th 1, 9 (1st Cir. 2024) (quoting 42 U.S.C. § 4332(C)). The NEPA "'does not mandate particular results, but simply prescribes the necessary process' for evaluating an agency action's environmental effects." *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S. Ct. 1835, 104 L. Ed. 2d 351 (1989)). This process is designed to prevent uninformed agency action and to provide information about environmental impact to the public and other government agencies so that they have an opportunity to respond. *See Town of Winthrop v. FAA*, 535 F.3d 1, 4 (1st Cir. 2008).

The NEPA does not contain a citizen-suit provision and is enforced through the judicial review provisions of

the APA. *See Scarborough Citizens Protecting Res. v. U.S. Fish & Wildlife Serv.*, 674 F.3d 97, 102 (1st Cir. 2012).

c. The Endangered Species Act

The BOEM also must comply with the Endangered Species Act ("ESA") when approving a COP. Section 7 of the ESA requires agencies to ensure that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . ." 16 U.S.C. § 1536(a)(2). To this end, a lead agency (here, the BOEM) must consult with the NMFS whenever an agency action "may affect" a listed marine species or critical habitat. 50 C.F.R. § 402.14(a); *see also Nantucket Residents*, 100 F.4th at 8. When such a consultation is required, the NMFS must issue a "biological opinion" stating whether the contemplated agency action is "likely to jeopardize the continued existence" of any listed species or "result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(g)(4), (h). If so, the NMFS also must determine whether "reasonable and prudent alternatives" are available. *Id.* § 402.14(g)(5). The opinion must be based on the "best scientific and commercial data available." *Id.* § 402.14(g)(8); *see also* 16 U.S.C. § 1536(a)(2).

A lead agency must request reinitiation of consultation following the NMFS's issuance of a biological opinion if the agency has retained discretionary involvement in or control over the contemplated action, and certain other conditions, including new information becoming available, are satisfied. *See* 50 C.F.R. § 402.16(a).

Generally, Section 9 of the ESA prohibits the "take" of an endangered species within the United States or the territorial seas of the United States. *See Nantucket Residents*, 100 F.4th at 8; 16 U.S.C. § 1538(a)(1)(B). A "take" includes the harassment of or harm to the species. *Id.* § 1532(19). A section 9 prohibition also can be applied to "threatened" (as opposed to endangered) species. *See* 16 U.S.C. § 1533(d).

One form of take is an "incidental take." During consultation, the NMFS may conclude that proposed agency action is not likely to jeopardize an endangered or threatened species but is reasonably certain to incidentally affect the species. In such a situation, the NMFS issues an "incidental take statement" along with its biological statement. *See id.* § 1536(b)(4); 50 C.F.R § 402.14(i). An incidental take statement details the extent of the anticipated take, reasonable and prudent measures to minimize and monitor it, and the terms and conditions under which such measures will be implemented. *See* 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). A take authorized in compliance with the incidental take statement is exempt from the ESA's take prohibition. *See* 16 U.S.C. § 1536(o).

The ESA contains a citizen-suit provision. 16 U.S.C. § 1540(g).

2. The Alliance Appeal

The Alliance appeal involves claims pursuant to, inter alia, the APA, the OCSLA, the NEPA, the ESA, and two additional environmental statutes.

Appendix A

a. The Marine Mammal Protection Act

Congress enacted the Marine Mammal Protection Act ("MMPA") to prevent marine mammals from "diminish[ing] beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part . . . ." 16 U.S.C. § 1361(2). While the MMPA generally prohibits the take (including the harassment) of marine mammals, *id.* §§ 1372(a), 1371(a) 1362(13); 50 C.F.R. § 216.3, it permits the NMFS to authorize, for a period not exceeding one year, the incidental "taking . . . of small numbers of marine mammals" if it concludes that "such taking . . . will have a negligible impact on such species," 16 U.S.C. § 1371(a)(5)(D)(i)(I).

Under the MMPA, there are two types of harassment: Level A and Level B. Relevant here is Level B harassment, which is "'any act of pursuit, torment, or annoyance' that has the 'potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavior patterns.'" *Nantucket Residents*, 100 F.4th at 9 (quoting 16 U.S.C. § 1362(18)(A)(ii), (18)(D)). The required contents of an incidental harassment authorization ("IHA"), and the process for obtaining such an authorization, are described in 16 U.S.C. § 1371(a)(5)(D)(ii)(I), (II), (III), and 50 C.F.R. § 216.104, respectively.

The MMPA does not contain a citizen-suit provision and is enforced through the judicial review provisions of the APA. *See Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1178 (9th Cir. 2004).

b. The Clean Water Act and the Rivers and Harbors Act

Congress enacted the Clean Water Act ("CWA") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA prohibits the "discharge of any pollutant" into "navigable waters," including the "territorial seas," unless done in compliance with the Act. *Id.* §§ 1311(a), 1344(a), 1362(7); 33 C.F.R. §§ 328.2, 328.3(a)(1), 328.4(a). The territorial seas generally include waters extending seaward three nautical miles from the coast but may also include other waters in contact with the open sea such as waters within three nautical miles from islands. *See* 33 U.S.C. § 1362(8); 33 C.F.R. §§ 328.4(a), 329.12(a).

Section 404 of the CWA authorizes the Secretary of the Army, acting through the Corps, to issue permits for discharges of dredged or fill material into waters of the United States. 33 U.S.C. §§ 1344, 1362(6)-(7). Permits must be issued in compliance with both the Corps' permitting regulations, 33 C.F.R. pt. 320, and regulations jointly developed by the U.S. Environmental Protection Agency ("EPA") and the Corps, known as the "Section 404(b)(1) Guidelines," 40 C.F.R. pt. 230.

The Corps' regulations require that a permitting decision be based on "an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." 33 C.F.R. § 320.4(a)(1). Similarly, the Section 404(b)(1) Guidelines require the Corps to determine the potential impacts,

including cumulative impacts, of proposed discharges. 40 C.F.R. § 230.11. The Section 404(b)(1) Guidelines also state that the Corps should not issue a permit "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." *Id.* § 230.10(a). The purpose of the analysis required by the Section 404(b)(1) Guidelines is to ensure that proposed discharges will not have a significant adverse effect on human health or welfare, aquatic life, aquatic ecosystems, or recreational, aesthetic, or economic values. *See id.* § 230.10(c)(1).

The Corps also may issue permits to authorize the installation of structures in navigable U.S. waters more than three nautical miles from the coast. But it must do so pursuant to Section 10 of the Rivers and Harbors Act ("RHA"), *see* 33 U.S.C. § 403; 33 C.F.R. §§ 320.2(b) & 322.3(a)-(b), and not the CWA.

The CWA contains a citizen-suit provision. 33 U.S.C. § 1365(a). The RHA does not contain a citizen-suit provision and is enforced through the judicial review provisions of the APA. *See Huron Mountain Club v. U.S. Army Corps of Eng'rs*, 545 F. App'x 390, 393 & n.2 (6th Cir. 2013).

C. Factual and Procedural Background

We recently decided two appeals involving challenges to the Vineyard Wind project brought by different plaintiffs. *See Melone v. Coit*, 100 F.4th 21 (1st Cir. 2024);

Nantucket Residents, 100 F.4th at 1. We draw from our opinions in those cases to set forth the factual and procedural background of the Vineyard Wind project. We then provide additional relevant facts as necessary.

In 2009, the BOEM began evaluating the possibility of wind energy development on the Outer Continental Shelf off the coast of Massachusetts, pursuant to its authority under the OCSLA. *Melone*, 100 F.4th at 26. After several years of review, in 2014, the BOEM made "a small portion of the Massachusetts Wind Energy Area -- a section of the Outer Continental Shelf -- available for lease." *Nantucket Residents*, 100 F.4th at 10 (citing 79 Fed. Reg. 34771 (June 18, 2014)). In 2015, the BOEM leased a 166,886-acre (or 675-square-kilometer) portion of the area to Vineyard Wind. *Melone*, 100 F.4th at 26.

In December 2017, Vineyard Wind submitted to the BOEM a COP that proposed building an offshore wind project in an approximately 76,000-acre zone of the lease area. *Id.* The COP contemplated the construction of turbines and additional wind energy infrastructure capable of generating approximately 800 megawatts of clean wind energy, enough to power approximately 400,000 homes. *Melone*, 100 F.4th at 26; *Nantucket Residents*, 100 F.3d at 10. In response to Vineyard Wind's submission, several federal agencies initiated an environmental review process.

In March 2018, the BOEM published a notice of intent to prepare an EIS responsive to the Vineyard Wind proposal. 83 Fed. Reg. 13777 (Mar. 30, 2018). Following

this notice, the BOEM held five public "scoping" meetings in the vicinity of the proposed project to identify issues and potential alternatives to the COP for consideration in the EIS. In November 2018, Vineyard Wind applied for permits under CWA Section 404 and the RHA to construct an offshore cable transmission system that would connect the turbines to a landfall site at Covell's Beach in Hyannis, Massachusetts. In December 2018, the BOEM issued a draft EIS, 83 Fed. Reg. 63184-02 (Dec. 7, 2018), which it supplemented in June 2020.

Meanwhile, on December 6, 2018, the BOEM requested consultation with the NMFS out of concern about the impact the COP might have on the endangered right whale. Consultation commenced in May 2019. On September 11, 2020, the NMFS issued a biological opinion concluding that the Vineyard Wind project would likely not jeopardize the continued existence of the right whale. The opinion also contained reasonable and prudent mitigation measures deemed necessary to reduce the project's potential effects on the right whale. *See generally Nantucket Residents*, 100 F.4th at 10. On May 21, 2021, the NMFS issued to Vineyard Wind an IHA allowing the non-lethal, "incidental Level B harassment of no more than twenty" right whales. *Melone*, 100 F.4th at 26.

On May 7, 2021, the BOEM requested that the NMFS reinitiate consultation in response to two developments. First, the BOEM had concluded that the September 11, 2020, biological opinion did not fully assess the potential impacts on the right whale of fish monitoring surveys to be conducted by Vineyard Wind if its COP were approved.

Second, more up-to-date information regarding the right whale population had become available since completion of the September 11, 2020, biological opinion. In requesting reinitiation of consultation, the BOEM documented its understanding that the September 11, 2020, biological opinion "will remain valid and effective until consultation is completed." The BOEM also represented that, if the COP were to be approved, "it would not allow the commencement of the aforementioned [fish monitoring] surveys until [the reinitiated consultation] is concluded."[3]

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3. In a contemporaneously issued file memorandum, the BOEM explained that, while it had requested reinitiation of consultation on the fishery monitoring plan, approval of the project would "neither jeopardize the continued existence of ESA-listed species nor destroy or adversely modify designated critical habitat." Supp. App. at 1683, Seafreeze Appeal. The memorandum emphasized that reinitiation of consultation to consider fishery monitoring plans as part of the proposed action would "not provide any new information concerning potential effects on threatened and endangered species from construction, operation, and decommissioning of the project and, therefore, [would] not change the determinations of the [September 11, 2020, biological opinion] for the rest of the project already considered in the Opinion." *Id.* at 1684; *see also id.* at 1683 ("The authorization of Vineyard Wind I and the fishery monitoring plan are not interdependent. Although approval of the fishery monitoring plan . . . would not occur but for the project, the authorization of [the project] is not dependent upon approval of the fishery monitoring plan."). The memorandum also stated that, if the BOEM were to approve the COP, "commencement of any monitoring activities would be conditioned on the conclusion of this reinitiation and compliance with any NMFS survey mitigation measures that may be identified and included in the revised Incidental Take Statement and implementing Terms and Conditions in the revised Opinion." *Id.* at 1684.

The NMFS agreed to reinitiate consultation and, on October 18, 2021, issued an updated biological opinion. The updated opinion again concluded that the project would likely not jeopardize the right whale's continued existence. Both the 2020 and 2021 biological opinions also included incidental take statements which concluded that, after mitigation measures were implemented, the maximum anticipated take from project construction was Level B harassment of twenty right whales caused by construction noise.

Between the issuance of the September 11, 2020, and October 18, 2021, biological opinions, several other relevant events took place. On December 1, 2020, Vineyard Wind notified the BOEM that it was withdrawing its proposed COP from review in order to conduct a technical and logistical analysis of the wind turbine generator it had decided to use in the final project design. *See* 86 Fed. Reg. 12494 (Mar. 3, 2021). This analysis sought to "review updated project parameters to confirm that [they] fell within the project design envelope" that the BOEM had used in conducting its earlier review. *Id.* The notice stated that Vineyard Wind intended to rescind its withdrawal of the COP upon completion of its analysis. Less than two months later, on January 22, 2021, Vineyard Wind notified the BOEM that it had completed its analysis and concluded that it did not need to modify the COP. Vineyard Wind also requested that the BOEM resume its review of the COP, and the BOEM did so, *see* 86 Fed. Reg. at 12494-95.

The BOEM issued a final EIS ("FEIS") on March 12, 2021. 86 Fed. Reg. 14153 (Mar. 12, 2021). The FEIS

considered five action alternatives (one of which had two sub-alternatives) to the project proposed by Vineyard Wind in the COP. It also considered a no-action alternative. The FEIS identified the COP, with modifications drawn from several of the alternatives that the BOEM had considered, as the preferred alternative. The FEIS also included a lengthy assessment of potential impacts from the project on the natural and human environment. It acknowledged that the project would likely have a negative economic impact on commercial fishing. But it suggested that potential revenue losses could be offset by compensatory funds that Vineyard Wind had agreed to set aside. It also proposed mitigation measures that would reduce negative impacts.

On May 10, 2021, the BOEM, the Corps, and the NMFS issued a joint record of decision ("ROD"). The ROD memorialized the BOEM's selection of the preferred alternative in the FEIS, the Corps' decision to issue the necessary CWA/RHA permits, and the NMFS's decision to issue the IHA. The ROD stated that the preferred alternative would allow eighty-four or fewer wind turbines to be installed in 100 of the 106 locations proposed in the COP. It also required that the turbines be placed in an east-west orientation with each turbine separated by one nautical mile.

The BOEM's approval of the COP was subject to several non-discretionary mitigation, monitoring, and reporting measures. The BOEM attached to the ROD a memorandum explaining why the preferred alternative satisfied the requirements of the OCSLA and other

applicable regulatory authority. On July 15, 2021, the BOEM issued its final approval of the COP. The approval was subject to more than 100 pages of terms and conditions, including compliance with any substantive amendments to the September 11, 2020, biological opinion that might arise from the ongoing reinitiated consultation. On January 20, 2022, after receiving the October 18, 2021, biological opinion from the NMFS, the BOEM confirmed its final approval of the COP subject to the terms and conditions, and prescribed reasonable and prudent measures, set forth in the updated opinion.

The Seafreeze plaintiffs and the Alliance filed the lawsuits underlying these appeals on December 15, 2021, and January 31, 2022, respectively. As explained, the Seafreeze plaintiffs sued under the APA, the ESA, the NEPA, and the OCSLA. The Alliance sued under the APA, the NEPA, the MMPA, the ESA, the OCSLA, and the CWA/RHA. In both cases, the parties cross-moved for summary judgment, and the district court, in a thoughtful order, granted the defendants' motions and denied the plaintiffs' motions.

The district court concluded, inter alia, that (1) the plaintiffs' ESA claims were non-justiciable under Article III of the Constitution, (2) the plaintiffs were outside of the zone of interests protected by the NEPA, (3) the Alliance was outside of the zone of interests protected by the MMPA, (4) the Alliance had failed to identify a genuine issue of material fact as to whether the Corps' issuance of the CWA Section 404 permit was arbitrary, capricious, an abuse of discretion, unsupported by substantial

evidence, or otherwise not in accordance with law, and (5) the plaintiffs had failed to identify a genuine issue of material fact as to whether the BOEM's approval of the project under the OCSLA was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or otherwise not in accordance with law. These appeals followed.

II.

We review the district court's summary judgment rulings de novo. *See, e.g., Melone*, 100 F.4th at 29; *Nantucket Residents*, 100 F.4th at 12. These include the court's Article III standing and zones-of-interests rulings, the challenges to which raise legal questions. *In re Evenflo Co., Inc. Mktg., Sales Pracs. & Prods. Liab. Litig.*, 54 F.4th 28, 34 (1st Cir. 2022) (reviewing de novo the district court's ruling on Article III standing); *T.S. ex rel. T.M.S. v. Heart of CarDon, LLC*, 43 F.4th 737, 741 (7th Cir. 2022) (reviewing de novo the district court's zone-of-interests ruling).

We also review de novo the district court's summary judgment determinations that the defendants did not act in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or that was "unsupported by substantial evidence." *Melone*, 100 F.4th at 29 (quoting 5 U.S.C. § 706(2)(A), (E)); *see also Nantucket Residents*, 100 F.4th at 12. An agency action or inaction is arbitrary or capricious if the agency relied on factors Congress did not intend it to consider, failed to consider an important aspect of the problem, explained

the decision in terms that run counter to the evidence, or reached a decision so implausible that it cannot be ascribed to a difference in view or the product of agency expertise. *See Melone*, 100 F.4th at 29; *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)).

Finally, we may affirm the district court's judgments on any independent ground supported by the record. *E.g.*, *Puerto Rico Fast Ferries LLC v. SeaTran Marine, LLC*, 102 F.4th 538, 549 (1st Cir. 2024).

III.

A. The APA/ESA Claims

We first consider the challenges to the district court's grant of summary judgment to the defendants on the plaintiffs' APA/ESA claims. As previously noted, the court dismissed these claims as non-justiciable under Article III. Whether a claim satisfies the demands of Article III implicates our subject matter jurisdiction, *e.g.*, *United States v. Texas*, 599 U.S. 670, 686, 143 S. Ct. 1964, 216 L. Ed. 2d 624 (2023), and so we must satisfy ourselves that we have subject-matter jurisdiction before addressing the merits of a claim, *see Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-102, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (prohibiting the exercise of "hypothetical jurisdiction"). We therefore begin by reviewing whether the court properly concluded that the plaintiffs' ESA claims were non-justiciable based on the summary judgment record.

The plaintiffs presented the district court with three developed theories of how the defendants violated the ESA. The first two, advanced by the Seafreeze plaintiffs, targeted aspects of the September 11, 2020, biological opinion, but not the superseding October 18, 2021, biological opinion. The third, advanced by the Alliance, argued that the sequence in which the defendants acted resulted in the issuance of the ROD and approval of the COP without there being in place a valid biological opinion.

The district court rejected all three arguments for a lack of standing and, alternatively, mootness. As to standing, the court first assessed the nature of the injuries that the plaintiffs were entitled to assert. *See, e.g., FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380, 144 S. Ct. 1540, 219 L. Ed. 2d 121 (2024) (observing that, to establish standing, "a plaintiff must demonstrate (i) that she has suffered or likely will suffer an injury in fact, (ii) that the injury likely was caused or will be caused by the defendant, and (iii) that the injury likely would be redressed by the requested judicial relief"). The court concluded that, while each plaintiff had adduced sufficient evidence of economic injury due to the project's potential adverse effects on commercial fishing, no plaintiff had adduced admissible evidence of non-economic injury. In reaching this latter conclusion, the court rejected the plaintiffs' arguments that they were appropriate parties to assert environmental and aesthetic interests that would be harmed by the project.

The district court then turned to whether the plaintiffs' evidence of economic injury, causation, and

redressability was sufficient to establish that they had Article III standing to press their ESA claims. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (emphasizing that, at the summary judgment stage, a party claiming standing cannot rest on general allegations of injury resulting from the defendant's conduct but rather must adduce evidence to support the specific facts necessary to substantiate its standing theory); *see also Bennett v. Spear*, 520 U.S. 154, 167-68, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997). The court concluded that the plaintiffs' evidence was insufficient to meet this burden as a matter of law.

With respect to the Seafreeze plaintiffs, who, again, only sought to challenge aspects of the superseded September 11, 2020, biological opinion, the district court determined that they had failed to adduce evidence that their economic injuries were likely caused by the project's alleged negative impact on any endangered species. With respect to the Alliance, the court determined that it had failed to adduce evidence that the procedural actions of which it complained regarding the two biological opinions either likely caused its alleged injury or likely caused any erroneous government decision. *See Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 184, 430 U.S. App. D.C. 15 (D.C. Cir. 2017) (observing that a plaintiff alleging procedural injury must show both a connection between the error and a substantive agency outcome and a connection between that outcome and the plaintiff's particularized injury). In support of the latter ruling, the court observed that the October 18, 2021, biological opinion, which the Alliance did not challenge, served to

break the chain of causation underlying the Alliance's standing theory.

Alternatively, the district court concluded that all of plaintiffs' claims were moot. As to the Seafreeze plaintiffs, their ESA claims were moot because they had targeted the September 11, 2020, biological opinion, and not the superseding October 18, 2021, biological opinion, which was the ultimate basis for the BOEM approving the COP. As to the Alliance, its ESA claim was moot because the alleged procedural error was rendered immaterial by the subsequent issuance of the superseding biological opinion, which the Alliance did not challenge, and which, again, was the ultimate basis for approving the COP.

On appeal, the Seafreeze plaintiffs present only one developed argument challenging the district court's standing and mootness rulings on their ESA claims.[4]

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4. The section of the Seafreeze plaintiffs' brief challenging the district court's ESA rulings contains three subparts. The first presents the developed argument we are about to address. The second, titled "The Commercial Fishermen's ESA Claims Were Not Mooted And The [September 11, 2020, Biological Opinion] Violated ESA In Multiple Ways," contains five brief arguments. Two reiterate the Seafreeze plaintiffs' merits challenges to the September 11, 2020, biological opinion and add nothing to the justiciability analysis. The other three involve variations on a single theme: that challenges to the September 11, 2020, biological opinion are not moot because that was the opinion in effect when the agency defendants issued the ROD and approved the COP. We shall have more to say about this argument in our discussion of the Alliance's challenge to the court's dismissal of its ESA claim. The third, titled "The District Court Erred In Holding That The Commercial Fishermen Waived

They assert that the court erred in refusing to recognize the LICFA's associational standing to assert, on behalf of LICFA member David Aripotch, certain non-economic environmental and aesthetic injuries arising from Vineyard Wind's impact on the project area. Aripotch, who is not a party, owns plaintiff Old Squaw and captains its boat. In the district court, he submitted a declaration detailing the aesthetic and spiritual pleasures he derives from fishing and photographing right whales and other marine life in the project area.

The district court rejected the argument for two reasons. First, it concluded that Aripotch's personal injuries and interests could not be imputed to Old Squaw, the corporation he owns. Second, the court refused to allow the LICFA to assert Aripotch's non-economic interests in the project area because the LICFA did

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Certain ESA Arguments," asserts that the district court erred in regarding as waived for lack of summary judgment briefing nine additional ESA claims the Seafreeze plaintiffs had asserted in their complaint. But the record citations the Seafreeze plaintiffs provide in support of this argument only point to a few passing mentions of these claims and attempts to incorporate by reference arguments made elsewhere, often by parties to other Vineyard Wind lawsuits. The record therefore confirms that the merits of these claims were not developed and argued in the summary judgment papers. *See Rocafort v. IBM, Corp.*, 334 F.3d 115, 121-22 (1st Cir. 2003) (arguments raised in the complaint but not developed in summary judgment papers are waived); *Exec. Leasing Corp. v. Banco Popular de P.R.*, 48 F.3d 66, 67-68 (1st Cir. 1995) (parties must include within the four corners of their briefs any arguments they wish the court to consider and cannot circumvent page limits through incorporation by reference of arguments made elsewhere). The district court appropriately declined to address the merits of these claims.

not demonstrate that those interests are germane to its purpose of supporting fisheries management. *See Friends of the Earth, Inc. v. Laidlaw Env'tl Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (observing that an association may have standing to sue on behalf of its members when, inter alia, the member interest it is asserting is "germane to the organization's purpose").

The Seafreeze plaintiffs challenge the ruling that the LICFA failed to demonstrate that protection of Aripotch's aesthetic and spiritual interests in the project area is germane to its purpose. They call our attention to the LICFA's articles of incorporation. Those articles indicate that the preservation, maintenance, and welfare of the environment in the saltwater fisheries "in Suffolk County [New York] and its environs," now and for future generations, are among the purposes for which the LICFA was formed in October 2001. The Seafreeze plaintiffs sought to introduce the articles into the summary judgment record by means of a motion for judicial notice filed after the summary judgment briefing deadline had passed. The court denied the motion as an untimely effort to supplement the summary judgment record.

The Seafreeze plaintiffs first say that this was reversible error because "no timeliness requirement exists for matters of judicial notice pertaining to standing, as jurisdictional rules like standing may be raised at any time." This argument is incorrect. Trial courts possess considerable case-management authority, which includes the authority to set deadlines for filing pretrial motions.

Rosario-Díaz v. González, 140 F.3d 312, 315 (1st Cir. 1998) (citing Fed. R. Civ. P. 16(b)(2)); *see also* Fed. R. Civ. P. 16(b)(3) (mandating that when federal trial courts issue scheduling orders, those orders limit the time for, inter alia, filing motions); L.R., D. Mass. 7.1(a)(1) (authorizing the establishment of briefing deadlines). If information calling into question the court's subject-matter jurisdiction becomes available after such a deadline has passed, the expiration of the deadline does not preclude an inquiry into the court's power to hear the underlying claim. *See* Fed. R. Civ. P. 12(h)(3) (stating that a court must dismiss an action if "at any time" it determines "that it *lacks* subject-matter jurisdiction" (emphasis supplied)). But this principle has no bearing on the court's authority to place reasonable time limits on the ability of a party *asserting* federal subject-matter jurisdiction to produce proof that Article III standing exists. *See Town of Milton v. FAA*, 87 F.4th 91, 95 (1st Cir. 2023) (party asserting federal jurisdiction bears the burden of establishing Article III standing).

The Seafreeze plaintiffs also invoke Fed. R. Evid. 201(c)(2), which states that a court "must take judicial notice if a party requests it and the court is supplied with the necessary information," and Fed. R. Evid. 201(d), which states that a court "may take judicial notice at any stage of the proceeding." According to the Seafreeze plaintiffs, these Rules obliged the court to take judicial notice of the LICFA's articles of incorporation, even though the deadline for summary judgment briefing had passed. But even if the articles of incorporation are a proper subject of judicial notice because the LICFA had filed them with

the New York Secretary of State, they would not provide grounds for the LICFA to represent Aripotch's personal interests in the project area.

The articles of incorporation establish only that a *stated* purpose for incorporating the LICFA in October 2001 was to protect the welfare of the environment in the saltwater fisheries in Suffolk County and its environs. They do not establish, as a matter of law, that this has been one of the LICFA's *actual* purposes in the years since its founding. It would deprive the defendants of their procedural right to contest the issue if we were to draw the broader inference from a document introduced into the record after the summary judgment briefing had closed. Moreover, a commercial fishing association's interest in protecting the welfare of the area in which its members carry on their business does not, ipso facto, encompass an individual member's observational interests in the right whale or recreational interests in fishing and photography. And finally, the area to which the LICFA's environmental interests allegedly extend do not appear to include the project area, which is more than sixty-five miles away from Suffolk County.

We turn now to the Alliance's challenge to the district court's rejection of its ESA claim on justiciability grounds. The Alliance does not explicitly engage the particulars of the court's standing and mootness rulings. The section of the Alliance's opening brief addressing the rejection of its ESA claim contains two subparts. The first reiterates the merits of its ESA claim. That claim, as we understand it, is that issuance of an ROD based on a biological opinion

that is subject to reinitiated consultation is a per se violation of the ESA, regardless of (1) what the agencies say about the ongoing validity and effectiveness of the earlier opinion, (2) the limited and discrete nature of the reinitiated consultation, and (3) steps the agencies take to ensure that the terms and conditions and reasonable and prudent measures contained within the updated opinion will be both enforceable and enforced. The second subpart argues that the Alliance has properly alleged and demonstrated both economic and environmental injuries and a basis for representing the interests of its members.

The Alliance's lack of direct engagement with the substance of the court's justiciability rulings in its opening brief is itself grounds for rejecting its challenge to the entry of summary judgment on its ESA claim. *E.g., Cioffi v. Gilbert Enters., Inc.*, 769 F.3d 90, 93-94 (1st Cir. 2014) (observing that an appealing party must explain "why a particular order is erroneous"); *Sparkle Hill, Inc. v. Interstate Mat Corp.*, 788 F.3d 25, 29 (1st Cir. 2015) ("[W]e do not consider arguments for reversing a decision of a district court when the argument is not raised in a party's opening brief."). But, in any event, there is no basis for disturbing the court's justiciability rulings on their merits.

We assume solely for the sake of argument, but with skepticism, that the ESA prohibits the issuance of an ROD and approval of a COP while reinitiated consultation over a biological opinion is ongoing, regardless of circumstances. *Compare Defenders of Wildlife v. BOEM*, 684 F.3d 1242, 1252 (11th Cir. 2012) (rejecting argument that the "BOEM's choice to reinitiate consultation . . . automatically

renders . . . former biological opinions invalid," particularly where the prior opinions were "reconfirmed" and "have not been withdrawn despite reinitiation of consultations"), *with Env'tl Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1076 (9th Cir. 2001) (stating in dicta and without elaboration that "[r]einitiation of consultation requires . . . the NMFS to issue a new Biological Opinion before the agency action may continue") (citation and internal quotation marks omitted)). Even so, this assumption does not undermine the court's justiciability rulings.

As explained above, the district court concluded, based on the summary judgment record, that the Alliance lacked standing to press its ESA claim because an event occurring after the alleged procedural error (the initial issuance of the ROD and approval of the COP without a valid biological opinion) broke the causal chain between that error and both the agencies' substantive action (approval of the COP) and the Alliance's alleged Article III injury (economic harm from the operation of the project). For the same reasons, the court concluded that the Alliance's ESA claim was moot because an event occurring after the alleged procedural error had rendered it immaterial.

The event on which both conclusions rest was the NMFS's issuance of the superseding October 18, 2021, biological opinion, whose merits the Alliance does not challenge. Once that superseding biological opinion issued, the district court reasoned, the Alliance could no longer claim that the alleged procedural error remained a legal cause of either the relevant substantive agency

actions (the final COP approval) or the Alliance's injury (economic harm caused by the COP approval). *Seafreeze Shoreside, Inc., et al. v. U.S. Dep't of the Interior, et al.*, Nos. 1:22-cv-11091-IT, 1:22-cv-11172-IT, 2023 U.S. Dist. LEXIS 183483, 2023 WL 6691015, at *28-29 (D. Mass. Oct. 12, 2023). Nor could the court provide a remedy that might affect the matter at issue because the Alliance alleged only an error that was no longer relevant to the agency action under review. *See* 2023 U.S. Dist. LEXIS 183483, [WL] at *27 n.19 (citing *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992) (describing the essential characteristic of a moot case) and *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1114 (10th Cir. 2010) (holding moot an ESA claim that did not challenge a superseding biological opinion)).

In its reply brief, the Alliance addresses the district court's analysis by stating that the issuance of the superseding October 18, 2021, biological opinion, and the January 20, 2022, confirmation of the prior COP approval, "cannot cure" the BOEM's earlier procedural error of issuing the ROD and approving the COP while the 2020 biological opinion was under reinitiated consultation. "Because the iron-clad rule of ESA is to look before you leap," the Alliance says, "the later-issued [October 18, 2021, biological opinion] is irrelevant to the BOEM's procedural duty to comply with the ESA in rendering its decision [to issue the ROD] on May 10, 2021."

This argument misses the point. The significance of the NMFS's issuance of the unchallenged superseding

October 18, 2021, biological opinion (and, we might add, the BOEM's January 20, 2022, confirmation of its prior approval of the COP given the conclusions in that unchallenged superseding opinion) does not lie in whether they "cured" any earlier-occurring procedural error. Rather, these later agency actions, taken as part of an ongoing and legally authorized consultation process, precluded any basis for finding that taint to the COP approval arising from its allegedly having been issued without a valid biological opinion was having any ongoing effect. And, if there was no basis in the summary judgment record for finding that the procedural violation complained of was having an ongoing effect, there was no basis in the record for either enjoining or unwinding the project, which is the specific relief the Alliance sought, or for concluding that the Alliance's injury was redressable in any way.

The district court thus did not err in awarding summary judgment to the defendants on the plaintiffs' APA/ESA claims.

B. The APA/NEPA and APA/MMPA Claims

We next consider the challenges to the district court's grant of summary judgment to the defendants on the plaintiffs' APA/NEPA claims and the Alliance's APA/MMPA claim. We consider these challenges together because the court dismissed both sets of claims for being outside the zones of interests of the environmental statutes that the plaintiffs invoked. With respect to the APA/NEPA claims, the court held that the plaintiffs did not put forth competent evidence as to an environmental harm that

would impact their commercial fishing. With respect to the APA/MMPA claim, the court held that the Alliance had not established a cognizable interest in right whales or any other marine mammal.

An APA claimant must establish that the claim arguably falls within the zone of interests to be protected or regulated by the underlying statute. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-30, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014). As the word "arguably" suggests, the zone-of-interests test "is not 'especially demanding.'" *Id.* at 130 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225, 132 S. Ct. 2199, 183 L. Ed. 2d 211 (2012)). Congress enacted the APA "to make agency action presumptively reviewable," and we do not require "any indication of congressional purpose to benefit the would-be plaintiff." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 567 U.S. at 225 (internal quotation marks omitted) (quoting *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 399, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1987)). Thus, the zone-of-interests test "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Lexmark*, 572 U.S. at 130 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 567 U.S. at 225 (internal quotation marks omitted)).

The zone-of-interests test was once treated as a justiciability doctrine implicating the court's subject-

matter jurisdiction. *See id.* at 128 n.4 (citations omitted). But in *Lexmark*, the Supreme Court clarified that the test is not jurisdictional but rather goes to whether the claimant has stated a viable claim. *See id.* (citations omitted). Therefore, we may affirm a zone-of-interests-based dismissal on other grounds supported by the record. *See Puerto Rico Fast Ferries*, 102 F.4th at 549. *But cf. Steel Co.*, 523 U.S. at 93-102 (prohibiting affirmance of the dismissal of a claim based on lack of subject-matter jurisdiction by rejecting the claim on its merits).[5]

Here, we agree with the district court's zone-of-interests ruling as to the Alliance's APA/MMPA claim. The Alliance argues that it may assert the aesthetic and recreational interests in marine mammals (including the right whale) of "Alliance member" David Aripotch. But this argument is based on a misstatement. Aripotch's company, Old Squaw, is a member of the Alliance, but Aripotch is not.[6] Moreover, and in any event, the protection of marine

5. The plaintiffs' APA/NEPA challenges come to us in an odd procedural posture. The Seafreeze plaintiffs challenge both the district court's zone-of-interests ruling and the lawfulness under the NEPA of the BOEM's actions. The Alliance, however, challenges only the court's zone-of-interests ruling. It does not address the merits of its APA/NEPA challenge in either its opening brief or its reply brief, even though the government calls the lapse to its attention, and even though the success of its zone-of-interests argument would lead naturally to our consideration of the merits given the fully developed administrative record and opportunity the Alliance had to develop its APA/NEPA claims in the summary judgment briefing. Thus, to the extent that the Alliance intends to press any APA/NEPA claims that differ from those of the Seafreeze plaintiffs, they are waived.

6. In their responsive briefs, the defendants called our attention to the fact that Aripotch is neither a member of the Alliance nor

mammals such as the right whale is not germane to the Alliance's purpose, which is to represent the interests of commercial fisheries and related organizations. *See Friends of the Earth*, 528 U.S. at 181. The court properly awarded the defendants summary judgment on the Alliance's APA/MMPA claim.

But we disagree with the district court's zone-of-interests ruling as to the plaintiffs' APA/NEPA claims. While the court was correct to reject as incompetent much of the plaintiffs' evidence of environmental injury, the ROD itself acknowledges that the discharge of fill material associated with the project will have major adverse impacts on mollusks, fish, and crustaceans in the project area. Moreover, the plaintiffs have plausibly linked these adverse impacts to the expected adverse economic effects of the project on their commercial fishing interests. This is enough to satisfy the zone-of-interests test. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 155-56, 130 S. Ct. 2743, 177 L. Ed. 2d 461 (2010) (recognizing that plaintiffs whose alleged injuries from agency deregulation had both environmental and economic components fell within the APA and the NEPA's zone of interest).

Despite this, we affirm the dismissal of these claims. On appeal, the Seafreeze plaintiffs develop three arguments that the BOEM violated the NEPA's procedural requirements. They explicitly premise all

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a party to either of these consolidated appeals. The Alliance did not correct the misstatement in its opening brief or reply; rather, it simply changed its characterization of Aripotch from being an "Alliance member" to being a "representative" of an Alliance member.

three arguments on an underlying assertion that the BOEM was improperly motivated to reach decisions so that Vineyard Wind could timely honor its prior contractual commitments surrounding the project. The first argument is that this improper motivation led the BOEM to limit its consideration of reasonable alternatives to the project. The second is that it led the BOEM to inappropriately revive the EIS process after Vineyard Wind's December 1, 2020, provisional withdrawal of its proposed COP from review to test the wind turbine generator it had decided to use. The third is that it led the BOEM to fail to appropriately consider the incremental impact of the project in combination with the likely impact of other future, reasonably foreseeable offshore wind development projects.

As an initial matter, the premise of the Seafreeze plaintiffs' arguments is misguided. By regulation, the BOEM was under an obligation to "briefly summariz[e] [in the FEIS] the purpose and need to which the agency is responding," 40 C.F.R. § 1502.13; to "[r]igorously explore and objectively evaluate all reasonable alternatives," *id.* § 1502.14(a); and, most importantly for present purposes, to consider "the needs and goals of the parties involved in the application or permit as well as the public interest," 43 C.F.R. § 46.420(a)(2).[7] Thus, where the agency is

7. The FEIS identified the BOEM's purpose and need as "whether to approve, approve with modifications, or disapprove the COP to construct, operate, and decommission an approximately 800 MW, commercial-scale wind energy facility within the area of [Vineyard Wind's] lease to meet New England's demand for renewable energy." Supp. App. at 972, Seafreeze Appeal. It also noted, inter alia, that the "BOEM's decision on Vineyard Wind's COP

not itself the project's sponsor, it may give substantial weight to an applicant's preferences, at least insofar as it considers alternatives. *See Beyond Nuclear*, 704 F.3d at 19. This principle derives from the fact that, under the NEPA, agencies must consider only "reasonable" alternatives, meaning alternatives "bounded by some notion of [technical and economic] feasibility," *id.* (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 551, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978)), and only alternatives that would "'bring about the ends of the proposed action,'" *id.* (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195, 290 U.S. App. D.C. 371 (D.C. Cir. (1991)).

Apart from the erroneous premise, the Seafreeze plaintiffs' APA/NEPA arguments fail to establish that the BOEM engaged in arbitrary or capricious decisionmaking. The Seafreeze plaintiffs challenge the BOEM's failure to consider alternatives that would have required construction outside the lease area. But the BOEM supportably concluded that these were effectively new proposed actions that were not responsive to the agency's regulatory obligation to address the Vineyard Wind proposal, which was of course limited to the Vineyard Wind lease area. The BOEM also supportably explained that it would consider proposals on other lease areas through separate regulatory processes.

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is needed to execute [the BOEM's] duty to approve, approve with modifications, or disapprove, the proposed Project in furtherance of the United States' policy to make [Outer Continental Shelf] energy resources available to expeditious and orderly development." *Id.* The plaintiffs do not challenge the lawfulness of this purpose and need statement.

The Seafreeze plaintiffs also challenge the BOEM's termination of the EIS process in response to Vineyard Wind's request to provisionally withdraw the proposed COP from review, and the agency's subsequent decision to permit Vineyard Wind to rescind its withdrawal without providing an additional notice and comment period. Vineyard Wind asserts that the Seafreeze plaintiffs lack Article III standing to make this claim.

We agree, for reasons that track those explaining our ruling that the plaintiffs lack standing to complain about the allegedly improper issuance of the ROD and approval of the COP while reinitiation of ESA consultation was underway. *See supra* Part III-A. Here too, even if we assume (again, with skepticism) that a second notice-and-comment period was required, the summary judgment record does not permit a conclusion that any taint from the alleged procedural error had a causal effect on the BOEM's ultimate approval of the COP. *See Lujan*, 504 U.S. at 561. The Seafreeze plaintiffs point to no comment that they, or anyone else, were precluded from submitting to the BOEM, and they suggest no other practical effect that flowed from the absence of a second notice-and-comment period. Any possibility of such an effect is, moreover, implausible, given that the COP was unchanged and already had been subject to extensive notice and comment. Thus, the alleged procedural error was not a likely cause of the Seafreeze plaintiffs' injury. *See Ctr. for Bio. Div.*, 861 F.3d at 184. Nor, therefore, could it justify enjoining or unwinding the project.[8]

8. In addition to complaining about the lack of an additional notice-and-comment period, the Seafreeze plaintiffs say that

Finally, the Seafreeze plaintiffs argue that the BOEM failed to appropriately consider the incremental impact of the project in combination with the likely impact of other future, reasonably foreseeable offshore wind development projects. They support this argument only with two conclusory allegations: (1) "the Federal Defendants gutted the core of the cumulative impacts analysis set forth in the Supplemental Draft EIS by removing much of it from the [FEIS], thereby violating NEPA's regulations"; and (2) "the Federal Defendants improperly segmented their NEPA analysis" by "undercounting reasonably foreseeable offshore wind development outside the lease area." The Seafreeze plaintiffs do not elaborate upon either of these allegations.[9] They therefore have not put the correctness

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resuming review of the Vineyard Wind COP was ultra vires because nothing in the NEPA or the OCSLA "provides the BOEM with authority to resume review of a terminated COP." But again, even if we assume that to be so, the Seafreeze plaintiffs have provided no basis in evidence or argument for concluding that this alleged procedural error likely tainted the injury-causing event: ultimate approval of the COP. There is no likelihood of a different outcome had the BOEM been required to formalistically reconduct its review process from the start rather than picking up where it left off. Moreover, without a basis for finding a likely causal effect, there would be no proper basis for enjoining or unwinding the project.

9. In their reply brief, in response to the defendants' arguments that the Seafreeze plaintiffs' briefing of the cumulative-impacts issue was inadequate, the Seafreeze plaintiffs point to a portion of the executive summary of the supplement to the EIS that, they say, did not make its way into the FEIS. They also seek to clarify that their position with respect to the BOEM's alleged improper segmenting of its cumulative effects analysis is that the BOEM improperly failed to treat certain aspirational goals that the Biden administration set for offshore wind development as "reasonably foreseeable future

of the district court's ruling into issue. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.") (citations omitted); *see also id.* ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work . . . .").

The district court did not err in awarding summary judgment to the defendants on the plaintiffs' APA/NEPA and APA/MMPA claims.

C. The APA/CWA Claims

We next consider the challenge to the district court's grant of summary judgment to the defendants on the Alliance's APA/CWA claims. Although the Alliance makes three arguments on appeal, only one was properly preserved: that the Corps' decision to issue a CWA Section 404 permit for the discharge of dredged or fill material arbitrarily and capriciously failed to properly account for the effect of the project on commercial fisheries, wildlife, and the marine environment.[10] The court did not explicitly address this argument in its summary judgment order.

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actions," within the meaning of 43 C.F.R. § 46.30, to be accounted for in the cumulative-impacts analysis. Arguments raised for the first time in a reply brief are ordinarily deemed waived, *see Lahens v. AT&T Mobility P.R., Inc.*, 28 F.4th 325, 328 n.1 (1st Cir. 2022), and we see no reason to depart from that principle here.

10. The Alliance also claims that certain misstatements regarding the scope of the project contained in the Corps' section of the ROD, later corrected as clerical errors in an August 4, 2021,

The Alliance argues that the Corps issued the permit under the mistaken belief that the impacts of the project on commercial fisheries, wildlife, and the marine environment would be minor. In support of this argument, the Alliance points to several statements in the FEIS which, if read in isolation, appear to project more-than-minor impacts from the project on commercial fisheries, commercial shipping, recreational vessel businesses, mollusks, fish, and crustaceans. But the Alliance's brief omits context that qualifies the statements in a manner that supports the Corps' conclusion.

For example, the Alliance cites to a page in the FEIS allegedly stating that the project will have "moderate

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ROD Supplement, reveal that the Corps did not understand the scope of the project it was permitting. This claim is not preserved. The district court held it waived because it was not pleaded in the Alliance's complaint, and the Alliance does not engage this ruling in its opening brief. *See Lahens*, 28 F.4th at 328 n.1. The Alliance also claims that, in issuing the permit, the Corps violated the CWA by failing to consider the cumulative impacts of Vineyard Wind and other surrounding offshore wind projects. But the Alliance did not raise this concern with the Corps during its public comment process. It therefore cannot now seek to establish that the Corps acted arbitrarily or capriciously on this basis. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764-65, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2004); *see also Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 553-55 (emphasizing that a party must have presented a position during the administrative process to later challenge an agency decision as arbitrary and capricious for failure to have taken the position adequately into account). In so ruling, we reject the Alliance's assertion, made in its reply brief without supporting record citation, that it preserved its litigation rights on this point through comments it submitted to the BOEM during the EIS's public comment period.

to major impacts on commercial fisheries." App. at 141, Alliance Appeal. But in fact, that statement refers to the impacts of activities "other than offshore wind." *Id.* at 141. Similarly, the Alliance cites to alleged admissions that "offshore wind structures and hard coverage for cables would have long-term impacts on commercial fishing operations and support businesses such as seafood processing," and that "the impacts would increase in intensity as more offshore structures are completed." *Id.* at 139. But the very same sentence concludes that "the fishing industry is anticipated to be able to adjust fishing practices over time in order to maintain the commercial fishing industry in the context of offshore wind structures." *Id.* And while the FEIS acknowledged that increased vehicle traffic from the construction of future offshore wind projects could result in congestion and delays that could decrease productivity for commercial shipping, fishing, and recreational vessel businesses, it also concluded that the project would have negligible to moderate impacts on navigation and vehicle traffic after required mitigation measures were implemented.

The Alliance also cites to pages in the Corps' section of the ROD noting anticipated adverse project impacts on the aquatic ecosystems. But those same pages note that some of these effects will be temporary, that required mitigation measures will reduce impacts, and that there may also be some environmental benefits from the project. Overall, after extensive analysis, the FEIS concluded that the project would have a moderate impact on fish and other aquatic organisms.

The record does not support a conclusion that the Corps acted arbitrarily or capriciously in issuing the CWA Section 404 permit because the Corps misunderstood the findings in the administrative record. The district court did not err in awarding summary judgment to the defendants on the Alliance's APA/CWA claim.

D. The APA/OCSLA Claims

Finally, we consider the challenges to the district court's grant of summary judgment to the defendants on the plaintiffs' APA/OCSLA claims. The plaintiffs' principal appellate argument is that the district court misunderstood OCSLA's core statutory provision governing the approval of offshore wind projects, 43 U.S.C. § 1337(p)(4), in holding that the BOEM had not acted arbitrarily or capriciously in approving the COP. Again, that provision imposes an obligation on the BOEM to "ensure that any activity [under the OCSLA] is carried out in a manner that provides for" twelve criteria including, insofar as is relevant, safety; protection of the environment; conservation of natural resources of the Outer Continental Shelf; prevention of interference with reasonable uses of the Outer Continental Shelf (as determined by the Interior Secretary); and consideration of any other use of the sea or seabed, including use for fishing and navigation. *Id.* The plaintiffs also argue that the court impermissibly discounted their evidence of safety concerns, environmental harms, and the devastating effect on commercial fishing that the project would cause.

The plaintiffs' principal argument is based upon mischaracterizations of the district court's reading of OCSLA § 1337(p)(4). The Alliance says that the court interpreted "the twelve mandatory requirements" as "discretionary considerations that [the BOEM] could consider and balance." The Seafreeze plaintiffs say that the court "decided to insert the word 'reasonably' into the statutory text to allow [the BOEM] to ostensibly 'balance' [its] mandatory duties under Section 1337(p)(4) against other considerations." The Alliance also says that the court read the statutory phrase "shall ensure" to "'reflect[] Congress's intent to confer flexibility . . . .'" And it further states that "the district court erroneously held" that Congress gave the BOEM "the discretion to ignore [the twelve OCSLA criteria] or to balance one off another. . . ."

The district court did not (1) treat the twelve OCSLA criteria as discretionary considerations that the BOEM "could consider," (2) read the word "reasonably" into the OCSLA, (3) say anything close to what the Alliance purports to quote it as saying, or (4) hold that the BOEM has the discretion to ignore or balance criteria. In fact, the court explicitly acknowledged that the OCSLA criteria are "mandatory," *Seafreeze Shoreside, Inc., et al.* 2023 U.S. Dist. LEXIS 183483, 2023 WL 6691015, at *44, and proceeded from the premise that the BOEM must ensure that "each criterion is met" in a manner that is "not to the detriment of the other criteria." *Id.*

The district court held only that the BOEM must have "discretion" in considering whether each statutory

criterion is satisfied, and that the BOEM must "balance" the statutory mandate to develop energy projects on the Outer Continental Shelf with the twelve statutory criteria for which it must provide. The plaintiffs do not contest either of these points; in fact, they appear to concede them. *See* Reply Br. for Alliance at 3 ("[Defendants] incorrectly argue that the Alliance takes an absolutist position, arguing that [the BOEM] lacks any discretion at all in how to satisfy OCSLA's requirements. But this is not true."). In any event, the plaintiffs have not provided us with any basis for concluding that the district court's award of summary judgment to the defendants was infected by a misreading of OCSLA § 1337(p)(4).

Nor have the plaintiffs provided any other reason to find that the BOEM acted arbitrarily or capriciously under the OCSLA in approving the project. In focusing exclusively on the district court's alleged errors, the plaintiffs ignore the joint ROD and a May 10, 2021, information memorandum in which James F. Bennett, the Program Manager for the BOEM's Office of Renewable Energy Programs, explains the conditions that the BOEM imposed on the project and why approval of the project, with those conditions, satisfies the OCSLA § 1337(p)(4) criteria. Instead, the plaintiffs simply point to portions of the record which, when read in isolation, appear to raise safety and environmental concerns.[11]

11. The plaintiffs also argue that the project likely will cause commercial fisheries to abandon the project area due to difficulties with navigation, in violation of OCSLA § 1337(p)(4). The plaintiffs support the argument by pointing to a statement to this effect that the Corps initially included in its section of the ROD but later

The plaintiffs' position appears to be that, if a project is likely to have any modicum of impact on one or more of the twelve OCSLA criteria, the BOEM cannot approve it. *See, e.g.,* Corrected Opening Br. for Seafreeze Pls. at 44 (challenging the district court's conclusion that the BOEM "still retains some discretion in considering whether the enumerated statutory criteria have been satisfied, even when the statute does not state so explicitly") (citations omitted). *But see* Reply Br. for Alliance at 3 ("[Defendants] incorrectly argue that the Alliance takes an absolutist position, arguing that [the BOEM] lacks any discretion at all in how to satisfy the OCSLA's requirements. But this is not true.").

This absolutist argument fails. A statute encouraging the development of offshore wind projects but obligating the BOEM to ensure that such projects be carried out in a manner that provides for safety, for example, cannot be read to prohibit project approval simply because one could imagine the project being involved in an accident.

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removed with a clarifying statement, issued in the form of an ROD supplement, that inclusion of the statement "was based solely upon comments of interested parties submitted to BOEM during the public comment period" and "was not based upon any separate or independent [Corps'] or other agency evaluation or study, and accordingly does not represent the position of the [Corps] . . . ." The plaintiffs contest the veracity of the Corps' representation in the ROD supplement, but the ROD, taken as a whole, bears out the Corps' statement. *See* Supp. App. at 2016, Seafreeze Appeal (noting that the proposed discharge of fill "will likely have minor, long-term effects on recreational and commercial fisheries"); *id.* at 2023 (noting that the project "will have neutral impacts to navigation during construction and operation with the incorporation of mitigation").

If that is the plaintiffs' position, we reject it. Moreover, as was the case with their APA/CWA arguments, *see supra* Part III-D, the plaintiffs' record citations in support of the claim that the BOEM did not ensure that the COP would be carried out in a manner that provides for the statutory criteria omit necessary context. They fail to acknowledge either the mitigation requirements that the BOEM imposed in response to the safety and environmental concerns raised, or that the concerns were raised in connection with alternatives that the BOEM had rejected.

The district court did not err in awarding summary judgment to the defendants on the plaintiffs' APA/OCSLA claims.

IV.

Before and after oral argument, we have received Fed. R. App. P. 28(j) letters alerting us to recent developments that have caused federal regulators to pause the project. These incidents, occurring after the challenged agency decisions, are not relevant to the arguments made in these appeals. *See Town of Winthrop*, 535 F.3d at 14 ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.") (quoting *Camp v. Pitts*, 411 U.S. 138, 142, 93 S. Ct. 1241, 36 L. Ed. 2d 106 (1973)).

For the reasons explained, we ***affirm*** the judgments of the district court.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, ENTERED DECEMBER 5, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 23-1853
No. 23-2051

SEAFREEZE SHORESIDE, INC.; LONG ISLAND COMMERCIAL FISHING ASSOC., INC.; XIII NORTHEAST FISHERY SECTOR, INC.; HERITAGE FISHERIES, INC.; NAT. W., INC.; OLD SQUAW FISHERIES, INC.,

Plaintiffs, Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; HONORABLE DEBRA HAALAND, in her official capacity as Secretary of the Department of the Interior; BUREAU OF OCEAN ENERGY MANAGEMENT; LIZ KLEIN, in her official capacity as the Director of the Bureau of Ocean Energy Management; LAURA DANIEL-DAVID, in her official capacity as Principal Deputy Assistant Secretary, Land and Minerals Management; UNITED STATES DEPARTMENT OF COMMERCE; HONORABLE GINA M. RAIMONDO, in her official capacity as the Secretary of the Department of Commerce; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, NATIONAL MARINE FISHERIES SERVICE; CATHERINE MARZIN, in her official capacity as the Deputy Director of the

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National Oceanic and Atmospheric Administration; UNITED STATES DEPARTMENT OF DEFENSE; HONORABLE LLOYD J. AUSTIN, III, in his official capacity as the Secretary of the Department of Defense; UNITED STATES ARMY CORPS OF ENGINEERS; LT. GEN. SCOTT A. SPELLMON, in his official capacity as the Commander and Chief of Engineers of the U.S. Army Corps of Engineers; COLONEL JOHN A. ATILANO, II, in his official capacity as the District Engineer of the New England District of the U.S. Army Corps of Engineers; VINEYARD WIND 1, LLC,

Defendants, Appellees,

RESPONSIBLE OFFSHORE DEVELOPMENT ALLIANCE, a D.C. nonprofit corporation,

Plaintiff, Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; DEBRA HAALAND, in her official capacity as the Secretary of the Interior; BUREAU OF OCEAN ENERGY MANAGEMENT; LIZ KLEIN, in her official capacity as the Director of the Bureau of Ocean Energy Management; NATIONAL MARINE FISHERIES SERVICE; RICHARD W. SPINRAD, in his official capacity as the Administrator of the National Oceanic and Atmospheric Administration; UNITED STATES DEPARTMENT OF THE ARMY; CHRISTINE WORMUTH, in her official capacity as Secretary of the Army; UNITED STATES ARMY

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CORPS OF ENGINEERS; JAMIE A. PINKHAM, in his official capacity as the Acting Assistant Secretary of the Army for Civil Works; VINEYARD WIND 1, LLC,

Defendants, Appellees.

Entered: December 5, 2024

JUDGMENT

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgments of the district court are affirmed.

By the Court:

Anastasia Dubrovsky, Clerk

cc: Roger J. Marzulla, Ira H. Zaleznik, Nancie G. Marzulla, Perry M. Rosen, Donald Campbell Lockhart, Thekla Hansen-Young, Lea J. Tyhach, Kevin W. McArdle, Peter R. Steenland, Jack Woodruff Pirozzolo, Kathleen Moriarty Mueller, James Wedeking, Peter Whitfield, Brooklyn Hildebrandt, Theodore Hadzi-Antich, Chance Weldon, Connor William Mighell, Robert Henneke, Pedro Melendez-Arreaga

APPENDIX C — MEMORANDUM & ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS, FILED OCTOBER 12, 2023

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case No. 1:22-cv-11091-IT; Case No. 1:22-cv-11172-IT

SEAFREEZE SHORESIDE, INC., *et al.*,

Plaintiffs,

v.

THE UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Defendants,

and

VINEYARD WIND 1, LLC,

Intervenor-Defendant.

RESPONSIBLE OFFSHORE DEVELOPMENT ALLIANCE,

Plaintiff,

v.

Appendix C

UNITED STATES DEPARTMENT
OF THE INTERIOR, *et al.*,

Defendants,

and

VINEYARD WIND 1, LLC,

Intervenor-Defendant.

Filed October 12, 2023

MEMORANDUM & ORDER

TALWANI, D.J.

Plaintiffs Seafreeze Shoreside, Inc. ("Seafreeze Shoreside"), Long Island Commercial Fishing Association, Inc. ("LICFA"), XIII Northeast Fishery Sector, Inc. ("Sector XIII"), Heritage Fisheries, Inc. ("Heritage Fisheries"), Nat. W., Inc. ("Nat. W.") and Old Squaw Fisheries, Inc. ("Old Squaw") (collectively, the "Seafreeze Plaintiffs") and Plaintiff Responsible Offshore Development Alliance ("Alliance") brought the above-captioned lawsuits challenging actions taken by several federal agencies and associated officials in the approval of an offshore-wind energy project to be constructed and operated by Intervenor-Defendant Vineyard Wind 1 LLC ("Vineyard Wind") in the Outer Continental Shelf off the coast of Martha's Vineyard and Nantucket, Massachusetts (the "Vineyard Wind Project" or the "Project").[1]

1. *Seafreeze Shoreside, Inc., et al. v. The United States Dept. of the Interior, et al.*, 1:22-cv-11091, and *Responsible Offshore*

Appendix C

Before the court in a consolidated proceeding are cross-motions for summary judgment in *Seafreeze*, 1:22-cv-11091, *see* Plaintiffs' *Motion for Summary Judgment*, Doc. No. 66, Defendants' *Motion for Summary Judgment*, Doc. No. 72, Vineyard Wind's *Motion for Summary Judgment*, Doc. No. 86; and in *Responsible*, 1:22-cv-11172, *see* Plaintiff's *Motion for Summary Judgment*, Doc. No. 52, Defendants' *Motion for Summary Judgment*, Doc. No. 59, Vineyard Wind's *Motion for Summary Judgment*, Doc. No. 73. For the reasons that follow, Plaintiffs' Motions for Summary Judgment are DENIED and Defendants' and Vineyard Wind's Motions for Summary Judgment are GRANTED.

I. Background

A. Procedural Background

The Procedural Background is set forth in detail in the court's *Memorandum and Order*, 1:22-cv-11091, Doc. No. 137; 1:22-cv-11172, Doc. No. 104, denying Plaintiffs' *Motions to Strike Documents from and Supplement the Administrative Record*, 1:22-cv-11091, Doc. No. 56; 1:22-cv-11172, Doc. No. 43, and is incorporated by reference herein.

Development Alliance v. United States Dept. of the Interior, et al., 1:22-cv-11172, are referred to herein by their respective case numbers.

Two other challenges to the Project were filed in this District and are now on appeal. *See Melone v. Coit, et al.*, 1:21-cv-11171-IT, *appeal docketed*, No. 23-1736 (1st Cir. Sept. 8, 2023); *Nantucket Residents Against Turbines et al. v. U.S. Bureau of Ocean Energy Mgmt.*, 1:21-cv-11390-IT, *appeal docketed*, 2023 U.S. Dist. LEXIS 86176, (together "the Related Actions").

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B. Background Concerning the Project

The Background Concerning the Project is also set forth in detail in the court's *Memorandum and Order*, 1:22-cv-11091, Doc. No. 137; 1:22-cv-11172, Doc. No. 104, and is incorporated by reference herein. The Background Concerning the Project is derived from the Administrative Record common to the pending challenges and the Related Actions.[2]

The following further background concerning the Project is also drawn from the Administrative Record, is specific to the pending challenges, and was not at issue in the Related Actions.

In considering Vineyard Wind's application for a permit under Section 404 of the Clean Water Act ("Section 404 Permit") pertaining to the discharge of dredged and fill materials that would occur along a 23.3 mile long corridor as part of Vineyard Wind's installation of the wind energy facility, electronic service platforms, connections between the wind turbine generators, service platforms, and export cables, the Army Corps of Engineers ("Corps") considered the practicability of the following

2. Certified Indices of the Administrative Record and addenda were docketed electronically, *see* 1:22-cv-11091, Federal Defendants' Notices, Doc. Nos. 26, 30, 34, 36; 1:22-cv-11172, Federal Defendants' Notices, Doc. Nos. 17, 23; portions of the Administrative Record reflected in the parties briefing are docketed electronically as part of the parties' *Joint Appendices* filed in connection with the cross-motions for summary judgment, 1:22-cv-11091, Doc. Nos. 104, 105; 1:22-cv-11172, Doc. Nos. 97, 98.

alternatives to the proposed Vineyard Wind Project: (a) one no-action alternative; (b) a largely land-based alternative; (c) alternatives that would bring the cable on shore in a different location; (d) two off-site alternatives in other zones of the ocean; and (e) seven different on-site alternatives identified by Bureau of Ocean Energy Management ("BOEM") in the Environmental Impact Statement ("Final EIS"). Joint Record of Decision ("Joint ROD"), BOEM_0076799 at -6830-31.

The Corps stated that in order to consider an alternative "practicable," the alternative "must be available, achieve the overall project purpose (as defined by USACE) and be feasible when considering cost, logistics, and existing technology." *Id.*

In issuing the Section 404 Permit to Vineyard Wind, the Corps imposed certain "Special Conditions" on Vineyard Wind as the permittee, including compliance with all "mandatory terms and conditions to implement the reasonable and prudent measures that are associated with 'incidental take' that is also specified in the [Biological Opinion ('BiOp')]." The Permit further specified that the Permit is conditional on Vineyard Wind's "compliance with all of the mandatory terms and conditions associated with incidental take of the attached [BiOp], and any future [BiOp] that replaces it, which terms and conditions are incorporated by reference into this [P]ermit." Dep't of Army Permit, USACE_AR_012635 at -36.

C. Plaintiffs' Pending Claims

In reviewing the pending motions, the court considers the following claims asserted by Plaintiffs.

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1. Claims under the Administrative Procedure Act ("APA") for Violations of the Endangered Species Act

Plaintiffs allege that Defendant National Marine Fisheries Service ("NMFS") violated Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536, and attendant regulations by failing during the 2020 biological consultation process (i) to consider the cumulative effects of the proposed Project to endangered species or their habitat (1:22-cv-11091, 9th Claim for Relief), or (ii) to inform BOEM of alternatives to the proposed Project that would avoid harming endangered species (1:22-cv-11091, 10th Claim for Relief), and that Defendants violated the ESA and its implementing regulations by approving the Vineyard Wind Construction Operations Plan ("COP") and issuing the Section 404 Permit without a valid BiOp (1:22-cv-11172, Count 3).[3]

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3. The Seafreeze Plaintiffs' ESA claims set forth in their 6th, 7th, 8th, 11th, 12th, 13th, 14th, 15th, and 16th Claims for Relief, 1:22-cv-11091, *Complaint*, Doc. No. 1, and portions of the Alliance's Count 3 asserting Defendants violated the ESA by (i) approving minimal mitigation measures to protect the safety of endangered species, and (ii) failing to rely on the best scientific and commercial data available, 1:22-cv-11172, *Complaint*, Doc. No. 1, are waived where neither the Seafreeze Plaintiffs nor the Alliance briefed these claims. And although Seafreeze Shoreside and the Alliance submitted 60-day notice of intent to sue letters as required under the ESA to commence a citizen-suit, 16 U.S.C. § 1540(g)(2)(A)(i), those letters did not assert any violations pertaining to the 2021 BiOp. Accordingly, Plaintiffs' ESA challenges to the BiOp are limited to the 2020 BiOp.

2. Claims under the APA for Violations of the Clean Water Act

Next, Plaintiffs allege that the Corps violated the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.*, and attendant regulations in issuing the Section 404 Permit pertaining to the dredge and fill activities associated with the Project by (i) failing to review practicable alternatives to the Project outside of the Lease Area[4] (1:22-cv-11091, 17th Claim for Relief; 1:22-cv-11172, Counts 2.2, 2.3), and (ii) failing to consider the cumulative effects of multiple similar projects in issuing the Section 404 Permit (1:22-cv-11172, Count 2.4).[5]

3. Claims under the APA for Violations of the Marine Mammal Protection Act

Next, Plaintiffs allege that NMFS violated the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1371, and attendant regulations in issuing the Incidental Harassment Authorization ("IHA") (i) by failing to provide evidence that the Project will only affect "small numbers," have a "negligible impact" on marine mammal species, or

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4. The Lease Area covers the 166,886 acres of the Outer Continental Shelf leased by BOEM to Vineyard Wind on April 1, 2015. *See* 1:22-cv-11172, Mem. & Order 5, Doc. No. 104.

5. The Seafreeze Plaintiffs' CWA claims set forth in their 18th, 19th, and 20th Claims for Relief, 1:22-cv-11091, *Complaint*, Doc. No. 1, and the Alliance's CWA claims set forth in Counts 2.1, 2.5, and 2.6, 1:22-cv-11172, *Complaint*, Doc. No. 1, are also waived where neither the Seafreeze Plaintiffs nor the Alliance briefed these claims.

be completed within one year of issuance of the IHA (1:22-cv-11091, 22nd Claim for Relief), and (ii) by improperly relying on defects in the Corps' CWA review, rendering the issuance of the IHA arbitrary and capricious (1:22-cv-11172, Count 5).[6]

4. Claims under the APA for Violations of the National Environmental Protection Act

Next, Plaintiffs allege that Defendants violated various provisions of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, and attendant regulations throughout the Project review process by:

(i) defining the purpose of the Action in connection with the Vineyard Wind COP too narrowly (1:22-cv-11091, 23rd Claim for Relief; 1:22-cv-11172, Count 4.4);

(ii) failing to properly consider a range of alternatives to the COP (1:22-cv-11091, 24th Claim for Relief; 1:22-cv-11172, Count 4.1);

(iii) failing to comply with requirements for analyzing cumulative impacts of the Project (1:22-cv-11091, 25th Claim for Relief; 1:22-cv-11172, Count 4.2);

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6. The Seafreeze Plaintiffs' MMPA claim set forth in their 21st Claim for Relief, 1:22-cv-11091, *Complaint*, Doc. No. 1, is also waived where neither the Seafreeze Plaintiffs nor the Alliance briefed this claim.

(iv) failing to take reasonable steps considering the lack of information relevant to reasonably foreseeable significant adverse impacts (1:22-cv-11091, 26th Claim for Relief);

(v) limiting the scope of the Final EIS to the Vineyard Wind Project Area (1:22-cv-11091, 27th Claim for Relief);

(vi) failing to make diligent efforts to involve the public in the NEPA process (1:22-cv-11091, 28th Claim for Relief);

(vii) inadequately addressing and disclosing comments submitted by the public (1:22-cv-11091, 29th, 30th Claims for Relief; 1:22-cv-11172, Count 4.5);

(viii) failing to prepare an EIS prior to issuing the Lease (1:22-cv-11091, 31st Claim for Relief; 1:22-cv-11172, Count 4.6);

(ix) improperly segmenting the NEPA analysis (1:22-cv-11091, 32nd Claim for Relief; 1:22-cv-11172, Count 4.6);

(x) relying on outdated NEPA regulations (1:22-cv-11091, 33rd Claim for Relief; 1:22-cv-11172, Count 4.7);

(xi) withdrawing the EIS and reinitiating it without supplementing to account for design changes (1:22-cv-11172, Count 4.3);

(xii) failing to consider the impacts of climate change (1:22-cv-11172, Count 4.8).

5. Claims under the APA for Violations of the Outer Continental Shelf Lands Act

Finally, Plaintiffs have asserted that Defendants have violated the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1337, in connection with the issuance of the Vineyard Wind Lease and review of the Vineyard Wind COP by (i) adopting and applying the "Smart from the Start" Initiative to the leasing process in violation of 43 U.S.C. § 1337(p)(4)'s requirement that BOEM consider a set list of criteria (1:22-cv-11091, 1st, 2nd, and 3rd Claims for Relief); (ii) resuming review of the COP after Vineyard Wind withdrew and resubmitted it in January 2021 (1:22-cv-11091, 4th Claim for Relief); and (iii) adopting and approving the COP without considering and providing for the factors set forth in 43 U.S.C. § 1337(p)(4) (1:22-cv-11091, 5th Claim for Relief; 1:22-cv-11172, Counts 1.1, 1.2, 1.7).[7]

II. Standard of Review

Under Federal Rules of Civil Procedure 56(a), summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material

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7. The Alliance's OCSLA claims set forth in Counts 1.3, 1.4, 1.5, 1.6, 1.8, 1:22-cv-11172, *Complaint*, Doc. No. 1, are also waived where neither the Seafreeze Plaintiffs nor the Alliance briefed these claims.

The Alliance has conceded its claim under the Jones Act. 1:22-cv-11172, Hearing Tr. 7:4-10, Doc. No. 101.

fact and the movant is entitled to judgment as a matter of law." A fact is material when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Baker v. St. Paul Travelers, Inc.*, 670 F.3d 119, 125 (1st Cir. 2012). A dispute is genuine if a reasonable jury could return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248.

The moving party bears the initial burden of establishing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once the moving party establishes the absence of a genuine dispute of material fact, the burden shifts to the non-moving party to set forth facts demonstrating that a genuine dispute of material fact remains. *Anderson*, 477 U.S. at 250.

The non-moving party cannot oppose a properly supported summary judgment motion by "rest[ing] upon the mere allegations or denials of [the] pleading[s]." *Id.* at 248. Disputes over facts "that are irrelevant or unnecessary" will not preclude summary judgment. *Id.* When reviewing a motion for summary judgment, the court must take all properly supported evidence in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor. *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment." *Anderson*, 477 U.S. at 255.

The fact that the parties have filed cross motions does not alter these general standards; rather the court reviews each party's motion independently, viewing the facts and drawing inferences as required by the applicable standard, and determines, for each side, the appropriate ruling. *See Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 230 (1st Cir. 1996) (noting that cross-motions for summary judgment do not "alter the basic Rule 56 standard" but rather require the court "to determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed").

A summary judgment motion has a "special twist in the administrative law context." *Boston Redevelopment Auth. v. Nat. Park Serv.*, 838 F.3d 42, 47 (1st Cir. 2016) (quotations omitted). In an APA action, a motion for summary judgment serves as "a vehicle to tee up a case for judicial review and, thus, an inquiring court must review an agency action not to determine whether a dispute of fact remains but, rather, to determine whether the agency action was arbitrary and capricious." *Id.* (citing cases); *see also* 5 U.S.C. § 706(2)(A) ("The reviewing court shall...hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]").

Because the APA affords great deference to agency decision-making and agency actions are presumed valid, "judicial review [under the APA], even at the summary judgment stage, is narrow." *Assoc'd Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 109 (1st Cir. 1997) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401

U.S. 402, 415-16, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971)). Courts should "uphold an agency determination if it is 'supported by any rational view of the record.'" *Marasco & Nesselbush, LLP v. Collins*, 6 F.4th 150, 172 (1st Cir. 2021) (quoting *Atieh v. Riordan*, 797 F.3d 135, 138 (1st Cir. 2015)). Even where an inquiring court disagrees with the agency's conclusions, the court cannot "'substitute its judgment for that of the agency.'" *Boston Redevelopment Auth.*, 838 F.3d at 47 (quoting *Assoc'd Fisheries*, 127 F.3d at 109). Rather, an agency's action should only be vacated where the agency "has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007) (quotations omitted).

III. Standing

Defendants challenge Plaintiffs' standing to bring claims under NEPA while Vineyard Wind challenges Plaintiffs' standing to bring claims under NEPA, ESA, and MMPA.[8] The court considers first the evidence in the record relating to Plaintiffs' standing, and then whether Plaintiffs have standing to bring their claims under each

8. Vineyard Wind also challenged the Seafreeze Plaintiffs' standing to bring a claim under the CWA but withdrew that argument at the summary judgment hearing. 1.22-cv-11091, Hearing Tr. 13:5-16, Doc. No. 112.

of the challenged statutes, addressing constitutional issues first and then statutory issues.

A. Evidence Relating to Plaintiffs' Standing[9]

1. Old Squaw, Heritage Fisheries, and Nat. W.

Seafreeze Plaintiffs Old Squaw, Heritage Fisheries, and Nat. W. (the "Commercial Fishing Entities") are

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9. Vineyard Wind opposes numerous statements in Plaintiffs' *Statement of Undisputed Material Facts*, 1:22-cv-11091, Doc. No. 66. *See* Vineyard Wind Resp. to Seafreeze Pls.' Statement of Undisp. Material Facts, Doc. No. 88. First, Vineyard Wind opposes many statements supported only by affidavits. *See* 1:22-cv-11091, Intervenor's Opening Mem. 28-31, Doc. No. 87 (disputing the admissibility of statements such as those concerning Seafreeze Shoreside's interests, goals, and purported injuries). Where Fed. R. Civ. P. 56(c)(4) permits affidavits or declarations "made on personal knowledge [that] set out facts that would be admissible in evidence, and [that] show that the affiant or declarant is competent to testify on the matters stated," the court considers the evidentiary weight of these submissions under this standard for purposes of standing, as discussed *infra*. Second, Vineyard Wind objects to Plaintiffs' numerous citations outside of the Administrative Record where Plaintiffs have not offered those materials through a motion to supplement the Record. *Id.* at 31-33. Here, the court does not consider statements relying on materials outside of the Administrative Record where Plaintiffs have not addressed these in any motion to supplement the Record or otherwise offered a basis for the court to consider extra-record material. Finally, Vineyard Wind asserts numerous statements of fact should be struck where Plaintiffs mischaracterize the Administrative Record. The court looks directly to the Administrative Record, as discussed in its *Memorandum and Order*, 1:22-cv-11172, Doc. No. 137, rather than the parties' characterizations of the Administrative Record.

each commercial fishing companies that engage in trawl fishing[10] for squid.

a. Evidence Offered as to Economic Injury

Declarant David Aripotch, the owner and president of Old Squaw and captain of its boat, the F/V Caitlin & Mairead, states that the F/V Caitlin & Mairead trawl fishes in the Atlantic Ocean off the coast of Massachusetts to the coast of North Carolina. 1:22-cv-11091, Aripotch Decl. ¶¶ 2, 5, 11, Doc. No. 66-1. Aripotch states that the F/V Caitlin & Mairead typically takes 25-40 trips per year to the Lease Area for squid. *Id.* at ¶¶ 8-9. Aripotch states further that, in a typical year, Old Squaw generates $175,000-$350,000 in annual revenues from fishing expeditions for squid in the Lease Area and that this accounts for roughly 30% of Old Squaw's revenue in a given year. *Id.* at ¶ 12. Aripotch states that Old Squaw will lose this revenue if construction and operation of the Project go forward as contemplated by the COP. *Id.* at ¶ 19.

Aripotch states that the spacing of the Vineyard Wind turbines "will not allow for safe transit lanes in the Vineyard Wind area for the F/V Caitlin & Mairead" because one nautical mile of distance "is not enough room to risk getting through[.]" *Id.* at ¶ 14. Aripotch also states

10. Trawl fishing involves pulling a net towed by steel wires and spread open by steel doors to harvest squid and other fish at the ocean bottom. 1:22-cv-11091, Decl. of David Aripotch ("Aripotch Decl.") ¶ 10, Doc. No. 66-1; 1:22-cv-11091, Decl. of Thomas E. Williams, Sr. ("Williams Sr. Decl.") ¶ 15, Doc. No. 66-2.

that the wind turbines, when operational, will interfere with marine radar. *Id.* at ¶ 15. Aripotch contends that commercial fishing will become untenable for his boat in the Lease Area because trawl fishing gear will become entangled. *Id.*[11] Finally, Aripotch states that the F/V Caitlin & Mairead will be unable to fish in the Wind Energy Area during the Project's construction because of the safety risks associated with certain construction activities, such as the installation of cables or installation of armoring with boulders, and that those safety risks will remain after the construction is complete and the Project is operational. *Id.* at ¶¶ 16-17.

Aripotch states that the risks posed to the F/V Caitlin & Mairead will also disrupt and displace squid in the Area and impact the marine ecosystem in ways that will further impact Old Squaw's ability to fish in the Lease Area. *Id.* at ¶ 20.[12] Aripotch states that, because of the Lease issuance and COP approval, Old Squaw will no longer be able to fish for squid in the Lease Area and will lose approximately 30% of its revenue as a result. *Id.* at ¶ 19.

Declarant Thomas E. Williams, Sr., the owner and President of Heritage Fisheries and Nat. W., states that,

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11. Aripotch relies on the Final EIS Vol. 1, BOEM_0068434 at -717, -18, -22, --224, -225, which states that entanglement is a possibility that could impact fishing businesses.

12. Additionally, Aripotch states that it is his understanding that the Vineyard Wind Project will result in environmental and ecological harms to numerous marine species. *Id.* at ¶¶ 29-30. Aripotch's declaration does not show, however, that he is competent to testify to this assertion.

in a typical year, Heritage Fisheries, which owns and operates the F/V Heritage, generates $290,000 in annual revenues from trawl fishing for squid in the Lease Area, accounting for approximately 30% of Heritage Fisheries total annual revenues in any given year. 1:22-cv-11091, Williams Sr. Decl. ¶¶ 2, 4-5, 17, Doc. No. 66-2. Williams states further that Nat. W., which owns and operates the F/V Tradition, generates roughly $490,000 in annual revenues from trawl fishing for squid in the Lease Area, accounting for approximately 65% of Nat. W.'s total annual revenues in any given year. *Id.* at ¶¶ 5, 18. Like Aripotch, Williams states that his companies will be unable to engage in trawl fishing in the Lease Area because (i) the spacing of the turbines will not allow for safe passage, (ii) the turbines will interfere with vessel radar, making passage more dangerous for his companies' boats, and (iii) protections around cables and foundations will cause gear to become tangled. *Id.* at ¶¶ 20, 23. Williams states that the Vineyard Wind Project will cause both Heritage Fisheries and Nat. W. to lose out on the annual revenues attributable to fishing in the Lease Area. *Id.* at ¶ 22.[13]

Vineyard Wind disputes Plaintiffs' representations regarding the frequency and duration of fishing trips

13. Williams also contends that the construction activities and operation of the turbines will affect the water quality in the Lease Area and beyond, which will displace not only squid, but other marine life, affecting the entire ecosystem and further impacting Heritage Fisheries and Nat. W.'s abilities to fish in the Lease Area. *Id.* at ¶ 24. Williams states this "impact" constitutes pollution of the waters and degradation of all living things in the waters. *Id.* Williams' declaration does not show, however, that he is competent to testify to these assertions.

by Plaintiffs Old Squaw, Heritage Fisheries, and Nat. W. *See* 1:22-cv-11091, Intervenor's Opening Mem. 3 n.1, Doc. No. 87. Vineyard Wind offers the expert opinion of R. Douglass Scott, PhD., P. Eng., a Principal with W.F. Baird & Associates Ltd., reflecting, based on Automatic Identification System ("AIS") tracking data, that the total time between January 2016 and 2022 spent in the Lease Area by Old Squaw's vessel (the F/V Caitlin & Mairead) was 21.2 hours, by Heritage Fisheries' vessel (the F/V Heritage) was 0.4 hours, and by Nat. W.'s vessel (the F/V Tradition) was 6.2 hours, for a total time of 27.7 hours over six years. *See* 1:22-cv-11091, Vineyard Wind Resp. to Seafreeze Pls.' Statement of Undisp. Material Facts ¶¶ 100-102, Doc. No. 88; 1:22-cv-11091, Decl. of R. Douglas Scott in Supp. of Intervenor's Cross-Mot. for Summ. J. and in Opp'n to Pls. Mot. for Summ. J., Doc. No. 86-1.[14]

Defendants also dispute that the Project will result in the cessation of commercial fishing in the Lease Area. 1:22-cv-11091 Fed. Defs.' Resp. to Seafreeze Pls.' Statement of Undisp. Material Facts ¶¶ 9-11, Doc. No. 76 (citing BOEM Info. Mem. dated May 21, 2021, BOEM_0076922 at -942-44 (reflecting that "the navigational risk assessment prepared for the Project shows that it is technically feasible to navigate and maneuver fishing vessels and

14. Plaintiffs dispute that AIS data is an accurate reflection of their fishing activities in the Lease Area where none of the Plaintiffs' vessels are required to carry or use AIS, and, instead, voluntarily use AIS, but typically not when fishing. *See* 1:22-cv-11091, Third Decl. of David Aripotch ¶¶ 4-6, Doc. No. 90-3; 1:22-cv-11091, Second Decl. of Thomas E. Williams, Sr. ¶¶ 8-9, Doc. No. 90-4.

mobile gear through the WDA.") and Final EIS, Vol. 1 BOEM_0068434 at -68718 (discussing impacts in the WDA that may impact fishing activities) and BOEM_0068743-44 (acknowledging concerns from commercial fishing interests about the ability to safely navigate the WDA but noting, "fishing vessels, including those involved in line, trawl, and drag fishing, would be able to work in the area; however vessel operators would need to take the [wind turbine generators] and [electrical service platforms] into account as they set their courses[.]"). Vineyard Wind states that the Lease Area was selected to minimize conflicts with commercial fishing and because it does not have high relative revenue as compared to nearby waters. *See* 1:22-cv-11091, Vineyard Wind Resp. to Seafreeze Pls.' Statement of Undisp. Material Facts ¶¶ 9-11, Doc. No. 88 (citing Final EIS, Vol. 1 for proposition that, during the leasing process, and in response to public comments, BOEM identified "high value fishing areas . . . and removed [them] prior to leasing." Final EIS Vol. 1, BOEM_0068434 at -725).

In sum, there is a dispute of material facts as to the extent of any economic harm that the Commercial Fishing Entities may suffer. For purposes of Defendants' and Intervenor's Motions for Summary Judgment, however, and considering the evidence in the light most favorable to the Commercial Fishing Entities, the court finds that the Commercial Fishing Entities have demonstrated that they trawl fish in the Lease Area and may lose an unquantified sum of the revenue attributable to their trawl-fishing activities in the Lease Area.

b. Evidence Offered as to Non-Economic Injury

Aripotch states that, in addition to economic interests in the Lease Area, he also has environmental and aesthetic interests in the Lease Area. He states that the Project will impact the aesthetic and spiritual pleasures he derives from fishing in the Vineyard Wind Lease Area. 1:22-cv-11091, Aripotch Decl. ¶ 21, Doc. No. 66-1. In particular, while engaged in commercial fishing in the Vineyard Wind Lease Area, Aripotch tries to bring his camera to capture the wildlife. *Id.* at ¶ 25. He observes right whales and other marine life. *Id.* He plans to continue fishing in the Lease Area, and observing marine mammals, "through the foreseeable future if the Vineyard Wind lease and COP are vacated." *Id.* at ¶ 28.[15]

Williams states that the impact the Vineyard Wind Project will have on the Vineyard Wind Lease Area will harm not only his business but also the aesthetic and emotional pleasures he derives from fishing. 1:22-cv-11091, Williams Sr. Decl. ¶ 25, 28, Doc. No. 66-2.[16] Williams' sons,

15. Aripotch also states that he fears the Project will destroy the area that his family, and many others, depend on for their food supply. *Id.* at ¶ 24. Aripotch's affidavit does not show that he is competent to testify as to the alleged destruction of the area.

16. Williams also states that it is his understanding that the impacts of the Project "will result in a sizeable overall decrease in the food supply" that will negatively affect food availability for all Americans, including his family. 1:22-cv-11091, Williams Sr. Decl. ¶ 28, Doc. No. 66-2. Again, Williams' affidavit does not show that he is competent to testify to these assertions.

who serve as captains of the F/V Heritage and the F/V Tradition, each likewise states that he takes pleasure in observing marine life, including right whales, while fishing in the Lease Area. 1:22-cv-11091, Decl. of Thomas H. Williams ¶ 25, Doc. No. 66-3; *see* 1:22-cv-11091, Decl. of Aaron Williams ¶ 27, Doc. No. 66-4.

Defendants dispute that statements of individual owners' aesthetic and emotional interests can be imputed to the Plaintiff corporations. *See* 1:22-cv-11091, Fed. Defs.' Opening Mem. 8, Doc. No. 73. Defendants also assert that the record directly conflicts these individuals' assertions where (i) NMFS has concluded there will be no adverse impacts to right whales other than temporary harassment of a small number of right whales due to exposure to pile driving noises, and (ii) that the Corps considered the Project's effects on food and fiber production as part of its public interest review and determined that the Project would have no effect on the food supply. 1:22-cv-11091, Fed. Defs.' Resp. to Seafreeze Pls.' Statement of Undisp. Material Facts ¶¶ 167, 120, Doc. No. 76.

The court concludes the Commercial Fishing Entities have not demonstrated any non-economic injury where the competent evidence proffered relates to the interests of their owners and not to the Commercial Fishing Entities themselves.

2. Seafreeze Shoreside

Plaintiff Seafreeze Shoreside is a seafood dealer located in Narragansett, Rhode Island. 1:22-cv-11091,

Decl. of Arthur Ventrone ("Ventrone Decl.") ¶ 4, Doc. No. 66-7; *see also* 1:22-cv-11091, Decl. of Meghan Lapp ("Lapp Decl.") ¶ 3, Doc. No. 66-8.

a. Evidence Offered as to Economic Injury

Declarant Arthur Ventrone, Seafreeze Shoreside's Treasurer, states that Seafreeze Shoreside purchases, sells, and processes fish product, primarily squid. 1:22-cv-11091, Ventrone Decl. ¶ 2, 4, Doc. No. 66-7. Ventrone states that Seafreeze Shoreside generates substantial revenue from squid seafood product brought in by commercial fishermen from the Lease Area and that, while revenues vary annually, catches from the Lease Area are "a consistently high percentage of [Seafreeze Shoreside's] total annual revenues year after year." *Id.* at ¶ 10. Ventrone states that, in 2016, 19% of Seafreeze Shoreside's total revenue, or $1.7 million, was attributable to catches in the "Vineyard Wind area." *Id.* Ventrone states that it is his understanding that commercial fishing in the Lease Area will "become untenable" as a result of the Vineyard Wind Project, and that, as a result, Seafreeze Shoreside will process less squid, and will experience a "substantial loss of revenues." *Id.* at ¶¶ 8-11. Ventrone also states that it is his understanding that squid will be displaced from the Lease Area as a result of the Project's impact to squid habitat, and that, even if commercial fishermen could continue fishing in the Area, the catch would be "severely reduced or nonexistent." *Id.* at ¶ 9.[17]

17. Although Ventrone has not demonstrated that he is competent to testify as to any reduction in commercial fishing in

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Declarant Meghan Lapp, Seafreeze Shoreside's Fisheries Liaison and Assistant General Manager, states that the pile driving and operational noise from the Project will negatively impact the habitats longfin squid and other species, and thus impact Seafreeze Shoreside. 1:22-cv-11091, Lapp Decl. ¶¶ 2, 45-50, Doc. No. 66-8.

Defendants dispute that the construction and operation of the Vineyard Wind Project will result in the cessation of commercial fishing in the Vineyard Wind Lease Area. 1:22-cv-11091, Fed. Defs.' Resp. to Seafreeze Pls.' Statement of Undisp. Material Facts ¶ 6, Doc. No. 76 (citing BOEM Info. Mem. dated May 21, 2021, BOEM_0076922 at -942-44, Final EIS, Vol. 1 BOEM_0068434 at -718 and -743-44). Defendants also dispute that the Project will have adverse impacts on the squid habitat where Plaintiffs' only support for this proposition are the statements of employee declarants, who Defendants contend offer opinions and understanding in lieu of expertise, and Seafreeze Shoreside's own comments in the Administrative Record. *See id.* at ¶ 166.

Vineyard Wind disputes that Seafreeze Shoreside derives substantial revenue from the Lease Area, stating that the Lease Area was selected to minimize conflicts with commercial fishing and because it does not have high relative revenue as compared to nearby waters. *See* 1:22-cv-11091, Vineyard Wind Resp. to Seafreeze

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the Lease Area, the Aripotch and Williams Sr. affidavits detailed above regarding their anticipated reduction in trawling for squid, are sufficient to allow the court to consider Ventrone's further statement that Seafreeze Shoreside will process less squid.

Pls.' Statement of Undisp. Material Facts ¶ 6, Doc. No. 88 (citing Final EIS, Vol. 1 for proposition that, during the leasing process, and in response to public comments, BOEM identified "high value fishing areas . . . and removed [them] prior to leasing." Final EIS Vol. 1, BOEM_0068434 at -725).

As above, there is a dispute of material facts as to the extent of any economic harm that Seafreeze Shoreside may suffer. For purposes of Defendants' and Intervenor's Motions for Summary Judgment, however, and considering the evidence in the light most favorable to Seafreeze Shoreside, the court finds that Seafreeze Shoreside has demonstrated that its suppliers trawl fish in the Lease Area and that Seafreeze Shoreside may lose an unquantified sum of the revenue attributable to the loss of its suppliers' trawl-fishing activities in the Lease Area.

b. Evidence offered as to Non-Economic Injury

Lapp states that "Seafreeze [Shoreside] has a keen interest in protecting the purity and cleanliness" of the Outer Continental Shelf, not only for economic reasons, but also because "environmental degradation" from the Vineyard Wind Project would take away "from Seafreeze [Shoreside] employees' aesthetic, psychological, emotional, and spiritual pleasures of working as part of a fishing community reliant on those waters." 1:22-cv-11091, Lapp Decl. ¶ 52, Doc. No. 66-8.

Vineyard Wind disputes that Plaintiffs have asserted any of its own legal rights and interests. *See* 1:22-cv-11091, Intervenor's Opening Mem. 4-5, Doc. No. 87.

As with the Commercial Fishing Entities, Seafreeze Shoreside has not shown that Seafreeze Shoreside, as opposed to its employees, have suffered any non-economic injuries where it has offered no evidence to that effect.

3. LICFA, Sector XIII, and the Alliance

Seafreeze Plaintiffs LICFA and Sector XIII, and Responsible Plaintiff Alliance (collectively, the "Associations"), are associations representing commercial fishing interests.

a. Evidence Offered as to Associations' Membership and Purposes

LICFA represents over 150 fishing businesses, boats, and fishermen from multiple ports on Long Island, New York. 1:22-cv-11091, Decl. of Bonnie Brady ("Brady Decl.") ¶ 3, Doc. No. 66-6. LICFA and its members "support extensive cooperative scientific research to better understand the marine environment and fisheries management." *Id.* at ¶ 4.

Sector XIII is a private organization of commercial fishermen that monitors compliance with fishing permits and supports the commercial fishing industry along the Atlantic Coast. 1:22-cv-11091, Decl. of John Haran ("Haran Decl.") ¶ 3, Doc. No. 66-5.

Plaintiff Alliance is a not-for-profit trade association headquartered in Washington, D.C., comprised of fishing associations and fishing companies, whose members own

and operate more than 120 vessels and conduct business in more than 30 fisheries throughout the country. 1:22-cv-11172, Joint SOF ¶ 1, Doc. No. 99; 1:22-cv-11172, Decl. of Anne Hawkins ("Hawkins Decl.") ¶ 2, Doc. No. 53-1. One of the Alliance's members is Town Dock, which is one of the largest producers of squid in the United States. 1:22-cv-11172, Decl. of Katie Almeida ("Almeida Decl.") ¶¶ 1-2, Doc. No. 77-2. The Alliance is committed to improving the compatibility of new offshore development with its members' fishing-related businesses. 1:22-cv-11172, Hawkins Decl. ¶ 2, Doc. No. 53-1. Hawkins states that Defendants' approval of the Vineyard Wind Project has "frustrated the very purpose for which the Alliance was formed[.]" *Id.* at ¶ 8.

b. Evidence offered as to Economic Injury

Each association offers as injury the economic injury of its members, primarily as detailed above. *See* 1:22-cv-11091, Brady Decl. ¶¶ 6, 19-22, Doc. No. 66-6 (the presence and good health of numerous species of marine life in the Lease Area is vital to LICFA members); 1:22-cv-11091, Second Decl. of David Aripotch ("2d Aripotch Decl.") ¶ 4, Doc. No. 90-1 (Aripotch and Old Squaw are members of LICFA and LICFA represents Aripotch's "economic . . . interests as a commercial fisherman"); *see also* 1:22-cv-11091, Second Decl. of Bonnie Brady ("2d Brady Decl.") ¶ 4, Doc. No. 90-2 ("LICFA, as an association of commercial fishermen, represents the economic . . . interests of David Aripotch in his capacity as a member of LICFA."); 1:22-cv-11091, Haran Decl. ¶¶ 3, 6, Doc. No.

66-5 (approximately 38 of Sector XIII's members operate their commercial fishing businesses in the Lease Area and the presence and good health of numerous species of fish and other marine life in the Lease Area are vital to the members of Sector XIII, who depend on the Lease Area for a substantial portion of their revenues); *id.* at ¶¶ 7, 20 (Plaintiffs Heritage Fisheries and Nat. W. are members of Sector XIII and Heritage Fisheries, Nat. W., and similarly situated Sector XIII members will experience "substantial economic adverse impacts" as a result of the Vineyard Wind Project); *id.* at ¶ 11 (stating that the Vineyard Wind Project would force Sector XIII members who operate trawl vessels to fish and travel outside of the "project area," thereby increasing vessel traffic and hazardous conditions outside of the Lease Area); *id.* at ¶ 18 (stating that the Vineyard Wind Project will preclude members from fishing in the Lease Area, due to (i) the risk of entanglement of trawl fishing gear, (ii) reduced navigational capabilities because of radar interference, and (iii) increased risk of collision when navigating through Project transit lanes); 1:22-cv-11172, Second Decl. of Anne Hawkins ("2d Hawkins Decl.") ¶¶ 4-7, Doc. No. 77-1 (Old Squaw, Sector XIII, LICFA, and Seafreeze Shoreside are members of the Alliance and will be harmed in the ways identified by the Seafreeze Plaintiffs' declarants); *see also* 1:22-cv-11172, Almeida Decl. ¶¶ 1-2, 4-5, Doc. No. 77-2 (Alliance member Town Dock is dependent on longfin squid, the Lease Area is "on top of and adjacent to one of [Town Dock's] most productive spring and summer longfin squid grounds," Town Dock's vessels may be unable to tow their trawling gear through the Lease Area safely and efficiently, and the

noise from the Project will negatively impact the longfin squid population, and ultimately, Town Dock's business) (citing letter offered as part of Town Dock's comments on an adjacent wind project which references a Woods Hole Oceanographic Institute study).

As discussed above, Defendants dispute that the Vineyard Wind Project will result in the cessation of fishing activities in the Lease Area. Vineyard Wind disputes that members of the Associations asserting "substantial" losses in revenue will experience such impacts where AIS data reflects that LICFA member Old Squaw and Sector XIII members Heritage Fisheries andNat. W. fished in the Lease Area for a collective 27.7 hours over six years.

Vineyard Wind also disputes that Alliance member Town Dock may have difficulty navigating through the Lease Area with gear where it previously submitted comments reflecting that Town Dock's boats will continue to work in the wind energy areas with one nautical mile of spacing between the turbines. *See* 1:22-cv-11172, Intervenor's Reply 4 n.2, Doc. No. 93.

As above, there is a dispute of material facts as to the extent of any economic harm that the Associations' members may suffer. For purposes of Defendants' and Intervenor's Motions for Summary Judgment and considering the evidence in the light most favorable to the Associations, the court finds that the Associations have demonstrated that their members may lose an unquantified sum of the revenue attributable to the loss

of their or their suppliers' trawl-fishing activities in the Lease Area.

c. Evidence Offered as to Non-Economic Injury

Each association also offers as injury the non-economic injury of its members, primarily as detailed above. *See* 1:22-cv-11091, 2d Aripotch Decl. ¶ 4, Doc. No. 90-1 (LICFA represents Aripotch's "environmental interests as a commercial fisherman"); *see also* 1:22-cv-11091, 2d Brady Decl. ¶ 4, Doc. No. 90-2 ("LICFA, as an association of commercial fishermen, represents the . . . environmental interests of David Aripotch in his capacity as a member of LICFA."). Whether that non-economic injury may be asserted by the Associations is discussed further below.

B. Constitutional Standing

Vineyard Wind challenges Plaintiffs' standing to bring their NEPA, ESA, and MMPA claims as a constitutional issue, and Defendants and Vineyard Wind also challenge the Associations' standing. The court considers the challenges to standing under NEPA and MMPA as a zone-of-interest question, which is addressed below. Here, the court considers first legal principles concerning constitutional standing generally, then questions of associational standing, and then Plaintiffs' standing under ESA.

Appendix C

1. Applicable Law

The doctrine of standing is rooted in Article III of the Constitution, which confines federal courts to the adjudication of actual "cases" and "controversies." *See* U.S. Const. Art. III, § 2, cl. 1; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Standing consists of three elements: "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016), *as revised* (May 24, 2016) (citing *Defs. of Wildlife*, 504 U.S. at 560-61). Plaintiffs' injury must be "'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable court ruling.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149, 130 S. Ct. 2743, 177 L. Ed. 2d 461 (2010)).

To establish the first element of standing, an injury-in-fact, a plaintiff must demonstrate "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Defs. of Wildlife*, 504 U.S. at 560 (quotations omitted). "The particularization element of the injury-in-fact inquiry reflects the commonsense notion that the party asserting standing must not only allege injurious conduct attributable to the defendant but also must allege that he, himself, is among the persons injured by that conduct." *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 731-32 (1st Cir. 2016).

Moreover, standing is "ordinarily substantially more difficult to establish," where the plaintiff is not the object of the action. *Defs. of Wildlife*, 504 U.S. at 562 (quotations omitted); *compare Maine Lobstermen Assoc. v. Nat. Marine Fish. Serv.*, 70 F.4th 582, 592-93 (D.C. Cir. June 16, 2023) (concluding that the plaintiff lobstermen have standing to challenge a biological opinion considering NMFS' fishery licensing activities where they were the "object of the action" and the biological opinion had "virtually determinative effect"). "The standing inquiry is claim-specific: a plaintiff must have standing to bring each and every claim that she asserts." *Katz v. Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012) (citing *Pagan v. Calderon*, 448 F.3d 16, 26 (1st Cir. 2006)).

Because standing is not a "mere pleading requirement[] but rather an indispensable part of the plaintiff's case," standing must be supported "with the manner and degree of evidence required at the successive stages of the litigation." *Defs. of Wildlife*, 504 U.S. at 561; *see also People to End Homelessness v. Develco Singles Apartments Assoc.*, 339 F.3d 1, 8 (1st Cir. 2003). While at the pleadings stage, "general factual allegations of injury" may suffice, and at summary judgment, such allegations must be supported by affidavits which will be taken to be true, where standing remains a controverted issue at trial, the specific facts establishing standing "must be 'supported adequately by the evidence adduced at trial.'" *Id.* (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 114, 115 n.31, 99 S. Ct. 1601, 60 L. Ed. 2d 66 (1979)).

2. Associational Standing

An association cannot establish standing to sue on behalf of its members unless (i) "at least one of [its] members possesses standing to sue in his or her own right," *United States v. AVX Corp.*, 962 F.2d 108, 116 (1st Cir. 1992), (ii) "the interests at stake are germane to the organization's purpose," and (iii) "neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 169, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000).

Here, despite an initial challenge,[18] there is no real dispute that the Associations may assert the economic injuries of its commercial fishing members.

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18. Defendants and Vineyard Wind initially asserted that the Alliance lacked standing to bring claims on behalf of its members where it had not identified any members with Article III standing. Defendants and Vineyard Wind withdrew this argument after the Alliance provided additional declarations identifying members who operate fishing vessels in the Vineyard Wind project area. *See* 1:22-cv-11172, Fed. Defs.' Reply, Doc. No. 92; 1:22-cv-11172, Intervenor's Reply 1, Doc. No. 93.

Defendants and Vineyard Wind also asserted that the Alliance lacked standing to bring claims on behalf of itself as a nonprofit trade organization. Where the Alliance has standing to raise the economic claims of its members and does not assert claims distinct from those asserted on behalf of its members, the court need not address whether the Alliance has standing based on its status as a nonprofit trade organization. *See Horne v. Flores*, 557 U.S. 433, 446-47, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (2009).

Plaintiffs argue that Seafreeze Plaintiff LICFA can also bring claims of noneconomic injury on behalf of LICFA member David Aripotch. 1:22-cv-11091, Pls.' Opp'n 12-14, Doc. No. 90. Defendants and Vineyard Wind challenge LICFA's standing to assert the environmental injuries of its members where it has not demonstrated environmental issues are germane to its purpose. 1:22-cv-11091, Fed. Defs.' Opening Mem. 8, Doc. No. 73; Fed. Defs.' Reply 2, Doc. No. 93; Intervenor's Opening Mem. 6-7, Doc. No. 87.

Here, LICFA has not demonstrated that the interests at stake-Aripotch's interests in observing right whales and marine life-are germane to LICFA's purpose of supporting fisheries management. *See Friends of the Earth*, 528 U.S. at 169. Accordingly, LIFCA does not have associational standing to assert any of Aripotch's injuries based on the aesthetic and spiritual pleasures he derives from fishing.

3. ESA (Seafreeze, 9th, 10th Claims for Relief; Responsible Count 3)

Plaintiffs assert that Defendants violated the ESA, where (i) NMFS failed to consider the cumulative effects of the Project on endangered species or their habitat, 1:22-cv-11091, *Complaint*, 9th Claim for Relief, Doc. No. 1; (ii) NMFS failed to inform BOEM of alternatives to the approved Project that would avoid harming endangered species, *id.*, 10th Claim for Relief; and (iii) Defendants violated the ESA by approving the COP and Corps' pollutant discharge permit without a valid biological opinion in place, 1:22-cv-11172, *Complaint*, Count 3, Doc. No. 1.

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The citizen-suit provision of the ESA grants "any person" the authority to commence a civil suit to enforce a violation of any provision of the ESA. 16 U.S.C. § 1540 (g) (1). But this "authorization of remarkable breadth," does not obviate Plaintiffs' obligations under Article III of the Constitution to establish standing. *Bennett v. Spear*, 520 U.S. 154, 162-164, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997).

Taking Plaintiffs' claims in turn, the Seafreeze Plaintiffs allege that NMFS violated its obligations under Section 7 of the ESA and attendant regulations in issuing the 2020 BiOp without (i) considering the cumulative effects of the Project on endangered species, and (ii) without informing BOEM of alternatives that would avoid harming endangered species. Vineyard Wind asserts that Plaintiffs lack standing to bring claims against the superseded Biological Opinion where they have not demonstrated any injury flowing from it, let alone established causation or redressability. 1:22-cv-11091, Intervenor's Opening Mem. 8, Doc. No. 87. As discussed above, considering the evidence in the light most favorable to the Plaintiffs, Plaintiffs or their members may lose some revenue if the Commercial Fishing Entities (or Seafreeze Shoreside's suppliers) reduce their trawling for squid as a result of the construction and operation of the Project but they have shown no noneconomic harm. Plaintiffs have not demonstrated their particularized injury is in any way connected to the Project's impact on any endangered species. They also have not shown that they are the object of any action taken under the ESA consultation process, nor that they are the object of any other challenged agency action under the ESA connected to the Project. Nor do

they have a demonstrated interest in the direct agency action related to the ESA.[19]

Similarly, although the Alliance alleges that both BOEM and the Corps permitted actions without satisfying the requirements of the ESA, *see* 1:22-cv-11172, Plaintiff's *Opposition* 24-25, Doc. No. 77, the Alliance has only offered evidence to support that their members may lose some revenue as a result of the construction and operation of the Project.

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19. Defendants argue that if the Seafreeze Plaintiffs have standing to assert their 9th and 10th Claims for Relief challenging NMFS' actions as part of the 2020 BiOp process, such challenge would still be moot. *See* 1:22-cv-11091, Fed. Defs.' Reply 38-39, Doc. No. 93. The court agrees where Plaintiffs challenge procedural defects in the 2020 BiOp, and seek declaratory and injunctive relief, but do not raise those challenges to the operative 2021 BiOp. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992) (courts cannot "'declare principles or rules of law which cannot affect the matter in issue in the case before it'" (quoting *Mills v. Green* 159 U.S. 651, 653, 16 S. Ct. 132, 40 L. Ed. 293 (1895)); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1114 (10th Cir. 2010) (concluding that environmental challenge was moot where complaint did not challenge superseding biological opinion). Defendants likewise challenges the Alliance's remaining ESA claim as moot where the Alliance likewise seeks declaratory relief in conjunction with its challenge that BOEM and the Corps improperly proceeded with approval of the COP and issuance of the Section 404 Permit without a valid biological opinion given the agency issued a superseding biological opinion shortly thereafter, which Plaintiffs do not challenge. The court agrees with Defendants as to the Alliance's remaining ESA claim as well. Accordingly, if the mootness inquiry should occur first, the court lacks jurisdiction to decide Plaintiffs' pending ESA claims where they are moot.

Appendix C

The relationship between the unquantified economic harm Plaintiffs will suffer as a result of the Project's possible physical impacts on Plaintiffs' preferred trawl fishing area, and the agency actions Plaintiffs are challenging—which are general procedural aspects of the 2020 biological consultation process undertaken pursuant the ESA—is too attenuated to support either that Plaintiffs have demonstrated an appropriately particularized injury-in-fact or causation under Article III's standing requirements.

"Establishing causation in the context of a procedural injury requires a showing of two causal links: one connecting the omitted [procedural step] to some substantive government decision that may have been wrongly decided because of the lack of [that procedural requirement] and one connecting that substantive decision to the plaintiff's particularized injury." *See Ctr. for Bio. Div. v. EPA*, 861 F.3d 174, 184, 430 U.S. App. D.C. 15 (D.C. Cir. 2017) (quotations omitted). An agency's procedural omission is necessary but not sufficient to establish standing. *Cf. Ctr. for Bio. Div.*, 861 F.3d at 183-86 (holding association had established standing where it demonstrated that the EPA's failure to conduct an "effects determination" or ESA Section 7 consultation created a demonstrable risk to the endangered species in which the association's member established a demonstrable interest). Instead, a plaintiff must also show the procedural step was connected to the substantive result.

Here, Plaintiffs have not shown their alleged procedural deficiencies were connected to (i) their alleged injuries or (ii) any substantive result, where they challenge only decisions undertaken during the 2020 biological

consultation process and not the 2021 BiOp from which all agency actions flowed.[20]

Accordingly, where Plaintiffs lack standing to assert the remaining ESA claims, Plaintiffs' Motions are denied and Defendants' and Vineyard Wind's Motions are granted.

C. Zone of Interest

1. Relevant Law

For Plaintiffs to establish standing under the APA, they must demonstrate they have been "adversely affected

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20. The Alliance's claims suffer from additional defects that would prevent consideration on the merits. First, the Alliance's claim requires the court to accept the unsupported fact that the 2020 BiOp was "inadequate," and thus, could not be relied upon for any purpose, resulting in BOEM and the Corps adopting actions without having conducted consultation as required under ESA Section 7. *See* 1:22-cv-11172, Pl.'s Opp'n 24-25, Doc. No. 77. But the Record demonstrates instead that (1) the 2020 BiOp was not deemed inadequate, invalid, or otherwise unreliable for any purpose, (2) reinitation of consultation was limited to discrete issues, (3) BOEM approved the COP on July 15, 2021, under numerous express conditions, including any terms and conditions and reasonable and prudent measures stemming from the reinitiated consultation, *see* COP Approval Letter, BOEM_077150 at -7152; *see also* 1:22-cv-11172, *Memorandum and Order* 15-19, Doc. No. 104, and (4) the Corps also imposed conditions on its approval, including adherence to the then-in-effect biological opinion and any subsequently issued biological opinion. *See* 2021 BiOp, BOEM_0077276 at -7282; Joint ROD, BOEM_ 0076799 at -6844. Accordingly, the Alliance has not pointed to some procedural requirement that was left unsatisfied where BOEM approved the COP and the Corps issued a Section 404 Permit pending the results of a reinitiated biological consultation.

or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702; *see also CSL Plasma Inc. v. U.S. Customs and Border Prot.*, 33 F.4th 584, 588, 456 U.S. App. D.C. 310 (D.C. Cir. 2022). The "zone of interests" test is "a limitation on the cause of action for judicial review conferred by the [APA.]" *Lexmark Int'l., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014). As such, a court "ask[s] whether [plaintiff] has a cause of action under the statute." *Id.* at 128. "'The 'zone of interest' test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision.'" *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 29 (1st Cir. 2007) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1987)). "[T]he test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399.

2. National Environmental Policy Act (Seafreeze, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd Claims for Relief, Responsible, Count 4)

Defendants and Vineyard Wind assert that the NEPA claims cannot survive where Plaintiffs' only asserted interests are economic. *See* 1:22-cv-11091, Fed. Defs.' Reply 1-3, Doc. No. 93; 1:22-cv-11172, Fed. Defs.' Reply 2-3, Doc. No. 92; 1:22-cv-11091, Intervenor's Reply, Doc.

No. 94; 1:22-cv-11172, Intervenor's Reply 2-4, Doc. No. 92. NEPA was enacted "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321; *see also Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993). Numerous courts have thus concluded that a plaintiff who asserts purely economic injuries does not come within NEPA's zone of interests. *Nev. Land Action Ass'n*, 8 F.3d at 716; *see also Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 274, 420 U.S. App. D.C. 162 (D.C. Cir. 2015); *Am. Waterways Operators v. U.S. Coast Guard*, 613 F. Supp. 3d 475, 486-87 (D. Mass. 2020) (collecting cases).

Such is the case here for the Commercial Fishing Entities and Seafreeze Shoreside, who each only asserts economic injuries. Similarly, where each of the Plaintiff Associations predicate injuries on the economic impact of the Project to their members, the Plaintiff Associations likewise lack statutory standing for their NEPA claims.

Plaintiffs argue that they have stated environmental injuries that will have economic impact, including that the Project will make Old Squaw Fisheries unable to fish in the Lease Area, and that this is sufficient to come within NEPA's zone of interests. 1:22-cv-11091, Pls.' Opp'n 3-4, Doc. No. 90. They contend that Defendants rely on case law involving purely economic injuries, *see* 1:22-cv-11091, Pls.' Opp'n 3-4, Doc. No. 90 (discussing *Am. Waterways Operators*, 613 F. Supp. 3d at 486-87 and *Gunpowder Riverkeeper*, 807 F.3d at 274), and that such cases are inapplicable here, where Plaintiffs have

asserted environmental harms that will cause economic injury, *id.* (citing *Monsanto*, 561 U.S. at 155). However, the plaintiff farmers in *Monsanto* based their standing on a claim that an environmental harm (a potential genetic mutation from the defendant's products) could harm their alfalfa crop and ultimately impact to their livelihoods. The Court left undisturbed the district court's unchallenged conclusion that plaintiffs fell within NEPA's zone of interests because the risk the genetically modified gene at issue would "infect conventional and organic alfalfa is a significant environmental effect within the meaning of NEPA." *Monsanto*, 561 U.S. at 155.

Here, by contrast, Plaintiffs have not put forth competent evidence as to an environmental injury, or even an environmental harm that would impact their fishing. Instead, where the gist of their claim is that the physical impediment the Project poses will limit their trawling, Plaintiffs' argument fails.

Accordingly, the court denies the Seafreeze and Responsible Plaintiffs' Motions and grants Defendants and Intervenor's Motions as to Plaintiffs' NEPA claims.

3. Marine Mammal Protection Act (Seafreeze, 22nd Claim for Relief; Responsible Count 5)

Vineyard Wind challenges Plaintiffs' ability to bring claims challenging the Incidental Harassment Authorization permit issued by NMFS under the MMPA where Plaintiffs have not asserted any environmental

injuries. The MMPA was adopted by Congress to promote marine mammal conservation. *See* 16 U.S.C. § 1361; *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1202-03 (9th Cir. 2004).

Here, Plaintiffs assert violations of the APA and MMPA pertaining to the issuance of the IHA to Vineyard Wind for taking by harassment of right whales. But Plaintiffs have not asserted any cognizable interest in right whales, or any marine mammals for that matter. While the test for prudential standing is not "especially demanding," *Lexmark*, 572 U.S. at 130 (quotations omitted), Plaintiffs have not demonstrated any interests that fall within the most generous reading of the zone of interests for the MMPA. Accordingly, Plaintiffs' claims fall outside of the zone of interests of the MMPA and cannot proceed. Thus, as to Plaintiffs' MMPA claims, the court denies the Seafreeze and Responsible Plaintiffs' Motions for Summary Judgment and grants Defendants and Intervenor's Motions.

IV. Plaintiffs' Clean Water Act Claims (Seafreeze, 17th Claim for Relief; Responsible, Count 2)

Plaintiffs assert that the Corps' issuance of Section 404 Permit under the CWA was arbitrary and capricious where it violated CWA regulations.[21] Both complaints allege that the Corps' failed to analyze alternatives to the Project. 1:22-cv-11172, Compl. Counts 2.2, 2.3, Doc. No.

21. Section 404 Permits allow for the discharge of dredged or fill materials into navigable waters at specified disposal sites. 33 U.S.C. § 1344.

1; 1:22-cv-11091, Compl. 17th Claim for Relief, Doc. No. 1. The Alliance additionally claims that the Corps failed to consider the cumulative impact of the Project and future similar Projects. 1:22-cv-11172, Compl. Counts 2.4, Doc. No. 1; 1:22-cv-11172, Pl.'s Opening Mem. 27-33, Doc. No. 53.[22]

A. Practicable Alternatives – (Responsible, Counts 2.2, 2.3, Seafreeze, 17th Claim for Relief[23])

The Alliance claims that in issuing the Section 404 Permit, Defendants violated their own regulations concerning practicable alternatives by failing to analyze less damaging alternatives to the Vineyard Wind Project. 1:22-cv-11172, Pl.'s Opening Mem. 28-29, Doc. No. 53.

Section § 230.10(a) prohibits (except in circumstances not at issue here) the discharge of dredged or fill materials "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the

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22. The Parties debate whether Plaintiffs waived their argument that the Section 404 Permit was flawed where the notice and Permit application reflected a corridor length of 23.3 miles, not the actual 39.4 mile length of the corridor. 1:22-cv-11172, Fed. Defs.' Opening Mem. 33-34, Doc. No. 60; 1:22-cv-11172, Pl.'s Opening Mem. 24-25, Doc. No. 53. However, where that alleged error was raised by the Alliance only in its summary judgment briefing, and not in its *Complaint*, the claim is not properly before the court.

23. The Seafreeze Plaintiffs do not independently brief this issue, instead incorporating the Alliance's briefing by reference.

aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a). Defendants assert that the Corps considered various other alternatives, "including: (a) the no-action alternative; (b) a largely land-based alternative; (c) alternatives that would bring the cable on shore in a different location; (d) two off-site alternatives in other zones of the ocean; and (e) seven different on-site alternatives." 1:22-cv-11172, Fed. Defs.' Opening Mem. 39, Doc. No. 60 (citing USACE AR 011451-52, 011471-73). The Alliance acknowledges that the Corps did consider other alternatives and it does not argue that any of these alternatives should have been selected. 1:22-cv-11172, Pl.'s Opp'n 23, Doc. No. 77.

Instead, the Alliance argues that the Corps' analysis violated its regulations. *Id.* at 24. The Alliance's arguments do not withstand scrutiny. First, the Alliance contends that there is a three-step analysis that the Corps must conduct: it must assess off-site alternatives; then, if none are available, it must try to modify the project to minimize impacts; finally, if the project cannot be modified to avoid impacts, it must determine mitigation measures. 1:22-cv-11172, Pl.'s Opening Mem. 29, Doc. No. 53 (citing 40 C.F.R. §§ 230.10(a)(2)). But the cited regulation says no such thing.

Then the Alliance contends that 40 C.F.R. § 230.10(a)(3) requires "the Corps to presume that practicable alternatives exist[.]" 1:22-cv-11172, Pl.'s Opening Mem. 29, Doc. No. 53. The Alliance reasons that the Project "is not water dependent" because it does not require "access or proximity to . . . the special aquatic site in question

to fulfill its basic purpose," and argues that "when a project does not require any access or proximity to an aquatic site," the Corps must "rebut the presumption that there are less practicable alternatives with less adverse environmental impact." *Id.* (citing 40 C.F.R. §§ 230.10(a)(3)). But as Defendants point out, the Alliance's argument relies on a misreading of the regulations, including failing to recognize that § 230.10(a)(3)'s presumption applies only to "special aquatic sites,"[24] and that where the Vineyard Wind Project will not be placed in a "special aquatic site," the presumption is inapplicable, and the Alliance's claim must fail. 1:22-cv-11172, Fed. Defs.' Opening Mem. 37-38, Doc. No. 60.

Consequently, Plaintiffs have failed to demonstrate how the regulation purportedly requiring consideration of alternatives and a presumption that practicable alternatives exist was violated here. Nor have they made other arguments, independent of the cited regulation, that would have obligated Defendants to consider other alternatives beyond what was done.

As a result, Plaintiffs' claims that Defendants failed to consider practicable alternatives fails.

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24. As summarized by Defendants, "[s]pecial aquatic sites are sanctuaries, refuges, wetlands, mud flats, vegetated shallows, coral reefs and riffle pools." 1:22-cv-11172, Fed. Defs.' Opening Mem. 38, Doc. No. 60 (citing 40 C.F.R. §§ 230.40 to 230.45; 40 C.F.R. § 230.3(m)).

B. Cumulative Impacts (Responsible, Count 2.4)

The Alliance claims that the Corps failed to consider the cumulative impacts of the Vineyard Wind Project and other future projects under 40 C.F.R. § 230.11(g),[25] where discussion of cumulative impacts from this Project and similar future projects is absent from the Joint ROD. 1:22-cv-11172, Pl.'s Opening Mem. 31-32, Doc. No. 53. The Alliance argues further that the Corps cannot rely on the EIS for its cumulative effects analysis, on the ground that the Final EIS is also deficient and fails to provide this discussion. *Id.* at 32.

Defendants respond first that, under 40 C.F.R. § 230.11(g), the Corps' required cumulative impact analysis is limited to the 23.3 miles of cable corridor[26]

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25. Under 40 C.F.R. § 230.11(g)(2), "cumulative effects attributable to the discharge of dredged or fill material in the waters of the United States should be predicted to the extent reasonable and practical. The permitting authority shall collect information and solicit information from other sources about the cumulative impacts on the aquatic ecosystem."

26. There are also two disputes concerning this figure: first, Plaintiffs appear to challenge impacts beyond the 23.3 miles considered under the CWA. Where those challenges are not based on any agency action or lack of action (i.e. Plaintiffs are not challenging the Rivers and Harbors Permit, nor are they arguing the CWA considered an overly narrow area) they fail. Second, Plaintiffs raise, for the first time, that in two public notices, the Corps improperly omitted the total corridor length. This argument is entirely without merit as the Corps detailed the area to be considered under the CWA, and other documents connected to the Project review detailed total figures.

covered by the CWA permit. Where the regulations at issue apply only to the length of corridor permitted under the CWA regulations (i.e. the 23.3 mile corridor), Defendants are correct.

Defendants argue next, that the Alliance has not explained how future projects would cause impacts along the 23.3 mile corridor that Defendants failed to consider, and that the Corps complied with § 230.11(g) in considering cumulative impacts to the 23.3 mile corridor. Defendants detail that the Corps both relied on cumulative impacts analysis performed as part of the NEPA review and independently considered cumulative impacts that other wind projects in the area would cause. 1:22-cv-11172, Fed. Defs.' Opening Mem. 42-44, Doc. No. 60 (citing USACE AR 011471 ("reasonably foreseeable activities within the larger overall wind lease area were considered to account for potential cumulative effects.")); Fed. Defs.' Reply 11, Doc. No. 92. Where the Alliance has not pointed to (i) authority suggesting that the Corps cannot rely on analysis performed during NEPA review or (ii) specific cumulative impacts not considered as part of the NEPA or CWA review, Defendants' arguments are well-taken.

At its core, the Alliance is contending that the Corps should have done more to satisfy its own regulations. The Alliance must meet a high bar to challenge an agency's interpretation of its own regulations. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007) (vacatur is proper only where the agency "has relied on factors which Congress had not intended it to consider, entirely failed to consider

an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."). The Alliance has failed to make this showing.

Accordingly, Plaintiffs' Motions for Summary Judgment as to the CWA claims are denied and Defendants' and Vineyard Wind's Motions are granted where certain claims were waived, and as to those remaining claims, Plaintiffs have not shown show any actions on the part of Defendants were arbitrary, capricious, or otherwise unlawful.

V. Plaintiffs' Outer Continental Shelf Lands Act Claims[27]

A. Smart from the Start (Seafreeze, 1st, 2nd, and 3rd Claims for Relief)

1. Background

On November 23, 2010, the Department of Interior issued a press release which announced the "Smart from the Start" Initiative, designed to "speed offshore wind energy development." 1:22-cv-11091, Joint SOF ¶ 18, Doc.

27. In their summary judgment briefing, the Seafreeze Plaintiffs assert for the first time that BOEM violated OCSLA in approving the Vineyard Wind Site Assessment Plan. Where this claim is absent from the Complaints, it is not properly before the court, and Plaintiffs' Motions for Summary Judgment fail as to that previously unasserted claim.

No. 106 (citing U.S. Dep't of Interior Press Release). In the press release, BOEM announced that it was "proposing a revision to its regulations that will simplify the leasing process of offshore wind in situations where there is only one qualified and interested developer." *Id.* at 19. On May 16, 2011, BOEM adopted a final rule pertaining to non-competitive leases on the Outer Continental Shelf that may utilize pre-existing facilities. 76 Fed. Reg. 28,178 (May 16, 2011). On February 6, 2012, in addition to publishing a Call for Information and Nominations for wind energy projects on the Outer Continental Shelf, BOEM published a notice concerning ongoing efforts to develop wind energy consistent with the "Smart from the Start" Initiative. 77 Fed. Reg. 5830 (Feb. 6, 2012).

2. Plaintiffs' Challenge

The Seafreeze Plaintiffs allege the "Smart from the Start" Initiative was a change in regulatory policy which violates the APA and OCSLA for various reasons, including that (1) the Initiative was not promulgated through notice-and-comment rulemaking, and (2) the subsequent application of the Initiative was impermissible, because of the lack of notice-and-comment at various stages of the Vineyard Wind review process.[28]

Defendants respond that the "Smart from the Start" Initiative-which Plaintiffs define as a "policy" adopted in

28. The Seafreeze Plaintiffs also brought a claim pertaining to the "Smart from the Start" Initiative under the APA and NEPA. *See* 1:22-cv-11091, Compl. 24th Claim for Relief, ¶¶ 286-293, Doc. No. 1. Where Plaintiffs lack standing to bring claims under NEPA, the court does not reach this claim.

2010 and 2011 press releases-is not a reviewable agency action. They argue further that, in any event, even if the 2011 press release and initiative could be challenged as an agency action, such challenge would be time barred. 1:22-cv-11091, Fed. Defs.' Opening Mem. 8-9, Doc. No. 73; 1:22-cv-11091, Fed. Defs.' Reply 21, Doc. No. 93. Vineyard Wind additionally asserts that (i) Plaintiffs' *Complaint* ¶ 55, 1:22-cv-11091, Doc. No. 1, challenges only 76 Fed. Reg. 28,178, a regulation pertaining to non-competitive leasing (which the process for OCS-A 0501 was not), and (ii) nothing in the Record demonstrates that the "Smart from the Start" Initiative was applied to the relevant Environmental Assessment or the EIS prepared in connection with the Vineyard Wind Project. 1:22-cv-11091, Intervenor's Reply 7-8, Doc. No. 94.[29] The court need not reach whether the "Smart from the Start" Initiative was a final agency action where Plaintiffs' challenges are time barred.

Under 28 U.S.C. § 2401(a), "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." Here, the "Smart from the Start" Initiative was announced in 2010; a final rule pertaining to non-competitive leaves was issued in 2011; and BOEM

29. Vineyard Wind also challenges the Seafreeze Plaintiffs' standing to bring claims concerning the "Smart from the Start" Initiative. 1:22-cv-11091, Intervenor's Reply 7-8, Doc. No. 94. Where the Seafreeze Plaintiffs have asserted economic injuries caused by the application of the "Smart from the Start" Initiative to BOEM's subsequent leasing and approval decisions under OCSLA, the court considers the statute of limitations defense first.

published a notice concerning ongoing efforts to develop wind energy consistent with the "Smart from the Start" Initiative in 2012. The two actions here were filed more than nine years later, in December 2021 and January 2022.

Plaintiffs contend the statute of limitations does not apply to *ultra vires* actions. 1:22-cv-11091, Pls.' Opening Mem. 19-20, Doc. No. 67 (citing *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986)). To the extent Plaintiffs are arguing that there is no statute of limitations applicable to such actions, they are incorrect. *Louisiana Public Service Commission* does not instruct otherwise.

Next, Plaintiffs contend their challenge is not time barred where it "'arises in response to application of the [agency action] to the challenger[.]'" 1:22-cv-11091, Pls.' Opp'n 33-34, Doc. No. 90 (quoting *Rodriguez v. United States*, 852 F.3d 67, 82 (1st Cir. 2017)). The statute of limitations to challenge illegal agency actions may be tolled until it is applied to a challenger. *See Aguayo v. Jewell*, 827 F.3d 1213, 1226 (9th Cir. 2016). However, Plaintiffs have not demonstrated that the "Smart from the Start" Initiative was applied to any aspect of the Vineyard Wind Project, let alone that it was applied to Plaintiffs. Although Plaintiffs contend BOEM's issuance of the Vineyard Wind Lease, publication of the Final EIS, issuance of the ROD, and approval of the COP were each "later" applications of the "Smart from the Start" Initiative, some of which they contend make their challenge timely, Plaintiffs offer no evidence to demonstrate the "Smart from the Start" Initiative was applied in any of those phases of the Project

review process. Where they have not offered evidence that the "Smart from the Start" Initiative was applied to the Vineyard Wind Project, their tolling argument fails.

Accordingly, the *Seafreeze* Plaintiffs' challenge to the "Smart from the Start" Initiative is time-barred.[30] As to the Seafreeze Plaintiffs' First, Second,[31] and Third Claims for Relief, the Seafreeze Plaintiffs' Motion for Summary Judgment is denied and Defendants' and Vineyard Wind's Motions for Summary Judgment are granted.

B. Violations of 43 U.S.C. § 1337(p)(4)

Both the Seafreeze Plaintiffs and the Alliance assert that BOEM violated OCSLA in numerous phases of the Vineyard Wind Project by failing to ensure it met the majority of the twelve goals enumerated under § 1337(p)(4). 1:22-cv-11091, Pls.' Opening Mem. 25-26, Doc. No. 67; 1:22-cv-11172, Pl.'s Opening Mem. 13, Doc. No. 53 (incorporating the Seafreeze Plaintiffs' arguments pertaining to OCSLA by reference). Defendants contend

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30. Although Plaintiffs assert that their claims challenging the application of the "Smart from the Start" Initiative implicates the major questions doctrine, where their APA/OCSLA claims pertaining to the "Smart from the Start" Initiative are time-barred, and their NEPA claims have been dismissed for want of standing, the court is without jurisdiction to consider Plaintiffs' further arguments as to these claims.

31. The Seafreeze Plaintiffs' Second Claim for Relief as it pertains to their claim that BOEM did not consider the requisite factors under 43 U.S.C. § 1337(p)(4) in issuing the Lease is addressed below.

that Plaintiffs' claims are deficient in numerous respects and that, in any event, Defendants' actions are entitled to deference. The court considers each of the challenged actions in turn below.

1. Vineyard Wind Lease (Seafreeze 2nd Claim for Relief)

Plaintiffs contend that BOEM's issuance of the Lease violated OCSLA's substantive requirements under § 1337 and EPA's procedural requirements under 40 C.F.R. § 1501.3(a) where BOEM prepared an Environmental Assessment but failed to prepare an Environmental Impact Statement for the Lease issuance; and BOEM did not otherwise consider the factors enumerated in § 1337 when issuing the Vineyard Wind Lease. 1:22-cv-11091, Pls.' Opening Mem. 19-26, Doc. No. 67.

Defendants assert that challenges to the issuance of the Vineyard Wind Lease and the Environmental Assessment BOEM prepared in connection with the Lease issuance are time barred. The court agrees. Under 28 U.S.C. § 2401(a), except in the case of contract disputes not at issue here, "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." The Lease was effective April 1, 2015. The first of these actions was not commenced until December 15, 2021. As discussed *supra*, Plaintiffs' sole argument that the action is not time barred – that actions which are "*ultra vires*" can be challenged at any time – has no legal support. Accordingly, the Seafreeze Plaintiffs' Motion for Summary Judgment

is denied and Defendants' and Vineyard Wind's Motions for Summary Judgment are granted as to the Seafreeze Plaintiffs' challenges to the issuance of the Vineyard Wind Lease as violating the OCSLA.

2. Approval of the COP (Seafreeze, 5th Claim for Relief; Responsible, Count 1.1, 1.2, and 1.7)

Plaintiffs argue that, as a matter of statutory construction, 43 U.S.C. § 1337(p)(4) imposes certain non-negotiable requirements that Defendants failed to provide for in consideration of the Vineyard Wind COP. 1:22-cv-11091, Pls.' Opening Mem. 25-27, Doc. No. 67; 1:22-cv-11172, Pl.'s Opening Mem. 13-15, Doc. No. 53 (adopting the Seafreeze Plaintiffs' arguments); Pl.'s Opp'n 17-19, Doc. No. 77 . Defendants respond that § 1337 commits discretion to the Secretary of the Interior to ensure these criteria are appropriately balanced, and that, as a result, the Secretary's determinations are entitled to deference, and, in any event, that Defendants complied with OCSLA in approving the COP. 1:22-cv-11091, Fed. Defs.' Opening Mem. 35-36, Doc. No. 73.

Under OCSLA, the Secretary of the Interior may, in consultation with other agencies, grant leases, easements, or other rights of way on the Outer Continental Shelf for the purpose of renewable energy production. 43 U.S.C. § 1337(p)(1)(C). Section 1337(p)(4), entitled "Requirements," provides:

Appendix C

The Secretary [of the Interior] shall ensure that any activity under this subsection is carried out in a manner that provides for –

(A) safety;

(B) protection of the environment;

(C) prevention of waste;

(D) conservation of the natural resources of the outer Continental Shelf;

(E) coordination with relevant Federal agencies;

(F) protection of national security interests of the United States;

(G) protection of correlative rights in the outer Continental Shelf;

(H) a fair return to the United States for any lease, easement, or right-of-way under this subsection;

(I) prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas;

(J) consideration of—

i. the location of, and any schedule relating to, a lease, easement, or right-of-way for an area of the outer Continental Shelf; and

ii. any other use of the sea or seabed, including use for a fishery, a sealane, a potential site of a deepwater port, or navigation;

(K) public notice and comment on any proposal submitted for a lease, easement, or right-of-way under this subsection; and

(L) oversight, inspection, research, monitoring, and enforcement relating to a lease, easement, or right-of-way under this subsection.

43 U.S.C. § 1337(p)(4).

Plaintiffs argue that where this Section is titled "Requirements" and states that the Secretary "shall ensure" that activity is carried out in a manner that provides for the twelve enumerated grounds, Defendants are required to ensure that each of those criteria are met. Plaintiffs argue that in approving the COP Defendants

did not provide for (A) safety, and (I) interference with reasonable uses of the OCS, specifically, fisheries' use.[32] *See* 1:22-cv-11091, Pls.' Opp'n 20, Doc. No. 90. Plaintiffs rely on *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998) and *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007), however, neither *Almendarez-Torres* nor *National Association of Home Builders* directs the result Plaintiffs seek.

First, it is true that "the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." *Almendarez-Torres*, 523 U.S. at 234 (internal citations omitted). But consideration of the section heading does not resolve the dispute here which centers on how the agency determines whether each of the enumerated "Requirements" is satisfied, not whether they are requirements at all.

Second, although Plaintiffs are correct that "shall" should be construed as mandatory, Plaintiffs are incorrect that the word mandates their preferred outcome here. While *National Association of Home Builders* certainly dictates that "shall" means the statutory directive is

32. Plaintiffs also asserted challenges as to (B) protection of the environment; (D) conservation of natural resources; and (F) protection of national security. 1:22-cv-11091, Compl. 5th Claim for Relief, Doc. No. 1; 1:22-cv-11172, Compl. Count 1, Doc. No. 1. However, Plaintiffs have not established standing as to these challenges. Specifically, as discussed *supra*, Plaintiffs offer no evidence to support their standing to bring claims on behalf of marine species, natural resources, or national security issues.

not discretionary, it also recognizes that, in considering whether the enumerated factors have been satisfied in the statute at issue, the agency must necessarily exercise some discretion. 551 U.S. at 671 ("While the EPA may exercise some judgment in determining whether a State has demonstrated that it has the authority to carry out § 402(b)'s enumerated statutory criteria, the statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list."). The Secretary still retains some discretion in considering whether the enumerated statutory criteria have been satisfied, even where the statute does not state so expressly.

Such is the case here. Plaintiffs advocate that each enumerated criterion must be satisfied to its absolute maximum, without the discretion functionally necessary for the Secretary to determine what each criterion requires, both generally and as to a given proposal, and how to ensure each criterion is met, and not to the detriment of the other criteria.

Commonwealth of Massachusetts v. Andrus, 594 F.2d 872 (1st Cir. 1979), cuts directly against Plaintiffs' argument (despite their contention otherwise). In *Andrus*, the First Circuit considered the following language:

> [T]his subchapter shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected.

43 U.S.C. § 1332(2). The plaintiffs in *Andrus* argued that this language "imposes a duty on the Secretary to see that mining and drilling are conducted absolutely without harm to fisheries." 594 F.2d at 888. However, prior interpretations of the provision concluded that it was "directed at the legal right to fish rather than at prohibiting physical impediments." *Id.* at 889. Against this backdrop, the First Circuit concluded that Section 1332(2) placed on the Secretary a duty to see that offshore drilling activities were conducted "without unreasonable risk to the fisheries." *Id.*

Moreover, the First Circuit recognized in *Andrus* that Congress knew that oil and gas development would have an impact on fisheries, but that "the concept of balance rules out a policy based on sacrificing one interest to the other." *Id.* at 889. Balance is similarly required here, where Congress has recognized the importance of leasing on the Outer Continental Shelf in support of energy projects, and, specifically enumerated twelve factors to be provided for, including the "prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas[.]" 43 U.S.C. § 1337(p)(4)(I).

Plaintiffs contend that *Andrus* rejected the wholesale destruction of a fishery, which they claim is the case here, 1:22-cv-11091, Pls.' Opp'n 22, Doc. No. 90 (citing Joint ROD, BOEM_0076837 reflecting that the area will "likely . . . be abandoned by commercial fisheries"), but, as the court held in its *Memorandum and Order*, 1:22-cv-11091, Doc. No. 137, on Plaintiffs' motions to strike, the

language on which Plaintiffs rely for the proposition that the Area will be abandoned is a mere clerical error in the Administrative Record that has since been corrected by the Corps. Where Plaintiffs do not offer other evidence of the complete destruction of fisheries in the OCS, their argument fails.

Beyond their statutory challenge, Plaintiffs contend that the Secretary, in fact, did not provide for safety or prevention of interference with reasonable uses as required by 43 U.S.C. § 1337(p)(4) in approving the COP. However, where Plaintiffs point only to the impact to fishing operations as reflected in since-corrected misstatements to the Record that the court has since concluded were clerical errors, Plaintiffs' challenges to the COP approval as arbitrary and capricious and in violation of OCSLA are entirely without merit.

Accordingly, as to Plaintiffs' challenge to the approval of the COP as violating OCSLA, Plaintiffs' *Motions for Summary Judgment* are denied and Defendants' and Vineyard Wind's *Motions for Summary Judgment* are granted.

3. Temporary Withdrawal and Resumption of COP Review (Seafreeze Plaintiffs' 4th Claim for Relief)

Plaintiffs alleges that BOEM lacked authority to restart review of the COP after suspending it at Vineyard Wind's request, and that BOEM's decision to restart review was *ultra vires*. 1:22-cv-11091, Pls.' Opening Mem. 33-34,

Doc. No. 67. Plaintiffs further contend that, once BOEM resumed review of the COP, BOEM did not independently confirm Vineyard Wind's technical review of the newly selected turbines, and BOEM failed to provide a notice-and-comment period for the resumed review process, as required under NEPA and OCSLA. *Id.* Defendants respond that the decisions to suspend and resume review were lawful. 1:22-cv-11091, Fed. Defs.' Opening Mem. 17-18, Doc. No. 73. Defendants further note that the requisite notice-and-comment periods were previously satisfied under both NEPA and OCSLA, and Vineyard Wind's technical review of the newly proposed turbines reflected that the turbine fit within the parameters and design envelope previously considered in the Supplemental Draft EIS so no substantive re-review was required by the agencies. 1:22-cv-11091, Fed. Defs.' Opening Mem. 17-18, Doc. No. 73 (citing BOEM_0067698-701, 0067703-04; BOEM_0067665).

The court finds Plaintiffs' arguments unpersuasive where Plaintiffs offer no authority (i) to suggest that resumption of review was subject to notice and comment, or (ii) that BOEM was without authority to suspend review and resume it. Nor have Plaintiffs shown that, even if there were some technical violation, how that violation was anything beyond harmless error where the changes made by Vineyard Wind were within the parameters already contemplated and reviewed as part of the NEPA process. *See* 1:22-cv-11091, Joint SOF ¶ 50, Doc. No. 106. Accordingly, Plaintiffs' Motion for Summary Judgment is denied, and Defendants' and Vineyard Wind's Motions are granted, as to the Seafreeze Plaintiffs' 4th Claim for Relief.

VI. Conclusion

For the foregoing reasons, Plaintiffs have not shown that Defendants acted arbitrarily, capriciously, or otherwise unlawfully. Accordingly, Defendants and Vineyard Wind's Motions for Summary Judgment, 1:22-cv-11091, Doc. Nos. 72, 86; 1:22-cv-11172, Doc. Nos. 59, 73, are GRANTED and Plaintiffs' Motions for Summary Judgment, 1:22-cv-11091, Doc. No. 66; 1:22-cv-11172, Doc. No. 52, are DENIED.

IT IS SO ORDERED

October 12, 2023 /s/ Indira Talwani
United States District Judge

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS, FILED OCTOBER 12, 2023

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Case No. 1:22-cv-11091-IT;
Case No. 1:22-cv-11172-IT

SEAFREEZE SHORESIDE, INC., *et al.*,

Plaintiffs,

v.

THE UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Defendants,

and

VINEYARD WIND 1, LLC,

Intervenor-Defendant.

RESPONSIBLE OFFSHORE DEVELOPMENT ALLIANCE,

Plaintiff,

v.

Appendix D

UNITED STATES DEPARTMENT
OF THE INTERIOR, *et al.*,

Defendants,

and

VINEYARD WIND 1, LLC,

Intervenor-Defendant.

October 12, 2023

JUDGMENT

TALWANI, D.J.

Pursuant to the court's *Memorandum and Order*, 1:22-cv-11091, Doc. No. 138; 1:22-cv-11172, Doc. No. 105, on the parties' cross-*Motions for Summary Judgment* 1:22-cv-11091, Doc. Nos. 66, 72, 86; 1:22-cv-11172, Doc. Nos. 52, 59, 73, JUDGMENT IS HEREBY ENTERED in favor of Defendants and Intervenor-Defendant and against Plaintiffs. All parties shall bear their own costs and fees. The above consolidated action CLOSED.

IT IS SO ORDERED

October 12, 2023

/s/ Indira Talwani
United States District Judge

APPENDIX E — RELEVANT STATUTES AND REGULATIONS

5 U.S.C. § 705

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

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5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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28 U.S.C. § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> **(1)** By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

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42 U.S.C. §4332(B), (C)(i)-(iii)

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act [42 USCS §§ 4321 et seq.], and (2) all agencies of the Federal Government shall—

* * *

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 et seq.], which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) consistent with the provisions of this Act [42 USCS §§ 4321 et seq.] and except where compliance would be inconsistent with other statutory requirements, include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) reasonably foreseeable environmental effects of the proposed agency action;

(ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented;

(iii) a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal;

* * *

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43 U.S.C. § 1332(1)-(3)

§ 1332. Congressional declaration of policy

It is hereby declared to be the policy of the United States that—

(1) the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act;

(2) this Act shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected;

(3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs;

* * *

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43 U.S.C. § 1337(p)(4)

§ 1337. Leases, easements, and rights-of-way on the outer Continental Shelf

* * *

(p) Leases, easements, or rights-of-way for energy and related purposes.

* * *

(4) Requirements. The Secretary shall ensure that any activity under this subsection is carried out in a manner that provides for—

(A) safety;

(B) protection of the environment;

(C) prevention of waste;

(D) conservation of the natural resources of the outer Continental Shelf;

(E) coordination with relevant Federal agencies;

(F) protection of national security interests of the United States;

(G) protection of correlative rights in the outer Continental Shelf;

(H) a fair return to the United States for any lease, easement, or right-of-way under this subsection;

(I) prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas;

(J) consideration of—

(i) the location of, and any schedule relating to, a lease, easement, or right-of-way for an area of the outer Continental Shelf; and

(ii) any other use of the sea or seabed, including use for a fishery, a sealane, a potential site of a deepwater port, or navigation;

(K) public notice and comment on any proposal submitted for a lease, easement, or right-of-way under this subsection; and

(L) oversight, inspection, research, monitoring, and enforcement relating to a lease, easement, or right-of-way under this subsection.

* * *

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30 C.F.R. § 585.626 (2020)

§ 585.626 What must I include in my COP?

(a) You must submit the results of the following surveys for the proposed site(s) of your facility(ies). Your COP must include the following information:

Information:	Report contents:	Including:
(1) Shallow hazards	The results of the shallow hazards survey with supporting data.	Information sufficient to determine the presence of the following features and their likely effects on your proposed facility, including: (i) Shallow faults; (ii) Gas seeps or shallow gas; (iii) Slump blocks or slump sediments; (iv) Hydrates; or (v) Ice scour of seabed sediments.
(2) Geological survey relevant to the design and siting of your facility.	The results of the geological survey with supporting data.	Assessment of: (i) Seismic activity at your proposed site; (ii) Fault zones; (iii) The possibility and effects of seabed subsidence; and

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		(iv) The extent and geometry of faulting attenuation effects of geologic conditions near your site.
(3) Biological	The results of the biological survey with supporting data.	A description of the results of biological surveys used to determine the presence of live bottoms, hard bottoms, and topographic features, and surveys of other marine resources such as fish populations (including migratory populations), marine mammals, sea turtles, and sea birds.

(4) Geotechnical survey	The results of your sediment testing program with supporting data, the various field and laboratory test methods employed, and the applicability of these methods as they pertain to the quality	(i) The results of a testing program used to investigate the stratigraphic and engineering properties of the sediment that may affect the foundations or anchoring systems for your facility. (ii) The results of adequate in situ testing, boring, and

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	of the samples, the type of sediment, and the anticipated design application. You must explain how the engineering properties of each sediment stratum affect the design of your facility. In your explanation, you must describe the uncertainties inherent in your overall testing program, and the reliability and applicability of each test method.	sampling at each foundation location, to examine all important sediment and rock strata to determine its strength classification, deformation properties, and dynamic characteristics. (iii) The results of a minimum of one deep boring (with soil sampling and testing) at each edge of the project area and within the project area as needed to determine the vertical and lateral variation in seabed conditions and to provide the relevant geotechnical data required for design.
(5) Archaeological resources.	The results of the archaeological resource survey with supporting data.	A description of the historic and prehistoric archaeological resources, as required by the NHPA (16 U.S.C. 470 *et. seq.*), as amended.

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(6) Overall site investigation.	An overall site investigation report for your facility that integrates the findings of your shallow hazards surveys and geologic surveys, and, if required, your subsurface surveys with supporting data.	An analysis of the potential for: (i) Scouring of the seabed; (ii) Hydraulic instability; (iii) The occurrence of sand waves; (iv) Instability of slopes at the facility location; (v) Liquefaction, or possible reduction of sediment strength due to increased pore pressures; (vi) Degradation of subsea permafrost layers; (vii) Cyclic loading; (viii) Lateral loading; (ix) Dynamic loading; (x) Settlements and displacements; (xi) Plastic deformation and formation collapse mechanisms; and (xii) Sediment reactions on the facility foundations or anchoring systems.

(b) Your COP must include the following project-specific information, as applicable.

Project information:	Including:
(1) Contact information.....	The name, address, e-mail address, and phone number of an authorized representative.
(2) Designation of operator, if applicable	As provided in § 585.405.
(3) The construction and operation concept.....	A discussion of the objectives, description of the proposed activities, tentative schedule from start to completion, and plans for phased development, as provided in § 585.629.
(4) Commercial lease stipulations and compliance.....	A description of the measures you took, or will take, to satisfy the conditions of any lease stipulations related to your proposed activities.
(5) A location plat.....	The surface location and water depth for all proposed and existing structures, facilities, and appurtenances located both offshore and onshore, including all anchor/ mooring data.

(6) General structural and project design, fabrication, and installation.....	Information for each type of structure associated with your project and, unless BOEM provides otherwise, how you will use a CVA to review and verify each stage of the project.
(7) All cables and pipelines, including cables on project easements	Location, design and installation methods, testing, maintenance, repair, safety devices, exterior corrosion protection, inspections, and decommissioning.
(8) A description of the deployment activities.....	Safety, prevention, and environmental protection features or measures that you will use.
(9) A list of solid and liquid wastes generated	Disposal methods and locations.
(10) A listing of chemical products used (if stored volume exceeds Environmental Protection Agency (EPA) Reportable Quantities).....	A list of chemical products used; the volume stored on location; their treatment, discharge, or disposal methods used; and the name and location of the onshore waste receiving, treatment, and/or disposal facility. A description of how these products would be brought onsite, the

	number of transfers that may take place, and the quantity that that will be transferred each time.
(11) A description of any vessels, vehicles, and aircraft you will use to support your activities.....	An estimate of the frequency and duration of vessel/vehicle/aircraft traffic.
(12) A general description of the operating procedures and systems....	(i) Under normal conditions.(ii) In the case of accidents or emergencies, including those that are natural or manmade.
(13) Decommissioning and site clearance procedures..	A discussion of general concepts and methodologies.
(14) A listing of all Federal, State, and local authorizations, approvals, or permits that are required to conduct the proposed activities, including commercial operations.....	(i) The U.S. Coast Guard, U.S. Army Corps Of Engineers, and any other applicable authorizations, approvals, or permits, including any Federal, State or local authorizations pertaining to energy gathering, transmission or distribution (e.g., interconnection authorizations). (ii) A statement indicating whether you have applied

	for or obtained such authorization, approval, or permit.
(15) Your proposed measures for avoiding, minimizing, reducing, eliminating, and monitoring environmental impacts	A description of the measures you will use to avoid or minimize adverse effects and any potential incidental take before you conduct activities on your lease, and how you will mitigate environmental impacts from your proposed activities, including a description of the measures you will use as required by subpart H of this part.
(16) Information you incorporate by reference ...	A listing of the documents you referenced.
(17) A list of agencies and persons with whom you have communicated, or with whom you will communicate, regarding potential impacts associated with your proposed activities.....	Contact information and issues discussed.
(18) Reference	A list of any document or published source that you cite as part of your plan. You may reference information and data

	discussed in other plans you previously submitted or that are otherwise readily available to BOEM.
(19) Financial assurance....	Statements attesting that the activities and facilities proposed in your COP are or will be covered by an appropriate bond or security, as required by §§ 585.515 and 585.516.
(20) CVA nominations for reports required in subpart G of this part.....	CVA nominations for reports in subpart G of this part, as required by § 585.706, or a request for a waiver under § 585.705(c).
(21) Construction schedule	A reasonable schedule of construction activity showing significant milestones leading to the commencement of commercial operations.
(22) Air quality information.....	As described in § 585.659 of this section.
(23) Other information.....	Additional information as required by BOEM.

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30 C.F.R. § 585.628 (2020)

§ 585.628 How will BOEM process my COP?

(a) BOEM will review your submitted COP, and the information provided pursuant to § 585.627, to determine if it contains all the required information necessary to conduct our technical and environmental reviews. We will notify you if your submitted COP lacks any necessary information.

(b) BOEM will prepare an appropriate NEPA analysis.

(c) If your COP is submitted after lease issuance, BOEM will forward one copy of your COP, consistency certification, and associated data and information under the CZMA to the applicable State CZMA agency or agencies after all information requirements for the COP are met.

(d) As appropriate, BOEM will coordinate and consult with relevant Federal, State, and local agencies and affected Indian Tribes, and provide to them relevant nonproprietary data and information pertaining to your proposed activities.

(e) During the review process, we may request additional information if we determine that the information provided is not sufficient to complete the review and approval process. If you fail to provide the requested information, BOEM may disapprove your COP.

(f) Upon completion of our technical and environmental reviews and other reviews required by Federal law (e.g.,

CZMA), BOEM may approve, disapprove, or approve with modifications your COP.

(1) If we approve your COP, we will specify terms and conditions to be incorporated into your COP. You must certify compliance with certain of those terms and conditions, as required under § 585.633(b); and

(2) If we disapprove your COP, we will inform you of the reasons and allow you an opportunity to resubmit a revised plan addressing the concerns identified, and may suspend the term of your lease, as appropriate, to allow this to occur.

(g) If BOEM approves your project easement, BOEM will issue an addendum to your lease specifying the terms of the project easement. A project easement may include off-lease areas that:

(1) Contain the sites on which cable, pipeline, or associated facilities are located;

(2) Do not exceed 200 feet (61 meters) in width, unless safety and environmental factors during construction and maintenance of the associated cables or pipelines require a greater width; and

(3) For associated facilities, are limited to the area reasonably necessary for power or pumping stations or other accessory facilities.

[76 FR 64623, Oct. 18, 2011, as amended at 79 FR 21625, Apr. 17, 2014]

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40 C.F.R. § 1500.1(a) (2020)

§ 1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

* * *

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40 C.F.R. § 1500.2(d) (2020)

§ 1500.2 Policy.

Federal agencies shall to the fullest extent possible:

* * *

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

* * *

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40 C.F.R. § 1502.2(f) (2020)

§ 1502.2 Implementation.

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

* * *

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).

* * *

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40 C.F.R. § 1502.14(a) (2020)

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

* * *

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40 C.F.R. § 1508.7 (2020)

§ 1508.7 Cumulative impact.

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

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40 C.FR. § 1508.25(a)(2), (3) (2020)

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

* * *

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.