No. 24-

IN THE

Supreme Court of the United States

RESPONSIBLE OFFSHORE
DEVELOPMENT ALLIANCE,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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

Counsel for Petitioner

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120330

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

QUESTION PRESENTED

Section 1337(p)(4) of the Outer Continental Shelf Lands Act[1] requires that the Secretary "shall ensure" that any approved activity under this subsection provides for the protection of twelve categories, including "use of the sea or seabed for a fishery."[2] In approving the Vineyard Wind Project, the Secretary newly interpreted the "shall ensure" language to require only that these factors be "considered" or "balanced" against the importance of the new offshore wind energy program, ignoring the Project's devastating impacts on the fishing industry. The First Circuit adopted the Secretary's new interpretation.[3]

Should the Court grant this petition to review the Secretary's April 2021 interpretation of Section 1337(p)(4) so that federal administration of the nation's ocean energy program and approval of offshore wind turbine projects are consistent with Congress's requirement that the Secretary ensure "prevention of interference with reasonable uses," including consideration of the "use of the sea or seabed for a fishery?"[4]

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1. 43 U.S.C. § 1337(p)(4).

2. 43 U.S.C. § 1337(p)(4)(J)(ii).

3. *See* U.S. Dep't. of the Interior, Off. of the Solicitor, M-37067 at 5 (Apr. 9, 2021) (April 2021 Memorandum).

4. 43 U.S.C. § 1337(p)(4)(J)(ii).

PARTIES TO THE PROCEEDINGS

Petitioner, Responsible Offshore Development Alliance, was Plaintiff-Appellant in the First Circuit. Respondents, the United States, acting through the U.S. Bureau of Ocean Energy Management, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, United States Army Corps of Engineers, the Secretary of the Interior, the Director of the Bureau of Ocean Energy Management, the Administrator of the National Oceanic and Atmospheric Administration, the Acting Assistant Secretary of the Army for Civil Works, and Vineyard Wind 1 LLC, were Defendant-Appellees in the court below.

CORPORATE DISCLOSURE

The Responsible Offshore Development Alliance is a 501(c)(6) non-profit trade association corporation. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED CASES

In the district court, this case was consolidated with *Seafreeze Shoreside, Inc. v. U.S. Department of the Interior*, No. 22-cv-11091-IT, U.S. District Court for the District of Massachusetts, Judgment entered October 12, 2023. The First Circuit consolidated the cases for argument and issued a single opinion, which Seafreeze and Petitioner ask this Court to review. *See Seafreeze Shoreside, Inc. v. U.S. Department of the Interior*, No. 23-1853, U.S. Court of Appeals for the First Circuit, Judgment entered December 5, 2024.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported as *Responsible Offshore Development Alliance v. U.S. Department of the Interior*, 123 F.4th 1 (1st Cir. 2024), decided on Dec. 5, 2024, and reproduced in the appendix hereto ("Pet. App.") at 1a. The opinion of the District Court for the District of Massachusetts is reported at 2023 WL 6691015 (D. Mass. Oct. 12, 2023) and is reproduced at Pet. App. 48a.

JURISDICTION

The judgment of the First Circuit was entered on Dec. 5, 2024. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Outer Continental Shelf Lands Act,[5] are reproduced at Pet. App. 108a.

STATEMENT OF THE CASE

1. Statutory and Regulatory Framework

A. Energy Policy Act of 2005

The Energy Policy Act of 2005 authorized the Secretary of the Interior to issue leases and approve

5. *See* 43 U.S.C. § 1331.

the construction of offshore wind facilities to generate electricity on the outer Continental Shelf.[6] The statute states, "[i]t is hereby declared to be the policy of the United States that . . . this 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."[7]

Section 388 of the Energy Policy Act, later codified as 43 U.S.C. § 1337(p)(4) of the Outer Continental Shelf Lands Act, provides:

> The Secretary shall ensure that any activity under this subsection is carried out in a manner that provides for—
>
> (A) safety;
>
> . . .
>
> (I) prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas;

6. Outer Continental Shelf means "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control or within the exclusive economic zone of the United States and adjacent to any territory of the United States; and [ ] does not include any area conveyed by Congress to a territorial government for administration[.]" *See* 43 U.S.C. § 1331(a).

7. 43 U.S.C. § 1332.

(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 sea lane, a potential site of a deepwater port, or navigation[.]

B. Applicable Regulations

The regulations to implement the requirements of 43 U.S.C. § 1337(p)(4) appear at 30 C.F.R. § 585.102 and state: "[The Bureau of Ocean Energy Management] will ensure that any activities authorized in this part are carried out in a manner that provides for and reaches a rational balance among the following goals to the extent they conflict or are otherwise in tension, none of which inherently outweighs or supplants any other[.]"[8]

The regulations deviate from the statute in two important respects: they omit the requirement that the agency "shall ensure" these requirements are provided for, and they omit the requirement that the agency consider other uses of the outer Continental Shelf "for a fishery, a sealane, a potential site of a deepwater port, or navigation[.]"[9]

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8. 30 C.F.R. § 585.102.

9. 43 U.S.C. § 1337(p)(4)(I), (J) (emphasis added).

C. Department of Interior Issues Conflicting Interpretations of the Act

In December 2020, the Interior Department published its interpretation of Section 1337(p)(4),[10] concluding that, under a plain reading of the provision, the Secretary has a duty to protect fisheries and vessel transit and that those uses constitute "reasonable uses" that the "Secretary has a duty to prevent interference with" under Section 1337(p)(4).[11]

In January 2021, a new president was sworn in, and three months later, the Department of Interior withdrew its December 2020 opinion memorandum and announced its new interpretation of the statute—which was just the opposite of the December 2020 interpretation.[12] This new interpretation swept away the statute's "shall ensure" requirement and stated that instead of a strict reading, the statute should be read to require only "discretionary balancing" of factors, including unreasonable interference with fishing, which did "not require the Secretary to ensure that the [requirements of 1337(p)(4)] are achieved to a particular degree,"[13] but "need only be

10. *See* U.S. Dep't. of the Interior, Off. of the Solicitor, M-37059, Mem. on Secretary's Duty to Prevent Interference with Reasonable Uses of the Exclusive Economic Zone, the High Seas, and the Territorial Seas in Accordance with Outer Continental Shelf Lands Act Subsection 8(p), Alternate Energy-related Uses on the Outer Continental Shelf (Dec. 14, 2020) (December 2020 Memorandum).

11. *Id.* at 6.

12. April 2021 Memorandum *supra* note 3 at 1-2.

13. *Id.* at 5.

'rational.'"[14] The regulations governing offshore wind projects are based on this opinion.

D. The President Announces His Bold, New Plan for Offshore Wind Development

In March 2021, the administration identified a series of "bold actions" to "catalyze offshore wind energy" development.[15] The White House stated its goal of deploying 30 gigawatts of offshore wind energy by 2030 and announced that it was taking "coordinated steps to support rapid offshore wind deployment."[16] To meet the 2030 target, the administration announced its plans to advance new lease sales and complete the review of "at least 16 Construction and Operations Plans (COPs) by 2025."[17] To accomplish this objective, the administration generously construed its statutory duties to enforce environmental protection requirements, notably Section 1337(p)(4).

Vineyard Wind was the first offshore wind energy project approved by the Interior Department. The First

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14. Adele Irwin, *Offshore Wind Energy or Domestic Seafood? How the Department of the Interior Can Facilitate Both Through Self-Binding Procedures*, 96 St. John. L.R. 517, 532 (2022) (quoting April 2021 Memorandum *supra* note 3 at 2).

15. Biden Administration, *Fact Sheet: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs* (Mar. 29, 2021), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-biden-administration-jumpstarts-offshore-wind-energy-projects-to-create-jobs/ (Fact Sheet).

16. *Id.*

17. *Id.*

Circuit's decision is the first appellate ruling interpreting Section 1337(p)(4) of OCSLA. As of today, approximately 35 offshore wind projects are in various stages of approval or construction along the Atlantic coast, all of which will be located in, along, or near vital commercial fishing lanes and fishing grounds.[18]

REASONS FOR GRANTING THE PETITION

This petition raises an issue of vital importance of precedential value regarding the proper interpretation of Section 1337(p)(4) that governs the industrial development of the nation's outer Continental Shelf. Under an April 2021 interpretation of this provision, which reads the term "shall ensure" out of the statute, the federal government rushed through the approval of leases covering millions of acres of the ocean to construct thousands of massive wind turbines into the Atlantic Ocean floor. Construction and operation of these turbines will forever change the character of the marine environment and the use of the high seas for trade, navigation, fishing—and public enjoyment of all kinds.

In 2005, Congress authorized the Secretary of the Interior to allow the construction of offshore wind projects on the outer Continental Shelf.[19] Exercising that statutory authority, the Secretary has leased 3,261,124 acres of

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18. Bureau of Ocean Energy Management, Renewable Leases and Planning Areas (Mar. 4, 2025), https://boem.maps.arcgis.com/apps/instant/sidebar/index.html?appid=e2079773d85b43059abf15a16bce7aa7&locale=en.

19. Energy Policy Act of 2005, PL 109–58, August 8, 2005, 119 Stat. 594.

the Continental Shelf[20] and approved the construction of thousands of massive wind turbine generators, thousands of miles of undersea high-voltage power lines connecting them to onshore power stations, and hundreds of square miles of boulders and concrete mattresses covering the seabed to support and protect these structures on the leased areas. Many other offshore wind generation projects are at various stages of planning and approval. This is the first case interpreting the limits of the Secretary's discretion under this statute. The Vineyard Wind Project, now under construction in a 75,000-acre area offshore Massachusetts, is the first offshore wind facility approved by the Secretary and the first to reach the appellate court.

The offshore wind turbine projects threaten the survival of our nation's commercial fishing industry, including the businesses and livelihoods of Petitioner's, the Responsible Offshore Development Alliance (the Alliance), members. These turbine generators, surrounded by thousands of tons of rock and concrete, connected to onshore electrical substations by thousands of miles of high-voltage electrical cables, are increasingly blocking access to essential fishing grounds, excluding commercial fishermen and their vessels from their historic fishing areas by making it inaccessible to fish in those areas with traditional methodology such as nets or dredges, creating dangerous navigation hazards and obstacles, and

20. Bureau of Ocean Energy Management, *Lease and Grant Information*, https://www.boem.gov/renewable-energy/lease-and-grant-information (last accessed Feb. 28, 2025) (The leasing history and acreage for each active offshore wind project are located on the Bureau of Ocean Energy Management's websites in this list.).

threatening the livelihood of commercial fishermen from Maine to North Carolina.

Fishing has a rich history in coastal communities across the United States, providing jobs, significant economic value, and food security to our nation. In recent years, the commercial fishing industry generated $183 billion in sales, $47.2 billion in income and $74 billion in value-added impacts.[21] The industry supports 1.6 million jobs, including almost 214,000 jobs in Massachusetts alone.[22]

1. Review by this Court Is Necessary to Determine Whether "Shall Ensure" in Section 1337(p)(4) Means What Congress Said It Means and Whether the Secretary Can Read That Provision Out of the Statute

The extent of the Secretary's statutory authority to approve the Vineyard Wind Project and other projects in the approval pipeline rests squarely on the meaning of Section 1337(p)(4) of the Outer Continental Shelf Lands Act, which sets out a dozen requirements that the Secretary "shall ensure" are met for any activity approved under the statute.[23] Among those requirements are "[s]afety," "prevention of interference with reasonable uses (as determined by the Secretary) of the

21. NOAA, *Fisheries Economics of the United States 2022: Economics and Sociocultural Status and Trends Series* (Nov. 2024) at 5, https://media.wbur.org/wp/2025/01/FEUS-2022-SPO248B-compressed.pdf.

22. *Id.* at 5.

23. 43 U.S.C. § 1334(p)(4).

exclusive economic zone, the high seas, and the territorial seas," and

> 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[.][24]

The Department of Interior has published inconsistent and diametrically opposite regulations and opinions interpreting what this provision requires of the Secretary, illustrated in the way the Interior Department has, in the past few years, exalted offshore wind facility construction over the commercial fishing industry. In its initial regulations promulgated after Section 1337(p)(4) was enacted, the Interior Department included a provision that required a lessee to demonstrate in its Construction and Operations Plan that the proposed activities will not "unreasonably interfere with other uses of the [outer Continental Shelf]."[25]

In September 2020, an attorney in the Minerals Management Division of the Solicitor's Office authored an opinion for the Bureau of Ocean Energy Management (BOEM), stating that "prevention of interference with reasonable uses of the exclusive economic zone, the high seas, and the territorial seas," meant that "BOEM

24. 43 U.S.C. § 1337(p)(4)(A), (I), (J).

25. 30 C.F.R. § 585.621(d).

should prevent interference with the legal right to fish or navigate, rather than prevent physical impediments to fishing and vessel transit."[26]

In December 2020, at the Secretary's request, the Interior Solicitor reviewed that opinion, and authored a new, formal Solicitor's Opinion stating that "the phrase requires the Secretary to act to prevent interference with reasonable uses in a way that errs on the side of less interference rather than more interference. This means preventing all interference, if the proposed activity would lead to unreasonable interference."[27]

Four months later, following the change in administration, the new Interior Department Solicitor made an abrupt about-face and withdrew the December 2020 opinion.[28] In an April 2021 formal opinion, the new Solicitor concluded that the statute

> require[s] only that the Secretary strike a rational balance between Congress's enumerated goals, i.e., a variety of uses. In making this determination, the Secretary retains wide discretion to weigh those goals as an application of her technical expertise and policy judgment. . . . I hereby withdraw the Opinion and advise the Secretary that, for purposes of subsection 8(p)(4) of OCSLA, her actions must strike a rational balance between the subsection's enumerated goals.[29]

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26. December 2020 Memorandum *supra* note 10 at 1.

27. *Id.* at 2.

28. April 2021 Memorandum *supra* note 3.

29. *Id.* at 2.

Armed with this new interpretation of the statute, the Interior Department promulgated a new regulation that interpreted the statutory requirement as virtually meaningless, giving the Secretary almost unlimited discretion to approve any offshore wind turbine generator project: "BOEM will ensure that any activities authorized in this part are carried out in a manner that provides for and reaches a rational balance among the following goals to the extent they conflict or are otherwise in tension, none of which inherently outweighs or supplants any other."[30]

The district court rejected Petitioner's challenge to this interpretation, adopting the most recent Solicitor's opinion to rule that OCSLA gives the Secretary "discretion" to see that the criteria of Section 1337(p)(4) are "appropriately balanced."[31] Ignoring the plain meaning of the language that "[t]he Secretary shall ensure," the Secretary concluded that the twelve requirements were merely goals because "Congress has recognized the importance of leasing on the Outer Continental Shelf in support of energy projects."[32] The First Circuit affirmed the district court's interpretation, adding that the Secretary can "'balance' the statutory mandate to develop energy projects on the Outer Continental Shelf with the twelve statutory criteria for which it must provide."[33]

This Court has consistently held that the phrase "shall [e]nsure"[34] means what it says, and deprives an agency

30. 30 C.F.R. § 585.102(a).

31. Pet. App. 100a.

32. Pet. App. 105a.

33. Pet. App. 45a.

34. Many federal statutes state "shall insure" instead of "shall ensure." Courts and Congress have used the two words

or its officials of discretion or flexibility.[35] In *National Association of Homebuilders*,[36] this Court interpreted the Endangered Species Act, which states, "[e]ach Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize endangered or threatened species or their habitats"[37] as imperative, mandatory, and non-discretionary, stating:

> The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive"[]; Black's Law Dictionary 1375 (6th ed. 1990) ("As used in statutes . . . this word is generally imperative or mandatory").[38]

The First Circuit has also interpreted Congress's selection of the word "ensure" as a "crystal clear" sign that Congress was prescribing necessary processes and setting forth directives that must be guaranteed.[39] And

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interchangeably in opinions and statutes. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 667 (2007).

35. *See National Ass'n of Home Builders*, 551 U.S. 644.

36. *Id.*

37. 16 U.S.C. § 1536(a)(2).

38. *National Ass'n of Home Builders*, 551 U.S. at 667 (quoting *Ass'n of Civilian Technicians, Montana Air Chapter No. 29 v. Fed. Lab. Rels. Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994)).

39. *See United States v. Sklar*, 920 F.2d 107, 115 (1st Cir. 1990) (quoting 28 U.S.C. § 994(k)) (The use of "shall ensure" to prohibit using rehabilitation as a reason for departure in sentencing was a "crystal clear" sign "that Congress largely rejected rehabilitation as a direct goal of criminal sentencing under the guidelines.");

the D.C. Circuit has rejected the argument that the use of ensure "reflects Congress's intentional effort to confer flexibility" on an agency,[40] holding that to "'ensure' is 'to make sure, certain, or safe.'"[41]

If Congress intended to give the Secretary discretion or flexibility to balance the twelve requirements prescribed in Section 1337(p)(4) with renewable energy policies, as the Interior Department argues and the First Circuit erroneously affirmed, Congress would have written such a balancing test into OCSLA. Instead, Congress directed the Secretary—giving the Secretary no discretion or flexibility—to ensure that authorized activities provide for, among others, safety, prevention of interference with commercial fishing and navigation on the outer Continental Shelf, and consideration of the use of the sea for fishing and navigation.

With sharply conflicting Solicitor's opinions, regulations, and case law, the Secretary cannot be expected to administer this massive offshore wind construction and energy program as Congress intended without review and guidance by this Court.

Dubois v. U.S. Dep't of Agric., 102 F.3d 1273 (1st Cir. 1996) NEPA's ensure requirement signaled that Congress was prescribing a "necessary process" for environmental review.).

40. *Heating, Air Conditioning & Refrigeration Distributors Int'l v. Env't Prot. Agency*, 71 F.4th 59, 66–67 (D.C. Cir. 2023).

41. *Id.* (internal citations omitted).

2. This Issue Is Also Vitally Important to the Fishing Industry and Others Who Use and Enjoy the Outer Continental Shelf

The Vineyard Wind Project is the first approved of approximately 35 offshore wind facilities (each facility will have, on average, 95 turbines) in various stages of government approval or under construction. Now well into construction, Vineyard Wind illustrates the devastating impact these projects will have on the nation's commercial fishing industry—whose continued viability, according to the First Circuit, is a mere nonbinding "goal" that gives way in the face of the importance of the government's offshore wind program.[42]

Unfortunately, the Vineyard Wind lease area overlaps with one of the East Coast's most productive fishing zones, crucial for fluke, whiting, longfin squid, and more. Members of Petitioner, the Alliance, a coalition of over 150 vessels and fishing companies, have historically relied on this area for up to 30% of their annual revenue. The construction of turbines, underwater cables, and other obstacles has rendered fishing in this area nearly impossible and perilous. The Government concedes that the entire 75,614-acre area will likely be abandoned by commercial fisheries due to the damage to fishing resources and the navigational and safety hazards, with an anticipated economic loss of $14 million.[43]

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42. Pet. App. 6a ("To further these goals, OCSLA authorizes . . .); Pet. App. 98a ("[T]welve goals enumerated under § 1337(p)(4).").

43. Bureau of Ocean Energy Management, *Vineyard Wind 1 Record of Decision* (May 10, 2021) at 39, https://www.boem.gov/

The obstacles presented by the turbines and cables endanger the safety of the fishermen and disrupt traditional fishing practices, including trawling operations that rely on dragging equipment behind vessels to capture fish. Those who can still access parts of the area are experiencing a dramatic decline in their catch, with fish populations dwindling due to the altered marine environment.

The First Circuit, which approved this standardless interpretation of Section 1337(p)(4), had before it the administrative record, which details the catastrophic effects of this ruling on commercial fishing and the constraints imposed by location-specific, species-specific, and sometimes gear or vessel specific fishing permits. These permits restrict fishermen to designated areas, meaning that even if they wished to relocate to more productive waters, they are legally barred from doing so without obtaining a separate and expensive permit. Under this regulatory limitation, the challenges faced by the fishing industry are exacerbated, leaving many fishermen without viable alternatives to sustain their operations.

The Vineyard Wind Record of Decision and Environmental Impact Statement show that the Project will destroy local fisheries—all of which the Secretary "balanced away" as an exercise of her purportedly broad discretion under the agency's interpretation of Section 1337:

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sites/default/files/documents/renewable-energy/state-activities/Final-Record-of-Decision-Vineyard-Wind-1.pdf (emphasis added) (Record of Decision).

- "The extent of impact to *commercial fisheries* and loss of economic income is estimated to total $14 million over the expected 30-year lifetime of the Project."[44]

- "Disruption may result in conflict over other fishing grounds, increased operating costs for vessels, and lower revenue (e.g., if the substituted fishing area is less productive or supports less valuable species)."[45]

- The Project "would have moderate to major impacts on *commercial fisheries*."[46]

- "[O]ffshore wind structures and hard coverage for cables would have long-term impacts on *commercial fishing* operations and support businesses such as seafood processing."[47]

- [T]he Project would include "permanent reduction in catch or loss of access to fishing areas due to the presence of construction activities or changes in fish and shellfish populations that are the basis of fishing activities . . . [including] abandonment of

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44. *Id.*

45. Bureau of Ocean Energy Management, *Vineyard Wind 1 Final Environmental Impact Statement* (Mar. 2021) at 3-126, https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Vineyard-Wind-1-FEIS-Volume-1.pdf (Final Environmental Impact Statement); *see* Final Environmental Impact Statement at ES-13 (Major impacts to commercial fisheries and for-hire recreational fishing when considering planned actions and project impacts).

46. *Id.* at 3-226.

47. *Id.* at 3-129.

> fishing locations due to difficulty in maneuvering fishing vessels, fear of allisions with Proposed Action components (e.g., WTGs), increased risk of collisions with construction or lay vessels, and/or fear of damage or loss of deployed gear."[48]

The Record of Decision also states that "due to the placement of the turbines, it is likely that the entire 75,614-acre area will be abandoned by commercial fisheries due to difficulties with navigation."[49] This destruction of commercial fisheries, standing alone, defies OCSLA's requirement that the Secretary "shall ensure" "prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas" and consideration of "any other use of the sea or seabed, including use for a fishery[.]"[50]

Multiply the physical obstacles and environmental destruction of Vineyard Wind by the approximately 35 other projects under construction or awaiting approval, along with the devastating impacts on coastal communities, shipping, navigation, aviation, and tribal interests and the Department of Interior's emphasis on offshore development over the interests it must statutorily protect and preserve puts the national importance of this issue in sharp view. Without this Court's guidance, the offshore wind program will remain adrift, causing needless destruction to the interests Congress required the Interior Department to "ensure" were provided for and protected.

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48. *Id.* at 3-211.

49. Record of Decision *supra* note 43 at 39.

50. 43 U.S.C. § 1337(p)(4).

3. The Interior Department Has Undertaken a Massive, Accelerated Program Approving the Construction of Thousands of Offshore Wind Turbines on the Outer Continental Shelf

In January 2021, President Biden issued Executive Order 14008 outlining an aggressive program to combat climate change by developing a clean energy supply.[51]

In March 2021, the administration identified a series of "bold actions" to "catalyze offshore wind energy" development.[52] The White House stated its goal of deploying 30 gigawatts of offshore wind energy by 2030 and announced that it was taking "coordinated steps to support rapid offshore wind deployment."[53] To meet the 2030 target, the administration announced that it planned to advance new lease sales and review "at least 16 Construction and Operations Plans (COPs) by 2025."[54]

Vineyard Wind 1 LLC, owned by Avangrid and Copenhagen Infrastructure Partners through Vineyard Wind LLC, marks the beginning of the government's "coordinated steps" to install approximately 35 projects along the Atlantic Seaboard. This offshore wind program will cover millions of acres of federal submerged lands with thousands of turbines, thousands of miles of underwater cables connecting the projects to the electric grid, and

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51. *Id.*

52. Fact Sheet *supra* note 15.

53. *Id.*

54. *Id.*

thousands of acres of underwater construction, including massive boulders and concrete mattresses.[55]

On July 15, 2021, the Secretary of the Interior, acting through BOEM, approved Vineyard Wind 1 LLC's Construction and Operations Plan for an offshore renewable energy project off the coast of Massachusetts, authorizing the construction of up to 84 turbine towers covering 65,296 acres of seabed.[56] BOEM also granted Vineyard Wind an easement to construct 23.3 miles of high-voltage electrical cable to carry power from the turbines to an electrical substation to be constructed in Barnstable, Massachusetts.[57]

As noted, Vineyard Wind is only the first of more than 30 enormous offshore wind energy facilities or projects that the government intends to approve under its plan to produce 30,000 megawatts of wind energy by 2030, covering millions of acres of ocean. Each of the thousands of turbines will stand at hundreds of feet above

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55. Fact Sheet *supra* note 15; *see generally* Dept. of Energy, *Advancing Offshore Wind Energy in the United States* (Mar. 29, 2023), https://www.energy.gov/sites/default/files/2023-03/advancing-offshore-wind-energy-full-report.pdf.

56. Bureau of Ocean Energy Management, Construction and Operations Plan Approval Letter (July 15, 2021) at 1-3, https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/VW1-COP-Project-Easement-Approval-Letter_0.pdf.

57. Record of Decision *supra* note 43 at 30; *see also* United States Army Corps of Engineers, *Record of Decision Supplement* (Aug. 4, 2021) at 2, https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/USACE-ROD-Supplement-2021.pdf.

the ocean surface, require up to 2,500 square meters of scour protection at each turbine foundation in the ocean's floor, and require additional materials for cable protection, electrical substations, and more.[58]

As of today, Vineyard Wind LLC has constructed, or at least partially constructed, 47 of the 62 approved wind turbines (each turbine stands 853 feet above the water and is almost three times the size of the Statue of Liberty), spaced one nautical mile apart. The 47 turbines have already begun to adversely impact commercial fishermen, nearby communities, and the ocean environment.

On July 13, 2024, a large portion of a 350-foot, 55-ton fiberglass, Polyvinyl chloride, and polyethylene terephthalate blade broke off a newly constructed turbine in the Vineyard Wind Project, scattering thousands of shards across the ocean's surface and ocean floor. Over the next few days, additional blade pieces also fell into the ocean, adding to the mayhem. The Coast Guard sealed off the area from ship transit, and the company attempted to remove shards of the shattered blade from the ocean. These efforts were largely unsuccessful, and tons of debris (thousands of pounds) washed ashore not only in Nantucket—closing its beaches—but were also carried many miles away to wash up on Martha's Vineyard, Cape Cod, the beaches of Rhode Island, and even Montauk. The government ordered Vineyard Wind to suspend work on the project pending its investigation.[59] In December 2024,

58. Final Environmental Impact Statement *supra* note 45 at ES-4–ES-5.

59. Bureau of Safety and Environmental Enforcement, *BSEE Issues New Order to Vineyard Wind in Continuing*

the Bureau of Safety and Environmental Enforcement issued a suspension order, suspending all Vineyard Wind project operations.[60] On January 17, 2025, BOEM approved an addendum to the Construction and Operations Plan, requiring the removal of blades from 22 turbines.[61]

Investigation (Dec. 19, 2024), https://www.bsee.gov/newsroom/latest-news/statements-and-releases/press-releases/bsee-issues-new-order-to-vineyard-wind; Bureau of Safety and Environmental Enforcement, Suspension Order for the Vineyard Wind 1 Project (July 15, 2024), https://www.bsee.gov/sites/bsee.gov/files/2024-09/Order%20VW%20AW-38%20Blade%20Failure%2015July2024.pdf.

60. *Id.*

61. *See* Bureau of Ocean Energy Management, *COP Addendum Approval* (Jan. 17, 2025), https://www.boem.gov/sites/default/files/documents/renewable-energy/VW1-Blade-Removal-COP-Revision-Approval-Letter.pdf; *see also* Vineyard Wind 1, LLC, *Construction and Operations Plan Addendum* (Dec. 16, 2024), https://www.boem.gov/sites/default/files/documents/renewable-energy/VW1%20COP%20Revision-Blade%20Removal%20Updated.pdf.

CONCLUSION

Petitioner asks this Court to grant review of this issue of vital importance to the fishing industry and to provide guidance to the Secretary regarding the correct statutory interpretation of "shall ensure" in Section 1337(p)(4) so that future ocean energy projects are reviewed according to the criteria provided by Congress.

Respectfully submitted,

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

Counsel for Petitioner

Dated: March 5, 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 FISHERIES SERVICE; CATHERINE MARZIN, IN HER OFFICIAL CAPACITY AS THE DEPUTY

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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 MARINE FISHERIES SERVICE; RICHARD W. SPINRAD, IN HIS OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION;

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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 of Martha's Vineyard and Nantucket. The plaintiffs are entities involved in or associated with the commercial fishing industry. The defendants are federal departments,

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

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

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

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).

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 — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, FILED OCTOBER 12, 2023

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

1:22-cv-11091-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.

1:22-cv-11172-IT

RESPONSIBLE OFFSHORE DEVELOPMENT ALLIANCE,

Plaintiff,

v.

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

Defendants,

and

VINEYARD WIND 1, LLC,

Intervenor-Defendant.

October 12, 2023

Appendix B

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]

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

Appendix B

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.

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 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

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.

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.

Appendix B

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]

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 be completed within one year of issuance of the IHA (1:22-

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.

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]

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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.

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 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

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.

Plaintiffs have standing to bring their claims under each 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

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 mobile gear through the WDA.") and Final EIS, Vol. 1 BOEM_0068434 at -68718 (discussing impacts in the WDA

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.

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 the Lease Area, the Aripotch and Williams Sr. affidavits detailed

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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 Pls.' Statement of Undisp. Material Facts ¶ 6, Doc. No. 88 (citing Final EIS, Vol. 1 for proposition that, during

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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.

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 B

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 B

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.

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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.

C. Zone of Interest

1. Relevant Law

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

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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.

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.

"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." 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. No. 106 (citing U.S. Dep't of Interior Press Release). In the

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.

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 2010 and 2011 press releases-is not a reviewable agency

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.

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 published a notice concerning ongoing efforts to develop

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.

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 that Plaintiffs' claims are deficient in numerous respects

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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.

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:

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

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.

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 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 C — CONSTITUTIONAL PROVISION INVOLVED — 43 U.S.C.A. § 1332

43 U.S.C.A. § 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 subchapter;

(2) this 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;

(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;

(4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments –

(A) such States and their affected local governments may require assistance in protecting their coastal zones and other affected areas from any temporary or permanent adverse effects of such impacts;

(B) the distribution of a portion of the receipts from the leasing of mineral resources of the outer Continental Shelf adjacent to State lands, as provided under section 1337(g) of this title, will provide affected coastal States and localities with funds which may be used for the mitigation of adverse economic and environmental effects related to the development of such resources; and

(C) such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf.[1]

(5) the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related

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development and activity should be considered and recognized; and

(6) operations in the outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.

APPENDIX D — CONSTITUTIONAL PROVISION INVOLVED – 43 U.S.C.A. § 1337

43 U.S.C.A. § 1337. Leases, easements, and rights-of-way on the outer Continental Shelf

(a) Oil and gas leases; award to highest responsible qualified bidder; method of bidding; royalty relief; Congressional consideration of bidding system; notice

(1) The Secretary is authorized to grant to the highest responsible qualified bidder or bidders by competitive bidding, under regulations promulgated in advance, any oil and gas lease on submerged lands of the outer Continental Shelf which are not covered by leases meeting the requirements of subsection (a) of section 1335 of this title. Such regulations may provide for the deposit of cash bids in an interest-bearing account until the Secretary announces his decision on whether to accept the bids, with the interest earned thereon to be paid to the Treasury as to bids that are accepted and to the unsuccessful bidders as to bids that are rejected. The bidding shall be by sealed bid and, at the discretion of the Secretary, on the basis of –

> **(A)** cash bonus bid with a royalty at not less than 16 2/3 percent, but not more than 18 ¾ percent, during the 10-year period beginning on August 16, 2022, and not less than 16 2/3 percent thereafter, fixed by the Secretary in amount or value of the production saved, removed, or sold;
>
> **(B)** variable royalty bid based on a per centum in amount or value of the production saved, removed, or sold, with either a fixed work commitment based on

dollar amount for exploration or a fixed cash bonus as determined by the Secretary, or both;

(C) cash bonus bid, or work commitment bid based on a dollar amount for exploration with a fixed cash bonus, and a diminishing or sliding royalty based on such formulae as the Secretary shall determine as equitable to encourage continued production from the lease area as resources diminish, but not less than 16 2/3 percent, but not more than 18 3/4 percent, during the 10-year period beginning on August 16, 2022, and not less than 16 2/3 percent thereafter, at the beginning of the lease period in amount or value of the production saved, removed, or sold;

(D) cash bonus bid with a fixed share of the net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;

(E) fixed cash bonus with the net profit share reserved as the bid variable;

(F) cash bonus bid with a royalty at not less than 16 2/3 percent, but not more than 18 ¾ percent, during the 10-year period beginning on August 16, 2022, and not less than 16 2/3 percent thereafter, fixed by the Secretary in amount or value of the production saved, removed, or sold and a fixed per centum share of net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;

(G) work commitment bid based on a dollar amount for exploration with a fixed cash bonus and a fixed royalty in amount or value of the production saved, removed, or sold;

(H) cash bonus bid with royalty at not less than 16 2/3 percent, but not more than 18 ¾ percent, during the 10-year period beginning on August 16, 2022, and not less than 16 2/3 percent thereafter, fixed by the Secretary in amount or value of production saved, removed, or sold, and with suspension of royalties for a period, volume, or value of production determined by the Secretary, which suspensions may vary based on the price of production from the lease; or

(I) subject to the requirements of paragraph (4) of this subsection, any modification of bidding systems authorized in subparagraphs (A) through (G), or any other systems of bid variables, terms, and conditions which the Secretary determines to be useful to accomplish the purposes and policies of this subchapter, except that no such bidding system or modification shall have more than one bid variable.

(2) The Secretary may, in his discretion, defer any part of the payment of the cash bonus, as authorized in paragraph (1) of this subsection, according to a schedule announced at the time of the announcement of the lease sale, but such payment shall be made in total no later than five years after the date of the lease sale.

(3)(A) The Secretary may, in order to promote increased production on the lease area, through direct, secondary, or

tertiary recovery means, reduce or eliminate any royalty or net profit share set forth in the lease for such area.

(B) In the Western and Central Planning Areas of the Gulf of Mexico and the portion of the Eastern Planning Area of the Gulf of Mexico encompassing whole lease blocks lying west of 87 degrees, 30 minutes West longitude and in the Planning Areas offshore Alaska, the Secretary may, in order to –

> **(i)** promote development or increased production on producing or non-producing leases; or
>
> **(ii)** encourage production of marginal resources on producing or non-producing leases;
>
> > through primary, secondary, or tertiary recovery means, reduce or eliminate any royalty or net profit share set forth in the lease(s). With the lessee's consent, the Secretary may make other modifications to the royalty or net profit share terms of the lease in order to achieve these purposes.

(C)(i) Notwithstanding the provisions of this subchapter other than this subparagraph, with respect to any lease or unit in existence on November 28, 1995, meeting the requirements of this subparagraph, no royalty payments shall be due on new production, as defined in clause (iv) of this subparagraph, from any lease or unit located in water depths of 200 meters or greater in the Western and Central Planning Areas of the Gulf of Mexico, including

that portion of the Eastern Planning Area of the Gulf of Mexico encompassing whole lease blocks lying west of 87 degrees, 30 minutes West longitude, until such volume of production as determined pursuant to clause (ii) has been produced by the lessee.

(ii) Upon submission of a complete application by the lessee, the Secretary shall determine within 180 days of such application whether new production from such lease or unit would be economic in the absence of the relief from the requirement to pay royalties provided for by clause (i) of this subparagraph. In making such determination, the Secretary shall consider the increased technological and financial risk of deep water development and all costs associated with exploring, developing, and producing from the lease. The lessee shall provide information required for a complete application to the Secretary prior to such determination. The Secretary shall clearly define the information required for a complete application under this section. Such application may be made on the basis of an individual lease or unit. If the Secretary determines that such new production would be economic in the absence of the relief from the requirement to pay royalties provided for by clause (i) of this subparagraph, the provisions of clause (i) shall not apply to such production. If the Secretary determines that such new production would not be economic in the absence of the relief from the requirement to pay royalties provided for by clause (i), the Secretary must determine the volume of production from the lease or unit on which no royalties would be due in order to make such new production economically viable; except that for new production as defined in

clause (iv)(I), in no case will that volume be less than 17.5 million barrels of oil equivalent in water depths of 200 to 400 meters, 52.5 million barrels of oil equivalent in 400-800 meters of water, and 87.5 million barrels of oil equivalent in water depths greater than 800 meters. Redetermination of the applicability of clause (i) shall be undertaken by the Secretary when requested by the lessee prior to the commencement of the new production and upon significant change in the factors upon which the original determination was made. The Secretary shall make such redetermination within 120 days of submission of a complete application. The Secretary may extend the time period for making any determination or redetermination under this clause for 30 days, or longer if agreed to by the applicant, if circumstances so warrant. The lessee shall be notified in writing of any determination or redetermination and the reasons for and assumptions used for such determination. Any determination or redetermination under this clause shall be a final agency action. The Secretary's determination or redetermination shall be judicially reviewable under section 702 of Title 5, only for actions filed within 30 days of the Secretary's determination or redetermination.

(iii) In the event that the Secretary fails to make the determination or redetermination called for in clause (ii) upon application by the lessee within the time period, together with any extension thereof, provided for by clause (ii), no royalty payments shall be due on new production as follows:

> **(I)** For new production, as defined in clause (iv)(I) of this subparagraph, no royalty shall be due on such

production according to the schedule of minimum volumes specified in clause (ii) of this subparagraph.

(II) For new production, as defined in clause (iv) (II) of this subparagraph, no royalty shall be due on such production for one year following the start of such production.

(iv) For purposes of this subparagraph, the term "new production" is –

(I) any production from a lease from which no royalties are due on production, other than test production, prior to November 28, 1995; or

(II) any production resulting from lease development activities pursuant to a Development Operations Coordination Document, or supplement thereto that would expand production significantly beyond the level anticipated in the Development Operations Coordination Document, approved by the Secretary after November 28, 1995.

(v) During the production of volumes determined pursuant to clauses[1] (ii) or (iii) of this subparagraph, in any year during which the arithmetic average of the closing prices on the New York Mercantile Exchange for light sweet crude oil exceeds $28.00 per barrel, any production of oil will be subject to royalties at the lease stipulated royalty rate. Any production subject to this

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clause shall be counted toward the production volume determined pursuant to clause (ii) or (iii). Estimated royalty payments will be made if such average of the closing prices for the previous year exceeds $28.00. After the end of the calendar year, when the new average price can be calculated, lessees will pay any royalties due, with interest but without penalty, or can apply for a refund, with interest, of any overpayment.

(vi) During the production of volumes determined pursuant to clause (ii) or (iii) of this subparagraph, in any year during which the arithmetic average of the closing prices on the New York Mercantile Exchange for natural gas exceeds $3.50 per million British thermal units, any production of natural gas will be subject to royalties at the lease stipulated royalty rate. Any production subject to this clause shall be counted toward the production volume determined pursuant to clauses[1] (ii) or (iii). Estimated royalty payments will be made if such average of the closing prices for the previous year exceeds $3.50. After the end of the calendar year, when the new average price can be calculated, lessees will pay any royalties due, with interest but without penalty, or can apply for a refund, with interest, of any overpayment.

(vii) The prices referred to in clauses (v) and (vi) of this subparagraph shall be changed during any calendar year after 1994 by the percentage, if any, by which the implicit price deflator for the gross domestic product changed during the preceding calendar year.

(4)(A) The Secretary of Energy shall submit any bidding system authorized in subparagraph (H) of paragraph (1) to

the Senate and House of Representatives. The Secretary may institute such bidding system unless either the Senate or the House of Representatives passes a resolution of disapproval within thirty days after receipt of the bidding system.

(B) Subparagraphs (C) through (J) of this paragraph are enacted by Congress –

> **(i)** as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but they are applicable only with respect to the procedures to be followed in that House in the case of resolutions described by this paragraph, and they supersede other rules only to the extent that they are inconsistent therewith; and
>
> **(ii)** with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

(C) A resolution disapproving a bidding system submitted pursuant to this paragraph shall immediately be referred to a committee (and all resolutions with respect to the same request shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

(D) If the committee to which has been referred any resolution disapproving the bidding system of the Secretary has not reported the resolution at the end of ten calendar days after its referral, it shall be in order to move either to discharge the committee from further consideration of the resolution or to discharge the committee from further consideration of any other resolution with respect to the same bidding system which has been referred to the committee.

(E) A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same recommendation), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(F) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same bidding system.

(G) When the committee has reported, or has been discharged from further consideration of, a resolution as provided in this paragraph, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall

be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(H) Debate on the resolution is limited to not more than two hours, to be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the resolution is not in order, and it is not in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

(I) Motions to postpone, made with respect to the discharge from the committee, or the consideration of a resolution with respect to a bidding system, and motions to proceed to the consideration of other business, shall be decided without debate.

(J) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to a bidding system shall be decided without debate.

(5)(A) During the five-year period commencing on September 18, 1978, the Secretary may, in order to obtain statistical information to determine which bidding alternatives will best accomplish the purposes and policies of this subchapter, require, as to no more than 10 per centum of the tracts offered each year, each bidder to submit bids for any area of the outer Continental Shelf

in accordance with more than one of the bidding systems set forth in paragraph (1) of this subsection. For such statistical purposes, leases may be awarded using a bidding alternative selected at random for the acquisition of valid statistical data if such bidding alternative is otherwise consistent with the provisions of this subchapter.

(B) The bidding systems authorized by paragraph (1) of this subsection, other than the system authorized by subparagraph (A), shall be applied to not less than 20 per centum and not more than 60 per centum of the total area offered for leasing each year during the five-year period beginning on September 18, 1978, unless the Secretary determines that the requirements set forth in this subparagraph are inconsistent with the purposes and policies of this subchapter.

(6) At least ninety days prior to notice of any lease sale under subparagraph (D), (E), (F), or, if appropriate, (H) of paragraph (1), the Secretary shall by regulation establish rules to govern the calculation of net profits. In the event of any dispute between the United States and a lessee concerning the calculation of the net profits under the regulation issued pursuant to this paragraph, the burden of proof shall be on the lessee.

(7) After an oil and gas lease is granted pursuant to any of the work commitment options of paragraph (1) of this subsection –

> **(A)** the lessee, at its option, shall deliver to the Secretary upon issuance of the lease either (i) a cash

deposit for the full amount of the exploration work commitment, or (ii) a performance bond in form and substance and with a surety satisfactory to the Secretary, in the principal amount of such exploration work commitment assuring the Secretary that such commitment shall be faithfully discharged in accordance with this section, regulations, and the lease; and for purposes of this subparagraph, the principal amount of such cash deposit or bond may, in accordance with regulations, be periodically reduced upon proof, satisfactory to the Secretary, that a portion of the exploration work commitment has been satisfied;

(B) 50 per centum of all exploration expenditures on, or directly related to, the lease, including, but not limited to (i) geological investigations and related activities, (ii) geophysical investigations including seismic, geomagnetic, and gravity surveys, data processing and interpretation, and (iii) exploratory drilling, core drilling, redrilling, and well completion or abandonment, including the drilling of wells sufficient to determine the size and a real extent of any newly discovered field, and including the cost of mobilization and demobilization of drilling equipment, shall be included in satisfaction of the commitment, except that the lessee's general overhead cost shall not be so included against the work commitment, but its cost (including employee benefits) of employees directly assigned to such exploration work shall be so included; and

(C) if at the end of the primary term of the lease, including any extension thereof, the full dollar amount of the exploration work commitment has not been satisfied, the balance shall then be paid in cash to the Secretary.

(8) Not later than thirty days before any lease sale, the Secretary shall submit to the Congress and publish in the Federal Register a notice –

(A) identifying any bidding system which will be utilized for such lease sale and the reasons for the utilization of such bidding system; and

(B) designating the lease tracts selected which are to be offered in such sale under the bidding system authorized by subparagraph (A) of paragraph (1) and the lease tracts selected which are to be offered under any one or more of the bidding systems authorized by subparagraphs (B) through (H) of paragraph (1), and the reasons such lease tracts are to be offered under a particular bidding system.

(b) Terms and provisions of oil and gas leases

An oil and gas lease issued pursuant to this section shall –

(1) be for a tract consisting of a compact area not exceeding five thousand seven hundred and sixty acres, as the Secretary may determine, unless the Secretary finds that a larger area is necessary to comprise a reasonable economic production unit;

(2) be for an initial period of –

(A) five years; or

(B) not to exceed ten years where the Secretary finds that such longer period is necessary to encourage exploration and development in areas because of unusually deep water or other unusually adverse conditions, and as long after such initial period as oil or gas is produced from the area in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon;

(3) require the payment of amount or value as determined by one of the bidding systems set forth in subsection (a) of this section;

(4) entitle the lessee to explore, develop, and produce the oil and gas contained within the lease area, conditioned upon due diligence requirements and the approval of the development and production plan required by this subchapter;

(5) provide for suspension or cancellation of the lease during the initial lease term or thereafter pursuant to section 1334 of this title;

(6) contain such rental and other provisions as the Secretary may prescribe at the time of offering the area for lease; and

(7) provide a requirement that the lessee offer 20 per centum of the crude oil, condensate, and natural gas liquids produced on such lease, at the market value and point of delivery applicable to Federal royalty oil, to small or independent refiners as defined in the Emergency Petroleum Allocation Act of 1973.

(c) Antitrust review of lease sales

(1) Following each notice of a proposed lease sale and before the acceptance of bids and the issuance of leases based on such bids, the Secretary shall allow the Attorney General, in consultation with the Federal Trade Commission, thirty days to review the results of such lease sale, except that the Attorney General, after consultation with the Federal Trade Commission, may agree to a shorter review period.

(2) The Attorney General may, in consultation with the Federal Trade Commission, conduct such antitrust review on the likely effects the issuance of such leases would have on competition as the Attorney General, after consultation with the Federal Trade Commission, deems appropriate and shall advise the Secretary with respect to such review. The Secretary shall provide such information as the Attorney General, after consultation with the Federal Trade Commission, may require in order to conduct any antitrust review pursuant to this paragraph and to make recommendations pursuant to paragraph (3) of this subsection.

(3) The Attorney General, after consultation with the Federal Trade Commission, may make such recommendations to the Secretary, including the nonacceptance of any bid, as may be appropriate to prevent any situation inconsistent with the antitrust laws. If the Secretary determines, or if the Attorney General advises the Secretary, after consultation with the Federal Trade Commission and prior to the issuance of any lease, that such lease may create or maintain a situation inconsistent with the antitrust laws, the Secretary may –

> **(A)** refuse (i) to accept an otherwise qualified bid for such lease, or (ii) to issue such lease, notwithstanding subsection (a) of this section; or
>
> **(B)** issue such lease, and notify the lessee and the Attorney General of the reason for such decision.

(4)(A) Nothing in this subsection shall restrict the power under any other Act or the common law of the Attorney General, the Federal Trade Commission, or any other Federal department or agency to secure information, conduct reviews, make recommendations, or seek appropriate relief.

(B) Neither the issuance of a lease nor anything in this subsection shall modify or abridge any private right of action under the antitrust laws.

(d) Due diligence

No bid for a lease may be submitted if the Secretary finds, after notice and hearing, that the bidder is not meeting due diligence requirements on other leases.

(e) Secretary's approval for sale, exchange, assignment, or other transfer of leases

No lease issued under this subchapter may be sold, exchanged, assigned, or otherwise transferred except with the approval of the Secretary. Prior to any such approval, the Secretary shall consult with and give due consideration to the views of the Attorney General.

(f) Antitrust immunity or defenses

Nothing in this subchapter shall be deemed to convey to any person, association, corporation, or other business organization immunity from civil or criminal liability, or to create defenses to actions, under any antitrust law.

(g) Leasing of lands within three miles of seaward boundaries of coastal States; deposit of revenues; distribution of revenues

(1) At the time of soliciting nominations for the leasing of lands containing tracts wholly or partially within three nautical miles of the seaward boundary of any coastal State, and subsequently as new information is obtained or developed by the Secretary, the Secretary shall, in addition to the information required by section 1352 of this title, provide the Governor of such State –

> **(A)** an identification and schedule of the areas and regions proposed to be offered for leasing;
>
> **(B)** at the request of the Governor of such State, all information from all sources concerning

the geographical, geological, and ecological characteristics of such tracts;

(C) an estimate of the oil and gas reserves in the areas proposed for leasing; and

(D) at the request of the Governor of such State, an identification of any field, geological structure, or trap located wholly or partially within three nautical miles of the seaward boundary of such coastal State, including all information relating to the entire field, geological structure, or trap.

The provisions of the first sentence of subsection (c) and the provisions of subsections (e)–(h) of section 1352 of this title shall be applicable to the release by the Secretary of any information to any coastal State under this paragraph. In addition, the provisions of subsections (c) and (e)–(h) of section 1352 of this title shall apply in their entirety to the release by the Secretary to any coastal State of any information relating to Federal lands beyond three nautical miles of the seaward boundary of such coastal State.

(2) Notwithstanding any other provision of this subchapter, the Secretary shall deposit into a separate account in the Treasury of the United States all bonuses, rents, and royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1)), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978 of any Federal tract which lies wholly (or, in the case

of Alaska, partially[2] until seven years from the date of settlement of any boundary dispute that is the subject of an agreement under section 1336 of this title entered into prior to January 1, 1986 or until April 15, 1993 with respect to any other tract) within three nautical miles of the seaward boundary of any coastal State, or, (except as provided above for Alaska) in the case where a Federal tract lies partially within three nautical miles of the seaward boundary, a percentage of bonuses, rents, royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1)), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978 of such tract equal to the percentage of surface acreage of the tract that lies within such three nautical miles. Except as provided in paragraph (5) of this subsection, not later than the last business day of the month following the month in which those revenues are deposited in the Treasury, the Secretary shall transmit to such coastal State 27 percent of those revenues, together with all accrued interest thereon. The remaining balance of such revenues shall be transmitted simultaneously to the miscellaneous receipts account of the Treasury of the United States.

(3) Whenever the Secretary or the Governor of a coastal State determines that a common potentially hydrocarbon-bearing area may underlie the Federal and State boundary, the Secretary or the Governor shall notify the other party in writing of his determination and the Secretary shall provide to the Governor notice

2. So in original.

of the current and projected status of the tract or tracts containing the common potentially hydrocarbon-bearing area. If the Secretary has leased or intends to lease such tract or tracts, the Secretary and the Governor of the coastal State may enter into an agreement to divide the revenues from production of any common potentially hydrocarbon-bearing area, by unitization or other royalty sharing agreement, pursuant to existing law. If the Secretary and the Governor do not enter into an agreement, the Secretary may nevertheless proceed with the leasing of the tract or tracts. Any revenues received by the United States under such an agreement shall be subject to the requirements of paragraph (2).

(4) The deposits in the Treasury account described in this section shall be invested by the Secretary of the Treasury in securities backed by the full faith and credit of the United States having maturities suitable to the needs of the account and yielding the highest reasonably available interest rates as determined by the Secretary of the Treasury.

(5)(A) When there is a boundary dispute between the United States and a State which is subject to an agreement under section 1336 of this title, the Secretary shall credit to the account established pursuant to such agreement all bonuses, rents, and royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1)), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978 of any Federal tract which lies wholly or partially within three nautical miles of the seaward boundary asserted by

the State, if that money has not otherwise been deposited in such account. Proceeds of an escrow account established pursuant to an agreement under section 1336 of this title shall be distributed as follows:

> **(i)** Twenty-seven percent of all bonuses, rents, and royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1)), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978, of any tract which lies wholly within three nautical miles of the seaward boundary asserted by the Federal Government in the boundary dispute, together with all accrued interest thereon, shall be paid to the State either –
>
> > **(I)** within thirty days of December 1, 1987, or
> >
> > **(II)** by the last business day of the month following the month in which those revenues are deposited in the Treasury, whichever date is later.
>
> **(ii)** Upon the settlement of a boundary dispute which is subject to a section 1336 of this title agreement between the United States and a State, the Secretary shall pay to such State any additional moneys due such State from amounts deposited in the escrow account. If there is insufficient money deposited in or credited to the escrow account, the Secretary shall transmit, from any revenues derived from any lease of Federal lands under this

subchapter, the remaining balance due such State in accordance with the formula set forth in section 8004(b)(1)(B) of the Outer Continental Shelf Lands Act Amendments of 1985.

(B) This paragraph applies to all Federal oil and gas lease sales, under this subchapter, including joint lease sales, occurring after September 18, 1978.

(6) This section shall be deemed to take effect on October 1, 1985, for purposes of determining the amounts to be deposited in the separate account and the States' shares described in paragraph (2).

(7) When the Secretary leases any tract which lies wholly or partially within three miles of the seaward boundary of two or more States, the revenues from such tract shall be distributed as otherwise provided by this section, except that the State's share of such revenues that would otherwise result under this section shall be divided equally among such States.

(h) State claims to jurisdiction over submerged lands

Nothing contained in this section shall be construed to alter, limit, or modify any claim of any State to any jurisdiction over, or any right, title, or interest in, any submerged lands.

(i) Sulphur leases; award to highest bidder; method of bidding

In order to meet the urgent need for further exploration and development of the sulphur deposits in the submerged

lands of the outer Continental Shelf, the Secretary is authorized to grant to the qualified persons offering the highest cash bonuses on a basis of competitive bidding sulphur leases on submerged lands of the outer Continental Shelf, which are not covered by leases which include sulphur and meet the requirements of section 1335(a) of this title, and which sulphur leases shall be offered for bid by sealed bids and granted on separate leases from oil and gas leases, and for a separate consideration, and without priority or preference accorded to oil and gas lessees on the same area.

(j) Terms and provisions of sulphur leases

A sulphur lease issued by the Secretary pursuant to this section shall (1) cover an area of such size and dimensions as the Secretary may determine, (2) be for a period of not more than ten years and so long thereafter as sulphur may be produced from the area in paying quantities or drilling, well reworking, plant construction, or other operations for the production of sulphur, as approved by the Secretary, are conducted thereon, (3) require the payment to the United States of such royalty as may be specified in the lease but not less than 5 per centum of the gross production or value of the sulphur at the wellhead, and (4) contain such rental provisions and such other terms and provisions as the Secretary may by regulation prescribe at the time of offering the area for lease.

Appendix D

(k) Other mineral leases; award to highest bidder; terms and conditions; agreements for use of resources for shore protection, beach or coastal wetlands restoration, or other projects

(1) The Secretary is authorized to grant to the qualified persons offering the highest cash bonuses on a basis of competitive bidding leases of any mineral other than oil, gas, and sulphur in any area of the outer Continental Shelf not then under lease for such mineral upon such royalty, rental, and other terms and conditions as the Secretary may prescribe at the time of offering the area for lease.

(2)(A) Notwithstanding paragraph (1), the Secretary may negotiate with any person an agreement for the use of Outer Continental Shelf sand, gravel and shell resources –

> **(i)** for use in a program of, or project for, shore protection, beach restoration, or coastal wetlands restoration undertaken by a Federal, State, or local government agency; or
>
> **(ii)** for use in a construction project, other than a project described in clause (i), that is funded in whole or in part by or authorized by the Federal Government.

(B) In carrying out a negotiation under this paragraph, the Secretary may assess a fee based on an assessment of the value of the resources and the public interest served by promoting development of the resources. No fee shall be assessed directly or indirectly under this subparagraph against a Federal, State, or local government agency.

(C) The Secretary may, through this paragraph and in consultation with the Secretary of Commerce, seek to facilitate projects in the coastal zone, as such term is defined in section 1453 of Title 16, that promote the policy set forth in section 1452 of Title 16.

(D) Any Federal agency which proposes to make use of sand, gravel and shell resources subject to the provisions of this subchapter shall enter into a Memorandum of Agreement with the Secretary concerning the potential use of those resources.

The Secretary shall notify the Committee on Merchant Marine and Fisheries and the Committee on Natural Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate on any proposed project for the use of those resources prior to the use of those resources.

(l) Publication of notices of sale and terms of bidding

Notice of sale of leases, and the terms of bidding, authorized by this section shall be published at least thirty days before the date of sale in accordance with rules and regulations promulgated by the Secretary.

(m) Disposition of revenues

All moneys paid to the Secretary for or under leases granted pursuant to this section shall be deposited in the Treasury in accordance with section 1338 of this title.

(n) Issuance of lease as nonprejudicial to ultimate settlement or adjudication of controversies

The issuance of any lease by the Secretary pursuant to this subchapter, or the making of any interim arrangements by the Secretary pursuant to section 1336 of this title shall not prejudice the ultimate settlement or adjudication of the question as to whether or not the area involved is in the outer Continental Shelf.

(o) Cancellation of leases for fraud

The Secretary may cancel any lease obtained by fraud or misrepresentation.

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

(1) In general

The Secretary, in consultation with the Secretary of the Department in which the Coast Guard is operating and other relevant departments and agencies of the Federal Government, may grant a lease, easement, or right-of-way on the outer Continental Shelf for activities not otherwise authorized in this subchapter, the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.), the Ocean Thermal Energy Conversion Act of 1980 (42 U.S.C. 9101 et seq.), or other applicable law, if those activities –

(A) support exploration, development, production, or storage of oil or natural gas,

except that a lease, easement, or right-of-way shall not be granted in an area in which oil and gas preleasing, leasing, and related activities are prohibited by a moratorium;

(B) support transportation of oil or natural gas, excluding shipping activities;

(C) produce or support production, transportation, storage, or transmission of energy from sources other than oil and gas;

(D) use, for energy-related purposes or for other authorized marine-related purposes, facilities currently or previously used for activities authorized under this subchapter, except that any oil and gas energy-related uses shall not be authorized in areas in which oil and gas preleasing, leasing, and related activities are prohibited by a moratorium; or

(E) provide for, support, or are directly related to the injection of a carbon dioxide stream into sub-seabed geologic formations for the purpose of long-term carbon sequestration.

(2) Payments and revenues

(A) The Secretary shall establish royalties, fees, rentals, bonuses, or other payments to ensure a fair return to the United States for any lease, easement, or right-of-way granted under this subsection.

(B) The Secretary shall provide for the payment of 27 percent of the revenues received by the Federal Government as a result of payments under this section from projects that are located wholly or partially within the area extending three nautical miles seaward of State submerged lands. Payments shall be made based on a formula established by the Secretary by rulemaking no later than 180 days after August 8, 2005, that provides for equitable distribution, based on proximity to the project, among coastal states that have a coastline that is located within 15 miles of the geographic center of the project.

(3) Competitive or noncompetitive basis

Except with respect to projects that meet the criteria established under section 388(d) of the Energy Policy Act of 2005, the Secretary shall issue a lease, easement, or right-of-way under paragraph (1) on a competitive basis unless the Secretary determines after public notice of a proposed lease, easement, or right-of-way that there is no competitive interest.

(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.

(5) Lease duration, suspension, and cancellation

The Secretary shall provide for the duration, issuance, transfer, renewal, suspension, and cancellation of a lease, easement, or right-of-way under this subsection.

(6) Security

The Secretary shall require the holder of a lease, easement, or right-of-way granted under this subsection to –

(A) furnish a surety bond or other form of security, as prescribed by the Secretary;

(B) comply with such other requirements as the Secretary considers necessary to protect the interests of the public and the United States; and

(C) provide for the restoration of the lease, easement, or right-of-way.

(7) Coordination and consultation with affected State and local governments

The Secretary shall provide for coordination and consultation with the Governor of any State or the executive of any local government that may be affected by a lease, easement, or right-of-way under this subsection.

(8) Regulations

Not later than 270 days after August 8, 2005, the Secretary, in consultation with the Secretary of Defense, the Secretary of the Department in which the Coast Guard is operating, the Secretary of Commerce, heads of other relevant departments and agencies of the Federal Government, and the Governor of any affected State, shall issue any necessary regulations to carry out this subsection.

(9) Effect of subsection

Nothing in this subsection displaces, supersedes, limits, or modifies the jurisdiction, responsibility, or authority of any Federal or State agency under any other Federal law.

(10) Applicability

This subsection does not apply to any area on the outer Continental Shelf within the exterior boundaries of any unit of the National Park System, National Wildlife Refuge System, or National Marine Sanctuary System, or any National Monument.