No. 23-1853

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

v.

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

On Appeal from the United States District Court for the District of Massachusetts, No. 1:22-CV-11091-IT – Hon. Indira Talwani

REPLY BRIEF OF APPELLANTS SEAFREEZE SHORESIDE, INC., ET AL.

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SUMMARY OF ARGUMENT

In this case of first impression, the arguments of the Appellees (respectively, "Federal Defendants" and "Project Developer") rely on (1) snippets of the Administrative Record ("AR") taken out of context, (2) distinguishable cases, and (3) unpersuasive disputation.

ARGUMENT

I. STANDARD OF REVIEW

In administrative record cases, courts of appeal "apply the same legal standards that pertain in the district court and afford no special deference to that court's decision." *Green Mt. Realty Corp. v. Leonard*, 688 F.3d 40, 50 (1st Cir. 2012). Cases cited by the Appellees do not state otherwise.

II. FEDERAL DEFENDANTS VIOLATED ESA

A. Commercial Fishermen's ESA Claims Are Not Moot

Federal Defendants approved the Project Construction and Operations Plan ("COP") through a Record of Decision ("ROD") in May 2021 based on a Final Environmental Impact Statement ("FEIS") issued in March 2021. The ROD and FEIS relied on a National Marine Fisheries Service ("NMFS") biological opinion issued in September 2020 (the "2020 BiOp"). NMFS produced a revised biological opinion in October 2021 (the "2021 BiOp"), approximately eight months after the FEIS was finalized and five months after the ROD was published. The ROD is the

document that approved the COP. Accordingly, the ROD is the final agency action on the COP application. No party disputes these facts. *See* Fed. Defs. Br. at 54–56; VW Br. at 30.

Commercial Fishermen challenged the sufficiency of the 2020 BiOp because that was the sole NMFS BiOp upon which the FEIS and the ROD were based. The 2021 BiOp is a stranger to the FEIS and ROD. Op. Br. at 40–42.

Federal Defendants argue that this Court lacks jurisdiction to consider challenges to the 2020 BiOp because the 2021 BiOp replaced it. Fed. Defs. Br. at 55–56. But the FEIS and ROD relied on the 2020 BiOp and not on the 2021 BiOp.

Project Developer asserts that Commercial Fishermen's argument is waived because it cannot incorporate arguments from its motion to strike. VW Br. at 31–32. But Project Developer's supporting case involved a *pro se* litigant incorporating his motion's arguments without explication. Commercial Fishermen explained in detail why the district court's denial of their motion to strike was inappropriate. Op. Br. at 40–43.

Project Developer falsely accuses Commercial Fishermen of arguing that "a biological opinion cannot be updated . . . ." VW Br. at 32. Commercial Fishermen make no such argument, instead explaining that the 2020 BiOp was "the one from which all agency actions flowed" *because* the FEIS and ROD were predicated on the 2020 BiOp and no other. Accordingly, Commercial Fishermen asked the district

court, and now ask this Court, to strike the 2021 BiOp from the record because post-decisional documents should not be considered in support of final agency action. Op. Br. at 40, 67-68. "Review of administrative decisions is ordinarily limited to consideration of the decision of the agency and of the *evidence on which it was based*." *Murphy v. Comm'r*, 469 F.3d 27, 31 (1st Cir. 2006) (emphasis added) (cleaned up).

B. Commercial Fishermen Did Not Waive Their ESA Claims

Federal Defendants accuse Commercial Fishermen of failing to "articulate . . . [ESA] claims with any specificity." Fed. Defs. Br. at 57. That is false. *See* Op. Br. at 28–31*; see also Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 35 (1st Cir. 2019) (opining that "magic words" not required in arguments).

Project Developer argues that *Rocafort v. IBM Corp,* 334 F.3d 115, 121–22 (1st Cir. 2003) and *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 678 (1st Cir. 1995) hold that all arguments not developed in summary judgment briefing are waived. VW Br. at 37. But Commercial Fishermen explained in their opening brief where and how they raised these ESA claims at summary judgment and properly presented them to this Court. Op. Br. at 28–31.

C. Commercial Fishermen Have Standing To Bring ESA Claims

Long Island Commercial Fishing Association ("LICFA") has associational and prudential standing to bring ESA claims because its member David Aripotch

"routinely fishes . . . within the Project Developer lease area" and asserts cognizable ESA harms. Appx. at 00236; *see also* Op. Br. at 33-39. Publicly available articles of incorporation proffered by LICFA in district court establish that LICFA's purposes include protecting, preserving, and maintaining saltwater fisheries, and furthering the welfare of the environment in order to protect the interests of its members. Accordingly, LICFA may stand in Aripotch's shoes to bring claims on his behalf. Appx. at 00757; see also *Am. Postal Workers Union v. Frank*, 968 F.2d 1373, 1375 (1st Cir. 1992). Additionally, Aripotch has concrete plans to observe NARWs in the Project area, Appx. at 00240–44, thereby establishing a "cognizable interest" supporting standing under the ESA. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562–63 (1992).

Project Developer argues that Commercial Fishermen violated D. Mass. Local Rule 7.1(b)(1) by untimely filing LICFA's articles of incorporation. Untrue. Commercial Fishermen introduced LICFA's articles of incorporation after Appellees questioned their standing to sue. *See* FED. R. CIV. P. 12(h)(3), FED. R. EVID. 201(c)(2); (d). Furthermore, *Mirakl, Inc. v. Vtex Commerce Cloud Sols LLC*, 544 F. Supp. 3d 146, 147 (D. Mass. 2021) establishes that "[w]here Local Rules conflict with Federal Rules, the Federal Rules take precedence."

Moreover, existing testimonial evidence demonstrated Commercial Fishermen's standing to bring ESA claims even without reference to LICFA's articles

of incorporation. See Appx. at 00240–44; 00714. Accordingly, filing LICFA's articles of incorporation in a motion for judicial notice caused no prejudice to the Appellees. *McDonough v. City of Quincy*, 452 F.3d 8, 19–20 (1st Cir. 2006).

Appellees mistakenly claim that no First Circuit caselaw declares that standing may be raised at any time. Fed. Defs. Br. at 46–47; VW Br. at 28. In fact, "[s]tanding is a jurisdictional issue that may be raised at any time." *In re Torres Martinez,* 397 B.R. 158, 163 (1st Cir. 2008); *see also P.R. Tel. Co. v. T-Mobile P.R. LLC*, 678 F.3d 49, 57 (1st Cir. 2012) (same). Project Developer's novel argument that the "at any time" language of FED. R. CIV. P. 12(h)(3) *only* applies to times when standing is challenged is groundless.

Furthermore, during the district court proceedings, Project Developer opened the door to LICFA's articles of incorporation by continuing to argue, despite declaratory evidence to the contrary, that LICFA lacked standing. Appx. at 00757–58 (Commercial Fishermen's motion); 00772–73 (Project Developer's response).

Project Developer states that LICFA provides "no evidence" sufficient to ground ESA standing. VW Br. at 29. Not so. LICFA's Executive Director Bonnie Brady explained LICFA's interest in preserving and maintaining the saltwater fisheries that the Project harms. Appx. at 00478, 00667–69, 00757. Furthermore, LICFA's interest in the "welfare of the environment" includes the biodiversity needed to maintain fishable waters and support marine creatures that provide

aesthetic pleasure to LICFA members like Mr. Aripotch. *See* Appx. at 00240–45, 00712–14. LICFA's associational interests, therefore, are "germane to the purpose" of the ESA, and it has standing to bring claims on behalf of its members, including Mr. Aripotch.

D. Federal Defendants Violated ESA

Federal Defendants assert they complied with the ESA by concluding in *the 2020 BiOp* that the Project would not harm NARWs and that the 2021 BiOp did not alter that holding. Fed. Defs. Br. at 57. Federal Defendants cannot have it both ways. If Federal Defendants can rely on the 2020 BiOp in their briefing to establish ESA compliance, Commercial Fishermen can challenge the 2020 BiOp to show ESA violation.

Project Developer argues that because an ESA cumulative effects analysis is not required for *federal* activities, NMFS's failure to consider the cumulative effects of nearby offshore wind projects on NARWs cannot be considered an ESA violation. VW Br. at 33. But the Project at issue is anchored in *state* mandates for renewable energy generation, which Project Developer, a *private* company, is seeking to provide. Accordingly, this case is not akin to BOEM constructing a federal office building. Furthermore, contrary to Project Developer's assertion, Commercial Fishermen did not raise this issue for the first time on appeal. *See* VW Br. at 34 n.9. Commercial Fishermen's pleadings and briefing in the district court and here have

consistently challenged the 2020 BiOp's failure to analyze cumulative effects relevant to Project Developer's efforts to meet its contractual obligations to Massachusetts energy providers. Appx. 00041–42, 00045.

Project Developer next argues that NMFS did not need to provide BOEM with "reasonable and prudent alternatives" because it decided the NARW was not in jeopardy. VW Br. at 34. But Commercial Fishermen challenge that very NMFS decision. Appx. at 00504.

Project Developer asserts that the 2020 BiOp's lack of relevant scientific data did not render it—and by extension, the ROD—inadequate under the ESA. VW Br. at 35. But when Federal Defendants reinitiated consultation, they knew the 2020 BiOp lacked relevant scientific data, and accordingly, they should have postponed issuance of the ROD, but they did not. Op. Br. at 27.

Finally, Project Developer posits that the Army Corps of Engineers ("the Corps") could rely on the 2020 BiOp to issue its permit because the Corps included a clause stating the permit required Project Developer's compliance with "all of the mandatory terms and conditions associated with incidental take of the [2020 BiOp] and any future [biological opinion]." VW Br. at 35–36. But the ROD required Project Developer to comply with the BiOp then in effect—the 2020 BiOp, which did not include any future iterations. Project Developer's citation to *La. Pub. Serv. Comm'n* misstates the case because Congress never gave the Corps the power to

issue a permit based on an inadequate BiOp or on a future BiOp the contents of which were unknown at the time of permit issuance.

III. FEDERAL DEFENDANTS VIOLATED NEPA

A. Commercial Fishermen Have Standing To Bring NEPA Claims

Commercial Fishermen have Article III standing under NEPA, Op. Br. at 46–47, and the district court did not opine otherwise.

Regarding prudential standing, Federal Defendants agree with the district court that Commercial Fishermen's claims are "purely economic." Fed. Defs. Br. at 42. But Commercial Fishermen explained that injuries with "an environmental as well as an economic component" are within NEPA's zone of interests. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156 (2010). Commercial Fishermen detailed the Project's environmental harms that led directly to their economic injuries. Op. Br. at 46–49. As such, they are "adversely affected or aggrieved by agency action within the meaning" of NEPA. 5 U.S.C. § 702. Their economic interests are closely tethered to their environmental interests in fishable waters and the continued wellbeing of the benthic species they harvest. *See, e.g.* Appx. at 00236–37, 240–45, 249–55, 259–64, 268–72.

Federal Defendants try in vain to distinguish *Monsanto*. Fed. Defs. Br. at 44. In *Monsanto*, alfalfa farmers sought to "avert the risk of gene flow to their crops," *Monsanto*, 561 U.S. at 154–56, while here, Commercial Fishermen seek to avert the

risk of habitat alteration impacts to their fish harvest. Op. Br. at 46–49. Seeking to avert the risk of environmental alteration to crops is not fundamentally different from seeking to avert the risk of environmental alteration to fishing grounds. *Id*. at 48. *See Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987) (opining that the zone of interests test "is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff").

Federal Defendants misstate Commercial Fishermen's argument as placing "primary" concern on the Project's effects on navigation. Fed. Defs. Br. at 43. But Commercial Fishermen argue that overwhelming record and declaratory evidence demonstrates the environmental harms the Project will inflict on the Project area. *See, e.g.* Op. Br. at 55, 65–66.

The district court erroneously found Commercial Fishermen's declarants incompetent to testify regarding environmental harms to their fishing grounds, Op. Br. at 69–70, but provided no cogent reason to conclude that the declarants, whose commercial fishing experience in the Vineyard Wind area spans decades, cannot testify to the Project's environmental harms. Furthermore, Commercial Fishermen's allegations of injury are not "bare," Fed. Defs. Br. at 44, because they explain thoroughly why the Project will ruin their fishing harvest. Op. Br. at 46–49.

Federal Defendants argue that the interests of LICFA member David Aripotch, owner of Appellant Old Squaw Fisheries ("Old Squaw"), are irrelevant. Fed. Defs.

Br. at 45. LICFA has standing to sue based on harms from the Project to its members, including Old Squaw and Aripotch, because its purposes include environmental preservation of saltwater fisheries, including those within the Project area. Op. Br. at 34–37. Federal Defendants note that the Project is several miles from "Suffolk County and its environs," arguing that the Project is outside of LICFA's orbit. Fed. Defs. Br. at 47. This ignores much of LICFA's purpose statement, which includes:

> to clean up, improve, protect and preserve the saltwater fisheries; to increase, further and enhance . . . activism for the welfare of the environment; . . . and generally to endeavor to promote the preservation and maintenance of the saltwater fisheries for future generations.

Appx. at 00763. Thus, LICFA's purposes include protecting the quality of saltwater fisheries anywhere its members fish, and LICFA members regularly fish in the Project area. *See* Appx. at 00236. Accordingly, LICFA demonstrated that the environmental interests of its members Aripotch and Old Squaw are germane to its purposes. Consequently, Federal Defendants' citation to *United States v. AVX Corp.*, 962 F.2d 108, 116 (1st Cir. 1992), is misleading because here, unlike in *AVX*, LICFA members Aripotch and Old Squaw have established that they have extensively used and have concrete plans to continue to use the waters of the Project area for fishing purposes. *Id.* at 117; *see also* Appx. at 00236-39.

Federal Defendants also cite the inapposite case of *Pacific Northwest Generating Co-op,* which involved an employer bringing claims based on its employees' interests and not an association asserting its members' interests. 38 F.3d

1058, 1063 (9th Cir. 1994). No case has ever held that membership standing equates to employer standing.

Furthermore, standing may be considered at any time, courts must judicially notice documents like LICFA's articles, and Commercial Fishermen filed their motion well before the summary judgment hearing. Neither of the cases Federal Defendants cite concern motions for judicial notice. Instead, both stand for the unremarkable proposition that courts can manage their dockets. It is not a sensible measure of docket management to flout Federal Rule of Evidence 201 and Federal Rule of Civil Procedure 56 by failing to take judicial notice of properly presented documents. In any event, declaratory evidence establishes LICFA's standing under NEPA even without judicial notice of its articles of incorporation.

B. Federal Defendants Did Not Comply With NEPA.

1. Federal Defendants Failed To Consider Reasonable Alternatives.

Federal Defendants ignored or downplayed reasonable alternatives to the Project, Op. Br. at 50–51, despite concerns about the Project's "moderate" to "major" impacts to the squid trawl fishery on which Commercial Fishermen rely. Supp. Appx. at 1231. They also improperly limited their consideration of alternatives only within the Project lease area. Op. Br. at 51–52.

Citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 197 (D.C. Cir. 1991), Federal Defendants argue that NEPA regulations require them to consider the

Project Developer's desires, even giving them "substantial weight." Fed. Defs. Br. at 48, VW Br. at 40–41. But the quoted language is not part of the court's holding in *Busey*. It is a quotation from an EIS. *Busey*, 938 F.2d at 197.

Furthermore, considering Project Developer's preferences when reviewing reasonable alternatives is different from giving Project Developer *carte blanche*. NEPA's procedural requirements do not authorize federal agencies to act as advocates for projects. *See Bennett v. Spear*, 520 U.S. 154, 172 (1997) (an agency has no discretion to ignore "the required procedures of decisionmaking").

Federal Defendants failure to thoroughly consider alternatives outside the lease area resulted from BOEM's refusal to conduct an EIS before issuing the lease and thus "prejudic[ed] selection of alternatives before making a final decision" on the COP, in violation of 40 C.F.R. § 1502(f) (2020). *See Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1286–1288 (1st Cir. 1996).

Federal Defendants say Commercial Fishermen do not demonstrate that their choice of alternatives "was motivated by any alleged pressure" from Project Developer. Fed. Defs. Br. at 49 n.7. But the record demonstrates that Federal Defendants impermissibly tied the scope of alternatives considered to only those that could fulfill Project Developer's contractual agreements. *See* BOEM_0076808–09.

Finally, Project Developer states NMFS never refused to concur with BOEM on the Project DEIS. That is untrue. BOEM_0037616–20 (NMFS letter withholding concurrence on DEIS).

2. Federal Defendants Impermissibly Revived The Terminated NEPA Review Process

BOEM found that because "[Project Developer] has indicated that its proposed COP is a 'decision pending before BOEM,'" BOEM could restart the terminated NEPA review process. (Appx. at 01183, 01186–87, quoting Add. at 00126–28). This violated NEPA for two reasons. First, Federal Defendants admit they provided no opportunity for comment when restarting NEPA review because they found no "significant new information bearing on the project design or environmental impacts." Fed. Defs. Br. at 51 (quoting 40 C.F.R. § 1502.9(c)(1) (2020)). Nothing in NEPA or its regulations authorizes Federal Defendants to forego comment when they unilaterally deem new information insignificant. 40 C.F.R. § 1506.6 (2020) (agencies must make "diligent efforts to involve the public"). Federal Defendants ask Commercial Fishermen to identify comments that would have established a NEPA violation; otherwise, they aver, their error was harmless. Fed. Defs. Br. at 52. But the cases Federal Defendants cite do not require Commercial Fishermen to make any such identification.

Second, it is beyond parody to assert, as Project Developer does, that Federal Defendants' decision to violate NEPA by resuming a review process it terminated

"caused [Commercial Fishermen] no injury." VW Br. at 42. Federal Defendants' decision resulted in approval of the Project. The Project's construction and operation injures Commercial Fishermen economically and environmentally. The proper "redress . . . available now," *id.* at 43, is to vacate the Project's approval.

3. Federal Defendants Did Not Account For Reasonably Foreseeable Future Actions

Federal Defendants omitted, without explanation, their cumulative impacts analysis set forth in the Supplemental Draft EIS ("SDEIS") from the FEIS, thereby violating NEPA regulations by failing to account for "reasonably foreseeable future actions[.]" *Id.* at 56 (quoting 40 C.F.R. § 1508.7 (2020)). By not addressing plans for massive offshore wind construction in the Atlantic Ocean, Federal Defendants improperly segmented their NEPA analysis. *See Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014).

Federal Defendants falsely argue that they did not leave out any cumulative impacts analysis from the FEIS that had been in the SDEIS. Fed. Defs. Br. at 52. But the cumulative analysis set forth in the SDEIS' executive summary compared impacts by alternative, stating that the action "could have major direct or cumulative impacts on . . . commercial fisheries . . . [and] military and national security uses . . . due to navigation complexity and increased difficulty to conduct search and rescue." *See* BOEM_56958. This SDEIS section is found nowhere in the FEIS, and no explanation is provided for the omission of this important comparative data.

Judulang v. Holder, 565 U.S. 42, 45 (2011) (an administrative agency "must provide a reasoned explanation for its action").

Federal Defendants allege that Commercial Fishermen did not argue that Federal Defendants undercounted reasonably foreseeable offshore wind construction. Fed. Defs. Br. at 53. In fact, Commercial Fishermen highlighted the discrepancy between the federal plan to deploy 30 gigawatts ("GW") of offshore wind by 2030, which was issued before Federal Defendants published the FEIS stating that only 22 GW of offshore wind were foreseeable. Op. Br. at 56.

Project Developer calls the 30 GW plan "aspirational" and asserts that the Project EIS need not consider other offshore wind projects that lack a proximate "geographic component" to the Project. VW Br. at 43–44. NEPA's definition of "reasonably foreseeable future actions" contains no such limitation. 43 C.F.R. § 46.30 (2020). It includes "federal . . . activities not yet undertaken, but sufficiently likely to occur[,]" which describes the 30 GW plan. *Id*. Project Developer never explains why such a plan should be considered speculative. *See* Appx. at 00169–70 (detailing effort to "catalyze offshore wind energy"); *see also* Appx. at 001189; Op. Br. at 56. Project Developer then faults Commercial Fishermen for failing to identify any project the FEIS omitted, but Federal Defendants knew that the Project was only one part of a larger effort to place offshore wind throughout the Atlantic Ocean at a level of 30 GW. *See id.*; *see also* Appx. at 00509; 01177; 01247–48 (maps showing

planned Atlantic offshore wind development based on state initiatives and private developer interests).

IV. FEDERAL DEFENDANTS VIOLATED OCSLA

A. The District Court Misinterpreted OCSLA

Contrary to the Appellees' assertions, Section 1337(p)(4) does not contain aspirational "goals" that can be balanced against each other. It contains express limitations on BOEM's power to authorize offshore wind projects. And courts cannot defer to a statutory reading that runs counter to its plain terms. *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009).

Federal Defendants assert they have "discretion to determine the appropriate method of furthering and balancing" between the mandatory duties set forth in Section 1337(p)(4). Fed. Defs. Br. at 31. But neither agencies nor courts may add words to statutes that are not there. *Alabama v. North Carolina*, 560 U.S. 330, 352 (2010). And agencies cannot balance their own policy preferences against Congress's express limits on their authority. Op. Br. at 60–61 (gathering cases). As Commercial Fishermen explained, the capacious term "reasonably" is not present in the applicable statutory text of Section 1337(p)(4)(A)-(D), (G), and BOEM cannot insert such a term via regulation. Op. Br. at 61. Furthermore, Federal Defendants provide no evidence or examples of why or how "maximum pursuit of some" of

Section 1337(p)(4)'s duties "may foreclose maximum pursuit of others." Fed. Defs. Br. at 31.

A close reading of Subsection 1337(p)(4) shows that the Appellees' arguments are meritless. Section 1337(p)(4)(A)–(D) and (G) require the Secretary to "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 natural resources of the outer Continental Shelf [and] (G) protection of correlative rights in the outer Continental Shelf.

43 U.S.C.§ 1337(p)(4)(A)–(D), (G). The qualifier "reasonable" is absent from the statutory language in those subsections. The Appellees argue that because the term "reasonable" is used as a qualifier in a *different* subsection of Section 1337(p)(4), namely subsection (p)(4)(I), that the term somehow also applies to subsections (A)–(D) and (G). They are mistaken. Subsection (p)(4)(I) provides the Secretary shall ensure:

> (I) 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). The term "reasonable" is a stranger to all other parts of Section 1337(p)(4) and accordingly applies *only* to subsection (I) and not to subsections (A)–(D) and (G). *See Dep't of Homeland Sec. v. MacLean*, 574 U.S.

383, 391 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.").

In turn, subsection (J) states that the Secretary shall ensure:

> (J)(i) consideration of 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 as a fishery, a sealane, a potential site of a deepwater port, or navigation.

42 U.S.C. § 1337(p)(4)(J). This provision sets forth the types of issues the Secretary must "consider" under subsection (J) and does not authorize the use of a balancing test. Nor does it modify the Secretary's nondiscretionary duty to "ensure" that the criteria set forth in subsections (A)–(D) and (G) are met by offshore wind energy projects.

Accordingly, Federal Defendants cannot establish that they satisfy Section 1337(p)(4)(A)–(D), (G) by observing that the word "reasonable" appears in one of the other subsections of Section 1334(p)(4) while the word "consideration" appears in another, separate subsection. *MacLean,* 574 U.S. at 391; *see also Alabama v. North Carolina*, 560 U.S. 330, 352 (2010) (courts "cannot" add words to statutes). No authority cited by Appellees states otherwise.

Furthermore, the phrase "in a manner that provides for" does not admit of a balancing test. To assert it does, Federal Defendants describe Section 1337(p)(4) as "a general requirement that an agency further one or more broadly defined goals"—an interpretation that is inconsistent with the statute's express language. Fed. Defs.

Br. at 31. Their citation to *Norton* is off base. That case dealt with a different statute containing a different requirement that did not include the term "ensure." *Lovgren* and *NMFS* also do not concern OCSLA, or any other statute with a similar structure or text.

Project Developer is mistaken about the meaning of the term "provide for" in Section 1337(p)(4). *Rake v. Wade*, 508 U.S. 464, 473 (1993), an inapposite bankruptcy case cited by Project Developer, states that to "provide for" secured claims for mortgages means "establishing repayment schedules for arrearages," based on a dictionary definition of "provide for" as "to make a stipulation or condition." Of course, making a "stipulation or condition" for repayment schedules is irrelevant to any issue of ensuring "safety" and "protection of the environment" under OCSLA. *See* Op. Br. at 65–72. Furthermore, *Rake* has been abrogated in part by statute. *See In re Materne*, 640 B.R. 781, 800 (D. Mass. 2022).

Project Developer then tries to interpret OCSLA as requiring BOEM to merely take measures to *prepare* for ensuring, *e.g.*, "safety" and "protection of the environment" *without actually* ensuring either safety or protection of the environment. VW Br. at 48. That cannot stand. *See Duncan v. Walker*, 533 U.S. 167, 173-74 (2001).

Federal Defendants cite *Massachusetts v. Andrus*, 594 F.2d 872, 888–90 (1979), which was decided decades before Section 1337(p)(4) was enacted. A*ndrus*

observes that "the Secretary is under a duty to see that *gas and oil exploration and drilling* is conducted without *unreasonable risk* to the fisheries." *Andrus,* 594 F.2d at 889 (emphasis added). That "reasonableness" language is foreign to the specific limitations on *renewable energy development* set forth in the subsequently enacted Section 1337(p)(4)(A)–(D), (G). Accordingly, *Andrus'* interpretation does not apply to requirements for offshore renewable energy, which were not available for the *Andrus* court to review. *Alabama*, 560 U.S. at 352.

Appellees' arguments regarding 43 U.S.C. § 1332 are groundless. That section makes a general policy pronouncement regarding Outer Continental Shelf development (declaring "the policy of the United States"), while Section 1337(p)(4) delineates specific duties Federal Defendants must fulfill when pursuing that general policy. Policy statements and other "statements of purpose . . . by their nature cannot override a statute's operative language." *Sturgeon v. Frost*, 139 S.Ct. 1066, 1086 (2019). Accordingly, Commercial Fishermen do not interpret OCSLA to "defeat its purpose." VW Br. at 46–47.

Project Developer is additionally incorrect to state the "purpose" of Section 1337(p)(4) is "to issue alternative energy leases." VW Br. at 45. By its terms, Section 1337(p)(4) *limits* leasing by imposing nondiscretionary requirements. Commercial Fishermen never assert, as Federal Defendants imply, that perfection is required for approval of offshore wind projects. They do argue, however, that

approval of such projects must comply with OCSLA's requirements to ensure, *e.g.*, "safety" and "protection of the environment."

Federal Defendants claim based on a nonprecedential case that deference is appropriate because their interpretation of the statute is "the best one." Fed. Defs. Br. at 34 (citing *Guedes v. BATFE*, 45 F.4th 306, 313 (D.C. Cir. 2022)). That bare assertion is not an argument.

Bottom line: Section 1337(p)(4)(A)–(D), (G) does not use the capacious term "reasonably," and, accordingly, this Court should determine that Congress meant not to use it. *See Russello v. United States*, 464 U.S. 16, 23 (1983). Similarly, the section does not authorize a balancing test, and, accordingly, Federal Defendants may not engage in one. *Id.*

B. Federal Defendants Did Not Comply With OCSLA

Commercial Fishermen demonstrated that the Federal Defendants' decision to approve the Project violated OCSLA by failing to meet the requirements in Section 1337(p)(4)(A)–(D), (G). Op. Br. at 65–72. Federal Defendants argue that (1) reviewing the Project's harms, (2) instructing Project Developer to follow "industry standards," and (3) requiring mitigation measures all satisfy OCSLA. Fed. Defs. Br. at 34–42. Commercial Fishermen address these arguments in turn.

First, merely reviewing the Project's harms does not qualify as "ensur[ing]" Section 1337(p)(4)'s mandates.

Second, Federal Defendants never specify what "industry standards" exist for a first-of-its-kind offshore wind project, nor whether they have "ensure[d]" that any such standards have been met. Fed. Defs. Br. at 37. Federal Defendants aver they "would oversee aspects of the [P]roject to ensure it is carried out safely." Fed. Defs. Br. at 35. They do not explain how or who will enforce the safety requirements, or when they will be enforced, whatever they may be.

Third, Federal Defendants' asserted mitigation measures do not remedy their OCSLA violations. For instance, it does not matter that "[p]rimary vessel traffic and commercial shipping lanes" are outside the Project area. Fed. Defs. Br. at 35. Commercial Fishermen harvest their catch within the Project area. Federal Defendants also state that any radar interference from turbines could be mitigated through efforts to "help enable safe navigation." Fed. Defs. Br. at 35–36. But they do not show that any mitigation efforts are underway to ensure safe navigation.

Federal Defendants assert the Coast Guard recommendations it adopted "rendered impacts on navigation minor to moderate." Fed. Defs. Br. at 36, *see also id.* at 38. This assertion is neither quantified nor described qualitatively. The FEIS never explains how these recommendations mitigate adverse safety impacts. Op. Br. at 65–72. Other cited mitigation measures fall short for the same reasons. *See* Fed. Defs. Br. at 38–41; VW Br. at 55.

Project Developer asserts Commercial Fishermen ignore a "decision memorandum explaining" why BOEM's approval of the Project meets the requirements of Section 1337(p)(4). VW Br. at 51. That memorandum has no legal effect. Moreover, Project Developer never specifies how or when the memorandum will be implemented or enforced, if at all.

Project Developer asserts further that Commercial Fishermen never "develop an[] argument" as to why Federal Defendants' reasoning in the ROD was arbitrary and capricious. VW Br. at 51 (quoting *Housatonic River Initiative v. EPA*, 75 F.4th 248, 273 (1st Cir. 2023)). The assertion is false. *See* Op. Br. at 65–72.

It is also false to claim Commercial Fishermen's citation to the myriad portions of the record establishing the Project's harms are all "out of context." VW Br. at 52. In fact, Project Developer cherry-picks the record to cast doubt on Commercial Fishermen's extensive citations to the AR showing OCSLA violations. VW Br. at 54. For example, Project Developer states that Commercial Fishermen's FEIS citation pointing out "major" impacts to navigation concerned an alternative that Federal Defendants did not select, instead selecting turbine spacing coupled with Coast Guard recommendations that would supposedly make these impacts "negligible to moderate." VW Br. at 55. Nothing about Federal Defendants' selection lessens the Project's adverse impact. The approved Project is still inaccessible to Commercial Fishermen. *See* Appx. at 01220; *see also*

BOEM_0034945–46 (Draft EIS discussing impacts of 1 nm spacing alternative on fishermen). The FEIS also does not define "negligible" or "moderate," and never explains how impacts would "ensure" safety or environmental protection.

Moreover, the ROD states that the Project's construction and operation will lead fishermen to abandon the Project area due to navigational difficulties. Op. Br. at 66–68. Citing a post-ROD publication, Federal Defendants attempt to attribute this conclusion to commenters — after Commercial Fishermen noted the ROD statement in their complaint. Appx. at 00213. The district court erred in finding that the post-ROD statement corrected a "mere clerical error." Appx. at 01038. Federal Defendants argue that Commercial Fishermen do not state denial of this motion was an abuse of discretion. Fed. Defs. Br. at 33 n.4. But Commercial Fishermen argued that Federal Defendants' post-ROD statement was an unlawful attempt to substantively edit the ROD. Op. Br. at 68. *See Top Entm't, Inc. v. Torrejon*, 351 F.3d 531, 533 (1st Cir. 2023) ("Where a legal error is committed, there is by definition an abuse of discretion.").

Contrafactually, Appellees argue the ROD's statement that "the entire [Project] area will be abandoned by commercial fisheries[,]" Appx. at 01239, is extra-record evidence. But the statement is in the ROD, which constitutes final agency action, and the ROD is in the record. Moreover, Appellees have provided no

evidence that this statement was a clerical error. Accordingly, *Frisco*, 358 U.S. 133 (1958) does not apply.

Appellees are mistaken that Federal Defendants can satisfy OCSLA's requirements by making "reasonable" decisions and balancing them, *see, e.g.* Fed. Defs. Br. at 36, 37, 40, because Section 1337(p)(4)(A)–(D), (G) contains no such reasonableness or balancing test. Accordingly, *Cassidy v. Chertoff*, 471 F.3d 67, 84 (2d Cir. 2006) is off point, because the benchmark for OCSLA compliance for offshore wind projects is not whether BOEM's determinations are "reasonable" but whether the criteria of Section 1337(p)(4) have been satisfied. Project Developer's appeal to *Hopper*, a nonprecedential case, is also unavailing. The statute in *Hopper* specifically directs the Coast Guard to identify "the reasonable terms and conditions" it finds necessary for navigational safety. 827 F.3d at 1087. No such capacious standard exists here.

Likewise, merely stating it is "highly unlikely" that the Project turbines would collapse is insufficient to meet OCSLA's directive to "ensure" safety. Fed. Defs. Br. at 37; VW Br. at 54–55. It also does not matter that "BOEM took seriously" its OCSLA obligations, as BOEM saw them. Id. at 39. Merely asserting that BOEM takes safety or environmental protection "seriously" does not 'ensure" safety or environmental protection.

Project Developer also cites no authority to establish that Commercial Fishermen's declarations cannot be considered. The declarations are in the district court record and are properly before this Court.

Finally, Project Developer cites unsupported statements by BOEM that some fishermen can and will adapt to the Project as approved. VW. Br. at 57. This does not satisfy OCSLA's command to "ensure" safety and environmental protection.

V. THE COURT SHOULD REVERSE WITH VACATUR OR GRANT TEMPORARY RELIEF

Appellees argue remand without vacatur is appropriate. But the APA instructs courts to "hold unlawful and set aside" agency actions found arbitrary, capricious, or otherwise contrary to law. 5 U.S.C. § 706 (emphasis added). Courts have repeatedly found that this APA provision instructs courts to "vacate" such actions. *See, e.g. Town of Weymouth v. Mass. Dep't of Envtl. Prot.*, 961 F.3d 34, 58 (1st Cir. 2020); *Long Island Power Auth. & Long Island Lighting Co. v. FERC*, 27 F.4th 705, 717 (D.C. Cir. 2022) ("Vacatur is the normal remedy under the APA . . . ."); *Illinois v. Wheeler*, 60 F.4th 583, 594–95 (9th Cir. 2023) (treating "set aside" and "vacate" as synonyms).

Remand is unnecessary because Commercial Fishermen's injury "presents questions of law and the record." *In re Steinmetz*, 862 F.3d 128, 136 (1st Cir. 2017). Vacatur without remand is especially appropriate when an agency has "suggested no

alternative bases for upholding" its determination. *Crown Cork & Seal Co. v. NLRB*, 36 F.3d 1130, 1142–43 (D.C. Cir. 1994). That is the case here.

Federal Defendants offer that any errors "would likely be corrected with additional explanation on remand" and appeal to "the equities and public interest in supplying renewal [sic] energy" to Massachusetts and to efforts to combat climate change. Fed. Defs. Br. at 60. But remand will not salvage an illegally approved COP. *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (agency "literally has no power to act . . . unless and until Congress" confers said power). Further, the Project SDEIS states "[t]he construction of offshore wind facilities are not expected to impact climate change . . . ." Supp. Appx. at 0493.

Should this Court remand without vacatur, it should issue a stay postponing the Project approval's effective date due to the irreparable harm that will otherwise result. Op. Br. at 76–79. Federal Defendants argue that Commercial Fishermen did not establish irreparable harm, and that this Court "cannot" postpone the Project's approval because it "took effect long ago." Fed. Defs. Br. at 60. This contention is incorrect for three reasons. First, Commercial Fishermen successfully established irreparable harm will result from any continued construction on the Project in their interlocutory appeal briefing, which is in the record before this Court. Op. Br. at 77.

Second, remand without a stay would be futile because "the underlying facts" regarding the Project "are largely undisputed . . . ." *Boston Duck Tours, LP v. Super*

Duck Tours, LLC, 531 F.3d 1, 15 (1st Cir. 2008). Letting Project construction continue until Federal Defendants and Project Developer can argue that it is a *fait accompli* is "incompatible with the urgency of the issue" before the Court. *Id.* Project Developer does not dispute it intends to continue construction through 2024 until the Project is complete, making bottom-trawl fishing in the Project area impracticable for the foreseeable future. Furthermore, *Millipore Corp. v. Travelers Indem. Co*., 115 F.3d 21, 34 (1st Cir. 1997), cited by Federal Defendants, concerns the adequacy of the record, whereas this case concerns whether Federal Defendants' actions were arbitrary and capricious based on a record of several hundred-thousand pages.

Third, this Court may postpone the effective date of already-effective agency action under 5 U.S.C. § 705. *All. for Hippocratic Med. v. United States Food & Drug Admin.*, 78 F.4th 210, 255 (5th Cir. 2023) (stating that Section 705 does not "limit[] stays to contemporaneous agency actions" because "[t]he text does not provide such a limitation")."

Federal Defendants finally argue that "evidence of robust insurance policies, . . . use [of] proven wind turbine technology, . . . [and] predictable income over the life of the project" mean that their decision to waive decommissioning financial assurances does not justify a stay. Fed. Defs. Br. at 61. But those insurance policies are not in the record, the enormous size of the wind turbines in this Project have

never before been used on the Outer Continental Shelf, and income is unpredictable because the Project is the first of its kind.

The district court denied Commercial Fishermen's motion to reconsider, thereby further informing this Court's judgment that remand would be futile.

CONCLUSION

For the foregoing reasons, the full relief requested by the Commercial Fishermen should be granted.

DATE: March 13, 2024,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on March 13, 2024. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Theodore Hadzi-Antich
THEODORE HADZI-ANTICH

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Federal Rule of Appellate Procedure 28.1(e)(2) and this Court's order of November 2, 2023, because, excluding the parts of the document exempted by the rule, it contains 6,495 words and has been prepared in a proportionally spaced typeface using Microsoft Office Word 2020 in 14-point Times New Roman font.

Date: March 13, 2024,

/s/Theodore Hadzi-Antich
THEODORE HADZI-ANTICH