

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

SEAFREEZE SHORESIDE, INC., et al.,

*Plaintiffs,*

v.

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

*Defendants,*

and

VINEYARD WIND 1 LLC,

*Intervenor-Defendant.*

Civil Action No. 1:22-cv-11091-IT

Hon. Indira Talwani

REQUEST FOR ORAL ARGUMENT

**VINEYARD WIND 1 LLC'S MOTION FOR SUMMARY JUDGMENT**

Intervenor-Defendant Vineyard Wind 1 LLC (“Vineyard Wind” or “Intervenor”) hereby cross-moves, pursuant to Fed. R. Civ. P. 56, for summary judgment against Plaintiffs Seafreeze Shoreside, Inc. *et al.* (“Seafreeze”) as to all claims asserted in Plaintiffs’ Complaint, ECF No. 1. As grounds for this motion, Vineyard Wind states as follows:

1. Plaintiffs have filed a motion for summary judgment in this matter, *see* ECF No. 66 (“Motion”), arguing that the defendants in this action (the “Federal Defendants”) violated the Outer Continental Shelf Lands Act (“OCSLA”), 43 U.S.C. § 1331 *et seq.*, Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*, Marine Mammal Protection Act, 16 U.S.C. § 1361 *et seq.*, and the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, in issuing a Biological Opinion (“BiOp”) and Final

Environmental Impact Statement (“Final EIS”) for constructing and operating the Vineyard Wind offshore wind energy project (the “Project”).

2. Not only should the Court deny Plaintiffs’ Motion, but it should grant summary judgment in Vineyard Wind’s favor as to all of Plaintiffs’ claims, for a number of reasons. First, Plaintiffs lack Article III standing because, among other things, they failed to provide evidence sufficient to establish a cognizable injury-in-fact. Second, other of Plaintiffs’ claims face various procedural impediments, such as raising claims that are moot or challenging non-final agency actions that are not subject to judicial review. Third, Plaintiffs’ ESA claims fail, either on the merits or because they are unrelated to the ESA’s purpose. Fourth, Plaintiffs’ CWA claims were waived and, even if they were not, those CWA claims were never briefed by either Plaintiffs or any other party. Similarly, Plaintiffs’ Marine Mammal Protection Act claims were never brief by Plaintiffs or any other party.

3. Vineyard Wind’s grounds for this cross-motion for summary judgment are further set forth in Vineyard Wind’s Memorandum of Law in Support of Its Motion for Summary Judgment and in Opposition to Plaintiffs’ Motion for Summary Judgment (“Memorandum”), which Vineyard Wind references and incorporates fully in this motion. The Memorandum also incorporates by reference the arguments presented in Federal Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Summary Judgment, and in Support of Cross Motion, ECF No. 75.

4. Vineyard Wind further incorporates and relies upon as grounds for this motion: (1) Vineyard Wind’s Response to Plaintiffs’ Statement of Facts and Additional Facts in Support of Intervenor-Defendant’s Motion for Summary Judgment, filed concurrently herewith; (2) Vineyard Wind’s Statement of Additional Undisputed Material Facts in Support of Intervenor-Defendant’s

Motion for Summary Judgment, filed concurrently herewith; (3) a declaration by R. Douglas Scott, which is attached to this Motion as Exhibit 1; (4) unless otherwise noted in Vineyard Wind's Response, facts identified in Federal Defendants' Statement of Undisputed Material Facts in Support of Federal Defendants' Motion for Summary Judgment, ECF No. 74, and Defendants' Response to Plaintiffs Seafreeze Shoreside, Inc. Et Al.'s Statement of Material Facts, ECF No. 76; (5) to the extent not otherwise disputed in Vineyard Wind's Response, certain facts identified in Plaintiffs' Rule 56.1 Statement of Material Facts in Support of Plaintiff's Motion for Summary Judgment, ECF No. 68; (6) the administrative records previously filed by Federal Defendants; (7) the joint appendix to be filed by the parties pursuant to this Court's Order, ECF No. 71; and (8) the arguments of counsel at the time of the Court's hearing.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(d), Vineyard Wind hereby requests oral argument on this motion.

Dated: December 27, 2022

Respectfully submitted,

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Peter C. Whitfield (*pro hac vice*)  
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*Counsel for Vineyard Wind 1 LLC*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 27th day of December 2022, a true and complete copy of the foregoing has been filed with the Clerk of the Court pursuant to the Court's electronic filing procedures, and served on counsel of record for Plaintiffs and Defendants via the Court's electronic filing system.

/s/ Jack W. Pirozzolo

Jack W. Pirozzolo

# **Exhibit 1**

**IN THE UNITED STATES DISTRICT COURT  
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VINEYARD WIND 1 LLC,

Intervenor-Defendant

Civil Action No. 1:22-cv-11091-IT

Hon. Indira Talwani

**ORAL ARGUMENT REQUESTED**

**DECLARATION OF R. DOUGLAS SCOTT IN SUPPORT OF  
VINEYARD WIND'S CROSS-MOTION FOR SUMMARY JUDGMENT AND  
OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I, R. Douglas Scott, Ph.D., P. Eng. declare under the penalty of perjury as follows:

1. I am over the age of twenty-one years old and have personal knowledge of the statements made herein. This declaration is filed in support of Vineyard Wind's Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment.
2. I am a Principal with the firm W. F. Baird & Associates Ltd. ("Baird"), an engineering consulting firm founded in 1981 that specializes in providing technical assessments and engineering solutions in coastal, estuarine, and marine environments. I have spent much of my career focusing on coastal and port assessments and engineering, including risks to navigation faced by oceangoing vessels.
3. Vineyard Wind 1 LLC ("Vineyard Wind") retained Baird to analyze publicly available vessel tracking data for the purpose of ascertaining fishing activity levels of three United

States flagged commercial fishing vessels – the F/V Caitlin & Mairead, the F/V Heritage, and the F/V Tradition – in and around the Vineyard Wind 1 lease area.

4. Under my supervision, Baird staff accessed publicly available tracking data for these three vessels for the years 2016 through June of 2022 and produced a report (in the form of a PowerPoint presentation) attached to this declaration that: (1) presents those data as a series of figures that graphically illustrate the amount of fishing activity in and around the Vineyard Wind 1 lease area for each vessel; and (2) analyzes those data to determine the cumulative amount of time each vessel spent fishing inside the Vineyard Wind 1 lease area.

#### **PROFESSIONAL QUALIFICATIONS**

5. I received a B.Sc. in Civil Engineering from Queen's University, Kingston, Ontario in 1980 and a Ph.D. in Civil Engineering, Queen's University in 1987.
6. I am a member of Professional Engineers Ontario, the Canadian Society for Civil Engineering, the American Meteorological Society, and the Canadian Meteorological and Oceanographic Society.
7. I have been employed by Baird since I received my Ph.D. in January 1987. I have been a Principal and Project Manager at Baird for over 25 years.
8. I have more than 35 years' experience providing overall management and high-level technical direction of complex investigations and projects in the coastal and port fields. Over my career, I have been the Project Manager or have had major technical input for numerous port projects that have involved reviews of navigation practices, channel design, and port throughput assessments, including numerous studies to support the development of guidelines and operational procedures for safe navigation. I have

published more than 50 technical papers in conference proceedings and journals in the field of coastal and port assessment and engineering.

## **ANALYSIS OF VESSEL TRACKING DATA**

### **AIS Data**

9. The basis for the analysis in Baird’s report is Automatic Identification System (“AIS”) data. Federal regulations require self-propelled commercial fishing vessels greater than 20 m (65 ft) in length to operate an AIS Class B device to broadcast vessel information. (33 C.F.R. § 164.46). AIS is, in part, a shipborne mobile equipment system that typically consists of integrated Very High Frequency (“VHF”) radio and Global Positioning Systems (“GPS”) which broadcast a vessel’s name, dimensions, course, speed and position, among other vessel characteristics. AIS Class B devices automatically send out a message providing a vessel’s position (latitude, longitude, speed, and heading) every few minutes. AIS transmissions also allow identification of broad categories of vessel type, including commercial fishing vessels.
10. The primary use of AIS systems is to allow vessels to monitor marine traffic in their area and to broadcast their location to other vessels with AIS equipment onboard. Because of the autonomous and continuous nature of AIS data, it can also be compiled to establish a record of a particular vessel’s operating history, and aggregated to evaluate vessel activity in a specific area, such as commercial fishing vessel activity in and around the Vineyard Wind 1 project area.
11. Because AIS data include a vessel’s speed, they can also be used to infer whether a particular vessel is actively fishing or transiting in the open ocean at a particular time. Vessels traveling at speeds greater than four knots generally are moving too fast to be

fishering (e.g., trawling) and can reasonably be characterized as transiting; fishing vessels traveling at four knots or less can reasonably be characterized as trawling, though there are certain species, such as scallops, for which fishing activity takes place at speeds up to 5 knots.

**Analysis of F/V Caitlin & Mairead, F/V Heritage, and F/V Tradition  
AIS Data from 2006 through MONTH 2022**

12. Baird used the following procedure to analyze AIS data for the F/V Caitlin & Mairead, F/V Heritage, and F/V Tradition.
  - For this analysis, Baird utilized the Marine Cadastre AIS dataset,<sup>1</sup> which is a compilation of vessel traffic data collected by the United States Coast Guard. The dataset consists of a series of text files containing the AIS point data filtered to a one-minute time interval. Baird maintains a copy of the complete dataset on its computer servers and runs a procedure that assembles tracks for each vessel based on the time and distance separation between the AIS data points.
  - Starting with the three vessel names, we matched each vessel with the principal port from which each vessel operates based on fishing permit information. These are: F/V Caitlin & Mairead, Montauk, NY; F/V Heritage and F/V Tradition, Point Judith, Rhode Island.
  - Each of these vessels was then associated with standard marine identification numbers for each vessel. These are the Marine Mobile Services Identities (“MMSI”), a nine digit number assigned to marine communications equipment to uniquely identify a vessel, and the International Maritime Organization (IMO) number, which

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<sup>1</sup> Data located at this website: <https://marinecadastre.gov/ais/>.

is a unique number assigned to vessel hulls (not available for all vessels). We also checked the vessel names and numbers against the United States Coast Guard vessel registration database. The identification numbers for each vessel were determined to be:

- F/V Caitlin & Mairead: 366274490 (MMSI) and 8885212 (IMO)
- F/V Heritage: 367142820 (MMSI before June 2021), 368188280 (MMSI June 2021 and later)
- F/V Tradition: 367134030 (MMSI) and 8719542 (IMO)
- We then queried the AIS database and extracted data (vessel tracks) for these specific MMSI and IMO numbers.
- For each vessel, we used the AIS data to plot the following:
  - All vessel tracks from 2016-2022 broken out and color coded by year.
  - Vessel tracks for all years separated into bins and color coded by vessel speed, where blue tracks indicate a vessel speed of less than or equal to four knots, which is assumed to represent active fishing.
- We used latitude and longitude information to identify portions of vessel tracks located within the Vineyard Wind 1 lease area and vessel speed information to calculate the corresponding amount of time those tracks were inside the Vineyard Wind 1 lease area and traveling at less than or equal to four knots (i.e., actively fishing). We then summed those times to determine the cumulative time over the years 2016 through June 2022 that each vessel spent actively fishing in the lease area.

13. The plots of vessel tracks are presented in the attached report as follows:

- F/V Caitlin & Mairead: Slides a-b.

- F/V Heritage: Slides c-d.
- F/V Tradition: Slides e-f.

14. The cumulative time each vessel spent fishing in the Vineyard Wind 1 lease area is presented in Table 1 on Slide g of the attached report and reproduced below.

**Table 1: Total Cumulative Time (Hours) Actively Fishing in the Lease Area 2016-2022**

Vessel	Total Cumulative Time (hours) from January 2016 to June 2022
Heritage	0.4
Tradition	6.2
Caitlin & Mairead	21.1

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 20, 2022.

Respectfully submitted,

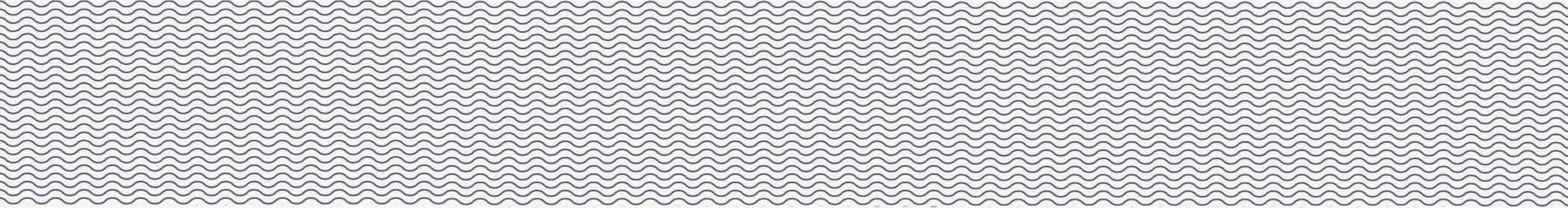
By:   
R. Douglas Scott, Ph.D., P. Eng.

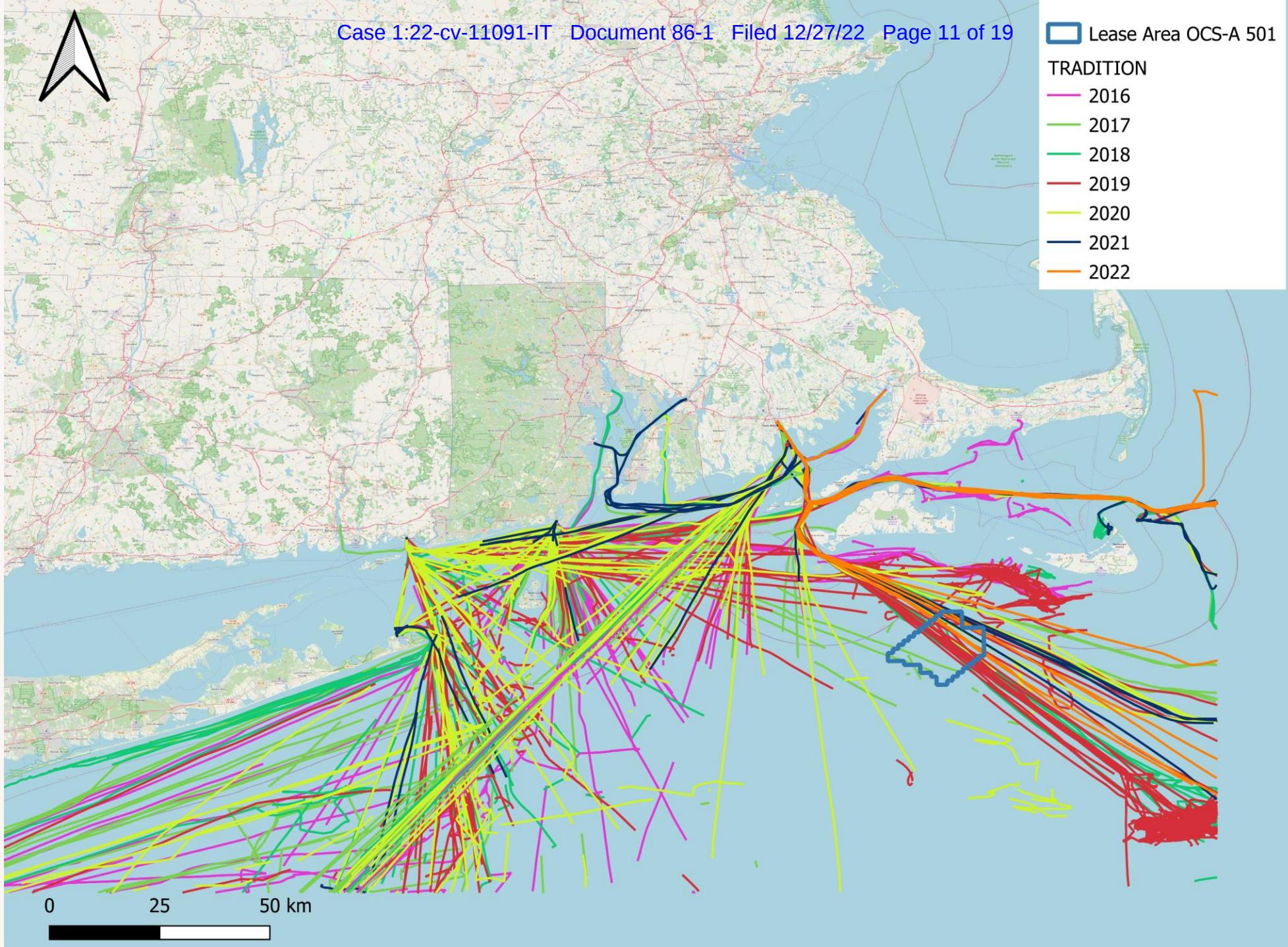
**DECLARATION OF R. DOUGLAS SCOTT IN  
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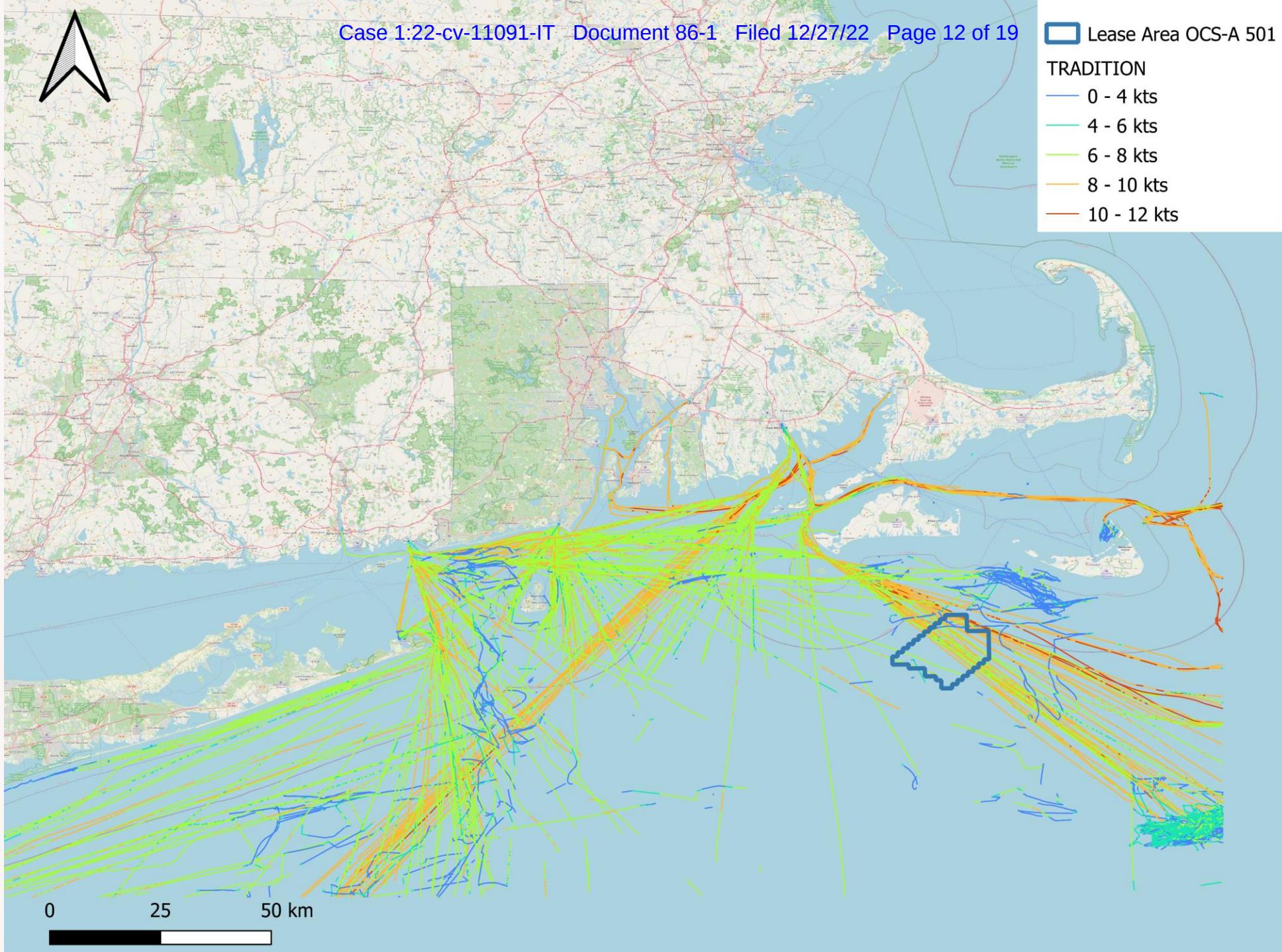
**ATTACHMENT**

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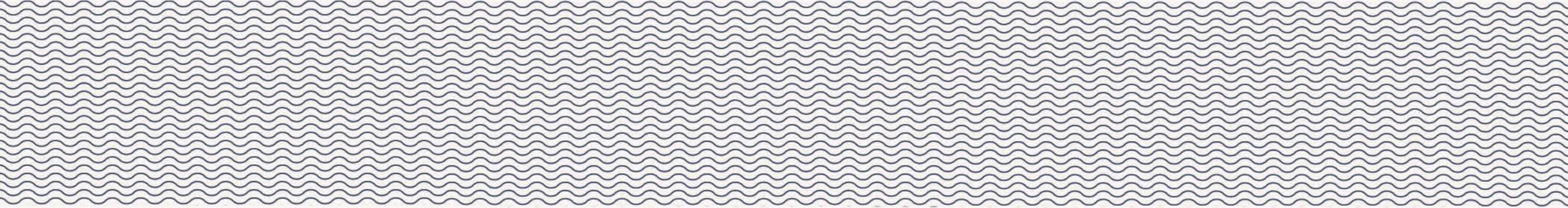
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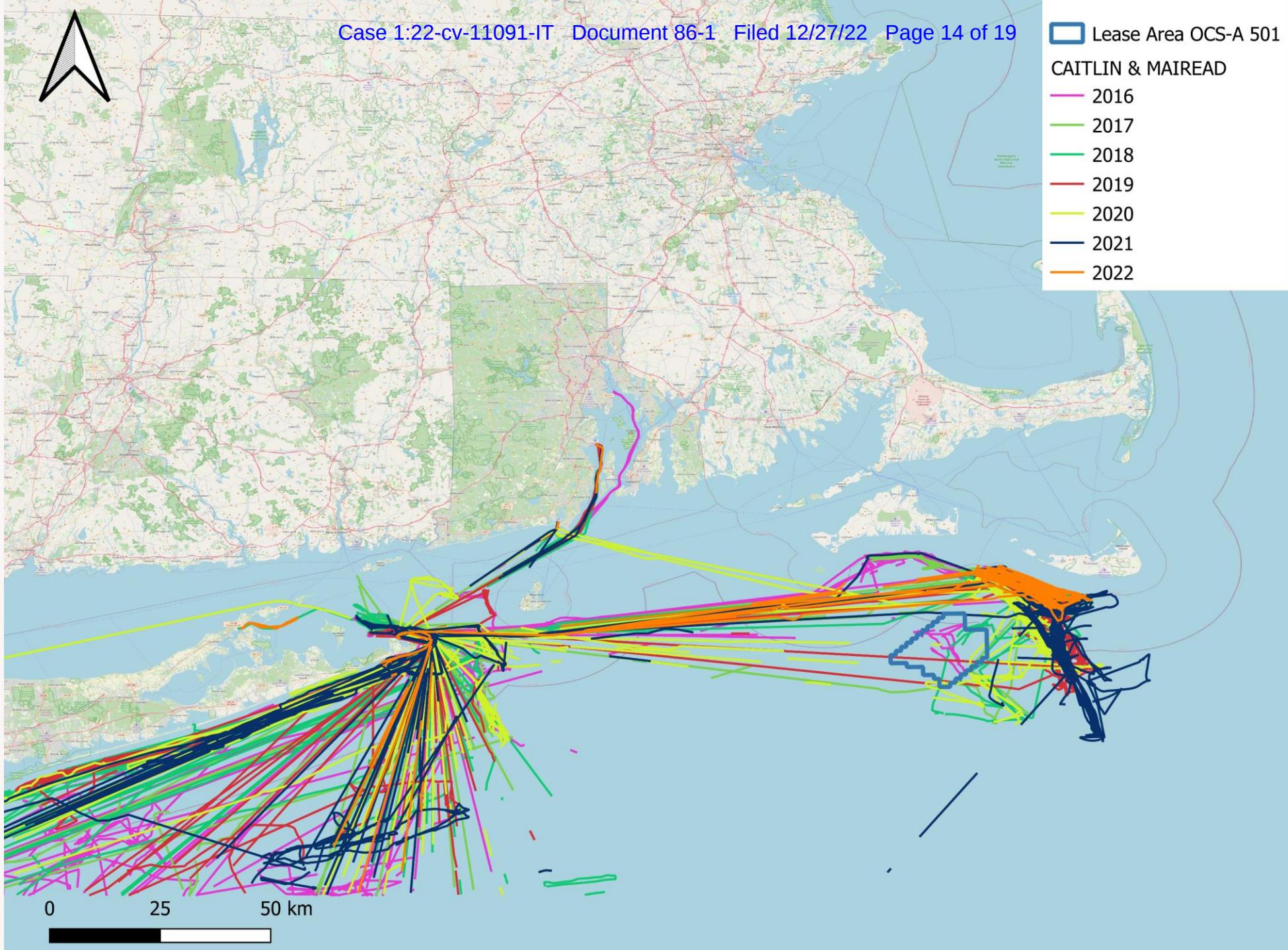


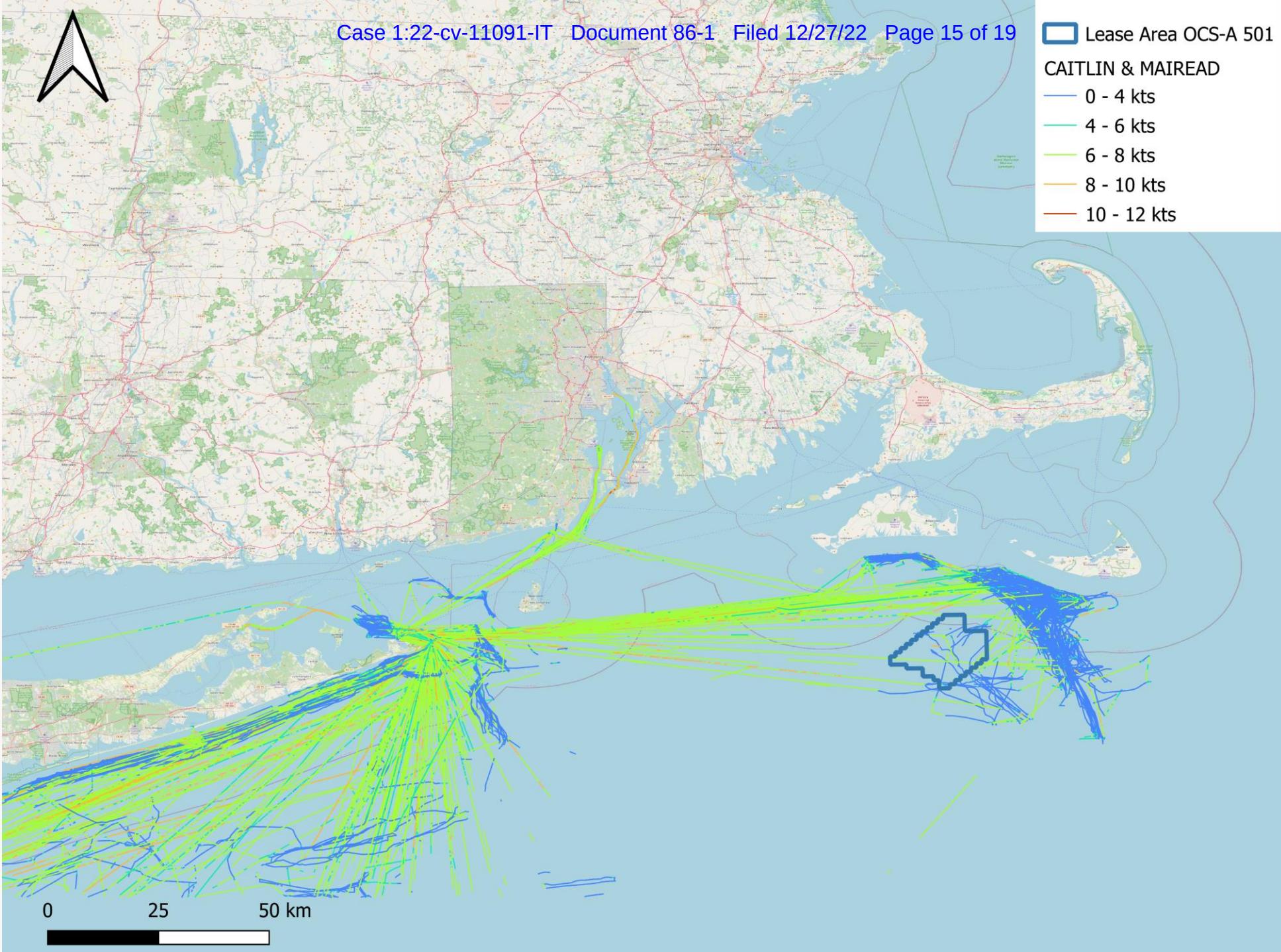




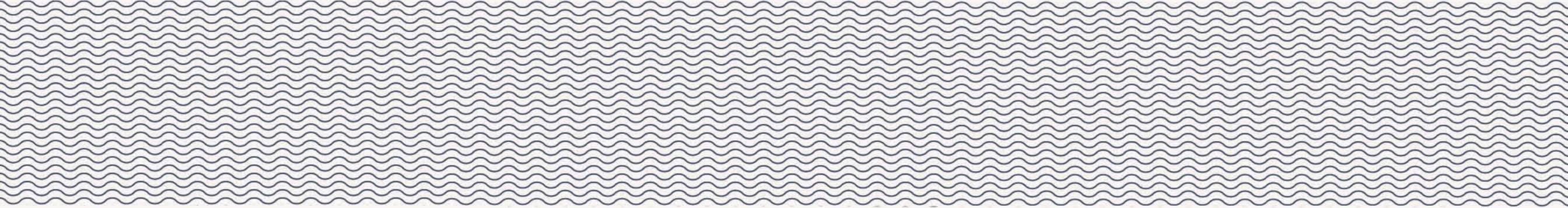
**CAITLIN & MAIREAD**

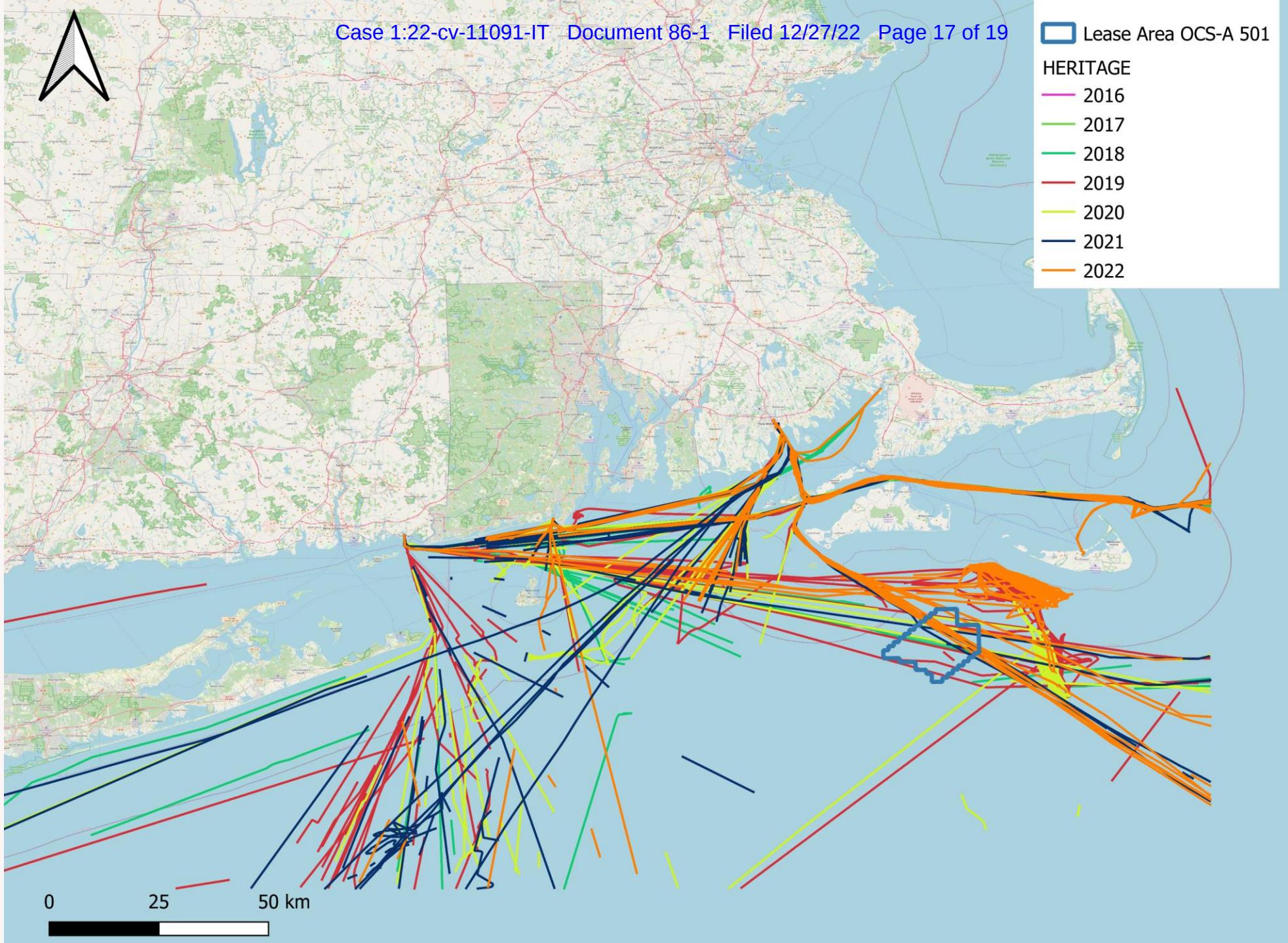


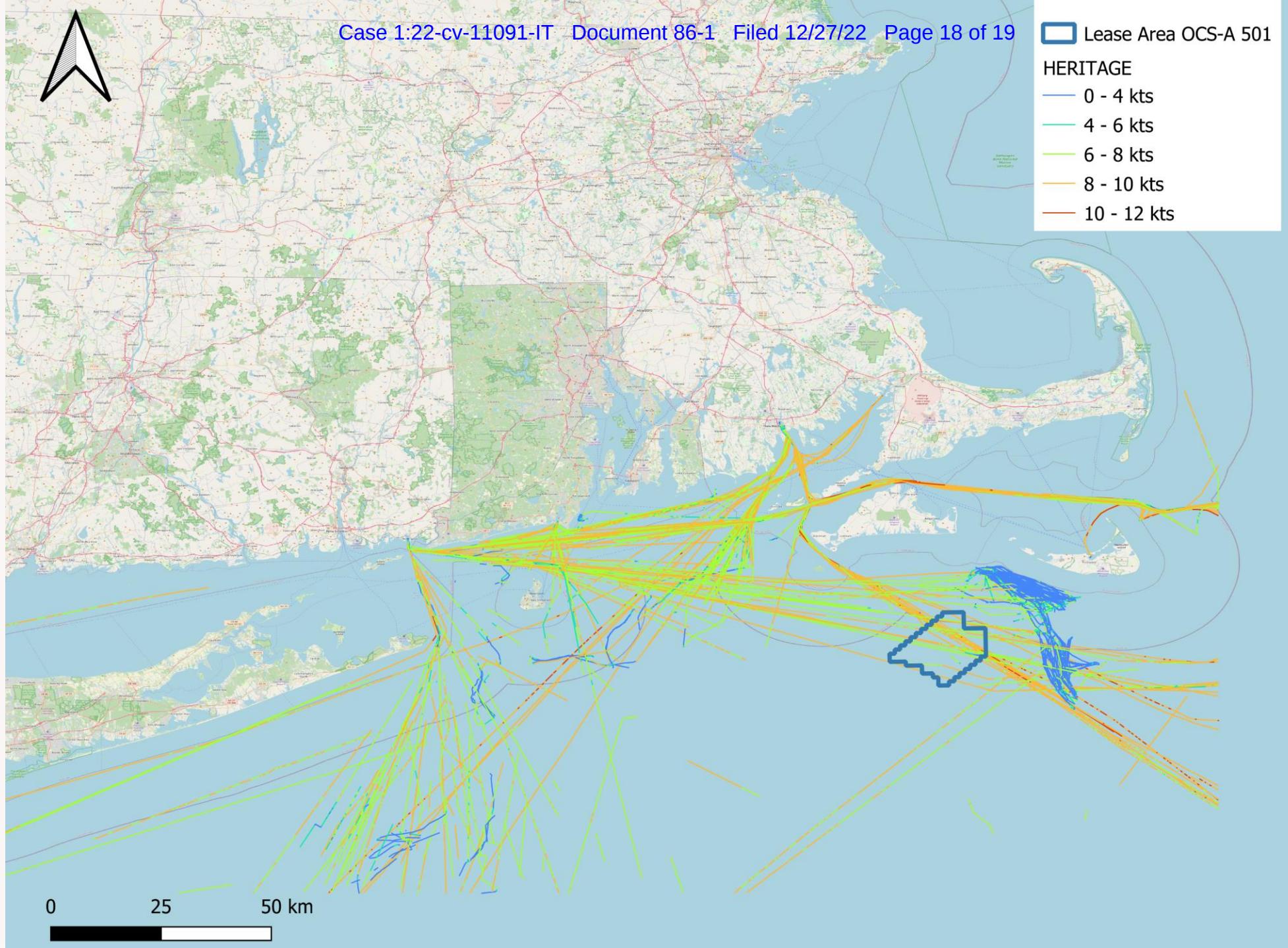




**HERITAGE**







# Total Duration Activity Fishing in the Lease Area

- The cumulative time (in hours) each vessel spent in the Lease Area actively fishing was calculated from the AIS dataset and summarized in Table 1 below
- A vessel was assumed to be actively fishing if the vessel speed in an AIS track segment was less than or equal to 4 knots
- The AIS dataset covered the period from January 1, 2016 to June 30, 2022.

**Table 1: Total Cumulative Time (Hours) Actively Fishing in the Lease Area 2016-2022**

	Heritage	Tradition	Caitlin & Mairead
Total Duration (hours)	0.4	6.2	21.1