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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT AND REPLY TO THE DEFENDANTS' OPPOSITIONS TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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GLOSSARY

APA.....Administrative Procedure Act

BiOp.....Biological Opinion

BOEM.....Bureau of Ocean Energy Management

Corps.....U.S. Army Corps of Engineers

COP.....Construction and Operations Plan

CWA.....Clean Water Act

EA.....Environmental Assessment

EIS.....Environmental Impact Statement

ESA.....Endangered Species Act

MMPA.....Marine Mammal Protection Act

NEPA.....National Environmental Policy Act

NMES.....National Marine Fisheries Service

OCSLA.....Outer Continental Shelf Lands Act

ROD.....Record of Decision

ARGUMENT

I. THE PLAINTIFFS' HAVE ARTICLE III AND PRUDENTIAL STANDING TO BRING ALL THEIR CLAIMS

The Federal Defendants and Defendant-Intervenor Vineyard Wind (collectively, the "Defendants") assert that the environmental harms causing the Plaintiffs' alleged injuries are not injuries to the Plaintiffs but are merely personal injuries of the declarants. A careful review of the contents of each declaration, starting with that of David Aripotch filed on behalf of Plaintiff Old Squaw Fisheries, Inc. ("Old Squaw Fisheries"), shows the Defendants' assertions are baseless.

A. Plaintiff Old Squaw Fisheries Has Standing To Bring All Its Claims.

Mr. Aripotch's declaration specifically addresses the injuries suffered by Plaintiff Old Squaw Fisheries resulting from the degradation of the ecosystem in the Vineyard Wind area attributable to the Federal Defendants' violations of OCSLA, NEPA, CWA, ESA, and MMPA. For example, *see*:

- Aripotch Decl ¶¶ 31-32 (stating that the "environmental and ecological harms" attributable to the project will act as a contributing factor in forcing the F/V Caitlin and Mairead, Old Squaw Fisheries' sole fishing boat, "to stop fishing in the Vineyard Wind lease area" and that, consequently, "Old Squaw has both an economic and environmental interest in reversing [the project approval] before the imminent construction activities . . . make them irreversible");

- Aripotch Decl. ¶ 13 ("The turbines will be pile-driven into the ocean bottom of the Outer Continental Shelf of the Vineyard Wind lease area, producing high levels of low-frequency noise capable of injuring fish and marine mammals, and the continuous operation of the turbines will produce further noise, and electromagnetic energy emanating from the cables will disturb marine life, including squid," the primary species Old Squaw Fishery catches in the Vineyard Wind area);

- Aripotch Decl. ¶ 20 (describing Old Squaw's interests in protecting the purity and cleanliness of the traditional fishing waters in the Vineyard Wind area against the adverse environmental impacts of the project in "throwing the local marine ecosystem out of balance and further impacting Old Squaw's ability to fish in the waters of the OCS in and around the Vineyard Wind lease area. These adverse ecological impacts attributable to the Vineyard Wind project constitute the

pollution of those waters and the degradation of all living things within them," all to the detriment of Old Squaw Fisheries' ability to fish those waters);

- Aripotch Decl. ¶ 21 (describing Mr. Aripotch's concern with the adverse environmental impacts of the project on Old Squaw Fisheries in connection with his role "[a]s the Owner and President of Old Squaw," and observing that the court has the power to redress those environmental injuries to Old Squaw Fisheries, "thereby erasing any such environmental, ecological . . . and related harms attributable to the Vineyard Wind project.");

- Aripotch Decl. ¶ 24 (further addressing the adverse environmental impacts of the Vineyard Wind project on Old Squaw Fisheries' ability to fish in the area, Mr. Aripotch states, "I am afraid that the Vineyard Wind project is going to destroy the pristine area south of Nantucket and north of Long Island" that support Old Squaw's fishing activities. "I think offshore wind is going to change the way fish migrate. They are going to leave the area. I think construction, by that I mean pile driving the turbines and jet plowing for hundreds of miles of cable, is going to be brutal on the fish too, in all of their life cycle, the larvae, the young of the year, and the adults. Jet plowing using water jets to either liquefy the ocean floor to six feet deep or dig a trench equally deep in the ocean floor to lay hundreds of miles of cable, will destroy the larvae of squid and eels. The squid and other bait fish also will be adversely affected because of all the electromagnetic frequency in the cables that are necessary for the operation of the turbines. As a commercial fisherman, I know the fish aren't going to like the noise and sound from the turbines, especially when high winds make the turbines vibrate and it resonates from their bases onto the ocean floor during operation. The fish in the Vineyard Wind area likely will be unable to spawn as they normally do. That will affect all the animals in the food chain that depend on squid to eat. Plus, there are thousands of gallons of oil in each turbine, and the offshore substations contain almost 100,000 gallons of oil. If a hurricane runs through the Vineyard Wind area it will be an environmental catastrophe.");

- Aripotch Decl. ¶¶ 27-29 (addressing how "the Federal Defendants' actions in approving the project will result in harm, injury, and death to a diverse range of marine species, including whiting, squid, the endangered NARW, and horseshoe crabs, plus destruction of their habitats, and the destabilization of the delicate marine ecosystem," all to the detriment of Old Squaw's commercial fishing business, which Mr. Aripotch knows well as the "Owner and President of Old Squaw and the Captain of the F/V Caitlin & Mairead"); and

- Aripotch Del. ¶ 33 (stating, on behalf of Old Squaw Fisheries: "As Owner and President of Old Squaw . . . I oppose the government approval of . . . the Vineyard Wind project, which would endanger the ocean's ecological health, diversity, and rich resources.").

The foregoing paragraphs of Mr. Aripotch's declaration were cited and analyzed in the Plaintiffs' opening brief in connection with their arguments that Old Squaw Fisheries has Article III and prudential standing to bring environmental claims based upon alleged violations of OCSLA, NEPA, CWA, ESA, and MMPA. Doc. 67 at 16-26. If there were any doubt, the Plaintiffs' legal brief highlights the fact that the injuries summarized above are those of Old Squaw Fisheries: "These injuries caused by the Federal Defendants *to Old Squaw* would be fully redressed by the relief requested in Old Squaw's complaint." *Id.* at 23 (emphasis added).

Cases cited by the Federal Defendants to support their position that Old Squaw Fisheries' interests here are unrelated to environmental concerns are palpably off-mark. For example, *Am. Waterways Operators v. U.S. Coast Guard,* No. 18-cv-12070-DJC, 2020 U.S. Dist. LEXIS 10449, at *16-17 (D. Mass. Jan. 22, 2020) stands for the unsurprising proposition that "a party must assert environmental harm in order to come within [NEPA's] zone of interest," *id.* at 17 (quoting *Gunpowder Riverkeeper v. FERC,* 807 F.3d 267, 274 (D.C. Cir. 2015) (cleaned up), and the harm must cause an injury traceable to a defendant's actions, *id.* at 10-11. Here, Plaintiff Old Squaw Fisheries asserts environmental harms to the Vineyard Wind area that make the area unfishable, thereby causing its economic injuries that are traceable to the Federal Defendants' approval of the Vineyard Wind project. "Where the alleged injury has an environmental as well as an economic component . . . the mere fact that parties also seek to avoid certain economic harms that are tied to the risk of [environmental harms] does not strip them of prudential standing." *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 155 (2010). In *Monsanto,* two corporations were held to have Article III and prudential standing to raise NEPA claims based on declarations made by their employees of economic injuries to their respective companies attributable to environmental harms. So too, here, Old Squaw Fisheries bases its claims of economic injuries attributable to

environmental harms through the declaration of its owner, Mr. Aripotch, who is in a position to know the extent and cause of those injuries. Aripotch Decl. ¶¶ 2-3. Indeed, there is no such thing as a declaration sworn to by a company itself other than through an individual, usually an employee or owner. Accordingly, the Federal Defendants' citation to *Am. Waterways Operators* fails. The Federal Defendants' citation to *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228, 1235-36 (D.C. Cir. 1996), fails for the same reason.

The Federal Defendants' citation to *Pacific Northwest Generating Co-op v. Brown*, 38 F.3d 1058, 1063 (9th Cir. 1994), is even further afield. In that Ninth Circuit ESA case, the court held that a company can only make claims to protect "an interest germane to its own purposes." *Id.* The plaintiff in that case was a power generating company whose purposes had nothing to do with its customers' or employees' "aesthetic and recreational interests" in protecting salmon under the ESA. *Id.* Here, by contrast, Mr. Aripotch is the sole owner of a commercial fishing company whose interests and purposes are dependent upon the ecological and environmental viability of the Vineyard Wind area as a fishing ground for squid and other fish. Aripotch Decl. ¶¶ 2, 31-32. As such, he is in a unique position to assert Old Squaw's "germane" interests in ensuring the continuing viability of the area for commercial fishing operations by Old Squaw Fisheries. *See Monsanto,* 561 U.S. at 155. And, as Captain of Old Squaw Fisheries' sole fishing boat, the F/V Caitlin & Mairead, he is also uniquely qualified to address the environmental damage that the Vineyard Wind project would cause to Old Squaw's fishing ground, including but not limited to the ecosystem-wide ecological damage to that fishing ground resulting in the taking of endangered species. Aripotch Decl. ¶¶27-29. The mere fact that his declaration also addresses his personal interests does not take away from the fact that he makes the deposition in support of Old Squaw Fisheries' interests and not merely his personal ones.

In turn, Vineyard Wind's legal brief cherry-picks two statements in Mr. Aripotch's declaration to falsely assert that the injuries he claims are solely his own personal injuries. Doc. 87 at 10, 12. In so doing, Vineyard Wind ignores the multiple statements that Mr. Aripotch makes regarding Old Squaw's economic injuries attributable to the environmental and ecological harms traceable to the Federal Defendants' approval of the Vineyard Wind project, as set forth in detail above in this Section I.A. *See* Aripotch Decl. ¶¶ 13, 20-21, 24, 27-29, 31-32, 33. Again, those paragraphs of Mr. Aripotch's declaration are cited and analyzed in Plaintiffs opening brief. Doc. 67 at 17-26.

To summarize, Old Squaw suffers injuries because the construction and operation of the Vineyard Wind project will destroy the pristine waters in the area by, among other things, pile driving, jet plowing, and creating excessive underwater noise, resulting in harm, injury, and death to a diverse range of marine species, destruction of their habitats, and destabilization of the marine ecosystem, making the Vineyard Wind area unfishable — all to the direct detriment, harm, and injury of Old Squaw Fisheries, a commercial fishing company dependent in at least some measure on the ability to fish in the waters Vineyard Wind lease area. *Id.* Thus, contrary to Vineyard Wind's claims, many of Mr. Aripotch's asserted injuries are injuries *to Old Squaw Fisheries* resulting from the failure of the Federal Defendants to comply with the substantive and procedural environmental protection statutes at issue in this case. To the extent that Mr. Aripotch's declaration also includes injuries that may be characterized as personal ones, it does not mean that his declaration's many paragraphs alleging environmental and ecological harms to Plaintiff Old Squaw Fisheries may be discounted, minimized, or ignored. Similarly, just because Old Squaw Fisheries is injured economically as a result of the alleged environmental harms does not mean

those economic injuries may be ignored for purposes of Article III or prudential standing. *See Monsanto,* 561 U.S. at 155. Vineyard Wind cites no case to the contrary.

The five cases Vineyard Wind does cite do not support its standing arguments. First, *Summers v. Earth Island Institute*, 555 U.S. 488, 494 (2009), is cited for the unremarkable proposition that standing cannot be based solely on "generalized harm to the forest or the environment." Here, as indicated, Mr. Aripotch's declaration states with particularity that the approval of the Vineyard Wind project will devastate the marine ecology of the Vineyard Wind area, thereby making the area unfishable, to the detriment of Old Squaw Fisheries. *See, e.g.,* Aripotch Decl. ¶ 20 (adverse environmental impacts of the project will result in "throwing the local marine ecosystem out of balance and further impacting Old Squaw's ability to fish in the waters of the OCS in and around the Vineyard Wind lease area. These adverse ecological impacts attributable to the Vineyard Wind project constitute the pollution of those waters and the degradation of all living things within them"); ¶ 24 (Vineyard Wind project will "destroy the pristine area . . . that supports Old Squaw's fishing activities" by changing "the way fish migrate [and] destroying the larvae of squid and eels [making species] unable to spawn as they normally do"); ¶¶27-32 ("The Federal actions will result in harm . . . to a diverse range of marine species . . . [causing Old Squaw] to stop fishing in the Vineyard Wind lease area."). These are not "generalized" but specific harms to the environment of the Vineyard Wind area that will cause Old Squaw Fisheries to stop fishing in the area, thereby causing it particularized injury in fact.

NEPA created procedural rights for individuals living in an area affected by federal action. *See Aberdeen & Rockfish Railroad Co. v. SCRAP*, 422 U.S. 289, 319 (1975). Therefore, "[i]n an action under NEPA, the procedural injury in an agency's violation of the statute is itself a sufficient 'injury in fact' to support standing, provided this injury is alleged by a plaintiff having a sufficient

geographical nexus to the site of the challenged project that he may be expected to suffer *whatever* environmental consequences the project *may* have." *Conservation Law Found. v. U.S. Dep't of Air Force*, 1987 U.S. Dist. LEXIS 15149 at * 5 (D. Mass. Nov. 23, 1987) (cleaned up, emphasis added) (referencing *Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975)); *see also Friends of St. Frances Xavier Cabrini Church v. Fed. Emergency Mgmt. Agency*, 658 F.3d 460, 466 (5th Cir. 2011); *Dine Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 840 (10th Cir. 2019). Old Squaw Fisheries has shown via Mr. Aripotch's declaration that it has the requisite "geographical nexus" to the Vineyard Wind area to support standing because the environmental damage to the area resulting from the construction and operation of the project will cause Old Squaw Fisheries to cease its commercial fishing activities in the area. Indeed, by any reasonable barometer, Old Squaw Fisheries' injuries satisfy the standing requirements under NEPA because those injuries are "tethered to the environment," *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 943 (9th Cir. 2005), and are "causally related to an act within NEPA's embrace." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA,* 415 F.3d 1078, 1103 (9th Cir. 2005). Put another way, Plaintiffs "need only show" that the statutes in question were "designed to protect some threatened concrete interest" of theirs. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 nn.7-8 (1992). This showing has been accomplished here by demonstrating that Plaintiff Old Squaw Fisheries has a "geographical nexus" with the Vineyard Wind project – that is, Old Squaw uses the waters for a purpose that the project threatens. *See Nulankeyutmonen Nkihtaqmikon v. Impson,* 503 F.3d 18, 27-28 (1st Cir. 2007); *see also Ashley Creek*, 420 F.3d at 938 (ruling that "plaintiffs who use the area threatened by a proposed action . . . have little difficulty establishing a concrete interest"). The Aripotch declaration is more than adequate to meet these requirements.

Second, *Warth v. Seldin,* 422 U.S. 490, 499 (1975) is cited for the equally unremarkable proposition that a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights and interests of third parties." *Id.* Mr. Aripotch's declaration contains fifteen paragraphs in which Mr. Aripotch, in his capacity as owner of Old Squaw Fisheries, asserts the legal rights and interests of Plaintiff Old Squaw Fisheries. The fact that his declaration also includes statements regarding his personal injuries does not negate his assertions of Old Squaw Fisheries' injuries. Furthermore, *Warth* was a case in which the plaintiffs did not assert *any* injuries that they or their companies suffered but only injuries of third parties not before the Court. It is not surprising, therefore, that the *Warth* court held that the petitioners in that case did not have standing because it was insufficient for them to allege merely "that injury has been suffered by other, *unidentified* members of the class to which they belong and which they purport to represent." *Id.* at 502 (emphasis added). By contrast, Mr. Aripotch's declaration contains specific allegations that Old Squaw Fisheries itself, a company he owns and runs, has been injured by the actions of the Federal Defendants.

Third, *Sierra Club v. Morton,* 405 U.S. 727, 734-35 (1972), is cited by Vineyard Wind for the proposition "that the party seeking review be himself *among* the injured" (emphasis added).[1] Here, Mr. Aripotch's declaration shows that Old Squaw Fisheries is "among the injured." In *Morton*, Petitioner Sierra Club failed to allege that any of its members would be injured by the construction of a road through a national forest. The Supreme Court denied standing because

[1] This case has been superseded by the Administrative Procedure Act. *See* U.S.C. § 702 (affording review to anyone "adversely affected or aggrieved by agency action within the meaning of a relevant statute."); *see also FAIC Secur. Inc. v. United States,* 768 F.2d 352, 357 (D.C. Cir. 1985) (recognizing *Morton* is no longer good law because "[t]he zone of interests adequate to sustain judicial review is particularly broad in suits to compel federal agency compliance with law, since Congress itself has pared back traditional prudential limitations . . .").

"[n]owhere in the pleadings or affidavits did the Club state that its members use of [the area] for *any* purpose . . . [or] would be significantly affected by the proposed actions of the respondents." *Id.* at 735 (emphasis added). By contrast, here, Mr. Aripotch's declaration specifically alleges concrete injuries to Old Squaw Fisheries stemming from the fact that the environmental harms attributable to the Vineyard Wind project will make the area unfishable. All that is required for Article III standing is "a concrete and particularized injury in fact, a causal connection that permits tracing the claimed injury to the defendant's actions, and a likelihood that prevailing in the action will afford some redress for the injury." *City of Bangor v. Citizens Communs. Co.,* 532 F.3d 70, 92 (1st Cir. 2008). Mr. Aripotch's declaration more than meets that standard.

Fourth, in *Osediacz v. City of Cranston*, 414 F.3d 136 (1st Cir. 2005), standing was denied because the plaintiff asserted injuries only to the free speech rights of third parties and not her own, and the plaintiff failed to allege that she had any interest at all in exercising the rights regulated by the challenged provision. Here, by contrast, Mr. Aripotch's declaration states that but for the alleged violations of the environmental protection laws leading to the approval of the Vineyard Wind project Old Squaw would continue to fish in the Vineyard Wind lease area. Aripotch Decl ¶¶ 31-32.

Fifth, and finally, *Lopez v. Garriga*, 917 F.2d 63, 68 n. 5 (1st Cir. 1990), stands for a similarly prosaic proposition, namely, that "Lopez must show his own rights are in jeopardy in order to secure injunctive relief," and standing cannot be based on "an abstraction." *Id.* at 68. Here, Mr. Aripotch's declaration does not allege an "abstraction" but concrete, environmental-based injuries to Old Squaw Fisheries resulting from the approval of the Vineyard Wind project in violation of several environmental protection statues.

Accordingly, none of the five cases cited by Vineyard Wind supports its position that Old Squaw Fisheries lacks standing to bring its environmental claims. Tellingly, neither Vineyard Wind nor the Federal Defendants even tried to distinguish cases cited by the Plaintiffs in their opening brief in support of Old Squaw Fisheries' standing.

Thus, Mr. Aripotch's declaration speaks directly to the environmental and ecological injuries caused to Old Squaw Fisheries by the Federal Defendant's approval of the Vineyard Wind project leading to the pollution of the waters of the area to the detriment of Old Squaw Fisheries' continuing ability to use the area as a fishing ground. *See* Aripotch Decl. ¶¶ 13, 21, 24, 27-28, 30-31, 33-34.[2] These environmental harms go beyond pollution of the waters protected by the CWA and also include the devastation of the habitat of marine mammals in the area, including the North Atlantic Right Whale ("NARW"), an endangered species protected by the ESA and MMPA which will be injured by the construction and operation of the project and which will "send the NARW away from the area." *Id.* at ¶ 27-28. Like all ecosystems supporting life, the ecosystem of the Vineyard Wind area supports the entire water-dependent population of the project area, including species caught by Old Squaw Fisheries, and the harm caused to such species will reverberate throughout the ecosystem. *Id.* at ¶ 24 ("The fish in the Vineyard Wind area likely will be unable to spawn as they normally do. That will affect all animals in the food chain that depend on squid to eat.").

The injuries to Old Squaw Fisheries, as set forth in Mr. Aripotch's declaration, are inextricably tethered to the environmental and ecological harms occasioned by the project's devastation of the waters and habitat of fish and marine mammals in the Vineyard Wind area,

[2] Again, all of these paragraphs were cited by the Plaintiffs in their opening brief in support of Old Squaw's standing to bring environmental claims under NEPA, CWA, ESA, and MMPA.

which constitutes the ecosystem in which Old Squaw Fisheries generates a portion of its revenues. Aripotch Decl. ¶¶ 7-9, 12. Because that ecosystem is being compromised by the project, and because Old Squaw Fisheries shares a geographical nexus with the Vineyard Wind project, Old Squaw Fisheries is injured-in-fact under the statutes intended by Congress to protect the environment, including OCSLA, NEPA, ESA, CWA, and MMPA. Of course, the ability to conduct its commercial fishing business in fishable waters that are not compromised by environmental pollution is not only "germane" but is central to Old Squaw Fisheries' corporate mission of operating a commercial fishing enterprise. *See Monsanto,* 561 U.S. at 155; *see also* Aripotch Decl. ¶¶ 7-9, 12, 24, 27, 33-34.

Finally, OCSLA requires BOEM to "ensure . . . protection of the environment." 43 U.S.C. § 1337(p)(4)(B). As such, OCSLA is, at least in part, an environmental protection statute. Old Squaw Fisheries has shown through Mr. Aripotch's declaration that its environmental and economic interests are tethered to the quality of the environment in the Vineyard Wind area because it has "a sufficient geographical nexus to the site of the challenged project that [it] may be expected to suffer *whatever* environmental consequences the project *may* have." *Conservation Law Found.*, 1987 U.S. Dist. LEXIS 15149 at * 5 (emphasis added). *See also Ashley Creek*, 420 F.3d at 943. Just as Old Squaw Fisheries has standing to bring its environmental claims based upon whatever injuries it may suffer as a result of BOEM's violations of OCSLA's environmental protection provisions, so too, Old Squaw Fisheries has standing to bring its environmental claims based upon BOEM's and the other the Federal Defendants' violations of the environmental protection provisions of NEPA, CWA, ESA, or MMPA.

Having shown that Old Squaw Fisheries has Article III and prudential standing to bring all of its environmental claims, those claims are appropriate for this Court to review on the merits.

Accordingly, no other Plaintiff need show standing to bring such claims. *See Horne v. Flores*, 557 U.S. 433, 447–448 (2009). Nevertheless, a few observations in response to Vineyard Wind's assertions regarding the standing of the other Plaintiffs may be appropriate.

B. Long Island Commercial Fishing Association Has Associational Standing.

Long Island Fishing Association ("LICFA") has associational standing to represent the interests of its member Old Squaw Fisheries. *See* Aripotch Decl. ¶ 3; Brady Decl. ¶ 9. As set forth in the Brady declaration, "LICFA and its members support extensive cooperative scientific research to better understand the marine environment and fisheries management. Since its inception, LICFA and its members have supported and advocated for clean, fishable waters free from pollution and navigational obstructions so that LICFA's members can pursue their livelihoods and life-callings as fishermen." Brady Decl. ¶ 4; see also *Id.* at ¶ 3. Furthermore, "[t]he presence and good health of, and access to, squid, whiting, scup, butterfish, and other marine life in the Vineyard Wind area is vital to LICFA members who depend on commercial fishing activities in the Vineyard Wind lease area for a substantial portion of their revenues." Brady Decl. ¶ 6. Moreover, "[t]he Vineyard Wind lease area is a prime fishery for squid, scup, and whiting," Brady Decl. ¶ 7, and the construction and operation of the Vineyard Wind lease area will produce "high-decibel low-frequency sound, sound pressure, and particle motion, and the continuous operation of the turbines will produce further noise and electromagnetic energy emanating from the cables that will disturb existing marine life, including squid," to the detriment of Old Squaw and other LICFA members. Brady Decl. ¶ 18. In addition, the construction and operation of the project "will throw the local marine ecosystem out of balance and further impact LICFA members to fish in the currently clean waters of the Outer Continental Shelf in and around the Vineyard Wind lease area." Brady Decl ¶ 22. Further, because of the "environmental degradation" of the

Vineyard Wind area that will be attributable to the project if it proceeds, "LICFA has advocated that the federal government must take action to mitigate the Vineyard Wind project's complete and total devastation of the Vineyard Wind lease area's potential use as a fishery." Brady Decl. ¶¶23-24.

The Brady declaration shows that protecting the quality of the ecosystem in the Vineyard Wind area is "germane" to LICFA's mission of representing the interests of its commercial fishing members, including Old Squaw Fisheries, in ensuring fishable waters, including the waters of the Vineyard Wind area. All of the forgoing paragraphs of the Brady declaration were cited by the Plaintiffs in their MSJ legal memorandum in support of LICFA's associational standing to bring environmental claims. Doc. 67 at 27. In short, LICFA has standing to represent the environmental and ecological interests of its member Old Squaw Fisheries in this lawsuit. In light of the foregoing, this Court should not give credence to Vineyard Wind's arguments that ensuring fishable waters for the benefit of its commercial fishing members, including Old Squaw Fisheries, is not "germane" to LICFA's purposes. *See* Doc. 87 at 13-14. As shown by the Brady declaration, those arguments of Vineyard Wind are palpably false.

Moreover, the two cases cited by Vineyard Wind in support of its challenge to LICFA's standing are inapposite. First, *Mangual v. Rotger-Sabat,* 317 F.3d 45, 56 (1st Cir. 2003) stands for the general proposition that the "burden to establish standing lies with the party invoking federal jurisdiction." As set forth above, LICFA has more than met that burden. Vineyard Wind's argument that LICFA's mission does not include protection of the environment used by its members for their commercial fishing operations is belied by the numerous paragraphs of the Brady declaration summarized above as well as numerous comments filed by LICFA during the Vineyard Wind approval process based on concerns regarding the impact of the project on the

fishing grounds LICFA's members utilize. *See, e.g.,* **BOEM_0051086–0051091; BOEM_0078885–0078887; BOEM_0111225–0111238.**

Second, *Minnesota Federation of Teachers v. Randall,* 891 F.2d 1354 (8th Cir. 1989), was a case involving a teachers' union seeking to challenge allocation of taxpayer funds, where the court held that the teachers union "is not an organization of taxpayers" and , therefore, there was an insufficient nexus between the purpose of the union and the allocation of tax revenues set forth in the complaint because the mission of the union had nothing to do with the fact that some of its members pay taxes. Here, by contrast, LICFA is a membership organization of commercial fishermen and their companies whose mission includes ensuring that its members have access to fishable, unpolluted waters.

If that were not enough, Bonnie Brady has prepared a second declaration, attached hereto, showing that Mr. Aripotch is himself an individual member of LICFA as a commercial fisherman, in addition to Old Squaw Fisheries' membership. *See* Second Brady Decl. ¶¶ 2-4. In support of the Second Brady declaration, Mr. Aripotch has also prepared a second declaration attached hereto stating that he is a member of LICFA in his personal capacity as a commercial fisherman, in addition to Old Squaw Fisheries' membership. *See* Second Aripotch Decl . ¶¶ 2-4. Incidentally, the second Brady and Aripotch declarations also serve to support Mr. Aripotch's allegations of personal environmental injuries attributable to the Vineyard Wind project, as well as LICFA's standing to bring the relevant environmental claims on his behalf. *See* First Brady Decl. ¶ 10 (stating that "other members of LICFA . . . are . . . relying on LICFA" to represent their interests in this lawsuit). It is appropriate for the Plaintiffs to file the new Brady and Aripotch declarations in support of standing at this time because the Defendants' Motions for Summary Judgment / Oppositions are the first documents filed by the Defendants directly challenging the Plaintiffs'

standing.[3] This Opposition/Response of the Plaintiffs is their first opportunity to respond to those standing challenges. To avoid any potential waiver argument, the Plaintiffs should be given the opportunity to respond now with the two new declarations. *See* Fed. R. Civ. Pro. 56(f) (requiring "a reasonable time to respond" to arguments made in summary judgment motion before rendering judgement); *see also Romano v. Arbella Mut. Ins. Co.*, 429 F. Supp. 2d 202, 205 (D. Mass. 2006) (requiring determination of "whether [the Plaintiffs] have had an opportunity to respond to the summary judgment motion" before ruling). Accordingly, the new declarations should be considered by this Court in weighing the issue of standing.

C. Heritage Fisheries, NAT W. Fisheries, and XIII Northeast Fishery Sector Have Standing.

Vineyard Wind's arguments that Heritage Fisheries, NAT W. Fisheries, and XIII Northeast Fishery Sector lack standing to raise environmental claims are also without merit. Thomas E. Williams, Sr. made his declaration in support of the standing of Heritage Fisheries and Nat. W. Fisheries in his capacity as Owner and President of both companies. Thomas E. Williams, Sr. Decl. ¶¶ 2, 7. He states that "the construction activities and the operation of the turbines will adversely impact the marine water quality of the Vineyard Wind lease and surrounding area. These adverse ecological impacts attributable to the Vineyard Wind project constitute the pollution of those waters and the degradation of all living things within them," and such "environmental degradation of those waters by Vineyard Wind" adversely impacts the "business activity and profits" of Heritage Fisheries and Nat. W. Fisheries. *Id.* at ¶¶ 24-25. For Heritage Fisheries and Nat W. Fisheries, the pollution and ecological degradation stemming from the Vineyard Wind project would "be a tragedy" because it would mean losing "the vitality of an area known for its

[3] The Defendants could have but failed to earlier challenge the Plaintiffs Article III and prudential standing in a motion to dismiss.

productivity from fish to squid to Right Whales because of the degradation of the water and the ocean bottom by the Project's pile driving, siting, electromagnetic frequency emission, destruction of the ocean floor by turbine foundations and scour protection and cable armoring, the low frequency noise and vibration caused by operating turbines, and the alteration of ocean currents that will result from so much fixed structure in the area". *Id.* at ¶ 28. All of the foregoing paragraphs from the Thomas E. Williams, Sr. declaration were cited in the Plaintiffs opening brief. Doc. 67 at 27.

With regard to Sector XIII's associational standing to bring claims on behalf of Heritage Fisheries and Nat W. Fisheries, *Mangual* and *Randall*, cited by Vineyard Wind, are inapposite for the same reasons that they are inapposite in connection with LIFCA's standing because Heritage Fisheries and Nat W. Fisheries are members of Section XIII. Doc. 87 at 14. In addition, the only evidence presented by Vineyard Wind are self-serving references to paragraphs from its own Statement of Facts based upon cherry-picking certain public records that indicate that Sector XIII has purposes in addition to ensuring fishable waters for its members. Doc. No. 87 at 12. John Haran, who serves as Sector Manager of Sector XIII, *see* Haran Decl. at ¶ 2, is in a better position to know Sector XIII's purposes and mission, and to describe same in a sworn declaration, than is Vineyard Wind or its counsel in a legal brief. As shown in this Section I.C. and in Plaintiffs' MSJ legal memorandum, protecting the interests of its members in having access to unpolluted, fishable waters is certainly "germane" to the mission of Sector XIII and, accordingly, Sector XIII has associational standing on behalf of its members Heritage Fisheries and Nat. W. Fisheries.

Among other purposes, Sector XIII's mission is to support "the commercial fishing industry in the area" of the Atlantic Coast and, to that end, "Sector XIII and its members have supported and advocated for clean, fishable waters free from pollution" to further the interests of

Sector XIII's members. Haran Decl. ¶¶ 3-5. "The presence and good health of, and access to squid, whiting, fluke, flounders, and other marine life in the Vineyard Wind lease area is vital to Sector XIII's members who depend on commercial fishing activities in the Vineyard Wind lease area for a substantial portion of their revenues." *Id.* at 6. The adverse ecological and environmental impacts of the Vineyard Wind project will injure Sector XIII's members Heritage Fisheries and Nat. W. Fisheries by polluting the waters, disturbing and displacing marine life (including the NARW who rely on food that will be displaced), and degrading the local ecosystem, "thereby adversely impacting Sector XIII's members' ability to fish in those waters due to the harm caused by the Vineyard Wind project to the sustainability of fish in the area." *Id.* at 13, 21, 23-24, 27. Just as in the case of LICFA, Vineyard Wind's argument that Sector XIII's purposes are not germane to protecting the fishability of the waters fished by its members is false.

D. Seafreeze Shoreside, Inc. Has Standing to Bring the Environmental Claims

Seafreeze Shoreside, Inc. ("Seafreeze") "is a seafood dealer in Narragansett, Rhode Island, that purchases, sells, and processes seafood products, primarily squid, caught by local fishermen who operate in the Vineyard Wind lease area." Lapp Decl. ¶ 3. "The presence and good health of squid and other marine life in the Vineyard Wind lease area is vital to the continuation of Seafreeze's business because Seafreeze depends on commercial fishing activities in the Vineyard Wind lease area, especially squid fishing activities, for a substantial portion of its revenue." Lapp Decl. ¶ 28. Construction and operation of the Vineyard Wind project are alleged to adversely impact the marine water quality of the Vineyard Wind lease area "to the detriment of the living things in those waters, thereby adversely impacting Seafreeze's ability to purchase, process, and sell squid caught in the area." Lapp Decl. ¶¶ 40, 45-51. Accordingly, the alleged environmental impacts from the Vineyard Wind project will injure Seafreeze because they will negatively affect

Seafreeze's revenues. Thus, Seafreeze's injuries stemming from the alleged environmental harms are tethered to the environment of the Vineyard Wind lease area, and, consequently, Seafreeze's interest in protecting the quality of that environment is germane to its corporate interests. *See* e.g., *Monsanto*, 561 U.S. at 155; *Ashley Creek,* 420 F.3d at 943. Accordingly, Seafreeze has standing to bring the environmental claims.

II. BOEM FAILED TO COMPLY WITH OCSLA.

Plaintiffs respond in Section II.A to the Federal Defendants' OCSLA arguments and respond to Vineyard Wind's arguments in Section II.B.

A. The Federal Defendants' Misreading of OCSLA Is Fatal to Their Arguments.

When "determining the meaning of a statutory provision," a court must "look first to its language, giving the words their ordinary meaning." *See Artis v. Dist. of Columbia*, 138 S. Ct. 594, 603 (2018). The Federal Defendants misread OCSLA because they disregard the ordinary meaning of the key operative terms of section 8(p)(4) of OCSLA, 43 U.S.C. § 1337(p)(4).

In relevant part, section 8(p)(4)(A)-(I)[4] states:

> "*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 natural resources of the outer Continental Shelf; . . . (G) protection of correlative rights in the outer Continental Shelf; . . . [and] (I) prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas; (Emphasis added).

The use of the term "Requirements" as the heading of Section 8(p)(4)(A)–(I) signifies that the Secretary *must* perform the duties set forth in the section. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (explaining that a statute's titles and headings may indicate its meaning). In turn, the use of the term "shall" in the introductory clause makes it mandatory for the Secretary to

[4] For a discussion of the function of section 8(p)(4)(J) in the statutory scheme, see fn 5, *infra.*

"ensure" that "any" activity covered by section8(p)(4)(A)–(I) of OCSLA provides for all of the protected interests listed in those subsections. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-662 (2007) (gathering cases demonstrating that "shall" imposes a mandatory duty). In other words, the duties of the Secretary in meeting the substantive requirements of section 8(p)(4)(A)–(I) are not discretionary. *See Lopez v. Davis*, 531 U.S. 230, 241 (2001) (explaining that Congress uses "a mandatory 'shall' . . . to impose discretionless obligations" when drafting statutes). "Every clause and word of a statute should, if possible, be given effect." *Chickasaw Nation v. United States,* 534 U.S. 84, 93 (2001) (cleaned up). And an interpretation that renders a term meaningless should be avoided. *See Duncan v. Walker,* 533 U.S. 167, 174 (2001). Accordingly, the meaning of the term "shall ensure" set forth in the introductory clause of section 8(p)(4) must be given effect.

When determining whether a statute's language is plain or ambiguous, courts look to "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (cleaned up). If the statute's language is plain, the court "must apply the statute according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009).

The term "ensure" is not defined in OCSLA. In such circumstances, "[d]ictionaries of the English language are a fundamental tool in ascertaining . . . plain meaning." *United States v. Lachman*, 387 F.3d 42, 51 (1st Cir. 2004); *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 129 (1st Cir. 1997) (explaining that "[w]e start, as we often do in searching out the meaning of a word, with the dictionary").

Merriam-Webster defines "ensure" as "to make sure, certain, or safe, guarantee". *Ensure*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003) (cleaned up). Another federal

district court applied this definition of "ensure" when interpreting statutory text. *See Corey H. by Shirley P. v. Board of Educ.*, 995 F. Supp. 900, 913 n.23 (N.D. Ill. 1998).

Applying this definition of "ensure" to section 8(p)(4), the Secretary of the Interior is required to "make sure . . . or guarantee" that her "activity" in issuing a lease or approving a construction and operations plan in fact "provides for" e.g., "safety," "protection of the environment," "conservation of natural resources," and "prevention of interference with reasonable uses." The Federal Defendants assert that the section gives the Secretary "discretion to weigh these factors and strike a rational balance between them, considering Congress's direction to authorize renewable energy development on the outer continental shelf." Doc. 73 at 44-45. That reading is contrary to the plain language of section 8(p)(4), and nothing in OCSLA permits the Secretary to balance the general goal of authorizing renewable energy projects against the specific limitations that Congress placed on attaining that goal in Section 8(p)(4). *See Alabama v. North Carolina,* 560 U.S. 330, 352 (2010) ("We do not – we cannot – add provisions to a federal statute."). Congress could have but did not authorize any such balancing in section 8(p)(4)(A)–(I). *See Motor & Equipment Mfrs. Asso. v. Environmental Protection Agency,* 627 F.2d 1095, 1113 (D.C. Cir. 1979) ("Congress was certainly capable of adding the phrase 'accompanying enforcement procedures' . . . We see no reason to assume that its failure to do so is attributable to sloppy draftsmanship."). Here, section 8(p)(4) specifically mandates that the Secretary shall ensure that "any activity" under her purview including, without limitation, the issuance of a lease and approval of a COP, "is carried out in a manner that provides for" e.g. "safety," and "protection of the environment." Section 8(p)(4) thus stands as an express *limitation* on the Secretary's ability to issue leases and approve COPs in connection with renewable energy development projects on the Outer Continental Shelf. *See Gustafson v. Alloyd Co.,* 513 U.S. 561, 569 (1995) (opining that

a court must interpret a statute "as a symmetrical and coherent regulatory scheme"); *see also Ali v. Fed. Bureau of Prisons,* 552 U.S. 214, 221-22 (2008) (observing that "construction of [related provisions] must, to the extent possible, ensure that the statutory scheme is coherent and consistent"); *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132-33 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (cleaned up).

Applying the foregoing traditional rules of statutory construction, the plain meaning of section 8(p)(4)(A)–(I) is not ambiguous and functions as a set of mandatory limitations on the Secretary's ability to authorize renewable energy projects on the Outer Continental Shelf. A court defers to an agency's interpretation only if a statute is ambiguous after the court uses all "traditional tools of statutory construction." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984); *see also Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (explaining that "deference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent"); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) ("[A] court cannot wave the ambiguity flag just because it found the [statute] impenetrable on first read."). Accordingly, the Secretary (and by extension, the Department of the Interior and its sub-agencies, including BOEM) has a non-discretionary duty to "ensure" that she adheres to provisions of section 8(p)(4)(A)-(I) limiting her authority to authorize renewable energy projects on the Outer Continental Shelf. And "that is the end of the matter." *Chevron*, 467 U.S. at 842.

The two cases cited by the Federal Defendants in support of their proposed balancing test are inapposite. In *Norton v. S. Utah Wilderness All.,* 542 U.S. 55, 66 (2004), the Court observed that under the Federal Land Policy and Management Act the Bureau of Land Management had

discretion to decide how to achieve a "mandatory object" of the Act, namely, to "continue to manage [a wilderness area] so as not to impair [its] suitability for preservation as wilderness." *Id.* By contrast, OCSLA's statutory authorization permitting the Secretary to develop renewable energy projects is not a "mandatory object" of the Act. Rather, it is a general authorization that is expressly limited by the mandatory, discretionless, and specific duty to protect, e.g. "safety" and "the environment" in pursuing that goal. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) ("A specific provision controls one of more general application."). And *Norton* certainly does not stand for the proposition that an agency can read into a statute a balancing test that is not supported by its plain text.

Massachusetts v. Andrus, 594 F.2d, 872, 889 (1st Cir. 1979), also cited by the Federal Defendants, did not involve section 8(p)(4) but a different former section of OCSLA, section 3(b), dealing with oil and gas development activities. Significantly, the Federal Defendants conveniently neglect to mention that the Court held: "We see no evidence that Congress sanctioned the destruction of a fishery as an acceptable price for oil and gas development." *Id.* Here, the Record of Decision ("ROD") stated explicitly that the Vineyard Wind lease area would "likely . . . be abandoned by commercial fisheries" because of the project's approval. *See* **AR BOEM_0076837.** And, as indicated, the general authorization to allow renewable energy development is explicitly limited by the mandatory duties to protect the interests identified in section 8(p)(4)(A)–(I). *Gozlon-Peretz*, 498 U.S. at 407.

Thus, the Federal Defendants' arguments that BOEM "struck a reasonable balance" are meritless because nothing in section 8(p)(4)(A)–(I) authorized BOEM to conduct a balancing test in order to evade the non-discretionary duties imposed by that section. In conducting such a balancing test, BOEM exceeded its authority under OCSLA and acted in an *ultra vires* fashion.

Because "[a]dministrative agencies are creatures of statute, they possess only the authority that Congress has provided." *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 665 (2022) (per curiam). Here, the Federal Defendants advance a reading of section 8(p)(4)(A)–(I) that runs counter to the statute's plain text and untethers it from the key words "shall ensure" and "Requirements." Such an interpretation "does not merit deference." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014) (finding an agency interpretation unreasonable because it did not fit the statute's wording, design, and structure).

The Federal Defendants further seek to bolster their argument by citing an Interior Department regulation stating that when approving a COP, BOEM should ensure that the planned project will "not unreasonably interfere with other uses of the [outer continental shelf]. Doc. 73 at 49 (citing 30 C.F.R. § 585.621(c)). That regulation adds a modifier, i.e., "unreasonably," to the statutory language that is not present in the text of section 8(p)(4). Therefore the cited regulation conflicts with the statutory language. Accordingly, the regulation itself is *ultra vires*, not in accordance with law, and should be given no legal effect by this Court. "A federal regulation in conflict with a federal statute is *invalid* as a matter of law." *In re Watson*, 161 F.3d 593, 598 (9th Cir. 1998 (emphasis in original) (citing *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 126 (1985)).

The Federal Defendants try to further justify their argument by referring to one of two conflicting Department of the Interior solicitor opinions. Doc. 73 at 12, 45, 49. *Compare* **AR BOEM_0067678 – 0067693** (December 14, 2020) with **AR BOEM_0072952 – 007956** (April 9, 2021). Neither of those dueling opinions, which were prepared four months apart from each other by solicitors appointed by successive administrations, do justice to the plain language of section 8(p)(4)(A)-(I), as set forth in this Section II.A. Each opinion either adds or subtracts words from

the actual statutory language. Accordingly, neither opinion should be deemed dispositive by this Court. "When the text is unambiguous and the statutory scheme is coherent and consistent," courts do not look beyond it to decode its meaning. *Penobscot Nation v. Frey*, 3 F.4th 484, 491 (1st Cir. 2021).

It is important to reemphasize that the Federal Defendants do not assert that BOEM "ensured" the achievement of the required statutory goals set forth by OCSLA section 8(p)(4). Rather, they argue that "BOEM struck a reasonable balance among the enumerated factors in section 8(p)(4) when approving the COP." The fatal flaw in that argument is that the statute does not direct BOEM to reach a "reasonable balance " among factors but, rather, requires BOEM to "ensure" that, in approving any renewable energy development project in the Outer Continental Shelf, BOEM adheres to the limitations specified in section 8(p)(4). *See Baker v. Smith & Wesson, Inc.*, 40 F.4th 43, 48 (1st Cir. 2022) (directing courts to "interpret a statute's text in accordance with its ordinary, contemporary, and common meaning").

Because BOEM failed to perform its non-discretionary duty by failing to "ensure" that its approval of the Vineyard Wind project (both at the leasing stage and subsequently) would provide for, e.g., "safety" and "protection of the environment," this Court should "hold unlawful and set aside" the COP approval as agency action that is "not in accordance with law," is "in excess of statutory authority," and is "short of statutory right." 5 U.S.C. § 706.

The Federal Defendants' citations to the administrative record to support their arguments that BOEM "struck a reasonable balance" in seeking to comply with section 8(p)(4) are unavailing. Doc. 73 at 45-54. For example, with regard to safety, protection of the environment, conservation of natural resources, marine navigation, and fishing, the citations to the administrative record provided by the Federal Defendants merely show that the agency *considered* those parameters in

approving the COP. They do not show that BOEM's issuance of the COP "ensured" safety or protection of the environment or any of the other mandatory duties assigned to BOEM in section 8(p)(4)(A)-(I)[5]. And the Federal Defendants make no such argument. Their argument is limited to showing that they "struck a reasonable balance," but that is not what section 8(p)(4)(A)-(I) requires.

Indeed, the Federal Defendants' citations do not even show that BOEM "reasonably balanced" the listed factors. As set forth in the Plaintiffs' motion for summary judgment and accompanying documents, including the numerous citations to the administrative record and the sworn declarations therein, the Federal Defendants, including BOEM, impermissibly downplayed[6] the devastating effects the project will have on safety (*see e.g.,* Doc. No. 67 at 17-19, 28, 30, 32-33, 35, 36, 50), the environment and natural resources (*id.* at 17, 19, 20-23, 25, 34-35, 44-46, 48, 50-51), marine navigation (*id.* at 15, 17, 19-20, 28, 33, 36, 38, 41, 49-50), commercial fishing (*id.* at 15, 17-19, 21, 23, 26-28, 33, 37-38, 44, 48, 50), and national security (*id.* at 50-51). Accordingly, even under the impermissible standard argued by the Federal Defendants, BOEM failed to strike a "reasonable balance" among these factors. That alone provides sufficient reason to deny their motion for summary judgment and grant the Plaintiffs' motion on the OCSLA claims.

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[5] In turn, section 8(p)(4)(J) states that the Secretary shall "ensure . . . (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 for a fishery, a sealane, a potential site of a deepwater port, or navigation." That provision sets forth examples of the types of issues the Secretary must consider. It does not authorize the use of a balancing test, nor does it modify the Secretary's nondiscretionary duty to ensure that any action she takes in authorizing renewable energy projects on the OCS provides for e.g., "safety" or "protection of the environment," as required by section 8(p)(4)(A)–(I).

[6] As detailed in Sections II.B and III, *infra,* the application of BOEM's Smart From The Start was instrumental in causing BOEM (and by extension the other the Federal Defendants) to impermissibly downplay the negative impacts of the Vineyard Wind project on ensuring compliance with BOEM's nondiscretionary duties under section 8(p)(4).

The Federal Defendants assert that the COP's conditions letter covers all BOEM's failures to "ensure" compliance with section 8(p)(4) during the COP review process. *See e.g.,* Doc. 73 at 11, 38, 40, 45. In fact, the conditions letter merely states that Vineyard Wind's "right to conduct activities under" the COP "is subject to" the conditions within it. **AR BOEM_0077151.** Yet, among other things, the COP lacks any non-discretionary penalties Vineyard Wind will suffer if it violates the conditions. BOEM only reserves the right to "issue a notice of noncompliance" and "take actions pursuant to 30 C.F.R. § 585.400" if "it is determined that the Lessee failed to comply" with the COP, the lease, OCSLA, or its implementing regulations. **AR BOEM_007152.** Notably, BOEM is not required to actively monitor Vineyard Wind's compliance or, for that matter, even enforce the COP or its attendant conditions. Unless Vineyard Wind monitors its own compliance and reports violations of the COP's conditions, third parties like the Plaintiffs would be relegated to policing the Outer Continental Shelf for the Federal Defendants. But OCSLA binds and requires *BOEM* to "ensure" compliance, not the Plaintiffs. Accordingly, the conditions are insufficient to *post hoc* patch the holes in BOEM's deficient OCSLA compliance. *See Gerber v. Norton,* 294 F.3d 173, 185 (D.C. Cir. 2002) (opining that an agency may not "delegate its responsibility to the regulated party"); *Idaho v. Interstate Commerce Comm'n*, 35 F.3d 585, 595 (D.C. Cir. 1994) (explaining that '"[a]n agency cannot . . . "defer [enforcement] to the scrutiny" of third parties).

B. BOEM Pre-Determined Its Decision to Approve the Vineyard Wind COP.

Vineyard Wind falsely claims that there is no evidence supporting the Plaintiffs' claims that BOEM predetermined its decision to approve the COP by fast-tracking the entire leasing and approval process. Doc. No. 87 at 31. As shown in the Plaintiffs' MSJ legal brief, the entire purpose of BOEM's Smart From The Start was to expedite the sale of leases and the consequent approval

of dozens of wind energy projects on the Outer Continental Shelf. Thus, Smart From The Start precipitated BOEM's decision to skip the requirement to prepare an environmental impact statement ("EIS") at the leasing stage, and subsequently to tailor the purposes statement of the EIS associated with the COP to pave the way for Vineyard Wind to comply with its contractual obligations to provide energy to Massachusetts utility companies as soon as possible. *See* Doc. No. 67 at 23–25, 28–29, 36–41. The cited pages from Plaintiffs' MSJ legal brief provide detailed analyses supporting the Plaintiffs' claims that BOEM prejudged the results of the COP approval by fast-tracking the entire process, not only for the Vineyard Wind project but also for nearby wind energy projects in the Atlantic Ocean. Notably, the cited pages provide specific examples of BOEM's own statements that all such projects must be fast-tracked in order to build renewable energy generating facilities on the Outer Continental Shelf as soon as possible.

If that were not enough, another example from the Federal Register published well before the Vineyard Wind project's lease issuance and subsequent COP approval demonstrates the Federal Defendants' desire to fast-track offshore wind development: "[W]e expect to be able to speed the process of developing renewable energy projects in the OCS." *See* 74 Fed. Reg. 19638, 19643 (Apr. 29, 2009).

Accordingly, the Plaintiffs have provided more than enough evidence to support their claims that the Federal Defendants' actions in issuing the Vineyard Wind lease and approving the Vineyard Wind COP violated OCSLA by impermissibly fast-tracking the entire process with the goal of meeting their policy objectives regardless of the niceties attendant to OCSLA compliance. Vineyard Wind's contrary assertion that Plaintiffs conflate OCSLA and NEPA, Doc. No. 87 at 31, is a red herring because BOEM is required to comply with both statutes and BOEM's decision to fast-track the project approval process has led to violations of both OCSLA and NEPA, thereby

providing a "clear and convincing showing of an unalterably closed mind on a matter [of] critical [importance] to disposition of the proceeding." *Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1179-80 (D.C. Cir. 1980).

III. THE DEFENDANTS' ARGUMENTS RESPONDING TO THE PLAINTIFFS' CLAIMS CHALLENGING SMART FROM THE START ARE MERITLESS

The Federal Defendants misconstrue Plaintiffs' arguments regarding the impermissible manner in which the Smart From The Start directive was initiated by BOEM and the ripple effects that BOEM's application of the directive had on the Environmental Assessment (the "EA"), the lease issuance, the subsequent process leading to the Environmental Impact Statement (the "EIS"), and the COP approval. As set forth in Plaintiffs' MSJ legal brief, the Smart From The Start directive required BOEM to fast-track all leasing decisions on the Outer Continental Shelf in an effort to approve as many renewable energy projects as soon as possible regardless of cost or legal compliance. As such, the policy is an underground regulation that should have been but was not promulgated through notice and comment rulemaking as required by the APA. Doc. 67 at 19-27, 36-4, 47-49. Vineyard Wind colorfully asserts that Plaintiffs treat the Smart From The Start directive as a "boogeyman responsible for all manner of other alleged regulatory violations." Doc. 87 at 21. In fact, the directive tainted the entire Vineyard Wind approval process and led to a cascade of violations of the APA, OCSLA, NEPA, ESA, and MMPA.

The adoption of Smart From The Start led directly to BOEM's impermissible decision to cut corners by preparing an EA (rather than an EIS) in connection with a vast Wind Energy Area that it had designated in the North Atlantic (the "WEA"). Foregoing a careful review, BOEM's EA did not address the foreseeable significant environmental impacts of leasing within the WEA for wind energy development purposes but simply jumped to the unfounded conclusion that no lease issuance within the WEA would have a significant environmental impact. BOEM then used

that unsupported finding to relinquish preparing an EIS before issuing the Vineyard Wind lease. In so doing, BOEM impermissibly circumvented NEPA's EIS requirement at the leasing stage.

Subsequently, BOEM acted as the lead agency in preparing an EIS before approving the Vineyard Wind COP, thereby leading the Federal Defendants to follow the hurry-up principles embedded in BOEM's Smart From the Start directive to cut corners during the EIS process by, among other things, basing the EIS on the 2020 NMFS BiOp that BOEM recognized was faulty and impermissibly reinitiating the terminated COP approval process, leading directly to a Record of Decision ("ROD") and COP approval that violated multiple provisions of OCSLA, NEPA, and ESA. Accordingly, BOEM's adoption of the *ultra vires* Smart From the Start directive had a ripple effect on all the subsequent actions taken by BOEM and the other Federal Defendants in connection with the Vineyard Wind project. During each of the sequential stages of project authorization, including EA preparation, leasing, EIS development, and COP approval, BOEM and/or the other Federal Defendants, as the case may be, applied and then reapplied the hurry-up principles established in BOEM's Smart From The Start directive.

Vineyard Wind argues that the Plaintiffs lack standing to challenge Smart From The Start because they were not injured by the directive, which Vineyard Wind claims only applies to noncompetitive leases while Vineyard Wind was the successful bidder in a competitive lease. Doc. 87 at 20-22. As set forth in detail in Section II, *supra,* and in this Section III, as well as in Plaintiffs' MSJ legal memorandum, BOEM *applied* the hurry-up Smart From The Start directive when, for example, it issued the Vineyard Wind lease. It did so by performing an expedited EA for the entire WEA, thereby impermissibly circumventing the EIS process in connection with the issuance of the lease, which caused BOEM to fail to comply with the requirements of OCSLA section 8(p)(4), 43 U.S.C. § 1337(p)(4), at the leasing stage. Indeed, the EA repeatedly refers to the Smart From

The Start directive when detailing its motivation and guiding principles in identifying the WEA where the Vineyard Wind lease was ultimately situated. *See* **BOEM_0000116, 0000370, 0000374–0000375, 0000377, 0000379–0000380, 0000388, 0000428, 0000500, 0000558**. This wholesale embrace of Smart From The Start in the EA led to reverberations throughout the remainder of the Vineyard Wind approval process undertaken by BOEM and the other Federal Defendants resulting in: (1) the preparation of an EIS that failed to consider a reasonable range of alternatives and impermissibly downplayed significant environmental impacts, (2) the issuance of a ROD that by its own terms showed that commercial fishing in the area would be devastated, and (3) the approval of the COP that showed BOEM failed to ensure, *e.g.*, "safety," "protection of the environment," and a host of other statutory requirements set forth in section 8(p)(4). All this resulted in the Plaintiffs' injuries, which are directly traceable to BOEM's implementation of the Smart From The Start directive at the EA stage for the WEA, then at the leasing stage, and finally at the EIS/ROD/COP approval stage in connection with the Vineyard Wind project.

In short, the Smart From The Start directive is not so much a "boogeyman" as it is the original sin from which many of the subsequent statutory and regulatory violations perpetrated by BOEM and the other Federal Defendants evolved.

A. Smart From The Start Is a Reviewable Federal Agency Action.

The Smart From The Start directive, as explained by BOEM's director in 2011, required BOEM's staff to "prepare environmental assessments, instead of initially preparing an environmental impact statement, in order to analyze the potential environmental impacts" of wind energy leasing in a wide area of the North Atlantic and thereby to "produce significant time-savings." *See* Doc. 68 at ¶ 29. This policy change constituted final agency action because it was a "'definitive statement[] of [the agency's] position' with 'direct and immediate' consequences"

to both BOEM and the general public. *See Trafalgar Capital Assocs. v. Cuomo,* 159 F.3d 21, 35 (1st Cir. 1998). The policy required BOEM to issue renewable energy leases on the Outer Continental Shelf without first conducting an EIS, which had the direct and immediate consequence of BOEM's failure to comply with NEPA at the leasing stage, was binding upon lease applicants, and created a cascading series of events that resulted in multiple violations of NEPA, OCSLA, and ESA to the injury of the Plaintiffs, as set forth in detail in Plaintiffs' MSJ legal memorandum. *See* Doc. 67 at 31, 33-35, 38. Contrary to the Federal Defendants' assertions, BOEM has no discretion to disregard the Smart From The Start directive until that directive is officially rescinded. and, to this day, it remains in effect. Thus, the directive binds "applicants and the Agency with the force of law." *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2022).

Furthermore, the Smart From The Start directive is a "rule" as defined by the APA, because it is "an agency statement of general or particular applicability and future effect designed to . . . prescribe law or policy"), *see* 5 U.S.C. § 551(4), and it is a "legislative rule" because it "creates rights, assigns duties, or imposes obligations, the basic tenor of which is not already outlined in the law itself . . . ." *La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1st Cir. 1992). In contrast, an interpretive rule is "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (cleaned up). "[T]he APA requires publication of proposed legislative rules followed by a period of notice and comment" but "exempts interpretive rules from such procedures." *Civitas Mass. Reg'l Ctr., LLC v. Mayorkas*, 2022 U.S. Dist. LEXIS 44170 at *19-20 (D. Mass. Jan. 19, 2022).

The line between a legislative rule and an interpretive rule is not always clear. The First Circuit teaches that "the point at which a rule crosses that line is a question enshrouded in

considerable smog." *N.H. Hosp. Ass'n v. Azar*, 887 F.3d 62, 70 (1st Cir. 2018) (cleaned up). The *Azar* court examined five considerations to determine whether an agency's rule is legislative: (1) "the words of the statute" to determine whether Congress delegated a substantive policymaking choice to the agency, *id*. at 71, (2) "the explanation or lack thereof given by the agency in adopting a policy," *id*., (3) "whether the rule is inconsistent with another rule having the force of law, or otherwise alters or enlarges obligations imposed by a preexisting regulation," *id*. at 73, (4) "the manner in which" the rule "fit[s] within the statutory and regulatory scheme," *id* at 72, and (5) what "pragmatic considerations" enter into play in a burden-weighing approach, *id*. Weighing these factors, the *Azar* court held that because the agency "announced a new policy on a matter of some considerable import[,]" . . . "the benefits of notice and comment" far outweighed "the burdens that might weigh against" such procedure. *Id*. at 74.

In fact, all of the *Azar* criteria weigh heavily in favor of a finding that Smart From The Start is a legislative rule. To begin, the decision to conduct an EA on the expansive WEA of the North Atlantic without requiring an EIS for any specific lease subsequently issued in that area was fueled by the explicit mandate directing BOEM to "produce significant time-savings" in connection with environmental impacts review under NEPA. *See* Doc. 68 at ¶ 29. This applies with equal force to all wind energy projects both in the WEA and everywhere else on the Atlantic, Pacific, and Gulf coasts. Thus, time savings were the driving forces of the directive rather than interpretations of OCSLA or NEPA. Furthermore, the Smart From The Start directive contradicts existing laws and regulations, as spelled out in Plaintiffs' opening legal memorandum. Doc. 67 at 29-33. *See* 43 U.S.C. § 1332, 1337(p)(4); 40 C.F.R. § 1502.5(a)–(b). Moreover, Smart From The Start acts to fill gaps in NEPA and OCSLA in that it prescribes a new regulatory process that directly impacted BOEM, the other Federal Defendants and the Plaintiffs by imposing a hurry-up

requirement not found (or even authorized) in any statute. The plaintiffs were impacted because, for example, when the Federal Defendants were preparing the EIS in connection with the review of the COP, they refused to consider any reasonable alternatives outside of the Vineyard Wind lease area *because* the boundaries of that area had been set in stone when the lease was issued, Doc. 67 at 57-58, in accordance with BOEM's hurry-up policy. Accordingly, using *Azar's* criteria, Smart From The Start is a legislative rule because BOEM "announced a new policy on a matter of considerable import," *id*., and set the stage for the entire regulatory process applicable not only to the Vineyard Wind project but also to all wind energy projects on the Outer Continental Shelf. *See e.g.,* Doc. 67 at 30, 32-35; 37-42; 44-51; 55-58.

"Unless an exception applies, the APA requires federal agencies, when promulgating new legislative rules, to first publish a notice of proposed rulemaking in the Federal Register." *Craker v. United States DEA*, 44 F.4th 48, 55 (1st Cir. 2022); *see also* 5 U.S.C. § 553(b) (listing exceptions). No exception applies to Smart From The Start because it is not an interpretative rule, or a general policy statement, or a rule of "agency organization, procedure, or practice," and notice is not "impracticable, unnecessary, or contrary to the public interest." *Id*. *See, e.g. Azar*, 887 F.3d at 70.

Because Smart From The Start is an underground legislative rule that was not promulgated in accordance with the notice and comment requirements of the APA, it should be set aside because it was adopted by BOEM "without observance of procedure required by law. 5 U.S.C. § 706(2)(D).

B. The Plaintiffs' Claims Challenging Smart From The Start As Applied to the EA, the EIS, the ROD, and the COP Are Not Time-Barred

The Federal Defendants entire argument that the Plaintiffs' challenge to Smart From the Start is time barred is made in a solitary sentence fragment: "such a challenge would be time barred

based on the six-year statute of limitations for civil actions against the United States." Doc. 73 at 18. But "[t]he [six-year] statute of limitations [applicable to APA claims] does not require that a substantive challenge to a regulation alleging that an agency exceeded its constitutional or statutory authority be brought within six years after the regulation is adopted when the challenge arises in response to *application* of the regulation to the challenger . . . ." *Rodriguez v. United States*, 852 F.3d 67, 82 (1st Cir. 2017) (cleaned up; emphasis added) (tolling statute of limitations in suit over application of regulation to plaintiff). Other circuits agree. "[T]o the extent that an agency's action necessarily raises the question of whether an earlier action was lawful, review of the earlier action for lawfulness is not time-barred." *Public Citizen v. Nuclear Regulatory Com.,* 901 F.2d 147, 151-52 (D.C. Cir. 1990) (cleaned up). *See also Dunn-McCampbell Royalty Interest v. National Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997) (explaining that regulation may be directly challenged when it is implemented six years after its promulgation to the detriment of a plaintiff).

As set forth in Section III.A, *supra,* the unlawfully promulgated Smart From The Start underground rule caused BOEM to impermissibly issue the Vineyard Wind lease without first conducting an EIS because of the requirement to speed up the leasing process. And, the hurry-up nature of Smart From The Start resulted in the publication of the deficient FEIS and ROD in violation of NEPA and the approval of the COP in violation of OCSLA less than six years before the instant lawsuit was filed. *See* **AR_BOEM_0076799**. The publication of the EIS/ROD and the approval of the COP constitute the application of Smart From the Start to the Vineyard Wind project, which directly and adversely injured the Plaintiffs. *See e.g.* Aripotch and Brady (first and second declarations). Accordingly, the Plaintiffs may challenge Smart From The Start *as applied* to the Vineyard Wind EIS/ROD/COP process. *See Rodriguez*, 852 F.3d at 82.

C. The Major Questions Doctrine Applies to Smart From The Start.

The Federal Defendants argue that the Plaintiffs have not "explain[ed] how the major questions doctrine would apply to this issue." Doc. No. 73 at 19. But as the Plaintiffs' MSJ Memo explains, where, as here, the federal government issues leases, permits, approvals and environmental impact statements allowing a private company to industrialize the Outer Continental Shelf, especially when such industrialization demonstrably will devastate the environment and the commercial fishing industry in the Vineyard Wind area, such government action qualifies as a major question of federal authority. *See* Doc. No. 67 at 30, 32, 43, 45, 52.

D. BOEM's Implementation of Smart From The Start Resulted in Violations of OCSLA at the Leasing and Site Assessment Plan Stages.

The Federal Defendants assert that the Plaintiffs fail to demonstrate that BOEM violated OCSLA when it approved the lease. Doc. 73 at 24. They are wrong. The Plaintiffs' MSJ legal memorandum describes in detail the manner in which the Federal Defendants violated OCSLA at the leasing stage, providing specific citations to the AR showing violations of OCSLA requirements set forth in 43 U.S.C. §§ 1332(2) and 1337(p)(4). Doc. 67 at 35-37. After describing specific violations at the leasing stage, the Plaintiffs explained, "So, BOEM's Smart From The Start policy, as applied to the Vineyard Wind lease issuance and all subsequent regulatory actions of the Federal Defendants in connection with the Vineyard Wind project, caused BOEM to evade its statutory responsibilities under OCSLA, as well as their associated NEPA responsibilities" *Id.* at 36.

In their opposition brief, the Federal Defendants broadly assert that "BOEM complied with OCSLA at all stages of the approval process." Doc. 73 at 24. They make no effort to show how the record citations in their legal brief indicate BOEM's compliance with OCSLA at the leasing stage. *Id.* at 24-25. Nor do they respond to the Plaintiffs' arguments that the impermissibly

promulgated Smart From the Start underground rule tainted the entire leasing process and led to specific violations cited by the Plaintiffs. Doc. 67 at 35-37. Section II of this memorandum, *supra,* responds by showing precisely how BOEM violated OCSLA at the leasing stage and how the Federal Defendants violated OCSLA at subsequent stages of the approval process.

The cases cited by the Federal Defendants do not support their arguments. *PEER v. Beaudreau*, 25 F. Supp. 3d 67, 107 (D.D.C. 2014), *rev'd in part on other grounds,* 827 F.3d 1077 (2016) was cited by the Federal Defendants for the proposition that BOEM's OCSLA obligation to provide for "safety" applies to the entirety of the leasing process. That is precisely one of Plaintiffs' arguments, i.e., BOEM failed to provide for e.g., "safety" at the leasing stage by promulgating an underground rule (Smart From The Start) that effectively required BOEM to speed through the Vineyard Wind leasing process without first ensuring safety or any of the other required parameters of section 8(p)(4) of OCSLA during or after the leasing process. *See* Doc. 67 at 33-37; *see also* Section II hereof, *supra. Beaudreau* therefore supports the Plaintiffs' position, not the Federal Defendants'.

As indicated in Section II hereof, *supra, Massachusetts v. Andrus*, also cited by the Federal Defendants, did not involve OCSLA section 8(p)(4) but a different former section of the Act, section 3(b), dealing with oil and gas development activities, and the Court specifically held: "We see no evidence that Congress sanctioned the destruction of a fishery as an acceptable price for oil and gas development." 594 F.2d at 889.

The Federal Defendants' arguments regarding BOEM's meetings with stakeholder groups do nothing to support their assertions that the issuance of the lease complied with BOEM's duties under section 8(p)(4). Furthermore, their assertions that the EA addressed the impacts of the Vineyard Wind lease are false because the EA covered a substantial area of the North Atlantic and

did not focus on the foreseeable impacts of issuing the Vineyard Wind lease within the WEA. Finally, their assertions that "several conditions" in the Site Assessment Plan addressed some of the parameters set forth in section 8(p)(4) are not supported by any analysis on how such asserted conditions show that BOEM "ensured" the achievement of those parameters at the leasing stage or subsequent stages.[7] *See* Doc. 73 at 25.

E. The Plaintiffs Have Standing to Challenge Smart From The Start.

As set forth in the Plaintiffs' MSJ legal brief, and as amplified by the Plaintiffs' response to the Federal Defendants' and Vineyard Winds legal briefs in Sections II and III hereof, the Plaintiffs were injured by the application of the hurry-up Smart From the Start directive because BOEM *applied* the directive to the Vineyard Wind leasing process, thereby issuing the lease in violation of OCSLA section 8(p)(4)(A)-(I), which had the ripple effect of the Federal Defendants' applying the hurry-up concepts in the directive throughout the entire subsequent Vineyard Wind approval process, in violation of the APA, OCLSA, NEPA, ESA, and MMPA, all to the injury of the Plaintiffs.

Vineyard Wind quotes, without context, a single sentence fragment in the Federal Register stating that the policy "pertains to noncompetitive acquisition of an Outer Continental Shelf (OCS) renewable energy lease." Doc. 87 at 20. Vineyard Wind conveniently neglects to inform the Court that the policy was *applied* by BOEM to the WEA that contains the Vineyard Wind lease, *see* **BOEM_0000116, 0000370, 0000374–0000375, 0000377, 0000379–0000380, 0000388, 0000428, 0000500, 0000558**, and in its legal brief Vineyard Wind does not point to anything in the record

[7] The Plaintiffs note that failure to include an unredacted version of the SAP in the AR after the Plaintiffs mentioned it in their complaint was not harmless error because the SAP contains information relevant to the Plaintiffs' claims. Doc. No. 68 at ¶¶ 35–37, 54. True, the Plaintiffs have not yet moved to supplement the record with the SAP, but an unredacted SAP should have been included in the AR regardless of the Plaintiffs' efforts.

to show that it was not so applied. Indeed, we know the policy was applied to the Vineyard Wind lease because only an EA was performed for the entire WEA and the Vineyard Wind lease was issued subsequently without an EIS. Neither Vineyard Wind nor the Federal Defendants argue that BOEM performed an EIS in connection with *any* lease within the entire WEA that had been covered by the EA. Thus the EA for the entire WEA served as an impermissible substitute for an EIS at the leasing stage regardless of whether a lease within the WEA was competitive or noncompetitive, and the Defendants do not assert otherwise.

Vineyard Wind also seems to argue, in passing, that because Smart From The Start was never codified in the *Code of Federal Regulations* ("CFR") it is not a regulation at all. But as indicated in Section III.A. hereof, *supra*, the directive is an impermissible underground rule that was not promulgated in accordance with the notice and comment requirements of the APA, regardless of whether it was ever published in the CFR. The Federal Defendants cannot escape responsibility for their *ultra vires* rules by simply choosing not to publish them in the CFR.

Vineyard Wind also asserts that "the regulations have no bearing on any other permit or authorization Plaintiffs challenge here, such as the Final EIS."[8] Doc. 87 at 20-21. As shown in Plaintiffs' MSJ legal memorandum, and in Sections II and III hereof, Smart From the Start had a consequential effect throughout the entire Vineyard Wind approval process, to the injury of the Plaintiffs. Vineyard Wind offers no evidence showing that such an effect or such an injury did not occur.

Furthermore, Vineyard Wind argues that Smart From The Start "is nothing more than a policy to comply with NEPA." In fact, it is more like a directive aimed at *avoiding* compliance

[8] Interestingly, Vineyard Wind refers to Smart From The Start as a regulation almost immediately after claiming that it is not a regulation.

with NEPA, OCSLA, ESA, MMPA, and the APA, as shown in the Plaintiffs' MSJ legal memorandum and in Sections II and III hereof.

F. Vineyard Wind's Miscellaneous Other Arguments Are Baseless.

Vineyard Wind challenges the Plaintiffs' standing to make certain arguments because it claims the Plaintiffs were not injured by the alleged conduct of the Federal Defendants in connection with two broad categories of issues. First Vineyard Wind asserts that Plaintiffs have no standing to make certain procedural-based arguments regarding alleged violations of NEPA, ESA, and OCSLA in connection with (1) the 2020 BiOp, (2) BOEM's reinitiation of Consultation with NMFS, (3) the termination and resumption of work on the final EIS, (4) BOEM's approval of the Site Assessment Plan, and (5) BOEM's use of the pre-2020 NEPA regulations. Doc. 87 at 15-18. But, as indicated in Plaintiffs' MSJ legal memorandum and in this Section III, *all* of those regulatory violations resulted from BOEM's continuing application of the hurry-up principles embedded in the Smart From The Start underground rule and caused the Plaintiffs' asserted injuries. Vineyard Wind offers no evidence to the contrary. As lead agency under NEPA for the preparation of the EIS and ROD, and in its role as consulting agency under ESA with NMFS, BOEM applied the hurry-up principles of Smart From The Start to cut corners at each stage of the regulatory process. These procedural violations led directly to injuries to the Plaintiffs' economic and environmental interests by paving the way to make the pristine waters of the Vineyard Wind area unfishable as a practical matter and to harass and injure an endangered species. *See Conservation Law Found.*, 1987 U.S. Dist. LEXIS 15149 at *5 (explaining that procedural injury in connection with NEPA supports standing where plaintiff has a geographical nexus to site of the challenged project); *see also Friends of St. Frances Xavier Cabrini Church v. Fed. Emergency Mgmt. Agency*, 658 F.3d 460, 466 (5th Cir. 2011).

Second, Vineyard Wind asserts that Plaintiffs have no standing to make certain arguments regarding ecological damage and consequent economic injury to Plaintiffs attributable to the Federal Defendants' approval of Vineyard Wind project resulting in harm, displacement, and/or interference with (1) horseshoe crabs, (2) sea turtles, (3) military radar, and (3) food supply, arguing that such impacts are "generalized" and not specific. Doc. 87 at 18-19. But a careful reading of Plaintiffs' MSJ legal brief and the supporting declarations, only some of which are selectively cited by Vineyard Wind, *id.*, show that the economic injuries to Plaintiffs result from environmental harms at sea that are alleged to be caused by the Federal Defendants' approval of the Vineyard Wind project. Those economic injuries, which are traceable to BOEM's continuing application of the hurry-up principles set forth in Smart From The Start, are not generalized but are specific to the Plaintiffs as commercial fishermen who routinely fish in the waters of the Vineyard Wind area. *See* Doc. 67 at e.g., 12, 30-31, 34, 41; see also, *e.g.,* Doc. 66-2 ¶ 30.

IV. THE PLAINTIFFS' NEPA CHALLENGES ARE NEITHER TIME-BARRED NOR LACK MERIT.

The Plaintiffs' hereby incorporate by reference the NEPA arguments set forth in the Opposition/Reply legal brief filed by the plaintiffs in *Responsible Offshore Dev. All. v. U.S. Dep't of the Interior* (the "*RODA* case"), Case No. 1:22-cv-11172-IT. In addition, the Plaintiffs offer the following.

As set forth in detail in Section III, *supra*, Smart From The Start is an underground rule impermissibly promulgated by BOEM at the very beginning of its offshore wind energy regulatory activities in the North Atlantic, and the application of the hurry-up policy set forth in Smart From The Start tainted each step of the NEPA process, starting with BOEM's decision to perform an EA rather than an EIS for the entire WEA in the North Atlantic. In turn, the hurry-up policies in Smart From The Start caused BOEM to forgo preparing an EIS when it issued the lease for the Vineyard

Wind project, thereby starting a cascade of NEPA regulatory violations that occurred due to BOEM's continuing application of Smart From The Start in its capacity as lead agency among the Federal Defendants in implementing their NEPA obligations.

The Federal Defendants' NEPA violations subsequent to BOEM's issuance of the lease included: (1) setting an impermissibly narrow purpose and need statement in the EIS and ROD that focused primarily on Vineyard Wind's desire to meet its contractual obligations to provide renewable energy resources to certain utility companies supplying electricity to Massachusetts; (2) failing to analyze a reasonable range of alternatives in the EIS for the Vineyard Wind project, especially those outside of the lease area; (3) refusal to appropriately analyze impacts on commercial fishing in the EIS; (4) failure to properly analyze potential environmental impacts of the Vineyard Wind project; (5) impermissibly issuing the ROD before consultation with NMFS had been completed under the ESA; (6) failing to properly analyze cumulative impacts; (7) unauthorized resumption of work on the EIS after the EIS process had been formally terminated; (8) unreasonably rejecting Alternative F in the final EIS; and (9) violating a host of other NEPA procedural requirements, as set forth in Plaintiffs' MSJ legal memorandum. The Federal Defendants' and Vineyard Wind's arguments responding to these multiple NEPA violations are baseless, for the reasons set forth in Section III, *supra,* and in this Section IV.

A. Plaintiffs' Challenge to the EA is Not Time Barred.

The Federal Defendants' argument that Plaintiffs' challenge to the EA is time barred fails for the same reason their limitations argument fails in connection with the Smart From The Start directive. *See* Section III.B., *supra,* which is incorporated in its entirety by reference here. In short, the initial issuance of the Vineyard Wind lease under BOEM's Smart From The Start directive allowing BOEM to substitute an EA for an EIS at the WEA stage resulted in violations

of NEPA at each subsequent phase of project approval, culminating in the EIS/ROD/COP approval. Accordingly, the Plaintiffs may challenge the application of the Smart From The Start at each stage of the NEPA process. This includes the WEA stage where an EA instead of an EIS was impermissibly conducted, even though the EA was issued more than six years before the lawsuit was filed, because the EA itself set the stage for subsequent NEPA violations. *See Rodriguez*, 852 F.3d at 82.

B. The Purpose and Need Statement in the EIS and ROD Is Illegitimate.

The Plaintiffs argued with copious reference to the record that *before* the Draft EIS stage, the Federal Defendants made a decision to define "Vineyard Wind's sole project purpose" as fulfilling its power purchase agreements ("PPAs") signed with Massachusetts before project approval "to deliver 800 MW of power . . . ." **BOEM_0038223–0038225.** *See* Doc. 67 at 38-39, 41, 47-48, 57-58. As the Plaintiffs explained in their MSJ legal brief, this decision had ripple effects that ran through the EIS/ROD/COP process, impermissibly limiting the number of reasonable alternatives considered by the Federal Defendants to only those few that would fit this cramped purpose — thus violating NEPA. *See* **BOEM_0057320–0057322** (Supplemental Draft EIS), **BOEM_0076808–0076809** (ROD). Indeed, the ROD states that the purpose of its action is "to meet New England's demand for renewable energy," noting that the Vineyard Wind project would help fill that demand. *Id*. The Federal Defendants claim that the ROD's purpose was "to determine whether to approve, approve with modifications, or disapprove the COP." Doc. 73 at 28. But the ROD itself limits that statement by explaining that the decision set forth in the ROD is intended to meet New England's renewable energy demands, a fact conveniently omitted by the Federal Defendants in their legal brief. *Id.*

The single citation to case law offered by the Defendants to support their argument, *Citizen Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. 1991), does no such thing. *Busey* dealt with an action initiated by a local port authority seeking approval from the Federal Aviation Administration ("FAA") to extend an airport runway where the environmental impact statement reviewed impacts on the surrounding area in a context where "FAA does not determine where to build and develop civilian airports. . . . Rather, the FAA facilitates airport development by providing Federal financial assistance and reviews and approves or disapproves revisions to Airport Layout Plans." *Id.* at 197. By contrast, here, BOEM was the agency that determined "where to build and develop" the Vineyard Wind project by first outlining the boundaries of the WEA and then issuing a call for lease proposals within that area, thereby inviting development. Unlike the role of FAA in *Busey,* BOEM was the driving force initiating the entire Vineyard Wind project pursuant to its Smart From The Start directive under which BOEM set the boundaries of the WEA and issued leases within those boundaries without conducting an EIS. The project was a federal project from start to finish, unlike the *Busey* project, which was initiated by the project's sponsor. *Busey* is limited by its terms to projects initiated by private sponsors seeking federal approval, and in that context, agencies should "take into account the needs and goals of the parties involved in the application." *Id.* at 196. Even then, the court in *Busey* explained that, for any NEPA action, "the rule of reason does not give agencies license to fulfill their own prophesies, whatever the parochial impulses that drive them [so that] . . . the EIS would become a foreordained formality." *Id.* Here, BOEM characterized Vineyard Wind's "sole project purpose" as compliance with power purchase agreements that Vineyard Wind entered into with utility companies before project approval "to deliver 800 MW of power" to Massachusetts. **BOEM_0038223–0038225.** By defining the purpose and need of the project so narrowly, BOEM acted to impermissibly "fulfill

[its] own prophesies" set forth in the Smart From The Start directive to approve as many wind energy projects on the Outer Continental Shelf as soon as possible regardless of the environmental impacts or economic costs. *See New York v. United States Dep't of Transp.*, 715 F.2d 732, 743 (2nd Cir. 1983) (explaining that "agency will not be permitted to narrow the objective of its action artificially"); *see also Nat'l Ass'n of Home Builders,* 551 U.S. at 658 (stating that it is arbitrary and capricious for an agency's decision to rely "on factors which Congress [did] not [wish] it to consider"); 42 U.S.C. § 4331(b)–(c).

C. The Federal Defendants Failed to Analyze a Reasonable Range of Alternatives.

The Plaintiffs show in their MSJ legal memorandum that the Federal Defendants should have but failed to consider all reasonable alternatives to siting the project in the Vineyard Wind lease area, given the damage to the marine environment and commercial fishermen that the project would wreak if placed within the lease area. Doc. No. 67 at 33, 35, 39-41, 45, 48-49, 57-58. Rather than directly challenging this claim, the Federal Defendants cite *Beyond Nuclear v. United States NRC*, 704 F.3d 12, 19 (1st Cir. 2013), to argue that their choice to limit the consideration of reasonable alternatives was due to their according "substantial weight to the preferences of the applicant." *Id.* But the Federal Defendants conveniently omit the fact that the *Beyond Nuclear* court observed that where "[the] agency is *not* [itself] the sponsor of a project, 'consideration of alternatives may accord substantial weight to the preferences of the applicant.'" *Id.* (emphasis added) (citing *City of Grapevine v. Dep't of Transp.,* 17 F.3d 1502, 1506 (D.C. Cir. 1994). Here, by contrast, as indicated in Section IV.B., *supra,* BOEM itself acted as the project's sponsor because it put the entire leasing program in motion via the Smart From The Start directive and reached out to private companies by asking them to participate in *BOEM's* effort to approve as many offshore wind projects as possible in as short a period of time as possible. It was

impermissible for BOEM to refuse to consider reasonable alternatives outside of the Vineyard Wind lease area by acceding to Vineyard Wind's threat to abandon the project if BOEM were to go beyond the lease boundaries in search of alternative areas where environmental impacts could be better minimized. *See New York v. United States Dep't of Transp.,* 715 F.2d at 743 (explaining that "an agency will not be permitted to narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered").

Accordingly, BOEM went too far in deferring to Vineyard Wind's preferences when determining which alternatives to consider because they abdicated their responsibility to define a reasonable range of alternatives by adhering to Vineyard Wind's business interests and its own policy preferences to expedite offshore wind development.[9] *See Busey,* 938 F.2d at 196 (explaining that "the rule of reason does not give agencies license to fulfill their own prophecies, whatever the parochial impulses that drive them").

D. The Federal Defendants Did Not Appropriately Analyze The Vineyard Wind Project's Impact On Fishing Or Other Environmental Impacts.

The Federal Defendants claim that "fishermen will be able to operate within the project area [although] BOEM recognized that some fishermen would be reluctant to do so." Doc. 73 at 34. Overwhelming evidence filed to date in this case shows that the construction and operation of

[9] The Federal Defendants claim that the Plaintiffs have not identified any portion of the AR to support this claim. *See* Doc. 73 at 31 n.7. This is demonstrably false. The first record citation in the Plaintiffs MSJ legal brief to the ROD demonstrates that the Federal Defendants impermissibly tied the ROD's purpose to fulfilling state-mandated renewable energy requirements through the Vineyard Wind COP. **BOEM_0076808–0076809.** *See* Doc. no. 67 at 47. The second examines alternatives not analyzed in detail in the Supplemental EIS, stating they were excluded "because they did not meet the purpose and need" of the Vineyard Wind Project. **BOEM_0057320–0057322.** *Id.* at 58. The third and fourth show the Federal Defendants recognized prior to any environmental analysis that the goal of their NEPA review was to allow Vineyard Wind to fulfill its PPAs and deliver renewable energy to Massachusetts. **BOEM_0038223–0038225.** *Id.* at 38, 38-39.

the Vineyard Wind project will make it impossible for trawl fishing vessels to continue to fish in those waters. *See* e.g., Doc. No. 66-1 at ¶¶ 13-24, 30-34; Doc. No. 66-2 at ¶¶ 15, 19-24, 29, 31; Doc. No. 66-4 at ¶¶ 5, 7-8, 10, 13-15; *see also*, e.g., **AR BOEM_0193460-0193461; 006817-18, 006822-25, 0068710, 0130447-0130449.** If that were not enough, as set forth in Plaintiffs' MSJ legal brief, Doc. No. 67 at 15, the Federal Defendants' ROD states, "While Vineyard Wind is not authorized to prevent free access to the entire wind development area, 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." *See* **AR BOEM_0076837** (emphasis added)**.**

The Federal Defendants also assert that the Plaintiffs failed to show that either the EIS or the ROD downplayed other environmental impacts. In an effort to support that assertion, the Federal Defendants provide a laundry list of record citations showing they at least did not completely ignore impacts on the benthic environment, marine mammals, sea turtles, the potential impacts of hurricanes, and impacts to national security. Doc. No. 73 at 61. But NEPA requires more than a cursory look at environmental impacts. It requires "a detailed and careful analysis of the relative environmental merits and demerits of the proposed action." *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1286-87 (1st Cir. 1996). As shown in Plaintiffs' MSJ legal brief, Doc. No. 67 at e.g., 23-25, 28-29, 34-41, 47-48, the Federal Defendants did not engage in "detailed and careful analysis," but rather, applied the hurry-up principles of Smart From The Start at every stage of the NEPA process in violation of both the letter and the spirit of NEPA. The Federal Defendants cite to a series of documents showing that they gave *some* consideration to fishing and other environmental impacts. Doc. No. 73 at 31–36. But merely providing some consideration is not enough. *Dubois*, 102 F. 3d at 1286-87.

Tellingly, the Federal Defendants do not cite even one legal authority to support their position that the EIS and ROD provided the level of detail and care required by NEPA. Rather, the three cases cited by the Federal Defendants on this issue actually support the Plaintiffs' position. First, in *United States v. Coalition for Buzzards Bay,* 644 F.3d 26, 31 (1st Cir. 2011), the First Circuit held that the Coast Guard "failed to satisfy its NEPA obligations" and remanded the matter to the agency, *id.* at 39, with instructions to comply with NEPA "to the fullest extent possible," and to timely "consider *all* significant environmental impacts before choosing a course of action." *Id.* at 31 (citations excluded; emphasis added).

Second, in *Dubois*, the First Circuit held that "the Forest Service has not rigorously explored all reasonable alternatives." *Dubois,* 102 F. 3d at 1288. In so holding, the Court explained that "[i]t is absolutely essential [that an EIS provide] a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement that we have characterized as the 'linchpin of the entire impact statement.'" *Id.* at 1286-87 (citations omitted).

Third, the Federal Defendants' citation to *Norfolk v. U.S. EPA,* 761 F. Supp. 867, 878 (D. Mass. 1991) provides them with no support. The *Norfolk* court held that the plaintiff's request that the defendant town prepare a supplemental EIS based on new evidence was premature because the town had not yet taken action on the plaintiff's petition asking for such a supplement. *Id.* No such petition is pending here.

E. Vineyard Wind's Argument that BOEM Considered Alternate Locations During Its EA Review Is Fatally Flawed.

Vineyard Wind argues that BOEM complied with NEPA by considering alternative locations for the wind energy area in the EA, claiming the Federal Defendants did not need to consider (1) alternative locations for the lease, or (2) locations outside of the lease area in the

subsequent EIS for Vineyard Wind's COP. *Id.* But the Federal Defendants' initial review of alternatives in connection with the EA covering the entire WEA does not substitute for a review of reasonable alternative locations in connection with the subsequent lease issuance or the subsequent EIS and ROD developed years later, as every step in the process leading up to the COP approval must comply with NEPA "to the fullest extent possible." *See* 42 U.S.C. § 4332; 40 C.F.R. §§ 1506.6 and 1503.4; *see also Flint Ridge Dev. Co. v. Scenic Rivers Ass'n,* 426 U.S. 776, 785 (1976).

F. BOEM Impermissibly Rejected Alternative F.

Vineyard Wind faults the Plaintiffs for arguing BOEM unreasonably rejected Alternative F, claiming the Plaintiffs "never explain" how BOEM's rejection of Alternative F was unreasonable. Doc. No. 87 at 27–29. The Plaintiffs do explain, as set forth in the Plaintiff's MSJ legal brief. *See e.g.,* Doc. No. 67 at 39, citing **AR BOEM_0076823** (showing that Vineyard Wind's own preferences outweighed those of the commercial fishing industry or other interested groups in the Federal Defendants' decision to reject Alternative F).

G. Project Revival After Termination Was Impermissible.

The Federal Defendants attempt to evade accountability for reviving the NEPA review process they terminated for the Vineyard Wind COP by casting the termination as a "temporary suspension." Doc. No. 73 at 26–27. But BOEM stated unambiguously that the NEPA "process has been *terminated*" and that the COP had "been withdrawn from further review and decision-making," meaning that "there is no longer a proposal for a major federal action awaiting technical and environmental review, nor is there a decision pending before BOEM." **BOEM_0067677**; *see also* Doc. No. 67 at 42. There is nothing "temporary" about this language. With the advent of a new political administration, however, Vineyard Wind was emboldened to send BOEM a letter

stating that, based on Vineyard Wind's own review, the Haliade-X turbine fit within the parameters of the COP application, and that "there are no legal or regulatory limitations to resuming" the previously-terminated review of the Vineyard Wind COP. **BOEM_0067701.** In reviving its review under the hurry-up process initiated by Smart From The Start, BOEM relied on Vineyard Wind's letter and issued a single-page memo stating that the Haliade-X turbine fit within the COP's parameters – a COP that was not before them for review. **BOEM_0067702.** That memo does not satisfy OCSLA's requirement that BOEM "ensure" its actions meet the statute's requirements. Its only justification for the decision was a diagram provided by Vineyard Wind. **BOEM_0067712.** BOEM never offered any statutory or regulatory reference demonstrating its authority to unilaterally revive its own terminated review processes. And it does not do so in its legal brief.[10]

The Federal Defendants argue that the need for public comment on its *ultra vires* decision to resume the terminated review process was fulfilled by a prior comment period on the Supplemental Draft EIS "regarding the changes to the design envelope" that it contends the Haliade-X turbine fits within. Doc. No. 73 at 27, 42. This begs the question. The regulations require BOEM to make "diligent efforts to involve the public" at each step of the NEPA review process. 40 C.F.R. §§ 1506.6 and 1503.4. Failure to seek public comment before reinstituting the NEPA process after it had been terminated hardly qualifies as a diligent effort to involve the public.

[10] Notably, BOEM did not alter the size of the turbine monopiles or scour protection from the Draft EIS, which analyzed 9 MW turbines, to the Final EIS — implying that BOEM did not actually analyze the environmental impact of larger turbines within the project envelope as required by NEPA. *See* **BOEM_0035174–0035175** (Draft EIS); **BOEM_0069350–0069351** (Final EIS).

H. NEPA Required BOEM To Wait Until NMFS Issued the 2021 BiOp.

The Federal Defendants argue that it was appropriate to issue the ROD knowing that its underlying Biological Opinion ("BiOp") was flawed, Doc. No. 73 at 37–38, while Vineyard Wind argues that the Plaintiffs' challenge is moot because the original BiOp is now "withdrawn" and "has no legal force or effect." Doc. No. 87 at 15. Both arguments are meritless. The post-ROD amended BiOp has no bearing on this suit, and the Plaintiffs have already moved for it to be stricken from the record. *See* Doc. No. 57.

I. The Cumulative Impacts Analysis Is Deficient.

NEPA requires the Federal Defendants to examine "reasonably foreseeable future actions" when determining cumulative impact. 40 C.F.R. § 1508.7. The Federal Defendants do not demonstrate they did so but merely quote their Final EIS language, without explaining why much of the cumulative impacts analysis in the Draft EIS was dropped in the Final EIS. Doc. No. 73 at 41. Notably, the Federal Defendants do not cite any cases in support of their cumulative impact arguments.

J. The Federal Defendants Did Not "Otherwise" Comply with NEPA.

The Federal Defendants claim that they complied with 40 C.F.R. §§ 1506.6 and 1503.4, by making "diligent efforts to involve the public in preparing and implementing their NEPA procedures." Doc. 73 at 42. The facts belie this claim in several particular ways as set forth in Plaintiffs' MSJ legal brief. Doc. No. 67 at 48-51, 56.

In addition, the Federal Defendants claim that they permissibly used the CEQ regulations in effect prior to July 2020. The only authority they cite for such a claim is a single statement in a Federal Register preamble indicating that agencies may choose to use the prior regulations rather

than the ones in effect at the time the FEIS and ROD were issued. Doc. No. 73 at 44. A preamble statement published in the Federal Register does not constitute legal authority.

V. THE FEDERAL DEFENDANTS FAILED TO COMPLY WITH THE CWA.

The Plaintiffs incorporate by reference the CWA arguments made in the Opposition/Reply brief made in *RODA*, and add the following. In a one paragraph summary argument, Vineyard Wind claims that the Plaintiffs' CWA claims were not briefed by any party and "should be deemed abandoned." Doc. 87 at 32. Vineyard Wind is wrong. In their MSJ brief, the Plaintiffs incorporated by reference the arguments made by the Plaintiff in *RODA*, Doc 67 at 54, and a careful review of RODA's MSJ brief shows that RODA's arguments cover issues that fall within Plaintiffs' CWA claims. Furthermore, the Federal Defendants had adequate notice of Plaintiffs' CWA claims, which they raised in their 60-day notice letter. *See* Doc. No. 1-1 at 34–39.

VI. THE FEDERAL DEFENDANTS FAILED TO COMPLY WITH THE ESA.

The Plaintiffs incorporate by reference the ESA arguments made in the Opposition/Reply brief in *RODA* and *Melone,* and add the following. The Federal Defendants argue that Plaintiffs challenges to the October and November 2021 BiOp fail because they failed to satisfy the pre-suit notice requirements of 16 U.S.C. § 1540(g)(2)(A)(i). Doc. 73. At 54. As indicated in Section IV.F. *supra*, the argument is a red herring because the BiOp that the Plaintiffs challenge was the one in effect at the time the ROD was approved in May of 2021 and the amended BiOps issued in October and November of 2021 have no bearing on this lawsuit. Should the Court reach the merits on the Federal Defendants' ESA arguments, they are baseless because, contrary to the ESA's requirements, the Federal Defendants did not use the best available scientific information in reaching the no-jeopardy conclusion. As the Federal Defendants' own documents reveal, "the loss of even one individual [NARW] a year may reduce the likelihood of recovery and of species'

achieving optimum sustainable population," placing the potential biological removal level for the species at "less than 1." *See BOEM and NOAA Fisheries North Atlantic Right Whale and Offshore Wind Strategy*, hosted at https://www.regulations.gov/document/BOEM-2022-0066-0003 at 9, 10 (the "Strategy Document"). The Strategy Document reaches these conclusions based in large part on studies that were available at the time the Original BiOp and Revised BiOp were compiled.

VII. THE FEDERAL DEFENDANTS FAILED TO COMPLY WITH THE MMPA.

Vineyard Wind asserts that the Plaintiffs' claims under the Marine Mammal Protection Act should be dismissed because "they have changed their claims to assert that BOEM (not NMFS) violated the Marine Mammal Protection Act by approving the COP (not the IHA)." Doc. 87 at 33. Vineyard Wind neglects to state the obvious: Both BOEM and NMFS are among the Federal Defendants, and BOEM relied on NMFS's asserted compliance with the MMPA when it approved the COP. Accordingly, Vineyard Wind supplies no justification for the assertion that the Federal Defendants' Twenty-First and Twenty-Second Claims for Relief be deemed abandoned. Furthermore, Vineyard Wind's argument that Mr. Melone's claims in *Melone v. Coit* are "largely dissimilar" to the Plaintiffs' is without merit as both involve NMFS' violations of the MMPA in issuing an Incidental Harassment Authorization ("IHA").

VIII. VINEYARD WIND'S EXPERT REPORT IS WRONG AND IMPERMISSIBLE.

Vineyard Wind attached a declaration from Dr. R. Douglas Scott to its Additional Statement of Undisputed Facts in an attempt to establish that the Plaintiffs' boats did not spend a great deal of time fishing in the Vineyard Wind lease area based on analysis of AIS data. *See* Doc. No. 88 at 77 (referencing Scott's qualifications and describing his work). Dr. Scott's conclusions are wrong, as set forth in the declarations of Thomas Williams and David Aripotch attached to this filing. As those declarations make clear, neither Williams' vessels (the F/V Heritage and F/V

Tradition) nor Aripotch's vessel (the F/V Caitlin & Mairead) are required to use AIS in the Vineyard Wind area because both are under 65 feet in length and the Vineyard Wind lease is located 14 nm from shore, while AIS is only required on vessels over 65 feet in length sailing within 12 nautical miles ("nm") of shore. Williams Second Decl. ("Williams 2nd") at ¶¶ 5-6; Aripotch Third Decl. ("Aripotch 3rd") at ¶ 4. *See also* **BOEM_0068464.** Both Williams and Aripotch testify that, while they have chosen to install an inexpensive form of AIS in their boats, they frequently turn off their AIS when further than 12 nm from shore so that other commercial fishermen cannot observe their fishing activity. Williams 2nd at ¶¶ 13–14, Aripotch 2nd at ¶¶ 8–14. Accordingly, any estimate of commercial fishing activity using AIS data will dramatically understate actual fishing activity. Williams 2nd at ¶¶ 14-15; Aripotch 3rd at ¶¶ 15-16. Furthermore, both Williams' vessels and Aripotch's vessel use Class B AIS, which can be displaced or blotted out when transmitting (and therefore not captured) when a vessel using a Class A AIS is in the area. Williams 2nd at ¶¶ 14–15; Aripotch 2nd at ¶¶ 13–14. Therefore, Dr. Scott's analysis is unreliable.[11]

In addition, by proffering this expert declaration, Vineyard Wind violated the Federal Rules of Civil Procedure, which requires disclosure to all other parties of any expert witness whose opinion evidence may be utilized at trial. *See* FED. R. CIV. P. 26(a)(2). Vineyard Wind did not disclose Dr. Scott's testimony to the Plaintiffs before filing Dr. Scott's report nor accompanied that disclosure with a written report. While Rule 26 exempts "an action for review on an administrative record," it does no such thing when requiring disclosure of expert testimony, such

[11] In any event, nothing in the Scott declaration addresses the revenues of Heritage Fisheries or Old Squaw attributable to fishing in the Vineyard Wind lease area.

as that of Dr. Scott. *Compare* FED. R. CIV. P. 26(a)(1)(B)(i) *with* 26(a)(2). *See Hanna v. Plumer*, 380 U.S. 460, 471 (1965) (instructing courts to "apply the Federal Rule" in civil cases).

IX. THE PLAINTIFFS STATEMENT OF MATERIAL FACTS COMPLIES WITH THIS COURT'S ORDERS REGARDING SUCH STATEMENT.

Vineyard Wind takes umbrage with the Plaintiffs' statement of material facts. Doc. No. 87 at 35. As set forth in the attached declaration of Connor Mighell, one of the Plaintiffs' attorneys, the Plaintiffs complied fully with this Court's orders regarding such statement. *See* Mighell Decl. at ¶¶ 4–16. If Vineyard Wind disputes the accuracy of any of the Plaintiffs' facts, their proper remedy is to file a response, not accuse the Plaintiffs of failure to comply with a local rule that this Court addressed with the parties by order with which the Plaintiffs complied. Vineyard Wind's mere disagreement with the Plaintiffs' statement of the facts does not transmute the Plaintiffs' statement into legal argumentation, while the facts set forth in Plaintiffs' SOMFs have copious support in the AR, the declarations, and materials Plaintiffs previously moved to supplement the AR. In a fit of pique, Vineyard Wind even accuses the Plaintiffs of picking citations at "random." Doc. No. 87 at 35. Of course, the assertion is false.[12] *See* Mighell Decl. at ¶¶ 17–19.

X. THE EIS, ROD, AND COP APPROVAL SHOULD BE VACATED.

The Defendants argue that if the Court should grant summary judgment in favor of the Plaintiffs, it should either remand without vacatur or schedule additional briefing on remedy. The only case proffered by the Federal Defendants in support is distinguishable on the facts. *Central*

[12] Vineyard Wind's MSJ legal memorandum exceeds by three pages its 30-page limit set by this Court. Doc. No. 65. Two of those three pages in excess of the Court's page limit address Vineyard Wind's objections to Plaintiffs' statement of material facts. Doc. No. 87 at 38-40. Accordingly, Plaintiffs respectfully request that this Court exercise its discretion to strike the arguments made by Vineyard Wind that exceed the 30-page limit, i.e. the arguments made in Doc. No. 87 at 38-40, or, in the alternative, to strike Vineyard Wind's entire MSJ legal memorandum and require Vineyard Wind to refile a legal memorandum within the 30-page limit.

Maine Power Co. v. FERC, 252 F.3d 34, 48 (1st Cir. 2001), stands for the proposition that remand without vacatur is appropriate only when "[a] reviewing court . . . perceives flaws in an agency's explanation [and] the balance of equities and public interest considerations" merit a court's forbearance from setting aside the agency's action upon remand. Here, the Federal Defendants have not provided any justification for this Court to exercise any such forbearance. For its part, Vineyard Wind offers no case law in support of its argument that vacatur should not accompany remand.

The APA requires that courts "hold unlawful and *set aside* agency action" that violates the APA or exceeds an agency's statutory authority. 5 U.S.C. § 706. "Vacatur . . . is the ordinary APA remedy." *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers,* 781 F.3d 1271, 1290 (11th Cir. 2015) (quotation omitted); *accord Allina Health Servs. v. Sebelius,* 746 F.3d 1102, 1110 (D.C. Cir. 2014) (explaining that vacatur is "the normal remedy" for an APA violation); *Advocs. for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005) ("Unsupported agency action normally warrants vacatur."). Although there are certain limited exceptions to the rule that vacatur should accompany remand to an administrative agency, *see e.g., Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n,* 988 F.2d 146, 150-51 (D.C. Cir. 1993), neither the Federal Defendants nor Vineyard Wind make any arguments that any of those exceptions apply here. Accordingly, any such arguments they could have raised have been waived.

CONCLUSION

For the foregoing reasons, the Defendants' motions for summary judgement should be denied and the Plaintiffs' motion for summary judgment should be granted.

DATE: January 31, 2023,

Respectfully submitted,

/s/Theodore Hadzi-Antich
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Attorneys for Plaintiffs Seafreeze Shoreside, Inc., et al.

CERTIFICATE OF SERVICE

Pursuant to Local Rule 5.2, I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by the CM/ECF electronic filing system on January 31, 2023.

/s/Theodore Hadzi-Antich
THEODORE HADZI-ANTICH

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

SECOND DECLARATION OF DAVID ARIPOTCH

I, David Aripotch, declare as follows:

1. I am over the age of eighteen (18) and am competent to testify in this matter. I have personal knowledge of the following facts and if called upon to do so could competently testify to them under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I hereby incorporate by reference the totality of the contents of my declaration dated October 17, 2022.

3. I am a member of Long Island Commercial Fishing Association ("LICFA") in my individual capacity as a commercial fisherman.

4. My economic and environmental interests as a commercial fisherman are represented by LICFA.

Pursuant to 28 U.S.C. § 1746, I David Aripotch, declare under penalty of perjury that the foregoing is true and correct.

Executed on the 14th day of January, 2023, in the Hamlet of Montauk, Town of East Hampton, in the State of New York.

DAVID ARIPOTCH
P.O. Box 1036
Montauk, NY 11954

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

SECOND DECLARATION OF BONNIE BRADY

I, Bonnie Brady, hereby declare as follows:

1. I am over the age of eighteen (18) and am competent to testify in this matter. I have personal knowledge of the following facts and if called upon to do so could competently testify to them under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I hereby incorporate by reference the totality of the contents of my declaration dated October 17, 2022.

3. David Aripotch is a member of Long Island Commercial Fishing Association ("LICFA") in his individual capacity as a commercial fisherman.

4. LICFA, as an association of commercial fishermen, represents the economic and environmental interests of David Aripotch in his capacity as a member of LICFA.

Pursuant to 28 U.S.C. § 1746, I Bonnie Brady, declare under penalty of perjury that the foregoing is true and correct.

Executed on the 14th day of January, 2023, in the Hamlet of Montauk, Town of East Hampton, in the State of New York.

BONNIE BRADY
Executive Director
Long Island Commercial Fishing Association
P. O. Box 191
Montauk, NY 11954

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

THIRD DECLARATION OF DAVID ARIPOTCH

I, David Aripotch, hereby declare as follows:

1. I am over the age of eighteen (18) and am competent to testify in this matter. I have personal knowledge of the following facts and if called upon to do so could competently testify to them under oath. As to points which reflect matters of opinion, they reflect my personal opinion and judgment upon the matter.

2. I hereby incorporate by reference the totality of the contents of my declarations dated and October 17, 2022, and January 14, 2023.

3. The Declaration of R. Douglas Scott ("Dr. Scott"), which attempts to discredit my fishing activity in the Vineyard Wind lease area by using Automatic Identification System (AIS) data, is wrong on all counts.

4. According to USCG regulations, AIS is required on vessels more than 65 feet in length engaged in commercial service, 33 C.F.R. § 164.46(a), (b)(1), and in waters from shore out to 12 nm. *See id.*; *see also* 33 C.F.R. § 2.36.

5. AIS is not required instrumentation on the F/V Caitlin & Mairead due to its length, which the US Coast Guard has documented as being 64.5 feet on its Certificate of Documentation. The only reason I have an AIS system on my boat at all is because my wife bought a Class B model in March of 2016 when the US government had announced that AIS was to be required on all vessels 65 feet and larger. She was unaware that my boat is documented as 64.5 feet. I have never been required to use AIS on the F/V Caitlin & Mairead.

6. I am also not required to activate my AIS when I am past 12 nautical miles ("nm") from shore. As stated by the Defendants, the Vineyard Wind lease is located further than 12 nm from shore. **BOEM_0068464.**

7. I believe that both Vineyard Wind and BOEM are aware of the aforementioned facts at ¶¶ 4–6, as we in the fishing industry have made this point many times and at many meetings to illustrate why AIS is not considered an accurate data source for determining fishing activity in offshore wind leases.

8. The only reason I know of as to why there would be so many track lines along the Nantucket shoreline directly south within the 12-mile limit on Dr. Scott's map is because that area specifically is known for having a great deal of fog. On some days, I may be fishing with 30–40 other boats in the same area, all in dense fog. When my visibility is limited due to bad weather, like fog or driving rain, I will keep AIS on so I can see which boats are close to mine, when without it the weather would make it harder for me to see them.

9. In good weather I normally shut AIS off within the Vineyard Wind lease area because when I have good fishing, meaning that I am catching a lot, I do not want to be followed by other boats.

10. In addition to squid fishing in the Vineyard Wind lease area, I also fish there for whiting. I land my whiting in New York. The price of whiting in New York is driven by the Hunts Point market's supply and demand. If too many fishermen land whiting and flood the market, the price tanks. So, if fish buyers tell me the whiting prices will be good, I may decide to combine a squid and whiting trip.

11. Like most commercial fishermen who fish for both squid and whiting, I fish for squid in the daytime and whiting at night. When I do so, I do not want other squid fishermen as myself to know that I am whiting fishing too because if there is too much whiting landed in the market, the price will drop and I will get paid less from fish buyers. To accomplish this, I turn off AIS and fish more stealthily so my competitors can't see where I am fishing.

12. My AIS is mostly turned on when I'm in transit out to sea through shipping lanes or if I'm fishing within 12 nm of shore where safety is an issue due to poor visibility conditions like fog. When it is off, it's because I am catching fish and do not want to alert other fishermen who might be my competition in the market.

13. Additionally, the AIS unit located on the F/V Caitlin & Mairead is a Class B unit, as is allowed for commercial fishing vessels. 33 C.F.R. § 164.46(b)(2)(i).

14. A Class B AIS unit is not as powerful as a Class A AIS unit. Class A units compete with Class B units for transmission priority. For instance, if another commercial fishing vessel with a Class A unit is passing through the Vineyard Wind lease area to head toward port while I have my Class B unit on, their Class A has a more powerful signal than mine and will step on or displace my transmission almost every time. And with a Class B unit, you can only see boats on AIS at best 5 to 8 miles away depending on the weather.

15. These facts explain why Dr. Scott's declaration proffered by Vineyard Wind in an effort to show very little activity from my boat in the Vineyard Wind lease area over a period of 5.5 years is in no way indicative of my fishing activities in the area over that period.

16. For these reasons, referencing AIS data to determine my fishing in the Vineyard Wind lease area in the F/V Caitlin & Mairead is wholly unreliable as a measure of the boat's fishing activity in the area.

Pursuant to 28 U.S.C. § 1746, I, David Aripotch, declare under penalty of perjury that the foregoing is true and correct.

Executed on the 25th day of January, 2023, in the ~~city~~ TOWN of EAST HAMPTON in the state of NEW YORK.

DAVID ARIPOTCH
OWNER AND PRESIDENT
Old Squaw Fisheries
P.O. Box 1036, Montauk, NY 11954

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

SECOND DECLARATION OF THOMAS E. WILLIAMS, SR.

I, Thomas E. Williams, Sr., hereby declare as follows:

1. I am over the age of eighteen (18) and am competent to testify in this matter. I have personal knowledge of the following facts and if called upon to do so could competently testify to them under oath. As to points which reflect matters of opinion, they reflect my personal opinion and judgment upon the matter.

2. I hereby incorporate by reference the totality of the contents of my declaration dated October 14, 2022.

3. The Declaration of R. Douglas Scott ("Dr. Scott"), which purports to discredit the fishing activity of the F/V Heritage and F/V Tradition in the Vineyard Wind lease area utilizing Automatic Identification System ("AIS") data is faulty on all counts.

4. According to USCG regulations, AIS is required on vessels more than 65 feet in length engaged in commercial service, 33 C.F.R. § 164.46(a), (b)(1)(i), (b)(2)(i), and in waters from shore out to 12 nm. *See id.*; *see also* 33 C.F.R. § 2.36.

5. AIS is not required instrumentation on either the F/V Heritage or the F/V Tradition due to their size. As stated in the declarations of my son Thomas H Williams, the F/V Heritage is 60.8 ft long, and as stated in the declaration of my son Aaron Williams, the F/V Tradition is 55 ft long. Neither the F/V Heritage nor the F/V Tradition are required to carry AIS.

6. AIS is also not required by vessels of any size, including the F/V Heritage or the F/V Tradition, outside of 12 nautical miles ("nm") from shore. As stated by Defendants, the Vineyard Wind lease is outside of 12 nm from shore. **BOEM_0068464.**

7. Both Vineyard Wind and BOEM are aware of the aforementioned facts at ¶¶ 6–8, as the fishing industry has made this point many times and at many meetings to illustrate why AIS is not accurate data for quantifying fishing activity in offshore wind leases.

8. Both the F/V Heritage and the F/V Tradition are voluntarily equipped with AIS for certain safety reasons; however, they are not required to have AIS nor to turn it on. They do not always turn it on. The majority of the time that the vessels do have AIS turned on, the AIS is set to receive mode only (which allows the vessel to track AIS of other nearby vessels for safety purposes), not to transmit mode (which allows other entities and vessels to track their AIS signal and their fishing activity).

9. The F/V Heritage and the F/V Tradition primarily turn off the AIS while fishing, or set the AIS to receive mode only, so that proprietary fishing activity is not readily available to competitors.

10. Therefore, no fishing vessel activity occurring when the AIS is set to "receive only" mode would be represented in the transmitted AIS data reviewed by Mr. Scott, nor would activity occurring when the AIS is turned off altogether (which is the majority of the activity occurring when the F/V Heritage and F/V Tradition are fishing).

11. When the AIS is set to both receive and transmit, it is mostly transit activity, as is clear from the straight lines shown in Dr. Scott's presentation. This is why Dr. Scott's declaration shows very little activity from the F/V Heritage and F/V Tradition.

12. If the activity depicted in Dr. Scott's declaration were all the fishing activity of these two vessels within the Vineyard Wind lease area for the past seven years, both Heritage Fisheries and Nat W. Fisheries would be bankrupt.

13. Additionally, both the F/V Heritage and F/V Tradition use Class B AIS, as specifically allowed by regulation for commercial fishing vessels. 33 C.F.R. § 164.46(b)(2)(i).

14. Class B AIS are less expensive and lower powered than Class A AIS. Class A AIS units take transmission priority over Class B AIS units, resulting in a loss of Class B data when Class A units are operating in the same vicinity and using the available transmission time slots. Therefore, even during the limited AIS transmission of both vessels, data may be unavailable if Class A vessels are in the vicinity.

15. For these reasons, AIS data is an inappropriate and unreliable measure of vessel activity for the F/V Heritage and F/V Tradition. Accordingly, this data and Dr. Scott's analysis of it should be rejected as incomplete, faulty, and irrelevant to the actual fishing activities of F/V Heritage and F/V Tradition.

Pursuant to 28 U.S.C. § 1746, I, Thomas E. Williams, Sr., declare under penalty of perjury that the foregoing is true and correct.

Executed on the 23 day of January, 2023, in the city of Westerly in the state of Rhode Island.

Thomas E. Williams

THOMAS E. WILLIAMS, SR.
OWNER AND PRESIDENT

Heritage Fisheries, Inc. & Nat W. Inc.
6 Rhody Drive, Westerly, RI 92891

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

DECLARATION OF CONNOR MIGHELL

I, Connor W. Mighell, hereby declare as follows:

1. I am over the age of eighteen (18) and am competent to testify in this matter. I have personal knowledge of the following facts and if called upon to do so could competently testify to them under oath. As to points which reflect matters of opinion, they reflect my personal opinion and judgment upon the matter.

2. I am an Attorney at the Texas Public Policy Foundation's Center for the American Future. I have served in that capacity since October 18, 2021. My duties include performing legal research, drafting legal memoranda and filings, and undertaking a variety of legal support tasks for my supervising attorney, Theodore Hadzi-Antich.

3. I represent the Plaintiffs in the case of *Seafreeze Shoreside, Inc. et al. v. The United States Department of the Interior, et al.*, currently pending before this Court.

4. On August 17, 2022, I attended a scheduling conference via Zoom before Judge Talwani with Mr. Hadzi-Antich. Counsel for the Federal Defendants and Intervenor-Defendant in the above-captioned case also attended said conference.

5. At that conference, Judge Talwani instructed the parties as to deadlines and points of procedure that would govern the case.

6. It was my responsibility to take notes detailing for Mr. Hadzi-Antich and myself the contents of these instructions for future reference. The recollections that follow are directly derived from said notes.

7. Judge Talwani stated that both parties should file a statement of material facts that complied with Local Rule 56.1 at the same time as their respective motions for summary judgment and accompanying memoranda, but as separate documents.

8. Judge Talwani instructed counsel for all parties to email a Word document of their statement of material facts to opposing counsel upon filing of said statement, so that opposing counsel may respond alongside the stated facts and file said response with their materials.

9. Judge Talwani instructed all parties to attempt to file a joint statement of undisputed facts to further comply with Local Rule 56.1 after all parties had filed respective motions for summary judgment and accompanying memoranda. Judge Talwani also instructed both parties to adopt undisputed facts in other related cases by reference, if possible, when crafting the joint statement of undisputed facts.

10. Judge Talwani stated that she preferred this method of fact statement in order to clarify what the disputed facts that required her resolution were while minimizing the work needed from the parties and encouraging cooperation.

11. Counsel for the Federal Defendants and Intervenor-Defendants did not state at the scheduling conference that these instructions were vague or otherwise unclear to them.

12. The Court's subsequent order stated that "[c]ounsel shall endeavor to jointly file a single consolidated statement of facts" after all parties had moved for summary judgment. Doc. No. 55 at 2.

13. Within that aforementioned order, the Court also required all parties to file their own statements of facts with their respective motions for summary judgment. *Id.*

14. The facts cited in the Plaintiffs' subsequent statement of material facts contain citations to declarations that accompanied the Plaintiffs' motions.

15. The Plaintiffs complied with this Court's order, and Vineyard Wind does not argue that they did not.

16. Based on its plain text, Local Rule 56.1 does not require parties to file statements of facts that are "undisputed" with their motions for summary judgment, and in fact provides a mechanism by which opposing parties can dispute statements of material facts. The rule reads, in relevant part:

> Motions for summary judgment shall include a concise statement of the material facts of record as to which the moving party contends there is no genuine issue to be tried . . . A party opposing the motion shall include a concise statement of the material facts of record as to which it is contended that there exists a genuine issue to be tried, with page references to affidavits, depositions and other documentation. . . . Material facts of record set forth in the statement required to be served by the moving party will be deemed for purposes of the motion to be admitted by opposing parties unless controverted by the statement required to be served by opposing parties.

17. When drafting the Plaintiffs' memorandum in support of the motion for summary judgment ("Plaintiffs' MSJ Memo"), I had difficulty matching cites from the 60-day notice letter,

which referred to the original page numbers of various documents, to the Bates numbered pages for the same documents within the administrative record ("AR"), due to the vast extent of the AR.

18. To the extent that mistranslated citations remain in the Plaintiffs' MSJ Memo, they are likely scrivener's errors caused by cite-translation between the 60-day notice letter and the AR.

19. Despite a thorough search of the Plaintiffs' MSJ Memo conducted after receiving Vineyard Wind's memorandum in support of the motion for summary judgment ("Vineyard Wind MSJ Memo"), I could not find any such errors.

20. To the best of my knowledge, every fact contained in the Plaintiffs' Statement of Material Facts is true, material, and evinced by the record or other supporting documentation.

Pursuant to 28 U.S.C. § 1746, I, Connor W. Mighell, declare under penalty of perjury that the foregoing is true and correct.

Executed on the 26th day of January, 2023, in the city of Austin in the state of Texas.

Connor W. Mighell

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