No. 23-1853

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; HONORABLE DEBRA HAALAND, in her official capacity as Secretary of the Department of the Interior; BUREAU OF OCEAN ENERGY MANAGEMENT;
Defendants-Appellees,

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Appeal from the United States District Court for the District of Massachusetts No. 1:22-CV-11091 (Hon. Indira Talwani)

INTERVENOR-DEFENDANT-APPELLEE'S BRIEF

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February 22, 2024

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LIZ KLEIN, in her official capacity as the Director of the Bureau of Ocean Energy Management; LAURA DANIEL-DAVID, in her official capacity as Principal Deputy Assistant Secretary, Land and Minerals Management; UNITED STATES DEPARTMENT OF COMMERCE; HONORABLE GINA M. RAIMONDO, in her official capacity as the Secretary of the Department of Commerce; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, NATIONAL MARINE FISHERIES SERVICE; CATHERINE MARZIN, in her official capacity as the Deputy Director of the National Oceanic and Atmospheric Administration; UNITED STATES DEPARTMENT OF DEFENSE; HONORABLE LLOYD J. AUSTIN, III, in his official capacity as the Secretary of the Department of Defense; UNITED STATES ARMY CORPS OF ENGINEERS; LT. GEN. SCOTT A. SPELLMON, in his official capacity as the Commander and Chief of Engineers of the U.S. Army Corps of Engineers; COLONEL JOHN A. ATILANO, II, in his official capacity as the District Engineer of the New England District of the U.S. Army Corps of Engineers; VINEYARD WIND 1 LLC,

Defendants-Appellees.

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Rule 26.1 Corporate Disclosure Statement

Intervenor-Defendant-Appellee Vineyard Wind 1 LLC ("Vineyard Wind") is jointly owned 50% by Copenhagen Infrastructure Partners, P/S, and 50% by Avangrid Renewables, LLC. No publicly held corporation has a 10% or greater ownership interest in Vineyard Wind.

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Vineyard Wind agrees with Appellants that oral argument may be helpful to the Court given the lengthy administrative record and number of issues raised on appeal. Moreover, the district court consolidated this case with *Responsible Offshore Development Alliance v. United States Department of the Interior*, No. 1:22-cv-11172-IT (D. Mass), and issued one opinion granting summary judgment to Federal Defendants and Vineyard Wind in both cases. The Responsible Offshore Development Alliance filed a separate appeal (Case No. 23-2051) that is being briefed separately from this case. Because the cases were decided together below, Vineyard Wind respectfully submits that it would promote efficiency and avoid the possibility of inconsistent decisions for them to be argued in this Court before the same panel on the same day.

INTRODUCTION

Vineyard Wind 1 LLC ("Vineyard Wind") is constructing the nation's first commercial offshore wind energy project on the outer-continental shelf about 14 nautical miles south of Martha's Vineyard and Nantucket Island (the "Project"). When completed, the Project's 62 wind turbines will be capable of generating 800 megawatts of clean renewable electricity, enough to power 400,000 Massachusetts homes.

Plaintiffs-Appellants (collectively, "Seafreeze") include commercial fishing companies, seafood processing companies, and related trade associations. Seafreeze sued to block Vineyard Wind's Project by using various environmental laws to challenge several federal agency decisions authorizing its construction and operation. Having spent approximately 10 years and $300 million to obtain those authorizations, and relying on them to enter into over $3 billion in construction contracts, Vineyard Wind intervened to defend its Project.

All parties cross-moved for summary judgment on Seafreeze's 33 claims for relief. While that motion was pending, Seafreeze moved to stay the federal authorizations under the Administrative Procedure Act ("APA") or preliminarily enjoin construction activities based on a

relatively narrow subset of its claims. After full briefing, the submission of witness declarations, and an evidentiary hearing, the district court denied the motion. Seafreeze appealed the denial to this Court but, after the matter was fully briefed, the district court granted summary judgment to Vineyard Wind and the Federal Defendants on all claims. Seafreeze appealed and moved the district court for a stay of its summary judgment order and an injunction against Project construction pending appeal. The district court denied that motion and Seafreeze declined to seek an injunction pending appeal in this Court.

On appeal, Seafreeze challenges several of the district court's decisions: (1) its grant of summary judgment to Vineyard Wind and the Federal Defendants, (2) its denial of Seafreeze's motion to strike the 2021 Biological Opinion from the administrative record, and (3) the denial of its motion for the district court to take judicial notice of Plaintiff-Appellant Long Island Commercial Fishing Association's articles of incorporation. None of Seafreeze's arguments have merit. Federal Defendants complied with all applicable laws in issuing Vineyard Wind's authorizations to construct and operate the Project and Seafreeze failed

to demonstrate that the district court abused its discretion in denying its other motions.

STATEMENT OF THE ISSUES

Vineyard Wind agrees with the Statement of the Issues presented by Federal Defendants-Appellees.

STATEMENT OF THE CASE

This case is one of four challenging the federal approvals for Vineyard Wind's Project. The cases were assigned to the same district court judge, who permitted Vineyard Wind to intervene in each case to defend its federal approvals. The district court granted summary judgment to the Federal Defendants and Vineyard Wind in each case, and all are now on appeal in this Court.[1]

[1] *Nantucket Residents Against Turbines*, Case No. 23-1501, raised claims about the Project's potential impacts on North Atlantic right whales and how the Federal Defendants analyzed those impacts. Thomas Melone filed the second case, Case No. 23-1736, raising his own concerns about right whales and his ownership interest in two companies that develop small solar energy projects. *Nantucket Residents* is scheduled for argument in this Court on March 5, 2024 and *Melone* will be decided without argument. This case was consolidated in the district court with *Responsible Offshore Development Alliance*, Case No. 23-2051, a case brought by commercial fishing companies and trade associations alleging that the Project will diminish commercial fishing operations. The district court issued a single opinion granting summary judgment for Federal Defendants and Vineyard Wind in both cases. *See* Add.00001-49.

A. Vineyard Wind's Offshore Energy Project

The Project lies on the outer-continental shelf approximately 14 miles south of Martha's Vineyard and Nantucket, Massachusetts. SA_1990 (Joint Record of Decision); *see also* SA_0102 (map). The Project will sell energy to Massachusetts utilities under power purchase agreements approved pursuant to a Massachusetts law requiring utilities to solicit proposals for offshore wind generation. SA_1990-91. When completed, the Project will be able to produce 800 megawatts of clean, renewable energy, enough to power approximately 400,000 homes. SA_1990-91.

The Project is being constructed on a lease that Vineyard Wind's predecessor acquired in a 2015 competitive auction held by the Bureau of Ocean Energy Management ("BOEM") under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331, *et seq.*; *see also* SA_1985. Installation of the in-water components of the Project began in 2022 with laying the first off-shore cables. App.01009. Work continued in 2023 with laying of scour protection and installation of the foundations for many of the wind turbine generators. App.01009-10. To date, the electrical service

platform and nearly a dozen wind turbines have been installed, and the Project has begun to supply power to the Massachusetts electrical grid.[2]

Before beginning construction, Vineyard Wind obtained multiple federal and state approvals. As relevant to this case, Vineyard Wind needed BOEM's approval of its detailed Construction and Operations Plan ("COP"). *See* 30 C.F.R. §§ 585.620–29 (OCSLA regulations). It also needed permits from the U.S. Army Corps of Engineers ("Army Corps") under the Clean Water Act, 33 U.S.C. § 1344, and the Rivers and Harbors Act, 33 U.S.C. § 403. Before approving the COP and granting the permit, the agencies engaged in extensive environmental reviews under the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA"). *See* Fed. Defs' Br. at 7-13.

B. Approval of the Construction and Operations Plan and Issuance of the Army Corps Permit

On May 10, 2021, BOEM, the National Marine Fisheries Service ("NMFS"), and the Army Corps issued a Joint Record of Decision ("Joint ROD") adopting the Final Environmental Impact Statement ("EIS").

[2] *See* https://www.vineyardwind.com/mariners-updates/83 (last visited Feb. 22, 2024) (chart that is regularly updated by Vineyard Wind to notify mariners of the Project's construction status).

SA_1981, 1983. The Joint ROD also explained BOEM's decision to approve the COP under section 8(p) of OCSLA, 43 U.S.C. § 1337(p), and the Army Corps' decision to issue Vineyard Wind's permits.[3] *See* SA_1981-2080. It explained that BOEM was approving the Project with several modifications from Vineyard Wind's original proposal, as described in the "Preferred Alternative," which was one of two "environmentally preferred alternatives" identified in the Final EIS. SA_2002-3.

As relevant here, BOEM found that the Project will be carried out safely because Vineyard Wind will "use the best available and safest technology, best management practices, and properly trained personnel" for construction and operations. SA_2115 (footnotes omitted). BOEM also found that the Preferred Alternative, with the mitigation measures identified in the Final EIS, "will result in the protection of the environment and prevention of undue harm or damage to natural resources." SA_2118.

[3] The Joint ROD also addressed NMFS's decision to authorize the incidental harassment of marine mammals from the noise of pile driving Project foundations. SA_1983. Seafreeze does not challenge that here.

BOEM further explained that the Coast Guard determined that the Preferred Alternative's turbine layout "will result in the functional equivalent of numerous navigation corridors that can safely accommodate both transits through and fishing within the [wind energy area.]" SA_2124. In addition, BOEM's approval "would not limit the right to navigate or fish within the Project area." SA_2126. And while some Project "components (e.g., foundations, cable protection measures) [were] expected to impact some types of fishing," fishing could occur in other areas and BOEM expected that "many fishermen will adapt to spacing and be able to fish successfully in the [wind development area.]" *Id.* Finally, Vineyard Wind established $26.7 million in funds to compensate commercial fishermen for lost gear and income resulting from Project construction or operation. SA_2127. These measures, BOEM concluded, will "prevent unreasonable interference with said fishing interests." SA_2128.

C. Proceedings In This Lawsuit

1. The Complaint And Summary Judgment Motions

Seafreeze filed this lawsuit in the District Court for the District of Columbia in December 2021. App.00010. Plaintiffs are Seafreeze Shoreside, Inc. (a Rhode Island seafood processor), two commercial

fishing trade associations, and three commercial fishing companies that allegedly fish in or around Vineyard Wind's lease. App.00028-31.

At Federal Defendants' request, this case and another case brought by commercial fishing companies were transferred to the District of Massachusetts, App.00011, 13, and assigned to Judge Talwani, who was presiding over two similar lawsuits. Vineyard Wind was permitted to intervene in all four cases. Seafreeze filed its motion for summary judgment in November 2022. App.00452. Vineyard Wind and Federal Defendants opposed the motion and filed cross-motions for summary judgment in December 2022. *See* App.00016-18. The district court heard argument on the motions on April 3, 2023. App.00020.

2. The Denial of Seafreeze's Motion for Preliminary Injunction

Seafreeze waited until May 10, 2023 to file a motion for a stay of BOEM's COP approval or, in the alternative, a preliminary injunction to stop Project construction. App.00777. By that point, in accordance with its publicly-available construction schedule, Vineyard Wind had begun installing the export cable in the ocean floor and laying the scour protection that goes under the wind turbine foundations. App.01009.

On May 23, 2023, the district court held an evidentiary hearing and heard testimony from five witnesses who had provided declarations in support of Seafreeze's motion or Vineyward Wind's opposition: the President of Plaintiff Old Squaw Fisheries, Vineyard Wind's Chief Executive Officer, and Vineyard Wind's three expert witnesses. App.01004.

Two days later, the district court issued a 15-page opinion denying the motion, finding that "all four" of the preliminary injunction and stay factors "weigh against the relief requested." App.01004-15. It found that Seafreeze was not likely to succeed on the merits of their NEPA and OCSLA claims and the "substantial delay in seeking preliminary relief is fatal to their claim of irreparable harm." App.01007-08. The court further found that Seafreeze's "purely economic injuries" were not irreparable but were compensable by Vineyard Wind's compensation funds. App.01006. What is more, an injunction preserving the *status quo* would not remedy Seafreeze's alleged harm: Seafreeze's only witness—the President of Old Squaw Fisheries—repeatedly testified that, because scour protection was already laid on the ocean floor, he would not fish or even travel through the Project area. App.01012 & n.7.

In contrast, the court found that unrebutted evidence demonstrated that a preliminary injunction would cause Vineyard Wind to "face significant financial harm and possible devastation to the Project." App.01013. Finally, the court concluded that an injunction would disserve the public interest, reflected in both "Congressional and Executive policy" of "promoting renewable energy initiatives for the public's benefit." App.01015.

Seafreeze appealed the denial of the preliminary injunction but did not seek expedited scheduling or an injunction pending appeal from this Court. App.01017. While that appeal was pending, the district court granted summary judgment to Federal Defendants and Vineyard Wind. Add.00001-47. Seafreeze then dismissed the preliminary injunction appeal as moot. Doc. 00118064890 (Oct. 19, 2023).

3. The District Court's Grant of Summary Judgment to Federal Defendants and Vineyard Wind

The district court found that Seafreeze had Article III standing to raise OCSLA claims because the Project could cause economic harm by interfering with "trawl-fishing activities in the Lease Area." Add.00015 (discussing commercial fishing companies); *see also* Add.00019 (discussing Seafreeze Shoreside); Add.00022-23 (discussing commercial

fishing associations). But it held that Seafreeze lacked standing to raise ESA and NEPA claims because no plaintiff suffered an environmental injury. Add.00026-32.

The district court acknowledged that the commercial fishing company owners submitted declarations stating they observe North Atlantic right whales when fishing and fear that the Project will harm those animals. Add.00015-16. However, the owners are not plaintiffs and, since the plaintiff commercial fishing companies have no interest in observing whales, the court held they lack standing to bring claims under the ESA and NEPA. Add.00016-17, Add.00026-30, Add.00032. And, while a company owner is a member of plaintiff Long Island Commercial Fishing Association ("LICFA"), the district court held that LICFA lacked associational standing to bring environmental claims on his behalf because "observing right whales and marine life" is not "germane to LICFA's purpose of supporting fisheries management." Add.00026.

The district court further held that plaintiffs lacked prudential standing to raise NEPA claims because they assert "only economic injuries," not environmental ones. Add.00031. The district court explained that Seafreeze did "not put forth competent evidence as to an

environmental injury" that "would impact their fishing." Add.00032. Instead, it held that "the gist of their claim is that the physical impediment the Project poses will limit their trawling." *Id.*

Turning to the merits, the district court held that BOEM's approval of Vineyard Wind's COP complied with OCSLA. Add.00042-46. Under OCSLA, the Secretary of the Interior "shall ensure" that offshore energy projects are "carried out in a manner that provides for" twelve enumerated factors. 43 U.S.C. § 1337(p)(4). The district court held that "shall" means that these requirements are mandatory but the Secretary "retains some discretion in considering whether the enumerated statutory criteria have been satisfied," and the Secretary did not err in finding that the COP approval provides for "'safety'" and "'prevention of interference with reasonable uses (as determined by the Secretary)'" of the high seas and territorial seas. Add.00044-46 (quoting 43 U.S.C. §§ 1337(p)(1)(A) & (I)).

Finally, the district court held that nothing prohibited BOEM from terminating its review of the COP and Final EIS and then resuming review without additional notice and comment proceedings. Any technical violation of OCSLA or NEPA would be harmless error because

"the changes made by Vineyard Wind were within the parameters already contemplated and reviewed as part of the NEPA process." Add.00046-47.

Seafreeze filed a timely notice of appeal, App.01042, and moved the district court to stay its judgment and prohibit further construction pending appeal. App.01045. The district court denied that motion, *see* Doc. Nos. 146, 148, and Seafreeze did not seek similar preliminary relief in this Court.

SUMMARY OF ARGUMENT

The district court correctly granted summary judgment to Vineyard Wind and the Federal Defendants. Many of Seafreeze's claims on appeal should be rejected for procedural reasons and all should be rejected on the merits.

First, the district court correctly held that Seafreeze lacked standing to raise its ESA claims as no plaintiff corporation or trade association established the necessary environmental injury. Even if they had standing, they waived many of their claims by declining to brief them. Further, Seafreeze cannot establish that it was injured by the

withdrawn and inoperative 2020 Biological Opinion, and even if it could, its challenges lack merit.

Second, Seafreeze lacks prudential standing to raise its NEPA claims. However, even if considered on the merits, Seafreeze's claims would fail as the Final EIS considered a reasonable range of feasible alternatives that gave appropriate consideration to Vineyard Wind's goals. Further, Seafreeze fails to demonstrate that the Final EIS's cumulative impact analysis overlooked any "reasonably foreseeable" future actions, as defined under the applicable regulations.

Third, the district court properly held that BOEM's approval of Vineyard Wind's COP complied with OCSLA in determining that the Project will be constructed and operated in a manner that provides for safety, environmental protection, and the other statutory criteria. Seafreeze's arguments to the contrary rely on a misreading of OCSLA, a misunderstanding of the Final EIS's findings, and fail to address BOEM's memorandum explaining the basis for its decision.

Fourth, in the unlikely event this Court finds reversible error, there is no basis to grant Seafreeze's demand for an injunction to stop construction and remove the turbines already built. Not only does

Seafreeze fail to show it meets the criteria for injunctive relief but such relief is best weighed by the district court after considering a complete and updated record. Nor is there a basis to vacate any agency action without remand as any error can likely be remedied without vacatur.

STANDARD OF REVIEW

Vineyard Wind agrees that the agency actions challenged here are reviewed under the APA's deferential standard of review. *See* Fed. Defs' Br. at 17.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY REJECTED SEAFREEZE'S ESA CLAIMS

The district court correctly held that Seafreeze lacks the necessary environmental injury to raise its ESA claims. Even if it had standing, Seafreeze's attacks on the 2020 Biological Opinion lack merit. Further, the district court correctly found that Seafreeze waived numerous ESA claims by failing to brief them.

A. Plaintiff-Appellants Lack Standing

Plaintiff-Appellants are commercial fishing companies, seafood processing companies, and related trade associations. None of these corporate entities possess any recreational, aesthetic, or spiritual

interest in observing right whales. Seafreeze asserts that plaintiff LICFA could represent David Aripotch's interest in observing right whales, Br. at 6-10, but the district court properly held that LICFA lacks associational standing to raise ESA Act claims on his behalf. Seafreeze provided no evidence at summary judgment that "Aripotch's interests in observing right whales and marine life" are "germane to LICFA's purpose of supporting fisheries management." Add.00026.[4]

On appeal, Seafreeze argues that LICFA's articles of incorporation include environmental interests. Br. at 18-24. But the district court properly declined to consider those articles because Seafreeze did not cite them in its summary judgment briefing or seek to use them as evidence until it filed a motion for judicial notice two months after the close of summary judgment briefing. *See* App.00775.

1. The District Court Properly Excluded LICFA's Articles of Incorporation

On appeal, Seafreeze argues that the district court was *required* to consider LICFA's late-filed articles because (1) a court is compelled take judicial notice of new evidence at any time, regardless of any other rule

[4] Mr. Aripotch is the owner of plaintiff Old Squaw Fisheries, Inc., App.00781, but was not a plaintiff himself.

or deadline, and (2) a plaintiff may raise new evidence on standing at any time. Br. at 20-21. Both arguments fail.

Local Rule 7.1(a)(1) authorizes the district court to establish briefing deadlines. An amended scheduling order established that summary judgment briefing would close on March 14, 2023. *See* Doc. No. 55 (scheduling order); Doc. No. 65 (continuing briefing deadlines by one week). Local Rule 7.1(b)(1) requires that all documents "evidencing facts on which the motion is based shall be filed with the motion." As the district court properly recognized, Seafreeze's motion for judicial notice of LICFA's article of incorporation was filed too late: it "should have been filed in connection with Plaintiffs' Motion for Summary Judgment … or their Opposition to Defendants' Cross Motions for Summary Judgment … and not after summary judgment briefing had concluded. App.00775.

District courts "enjoy broad latitude in adopting and administering such local rules," *NEPSK, Inc. v. Town of Houlton*, 283 F.3d 1, 6 (1st Cir. 2002) (internal quotation omitted), and those decisions are reviewed for an abuse of discretion. *Id.* at 5. The district court did not abuse its discretion here. Vineyard Wind's answer asserted that no plaintiff had standing to pursue ESA claims, Doc. No. 17 at 38-39, putting Seafreeze

on notice that it must provide evidence of standing with its summary judgment briefing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (plaintiff has the burden to establish standing with evidence at the summary judgment stage). It did not.

Instead, Seafreeze argues that all deadlines and rules must yield to Federal Rule of Evidence 201 and a principle purporting to allow new evidence in support of standing at any time. Br. at 20-21. Neither argument is correct. First, Seafreeze never explains how evidentiary rules governing admissibility supersede procedural rules governing *when* evidence must be submitted. It offers no caselaw from this Circuit, or any other, holding that Rule 201 countermands all deadlines, orders, and rules bearing on a court's timely and efficient management of litigation.

Second, only "*the absence of standing* may be raised at any stage of a case." *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 730 (1st Cir. 2016) (emphasis added). Seafreeze cites no legal authority holding open indefinitely the door for plaintiffs to *prove* standing.[5] *Cf. Lujan v. Nat'l*

[5] Seafreeze cites *Papetti v. Doe*, 691 F. App'x 24, 25 n.1 (2d Cir. 2017), however, this holds that "any party or the court sua sponte, at any stage of the proceedings, may raise the question of whether the court has subject matter jurisdiction." (quotation omitted). *Papetti* considered whether the plaintiff *lacked* standing. 691 F. App'x at 25 n.1.

Wildlife Fed'n, 497 US 871, 894-95 (1990) (district court properly excluded untimely filed standing affidavits in APA litigation)

2. LICFA's Articles of Incorporation do not Support Standing

LICFA's articles of incorporation, even if considered, provide no evidence of Article III standing for ESA claims. Seafreeze asserts, without any explanation, that "the saltwater fisheries in Suffolk County [New York] and its environs" include the Project site, some 65 miles away. Br. at 19. There is no evidence supporting that conclusion. And preserving saltwater fisheries or "the welfare of the environment" does not include protecting endangered species or an interest in observing them.[6] LICFA cannot expand its mission for litigation purposes by stretching the articles' terms beyond their plain meaning.

B. The Challenges to the Biological Opinion Lack Merit

Seafreeze lacks standing to challenge the withdrawn 2020 Biological Opinion. The superseded document causes no injury and there is no remedy for any alleged violation. In the alternative, all claims

[6] Reading such an interest into LICFA's articles of incorporation is especially inappropriate given its prior suit to block the Northeast Canyons and Seamounts Marine National Monument, established in part to protect "several species of endangered whales." *Mass. Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d 48, 52 (D.D.C. 2018).

against the 2020 Biological Opinion became moot once it was superseded by the 2021 Biological Opinion. Even if Seafreeze has standing, and its claims were not moot, its attempt to strike the 2021 Biological Opinion from the administrative record and challenges to the 2020 Biological Opinion, have no merit.

1. The 2020 Biological Opinion Presents no Case or Controversy

As the Federal Defendants explain, the 2020 Biological Opinion was superseded by the 2021 Biological Opinion and, therefore, cannot cause Seafreeze any injury. *See* Fed. Defs' Br. at 42-44; SA_2599 (2021 Biological Opinion stated that "[t]his Opinion replaces the Opinion we issued to you on September 2020."). Seafreeze does not dispute that NMFS withdrew the 2020 Biological Opinion. Nor is there redress for any potential violation as this Court cannot vacate a withdrawn biological opinion. Lacking any cognizable injury or prospect of redress, Seafreeze failed to demonstrate standing.

In the alternative, NMFS's issuance of the 2021 Biological Opinion mooted all challenges to the 2020 Biological Opinion. *Grand Canyon Tr. v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1017 (9th Cir. 2012) ("the issuance of a superseding BiOp moots issues on appeal relating to the

preceding BiOp.") (collecting cases)); *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1124 (9th Cir. 1997) (challenge to earlier biological opinion that "has been superseded by [a later] Biological Opinion" is "moot"). Seafreeze offers no legal authority for its assertion that the 2020 Biological Opinion is still somehow operative or how the superseding 2021 Biological Opinion did not moot its claims.

2. Seafreeze's Attacks on the 2020 Biological Opinion Lack Merit

Even if Seafreeze had standing, and the 2020 Biological Opinion was not moot, the remaining ESA claims would still fail.

a. *There is no basis to strike the 2021 Biological Opinion*

As discussed in Federal Defendants' brief, BOEM reinitiated Section 7 consultation regarding fishery monitoring surveys required as a mitigation measure and updated information on right whales. *See* Fed. Defs' Br. at 13. Upon completing this consultation, NMFS issued the 2021 Biological Opinion, replacing and superseding the 2020 Biological Opinion. *Id.* Seafreeze moved to strike the 2021 Biological Opinion from the administrative record, App.00202-30, and the district court correctly denied that motion. App.01019-41. Seafreeze purports to appeal that ruling by incorporating its motion to strike by reference. Br. at 25. This

is procedurally improper and the Court should consider the argument waived. *See United States v. Orrego-Martinez*, 575 F.3d 1, 8 (1st Cir. 2009) (per curiam) (incorporating arguments from district court briefing "has been 'consistently and roundly condemned' … and any incorporated argument is ordinarily deemed forfeited") (quoting *Gilday v. Callahan*, 59 F.3d 257, 273 n.23 (1st Cir. 1995)).

Even if considered, the motion to strike is meritless. Seafreeze offers no legal authority supporting its theory that a biological opinion cannot be updated, as may be required by applicable regulations. Indeed, the agencies must reinitiate consultation under certain conditions, such as new information or a project modification. 50 C.F.R. § 402.16. It also overlooks that a biological opinion is a distinct agency action with its own administrative record. *Shafer & Freeman Lakes Env't Conserv. Corp. v. FERC*, 992 F.3d 1071, 1087 (D.C. Cir. 2021). Thus, there is no basis to strike the operative agency action from the record.[7]

b. *Seafreeze's Other Arguments Fail*

[7] Contrary to Commercial Fishermen's apparent belief, striking the 2021 Biological Opinion from the administrative record would not vacate it. *See In re Clean Water Act Rulemaking*, 60 F.4th 583, 594 (9th Cir. 2023) ("we read the APA as foreclosing any authority of courts to vacate agency actions not first held unlawful").

None of Seafreeze's other ESA claims against the 2020 biological opinion have merit.

First, Seafreeze's claim that NMFS failed to consider the cumulative effects of offshore wind leases on right whales misreads the applicable regulations. Br. at 26 (citing 50 C.F.R. § 402.14(g)(3)). A cumulative effects analysis compares the potential effects of an action against an environmental baseline comprised of (1) other actions that have already undergone ESA consultation and (2) non-federal actions reasonably certain to occur in the action area. *See* 50 C.F.R. §§ 402.02 (defining "environmental baseline"), 402.14(g)(2) (evaluation of environmental baseline). This limits "cumulative effects" to "those effects of future State or private activities, *not involving Federal activities*." 50 C.F.R. § 402.02 (emphasis added); *see also Miccosukee Tribe of Indians v. United States*, 566 F.3d 1257, 1269 (11th Cir. 2009) ("Federal actions, and those involving federal agencies, are excluded from cumulative effects analysis because they are subject to their own consultation process.").[8]

[8] Seafreeze appears to confound a NEPA cumulative effects analysis with that in the ESA. These are different. *See Conserv. Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1055 (9th Cir. 2013) ("In essence, [plaintiff] demands that Defendants conduct a more extensive, NEPA-like cumulative impacts analysis. But NEPA and ESA call for different

Thus, the cumulative effects analysis need not include future offshore wind leasing – a "Federal activity" – as Seafreeze demands.[9]

Second, Seafreeze incorrectly asserts that reasonable and prudent alternatives are required because "individual NARWs will 'occur year round in the action area.'" Br. at 26. NMFS need only recommend reasonable and prudent alternatives "if a jeopardy opinion is to be issued." 50 C.F.R. § 402.14(g)(5); *see also* 16 U.S.C. § 1536(b)(3)(A) ("*If jeopardy or adverse modification [to critical habitat] is found*, the Secretary shall suggest … reasonable and prudent alternatives") (emphasis added).[10] NMFS did not issue a jeopardy opinion, SA_2987, rendering the "reasonable and prudent alternatives" requirement inapplicable.

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regulatory review, and we must defer to the procedural mechanisms established by the implementing agency.")

[9] Seafreeze's motion for summary judgment limited its cumulative effects argument to "the full scope of planned offshore wind leasing activity," App.00504, an excluded Federal activity. To the extent that Seafreeze now seeks to broaden its argument to include private construction of offshore wind projects, that argument cannot be raised for the first time on appeal. *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 22 (1st Cir. 1991).

[10] NMFS did impose reasonable and prudent *measures* under 50 C.F.R. § 402.14(i) to reduce the likelihood of incidental harassment. SA_2992-3008.

Third, the allegation that reinitiating consultation, as required under 50 C.F.R. § 402.16(a)(3), proved that the 2020 Biological Opinion was "inadequate," and the Joint ROD inadequate by extension, Br. at 26-27, is baseless. The limited reinitiation of consultation considered potential affects from fishery monitoring surveys required by BOEM. SA_2262. Seafreeze never explains how additional analysis for this survey work prohibited the Federal Defendants from issuing the Joint ROD. Seafreeze then claims that the 2020 Biological Opinion failed to incorporate the "best scientific and commercial data available" because it did not consider right whale data only available *after* the 2020 Biological Opinion issued. Br. at 27 (quoting 16 U.S.C. § 1536(a)(2)). Seafreeze never explains how NMFS's failure to do the impossible – consider data that did not exist – renders the 2020 Biological Opinion "incomplete," Br. at 27, or why the 2021 Biological Opinion's consideration of that data would not cure any potential violation.[11]

Fourth, Seafreeze's allegation that the Army Corps relied "on [an] admittedly incomplete or inadequate environmental analysis," Br. at 28,

[11] Notably, after considering the surveys and new right whale data, the 2021 Biological Opinion reached the same "no jeopardy" conclusion as the 2020 Biological Opinion.

lacks record support. In issuing its own permit under the Clean Water Act and the Rivers and Harbors Act, the Army Corps included a condition requiring Vineyard Wind to comply "with all of the mandatory terms and conditions associated with incidental take of the attached [biological opinion] and any future [biological opinion] that replaces it." App.01251. Seafreeze never explains how requiring compliance with the terms of the current, and any future, biological opinion is unlawful and cites no relevant legal authority in support.[12]

C. Seafreeze Forfeited Several ESA Claims by Failing to Brief Them

Seafreeze failed to move for summary judgment on nine ESA claims and the district court correctly found them waived. *See* Add.00005, n.3. Because claims not briefed are waived, *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 678 (1st Cir. 1995), the district court should be affirmed.

[12] Seafreeze's citation to *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986), holds that federal agencies cannot preempt State law without Congressional authorization. Seafreeze never explains how this is relevant to the Corps' power to issue permits for the Project or to impose necessary conditions.

Seafreeze cannot save these claims by "incorporating [their] complaint by reference," Br. at 28-31, as allegations are not developed legal arguments. *See Rocafort v. IBM Corp.*, 334 F.3d 115, 121-22 (1st Cir. 2003) (all arguments not fully developed in summary judgment briefing are waived); *Grenier*, 70 F.3d at 678 (declining to consider "alternative argument … found in the complaint").

Seafreeze also cites a handful of pages from their summary judgment briefing, App.00502-04 and App.00706-07, that purportedly "discuss" and "detail" their waived claims. Br. at 28-31. A comparison of the waived claims and the cited pages show this is incorrect. The waived claims include:

- Sixth Claim for Relief: Federal Defendants failed to consider impacts to unidentified endangered species.
- Seventh Claim: 2019 revisions to interagency consultation regulations violated the ESA.
- Eighth Claim: Federal Defendants did not seek an exemption from a special committee for the destruction of critical habitat.
- Eleventh Claim: the Biological Opinion failed to (1) establish the correct environmental baseline, (2) consider unidentified direct,

indirect, interrelated, and cumulative effects, (3) properly consider the survival and recovery of unidentified species, (4) consider unidentified "research studies" showing that wind farms harm the marine environment more than fossil fuel power plant emissions, (5) consider unidentified studies on vessel traffic, and (6) consider unidentified studies on the effects of pile driving and operational noise on unidentified species.[13]

- Twelfth Claim: BOEM violated 50 C.F.R. § 402.14(h) by relying on the Biological Opinion and failing to ensure that its actions will not jeopardize unidentified species.
- Thirteenth Claim: BOEM violated 50 C.F.R. §§ 402.14 and 402.16 for failing to reinitiate consultation to consider various purported findings in the Final EIS, such as vessels colliding with each other, severe weather, and harm to horseshoe crabs and unidentified "fish, sea turtle, and marine mammal populations."

[13] The Eleventh Claim also alleged that NFMS failed to list reasonable and prudent alternatives. This is the only aspect of the Eleventh Claim that Seafreeze briefed but, for the reasons discussed above, that claim lacks merit.

- Fourteenth Claim: BOEM violated 50 C.F.R. §§ 402.14 and 402.16 by failing to reinitiate consultation after Vineyard Wind selected the Haliade-X turbines for the Project.
- Fifteenth Claim: BOEM failed to consider if the Haliade-X turbines could survive a Category 3 or higher hurricane and unidentified "scientific data" purportedly demonstrating that the turbines would collapse and harm right whales.
- Sixteenth Claim: BOEM violated 50 C.F.R. § 402.14(h) by failing to reopen the Final EIS and Joint ROD, rescind the construction and operations plan approval, and halt Project construction based on unidentified information in the 2021 Biological Opinion.

The cited pages do not discuss these allegations. App.00502-03 alleges that the Federal Defendants "impermissibly downplayed" unidentified "adverse impacts" to unidentified "endangered species" and "mishandled the ESA consultation process" in some unspecified way. App.00504 briefs Seafreeze's Ninth and Tenth Claims (as indicated by the section heading at App.00503), not any of the waived claims. App.00706-07 purports to incorporate ESA arguments from other plaintiffs and argues that (1) Seafreeze did not have to comply with the

ESA's pre-suit notice provision, (2) urged the district court to disregard the 2021 Biological Opinion, and (3) argued that the Federal Defendants should have considered an extra-record "Strategy Document." The citations offered by Seafreeze do not demonstrate that these claims were actually presented to Judge Talwani for adjudication.

II. SEAFREEZE'S NEPA CLAIMS LACK MERIT

For the reasons stated in the Federal Defendants' brief, the district court correctly ruled that Seafreeze presented no competent evidence of an environmental injury and cannot bring NEPA claims. *See* Fed Defs' Br. at 30-36. Further, should this Court consider these claims for the first time on appeal, they lack merit.

A. BOEM Considered a Reasonable Range of Alternatives Under NEPA

For the reasons stated in the Federal Defendants' brief at 36-38, Seafreeze's argument that BOEM failed to consider reasonable alternatives, Br. at 35-36, does not withstand scrutiny. Vineyard Wind emphasizes, however, that it is entirely proper to view the reasonableness of NEPA alternatives within the context of an applicant's project goals. "[W]here the agency is not itself the project's sponsor, consideration of alternatives may accord substantial weight to the

preferences of the applicant." *Beyond Nuclear v. U.S. Nuclear Regulatory Comm'n*, 704 F.3d 12, 19 (1st Cir. 2013) (citation omitted). Here, Vineyard Wind sought approval to construct and operate an 800 megawatt offshore wind project within its lease area. Alternatives involving locations outside the lease area or significantly smaller generation capacity are not reasonable as Vineyard Wind cannot operate the Project under those conditions. Such alternatives are infeasible, inconsistent with the stated goals of the project, and duplicative of the no-action alternative already evaluated.[14]

Additionally, Seafreeze argues that NMFS's comments on the Draft EIS establish that the alternatives considered in the Final EIS were unreasonable. Br. at 35. This misrepresents the record. NMFS's comment on a "lack of adequate analysis," *id.*, was directed towards scientific research surveys, App.01163, not the alternatives considered or the Draft EIS generally.[15] Further, NMFS never "refused to concur with BOEM's analysis," Br. at 35, as Seafreeze claims. And, even if NMFS's comments

[14] The no-action or "no project" alternative analyzes the environmental impact of the *status quo*, assuming the Project is never constructed or operated. 43 C.F.R. § 46.30.

[15] NMFS aided in the assessment of these impacts, providing additional information that was included in the Final EIS. App.01163.

were far more critical, they cannot establish a NEPA violation. *See City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1151 (9th Cir. 1996) ("Agency 'concerns' and criticism alone do not undermine the validity of an Environmental Impact Statement.").

B. Seafreeze Lacks Standing to Complain of BOEM's Resumption of Work on the Final EIS and COP Approval

Seafreeze lacks standing to claim that BOEM unlawfully resumed its work on the Final EIS and COP approval, Br. at 37-40, as this caused Seafreeze no injury. Seafreeze complains that Vineyard Wind asked BOEM to "terminate" work on the then-pending Final EIS and COP approval while it reviewed the turbine model selected for the Project and then, two months later, asked BOEM to resume work on those documents. Br. at 37-38.[16] For every claim, Seafreeze "must establish each part of a familiar triad: injury, causation, and redressibility" in

[16] Vineyard Wind selected the Haliade-X turbine for the Project and, on December 1, 2020, requested time to review the turbine's technical specifications to ensure it was within the parameters analyzed in the Draft EIS and determine whether a COP amendment was required. SA_0801. Vineyard Wind completed that review and notified BOEM on January 22, 2021 that the turbines specifications were consistent with the Draft EIS and Supplement and no COP amendment was necessary. SA_0807. BOEM concurred. SA_0811.

order to prove Article III standing. *Katz v. Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012). Seafreeze offers no injury from this two month pause in BOEM's work or what redress is available now that BOEM's work on those documents is completed.

C. BOEM Properly Assessed the Cumulative Impacts of Other Wind Projects

For the reasons discussed in Federal Defendants' brief, Seafreeze's claim that BOEM "gutted the core of the cumulative impacts analysis," Br. at 41, is incorrect. Further, Seafreeze's claim that the Final EIS failed to account for aspirational goals of either 22 gigawatts of future offshore wind development, 30 gigawatts by 2030, or 110 gigawatts by 2050, Br. at 41, is also wrong. BOEM need only consider "[r]easonably foreseeable" future actions, defined as those "sufficiently likely to occur," such as actions subject to "existing decisions, funding, or proposals;" not "those actions that are highly speculative or indefinite." 43 C.F.R. § 46.30.[17] The

[17] Notably, the goals Seafreeze cites are for *nationwide* development. "Reasonably foreseeable future actions" have a geographic component in that they must be proximate enough that a lead agency "Responsible Officer of ordinary prudence would take" them "into account in reaching a decision." 43 C.F.R. § 46.30. Seafreeze never explains why offshore wind projects in the Gulf of Mexico or Pacific Ocean should be included in Vineyard Wind's cumulative impacts analysis.

Final EIS lists every offshore wind project considered, based on the information available at that time, SA_1316-21,[18] and Seafreeze does not identify any "reasonably foreseeable" project that was omitted.

III. BOEM'S COP APPROVAL COMPLIED WITH OCSLA

The district court properly granted summary judgment to Vineyard Wind and the Federal Defendants on Seafreeze's OCSLA claims. BOEM's COP approval imposed numerous conditions ensuring that the Project will provide for safety, environmental protection, and all other criteria specified in 43 U.S.C. § 1337(p)(4). In arguing otherwise, Seafreeze misreads the statute, misrepresents the findings of the Final EIS, and ignores the memorandum explaining the basis for BOEM's decision.

A. BOEM Properly Interpreted OCSLA

There is no dispute that Section 1337 (p)(4) imposes mandatory requirements on BOEM. The Joint ROD expressly acknowledges that Section 1337 (p)(4) "requires the Secretary to ensure that activities authorized under [that section] are carried out in a manner that provides for these twelve different goals." SA_1988. BOEM issued a memorandum

[18] BOEM even considered future projects in offshore areas where States had merely announced commitments to support offshore wind energy projects, even though those areas had not yet been leased, SA_1306-07, going well beyond what is "reasonably foreseeable" under NEPA.

explaining the steps it took, and the conditions imposed, to ensure that the Project will be carried in a manner providing for each of the criteria specified in Section 1337 (p)(4). SA_2104-34.

But as the district court recognized, the fact that the statute imposes mandatory criteria does not mean that the Secretary lacks discretion to determine "how to ensure each criterion is met, and not to the detriment of the other criteria." Add.00044. Seafreeze's interpretation, Br. at 44-45, contradicts the text and subverts the purpose of Section 1337(p), which is to issue alternative energy leases in addition to the oil and gas leases that had long been authorized by OCSLA.

The statute does not say the Secretary "shall ensure safety" or "shall ensure protection of the environment." It says the Secretary "shall ensure that any activity under this subsection is carried out in a manner that provides for" "safety," "protection of the environment," and ten other things. 43 U.S.C. § 1337(p)(4)(A), (B). To "provide for" means "To make ready," or "To take measures in preparation." Webster's II New Riverside University Dictionary, at 948 (1988); *cf. Rake v. Wade*, 508 U.S. 464, 473

(1993) (a "natural reading" of the phrase "to provide for" is "to make provision for") (cleaned up).

That statutory command is not self-executing. Judgment and expertise are needed to evaluate a project's potential risks and develop conditions ensuring it is "safe," "protects" the environment, and consistent with the ten other statutory factors. As the Federal Defendants explain, the statute creates "mandatory" goals and provides the Secretary discretion in how to "provide for" each of the listed factors. Fed. Defs' Br. at 18-22.

In contrast, Seafreeze's absolutist reading would make it virtually impossible for BOEM to approve any alternative energy project. *See* Br. at 44-45 (arguing that the statute prohibits reasonableness, discretion, and balancing). Every project entails some environmental impacts and some navigational safety risk because it necessarily requires the installation of structures and export cables. To hold that the Secretary lacks authority to approve such projects would violate the cannon that a statute should not be interpreted to "defeat [its] purpose." *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 920 (2015).

OCSLA declares a national policy that "the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." 43 U.S.C. § 1332(3). It reflects a judgment that energy projects can co-exist with "development and preservation of renewable resources like fish," and that the Secretary must "harmonize the interests of the various resources whenever they impinge upon one another." *Massachusetts v. Andrus*, 594 F.2d 872, 889 (1st Cir. 1979).

Seafreeze argues that *Andrus* is inapposite because oil and gas development is governed by a different OCLSA provision that "instructs the Secretary to strike a 'proper balance' between the potential for environmental damage and the potential for oil and gas discovery." Br. at 47 (citing, 43 U.S.C. § 1334). Seafreeze is mistaken. The "proper balance" language is in 43 U.S.C. § 1344(a)(3)—a provision that was enacted in 1978 and not cited in *Andrus*. *See* Pub. L. No. 95-372, § 208, 92 Stat. 629, 649-50 (Sept. 18, 1978). Moreover, the *Andrus* court held that, even before the 1978 amendments, the statutory language

"conferring powers upon the Secretary to provide for 'the prevention of waste and conservation of the natural resources of the Outer Continental Shelf'" imposed a duty on the Secretary to make a "balanced use of all resources." *Andrus*, 594 F.2d at 890. Similar language in Section 1337(p)(4) indicates that the Secretary should engage in a similar balancing when considering alternative energy projects like Vineyard Wind's. *See* 43 U.S.C. § 1337(p)(4) ("The Secretary shall ensure that any activity under this subsection is carried out in a manner that provides for … (C) prevention of waste; (D) conservation of the natural resources of the outer Continental Shelf").

That conclusion is further supported by two other provisions in Section 1337(p)(4) demonstrating that the Secretary may strike a reasonable balance between commercial fishing and offshore wind energy projects. One states that the Secretary shall ensure that the project is carried out in a manner that provides for "consideration of … any other use of the sea or seabed, including use for a fishery, a sealane, a potential site of deepwater port, or navigation." 43 U.S.C. § 1337(p)(4)(J)(ii). The other states that the Secretary shall ensure that the project is carried out in a manner that provides for "prevention of interference with reasonable

uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas." *Id.* § 1337(p)(4)(I).

These provisions do not prohibit *any* interference with commercial fishing or navigation, as Seafreeze asserts. Section 1337(p)(4)(J) requires only that commercial fishing, navigation and other uses of the sea or seabed are taken into "*consideration*." *Id.* § 1337(p)(4)(J)(ii) (emphasis added). Similar language appears in the OCSLA section governing oil and gas projects. *See* 43 U.S.C. § 1344(a)(2)(D) ("Timing and location of exploration, development, and production of oil and gas … shall be based on a consideration of— … (D) the location of such regions with respect to other uses of the sea and seabed, including fisheries, navigation, existing or proposed sealanes, potential sites of deepwater ports, and other anticipated uses of the resources and space of the outer Continental Shelf; …"). It is satisfied when the Secretary considers the needs of commercial fishing and navigation, balances the competing needs for energy projects, and takes steps to minimize conflicts between the two. *See, e.g.*, *California ex rel. Brown v. Watt*, 668 F.2d 1290, 1309-10 (D.C. Cir. 1981) (per curiam) (Secretary complied with this provision by identifying "means by which conflicts could be minimized," including by

"protective measures" for "fishery interests" and "the Fisherman's Contingency Fund").

Section 1337(p)(4)(I) further confirms that the Secretary has discretion to determine when and how any interference with commercial fishing, navigation, or other uses of the seas should be prevented. *See* 43 U.S.C. § 1337(p)(4)(I) (projects must be carried out in a manner that provides for the "prevention of interference with reasonable uses (*as determined by the Secretary*)") (emphasis added). Exercising that discretion, the Secretary issued regulations requiring that offshore wind energy projects be conducted "in a manner that … [d]oes not unreasonably interfere with other uses of the [outer continental shelf]." 30 C.F.R. § 585.621(c).

Seafreeze argues that the regulation is invalid because it "impermissibly adds the modifier 'unreasonably' to Section 1337(p)(4)'s language." Br. at 46. But it ignores that Section 1337(p)(4)(I) specifically authorizes the *Secretary* to determine when "prevention of interference" with other reasonable uses of the seas should be required. And the Secretary has quite reasonably exercised that authority to require that

wind energy projects prevent only unreasonable interference with other uses. 30 C.F.R. § 585.621(c).

B. BOEM's Approval Of Vineyard Wind's COP Was Not Arbitrary And Capricious Or Contrary To Law

Before approving the Vineyard Wind's COP, BOEM undertook a lengthy review that included extensive consultation with other federal agencies and affected States with multiple opportunities for public comment. *See* SA_1984-86 (describing review process). That process resulted in multiple changes to the Project and the imposition of conditions to ensure that it will be carried in a manner that provides for each of the Section 8(p)(4) factors. *See* SA_2134-250 (COP approval with conditions); SA_2104-34 (BOEM memorandum explaining why COP approval complies with Section 8(p)(4)).

Seafreeze has not demonstrated that BOEM's COP approval violated the APA. Its brief ignores the Joint ROD and detailed decision memorandum explaining the conditions BOEM imposed on the Project and why approval of the Project, with those conditions, complies with the criteria in Section 1337(p)(4). Seafreeze's failure to address BOEM's reasoning, "let alone develop any argument" why that reasoning was

arbitrary and capricious, is fatal to its claim. *Housatonic River Initiative v. EPA*, 75 F.4th 248, 273 (1st Cir. 2023).

Instead, the brief contains a lengthy string cite to the Final EIS that supposedly proves the Project threatens safety and harms the environment. Br. at 50-51. Seafreeze is mistaken. The cited pages are taken out of context or refer to alternatives that BOEM rejected, not the Project, with all of its mitigation measures, that BOEM approved.

For example, Seafreeze erroneously claims that the Final EIS found the Project "will increase risk of vessel collisions and interfere with navigation." Br. at 50. But those pages discuss the layout originally proposed by Vineyard Wind and an alternative that BOEM considered and rejected. *Id.* (citing App.01219, App.01228). Instead, BOEM approved a different layout with fewer structures than Vineyard Wind proposed; prohibited turbines in the northern-most part of the Project area; and required that turbines be arranged in an east-west orientation with a minimum spacing of one nautical mile between them (wider than the 0.7 nautical miles originally proposed by Vineyard Wind). SA_2003.

The Coast Guard's navigational study concluded that the approved layout "will result in the functional equivalent of numerous navigation

corridors that can safely accommodate both transits through and fishing within" the wind energy area, 85 Fed. Reg. 31,792, 31,795 (May 27, 2020); *see also* SA_0797 ("the spacing between wind turbines creates sufficient space to navigate safely"). Although the wind turbines "may have some effect" on radar for some vessels, they "do not render radar inoperable," and "the Coast Guard is confident that by following principles of prudent seamanship and utilizing all available bridge resources, including AIS, vessels can safely navigate through the [wind energy area] in most weather conditions." *Id.*[19] BOEM may rely on the Coast Guard's assessment, given the Coast Guard's expertise in maritime safety and BOEM's statutory duty to consult with the Coast Guard. *See* 43 U.S.C. § 1337(p)(1), (p)(4)(E); *Pub. Emps. For Env't Resp. v. Hopper*, 827 F.3d 1077, 1086-87 (D.C. Cir. 2016) (deferring to Coast Guard's determination about what conditions "would provide for navigational safety").

Seafreeze's string cite of alleged findings of serious environmental harm is equally infirm. The Final EIS did not find that "construction will devastate [the] project area's natural resources, including fish and

[19] "AIS" is an acronym for an "automatic identification system" that monitors the location of other vessels and structures equipped with AIS transponders. SA_0966, SA_1104.

endangered species." Br. at 50. It found that, while construction will have some impact on fish, invertebrates, and essential fish habitat, the impacts "are likely to be temporary and/or small in proportion to the overall habitat available regionally," and "are unlikely to have substantial effects on populations in the [wind development area], as displaced species would have large areas of preferred habitat available nearby." SA_1068, SA_1072; *see also* SA_1076 (noting impacts will be "considerably less" under BOEM's chosen layout "due to the reduced number of [wind turbines] and associated inter-array cabling").

As for endangered species, BOEM consulted with NMFS and the 2021 Biological Opinion concluded that the Project is not likely to jeopardize the continued existence of any endangered species. SA_2111. And with respect to right whales and sea turtles (referenced in Seafreeze's string citations), the Final EIS concluded that impacts will be minor to negligible with mitigation measures. SA_1109.

Nor did the Final EIS say that high winds would topple turbines and "devastate the environment." Br. at 50. Such structural failure is "highly unlikely" because the turbines are designed to survive a Category 3 hurricane, and "[s]ince records have been kept, no Category 4 or 5

hurricanes have made landfall in Massachusetts" or "passed through" the wind development area. App.01250, SA_1744-45. And even then, environmental impacts would be minimized by adherence to the Oil Spill Response Plan. App.01193.

Seafreeze incorrectly claims that the Final EIS deletes or changes the Draft EIS's cumulative impacts analysis "without explanation." Br. at 51. As discussed above, the Final EIS includes a cumulative impacts analysis for every resource, including commercial fishing and navigation. Seafreeze's citation to "**major**" impacts on navigation from "the increased loss of life due to maritime incidents," Br. at 51 (quoting App.01169), discusses a different alternative that BOEM rejected. For the *selected* alternative, involving a different layout with fewer turbines and one nautical mile grid spacing (as recommended by the Coast Guard), impacts on navigation would be "**negligible** to **moderate**." SA_1259. Similarly, changes in the Project design and mitigation measures reduced anticipated impacts to commercial fishing from "**major**," SA_0496, to "**moderate**." SA_1241.[20]

[20] This means that "[m]itigation would reduce adverse impacts substantially during the life of the" Project, or commercial fishing interests "would have to adjust somewhat to account for disruptions due

Seafreeze also turns to information outside the administrative record: an erroneous statement in the Joint ROD that was rescinded and corrected, and testimony by plaintiffs' corporate owners or representatives. Br. at 51-57. Neither is a basis for setting aside the COP approval.

The Army Corps' section of the Joint ROD said that the Project would "likely" cause "the entire 75,614 acre area" to "be abandoned by commercial fisheries due to difficulties with navigation." App.01239. The Army Corps later clarified that this statement was "based solely upon comments of interested parties submitted to BOEM during the public comment period for the draft environmental impact statement," and not "upon any separate or independent [Army Corps] or other agency evaluation or study." SA_3177. Seafreeze faults the district court for relying on the clarification, saying that it was an impermissible attempt to edit its decision. Br. at 52-53. But agencies have the inherent authority to correct ministerial errors in their decisions. *See Am. Trucking Ass'ns, Inc. v. Frisco Transp. Co.,* 358 U.S. 133, 145 (1958). And the claim that

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to notable and measurable impacts of the project." SA_1491 (definition of "moderate" impact).

commercial fisheries will abandon the Project area is neither reflected in any analysis by the Army Corps or other record evidence.

Moreover, even if the clarification was disregarded, BOEM's COP approval is not arbitrary and capricious or contrary to OCSLA. BOEM, not the Army Corps, authorizes alternative energy projects under OCSLA and BOEM determined "that with time, many fishermen will adapt to spacing and be able to fish successfully in the WDA," and any "vessel operators that choose to avoid the area" will be able to "fish or transit in other locations." SA_2126; *see also* SA_1225 (same). There is ample record support for that conclusion—including from Seafreeze itself. *See, e.g.*, SA_3169 (Seafreeze acknowledged that "other mobile gear fishing industry members have indicated that they will be able to operate if the turbines are oriented in an east-west layout," although that "will not be the case for [Seafreeze's] vessels."); SA_3167 (Rhode Island Coastal Resources Management Council: one-by-one nautical mile spacing would "allow continued fishing for most commercial fishing operations within the Vineyard Wind lease area" and permit "both the commercial fishing and offshore wind energy industries to coexist").

Finally, judicial review of agency action is based on the "administrative record already in existence, not some new record made initially in the reviewing court." *Housatonic River Initiative*, 75 F.4th at 278 (citations omitted). Accordingly, Seafreeze's declarations cannot be a considered in weighing whether BOEM's COP approval was lawful.

IV. ANY ERROR WOULD NOT JUSTIFY VACATUR OR INJUNCTIVE RELIEF

In the unlikely event that this Court finds any reversible error, it should reject Seafreeze's demand for vacatur without remand and an injunction, not just to stop construction activities, but to immediately "remove any and all materials, equipment, and structures of any kind." Br. at 58. This demand ignores this Court's tests for when vacatur and injunctive relief are appropriate.

A. Vacatur is Not Justified

As discussed in Federal Defendants' brief, a legal error does not automatically require vacatur. Fed. Defs' Br. at 47-48. Seafreeze's brief fails to address the legal test for when vacatur is appropriate, much less establish that vacatur would be appropriate here.[21] Further, should the

[21] Seafreeze seeks vacatur without remand because it surmises that "it is unlikely" the Federal Defendants "will change their positions in connection with the issues leading up to and including the approval of

Court hold that Seafreeze's ESA claims were not waived, or that it may raise NEPA claims, then those claims must be decided on the merits. The Court cannot vacate an agency action without a merits ruling. *In re Clean Water Act Rulemaking*, 60 F.4th at 594.

B. Seafreeze Offers no Basis for an Injunction

Seafreeze demands that this Court "order Project Developer to remove all things that have been placed in the Project area as a result of the Federal Defendants' impermissible approval of the COP," Br. at 60, but such equitable relief does not issue automatically. Seafreeze must still demonstrate (1) irreparable injury, (2) that the balance of equities favors it, and (3) that its requested relief is in the public interest. *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 914-15 (1st Cir. 1989). Seafreeze never asserts that these requirements are met and the Court should reject its request on that basis alone. *See United States v.*

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the COP." Br. at 58. However, under *Central Maine Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001), the possibility that the Federal Defendants could bolster the record in support of the same conclusion counsels *against* vacatur.

Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (undeveloped arguments are waived).[22]

Further, any plea for injunctive relief should be directed at the district court. The district court took evidence and held a hearing on May 23, 2023 to consider Seafreeze's motion for a preliminary injunction and denied that motion. App.00021-22. By the time this Court rules on the merits, that record will be nearly a year old and stale. Since then, the 2023 pile driving season ended (without a single Level B take of a right whale), turbines are being installed, with some producing power, and Vineyard Wind expended even more capital. Further, Seafreeze will have spent a season fishing elsewhere and can present evidence of lost revenue (if any). Any plea for injunctive relief requires an updated record. *See*, *e.g.*, *Webb v. Missouri Pac. R. Co.*, 98 F.3d 1067, 1069 (8th Cir. 1996) ("the district court abused its discretion by granting an injunction on a stale record"); *Katch, LLC v. Sweetser*, 143 F. Supp. 3d 854, 875 (D. Minn.

[22] Seafreeze cannot avoid the injunction test by asserting that plaintiffs would be owed "complete relief." Br. at 60. Without analyzing the injunction factors, based on record evidence, it is impossible to know what "complete relief" should be.

2015) (relying on a stale record "weighs against … awarding injunctive relief").

C. The Court Cannot Retroactively Stay an Agency Action's Effective Date

For the reasons discussed in the Federal Defendants' brief, Fed. Defs' Br. at 48-49, Seafreeze's plea to retroactively postpone the COP approval's effective date should be rejected as a matter of law.

CONCLUSION

For the foregoing reasons, the district court's order granting summary judgment to Vineyard Wind and the Defendants on all claims should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 9,642 words, excluding the parts exempted by Rule 32(f).

2. This document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft wOffice 365 in 14-point Century Schoolbook font.

Date: February 22, 2024

/s/ Jack W. Pirozzolo
Jack W. Pirozzolo

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of February 2024, a true and complete copy of the foregoing has been filed with the Clerk of the Court pursuant to the Court's electronic filing procedures, and served on counsel of record via the Court's electronic filing system.

/s/ Jack W. Pirozzolo
Jack W. Pirozzolo