UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ALLCO RENEWABLE ENERGY LIMITED, ALLCO FINANCE LIMITED AND THOMAS MELONE, Plaintiffs, v. DEB HAALAND, in her official capacity of Secretary of the Interior, GARY FRAZER, in his official capacity of Assistant Director for Endangered Species, U.S. Fish and Wildlife Service, PAUL DOREMUS, in his official capacity of Assistant Administrator for Fisheries, NOAA Fisheries Directorate, MARTHA WILLIAMS in her official capacity of Principal Deputy Director, U.S. Fish and Wildlife Service, COLONEL JOHN A. ATILANO II in his official capacity of Commander and District Engineer, Colonel, U.S. Army Corps of Engineers, U.S. FISH AND WILDLIFE SERVICE, NATIONAL MARINE FISHERIES SERVICE, U.S. ARMY CORPS OF ENGINEERS, BUREAU OF OCEAN ENERGY MANAGEMENT, and the U.S. DEPARTMENT OF THE INTERIOR, Defendants.	Case No. 1:21-cv-11171 **FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Pursuant to Fed. R. Civ. P 15, Plaintiffs Allco Renewable Energy Limited, Allco Finance Limited and Thomas Melone hereby file this first amended complaint seeking declaratory and injunctive relief, stating as follows in support:

1. This case challenges the approvals of the proposed Vineyard Wind Project and South Fork Wind project by the Defendants. It asks the Court to set aside those approvals as

violating the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§4321-4370h, the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §1337(p)), section 404 of the Clean Water Act ("CWA"), 33 U.S.C. §1344, section 101 of the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §1371, and the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq*., and the Defendants' rules and regulations, and to ensure that federal review of the proposed projects comply with the law.

INTRODUCTION

2. The Defendants' final joint Record of Decision for the Vineyard Wind 1 Offshore Wind Energy Project (the "VW Project") was issued May 10, 2021 (the "VWROD"). The VWROD addressed the Bureau of Ocean Energy Management's ("BOEM's") action to approve the VW Project's construction and operations plan ("VWCOP") under section 8(p) of the OCSLA, the United States Army Corps of Engineers' ("USACE's") permitting actions under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 ("Section 10") and Section 404 of the Clean Water Act, 33 U.S.C. § 1344 ("Section 404"), and the National Marine Fisheries Service's ("NMFS's") action of issuing an Incidental Harassment Authorization ("IHA") under section 101(a)(5)(D) of the MMPA. The Department of the Interior issued its approval of the VW Project on July 15, 2021. The NMFS issued an IHA on May 21, 2021, notice of which was published in the Federal Register on June 25, 2021. The Defendants' approvals of the Vineyard Wind 1 Project are collectively referred to as the "VW Approvals." Each of the VW Approvals were based upon the VWROD, which in turn was based upon the final environmental impact statement issued in March 2021 (the "VWEIS"). The VWROD and the VWEIS were also based upon a Biological Opinion issued by the NMFS dated September 11, 2020 (the "Old VW Biop").

3. The VWEIS was performed by BOEM as lead agency for all the agencies that

issued Approvals. Plaintiffs submitted comments on the VWEIS, which included comments for each agency's consideration. The VWEIS is part of each agency's administrative record.

4. Prior to issuing their VW Approvals, the Defendants engaged in re-consultation under the ESA. That re-consultation resulted in a new Biological Opinion on October 18, 2021 (the "New VW Biop"). The New VW Biop was 178 pages longer than the Old VW Biop.

5. The Defendants' final joint Record of Decision for the South Fork Wind Offshore Wind Energy Project was issued on November 24, 2021 (the "SFROD"). The SFROD addressed BOEM's action to approve the SF Project's construction and operations plan ("SFCOP") under section 8(p) of the OCSLA, the USACE's permitting actions under Section 10 and Section 404, and the NMFS's action of issuing an IHA under section 101(a)(5)(D) of the MMPA. The Department of the Interior issued its approvals of the SF Project on January 18, 2022. The NMFS issued an incidental harassment permit on December 21, 2021, notice of which was published on January 6, 2022. The Defendants' approvals of the South Fork Wind Project are collectively referred to as the "SF Approvals." Each of the SF Approvals were based upon the SFROD, which in turn was based upon the final environmental impact statement issued in August 2021 (the "SFEIS"). The SFROD and the SFEIS were also based upon a Biological Opinion issued by the NMFS dated October 1, 2021 (the "SF Biop").

6. The SFEIS was performed by BOEM as lead agency for all the agencies that issued SF Approvals. Plaintiffs submitted comments on the SFEIS, which included comments for each agency's consideration. The SFEIS is part of each agency's administrative record.

7. The Defendants' SF Approvals and VW Approvals left for the future, the preparation of measures intended to protect species covered under the ESA, the MMPA and the MBTA denying the Plaintiffs and other members of the public the right to comment on the

proposed measures under the NEPA process.

JURISDICTION AND VENUE

8. This action arises under NEPA, 42 U.S.C. §§4321-4370h, 36 C.F.R. Part 25, the MMPA, the OCSLA, the ESA and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

9. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 because the action raises a federal question. The Court has authority to issue the requested declaratory and injunctive relief pursuant to 28 U.S.C. §§2201, 2202, and 5 U.S.C. §§705, 706.

10. This action reflects an actual, present, and justiciable controversy between Plaintiffs and the Defendants within the meaning of the Declaratory Judgment Act, 28 U.S.C. §2201. Plaintiffs' interests will be imminently adversely affected and irreparably injured if the Defendants continue to violate NEPA and other federal law as alleged herein, and if they affirmatively implement the decisions challenged herein. These injuries are concrete and particularized, and fairly traceable to the Defendants' challenged decisions, providing the requisite personal stake in the outcome of this controversy necessary for this Court's jurisdiction.

11. The requested relief would redress the actual, concrete injuries to the Plaintiffs' caused by the Defendants' failure to comply with duties mandated by NEPA and its implementing regulations and federal law.

12. The challenged agency actions are final and subject to judicial review pursuant to 5 U.S.C. §§702, 704 and 706.

13. Plaintiffs have exhausted administrative remedies to the extent required to do so.

14. Venue in this Court is proper pursuant to 28 U.S.C. §1391(e) because an officer of the United States is named as a Defendant in his or her official capacity and resides in this judicial

district, and a substantial part of the events or omissions giving rise to this suit occurred in this district in the case of both the proposed Vineyard Wind project and the South Fork Wind project, and the proposed Vineyard Wind project would be partially located in this district, and in the case of both projects, the principal place of business of the developer is in Massachusetts.

THE PARTIES

15. Plaintiffs Allco Renewable Energy Limited and Allco Finance Limited (collectively, "Allco"), are the owner, operator, and developer of various solar electric generating facilities that are Qualifying Facilities ("QFs") located in Connecticut, Vermont, and Massachusetts, as well as other States. *See,* section 3(17) of the Federal Power Act §3(17), 16 U.S.C. § 796(17). Allco is a "qualifying small power producer" within the meaning of section 3(17) of the Federal Power Act, 16 U.S.C. §796(17)(D).

16. The Defendants' failure to comply with duties mandated by NEPA and the OCSLA and their implementing regulations and federal law will have a substantial adverse impact on the development of QF solar electric generation in the Northeastern United States, including Plaintiffs'.

17. Thomas Melone lives part-time in Edgartown, Massachusetts, on Nantucket Sound. Plaintiff Melone lives part-time at his home in Edgartown during the months of May through November with the bulk of the time being from June through September. Plaintiff Melone purchased his residence in Edgartown in 2000. Part of Plaintiff Melone's property includes and is adjacent to what is generally known as "Little Beach." A part of Little Beach is known in the Melone family as "Bird Island," being named by Plaintiff Melone's children after the thousands of migratory birds that nest and habitat there each year while Plaintiff Melone resides there, and because at high tide the area primarily occupied by the migratory birds would become an island.

Plaintiff Melone and his family have regularly observed the migratory birds on Little Beach for two decades since 2000. That observation has occurred daily while Plaintiff Melone resides in Edgartown. That observation is made from inside the house, outside the house on land and from Eel Pond and the Nantucket Sound. Plaintiff Melone and his family derive, recreational, conservation, environmental well-being and aesthetic benefits from the existence and observation of the migratory birds on Little Beach and their properly functioning habitat. The species of migratory birds that habitat on Little Beach year-after-year and observed by Plaintiff Melone include, ESA listed species such as the Piping Plover and the Roseate Tern, and other species such as the Common Tern, the Least Tern, the Willet, the Black Skimmer, the Oystercatcher, and the Purple Sandpiper. Plaintiff Melone intends to continue in the future residing part-time in Edgartown during the months that he has historically done so. Plaintiff Melone intends to continue during each of his future visits to continue regularly observing the migratory birds on Little Beach (such as the Piping Plover, the Roseate Tern, the Common Tern, the Least Tern, the Willet, the Black Skimmer, the Oystercatcher, and the Purple Sandpiper) and deriving recreational, conservation, environmental well-being and aesthetic benefits from the existence and observation of those migratory birds on Little Beach, "Bird Island" and their properly functioning habitat. Plaintiff Melone's next scheduled trip to his home in Edgartown is on June 29, 2022, on the 2:30pm boat to Oak Bluffs.

18. Plaintiff Melone has a particularized interest in the migratory birds that live and habitat on Little Beach and is concerned with the substantial adverse effects on those birds from the Defendants' failure to comply with duties mandated by NEPA, the ESA, the OCSLA and their implementing regulations and federal law. In particular Plaintiff Melone is concerned about the adverse effect of the Vineyard Wind project, South Fork project and all the other foreseeable

offshore wind projects on all the migratory birds that live on Little Beach. The wind turbines of the Vineyard Wind project, South Fork project and all the other foreseeable offshore wind projects are practically certain to kill one or more of the migratory birds that habitat on Little Beach as those birds migrate to and from Little Beach and as they forage for food. The killing of those Little Beach migratory birds will reduce the number of birds that Plaintiff Melone can observe on Little Beach, which directly and imminently harms the recreational, conservation, environmental well-being and aesthetic benefits from the existence and observation of the migratory birds on Little Beach and their properly functioning habitat that Plaintiff Melone derives.

19. In addition to the harm to those migratory birds from the wind turbines themselves, the habitat on Little Beach would be adversely affected by discharges into the Atlantic Ocean and/or Nantucket Sound and/or Vineyard Sound (including oil and other contaminant spills) from the wind turbines from a Category 3 or above Atlantic storm. No wind turbine that exists today has been shown to be able to survive a Category 3 or above Atlantic hurricane, which is likely to occur during the operational life of the Projects. Those discharges would harm the habitat on Little Beach, which in turn would harm the migratory birds on Little Beach which creates a direct and imminent harm to the recreational, conservation, environmental well-being and aesthetic benefits from the existence and observation of the migratory birds on Little Beach and their properly functioning habitat that Plaintiff Melone derives.

20. The latest research regarding endangered species of migratory birds such as the Piping Plover[1] indicates that the birds' flight paths cross the Vineyard Wind area and South Fork

[1] Loring, P., et al., *Supportive wind conditions influence offshore movements of Atlantic Coast Piping Plovers during fall migration 2 Piping Plover migration*, September 2020), https://www.researchgate.net/publication/343084422_Supportive_wind_conditions_influence_offshore_movements_of_Atlantic_Coast_Piping_Plovers_during_fall_migration_2_Piping_Plover_migration.

Wind area and the area of other foreseeable offshore wind projects, and with the new enlarged wind turbines that are nearly as tall as the Chrysler building, it is practically certain that deaths of those and other birds protected by the ESA and the MBTA will be caused by the Vineyard Wind project, the South Fork wind project and other foreseeable offshore wind projects. Vineyard Wind's and other foreseeable offshore wind projects such as the South Fork Wind project's causing the death of those birds is a strict-liability crime, 16 U.S.C. § 703, and there is no authority for exemptions from such conduct.

21. Each death of one of the Little Beach migratory birds caused by the Vineyard Wind project, the South Fork wind project and other foreseeable offshore wind projects is unlawful and would harm Melone's cognizable interests in the continued recreational, conservation, environmental well-being and aesthetic benefits from the existence and observation of the migratory birds on Little Beach and their properly functioning habitat.

22. The harm from the Vineyard Wind and South Fork Wind Projects and the Defendants' failure to follow the law in issuing the Approvals is a concrete and imminent harm to Melone's cognizable interests in the continued recreational, conservation, environmental well-being and aesthetic benefits from the existence and observation of the migratory birds on Little Beach and their properly functioning habitat.

23. Plaintiff Melone has a particularized interest in and is also concerned about the adverse effect of the Vineyard Wind and South Fork Wind projects and other foreseeable offshore wind projects will have on the North Atlantic Right Whale ("NARW") whose critical habitat includes Nantucket Sound. Plaintiff Melone derives recreational, conservation, environmental well-being and aesthetic benefits from the existence of the NARW and their properly functioning habitat through wildlife observation, study, and education. Melone believes in developing

sustainable and economically viable renewable energy generation in the United States, while maximizing the creation of United States jobs and minimizing the impact to the environment. Melone believes that offshore wind has too many adverse impacts and creates too much risk and adverse impacts on the marine, coastal and human environment and various species, such as the . NARW, migratory birds that live on Little Beach, and the impact off-shore wind ("OSW") would have on sustainable and benign renewable energy, such as solar and hydrogen generators.

24. In respect of the NARW, Plaintiff Melone went whale watching on New England Aquarium's Whale Watch Cruise on October 1, 2021, looking for the NARW. Melone did not observe a NARW on that trip, but did observe a handful of humpback whales, another species that Melone derives recreational, conservation, environmental well-being and aesthetic benefits from. On October 26-27, 2021, Melone attended two full days of events of the NARW Consortium Annual Meeting, learning from experts about the plight of the NARW. From December 28, 2021, to December 31, 2021, Melone engaged in a NARW-watch in Fernandina Beach, Florida, from a fifth-floor room at the Ritz Carlton using Celestron – SkyMaster 25X100 Astro Binoculars. Melone observed many porpoises each of the four days, and observed a NARW (Derecha) and her calf on December 30, 2021, at 7:40am. Melone observed them until 8:00am at which point he reported the sighting on the WhaleAlert app. After he reported the sighting, he continued to search for them but did not see them. Shortly after 9am he received a call from a representative from the Florida Fish & Wildlife Conservation Commission ("FL FWCC") asking him about the sighting. He gave her the information and then she said that their people would be taking off to soon to verify the sighting. The following day the FL FWCC let him know they confirmed the sighting. Melone intends to annually attend the NARW Consortium Annual Meeting continuing to learn and study the NARW and to annually engage in a NARW watch from Fernandina Beach in

December or early January, which is the time of year that NARWs are present in the waters off Fernandina Beach. Melone's next scheduled trip to Fernandina Beach for NARW watching is December 28 to December 30, 2022. Melone's next on New England Aquarium's Whale Watch Cruise to seek to observe the NARW and the humpback whale is June 10, 2022, at 10am.

25. The Defendants' failure to comply with duties mandated by NEPA and its implementing regulations and federal law, such as the MMPA, the ESA and the OCSLA, will result in an inadequate mitigation of harm to listed species, migratory birds on Little Beach, the NARW and their designated habitats—including but not limited to, the examples listed above—that benefit Plaintiff Melone. This harms Plaintiff Melone's past, present and future enjoyment of these species and their habitats. The Defendant's approvals and failure to adhere to federal law would imminently harm Melone because it would reduce his likelihood of spotting NARWs in his planned annual trips to Fernandina Beach for NARW watching lessening the aesthetic, environmental well-being, recreational, conservation, and benefits Melone derives from the NARW. The Defendant's approvals and failure to adhere to federal law would imminently harm Melone because it would reduce and lessen the aesthetic, environmental well-being, recreational, and conservation benefits Melone derives from the migratory birds on Little Beach. The Defendants' approvals by cause the NARW and migratory birds from Little Beach to be taken, interfere with the NARW's and those migratory birds' natural state and may increase their risk of death, reducing the likelihood that Plaintiff Melone will observe the NARW and those migratory birds in their natural state on future visits. Requiring the Defendants to comply with duties mandated by NEPA and its implementing regulations and federal law would ensure that those species and Plaintiff Melone's cognizable interests in these species would not be substantially adversely affected and would redress those harms to Plaintiff Melone.

26. Plaintiff Melone's Edgartown property is also within the affected zone of the proposed discharge from the Project that is authorized by the USACE. Melone's property is adjacent to wetlands, marshlands and eel grass habitats. Melone's property includes marshlands, wetlands and nesting grounds for various migratory bird species. Plaintiff Melone derives aesthetic, environmental well-being, recreational, and conservation benefits from his use of his property on Nantucket Sound, and the wetlands, marshlands, eel grass habitats and nesting grounds. The Defendants' failure to comply with duties mandated by NEPA and its implementing regulations and federal law will result in harm to wetlands, marshlands, eel grass habitats and nesting grounds and their habitats that benefit Plaintiff Melone. This harms Plaintiff Melone's past, present and future enjoyment of these lands, species and their habitats. Requiring the Defendants to comply with duties mandated by NEPA and its implementing regulations and federal law would ensure that those lands, species and habitats and Plaintiff Melone's cognizable interests in the same would not be substantially adversely affected.

27. Deb Haaland is the Secretary of the Interior (the "Secretary") and is sued in her official capacity.

28. Gary Frazer is the Assistant Director for Endangered Species, U.S. Fish and Wildlife Service, and is sued in his official capacity.

29. Paul Doremus is the Assistant Administrator for Fisheries, NMFS and is sued in his official capacity.

30. Martha Williams is the Principal Deputy Director, U.S. Fish and Wildlife Service, and is sued in her official capacity.

31. Colonel John A. Atilano II is the Commander and District Engineer, U.S. Army Corps of Engineers, New England District, and is sued in his official capacity.

32. The U.S. Fish and Wildlife Service ("FWS") is a bureau within the Department of the Interior. The FWS is the primary government agency dedicated to the conservation, protection, and enhancement of fish, wildlife and plants, and their habitats.

33. NMFS is an office of the National Oceanic and Atmospheric Administration within the Department of Commerce. NMFS is responsible for the stewardship of the Nation's ocean resources and their habitat. NMFS issues IHAs under section 101(a)(5)(D) of the MMPA, 16 U.S.C. §1371(a)(5)(D)).

34. The USACE is an engineer formation of the United States Army. The USACE issues permits pursuant to Section 404 and Section 10.

35. BOEM is a bureau within the Department of the Interior. BOEM issues approvals under section 8(p) of the OCSLA, 43 U.S.C. §1337(p).

STANDING

A. Economic Injury and Procedural Standing

36. Allco is a business that develops QF solar projects that sell the output of their solar energy facilities under long-term power purchase agreements. Plaintiff Melone is the owner of Allco. The Defendants' action will reduce Allco's opportunities and ability to develop QF solar projects because the VW Project, SF Project and the foreseeable OSW projects decimate U.S. onshore renewable energy producers in the Northeastern United States, including Allco. If the Projects and those foreseeable are not approved, the New England States need for renewable energy will be fulfilled by solar and other onshore renewables, including Allco's. The promise of offshore wind, and the related Defendants' Approvals have already harmed Plaintiffs, and continue to harm Plaintiffs' development of solar projects in Connecticut and Massachusetts. In Massachusetts, the Defendants' Approvals have eliminated and continue to eliminate opportunities

for the development of the Plaintiffs' solar project in Ashburnham, Massachusetts, which is located in the service territory of Ashburnham Municipal Light Plant. In Connecticut, the promise of offshore wind has reduced the electric distribution utilities' procurement of solar generation facilities and economic opportunity for Plaintiffs' proposed projects in Connecticut, such Plaintiffs' proposed solar projects in Plainfield, CT, Griswold, CT, and Hampton, CT. But for the State of Connecticut's and State of Massachusetts's requirements for the procurement of offshore wind projects such as the Vineyard Wind Project and other foreseeable OSW projects, the Plaintiffs' projects would have increased opportunities, and those States would need to require the electric distribution utilities to provide more contractual opportunities for Plaintiffs' solar projects. The Connecticut Department of Energy and Environmental Protection conceded in its most recent comprehensive energy strategy that because of the OSW procurements that it has already conducted that it would not need to conduct procurements for solar energy, creating direct ongoing harm to Plaintiffs' efforts to develop its solar projects in Connecticut. The same is true for the State of Massachusetts. Because of its OSW procurements, Massachusetts requires the electric distribution companies to acquire less solar energy which has and continues to harm Plaintiffs' ability to develop its solar energy facility in Ashburnham, Massachusetts. Allco's economic interests are part of the human environment affected by the Defendants' actions.

37. Plaintiffs have standing to challenge the Defendants' action and standing to ensure that the Defendants' follow all procedural requirements in their decision-making. NEPA requires the Defendants to analyze all direct, indirect and cumulative effects from the proposed action and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.

38. Effects include "ecological (such as the effects on natural resources and on the

components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative" effects. 40 C.F.R. §1508.8.

39. BOEM uses its *Market Simulation Model* (*MarketSim*) to estimate the amount and percentage of substitutes that the economy would adopt if a particular action related to energy were or were not adopted. The Defendants' own economic models dictate that the electricity generated by the VW Project, the SF Wind project and other reasonably foreseeable OSW projects would displace the opportunities and need for renewable generation of Plaintiffs' as well as other onshore renewable energy developers, which has already happened and continues to be the case.

40. The economic impacts on Plaintiffs are within the type of interests required to be analyzed under NEPA and the OCSLA and provide a sufficient interest that would be imminently harmed by the Defendants' failure to follow the procedural requirements of NEPA and the OCSLA. The aesthetic, environmental well-being, recreational, and conservation benefits Melone derives from the migratory birds on Little Beach and the NARW provide a sufficient interest that would be imminently harmed by the Defendants' failure to follow the procedural requirements of NEPA, the OCSLA, the MMPA and the MBTA.

41. Plaintiffs also have a procedural right to comment on material changes to the EIS. The New VW Biop is such a material change. The increased size of the proposed wind turbines is such a material change. Defendants have denied the Plaintiffs those procedural rights. If Plaintiffs were able to exercise their procedural rights to comment on such issues, their concrete interest could be protected.

42. Plaintiffs have a procedural right to comment on the proposed mitigation measures to the migratory birds on Little Beach and the NARW. Defendants have denied the Plaintiffs those procedural rights. Defendants have left the determination of final mitigation measures to the

future. If Plaintiffs were able to exercise their procedural rights to comment on such issues, their concrete interest could be protected. Because NEPA is essentially a procedural statute, injury alleged to have occurred as a result of violating these procedural rights confers standing.

43. Plaintiffs' economic and procedural standing would be redressed by an order that requires the Defendants to follow procedural requirements that make it less likely that the Defendants' action will be finalized and ultimately upheld in legal challenges, and less likely that the VW Project, SF Wind Project and the balance of the 2,021 turbines that the FEIS concludes are cumulative impacts of the proposed actions would be built.

B. Informational Standing.

44. As part of its business developing QF solar projects, Allco needs to engage in advocacy before Congress, federal agencies and State legislatures and agencies to ensure that the requirements of PURPA are implemented as required by Congress and that such entities recognize the benefits of solar energy and the detriments of OSW and other forms of electrical generation and implement policy and programs accordingly. Plaintiff Melone also engages in the same regulatory advocacy.

45. Proper consultation as required by the ESA and the preparation of an environmental impact statement ("EIS") that complies with NEPA and a proper legal and factual analysis by the Defendants under the OCSLA, the CWA and the MMPA would produce key information that Plaintiffs would use to engage in their regulatory advocacy. Defendants are required by NEPA and federal law to prepare such information and make it available to Plaintiffs.

46. Proper consultation as required by the ESA and the preparation of an EIS that complies with NEPA and a supplemental EIS and a proper legal and factual analysis under the OCSLA, the CWA and the MMPA would produce information from a neutral federal agency that

has greater credibility and weight than any such information developed and produced by private entities.

47. The Defendants' failure to properly consult as required by the ESA and the failures to prepare an EIS that complies with NEPA and a supplemental EIS, and a proper legal and factual analysis under the OCSLA, the CWA and the MMPA denies Plaintiffs the key, credible, and weighty information that it would use in engaging in their regulatory advocacy, which information the Defendants are required under NEPA and federal law to prepare and provide to Plaintiffs.

48. An order for the Defendants to consult using the standards mandated by the ESA and requiring the preparation of an EIS that complies with NEPA and a supplemental EIS and a prepare proper legal and factual analysis under the OCSLA, the CWA and the MMPA, would redress the denial of the information by requiring the Defendants to consult and prepare a supplemental EIS and to provide a proper legal and factual analysis under the OCSLA, the CWA and the MMPA, which will cause the information to be produced and available to Plaintiffs for their use in regulatory advocacy.

C. Species Impacts Standing.

49. The Plaintiffs' cognizable interests as stated above in the NARW and Little Beach migratory birds would be harmed by the Defendants' action, which would exacerbate climate change, harm habitat, reduce the population of the affected species, and result in take of affected species.

50. An order requiring the Defendants to prepare an EIS that complies with NEPA and prepare proper legal and factual analysis by the Defendants under the OCSLA, the CWA, the ESA and the MMPA would make it less likely that Defendants' action will be finalized and the Projects approved and thereby redress the Plaintiffs' injuries. An order declaring that no permitting may be

issued under the MMPA for either the Vineyard Wind Project or the South Fork Wind Project because any approval would need to account for decommissioning which is beyond the statutory five-year limit, and declaring that no permitting may be issued for either the Vineyard Wind Project or the South Fork Wind Project because take of the NARW, the Piping Plover and other ESA-listed species by the VW Project and the SF Wind Project is not incidental to the carrying out the construction, operation and decommissioning of each Project would make it less likely that Defendants' action will be finalized and the Projects approved and thereby redress the Plaintiffs' injuries.

D. OCSLA Standing.

51. § 1349(a)(1) allows any person having a valid legal interest which is or may be adversely affected by the terms of any permit issued by the Secretary to bring suit. The Plaintiffs' cognizable interests stated above would be harmed by Defendants' action and reasonably foreseeable actions. The Plaintiffs' harms would be redressed by an order vacating the Defendants' approvals of the Projects and that requires the Defendants to follow the requirements of the federal law.

E. MMPA Standing.

52. Plaintiff Melone has standing under 16 U.S.C. §1374(d)(6) because as stated above Melone derives concrete aesthetic, environmental well-being, recreational, and conservation benefits from the NARW that would be imminently harmed by the Defendants' failure to follow the requirements of NEPA, the OCSLA, and the MMPA.

F. Administrative Exhaustion.

53. Plaintiffs are a party that submitted a comment during the environmental review of each Project. A commenter during the environmental review of the VW Project and the SF Project

filed a sufficiently detailed comment so as to put the lead agency on notice of the issue on which Plaintiffs seek judicial review to the extent necessary.

54. Plaintiffs provided to Defendants notices of suit under the OCSLA on September 17, 2021, December 31, 2021, January 5, 2022 and January 7, 2022, and under the ESA on September 3, 2021, and January 7, 2022, copies of which are attached as Exhibit A.

LEGAL AND FACTUAL BACKGROUND

I. National Environmental Policy Act.

55. NEPA is our "basic national charter for the protection of the environment." 40 C.F.R. §1500.1(a). It was enacted—recognizing that "each person should enjoy a healthful environment"—to ensure that the federal government uses all practicable means to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings," and to "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences," among other policies. 42 U.S.C. § 4331(b), (c).

56. NEPA regulations explain, in 40 C.F.R. §1500.1(c), that:

> Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.

57. NEPA achieves its purpose through "action forcing procedures. . . requir[ing] that agencies take a hard look at environmental consequences." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citations omitted).

58. "Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." 40 C.F.R. §1501.2.

59. Federal agencies must comply with NEPA before there are "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. §4332(C)(v); *see also* 40 C.F.R. §§1501.2, 1502.5(a).

60. NEPA requires the Defendants to consider "any adverse environmental effects which cannot be avoided." 42 U.S.C. §4332(C)(ii). In so doing, the Defendants must "identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations." *Id.* §4332(B).

61. To accomplish these purposes, NEPA requires that all federal agencies prepare a "detailed statement" regarding all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). This statement, known as an EIS, must, among other things, rigorously explore and objectively evaluate all reasonable alternatives, analyze all direct, indirect, and cumulative environmental impacts, and include a discussion of the means to mitigate adverse environmental impacts. 40 C.F.R. §§1502.14, 1502.16. The scope of the analysis must include "[c]umulative actions," or actions that "when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement," and "[s]imilar actions," or actions that "when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together." 40 C.F.R. §§1508.25(a)(2), (3).

62. Direct effects include those that "are caused by the action and occur at the same time and place." 40 C.F.R. §1508.8(a). Indirect effects include effects that "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. §1508.8(b). Cumulative effects are "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. §1508.7. "Effects" are synonymous with "impacts." 40 C.F.R. §1508.8.

63. These effects include "ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative" effects. 40 C.F.R. §1508.8.

64. The cumulative impact requirement ensures that agencies consider effects that result from individually minor but collectively significant actions taking place over a period of time. 40 C.F.R. §1508.7).

65. The Defendants' analysis must do more than merely identify impacts; it must also "evaluate the severity" of effects. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989); 40 C.F.R. §1502.16(a)-(b) (recognizing that agency must explain the "significance" of effects).

66. "NEPA is 'essentially procedural,' designed to ensure 'fully informed and well-considered decision[s]' by federal agencies." *Del. Riverkeeper Network v. FERC*, 753 F.3d at 1309-10 (quoting *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978)). The statute serves that purpose by requiring federal agencies to take a "hard look" at "their proposed actions' environmental consequences in advance of deciding whether and how to proceed." *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 37 (D.C. Cir. 2015). NEPA "does not dictate

particular decisional outcomes, but 'merely prohibits uninformed—rather than unwise—agency action.'" *Id*. (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989)). Under NEPA regulations, agencies must consider all reasonable alternatives, *including those not specifically under their authority to implement*. *See* https://ceq.doe.gov/nepa/regs/40/1-10.HTM. *See also NRDC v. Morton*, 458 F.2d 827 (D.C. Cir 1972).

II. The Endangered Species Act.

67. Congress passed the ESA, 16 U.S.C. §§ 1531 *et seq*., in 1973 to affirm our nation's commitment to the conservation of threatened and endangered species and their habitat – the forests, rangeland, prairies, rivers, and seas these species need to survive. Congress purposefully gave "conservation" a sweeping definition – the use of all methods and procedures necessary to recover threatened and endangered species so that they no longer need the Act's protections. 16 U.S.C. §1532(3). The ESA works, in part, by placing the survival and recovery of imperiled animals, fish, and plants at the forefront of every federal action and decision.

68. The ESA requires that each federal agency initiate and complete consultation with the Department of the Interior, the FWS or the NMFS (the "Services") before taking any action that may jeopardize the continued existence of endangered or threatened species, or result in the destruction or adverse modification of critical habitat.

III. The Marine Mammal Protection Act.

69. The MMPA prohibits, with certain exceptions, the "take" of marine mammals in U.S. waters and by U.S. citizens on the high seas, and the importation of marine mammals and marine mammal products into the U.S. The primary purpose of MMPA is protection of marine animals and the MMPA was not intended to balance interests between other industries and the protected marine mammals. *Committee for Humane Legislation, Inc. v. Richardson*, 414 F. Supp.

297 (D.D.C.), *aff'd*, 540 F.2d 1141 (D.C. Cir. 1976).

IV. The Outer Continental Shelf Lands Act.

70. Subsection 8(p)(4) of the OCSLA authorizes the Secretary of the Interior, "in consultation with the Secretary of the Department in which the Coast Guard is operating and other relevant departments and agencies of the Federal Government" to "grant a lease, easement, or right-of-way on the outer Continental Shelf for activities …if those activities … produce or support production, transportation, or transmission of energy from sources other than oil and gas." Subsection 8(p)(4) of the OCSLA sets forth certain requirements that the Secretary "shall ensure" are met.

V. Legal Framework for the USACE's Approvals.

71. Section 404(a) of the CWA authorizes the Secretary of the Army, acting through the Army Corps of Engineers, to issue permits for the discharge of dredged or fill material into navigable waters "after notice and opportunity for public hearings." 33 U.S.C. §1344(a). In making permitting decisions, the Corps must follow a set of guidelines developed by the Environmental Protection Agency ("EPA") in conjunction with the Secretary of the Army (the "404(b)(1) Guidelines" or "Guidelines"). *See id*. § 1344(b); *Bersani v. EPA*, 850 F.2d 36, 39 (2d Cir. 1988). These Guidelines prohibit the Corps from granting a Section 404 permit "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. §230.10(a). The Corps' own regulations further require the Corps to conduct a public interest review for each proposed discharge, and prohibit the Corps from granting a permit that (1) would "not comply with [EPA's] 404(b)(1) [G]uidelines" and/or (2) that would be "contrary to the public interest." 33 C.F.R. §320.4(a)(1).

72. Under EPA's 404(b)(1) Guidelines, an alternative to the proposed discharge is practicable if it is "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 C.F.R. §230.10(a)(2). Alternatives need not be in locations that are presently owned by a permit applicant so long as they are otherwise practicable and could "reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity." *Id*.; *accord Bersani*, 850 F.2d at 39.

73. "[P]racticable alternatives include, but are not limited to: (i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters," *see* 40 C.F.R. §230.10(a)(1)(i), such as onshore renewable energy generation.

COUNT I
FAILURE TO COMPLY WITH THE OUTER CONTINENTAL SHELF LANDS ACT, NEPA AND THE ESA (VW AND SF)

74. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.

75. Subsection 8(p)(4) of the OCLSA sets forth certain requirements that the Secretary "shall ensure" are met. In approving the COP for each Project, the Secretary failed to comply with the requirements in subsection 8(p)(4) that she ensure the construction, operation and decommissioning of such Project be carried out in a manner that ensures each of those requirements are met. Specifically, the Secretary has failed to ensure the protection of the migratory birds that habitat on Little Beach, and the NARW which the Secretary has an obligation to do as part of her obligation to ensure the protection of the environment, and conservation of the natural resources of the outer Continental Shelf. The Projects individually and cumulatively with other foreseeable and planned offshore wind projects will result in the death of migratory birds, which is unlawful.

76. The Secretary has failed, and continues to fail, to ensure safety and protection of the environment and conservation of the natural resources of the outer Continental Shelf because no structural analysis was done or reviewed in connection with the Defendants' Approvals of either Project. No offshore wind turbine that exists today can survive a Category 3 or greater Atlantic hurricane. Neither the ROD nor the FEIS examine any safety or engineering issues with respect to the untested and unbuilt wind turbines planned for each Project.

77. In the draft EIS ("DEIS") for the VW Project, BOEM stated at 2-18:

> *Severe weather and natural events:* As described above, Vineyard Wind designed the proposed Project components to withstand severe weather events. The WTGs would be designed to endure sustained wind speeds of up to 112 mph (182.2 kph) and gusts of 157 mph (252.7 kph). WTGs would also automatically shut down when wind speeds exceed 69 mph (111 kph).

78. In Plaintiffs' comments on the DEIS, they brought to BOEM's attention that meant the WTGs would not survive a Category 3 or greater Atlantic storm. Since the submission of Plaintiffs' comments, BOEM deleted its reference to the WTGs' survivability and has omitted such information in subsequent versions of the EIS for the VW Project and the SF Project.

79. An adverse weather event of a category 3 or greater hurricane, which is likely to occur during the next thirty years, would likely lead to a release (and possibly catastrophic release) of the WTGs' oil and contaminants, thus causing the take of, and possibly extinction of, multiple endangered species including the NARW and the migratory birds that habitat on Little Beach, and destroying the fishing grounds off the coast of Rhode Island and Massachusetts for generations. The evidence is overwhelming that climate change will result in more frequent and more intense tropical cyclones in the Atlantic Ocean.

80. In addition, the Secretary also failed to adequately explain how each of those requirements in subsection 8(p)(4) are met.

81. The Secretary also failed to take a hard look at the Vineyard Wind project's effect and the South Fork Wind project' effect, both individually and cumulatively, and cumulatively with other foreseeable actions (the "Foreseeable Actions")[2] on marine environment, coastal environment, and human environment. The human environment includes the physical, social, and economic components, conditions, and factors which interactively determine the state, condition, and quality of living conditions, employment, and health of those affected, directly or indirectly, by activities occurring on the outer Continental Shelf. The Secretary has failed, and continues to fail, to ensure protection of the environment, and failed to take a hard look at the effects from the VW and SF Projects and the Foreseeable Actions of: (i) the impact on, and displacement of, development of onshore renewable energy resources, (ii) the acoustic impact of the wind turbine generators that are proposed for the Vineyard Wind project, the South Fork Wind project and the Foreseeable Actions on the NARW and migratory birds including impacts on habitat and breeding patterns, (iv) the transmission infrastructure that is required to be built to accommodate the Vineyard Wind and South Fork Wind projects and the Foreseeable Actions, (v) impacts on the NARW from vessel strikes, construction, operation, and decommissioning; (vi) impacts on other endangered or threatened species such as the Piping Plover and the Roseate Tern., (vii) impacts on migratory birds protected by the Migratory Bird Treaty Act, such as the Piping Plover, the Roseate Tern, the Common Tern, the Least Tern, the Willet, the Black Skimmer, the Oystercatcher, and the Purple Sandpiper.

82. The Secretary's approving the Vineyard Wind project while consultation with the

[2] The Foreseeable Actions include the following additional offshore wind projects: Vineyard Wind 1, South Fork Wind, Revolution Wind, Skipjack Wind, Empire Wind, Bay State Wind, US Wind, Sunrise Wind, Ocean Wind, Coastal Virginia Offshore Wind, Park City Wind, Mayflower Wind, Atlantic Shores Wind, Kitty Hawk Wind, and Vineyard Wind South.

NMFS was still in process violates the OCSLA, NEPA and the ESA.

83. The Secretary's approval of the Vineyard Wind project and the South Fork Wind project on the basis of biological opinions that were incomplete and not based upon the latest scientific data violates the OCSLA, NEPA and the ESA.

84. The Secretary's failure to impose adequate measures, including disapproval of each project, to ensure each of the requirements (A) through (L) are independently satisfied violates the OCSLA, NEPA and the ESA

85. Those failures and actions are arbitrary and capricious, violate the OCSLA, NEPA and the ESA and require the Approvals for both Projects to be vacated.

COUNT II
UNLAWFUL DELEGATION (VW AND SF)

86. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.

87. The Secretary has interpreted the OCSLA as leaving to the Secretary to decide which, if any, of the requirements in Subsection 8(p)(4) of the OCSLA are observed.

88. As interpreted and applied by the Secretary, that broad discretion is an unconstitutional delegation of legislative authority. There is no intelligible principle that must be observed if the Secretary has the discretion to discard some or all of the requirements in Subsection 8(p)(4) of the OCSLA.

89. Because the authority given to the Secretary to approve the COP for each Project is an unconstitutional delegation of legislative authority, the Approvals for both Projects must be vacated.

COUNT III
UNLAWFUL REDELEGATION (VW AND SF)

90. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.

91. The Approvals for each Project were not issued by the Secretary but by a subordinate. Under any interpretation of Subsection 8(p)(4) of the OCSLA, that redelegation of legislative authority is unlawful and as a result the Approvals for each Project must be vacated.

COUNT IV
FAILURE TO ADHERE TO THE MMPA NOTICE REQUIREMENTS (VIOLATION OF THE MMPA) (VW AND SF)

92. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the forgoing paragraphs as though fully set forth herein.

93. 16 U.S.C. §1374(d) requires that the notice of the issuance of an incidental harassment authorization "must be published in the Federal Register within ten days after the date of issuance or denial."

94. The SF IHA was issued on December 21, 2021. Notice of issuance was published on January 6, 2022. The permit is invalid as it was not published within the required ten-day timeframe.

95. The VW IHA was issued on May 21, 2021. Notice of issuance was published on June 25, 2021. The permit is invalid as it was not published within the required ten-day timeframe.

COUNT V
UNLAWFULLY NARROW OBJECTIVE (VIOLATION OF NEPA) (VW)

96. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the forgoing paragraphs as though fully set forth herein.

97. Courts must also reject an unreasonably narrow definition of objectives that compels the selection of a particular alternative. The scope of the objective of the Defendants' review of the VW Project was unlawfully narrow designed to compel the selection of a particular alternative. As a result, the Defendants' Approvals of the VW Project must be vacated.

COUNT VI
FAILURE TO TAKE A HARD LOOK AT THE NO-ACTION ALTERNATIVE (VIOLATION OF NEPA AND THE OCSLA) (VW AND SF)

98. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.

99. NEPA requires all federal agencies to consider the potential environmental impacts of their actions and to identify and evaluate reasonable alternatives to proposed actions and those alternatives' environmental impacts, including taking no action. The FEIS's assumption that, compared to No Action, approving the proposed Projects would have a positive impact on total greenhouse gas emissions is wrong and departs from basic economic principles and vastly overstates each Project's purported positive climate impacts.

100. The Defendants' assumption that the No Action will have no net effect on onshore renewable energy generation, economic benefits or climate benefits contradicts fundamental economic principles. Significant changes in renewable energy supply will affect renewable energy's price and, therefore, consumption and emission levels. The Defendants failed to properly analyze how electricity from each Project directly competes with other renewable energy resources in electricity generation, such that increasing the supply of offshore wind results in less American renewable energy generation on-shore, particularly solar electric generation. The Defendants also ignore how overall greenhouse gas emissions and climate impacts will vary among substitute sources of renewable energy generation. The Defendants should have—and easily could have—

evaluated the No-Action Alternative's climate effects and effects on onshore renewable energy. If either Project is not approved, utilities will acquire other renewable energy production to satisfy their respective renewable energy goals and standards, and therefore, lower greenhouse gas emissions, none of which would create the adverse effects on the NARW or the migratory birds on Little Beach. In the No-Action Alternative, any renewable energy substituting for each Project may provide a more positive impact on emissions and climate change. Yet, the Defendants do not properly analyze this environmental impact in its alternatives' analysis. That failure is in spite of the fact that in NEPA reviews for over the past 35 years, the Department of the Interior (the "Interior") has consistently understood that a decision not to take action related to energy production will affect that energy resource's supply and price and thus trigger other actions and trigger substitution effects. Thus, as early as 1979, the Interior recognized that canceling even a single oil and gas lease would cause the market to respond by substituting not just oil and gas from other sources, but alternative fuel types as well as increased energy conservation. Here, BOEM should have used (but apparently did not use) its *Market Simulation Model* (*MarketSim*) to estimate the amount and percentage of substitutes that the economy would adopt in the no-action alternative for each Project.

101. The Defendants wholly ignored the alternative generation resources that would fill the void if either Project was not approved. The Defendants assume that the Projects would prevent future natural gas electric generating plants. Such an assumption is absurd and defeats the entire purpose of analyzing viable replacements when the No-Action alternative is selected. It is also inconsistent with BOEM and Interior's use of market modeling in other environmental impact statements. Such inconsistent action is itself arbitrary and capricious agency action.

102. Under NEPA regulations, agencies must consider all reasonable alternatives, including those not specifically under their authority to implement. *See* 40 C.F.R. §1502.14; *see also NRDC v. Morton*, 458 F.2d 827 (D.C. Cir 1972) (explaining that it is the essence and thrust of NEPA that impact statements serve to gather in one place discussion of relative environmental impact of alternatives, and although alternatives required for discussion are those reasonably available, they should not be limited to measures which particular agency or official can adopt; when proposed action is integral part of coordinated plan to deal with broad problem, range of alternatives which must be evaluated is broadened). Thus, the failure to consider and take a hard look at onshore renewable generation resources because they would not require a permit within BOEM's or the cooperating agencies' jurisdiction or are not located offshore is clear error.

103. The No-Action Alternative must also take into account the fact that on-shore American jobs and tax revenues to the United States would be lost if either Project and the cumulatively foreseeable OSW projects are built. Each Project and the cumulatively foreseeable OSW projects will displace American jobs related to construction and operation of onshore renewable energy projects in the United States. The Defendants have not analyzed those economic impacts and the loss of American jobs and tax revenues if the Projects and the cumulatively foreseeable OSW projects are built.

104. The Defendants assume without adequate support that offshore electricity generation is needed, a need that was never analyzed. There surely cannot be informed decision making when the threshold question—need for the proposed Projects—is based merely upon conjecture or an unlawfully narrowly defined focus limited to use of the outer continental shelf.

105. Local taxing jurisdictions would realize increases in tax revenues as a result of the renewable generators that would be built onshore instead of the proposed Projects and the

cumulatively foreseeable OSW projects. Similarly, direct or indirect economic impacts for those alternative onshore renewable United States-based generators would occur within the region under the No-Action Alternative, and indeed would *far exceed* those from the Projects and the cumulatively foreseeable OSW projects.

106. Quite simply, the conclusions used for the No-Action Alternative baseline are preposterous, fail to use accepted substitution analysis used by Interior and BOEM and other federal agencies in conducting environmental impact statements, and are the type of uninformed review that has been rejected by the courts.

107. The "Socioeconomic" impacts of the No-Action alternative are manifestly wrong for each Project. The No-Action alternative would result in different renewable energy projects filling its place. And because those alternative projects would be located entirely onshore in the United States, they would far surpass the Projects in economic benefits to the United States.

108. The analysis of the No-Action alternative for Air Quality is incorrect. The Projects would be replaced with renewable energy projects located closer to the actual electrical load. Those projects would have the higher air quality benefits, and GHG benefits compared to the Projects. Further, the farther generation is from actual load, the more electrical losses incurred. The EPA classifies the Projects as a major source of air pollution and thus is subject to Prevention of Significant Deterioration and Nonattainment New Source Review Permitting requirements.

109. The Defendants' failures to properly analyze the no-action alternative also violates the duty to ensure protection of the environment under section 8(p)(4) of the OCSLA. The term environment is broad and includes the marine environment, coastal environment, and human environment.[3] The Secretary has failed to comply and continues to fail to comply with her duties

[3] (g) The term "marine environment" means the physical, atmospheric, and biological components,

to ensure the protection of the environment and the other requirements of subsection 8(p)(4) by approving, and failing to revoke her approval of the proposed Vineyard Wind offshore wind project and the South Fork Wind project.

110. The Defendants' failures are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

111. For the foregoing reasons, the Defendants have failed to comply with NEPA, the OCSLA and the Defendants' approvals for both Projects should be vacated.

COUNT VII
FAILURE TO TAKE A HARD LOOK AT ALTERNATIVES UNDER THE CLEAN WATER ACT—FAILURE TO COMPLY WITH EPA'S 404(B)(1) GUIDELINES (VW AND SF)

112. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.

113. Section 404(a) of the CWA authorizes the Secretary of the Army, acting through the Army Corps of Engineers, to issue permits for the discharge of dredged or fill material into navigable waters "after notice and opportunity for public hearings." 33 U.S.C. § 1344(a). In making permitting decisions, the Corps must follow the 404(b)(1) Guidelines. *See id*. § 1344(b); *Bersani v. EPA*, 850 F.2d 36, 39 (2d Cir. 1988). These Guidelines prohibit the Corps from granting a Section 404 permit "if there is a practicable alternative to the proposed discharge which would

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conditions, and factors which interactively determine the productivity, state, condition, and quality of the marine ecosystem, including the waters of the high seas, the contiguous zone, transitional and intertidal areas, salt marshes, and wetlands within the coastal zone and on the outer Continental Shelf;
(h) The term "coastal environment" means the physical atmospheric, and biological components, conditions, and factors which interactively determine the productivity, state, condition, and quality of the terrestrial ecosystem from the shoreline inward to the boundaries of the coastal zone;
(i) The term "human environment" means the physical, social, and economic components, conditions, and factors which interactively determine the state, condition, and quality of living conditions, employment, and health of those affected, directly or indirectly, by activities occurring on the outer Continental Shelf.

have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. §230.10(a). The Corps' own regulations further require the Corps to conduct a public interest review for each proposed discharge, and prohibit the Corps from granting a permit that (1) would "not comply with [EPA's] 404(b)(1) [G]uidelines" and/or (2) that would be "contrary to the public interest." 33 C.F.R. §320.4(a)(1). The Projects will discharge into a "special aquatic site."

114. Under EPA's 404(b)(1) Guidelines, an alternative to the proposed discharge is practicable if it is "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 C.F.R. §230.10(a)(2). Alternatives need not be in locations that are presently owned by a permit applicant so long as they are otherwise practicable and could "reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity." *Id*.; *accord Bersani*, 850 F.2d at 39.

115. "[P]racticable alternatives include, but are not limited to: (i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters," *see* 40 C.F.R. §230.10(a)(1)(i), such as onshore renewable energy generation. The USACE correctly concluded that the project is not water dependent, but then illogically restricted the overall purpose to a water dependent purpose, i.e., placing wind turbines in the water. "[A]n applicant cannot define a project in order to preclude the existence of any alternative sites and thus make what is practicable appear impracticable." *Sylvester v. U.S. Army Corps of Engineers*, 882 F.2d 407, 409 (9th Cir. 1989).

116. The Defendants' violated the CWA's requirements by not taking a hard look—indeed not taking any look—at the proposed purpose of the Projects being able to be accommodated by onshore renewable energy.

117. A Section 404 permit will not issue "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences" (the least environmentally damaging practicable alternative). 40 C.F.R. §230.10(a). The regulations define a "practicable alternative" as one that "is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." *Id*. §230.10(a)(2). When, as here, a non-water dependent project would discharge pollutants into a "special aquatic site," the regulations establish a presumption that practicable alternatives not involving special aquatic sites are available, "unless clearly demonstrated otherwise." *Id*. §230.10(a)(3).

118. The USACE's failure to take the required hard look at alternative violates NEPA and the Guidelines and as a result, the USACE's approvals should be vacated.

119. The USACE's determination that it was clearly demonstrated that practicable alternatives not involving special aquatic sites were not available is arbitrary and capricious, an abuse of discretion, not supported by substantial evidence and a violation of the Guidelines.

120. The USACE's failures are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." As a result, the USACE's approvals of each Project must be vacated.

COUNT VIII
VIOLATION OF THE SECTION 404 GUIDELINES (VW AND SF)

121. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.

122. 40 C.F.R. § 230.1(c) explains that "dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an

unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern." Probable impacts of other activities include the balance of the 2,021 wind turbines that the Defendants conclude are foreseeable.

123. The USACE's failure to take the required hard look at the probable impacts of the balance of the 2,021 wind turbines that the Defendants conclude are foreseeable violates the requirement that it be demonstrated that such a discharge will not have an unacceptable adverse impact. As a result, the USACE's approvals should be vacated.

124. The USACE's failures are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." As a result, the USACE's approvals must be vacated.

COUNT IX
FAILURE TO TAKE A HARD LOOK AT WHETHER EACH PROJECT SATISFIES THE PUBLIC INTEREST REQUIREMENT (VW AND SF)

125. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.

126. For the Corps to issue a permit for each proposed Project, the proposed use must be in the public interest. The public interest review must be "based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." 33 CFR §320.4(a)(1). "Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case." *Id.* "The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments." *Id.* "The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision

should reflect the national concern for both protection and utilization of important resources." *Id.*

127. "All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people." *Id.* The Defendants fail to offer any hard look explanation as to why either Project meets the public interest test.

128. In order to have taken a hard look at whether either proposed Project meets the public interest test, the USACE would need at a minimum to conduct a thorough review of the electricity supply and alternatives to meet renewable energy demand, the Defendants have made no such effort.

129. Moreover, in order to determine that either proposed Project meets the public interest test, a thorough review of its potential competitive effects on United States onshore based generators and the direct, indirect and cumulative effects on GHGs and other resource values must be conducted. The Defendants made no such effort.

130. The Defendants' failure to properly evaluate and take a hard look at whether either proposed Project satisfies the public interest test is arbitrary, capricious, an abuse of discretion, not supported by substantial evidence and a violation of the Guidelines. As a result, the USACE's approvals for both Projects must be vacated.

COUNT X
THE USACE'S FAILURE TO TAKE A HARD LOOK AT WHETHER ONSHORE RENEWABLE ENERGY IS A PRACTICABLE ALTERNATIVE IS CLEARLY

ERRONEOUS, ARBITRARY AND CAPRICIOUS AND UNSUPPORTED BY SUBSTANTIAL EVIDENCE (VW AND SF)

131. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.

132. If the Corps finds that a proposed project by its general nature is not water dependent, the Corps must presume that practicable alternatives to the project are available in less sensitive areas. *See* 40 C.F.R. § 230.10(a)(3). Likewise, the Corps must presume that such practicable alternatives have less adverse impact on the aquatic ecosystem. *See id*. Once a project is determined to be non-water dependent, the burden shifts to the permit applicant to rebut the first presumption by "clearly demonstrat[ing]" that a practicable alternative is not available, *id*., and to rebut the second presumption with "detailed, clear, and convincing information proving that an alternative with less adverse impact is impracticable." *Sierra Club*, 362 F. App'x at 106 (quoting *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1269 (10th Cir. 2004)). If the basic purpose of a proposed project is water dependent, then these presumptions do not apply.

133. Thus, if a project is located in a special aquatic site, Corps' determination of the "project's basic purpose and whether it is water dependent are threshold questions that determine the procedure the Corps must follow in granting the applicant a permit." *Id*. If the Corps incorrectly defines the project's basic purpose or improperly determines that the project is water dependent, then it will not follow the procedure set forth by the 404(b)(1) Guidelines, resulting in a decision that is arbitrary and in violation of the APA. *See id.; see also, e.g., Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 570 (2d Cir. 2015) (agency action violates APA where agency followed incorrect procedure).

134. The FEIS for each Project makes little mention of "special aquatic sites" as defined in 40 C.F.R. §§ 230.40-230.45. The FEIS makes no mention of the permit applicant's evidence

to rebut the second presumption with "detailed, clear, and convincing information proving that an alternative with less adverse impact is impracticable."

135. In addition, where a discharge is proposed for a special aquatic site (as is the case here), "*all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise*." 230.10(a)(3) (emphasis added.)

136. The failure of the USACE to review onshore renewable energy as a practicable alternative to the proposed discharge and to adhere to the presumption that there are alternatives presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise, is clear error, and arbitrary and capricious and contrary to law.

137. To the extent the USACE did review onshore renewable energy as a practicable alternative and concluded that it was not a practicable alternative, such a conclusion is arbitrary and capricious, unsupported by substantial evidence and clearly erroneous.

138. As a result, the USACE's approvals for both Projects must be vacated.

COUNT XI
FAILURE TO PROPERLY ANALYZE THE EFFECT OF CLIMATE CHANGE ON HURRICANES THAT MAY IMPACT THE PROJECTS (VW AND SF)

139. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.

140. The FEIS' analysis for each Project of severe weather events is seriously flawed.

141. Each FEIS fails to properly analyze the effects of climate change on hurricane activity in the Project areas over the next 30 years, and the likelihood of a catastrophic failure of the WTGs, and the likelihood of turbine parts and oil and chemical spills in the Atlantic, reaching the shores of New York, Rhode Island, Connecticut, Martha's Vineyard, Nantucket, and Cape

Cod, including the individual Plaintiff's property in Edgartown, and the effects of such an event on the NARW and the migratory birds on Little Beach.

142. It is certainly not a low probability that the Northeast would experience a category 3 or above hurricane over the next 30 years. To the contrary, it is virtually certain that one or more such events would occur. The taller the WTGs get, the more susceptible they are to higher wind speeds. The Defendants did not perform any analysis related to the experimental WTGs for each Project, much less take the required hard look. The Defendants must make an informed decision, and cannot ignore the virtual certainty that a hurricane of category 4 or 5 strength will directly hit the wind energy area for each Project over the next 30 years. They cannot ignore the likelihood of a catastrophic oil spill from a category 4 and 5 hurricane over the next 30 years the devastation on the marine environment and migratory birds.

143. The failure of the Defendants to review the effects of climate change on hurricane activity in the Northeast and each Project area over the next 30 years is clear error, and arbitrary and capricious, violates NEPA, the OCSLA, the MMPA, the Guidelines and is contrary to law.

COUNT XII
THE IMPACTS OF THE PROJECTS ARE OVERESTIMATED, INACCURATE, FLAWED AND INADEQUATELY ANALYZED (VW AND SF)

144. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.

145. The Defendants assume that taking no action on either Project would have, compared to approval, no net negative effects on various resource values or climate change. The preceding paragraphs of these comments have explained why that assumption is entirely inconsistent with economic theory, real market conditions, and past agency practices.

Consequently, the Defendants and the FEIS for each Project present a deeply inaccurate and misleading comparison of the approval options and No-Action Alternative.

146. Similarly, the analysis of the No-Action Alternative regarding Air Quality is incorrect. Each Project would be replaced with renewable energy projects located closer to the actual electrical load. Those projects would have the higher air quality benefits, and GHG and climate benefits compared to each Project because they would be more efficient. The FEIS for each Project is riddled with over-assessments of the purported benefits of each Project.

147. The FEIS for each Project must subtract from its calculation of the Project's economic, energy supply and climate benefits, the lost benefits from all those onshore sources of renewable energy generation that would no longer be built and the decimation of the commercial fishing industry. Once that is done, each Project may (and likely would) have a net negative impact on economics, climate benefits, fisheries, marine mammals, endangered species, commercial fishing, and all other resource values compared to its substitutes.

148. The FEIS for each Project does not comply with NEPA and the ROD for each Project does not comply with the Guidelines, the MMPA, the OCSLA because they fail to analyze those effects. The FEIS's and the ROD's failure for each Project to properly evaluate those effects is arbitrary, capricious, an abuse of discretion, unlawful and requires that the Defendants' approvals for both Projects be vacated.

COUNT XIII

FAILURE TO SATISFY THE TAKE REQUIREMENT UNDER THE MMPA (VW AND SF)

149. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.

150. Section 101(a) of the MMPA (16 U.S.C. §1361) prohibits persons or vessels subject to the jurisdiction of the United States from taking any marine mammal in waters or on lands under the jurisdiction of the United States or on the high seas (16 U.S.C. §1372(a) (l), (a)(2)). Sections 101(a)(5)(A) and (D) of the MMPA provide exceptions to the prohibition on take, which give NMFS the authority to authorize the incidental but not intentional take of small numbers of marine mammals, provided certain findings are made and statutory and regulatory procedures are met. ITAs may be issued as either (1) regulations and associated Letters of Authorization or (2) an IHA.

151. Letters of Authorizations may be issued for up to a maximum period of 5 years, and IHAs may be issued for a maximum period of 1 year. NMFS has also promulgated regulations to implement the provisions of the MMPA governing the taking and importing of marine mammals (50 C.F.R. §216) and has published application instructions that prescribe the procedures necessary to apply for an Incidental Take Authorization ("ITA"). U.S. citizens seeking to obtain authorization for the incidental take of marine mammals under NMFS's jurisdiction must comply with these regulations and application instructions in addition to the provisions of the MMPA.

152. Once NMFS determines an application is adequate and complete, NMFS has a corresponding duty to determine whether and how to authorize take of marine mammals incidental to the activities described in the application. To authorize the incidental take of marine mammals, NMFS evaluates the best available scientific information to determine whether the take would have a negligible impact on the affected marine mammal species or stocks and an immitigable impact on their availability for taking for subsistence uses. NMFS must also prescribe the "means of effecting the least practicable adverse impact" on the affected species or stocks and their habitat, and on the availability of those species or stocks for subsistence uses, as well as monitoring and reporting requirements.

153. The term "take" means "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal" (16 U.S.C. §1362(3)(13)). The incidental take of a marine mammal falls under three categories: mortality, serious injury, or harassment (i.e., injury and/or disruption of behavioral patterns). Harassment, as defined in the MMPA for non-military readiness activities (Section 3(8)(A)), is any act of pursuit, torment, or annoyance that has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment) or any act of pursuit, torment, or annoyance that has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns (Level B harassment). Disruption of behavioral patterns includes, but is not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.

154. Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant).

155. An IHA is appropriate if the proposed action would result in harassment only (i.e., injury or disturbance) and is not planned for multiple years.

156. A LOA is required if the actions will result in harassment only (i.e., injury or disturbance) and is planned for multiple years. For a Letter of Authorization, NOAA Fisheries must issue regulations.

157. An IHA is inappropriate for either Project for multiple reasons. First, the proposed action for each Project individually and cumulatively for both Projects will certainly require more than 1 year for construction, causing noise from pile driving, dredge from the disturbance of the sea floor, increased vessel traffic and other effects discussed in the FEIS. Second, each Project would need to be decommissioned. The need to decommission each Project removes any ability

of the Defendants to issue a permit of any kind under the MMPA because the take will clearly occur at the end of the useful life of each Project far exceeding the five-year statutory limitation when taking into account the construction and operation of the Project.

158. The Defendants' have also failed to provide substantial evidence that the take from each Project, individually and cumulatively, will only affect small numbers of marine mammals. The noise and other harassment from each Project will affect a greater than small number of NARWs and other marine mammals.

159. Moreover, the Defendants' actions must be measured cumulatively, otherwise developers can simply pass the baton of 1-year take cycles that in reality represent ongoing take under the Defendants' coordinated push for OSW.

160. The Defendants' have also failed to provide substantial evidence that using the best available scientific information the take would have a negligible impact on the affected marine mammal species or stocks and an immitigable impact on their availability for taking for subsistence uses.

161. The issuance of the IHA for each Project violates the MMPA. The Defendants' failures are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." As a result, the Defendants' approvals should be vacated.

COUNT XIV
THE DEFENDANTS FAILED TO TAKE A HARD LOOK AT THE IMPACT ON ENDANGERED SPECIES (VW AND SF)

162. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.

163. Under the ESA, "action" is broadly defined to include actions that may directly or indirectly cause modifications to the land, water, or air, and actions that are intended to conserve

listed species or their habitat. 50 C.F.R. §402.02. An action would "jeopardize the continued existence of" a species if it "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." *Id.* "Destruction or adverse modification" of critical habitat means "a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species." *Id.* "Action area" means "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. §402.02.

164. The action agency must make an effects determination based on the sum of the direct, indirect, and cumulative effects of the action, added to the environmental baseline and interrelated and interdependent actions. *Id.* The agencies must use "the best scientific and commercial data available" to evaluate the impacts the action will have on listed species. 16 U.S.C. §§1536(a)(2), (b)(3), (c)(1); 50 C.F.R. §402.14(g). The Defendants have failed to take a hard look at the risks to the NARW and the migratory birds that habitat on Little Beach and other ESA-listed species from the VW Project, the SF Wind project, both individually and cumulatively, and cumulatively with the Foreseeable Actions. The Defendants' failure to take a hard look at the impact on endangered species is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and violates the OCSLA, the MMPA, NEPA, and the Guidelines. Therefore, the Defendants' approvals must be vacated.

COUNT XV
VIOLATION OF THE OCSLA-MIGRATORY BIRDS (VW AND SF)

165. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.

166. The wind turbines themselves from each of the VW and SF Projects are practically certain, and likely, to kill migratory birds protected under the MBTA including those that habitat on Little Beach in Edgartown, Massachusetts, the Piping Plover, the Roseate Tern, the Common Tern, the Least Tern, the Willet, the Black Skimmer, the Oystercatcher, and the Purple Sandpiper, as those birds migrate to and from their seasonal homes and as they forage for food.

167. The OCSLA does not authorize the Secretary to approve a use that is practically certain to engage in criminal conduct in violation of the MBTA. Therefore, her approvals must be vacated.

COUNT XVI
VIOLATION OF SECTION 9 OF THE ESA (VW AND SF)

168. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.

169. Section 9 of the ESA provides additional, substantive restrictions on agency actions affecting endangered species. The provision prohibits any person, including federal agencies, from "tak[ing]" endangered species, defined as actions that "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" a listed species, as well as any "attempt to engage in any such conduct." 16 U.S.C. § 1538(a)(1)(B); *id*. § 1532(19). The Secretary may issue a permit for an "any taking otherwise prohibited by section 9(a)(1)(B) [16 USCS § 1538(a)(1)(B)] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."

170. The take of the NARW, the Piping Plover and other ESA-listed species by the VW Project and the SF Wind Project is not incidental to the carrying out the construction, operation and decommissioning of each Project. The take is knowing and intentional because it is practically certain to occur. As a result, it is not and cannot be incidental.

171. The Defendants have and are continuing to violate ESA section 9 by authorizing and failing to withdraw authorization for the VW Project and the SF Project.

172. The Defendants' approvals of each Project and the conclusion that the take is incidental are arbitrary and capricious and an abuse of discretion and not supported by substantial evidence.

173. The Approvals of the Projects must be vacated and the Defendants ordered to comply with their obligations under Section 9.

COUNT XVII
BOEM HAS FAILED TO COMPLY WITH 30 CFR 585.102(b) (VW AND SF)

174. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.

175. 30 CFR 585.102(b) provides that "BOEM will require compliance with all applicable laws [and] regulations." BOEM has not required compliance with all applicable laws and regulations because the Vineyard Wind and South Fork Wind projects are likely and practically certain to kill migratory birds including those that habitat on Little Beach, which is a strict liability crime.

COUNT XVIII
VIOLATION OF NEPA (VW AND SF)

176. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.

177. The Defendants' SF Approvals and VW Approvals left for the future (i.e., after the issuance of the Approvals), the preparation of measures intended to protect species covered under the ESA, the MMPA and the MBTA denying the Plaintiffs and other members of the public the

right to comment on the proposed measures under the NEPA process. Such measures are a material part of the environmental review and protection of affected species.

178. The Approvals of the Projects must be vacated and the Defendants ordered to comply with their obligations under NEPA to allow public comment on all proposed mitigation measures for affected species once all those measures are finalized.

COUNT XVIII
VIOLATION OF ADMINISTRATIVE PROCEDURE ACT AND THE ESA (VW)

179. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth.

180. The Defendants must take new agency action, affirming or revising their approvals of the VW Project. The issuance of the New VW Biop requires agency action based upon that New VW Biop because all Defendants' Approvals were based upon the Old VW Biop, even though the Defendants knew at the time of their Approvals that the Old VW Biop was inadequate. New agency action is required in this case for two reasons.

181. *First*, the ESA and its implementing regulations require the Defendants taking action to consult and *complete* consultation with NMFS "*before taking any action* that 'may affect' an endangered species or its habitat. *See* 50 C.F.R. § 402.14(a)." *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 177 (D.C. Cir. 2017) (emphasis added). Consultation was not completed when the Defendants issued the VW Approvals. Thus, the Defendants took unlawful agency action by issuing approvals before consultation was completed.

182. *Second*, remand and vacatur is required by *Dep't of Homeland Security v. Regents of the Univ. of California,* 591 U.S. ___, 140 S. Ct. 1891 (2020) ("*Regents*") so that the Defendants can take new agency action. Sometime on or before May 7, 2021, the Defendants realized that the environmental analysis that was done to that point on the VW Project was

seriously deficient. The Defendants also had realized that because of those deficiencies further consultation with the NMFS was required by law. Thus, on May 7, 2021, BOEM, as lead agency, requested re-consultation with NMFS. Notwithstanding the fact that required consultation was not complete, and that the Defendants were operating under an admittedly seriously deficient record, the Defendants issued approvals for the VW Project, even though the Defendants knew their analysis at that point in time did not pass muster for informed decision-making. Rather, the Defendants gambled that the political pressure to advance offshore wind would produce a consultation that would provide post-hoc justification for the Defendants' VW Approvals.

183. The result of the re-consultation was the issuance of the New VW Biop which is 178 pages longer than the Old VW Biop. Here as in *Regents*, if the Defendants are not required to take new agency action, the Defendants would be able to offer unlimited backfilling and *post-hoc* rationalizations for their decisions in this case and in others.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Declare that Defendants' authorizations challenged herein violate NEPA, the MMPA, the OCSLA, the ESA and the Guidelines and their implementing regulations;

B. Vacate Defendants' authorizations and void the approvals of the proposed Vineyard Wind Project and South Fork Wind Project;

C. Enjoin Defendants from approving or otherwise taking action on any applications for permits for the Vineyard Wind Project and South Fork Wind Project until Defendants have fully complied with NEPA, the ESA, the MMPA, the OCSLA, the Guidelines, and the APA and their implementing regulations,

and prepared an EIS comprehensively analyzing the all direct, indirect, and cumulative effects of the authorizations challenged herein, and taken the required hard look analysis required by the Guidelines, NEPA, the MMPA and the OCSLA;

D. Declare that no permitting may be issued under the MMPA for either the Vineyard Wind Project or the South Fork Wind Project because any approval would need to account for decommissioning which is beyond the statutory five-year limit;

E. Declare that no permitting may be issued for either the Vineyard Wind Project or the South Fork Wind Project because take of the NARW, the Piping Plover and other ESA-listed species by the VW Project and the SF Wind Project is not incidental to the carrying out the construction, operation and decommissioning of each Project. The take is knowing and intentional because it is practically certain to occur. As a result, it is not and cannot be incidental.

F. Retain continuing jurisdiction of this matter until Defendants fully remedy the violations of law complained of herein, in particular to ensure Defendants take a meaningful hard look at the direct, indirect, and cumulative impacts of the proposed Vineyard Wind Project and South Fork Wind Project and all Foreseeable Actions;

G. Award Plaintiffs their fees, costs, and other expenses as provided by applicable law; and

H. Issue such relief as Plaintiffs subsequently request or that this Court may deem just, proper, and equitable.

Respectfully submitted,

THE PLAINTIFFS,

By their attorney,

Dated: February 23, 2022

/s/Thomas Melone
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Certificate of Service

I HEREBY CERTIFY that on this 23rd day of February 2022, a true and complete copy of the foregoing has been filed with the Clerk of the Court pursuant to the Court's electronic filing procedures, and served on each party's respective counsel of record via the Court's electronic filing system.

/s/Thomas Melone