

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

ALLCO RENEWABLE ENERGY LTD., ALLCO  
FINANCE LTD., and THOMAS M. 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.

Civil Action No. 1:21-cv-11171-IT

Hon. Indira Talwani

**MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION  
IN THE ALTERNATIVE TO SEVER CLAIMS RELATING TO FEDERAL  
APPROVAL OF THE SOUTH FORK OFFSHORE WIND PROJECT**

**INTRODUCTION**

On February 23, 2022, Plaintiffs filed an Amended Complaint (“Amd. Compl.”) that, for the first time added to this case a challenge to a completely different set of federal agency actions: Defendant Agencies’ approvals and permits related to the South Fork wind turbine project (“South Fork Project”), which is located in waters off of Montauk, New York and Block Island, Rhode Island and which will transmit electricity through undersea cables to a transmission station in Wainscott, New York. South Fork is a wholly different project than the

Vineyard Wind Project, as it is different in size and scope, is being constructed by a different company, in different waters, sending its electricity over different cables, to a different state, pursuant to a different project plan and schedule, and was reviewed by Defendant Agencies under a wholly separate process, considering different sets of comments and data, resulting in separate and distinct approvals and administrative records supporting those approvals. Neither the Plaintiffs in *ACK Residents Against Turbines, et al. v. U.S. Bureau of Ocean Mgmt., et al.*, No. 1:21-cv-11390-IT (“*ACK Residents*”), which is coordinated with this action, nor the Plaintiffs in two cases in District Court in Washington, D.C. that are subject to pending motions to transfer to this Court,<sup>1</sup> raise claims related to the South Fork Project or any project other than Vineyard Wind.

Inclusion of a new set of claims, based on a different project, challenging different federal agency actions, which requires the collection and submission of a different administrative record from each individual Defendant Agency, would unduly complicate and delay the proceedings in this action. To the extent that Plaintiffs have standing and other bases to challenge the wholly separate South Fork Project (i.e., if Defendants’ Motion to Dismiss is denied), Plaintiffs’ South Fork claims should be severed into a separate action pursuant to Fed. R. Civ. P. 21, so that all claims relating to the Vineyard Wind Project by all parties may proceed under the schedule already established by the Court and under which all parties – including Plaintiffs in this case – have been operating. In order to avoid any potential unnecessary duplication of effort, the severed South Fork challenge should be assigned to Judge Talwani and

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<sup>1</sup> *Seafreeze Shoreside, Inc. et al. v. United States Dept. of Interior, et al.*, No. 1:21-cv-03276-CRC (“*Seafreeze*”), and *Responsible Offshore Development Alliance v. United States Dep’t. of Interior, et al.*, No. 1:22-cv-237-CRC (“*RODA*”).

coordinated with the present action only in those instances where the Court determines doing so will advance judicial economy.

### STATEMENT OF FACTS

Other than the fact that the Vineyard Wind Project and the South Fork Project both involve the generation of electricity through offshore wind turbines, the projects are wholly separate and distinct, as was the Defendant Agencies' review and approval of those distinct projects. The projects can be summarized as follows:

<u>Topic</u>	<u>Vineyard Wind</u>	<u>South Fork</u>
Location	14 miles south of Martha's Vineyard, MA <sup>2</sup>	35 miles east of Montauk, NY and 19 miles south of Block Island, RI <sup>3</sup>
Size	84 turbines <sup>4</sup>	12 turbines <sup>5</sup>
Output	800 Megawatts <sup>6</sup>	130 Megawatts <sup>7</sup>
Owner/Operator	Vineyard Wind, LLC	South Fork Wind, LLC
Legal Counsel	Sidley Austin, LLP	Latham & Watkins. LLP
Transmission Facility	Barnstable, MA <sup>8</sup>	Wainscott, NY <sup>9</sup>
State Receiving Electricity	Massachusetts – 400,00 homes <sup>10</sup>	New York – 70,000 homes <sup>11</sup>
State Approvals	Massachusetts and localities <sup>12</sup>	New York and localities <sup>13</sup>
<b><u>Agency Actions</u></b>		
BiOp from NMFS	Sept. 11, 2020 <sup>14</sup>	Oct. 1, 2021 <sup>15</sup>

<sup>2</sup> Ex. 1 (Vineyard Wind Joint Record of Decision) at 1.

<sup>3</sup> Ex. 2 (South Fork Record of Decision) at 7.

<sup>4</sup> Ex. 1 at 23.

<sup>5</sup> Ex. 2 at 7.

<sup>6</sup> Ex. 1 at 10, 23.

<sup>7</sup> Ex. 2 at 7.

<sup>8</sup> Ex. 1 at 10.

<sup>9</sup> Ex. 2 at 4, 7; <https://southforkwind.com/resources-and-faqs>

<sup>10</sup> <https://www.vineyardwind.com>

<sup>11</sup> <https://southforkwind.com/resources-and-faqs>

<sup>12</sup> <https://www.vineyardwind.com/vw-1-permitting>.

<sup>13</sup> <https://southforkwind.com/resources-and-faqs>

<sup>14</sup> Amd. Compl. at ¶ 2.

<sup>15</sup> Amd. Compl. at ¶ 5.

Final EIS from BOEM	March 9, 2021 <sup>16</sup>	Aug. 16, 2021 <sup>17</sup>
Record of Decision (“ROD”)	May 10, 2021 <sup>18</sup> (Joint ROD)	Nov. 24, 2021 (BOEM ROD) <sup>19</sup> Jan. 14, 2022 (Corps ROD) <sup>20</sup>
Incidental Harassment Authorization-NMFS	May 21, 2021 <sup>21</sup>	Dec. 21, 2021 <sup>22</sup>
BOEM COP Approval	July 15, 2021 <sup>23</sup>	Jan. 18, 2022 <sup>24</sup>
Corps Permit	August 9, 2021 <sup>25</sup>	Jan. 18, 2022 <sup>26</sup>

## ARGUMENT

### **I. THE COURT HAS BROAD DISCRETION TO SEVER CLAIMS CHALLENGING GOVERNMENT APPROVALS OF A DISTINCT PROJECT INTO A SEPARATE ACTION**

While a plaintiff may join certain claims and parties in a single action under Fed. R. Civ. P. 18, “it is emphasized that amended Rule 18(a) deals only with pleading [and] a claim properly joined as a matter of pleading need not be proceeded together with the other claims if fairness or convenience justifies separate treatment.” Fed. R. Civ. P. 18, Notes of Advisory Committee of Rule. *See also* Charles Alan Wright, et al., Fed. Prac. & Proc. § 1583 (April 2017); *Texas Farmers Ins. Co. v. Louisiana-Pacific Corp.*, 321 F.R.D. 561, 563 (E.D. Tex. 2017). Indeed, regardless of whether a plaintiff does or does not have the right to join various claims against various parties under Fed. R. Civ. P. 18-20, “pursuant to Fed. R. Civ. P. 21, the Court has

<sup>16</sup> Amd. Compl. at ¶ 2.

<sup>17</sup> Amd. Compl. at ¶ 5.

<sup>18</sup> Amd. Compl. at ¶ 2. Short supplements were issued later.

<sup>19</sup> Amd. Compl. at ¶ 5.

<sup>20</sup> <https://www.nan.usace.army.mil/Portals/37/NAN-2020-01079-EVI%20SOF%2014%20PM%20Sign.pdf>

<sup>21</sup> Amd. Compl. at ¶ 2.

<sup>22</sup> Amd. Compl. at ¶ 5.

<sup>23</sup> Amd. Compl. at ¶ 2.

<sup>24</sup> Amd. Compl. at ¶ 5.

<sup>25</sup> <https://www.nae.usace.army.mil/Portals/74/docs/regulatory/PublicNotices/2022/Permit-NAE-2017-01206.pdf>

<sup>26</sup> [https://www.nan.usace.army.mil/Portals/37/NAN-2020-01079%20South%20Fork%20Wind%20Issued%20Permit-Dated%2018%20JAN%202022\\_1.pdf](https://www.nan.usace.army.mil/Portals/37/NAN-2020-01079%20South%20Fork%20Wind%20Issued%20Permit-Dated%2018%20JAN%202022_1.pdf)

discretion to ‘sever any claim against any party.’” *Patrick Collins, Inc. v. Does 1-38*, 941 F. Supp. 2d 153, 161 (D. Mass 2013). *See also, SBO Pictures v. Does 1-41*, No. 12-10804, 2012 WL 5464182 at \*4 (D. Mass, Nov. 5, 2012); *J.T. v. de Blasio*, 500 F. Supp. 3d 137, 175 (S.D.N.Y. 2020) (“[T]he plaintiff is not the master of his complaint; Fed. R. Civ. P. 21 allows a court, on its own motion and at any time, to add or drop a party or to sever claims....”).

More particularly, Fed. R. Civ. P. 21 “furnishes the mechanism for separating a case into separate actions.” *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 558 (1st Cir. 2003). *See also Herklotz v. Parkinson*, 848 F.3d 894, 898 (9th Cir. 2017); *Gaffney v. Riverboat Servs. of Ind.*, 451 F.3d 424, 441 (7th Cir. 2006) (“As a general matter, Rule 21 severance creates two discrete, independent actions, which then proceed as separate suits for the purpose of finality and appealability.”); *E.S. v. Indep. Sch. Dist.*, No. 196, 135 F.3d 566, 568 (8th Cir. 1998) (“When a single claim is severed from a lawsuit, it proceeds as a discrete, independent action....”); *United States v. O’Neill*, 709 F.2d 361, 368 (5th Cir. 1983) (“Severance under Rule 21 creates two separate actions or suits where previously there was but one.”).

As explained in *Gonzalez-Camacho v. Banco Popular de Puerto Rico*, 318 F. Supp. 3d 461, 477 (D.P.R. 2018), “[t]he First Circuit has been adamant that ‘the decision to separate parties or claims is a case management determination, is “peculiarly within the discretion of the trial court,” and courts of appeals accord broad latitude to district courts in this area.’ *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 558 (1st Cir. 2003) (quoting *Gonzalez-Marin v. Equitable Life Assurance Society*, 845 F.2d 1140, 1145 (1st Cir. 1988).” *See also Lewis v. Walt Disney Parks & Resorts, U.S., Inc.*, No. 18-11947, 2019 WL 1505964 at \*6 (D. Mass. Apr. 5, 2019); *Depianti v. Jan-Pro Franchising Int’l, Inc.*, No. 08-10663, 2016 WL 4771056 at \*2 (D. Mass Sept. 13, 2016) (under Fed. R. Civ. P. 21 “District courts have ‘broad latitude’ to sever claims.”).

**II. SEVERANCE OF PLAINTIFFS' SOUTH FORK CLAIMS SERVES THE INTERESTS OF JUSTICE, THE COURT, AND THE PARTIES**

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In making a determination whether to sever certain claims into a separate action, the court considers whether: (1) the claims arise out of the same transaction or occurrence; (2) the claims present common questions of law and facts; (3) settlement of the claims or judicial economy would be facilitated; (4) prejudice would be avoided if severance were granted; and (5) different witnesses and documentary proof are required for the separate claims. *Spinal Imaging, Inc. v. State Farm Mut. Auto Ins. Co.*, No. 12-11498, 2013 WL 1755200 at \*4 (D. Mass April 24, 2013). *See also Depinanti v. Jan-Pro Franchising Int'l, Inc.*, 2016 WL 4771056 at \*2. Each of these factors supports severing Plaintiffs' new claims challenging Defendant Agencies' approvals and permits for the South Fork Project from Plaintiffs' claims challenging the Agencies' actions with regard to the Vineyard Wind Project.

**A. Plaintiffs' Claims Challenging the South Fork Approvals do Not Arise Out of the Same Transaction or Occurrence as the Vineyard Wind Project Approvals**

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Whether measured by the approvals and permits being challenged or by the underlying transaction (i.e., project) that is the subject of the challenged approvals and permits, it is self-evident that they are different for the South Fork Project than for the Vineyard Wind Project. The approvals occurred at different times and were based on the specific project being approved. While both projects have a common purpose (the generation of electricity through wind power), they are fundamentally different in size, scope, generation capacity, location, and virtually all other factors. For example, whether measured by number of turbines (that might, for instance, affect fish, wildlife or commercial fishing), electrical output measured in megawatts, or number of homes to be served, the Vineyard Wind Project is five to six times the size of the South Fork Project. These differences plainly required a wholly different analysis for each Project.

Further, it is clear that in issuing their approvals and permits, and as is required under each statute implicated in this action, each Defendant Agency considered the details of the specific project at issue and *that project's* potential impacts. Compare e.g., Ex. 1 (Record of Decision for Vineyard Wind Project) with Ex. 2 (BOEM Record of Decision for South Fork Project), describing separate and distinct projects, review processes, alternatives analyzed, impacts, schedules, number and scope of comments considered, local concerns raised, construction elements, affected parties, affected environments, persons and entities, etc. Accordingly, the government's approvals of the Vineyard Wind and South Fork Projects most assuredly involve very different transactions or occurrences.

**B. Plaintiffs' Claims Challenging the Two Projects Do Not Present Common Questions of Fact or Law**

Plaintiffs bring this action under the Administrative Procedure Act ("APA") and other statutes challenging Defendant Agencies' decisions based on the administrative record supporting and otherwise underpinning each Agency's decision. As a general matter, "two suits under the APA challenging distinct agency actions will not involve common questions of law or fact . . . [b]ecause each action will be based on a different administrative record [and thus] challenges to different actions will likely involve different questions of law and fact." *Habitat Educ. Ctr., Inc. v. Kimbell*, 250 F.R.D. 390, 394-95 (E.D. Wis. 2008).

In this case, Plaintiffs challenge multiple Agency approvals and permits of two distinct projects based on different administrative records supporting each separate Agency approval or permit. It is clear that the record supporting each Agency's approvals for one project cannot be used to assess the validity of its approvals or permits for the other project. For instance, in assessing whether the Corps of Engineers considered reasonable alternatives relating to a permit for the discharge of fill in connection with the laying of seabed cables to the transmission station

in Wainscott, New York for the South Fork Project, one would need to consult solely the administrative record of the South Fork decision, and the Corps could not rely on its analysis of the amount, location, and effects of fill relating to the cable for the Vineyard Wind Project, which runs to a transmission station in Barnstable, Massachusetts. Similarly, in their review of each project, the Agencies considered the nature and location of specific shipping lanes, the presence and nature of commercial fishing in the construction and wind turbine zone, as well as the number and location of ship voyages during construction. That analysis was different with regard to the two projects, as they involve different waters and projects of wholly different size and scope. This type of site-specific analyses was applied to virtually every facet of the separate reviews and approvals challenged by Plaintiffs. Thus, Plaintiffs' challenges to the Vineyard Wind Project and South Fork Project do not present common questions of fact.

While Plaintiffs challenge both projects under the same statutes, their claims also involve separate questions of law. To make a case that separate claims should be litigated together, "it is not enough that plaintiffs' claims arise under the same general law.... (shared operative facts are necessary, and 'joinder is not warranted simply because defendants allegedly committed the exact same violation of the law in exactly the same way).'" *Alston v. Town of Brookline*, No. 15-13987, 2016 WL 5745091 at \*13 (D. Mass. Sept. 30, 2016). *See also Botero v. Commonwealth Limousine Serv. Inc.*, 302 F.R.D. 285, 286–87 (D. Mass. 2014); *New Sensations, Inc. v. Does 1-174*, 947 F.Supp.2d 146, 148 (D. Mass. 2012).

While Plaintiffs argue that Defendant Agencies violated the same statutes on both projects, their claims are specific to each project. Plaintiffs assert that, based on the specific Agency analysis performed of each project, Defendants failed to satisfy the statutory requirements. For instance, Plaintiffs allege that the Corps failed to adequately consider each



Project's impacts on special aquatic sites. Amd. Compl. at Count VII. Special aquatic sites include underwater sanctuaries, wetlands, mud flats, vegetated shallows, and coral reefs. 40 C.F.R. §§ 230.40-45. In order to assess Plaintiffs' claim, the Corps needed to separately consider whether each project proposed a discharge of dredged or fill material into a special aquatic site, and that can only be done on a Project-specific basis. Like this claim, all of Plaintiffs' legal arguments are fact-intensive and wholly dependent on an examination of the administrative record with regard to each specific Project. In such instances, the claims should not be litigated together. *See, e.g., Coal. for a Sustainable Delta v. U.S. Fish and Wildlife Service*, No. 1:09-cv-480, 2009 WL 3857417 (E.D. Cal. Nov. 17 2009) (Plaintiffs' challenges to actions of the Fish and Wildlife Service, the Corps, the Environmental Protection Agency and other agencies, that combined to allegedly contribute to the same environmental injury, were severed because the agencies took different actions based on different records); *Kimbell*, 250 F.R.D. at 394-95 (denying a motion to consolidate the same plaintiffs' challenges to different project approvals even when similar law was relied upon because "a district court must review each project based on its own administrative record.").

**C. Judicial Economy Would be Facilitated by Severing Plaintiffs' Claims Challenging the South Fork Approval**

A court "may sever claims or parties 'when doing so would serve the ends of justice and further the *prompt and efficient disposition of the litigation.*'" *BBJ, Inc. v. MillerCoors, LLC*, No. 12-cv-13305-IT, 2015 WL 4465410 at \*8 (D. Mass. July 21, 2015) (emphasis added). The Court has already acted to ensure that the claims of various parties challenging the Vineyard Wind Project are considered and addressed in a timely and organized (i.e., prompt and efficient) manner and in a way where every Plaintiff Group's set of claims will be fully considered by the Court. Scheduling Order at Doc. 47. Injecting a whole new set of claims regarding a distinct

project, with an entirely separate set of administrative records, where the challenged approvals were made at different times and were based on different information and analyses, would unduly delay the pending challenge to the Vineyard Wind Project.

For instance, it would be impossible for the Defendant Agencies to compile administrative records for the South Fork Project on the current timetable established for the Vineyard Wind project, where the records are due in one month. As a result, the existing summary judgment schedule would need to be significantly altered, thereby delaying resolution of all claims related to the Vineyard Wind Project on a basis that has nothing to do with that Project. That is not merely a concern to Intervenor Vineyard Wind but also of Defendant Agencies as well as the other Plaintiffs challenging the Vineyard Wind Project, which includes *ACK Residents* and the plaintiffs in *Seafreeze* and *RODA*, assuming Defendant Agencies' motions to transfer those cases to this Court are granted. Resolution of the Vineyard Wind claims of all these parties should not be required to await the actions necessary to address a single Plaintiff Group's concern about the wholly unrelated South Fork project.

**D. Prejudice Will be Avoided if Severance Is Granted**

Plaintiffs will not be prejudiced if their claims challenging approvals of the South Fork Project are severed and heard separately. Once severed, Plaintiffs' claims regarding the South Fork Project can be heard on their own, not in conjunction with the claims of other Plaintiffs challenging only the Vineyard Wind Project. Moreover, although there should be little or no duplication of effort on Plaintiffs' part, given that they challenge two distinct sets of approvals of two distinct projects, any potential duplication can be easily avoided by severing the South Fork claims into an action before Judge Talwani, who can then coordinate this challenge with the

challenges to the Vineyard Wind project under specific circumstances, where such coordination would prove helpful or efficient.

In contrast, Defendants and Intervenor would be prejudiced if required to litigate these challenges to two separate projects in a single proceeding. First, Intervenor Vineyard Wind, LLC (and presumptive Intervenor South Fork, LLC) would be required to engage in detailed litigation that has nothing to do with their respective projects. The parties and Court would also need to engage in procedures to ensure that confidential business information from one project proponent is not shared with the other project proponent, its competitor.

Additionally, the Court has made a significant effort to resolve all claims relating to the Vineyard Wind Project in a timely manner so as not to unduly interfere with the Project, should the Federal Agencies approvals be upheld. The Court has established a schedule that balances the need for alacrity with providing Plaintiffs a full and fair opportunity to consider the Agencies' administrative records and fully set forth their claims based thereon. It would be impossible for the Court to maintain that schedule should the South Fork challenge not be severed, as it will take months for each of the Defendant Agencies to compile the lengthy administrative records associated with the various approvals of the South Fork Project. Accordingly, allowing the inclusion of Plaintiffs' new challenge to the South Fork Project to proceed in the same action will prejudice the right of both Defendant Agencies and Intervenor Vineyard Wind to obtain the prompt and comprehensive resolution of the claims filed against them.

**E. Different Documentary Proof is Required in the Challenges to the Vineyard Wind and South Fork Projects**

As outlined above, these projects generated different Agency reviews and analyses and are based on wholly different administrative records, which in an administrative review case

such as this one represents the entirety of the documentary proof. *E.g., Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1446 (1st Cir. 1992).

**CONCLUSION**

To the extent that the Court determines that Plaintiffs have standing and may otherwise pursue their claims, Plaintiffs' claims relating to the South Fork Project should be severed, so that multiple parties, including other Plaintiffs and Intervenors, that have nothing to do with the South Fork Project and/or no claims regarding that Project, are not subjected to delay and unnecessary litigation over unrelated claims. Accordingly, for the foregoing reasons, all of Plaintiffs' claims challenging Defendants' approvals and actions regarding the South Fork Project should be severed into a separate action that should be assigned to Judge Talwani.

Respectfully submitted,

DATED: March 14, 2022

*Of Counsel:*

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filings to the attorneys of record for Plaintiffs and all other parties, who have registered with the Court's CM/ECF system.

So certified this 14th day of March, 2022 by

/s/ Perry M. Rosen  
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