

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

ALLCO RENEWABLE ENERGY LIMITED,
ALLCO FINANCE LIMITED, AND THOMAS
MELONE,

Plaintiffs,

v.

DEBRA HAALAND, in her official capacity of
Secretary of the Interior, *et al.*,

Defendants,

and

VINEYARD WIND 1 LLC,

Intervenor-Defendant.

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

Hon. Indira Talwani

**MEMORANDUM OF LAW IN SUPPORT OF SOUTH FORK WIND, LLC'S
MOTION TO INTERVENE AS AN INTERVENOR-DEFENDANT**

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I. INTRODUCTION

South Fork Wind, LLC (“South Fork Wind”) is the developer of the South Fork Wind Farm and South Fork Export Cable (together, “South Fork Project”), the first offshore wind project that will deliver clean, reliable power to New York State. Plaintiffs have amended their Complaint in this action, which had previously only challenged Defendants’ approvals of the Vineyard Wind Project, to now also challenge the federal Defendants’ separate and distinct proceedings and approvals for the South Fork Project. South Fork Wind has direct, substantial, and legally protectable interests in the federal approvals Plaintiffs have just added to their challenge in this litigation, and Plaintiffs’ attempt to block the South Fork Project threatens to impair those interests. *See generally* First Amended Complaint [#58] (“FAC”).

In considering a similar request for intervention from Vineyard Wind 1 LLC (“Vineyard Wind”), this Court granted Vineyard Wind permissive intervention under Federal Rule of Civil Procedure 24(b). *See* Order [#43] (“Order”) at 13. South Fork Wind respectfully requests that the Court similarly grant South Fork Wind permissive intervention under Rule 24(b). South Fork Wind also believes it satisfies the requirements to intervene as of right pursuant to Rule 24(a)(2) but, consistent with the Order, requests only that the Court not foreclose South Fork Wind’s opportunity to move for intervention as of right in the future if necessary.

South Fork Wind’s participation in this case is necessary because its interests are unique and separate from those of the existing Defendants and Intervenor-Defendant. Over the course of nearly a decade, South Fork Wind has sought, consulted on, and received over 20 required permits and approvals from federal and state authorities—including those directly at issue in this case. In the course of those processes, South Fork Wind has invested tens of millions of dollars in the South

Fork Project and has undertaken hundreds of millions of dollars in contractual obligations to construct this project.

In contrast to the current parties to this case, South Fork Wind is the only party that will bear the substantial financial and contractual consequences if the South Fork Project approvals are vacated. Neither federal Defendants nor Intervenor-Defendant Vineyard Wind (collectively “Defendants”) can speak to South Fork Wind’s unique project, construction schedule, and other potentially impacted interests. Indeed, even a sufficiently long construction delay stemming from the relief sought in this action could have a cascading effect, including contract penalties, loss of equipment and crew reservations, and could ultimately prevent the South Fork Project from meeting the construction windows necessary to meet the commercial operation date established under its power purchase agreement. If Plaintiffs succeeded in vacating the South Fork Project approvals, it could cost South Fork Wind and its affiliates in excess of \$200 million. Furthermore, because the administrative record for the South Fork Project’s permitting process is entirely distinct from the Vineyard Wind Project’s record, Intervenor-Defendant Vineyard Wind cannot speak to the facts relevant to the South Fork Project, or application of the law to those facts, because there is no overlap between the two projects’ respective federal permitting processes. Thus, South Fork Wind’s interests are unique, and it is in a singular position to aid the Court’s understanding of the issues in this case specific to the South Fork Project. None of the existing parties would be prejudiced should South Fork Wind be permitted to intervene, given that South Fork Wind moved to intervene less than three weeks after Plaintiffs’ amended complaint added challenges to the South Fork Project, and that South Fork Wind is prepared to follow any schedule ordered by this Court.

Moreover, given the distinct set of permits and approvals issued by the federal Defendants for the South Fork Project, South Fork Wind supports the federal Defendants' motion to sever the claims against the two separate projects. *See* [#67]. If granted intervention South Fork Wind intends to join that motion, seeking severance under Federal Rule of Civil Procedure 21, such that any challenge to the South Fork Project permits and approvals by Plaintiffs can proceed before this Court in a separate action from that concerning the Vineyard Wind Project, to avoid any future potential for prejudice to the parties and for judicial efficiency.¹

South Fork Wind submits a Proposed Answer with its Motion to Intervene in accordance with Rule 24(c). Should the Court grant South Fork Wind's Motion to Intervene, South Fork Wind also intends to join the federal Defendants' motion to dismiss [#64].

In accordance with Local Rule 7.1(a)(2), counsel for South Fork Wind has conferred with counsel for the current parties to this suit. Intervenor-Defendant Vineyard Wind does not oppose South Fork Wind's intervention, the government has indicated that it takes no position as to South Fork Wind's intervention, and Plaintiffs have stated that they oppose South Fork Wind's intervention.

II. BACKGROUND

The South Fork Project involves the construction of an approximately 130-megawatt ("MW") commercial-scale wind energy facility in the Atlantic Ocean approximately 35 miles southwest of the portion of Edgartown, Massachusetts closest to Nantucket Sound and 19 miles southeast of Block Island, Rhode Island. *See* Declaration of Robert Mastria ("Mastria Decl.") ¶ 4, Doc. No. 79 at 3. The South Fork Wind Farm's twelve wind turbine generators and associated

¹ South Fork Wind understands that this Court will already be hearing two separate cases on this same briefing schedule (*see* [44]): the one at issue here and *Nantucket Residents Against Turbines et al. v. United States Bureau of Ocean Energy Management et al.*, Civ. No. 1:21-civ-11390-IT.

facilities will be installed on the Outer Continental Shelf (“OCS”) in federal waters, and the South Fork Export Cable (“SFEC”) will connect the South Fork Wind Farm to the mainland electric grid at a substation in East Hampton, New York. *See id.* ¶¶ 4-5.

The South Fork Project is a key component of both the federal government’s and New York State’s laws and policies to fight climate change. In addition to broader greenhouse gas emission targets,² the federal government set a goal of 30 gigawatts (“GW”) of offshore wind by 2030. *See* FACT SHEET: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs (March 29, 2021).³ Similarly, New York State’s climate goals further require, as a means to achieving its own target of 100% zero-emission electricity by 2040, the development of 9 GW of offshore wind by 2035. *See* New York State Climate Leadership and Community Protection Act of 2019, §§ 1(12)(d) & 4. The South Fork Project is a significant step in achieving all of these goals. *See* Mastria Decl. ¶ 2, Doc. No. 79 at 2.

A. Multi-Year Federal Consultation and Approval Process

South Fork Wind has invested significant resources in the extensive, multi-year planning and development process for the South Fork Project, including by developing voluminous technical and scientific submissions to federal, state, and municipal agencies and participating in public review processes. *See id.* ¶ 11. South Fork Wind’s direct involvement with Defendant Bureau of Ocean Energy Management (“BOEM”) goes back to July 31, 2013, when BOEM conducted a competitive lease sale for commercial leasing for wind power generation on the OCS offshore Rhode Island and Massachusetts. *See id.* ¶ 12. Deepwater Wind New England, LLC won

² <https://www.whitehouse.gov/wp-content/uploads/2021/10/US-Long-Term-Strategy.pdf>.

³ <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-biden-administration-jumpstarts-offshore-wind-energy-projects-to-create-jobs/>.

the lease, which was subsequently bifurcated and a new, smaller lease area was assigned to South Fork Wind.⁴ *See id.*

After winning the lease, South Fork Wind and its affiliates undertook years of extensive surveys to understand and characterize the environment and the South Fork Project site. These included meteorological, bathymetric, geological, geotechnical, geophysical, biological, archaeological, hazard and oceanographic surveys. *See id.* ¶ 13. As part of this work, South Fork Wind developed and submitted a Site Assessment Plan (“SAP”), which was approved by BOEM.⁵ *See* 30 C.F.R. §§ 585.605-18.

In June 2018, South Fork Wind also prepared a detailed Construction and Operations Plan (“COP”), which South Fork Wind submitted to BOEM and which was thereafter refined several times to add updated technical information as the development process progressed. *See* Mastria Decl. ¶ 14, Doc. No. 79 at 6. The final version⁶ is thousands of pages long, including appendices, and required extensive effort and expense to prepare.⁷ On October 19, 2018, BOEM issued a Notice of Intent (“Notice”) to prepare an Environmental Impact Statement (“EIS”) under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (“NEPA”) for its review of the COP. *See* Mastria Decl. ¶ 15, Doc. No. 79 at 6.

⁴ For clarification, and because different entities appear in different documents in the administrative record, the South Fork Project is owned by South Fork Wind. South Fork Wind is a joint venture indirectly owned in equal part by Orsted North America Inc. and Eversource Energy. South Fork Wind was formerly known as Deepwater Wind South Fork, LLC. In this motion, “South Fork Wind” shall refer to South Fork Wind, LLC.

⁵ https://www.boem.gov/sites/default/files/renewable-energy-program/State-Activities/RI/SIGNED_BOEM-to-DWW_SAP-Approval-for-OCS-A-0486_101217-%281%29.pdf.

⁶ <https://www.boem.gov/sites/default/files/documents/renewable-energy/South-Fork-Construction-Operations-Plan.pdf>.

⁷ <https://www.boem.gov/renewable-energy/state-activities/volume-ii-appendices>.

That Notice began a three and a half-year period of environmental review by the federal government involving South Fork Wind, 10 federal agencies, 5 state and local cooperating agencies, and an extensive array of other stakeholders, ranging from the fishing industry, to local communities, to American Indian tribes. *See id.* The draft EIS (“DEIS”) was published on January 4, 2021, and after accepting and responding to public comments, BOEM published the final EIS (“FEIS”) on August 16, 2021.⁸ Appendix A to the FEIS describes the extensive consultations and public involvement BOEM undertook in its NEPA review process, as well as the extensive number of required federal, state, and local permits, consultations, and approvals required for the South Fork Project. *See id.* ¶¶ 15-16.

The process included three public scoping meetings during the public comment period at multiple locations near the South Fork Project, where interested parties were invited to offer feedback and identify issues and potential alternatives for BOEM to consider in the EIS, as well as three additional public meetings during the public comment period on the DEIS. *See id.* ¶ 17. South Fork Wind attended all of the meetings. *See id.* South Fork Wind also submitted comments in this administrative process. *See id.* According to Regulations.gov, 4,620 comments were received on the DEIS,⁹ and BOEM’s responses to those comments span approximately 513 pages of FEIS Appendix I. *See id.* On November 24, 2021, BOEM issued a Record of Decision (“ROD”) documenting both the National Marine Fisheries Service (“NMFS”) decision to issue an Incidental Harassment Authorization (“IHA”) under the Marine Mammal Protection Act, 16 U.S.C. §§ 1361 *et seq.*, and the U.S. Department of the Interior’s decision to approve the COP with some

⁸ The DEIS and FEIS are available under the “Construction and Operations Plan” tab at <https://www.boem.gov/renewable-energy/state-activities/south-fork>.

⁹ <https://www.regulations.gov/docket/BOEM-2020-0066>.

modifications. BOEM subsequently issued the COP approval on January 18, 2022.¹⁰ *See* Mastria Decl. ¶ 18, Doc. No. 79 at 7.

In parallel, South Fork Wind undertook many other applications to and consultations with federal agencies. Just a few examples are the 17 months of consultations with numerous parties, including eight American Indian tribes, the Massachusetts State Historic Preservation Officer (“SHPO”),¹¹ the Rhode Island SHPO, the New York Office of Parks, Recreation and Historic Preservation (which includes the New York SHPO), the National Park Service, and the Advisory Council on Historic Preservation in order to finalize a Memorandum of Agreement (“MOA”) under Section 106 of the National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq.*; the “no-jeopardy” biological opinion issued by NMFS under the Endangered Species Act, 16 U.S.C. §§ 1631 *et seq.*; the OCS air quality permit obtained from the U.S. Environmental Protection Agency (“EPA”); and the Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, and Section 404 of the Clean Water Act, 33 U.S.C. §§ 1344 *et seq.*, permit that South Fork Wind obtained from the U.S. Army Corps of Engineers, among others. *See* Mastria Decl. ¶¶ 22-26, Doc. No. 79 at 9-10.

B. State and Local Consultations and Approvals

South Fork Wind also engaged with state and local entities to obtain the requisite approvals for aspects of the South Fork Project under state jurisdiction, including onshore construction of the export cable that commenced February 1, 2022. *See id.* ¶ 19. This included a nearly three-year long environmental review process before the New York State Public Service Commission

¹⁰ Both the ROD and the COP approval are available under the “What’s New?” tab at <https://www.boem.gov/renewable-energy/state-activities/south-fork>.

¹¹ The Massachusetts SHPO participated in the Section 106 consultation for the South Fork Project because BOEM determined the project may be visible from three historic properties on the western portion of Martha’s Vineyard.

that resulted in a Joint Proposal signed by 5 state agencies, and approval by the New York State Public Service Commission of those portions of the project within New York State or in New York State waters.¹² *See id.* ¶ 19. This extensive process reflects South Fork Wind’s further diligence and investment in the state permitting process, resulting in interests that are indirectly threatened by Plaintiffs’ action against South Fork Wind’s federal permits.

C. Power Purchase Agreement

South Fork Wind and the Long Island Power Authority (“LIPA”) executed a Power Purchase Agreement (“PPA”) in February 2017. *See id.* ¶ 7. South Fork Wind and LIPA executed an amendment to the PPA in March 2017, and a second amendment to the PPA in September 2020. *See id.* To date, South Fork Wind has incurred financial obligations and commercial commitments in the hundreds of millions of dollars developing, permitting, engineering, and preparing for and commencing construction of the South Fork Project. *See id.* ¶ 8. The PPA includes penalties if the South Fork Project is delayed in achieving commercial operation within the timeframe established under the PPA. *See id.* ¶¶ 28-31. In that circumstance, South Fork Wind could be required to pay LIPA liquidated damages equal to \$300 per MW per day for each day of delay for the shortfall up to a maximum of 365 days of delay, which could be as much as approximately \$10 million. *See id.* If the South Fork Project does not achieve commercial operation by 365 days following the target date established under the PPA, LIPA may have the right to terminate the PPA and seek additional liquidated damages in the amount of the security provided by South Fork Wind to LIPA. *See id.* If the PPA is terminated, South Fork Wind could lose all of its investment in the South Fork Project, as well as all future profits. *See id.*

¹² <https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={9DF79C78-69C7-4DA0-B119-D0534E539178}>.

The relief Plaintiffs seek here directly threatens the federal approvals authorizing South Fork Wind to construct and operate the South Fork Project and meet South Fork Wind's obligations under the PPA. Plaintiffs allege that the South Fork Project's approvals violate federal law and ask this Court to order BOEM to vacate project approvals, including the FEIS, ROD, and COP approval, pending compliance with federal law, and to enjoin BOEM from initiating or authorizing any activities in furtherance of the South Fork Project unless and until the federal Defendants comply with Plaintiffs' interpretation of federal requirements. *See* FAC at 48-49. All told, South Fork Wind and its affiliates could lose in excess of \$200 million in investments to date and incurred financial obligations and commercial commitments if Plaintiffs succeed in blocking the South Fork Project. *See* Mastria Decl. ¶ 30, Doc. No. 79 at 11.

III. ARGUMENT

A. The Court Should Grant South Fork Wind Permissive Intervention

The Court should grant South Fork Wind permissive intervention because it meets the requirements of Rule 24(b) for the same reasons the Court determined Intervenor-Defendant Vineyard Wind did. Under Rule 24(b), a would-be party can intervene:

when an applicant's claim or defense and the main action have a question of law or fact in common In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b)(2). The Court otherwise has "broad discretion" to grant permissive intervention." *In re Thompson*, 965 F.2d 1136, 1142 n.10 (1st Cir. 1992).

First, like Intervenor-Defendant Vineyard Wind, South Fork Wind has significantly protectable interests at stake with respect to South Fork Wind's permits newly introduced into this action—although those interests are separate and distinct from Vineyard Wind's. South Fork holds the OCS lease and over 20 required permits and approvals from federal and state authorities. South

Fork has already invested tens of millions of dollars in pursuit of and reliance on those permits and approvals. *See* Mastria Decl. ¶¶ 11, 27-30, Doc. No. 79 at 11. All of these permits are now final, so South Fork Wind’s interest in them is “sufficiently direct and substantial to support intervention by right.” Order [#43] at 9. Indeed, even if a showing of standing were required at this stage (*see id.* at 6-7), these interests are sufficient to establish standing for South Fork Wind. *See Cotter v. Mass. Ass’n of Minority L. Enf’t Officers*, 219 F.3d 31, 34 (1st Cir. 2000) (“[I]n the ordinary case, an applicant who satisfies the ‘interest’ requirement of the intervention rule is almost always going to have a sufficient stake in the controversy to satisfy Article III as well.”).

Second, Plaintiffs seek relief that would adversely affect South Fork Wind’s aforementioned interests. If the Court were to vacate approvals specific to the South Fork Project, such relief would clearly impair South Fork Wind’s interests. In fact, the relief Plaintiffs seek could cost South Fork Wind and its affiliates in excess of \$200 million. *See* Mastria Decl. ¶¶ 27-30, Doc. No. 79 at 11. These risks are sufficient to establish potential impairment supporting intervention. *See* Order [#43] at 9-10.

Moreover, as the Court already determined for Intervenor-Defendant Vineyard Wind, South Fork Wind’s defense of the approvals for the South Fork Project that Plaintiffs are challenging “undoubtedly presents common questions of law and fact” with the main action as it relates to the South Fork Project. Order [#43] at 13 n.4. South Fork Wind’s timely motion and its intervention at this stage in the case also would not “unduly delay or prejudice the adjudication of the original parties’ rights” pursuant to Rule 24(b)(3). Rather, South Fork Wind seeks to intervene less than three weeks after the Complaint was amended to include the South Fork Project’s approvals. South Fork Wind is prepared to participate in this case in accordance with any schedule set by this Court and will be seeking to sever the claims related to the South Fork Project from the

existing claims related to Vineyard Wind, further eliminating any potential for prejudice to the parties interested in the Vineyard Wind Project portion of the case.

South Fork Wind's additional interest in the applicable state and local approvals not directly challenged here (but whose entire purpose could be frustrated by Plaintiffs' action) and South Fork Wind's ability to apprise the Court of the ramifications and interplay between those relevant state and local processes and the federal approvals at issue here further support South Fork Wind's intervention. *See* Order [#43] at 5 ("When evaluating a request for permissive intervention, 'the district court can consider almost any factor rationally relevant' when exercising its 'very broad discretion in granting or denying the motion.'") (quoting *Daggett v. Comm'n on Governmental Ethics & Election Pracs.*, 172 F.3d 104, 113 (1st Cir. 1999)).

In short, South Fork Wind is similarly situated to Intervenor-Defendant Vineyard Wind with respect to its own project, moves to intervene at a very early stage, and seeks to defend the same types of interests as Intervenor-Defendant Vineyard Wind—though, obviously, with respect to different permits and approvals and on an entirely different administrative record from those for the Vineyard Wind Project. Therefore, the Court's rationale in finding permissive intervention appropriate for Vineyard Wind should apply to South Fork Wind as well. *See* Order [#43] at 13 ("Given that Vineyard Wind timely moved to intervene, agreed to work with the existing parties to avoid unnecessary delay as a result of its intervention, and has an incentive to resolve this matter promptly, the court concludes permitting Vineyard Wind to intervene under Rule 24(b) would not create undue delay or prejudice the original parties in either case. Accordingly, having determined that Vineyard Wind has significant interests at stake in the litigation and that the outcome may impair its ability to protect those interests, the court finds permissive intervention appropriate.").

B. South Fork Wind Also Qualifies for Intervention as of Right

South Fork Wind also respectfully sets forth its qualification for intervention as of right. Under Rule 24(a)(2), courts grant intervention as of right where a party: (1) timely filed an application, (2) claims an interest in subject of the action, (3) would have its interest impaired by the disposition of the action, and (4) shows its interest is not adequately protected by the current parties to the action. *See Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 41 (1st Cir. 1992). South Fork Wind satisfies all four requirements.

First, South Fork Wind’s motion is timely because it was filed less than three weeks after Plaintiffs amended their Complaint to include South Fork Wind’s permits—thus at the earliest possible time. *Second*, as described above, after almost a decade of development efforts, South Fork Wind has significant protectable interests in the many permits and approvals regarding the construction, maintenance, and operation of the South Fork Project. *See* Mastria Decl. ¶¶ 11, 27-30, Doc. No. 79 at 5 & 11. *Third*, without intervention, disposition of the action would impede South Fork Wind’s ability to protect its interests, as the relief Plaintiffs seek here could cost South Fork Wind and its affiliates to lose in excess of \$200 million. *See id.* *Finally*, although the federal Defendants and South Fork Wind nominally share the same objective to defend the federal agencies’ approvals, the broad public interest the federal government defends is distinct from the more specific interests of South Fork Wind (including South Fork Wind’s interests in meeting its contractual obligations, protecting its financial investment in the South Fork Project, and fulfilling its commitment to advancing New York State’s policies to fight climate change).¹³ *See id.* ¶¶ 27-

¹³ South Fork Wind recognizes the law of this Circuit providing for a rebuttable presumption of adequate representation by the government in certain instances. *See Mass. Food Ass’n v. Mass. Alcoholic Beverages Control Comm’n*, 197 F.3d 560, 567 (1st Cir. 1999) (presumption that the government adequately represents “all private defenders of the statute or regulation unless there is a showing to the contrary.”). While South Fork Wind believes it will more vigorously defend its

30. And Intervenor-Defendant Vineyard Wind, which has no insight into or interest in South Fork Wind's distinct approval processes and separate factual administrative record, cannot adequately represent South Fork Wind's interests either.

In contrast, South Fork Wind has unique information on state and local permitting processes, onshore construction and timing, as well as its contracts, future obligations, expenditures, and activities necessary to construct and operate the South Fork Project existing parties to this litigation do not have. *See id.* ¶ 32. South Fork Wind therefore also qualifies for intervention as of right, and requests that the Court not foreclose South Fork Wind's opportunity to move for intervention as of right in the future if necessary. *See also Wilderness Society v. U.S. Forest Service*, 630 F.3d 1173, 1180 (9th Cir. 2011) (*en banc*) (overruling prior precedent and affirming that intervention as of right shall be granted whenever the elements of Rule 24(a)(2) are met, including in NEPA cases in defense of the government).

IV. CONCLUSION

For the foregoing reasons, South Fork Wind respectfully requests that the Court grant its motion to intervene in this case.

permits and unique economic interests such that the presumption of adequate representation is overcome, South Fork Wind requests the opportunity to seek renewed consideration of intervention as of right “should new considerations as to the adequacy of the government's representation” arise as the litigation proceeds. Order [#43] at 12.

Dated: March 15, 2022

Respectfully submitted,

/s/ U. Gwyn Williams

U. Gwyn Williams (BBO# 565181)
Alexander P. Rothschild (BBO# 704521)
LATHAM & WATKINS LLP
200 Clarendon Street
Boston, MA 02116
Telephone: (617) 948-6000
Facsimile: (617) 948-6001
gwyn.williams@lw.com
alex.rothschild@lw.com

Stacey L. VanBelleghem (DC Bar No. 988144)
(*Pro Hac Vice* pending)
555 Eleventh Street, NW
Suite 1000
Washington, D.C. 20004
Telephone: (202) 637-2200
Facsimile: (202) 637-2201
stacey.vanbelleghem@lw.com

*Attorneys for Proposed Intervenor –
Defendant South Fork Wind, LLC*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, which was filed with the Court through the CM/ECF system, will be sent electronically to all registered participants as identified on the Notice of Electronic Filing (“NEF”), and paper copies will be sent March 15, 2022 to those identified as non-registered participants.

/s/ U. Gwyn Williams
U. Gwyn Williams