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, JANET COIT, in her 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 **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO SEVER**

Plaintiffs, Allco Renewable Energy Limited, Allco Finance Limited and Thomas Melone submit this memorandum of points and authorities in opposition to the Defendants' motion to sever (ECF No. 58).

RELEVANT FACTS

The Vineyard Wind ("VW") project and the South Fork Wind ("SFW") project are two peas in a pod and must be analyzed together in the same analysis under the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA"), the Outer Continental Shelf Lands Act ("OCSLA"), and the Marine Mammal Protection Act ("MMPA"). The Defendants have already conceded that fact in the supplemental draft environmental impact statement (Exhibit 1 hereto, the "SEIS") and the final environmental impact statement (*see*, ECF No. 86-1) (the "VW FEIS").

SEIS at page ES-2 states:

> This SEIS reviews resource-specific baseline conditions and, using the methodology and assumptions outlined in Chapter 1 and Appendix A, assesses

> cumulative impacts that could result from the incremental impact of the Proposed Action and action alternatives when combined with past, present, or reasonably foreseeable activities, including other future offshore wind activities. To develop the cumulative activities scenario analyzed in this SEIS, BOEM conducted a thorough process to identify the possible extent of reasonably foreseeable offshore wind development on the Atlantic OCS. As a result of this process, BOEM has assumed that approximately 22 gigawatts of Atlantic offshore wind development are reasonably foreseeable along the east coast. Reasonably foreseeable development includes 17 active wind energy lease areas (16 commercial and 1 research). These include named projects and assumed future development within the remainder of lease areas outside of named project boundaries.

Appendix A of the SEIS lists the 130 MW SFW project as one of the peas in the same pod as the VW project because it is reasonably foreseeable. The SEIS at 1-1 states: "This SEIS focuses on the potential cumulative environmental, social, economic, historic, and cultural impacts that could result from the construction, operation, maintenance, and future decommissioning of the proposed Project, *when combined with other past, present, or reasonably foreseeable actions or projects*." (Emphasis added.)

The Defendants' SEIS concedes that to be "NEPA-complaint" the Defendants must consider not only the VW project but, at a minimum, the projects with a proposed or approved construction and operations plan which "encompass[] the following potential development: Vineyard Wind 1 (proposed Project, 800 MW); All projects with COPs approved or submitted (in addition to the proposed Project), which includes South Fork Wind, Bay State Wind, Skipjack Wind, Ocean Wind, Coastal Virginia Offshore Wind (CVOW), and Empire Wind) (5.4 GW)." SEIS 1-2.

The FEIS, expanded on the number of foreseeable actions that the Defendants' review of VW must include in order to be NEPA-compliant:

> BOEM decided to expand its planned action analysis and has concluded that approximately 22 GW of Atlantic offshore wind development is reasonably foreseeable, which encompasses the following potential development described in the June 2020 SEIS (with the MWs of power in parentheses including both the item and all items above it):
> • Vineyard Wind 1 Project (800 MW).
> • All projects with power offtake awarded (with the exception of Bay State Wind), which includes all of the projects listed in the previous criteria as well as Mayflower Wind (6.4 GW).
> • All projects with COPs approved or submitted (in addition to the proposed Project), which includes South Fork Wind, Bay State Wind, Skipjack Wind, Ocean Wind, Coastal Virginia Offshore Wind, Vineyard Wind 2 (also referred to

> as Park City Wind), Sunrise Wind, Revolution Wind, US Wind, and Empire Wind) (9.5 GW).
> • All projects for which the developer has publicly announced development plans, regardless of whether a COP has been approved or submitted or offtake awarded (in addition to the projects identified in the previous criteria), which includes Liberty Wind and Dominion Energy (13.5 GW)."[1]

The Defendants claim that they analyzed the impacts of SFW in connection with the review of VW, *see,* FEIS ES-2:

> This FEIS incorporates the draft analyses presented in the previously published DEIS and SEIS. The FEIS presents resource-specific baseline conditions and, using the methodology and assumptions outlined in Chapter 1 and Appendix A, assesses impacts that could result from the incremental impact of the Proposed Action and action alternatives when combined with past, present, or reasonably foreseeable activities, including other future offshore wind activities.

The VW FEIS makes specific references to the SFW project in reviewing the VW project at pages 1-6, 3-88 ("the South Fork Wind Project (OCS-A 0486) cable laying would overlap in time with the Proposed Action"), 3-89 (discussing the timing of pile driving for Vineyard Wind 1, South Fork wind and other foreseeable projects), 3-90, 3-112, 3-188, 3-223, 3-255, 3-257 and 3-264.

By proposing to break up Plaintiffs' claims into duplicative judicial proceedings, under the guise of seeking a speedier result for VW in this Court, the Defendants would have this Court effectively gut Plaintiffs' case so the Defendants can avoid having to confront the merits of those claims. Because the motion is not well-founded under Rule 21, seeks to abrogate Plaintiffs' rights under Rule 18, would not serve the interests of justice, and would ignore the requirements of NEPA, undermine Plaintiffs' claims under the ESA, the OCSLA and the MMPA, the Court should deny the motion.

ARGUMENT

I. Rule 21 Does Not Permit The Severance Of Plaintiffs' Claims.

The Defendants do not – and cannot – explain how the Court could somehow "sever" out the broadly-framed cumulative claims that are alleged in Plaintiffs' First Amended Complaint ("FAC") into a neat package of VW claims and SFW claims. Nor do they explain the basis for

[1] *See*, FEIS at 1-6.

separating a project whose information was purportedly reviewed in connection with the review of the VW project, which information is and must remain part of the administrative record in this case. They merely assert that "[t]he court has broad discretion to sever claims." *See* Defs' Memo. at 4. But that argument extends Rule 21 far beyond its context, ignores other applicable rules, and is not supported by the cited cases.

Rule 18(a) provides that a party "may join . . . as many claims as it has against an opposing party." Fed. R. Civ. P. 18(a). *See also* Fed. R. Civ. P. 8(d)(2) (a party "may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count . . . or in separate ones"). The Federal Rules thus allow Plaintiffs to combine their claims challenging the Defendants actions into a single complaint. In contrast to Rule 18(a)'s authorization of joinder of claims, Rule 21 is entitled "Misjoinder and Non-Joinder of Parties," and provides that courts may add or drop parties in order to ensure that parties are correctly joined in an action, as follows:

> Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

See Fed. R. Civ. P. 21.

The Defendants seize on the last sentence of Rule 21 to assert that the Court is authorized to sever all of Plaintiffs' claims related to what they incorrectly allege is a project that can be separated from VW. That argument overstates the authority granted under Rule 21, which—as its title and plain language show—is directed at severing out individual claims to ensure that proper parties are present or that an action can proceed efficiently before the court. The Defendants are not attempting to preserve jurisdiction over proper parties or ensure efficient proceedings before this Court. Instead, they seek to multiply the proceedings before this Court without any showing that there are improper parties or improper claims. Because there is no question of misjoinder of parties or improper claims here, the Defendants cannot use Rule 21 to "sever" Plaintiffs' claims that are presented before this Court.

Rule 21 provides that "[t]he court may also sever any claim against a party." The

advisory committee notes to Rule 21 of the Federal Rules of Civil Procedure indicate that this rule was directed at a "defect of parties." *See Southern Electric Generating Co. v. Allen Bradley Co.*, 30 F.R.D. 135, 136 (S.D.N.Y. 1962) (stating that Rule 21 "'is addressed to the court's discretion, [and] application of the rule is premised upon a defect of parties'"). *See also, Kirkland v. Legion Ins. Co*., 343 F.3d 1135, 1142 (9th Cir. 2003):

> Rule 21 is directed at "defect of parties." FED. R. CIV. P. 21 advisory committee notes. It is viewed as a grant of "discretionary power [to the federal court] to perfect its diversity jurisdiction by dropping a nondiverse party provided the non-diverse party is not indispensable to the action under Rule 19."

The cases cited by Defendants in their memorandum do not support their invocation of Rule 21 to completely sever anything and everything related to SFW. The cases instead confirm that Rule 21 is limited to situations that involve severing <u>parties</u> in order to preserve a court's jurisdiction, ensure judicial efficiency, or serve the interests of justice in a remaining case.

The Defendants cite *Patrick Collins, Inc. v. Does 1-38*, 941 F. Supp. 2d 153, 161 (D. Mass 2013) but that case involved the severing of Does 2-38 so that the case could proceed against Doe 1 (all of whom were accused of violating plaintiff's copyright in an adult film). *SBO Pictures v. Does 1-41*, No. 12-10804, 2012 WL 5464182 at *4 (D. Mass, Nov. 5, 2012) similarly involved claimed copyright infringement of adult films by various Does with the court severing all claims against Doe #1. *J.T. v. de Blasio*, 500 F. Supp. 3d 137, 175 (S.D.N.Y. 2020) is also distinguishable. There, like the other two cases, the defendants were different. Here that is not the case. The government agencies are the same. Moreover, the Defendants here overstate what the court said in *J.T. v. de Blasio.* There the court stated that:

> [b]ecause Rule 20 joinder is permissive, not required, a court is perfectly free to deny a plaintiff permission to join claims against different defendants. And in this respect the 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, on just terms. This means, "If a court concludes that defendants have been improperly joined under Rule 20, it has broad discretion under Rule 21 to sever parties or claims from the action." *Kalie v. Bank of Am. Corp*., 297 F.R.D. 552, 556 (2013) (citation omitted).

Other cases show the impropriety of what Defendants seek to do. In *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1297 (9th Cir. 2000), multiple plaintiffs were severed from an

employment discrimination case to prevent prejudice to the defendant that might arise from a single trial with all plaintiffs testifying together, and the potential for jury confusion arising from the separate employment agreements for plaintiffs in six different states. Similar concerns about jury confusion or prejudice from a joint trial are obviously not present in this APA judicial review proceeding. *See also Ferger v. C.H. Robinson Worldwide, Inc.*, No. 06-cv-174-RSL, 2006 WL 2091015, at *1 (W.D. Wash. July 25, 2006) (denying similar motion).

In *Coughlin v. Rogers*, 130 F.3d 1348, 1350-51 (9th Cir. 1997), numerous plaintiffs filed suit without satisfying the test for permissive joinder under Fed. R. Civ. P. 20. Hence the Ninth Circuit affirmed the district court's order severing them under Rule 21. *Coughlin* is inapposite here, as Plaintiffs have properly brought their challenges against the Defendants under the APA and the other federal statutes and Rule 18; and there is no question of improper joinder under Rule 20. Similarly, in *Khanna v. State Bar of Calif.*, No. 07-cv-2587- EMC, 2007 WL 2288116 (N.D. Cal. Aug. 7, 2007), a party who did not respond to the complaint was severed in order to allow the litigation to proceed.

As stated in *Moore's Federal Practice, Civil* § 21.05: "Rule 21 gives the court tools to jettison those parties and claims that are not within its jurisdiction or that are not conveniently prosecuted together, preserving parties and claims that are properly before it. Typically, the court uses this power to drop parties or sever claims involving parties whose presence destroys diversity of citizenship jurisdiction." Likewise, the discussion in 7 Wright, Miller & Kane, *Federal Practice and Procedure, Civil* § 1689 notes that: "The final sentence of [Rule 21] explicitly provides that 'any claim may be severed and proceeded with separately.' However, this provision must be read in conjunction with . . . Rule 18, which provides the parties with great freedom in the joinder of claims. . . ." Again, the Defendants ignore Rule 18 and the fact that Plaintiffs have properly filed this case in this Court under it.

The premise of the Defendants' motion is thus fatally flawed. Here the Defendants are the same in the case of the VW project and the SFW project. In addition, those same Defendants concede that both projects are joined at the hip under their reviews. Defendants cite no case

where claims against the same defendants were severed that, as here, are properly presented under Rule 18. The Court is not broadly authorized under Rule 21 to effectively rewrite Plaintiffs' claims and then sever them, even though they are properly presented. Accordingly, the Motion to Sever should be denied on this ground alone.

II. Rule 21 Does Not Permit The Modification Of Plaintiffs' Claims

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. 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. 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).

The Defendants have already concluded that in order to properly analyze the VW project, the Defendants must also analyze the impacts of the SFW project and other foreseeable projects (the "Foreseeable Actions").

Plaintiffs' claims are based upon the individual *and cumulative* impacts of the VW and SFW projects and the Foreseeable Actions. *See, e.g.*, Count I, ¶75 ("The Projects individually and cumulatively with other foreseeable and planned offshore wind projects will result in the death of migratory birds.") ¶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 … on marine environment, coastal environment, and human environment.") Count VI ¶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.")

Counts II, III and IV involve a common question of law. Counts VI and VII involve a common question of law and fact. Count VIII involves a common question of law and fact related to the VW project's effect and the SFW project's effect, both individually and cumulatively, and cumulatively with the Foreseeable Actions. Counts IX and X involve common questions of law and facts. Counts XI, XII, XIII, XIV, XV, XVI, XVII, XVIII involve common questions of law and facts involving the individual and cumulative impacts of the projects and the Foreseeable Actions.

While Rule 21 permits the severance of claims, Rule 21 does not permit the amendment of Plaintiffs' claims so that claims related to cumulative impacts would be eliminated. Here, there is no reasonable way to sever claims against the Defendants related to one project when (i)

the Defendants concede that the effects of both projects must be considered when analyzing either project and (ii) Plaintiffs' claims are premised upon the cumulative impacts of both projects.

III. Even If Allowable Under Rule 21, Severance Would Not Be Appropriate.

A. The claims against the Defendants arise out of the same transaction or occurrence.

As discussed above, the SEIS and FEIS clearly establish that the claims against the Defendants arise out of the same transaction or occurrence because NEPA requires, as Defendants conceded, that the impacts of the SFW project be considered when considering the VW project, and Plaintiffs' claims present cumulative effects claims.

B. The claims present common questions of law or fact.

As detailed above, the claims present some common questions of law and fact. Plaintiffs claims include claims involving the cumulative impacts of the VW and SFW projects. Those cannot be separated into separate actions.

C. Judicial economy would not be facilitated.

Judicial economy would not be facilitated because in a severed VW case, the impacts of SFW and its administrative record must still be considered.

D. Prejudice would not be avoided if severance were granted.

Plaintiffs will be prejudiced if their claims challenging approvals of the SFW project are severed and heard separately. *First*, Defendants offer no way to neatly sever the claims. *Second*, the Defendants admit in their motion that they are seeking to prevent Plaintiffs from obtaining crucial evidence in this case regarding the effects of the SFW project that should be, and have allegedly been, considered in connection with VW project. Everything that is in the administrative record of the SFW project regarding impacts of the SFW project is also properly part of what should be the administrative record of the VW project, and is crucial to Plaintiffs' claims under NEPA, the ESA, the OCSLA and the MMPA. *Third*, there would be significant duplication of effort on Plaintiffs' and the Court's part because of the conjoined nature of VW, SFW and the Foreseeable Actions, and the potential for inconsistent rulings if the severed case

were heard by a different judge.

E. Common Witnesses and documentary proof apply to both projects.

As discussed above, common documentary proof apply to both projects because the SFW project's impacts are inseparable from the VW project's impact under NEPA, the ESA, the MMPA and the OCSLA.

CONCLUSION

In summary, Plaintiffs have rightly brought this case in the District of Massachusetts under Rule 18. For the reasons stated herein, the Court should deny the Motion to Sever.

Respectfully submitted,

Dated: March 27, 2022

/s/ Thomas Melone

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Certificate of Service

I HEREBY CERTIFY that on this 27th day of March 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 counsel of record via the Court's electronic filing system.

/s/Thomas Melone