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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS OF VINEYARD WIND 1 LLC

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ALLCO RENEWABLE ENERGY LIMITED *et al*., Plaintiffs, v. DEB HAALAND, *et al*., Defendants.	Case No. 1:21-cv-11171 **PLAINTIFF'S MEMORANDUM IN OPPOSITION THE MOTION FOR JUDGMENT ON THE PLEADINGS OF VINEYARD WIND 1 LLC**

Plaintiffs, Allco Renewable Energy Limited, Allco Finance Limited and Thomas Melone submit this opposition to the motion for judgment on the pleadings (ECF No. 70) of Vineyard Wind 1 LLC ("VW").

ARGUMENT

I. Plaintiffs Adopt The Arguments In Their Opposition To The Motion To Dismiss.

Plaintiffs adopt the arguments in their opposition, ECF No. 86, to the Defendants' motion to dismiss. Some of the additional arguments made by VW raise the same arguments made by the Defendants. Therefore, Plaintiffs' arguments in ECF No. 86 already address VW's re-treading the same ground.

II. Plaintiff Melone Has Standing For Aesthetic And Recreational Harms.

VW, like the Defendants, mischaracterize *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) as applied to this case. In VW's view, 19 miles from Little Beach is far-flung and equivalent to the "remote countries half-way around the world" discussed in *Lujan*. It is not. The VW project is so close to Plaintiff Melone's residence that he would be able to see it. Plaintiffs clearly fit within *Lujan*'s nexus requirements. *See, Lujan* at 566:

> It is clear that the person who observes [] a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible [] to think that a person who observes [] animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist.

That is the case here. The NARW pregnant females that habitat off the coast of Massachusetts (including the wind energy areas of VW and South Fork Wind ("SFW")) make an annual trip to the waters off the northern coast of Florida. To claim that the federal decisions in this case would not be a threat to Plaintiff Melone's ability to view the NARW during those annual visits to Fernandina Beach, simply denies science, contradicts the Defendants' own (albeit deficient) analyses and shows the lack of a hard look that pervades the Defendants' reviews of offshore wind. The NARW's presence in Fernandina Beach is included in "the very area of the world where that species is threatened by a federal decision." Similarly, the migratory birds that habitat on Little Beach, such as the endangered Piping Plover, fly back and forth through the wind energy areas of VW and SFW. ECF 86-4. The geographical nexus is clearly satisfied. The imminent requirement for standing is satisfied because Plaintiffs have specified definitive future plans and not "some day" intentions.[1]

III. Plaintiffs Have Standing Based Upon The Credible Threat Posed By Hurricanes.

As explained in Plaintiffs' opposition, ECF No. 86, standing based upon a credible threat of environmental arm is well-established. As it relates to Plaintiff Melone as a coastal landowner, he must "show the discharges (assuming they occur) will reach areas [] in which [he has] interests." *Ctr. for Biological Diversity v. United States EPA*, 937 F.3d 533, 538 (5th Cir. 2019) citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 499, 129 S. Ct. 1142 (2009) ("[T]o establish standing plaintiffs must show that they use the area affected by the challenged activity and not an area roughly in the vicinity of a project site." (Quotation omitted)). Plaintiffs have

[1] *Compare*, *Mausolf v. Babbitt*, 85 F.3d 1295, 1301 (8th Cir. 1996):

> As we noted in *Sierra Club v. Robertson*, 28 F.3d 753, 758 (8th Cir. 1994), "complaints of environmental and aesthetic harms are sufficient to lay the basis for standing." *See also Lujan*, 504 U.S. at 562-63 ("The desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purpose of standing."). The injuries alleged, however, must be imminent and direct, not hypothetical or fantastic. In *Lujan*, the Court emphasized that vague expressions of a hope to observe animals, in remote countries half-way around the world, "someday," could not establish the constitutionally required "actual or imminent injury." *Id.* at 563-64. For example, one member of the environmental group in *Lujan* said that she hoped to visit Sri Lanka someday and see leopards and elephants. When pressed, however, she admitted that her "hope" was not and could not be a "plan," because of a civil war. *Id*. at 564.

established that based upon VW's oil spill modeling. *See* ECF No. 86 at 8. The same applies to Plaintiff Melone and his aesthetic and environmental interests in the migratory birds on Little Beach and the NARW. In the case of a discharge of contaminants from a hurricane, VW's modeling shows that the discharges will reach Little Beach in roughly a day, thus harming the habitat of the migratory birds. In the case of death and harm from collisions with the WTGs, the Plaintiffs have plausibly alleged the required nexus because the Loring report, ECF 86-4, shows that the Piping Plover flies through the VW and SFW areas as they migrate and forage for food at heights that place them in the rotor-swept zone.

VW's citation of past events, like Hurricane Carol, miss the point. Hurricane Sandy was a Category 2 hurricane. However, according to a January 2020 report done for the Nuclear Regulatory Commission, ECF 86-2, a future Sandy would arrive as a category 4 or 5 storm and directly hit the Rhode Island/Massachusetts wind energy Area, potentially resulting in an oil spill off the coast of Connecticut, Rhode Island and Massachusetts in excess of the Exxon Valdez's oil spill in 1989 if all the wind turbines that the FEIS sees as foreseeable are built**.** The excerpt below from that report shows the predicted new path.

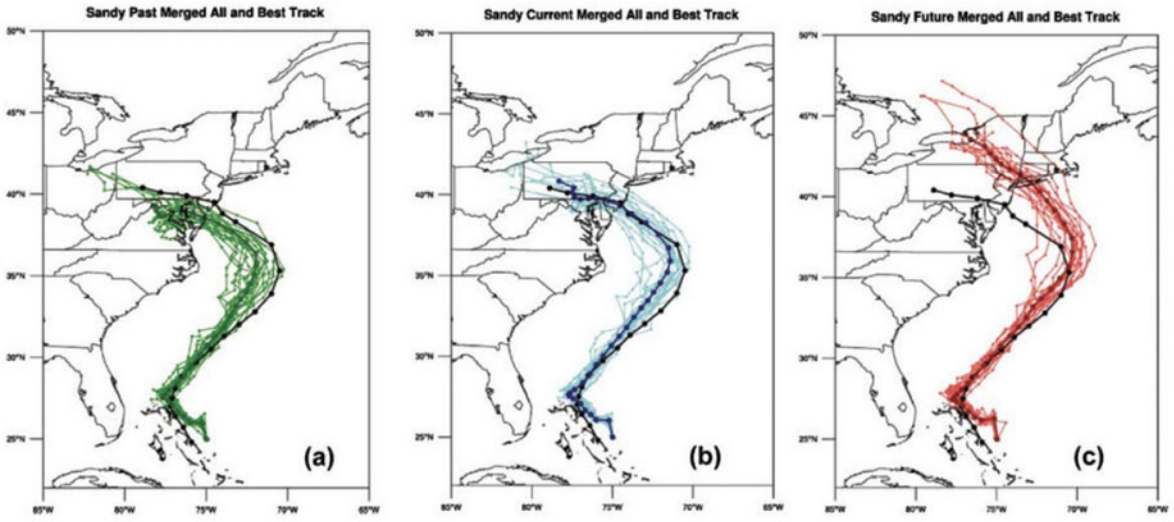

Figure 4.11. Track ensembles for (a) past, (b) current, and (c) future paths of Hurricane Sandy, derived from 6-day WRF simulations initialized 0000 UTC 26 Oct. The black line represents the National Hurricane Center best track; lighter colored lines represent ensemble members, and darker colored lines represent ensemble means for past (green), current (blue), and future (red). (Source: Lackman 2015.)

Such a hurricane presents a credible threat, and as the First Circuit emphasized in *Kerin v. Titeflex Corp*., 770 F.3d 978, 983 (1st Cir. 2014), "a small probability of a great harm may be sufficient, *see Vill. of Elk Grove Vill. v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993) (recognizing that 'even a small probability . . . is sufficient . . . [provided] the relief sought would, if granted, reduce the probability')." Here, even looking at only the oil and other containments housed offshore in the VW and SFW projects, the probability of great harm to Plaintiffs' and their interests is substantial because as the VW FEIS explains, the WTGs are designed to fail at sustained wind speeds above 112 mph. If one looks at all the Foreseeable Actions, the potential for great harm is unimaginable.

IV. Plaintiffs' Claims Of Economic Injury Provide Standing.

VW claims that "Allco's interests in this case, and those of Mr. Melone as Allco's owner, are purely economic." That is simply untrue. Even if it were, as argued in Plaintiffs' opposition to the Defendants' motion to dismiss, the Plaintiffs' economic injuries are sufficient for standing. NEPA, the CWA and the OCSLA specifically require the consideration of the economic impacts of the proposed action because economic impacts are part of the human environment.[2]

A plaintiff may, however, "have standing to sue under NEPA even if his or her interest is primarily economic, as long as he or she also alleges an environmental interest or economic injuries that are causally related to an act within NEPA's embrace." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. United States Dep't Agric*., 415 F.3d 1078, 1103 (9th Cir. 2005) (citation and internal quotation marks omitted). Plaintiffs have satisfied that requirement.

First, Plaintiffs have linked their pecuniary interest to the physical environment and to an environmental interest contemplated by NEPA. Solar facilities serve the same purpose as offshore wind facilities (i.e., providing renewable energy to the electrical grid) but without the

[2] The FEIS contains an entire section devoted to economics. *See,* section 3.6. The Corps' public interest test requires that economic effects be considered. 33 C.F.R. § 320.4. The OCSLA requires that the Secretary ensure the protection of the environment, which includes economic

minor, moderate and major adverse environmental consequences of offshore wind. Plaintiffs economic interest is tied to their interest in the environment and clean water and "seek to vindicate environmental concerns." *Dan Caputo Co. v. Russian River Cnty. Sanitation Dist.*, 749 F.2d 571, 575 (9th Cir. 1984) (citation omitted). *See also*, FAC ¶23. *Second*, Plaintiffs assert claims of environmental and aesthetic harm from the VW and SFW projects and the Foreseeable Actions and seek to vindicate those concerns.

V. Counts IV, XII, XIV and XVIII State Claims.

The Plaintiffs' claims regarding the Defendants' failure to adhere to the required procedural process (Counts IV, XII, XIV and XVIII) are neither moot nor lack standing. "[P]rocedural-rights cases are different: When a petitioner challenges an administrative agency's failure to satisfy a procedural requirement [] 'the primary focus of the standing inquiry is not the imminence or redressability of the injury to the plaintiff, but whether a plaintiff who has suffered personal and particularized injury has sued a defendant who has caused that injury.'" *Ctr. for Biological Diversity v. United States EPA,* 937 F.3d 533, 542, 543 (5th Cir. 2019) citing *Fla. Audubon Soc'y v. Bentsen,* 94 F.3d 658, 664 (D.C. Cir. 1996) (en banc). In such case, the plaintiff "must therefore establish a causal chain with at least two links: [a] link connecting the alleged legal violation to the issuance of the [permit issued], and [a] link connecting the issuance of the [permit issued] to the discharges behind their members' injuries." *Ctr. for Biological Diversity v. United States EPA*, 937 F.3d at 543. Plaintiffs have made that showing. As to Count IV, the violation is directly linked to the permit because the procedural notice requirements constrain the Defendants' authority to issue the permit. The second link is established because the permit is connected to the alleged harms to Plaintiffs' aesthetic and environmental interests in the NARW.

As to Counts XII and XIV, the Defendants' failure to take a hard look at various resource values and effects on various species is a violation of federal law that is directly linked to the approvals because the law constrains the Defendants' authority to issue the approval if they do

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considerations under the definition of the human environment. *See*, 43 U.S.C. 1331(i).

not take the required hard look at alternatives and resource values. The second link is established because the approvals are connected to the alleged harms to Plaintiffs' economic, procedural, informational and aesthetic and environmental interests.

In the case of Count XVIII, the Defendants robbed the Plaintiffs and the public of the procedural requirement of commenting. *See, e.g.*, 16 U.S.C. §1371(c)(5), 42 U.S.C. §4332(C). Defendants also issued the ROD prior to completion of consultation, violating 42 U.S.C. §4332(C) ("*Prior to* making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality *and to the public*.") (Emphasis added.)

The plain language of 42 U.S.C. §4332(C) requires the completion of consultation, which includes obtaining the comments "of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved," *prior to* issuance of the "recommendation," here the ROD. Plaintiffs have made the required two-prong showing. The violation is directly linked to the approvals because the procedural requirements constrain the Defendants' authority to issue the approvals. The second link is established because the approvals are connected to the alleged harms to Plaintiffs' economic interests, the aesthetic and environmental interests in the NARW and the Little Beach migratory birds, and the credible threat of environmental destruction from hurricanes and the contaminants stored as part of the projects.

In addition, all the approvals are based upon a now vacated biological opinion ("Old VW Biop). 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.

The result of the re-consultation was the issuance of the new VW Biop (the "New VW Biop") which is 178 pages longer than the Old VW Biop. Here as in *Dep't of Homeland Security v. Regents of the Univ. of California,* 591 U.S. ___, 140 S. Ct. 1891 (2020), 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. The course of action of taking new administrative action is required by approach laid out by the United States Supreme Court in *Regents*, 140 S. Ct. at 1907-08:

> It is a "foundational principle of administrative law" that judicial review of agency action is limited to "the grounds that the agency invoked when it took the action." …If those grounds are inadequate, a court may remand for the agency to do one of two things: First, the agency can offer "a fuller explanation of the agency's reasoning *at the time of the agency action*." …This route has important limitations. When an agency's initial explanation "indicate[s] the determinative reason for the final action taken," the agency may elaborate later on that reason (or reasons) but may not provide new ones. …. Alternatively, the agency can "deal with the problem afresh" by taking new agency action. … An agency taking this route is not limited to its prior reasons but must comply with the procedural requirements for new agency action.
>
> (internal citations omitted.)

The New VW Biop opinion can in no way be considered "a fuller explanation of the agency's reasoning *at the time of the agency action*" because the New VW Biop did not exist. The New VW Biop is almost 200 pages longer than the Old VW Biop. The New Biop provides new reasons for its opinion. For that reason, the Defendants must take new agency action. That does not mean, of course, that the entire process must re-start, but it does mean that anything based upon the Old VW Biop must be refreshed and reconsidered based upon the New VW Biop. Part of that process must include the appropriate notice and comment the public

(including Plaintiffs) is entitled to and the preparation of a supplemental environmental impact statement, if applicable.[3]

VI. Plaintiffs' Claims Satisfy The Zone of Interests Requirement.

"[T]he 'zone of interests' test and the bar on 'generalized grievances' are no longer part of prudential standing … the Lexmark inquiry — combining the zone of interests and proximate causation — does not implicate courts' subject matter jurisdiction but instead goes to the merits of a plaintiff's statutory claim for relief." *Lexmark International, Inc. v. Static Control Components, Inc*., Harvard Law Review, 128 Harv. L. Rev. 321, 322 (2014).[4]

The post-*Lexmark* approach is summarized in *N. N.M. Stockman's Ass'n v. United States Fish & Wildlife Serv*., 494 F. Supp. 3d 850 (D. N.M. 2020):

> Traditionally, federal courts framed the zone-of-interests test as an issue of prudential standing. … The Supreme Court recently clarified that the zone-of-interests analysis "is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." … Notably, the test "often 'conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff.'… Moreover, the test "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized the plaintiff to sue." *Lexmark Int'l v. Static Control Components*, 572 U.S. at 130 (internal quotation marks and citations omitted). …. This "lenient approach" preserves the APA's flexible judicial-review provisions. *Lexmark Int'l v. Static Control Components*, 572 U.S. at 130. There "need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke v. Securities*

[3] 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. Requiring new agency action is not a "an idle and useless formality," 140 S. Ct. at 1908. Rather,

> [r]equiring a new decision before considering new reasons promotes agency accountability, [] by ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of authority. Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply convenient litigating positions. Permitting agencies to invoke belated justifications, on the other hand, can upset the orderly functioning of the process of review, forcing both litigants and courts to chase a moving target. Each of these values would be markedly undermined were we to allow [the government] to rely on reasons offered nine months [later].
>
> 140 S. Ct. at 1908 (internal citations and quotations omitted.)

[4] https://harvardlawreview.org/2014/11/lexmark-international-inc-v-static-control-components-inc/.

> *Indus. Ass'n*, 479 U.S. 388, 399-400, 107 S. Ct. 750, 93 L. Ed. 2d 757. Finally, whether a plaintiff's interest is protected "is to be determined not by reference to the overall purpose of the Act in question . . . but by reference to the particular provision of law upon which the plaintiff relies . . . ." *Bennett v. Spear*, 520 U.S. 154, 175-76, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997).
>
> (Internal citations omitted).

VW argues that Allco lacks prudential standing to raise its NEPA, CWA, and MMPA claims arguing zone of interests and that Plaintiffs' claims are "purely economic." VW Memo at 7. As argued herein and in Plaintiffs' opposition to Defendants' motion to dismiss, VW is factually incorrect. First, Plaintiffs economic interest is tied to their interest in the environment and clean water and "seek to vindicate environmental concerns." *Dan Caputo Co. v. Russian River Cnty. Sanitation Dist.*, 749 F.2d 571, 575 (9th Cir. 1984) (citation omitted). Plaintiffs solar interest is not purely economic but is driven by environmental concerns—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. FAC ¶23. Onshore solar is benign but 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. FAC ¶23. Second, Plaintiffs assert claims of environmental and aesthetic harm from the VW and SFW projects and the Foreseeable Actions and seek to vindicate those concerns. Third, Plaintiffs also assert informational and procedural injury.

The "['zone of interests'] test is not meant to be especially demanding." *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 30 (1st Cir. 2007) citing *Clarke*, 479 U.S. at 399-400. The purpose of the zone of interests test is "to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 397 n.12, 107 S. Ct. 750 (1987). Here, none of Plaintiffs' claims would frustrate the relevant statutory objectives.

As regards, the MMPA, Plaintiffs are opposed to the IHA under the citizen suit provision and arguably seek to vindicate the environmental and aesthetic interests related to the NARW. As regards to the ESA and the OCSLA, Plaintiffs are citizens authorized to bring suit and

arguably seek to vindicate interests that further the statutory objectives. As regards to NEPA and the CWA and all of Plaintiffs' claims, Plaintiffs are arguably suffering legal wrong because of Defendants' actions, or arguably are adversely affected or aggrieved by the Defendants' actions. And Plaintiffs' suit is not "more likely to frustrate than to further statutory objectives" of those statutes. VW's zone-of-interests argument should be rejected.

VII. Counts II And III State A Claim.

Counts II and III involve the nondelegation doctrine, the major questions doctrine, the Property Clause[5] and the authority to redelegate authority.

The VW, SFW and Foreseeable Actions are intended to, and will, reshape the energy markets on the Eastern United States. The consequences will be far-reaching and massive to the economy, the environment and the OCS. The federal government must invoke a constitutionally enumerated source of authority to regulate and it must also act consistently with the Constitution's separation of powers. The United States Supreme Court has established a firm rule: "Congress [must] speak clearly" if it wishes to assign to an executive agency decisions "of vast economic and political significance." *Alabama Assn. of Realtors v. Department of Health and Human Servs*., 594 U. S. ___, ___ (2021) (per curiam) (slip op., at 6) (internal quotation marks omitted). This is sometimes called the major questions doctrine.

Here what authority the Secretary has, and what constraints exist on that authority, is anything but clear. The internal legal disputes at the Department of the Interior plainly show that to be the case. First there was the memorandum dated September 15, 2020 (the "September 2020 Memo") from attorneys in the Division of Mineral Resources of the Solicitor's Office provided to BOEM relating to interpretating of subsection 8(p)(4)(I) of the OCSLA. That September 2020 Memo concluded that "prevention of interference with reasonable uses of the exclusive economic zone, the high seas, and the territorial seas," meant that BOEM should prevent

[5] The Property Clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. In other words, the clause grants Congress plenary power to "determine what are needful rules respecting the public lands." *Kleppe v. New Mexico*, 426 U.S. 529, 539, 96 S. Ct. 2285 (1976) (internal quotations and citation omitted).

interference with the legal right to fish or navigate, rather than prevent physical impediments to fishing and vessel transit.

Next came Solicitor opinion M-37059 (December 14, 2020), Exhibit 1 hereto, which revised the conclusions of the September 2020 Memo, and stated that "a strict textual reading of the statute lends itself to an interpretation that requires the Secretary, when assessing whether to approve an activity on the Outer Continental Shelf (OCS) under subsection 8(p)(l) of OCSLA, to prevent any and all interference with fishing or other reasonable uses. Under such a reading, if it is not possible to prevent interference, the Secretary would be required to disapprove the activity." Because that plain language reading would be bad news for VW, Solicitor opinion M-37059 came up with a new approach—that the Secretary must "prevent interference with reasonable uses in a way that errs on the side of less interference rather than more interference. This means preventing all interference, if the proposed activity would lead to unreasonable interference, but not the type of interference that would be described as de minimis or reasonable." Solicitor opinion M-37059 also discusses some of the other must "ensure" criteria, at times citing Oliver Wendell Holmes, and reviews some of the legislative history to divine Congress' intent.

Solicitor opinion M-37059 was still bad news for VW, so the new solicitor in the Biden Administration came up with yet another opinion. Solicitor opinion M-37067 (April 9, 2021), Exhibit 2 attached hereto, concludes that the plain language of subsection 8(p)(4) that requires the Secretary to "ensure" the satisfaction of specific criteria or else deny the permit did not really mean what it says. According to Solicitor opinion M-37067, those requirements are merely choices on a menu that the Secretary can select or not depending upon her taste. The gyrations within the Interior Department as to ways to escape the language of the statute show that Congress did not speak clearly in its delegation of authority to the Secretary of the Interior. As a result, if the development of resources on the OCS is a major question, which Plaintiffs contend it is, then the purported delegation of authority to the Secretary to issue any approvals is void and unconstitutional.

Whether the industrialization of the OCS with 30 gigawatts-plus of offshore wind energy by 2030[6] is a decision "of vast economic and political significance," is an issue that is appropriate for summary judgment, not a motion to dismiss.

Even if this Court ultimately concludes that the industrialization of the OCS is not an issue of vast political and economic significance and within the scope of the major questions doctrine, the delegation to the Secretary (as interpreted by Solicitor opinion M-37067) would violate the nondelegation doctrine in any event because it seeks to pass off legislative power to the Secretary by allowing the secretary to pick and choose what if any of the "ensure" factors she will adhere to. That is because the "ensure" requirements are not really requirements at all. They are merely choices on a menu that the Secretary can select or not. That leaves it up to the Secretary to decide which one of those requirements to ignore or consider. The Defendants' approvals under the OCSLA are based upon the legal conclusion that the Secretary can ignore one or more numerated "ensure" clauses in subsection 8(p)(4).[7] Under the Secretary's view, she alone decides which one, if any, of Congress's enumerated "ensure" requirements are met, which is tantamount to her making the law.

As Justice Gorsuch recently observed in *Gundy v. United States,* 588 U.S. __, 139 S. Ct. 2116 (2019) (Gorsuch, J., dissenting), "[i]f Congress could pass off its legislative power to the executive branch, the '[v]esting [c]lauses, and indeed the entire structure of the Constitution,' would 'make no sense.' Without the involvement of representatives from across the country or the demands of bicameralism and presentment, legislation would risk becoming nothing more than the will of the current President." That is the case here as is amply demonstrated by the different Solicitor opinions under the Trump and Biden administrations. Justice Gorsuch's view

[6] Biden-Harris Administration Sets Offshore Energy Records with $4.37 Billion in Winning Bids for Wind Sale, https://www.doi.gov/pressreleases/biden-harris-administration-sets-offshore-energy-records-437-billion-winning-bids-wind.

[7] *See, e.g.*, VW ROD at 8-9 ("Subsection 8(p)(4) requires the Secretary to ensure that activities authorized under subsection 8(p) of OCSLA are carried out in a manner that provides for these twelve different goals. As stated in M-Opinion 37067 "…subsection 8(p)(4) of OCSLA imposes a general duty on the Secretary to act in a manner providing for the subsection's enumerated goals. The subsection does not require the Secretary to ensure that the goals are achieved to a particular degree, and she retains wide discretion to determine the appropriate balance between

now appears to be in accord with the majority of the Supreme Court justices. In *Gundy*, Justice Alito concurred in the judgment but indicated that the principle should be changed.[8] In a denial of a recent certiorari petition, Justice Kavanaugh indicated that he is willing to consider endorsing Justice Gorsuch's constitutional approach to the nondelegation doctrine, which would result in a majority for Justice Gorsuch's view (adopted from Justice Rehnquist). *See, Paul v. United States*, 589 U. S. ____ (2019), No. 17–8830 (November 25, 2019) (Statement of Kavanaugh, J.)

In *Gundy*, Justice Gorsuch summarized what appears now to be the likely view of a majority of justices—respect the text of the Constitution and stop allowing unelected officials to use their powers to effectively write laws on an *ad hoc* basis:

> The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens. Yes, those affected are some of the least popular among us. But if a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next?
>
> Today, a plurality of an eight-member Court endorses this extraconstitutional arrangement but resolves nothing. Working from an understanding of the Constitution at war with its text and history, the plurality reimagines the terms of the statute before us and insists there is nothing wrong with Congress handing off so much power to the Attorney General. But Justice Alito supplies the fifth vote for today's judgment and he does not join either the plurality's constitutional or statutory analysis, indicating instead that he remains willing, in a future case with a full Court, to revisit these matters. Respectfully, I would not wait.

The rationale for a different approach is compelling. The administrative state has become the fourth branch of government, and one which courts generally provide deference to. But as

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two or more goals that conflict or are otherwise in tension."); SF ROD at 5.

[8] *See*, 139 S. Ct. at 2130-2131: "The Constitution confers on Congress certain 'legislative [p]owers,' Art. I, §1, and does not permit Congress to delegate them to another branch of the Government. *See Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 472, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001). Nevertheless, since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards. See *Ibid*. "If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment. Because I cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years, I vote to affirm."

Justice Gorsuch stated in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018): "the adoption of new laws restricting liberty is supposed to be a hard business, the product of an open and public debate among a large and diverse number of elected representatives. Allowing Congress to hand off the job of lawmaking risks substituting this design for one where legislation is made easy, with a mere handful of unelected judges and prosecutors free to condemn all that they personally disapprove and for no better reason than they disapprove it." *Sessions*, at 1229 (internal quotations and citations omitted).

Here, the statute unconstitutionally delegates to the Secretary the power to decide the substance what the law should be, resulting (as shown by the dueling Solicitor opinions) in a continual re-write of the law from one Presidential administration to another.

As to the issue of redelegation, Congress did not authorize the Secretary to redelegate the authority to approve the VW and SFW projects to a subordinate. To the extent the delegation is valid, it is given to a cabinet level officer with no grant for that officer to redelegate the power to a subordinate.

VIII. Count XVI States A Claim. The Takes Of The NARW, the Piping Plover And Other Listed Species Are Not Incidental.

"[K]nowing and intentional takes cannot be deemed incidental." *Pac. Ranger, LLC v. Pritzker*, 211 F. Supp. 3d 196, 202 (D.D.C. 2016). The Model Penal Code describes knowingly as follows: "A person acts knowingly with respect to a material element of an offense when…he is aware that his conduct is of that nature…if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result" (Model Penal Code in § 2.02(2)(b)). A person "purposely" commits an act if he acts with a "conscious object[ive] to engage in conduct of that nature or to cause such a result; and [] if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist." *Id*. § 2.02(2)(a).

VW's take of the NARW and migratory birds, such as the Piping Plover, is done both knowingly and purposely. It is done knowingly because the take is practically certain to occur. It is done purposely because it is VW's "conscious object[ive] to engage in conduct of that

nature," i.e., conduct that will take, and VW is aware of the "existence of such circumstances" that take will occur.

VW cites *United States v. McKittrick*, 142 F.3d 1170, 1177 (9th Cir. 1998) ("McKittrick cannot qualify for the incidental take exception. He deliberately shot the wolf; he did not kill it unintentionally in the course of some other activity. The incidental take exception does not apply to 'deliberate action.'"). That case confirms that VW's take is not incidental. Knowing action (which VW's action is) constitutes deliberate action. Here, VW knows putting up a hundred wind turbines in the path of migratory birds will result in deaths. Putting up the wind turbines is a deliberate action. While killing migratory birds and taking the NARW are not the primarily purpose of VW's activities, primarily purpose does not

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. Incidental take is accidental or non-intentional (i.e., unknowing) take. *Pritzker* at 213 (the MMPA "clearly establishes that any and all takes are categorically prohibited, and that only accidental or non-intentional (i.e., unknowing) takes are permissible per an incidental-take authorization.") *Babbitt v. Sweet Home Chapter Communities for Greater Oregon*, 515 U.S. 687 (1995) does not answer the question presented here. *Babbit* involved habitat modification and with it the potential of a cascading chain of events that might harm a listed species. *Id*. at 711 ("By the dissent's reckoning, the regulation at issue here, in conjunction with 16 U.S.C. § 1540(a)(1), imposes liability for any habitat-modifying conduct that ultimately results in the death of a protected animal, 'regardless of whether that result is intended or even foreseeable, and no matter how long the chain of causality between modification and injury.'") But here, there are no series of intervening events. Here, in the case of migratory birds, VW erects the wind turbines and Piping Plover's are practically certain to die, and VW knows that will be the consequences of its actions. Moreover, the Defendants cannot authorize an act that, as here, would be a crime under a separate statute—the MBTA. In the case of the NARW, 16

USCS § 1543 make it clear that the more restrictive provisions of the MMPA apply. The MMPA does not have a comparable provision to 16 U.S.C. § 1539(a)(1)(B) relating to purpose. As a result, the take caused to the NARW from VW is not incidental because "[i]ncidental take is accidental or non-intentional (i.e., unknowing) take," *Pritzker*, at 213, and VW's take is knowing.

IX. Count V States A Claim.

Count V alleges that the scope of the objective of the Defendants' review of the VW Project was unlawfully narrow designed to compel, or unlawfully tilt toward, the selection of a particular alternative. The VW FEIS states the purpose and need as follows:

> The purpose of the federal agency action in response to the Vineyard Wind Project COP (Epsilon 2018, 2019, 2020a, 2020b) is to determine whether to approve, approve with modifications, or disapprove the COP to construct, operate, and decommission an approximately 800-megawatt, commercial-scale wind energy facility within Lease Area OCS-A 0501 to meet New England's demand for renewable energy. More specifically, the proposed Project would deliver power to the New England energy grid to contribute to Massachusetts's renewable energy requirements—particularly, the Commonwealth's mandate that distribution companies jointly and competitively solicit proposals for offshore wind energy generation (220 Code of Massachusetts Regulations § 23.04(5)).

The narrow purpose is stated as providing renewable energy through offshore wind. Such a narrow purpose effectively eliminates the hard look consideration of alternatives, including the no action alternative because it eliminates the proper review of substitutions, including renewable energy substitutions. Courts must "reject an unreasonably narrow definition of objectives that compels the selection of a particular alternative." *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 73 (D.C. Cir. 2011) (internal quotation and citation omitted). That is what occurred here in the case of VW. The narrow purpose steered the analysis away from what is truly the purpose—the provision of electrons generated from renewable energy. But the provision of renewable energy can be provided by onshore renewable energy, such as solar and renewable hydrogen fuel cells without the adverse environmental effects of offshore wind. Count V states a claim.

X. Counts VIII and IX State Claims For Violations Of The Corps' Guidelines.

Counts VIII and IX must be read in connection with what was stated before, particularly

Count VII, which lays out the section 404(b) guidelines, and what comes after.

Count VIII does not rely on just a policy statement. Count VIII simply separates the issue of the failure to consider the Foreseeable Actions in the Corps' review as a separate count. The statement in 40 C.F.R. § 230.1(c) is a synopsis of what the guidelines require. The policy statement 40 C.F.R. § 230.1(c) is given its teeth in the public interest requirement of 33 C.F.R. § 320.4 and the guidelines themselves.[9] *See, Ohio Valley Envtl. Coalition v. Aracoma Coal Co*., 556 F.3d 177, 207 (4th Cir. 2009) ("Under both NEPA and the CWA, the Corps is required to consider the cumulative impacts of an applicant's proposed project. Under NEPA, the Corps must evaluate '[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts.' 40 C.F.R. § 1508.27(b)(7) (2008). Under the CWA, the Corps' Guidelines instruct that a project should not receive a § 404 permit 'unless it can be demonstrated that [the project] 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.' 40 C.F.R. § 230.1(c) (2008).")

Probable impacts of other activities include SFW and the balance of the Foreseeable Actions. But the Corps failed to take the required hard look at the probable impacts of the Foreseeable Actions, thus no demonstration has been made that the discharges from VW and the Foreseeable Actions will not have an unacceptable adverse impact.

As to Count IX, VW simply ignores the language of the required public interest review. The public interest review under 33 C.F.R. § 320.4(a)(1) requires that the Corps analyze ***"[a]ll factors*** which may be relevant to the proposal [] 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***,

[9] 40 C.F.R. § 231.2(e): "Unacceptable adverse effect means impact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies (including surface or ground water) or significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas. In evaluating the unacceptability of such impacts, consideration should be given to the relevant portions of the section 404(b)(1) guidelines (40

safety, food and fiber production, mineral needs, considerations of property ownership and, in general, ***the needs and welfare of the people***." (Emphasis added). "All factors," "economics," "energy needs," and the "needs and welfare of the people," all tie in to whether the public interest is served by an offshore wind farm versus onshore renewable energy (which has little, if any, adverse effects). In addition, 33 C.F.R. § 320.4(a)(2) requires the Corps to evaluate the "relative extent of the public and private need for the proposed structure or work." This too ties into the need for an offshore wind farm to provide renewable energy and a hard look at that need cannot be done with looking at the alternatives and, in the case of VW, the needs in ISO-New England.

CONCLUSION

For the reasons sated above and in Plaintiffs' opposition to the Defendants motion to dismiss, VW's motion for judgment on the pleadings should be denied. If the Court grants any part of VW's motion, Plaintiffs request leave to amend the complaint.

Respectfully submitted,

Dated: March 28, 2022

/s/ Thomas Melone

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Certificate of Service

I HEREBY CERTIFY that on this 28th 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

CFR Part 230)."