

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

ALLCO RENEWABLE ENERGY LIMITED, et al.,

Plaintiffs,

v.

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

Defendants.

Case No. 1:21-cv-11171

**PLAINTIFFS' ASSENTED TO
MOTION FOR LEAVE TO
FILE A SECOND AMENDED
COMPLAINT**

Plaintiffs, Allco Renewable Energy Limited, Allco Finance Limited and Thomas Melone pursuant to Rule 15 of the Federal Rules of Civil Procedure respectfully move this Court for leave to file the attached Second Amended Complaint (the "SAC"). Rule 15 provides that "a party may amend its pleading [with] the court's leave" and that "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Allowing Plaintiffs to file the SAC would serve justice and promote judicial efficiency. Further, there is no substantial or undue prejudice, bad faith, undue delay, or futility.

Through the SAC, Plaintiffs seek to amend (1) Count IV to reflect the correct notice requirements of the statute, and (2) Count XIII to reflect the extent of NMFS's non-compliance with the Marine Mammal Protection Act ("MMPA"). With respect to the amendment of Count IV, the amendment is not a surprise to the Defendants. In Plaintiffs' opposition to Defendants motion to dismiss [ECF No. 86], Plaintiffs conceded that Count IV cited to the incorrect section of the MMPA and that Plaintiffs would seek leave to amend in order to reference the correct notice provisions of the MMPA that Plaintiffs allege NMFS failed to comply with. *See*, ECF No. 86 at 20.

Recognizing that the claims related to the South Fork Wind project have been severed and will proceed in Case No. 1:22-cv-10921-IT, the SAC has removed claims against the South Fork Wind project. All Counts have been dismissed against the Vineyard Wind project by the

Court's orders dated June 30, 2022, July 20, 2022, and August 4, 2022 (ECF No. 137), except for Counts IV and XIII related to the MMPA. The SAC renumbers those remaining two counts and removes the parties that are not involved with those two counts.

MEMORANDUM IN SUPPORT OF MOTION

Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend generally should be "freely give[n] . . . when justice so requires." *See* Fed. R. Civ. P. 15(a)(2); *see also Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) ("Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded."). "[E]ven so, [a] district court enjoys significant latitude in deciding whether to grant leave to amend." *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 55 (1st Cir. 2008). "Reasons for denying leave include undue delay in filing the motion, bad faith or dilatory motive, repeated failure to cure deficiencies, undue prejudice to the opposing party, and futility of amendment." *United States ex rel. Gagne v. City of Worcester*, 565 F.3d 40, 48 (1st Cir. 2009) (citing *Foman*, 371 U.S. at 182). In the context of a motion to amend, "futility means that the complaint, as amended, would fail to state a claim upon which relief could be granted." *O'Leary v. New Hampshire Boring, Inc.*, 323 F.R.D. 122, 126 (D. Mass. 2018) (citing *Glassman v. Computervision Corp.*, 90 F.3d 617, 623 (1st Cir. 1996)).

"If leave to amend is sought before discovery is complete and neither party has moved for summary judgment, the accuracy of the 'futility' label is gauged by reference to the liberal criteria of Federal Rule of Civil Procedure 12(b)(6)." *Hatch v. Dep't for Child., Youth & Their Fams.*, 274 F.3d 12, 19 (1st Cir. 2001). Under this standard, an amendment will not be deemed futile unless it fails to support a "plausible entitlement to relief." *Rodriguez-Ortiz v. Margo Caribe, Inc.*, 490 F.3d 92, 95 (1st Cir. 2007) (quoting *Twombly*, 550 U.S. at 559). "In determining whether to grant a motion to amend, the Court must examine the totality of the circumstances and 'exercise its informed discretion in constructing a balance of pertinent considerations.'" *United States ex rel. Hagerty v. Cyberonics, Inc.*, 146 F. Supp. 3d 337, 342 (D. Mass. 2015) (quoting *Palmer v. Champion Mortg.*, 465 F.3d 24, 30-31 (1st Cir. 2006)).

Here, the amendments are not futile. The proposed amendment counts state plausible entitlement to relief. The Defendants and Intervenor are not unduly prejudiced by the amendments because they were given fair notice of the amendment to Count IV, and as to Count XIII, the amendments conform to the evidence in the administrative record and include the latest information that would be includible in a claim if Plaintiff proceeded with a new complaint. For the reasons stated here, Plaintiffs respectfully request that leave to file the attached second amended complaint be granted.

Pursuant to Local Rule 7.1, undersigned counsel certify that they have conferred with counsel for the Defendants and Intervenor Vineyard Wind 1 LLC. Defendants and the Intervenor have stated their position as follows: “Federal Defendants and Intervenor Defendant do not oppose amendment of the complaint, while reserving objections that the proposed amendment is futile due to lack of jurisdiction, including lack of standing. Federal Defendants and Intervenor Defendant also reserve any and all defenses on the merits of Plaintiff’s claims, including objections concerning Plaintiff’s references to extra-record documents and events that post-date the challenged agency actions.”

The clean copy of the proposed SAC is attached as Exhibit A, and a copy marked against the first amended complaint is attached as Exhibit B. A proposed order is attached as Exhibit C.

Respectfully submitted,

Dated: August 23, 2022

/s/ Thomas Melone
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Certificate of Service

I HEREBY CERTIFY that on this 23rd day of August 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

EXHIBIT A

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

THOMAS MELONE,

Plaintiff,

v.

JANET COIT, in her official capacity of Assistant
Administrator, of the National Marine Fisheries
Service, and the NATIONAL MARINE
FISHERIES SERVICE,

Defendants.

Case No. 1:21-cv-11171

**SECOND AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

**SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE
RELIEF**

Pursuant to Fed. R. Civ. P 15, Plaintiff Thomas Melone hereby files this second amended complaint seeking declaratory and injunctive relief, stating as follows in support:

1. This case challenges the issuance of the incidental harassment authorization (“IHA”) issued by the Defendants to Vineyard Wind 1 LLC (“Vineyard Wind” or “VW”). It asks the Court to set aside the IHA as having been issued in violation the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. §1371 *et seq.*

JURISDICTION AND VENUE

2. This action arises under the MMPA and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706.

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

4. This action reflects an actual, present, and justiciable controversy between Plaintiff and the Defendants within the meaning of the Declaratory Judgment Act, 28 U.S.C. §2201. Plaintiff's interests will be imminently adversely affected and irreparably injured if the Defendants continue to violate the MMPA and if the IHA is not rescinded or set aside. These injuries are concrete and particularized, and fairly traceable to the Defendants' challenged decisions, providing the requisite personal stake in the outcome of this controversy necessary for this Court's jurisdiction.

5. The requested relief would redress the actual, concrete injuries to the Plaintiff caused by the Defendants' failure to comply with the MMPA and the APA.

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

7. Plaintiff has exhausted administrative remedies to the extent required to do so.

8. Venue in this Court is proper pursuant to 28 U.S.C. §1391(e) because a substantial part of the events or omissions giving rise to this suit occurred in this district, and the proposed Vineyard Wind project would be partially located in this district, and the principal place of business of the developer is in Massachusetts.

THE PARTIES

9. Plaintiff Thomas Melone lives part-time in Edgartown, Massachusetts, on Nantucket Sound. Plaintiff Melone lives part-time at his home in Edgartown during the months of May through November with the bulk of the time being from June through September. Plaintiff Melone has a particularized interest in and is concerned about the adverse effect of the Vineyard Wind project and other foreseeable offshore wind projects will have on the North Atlantic Right Whale ("NARW") whose critical habitat includes Nantucket Sound. Plaintiff Melone derives

recreational, conservation, environmental well-being and aesthetic benefits from the existence of the NARW and their properly functioning habitat through wildlife observation, study, and education. Melone believes in developing sustainable and economically viable renewable energy generation in the United States, while maximizing the creation of United States jobs and minimizing the impact to the environment. Melone believes that offshore wind has too many adverse impacts and creates too much risk and adverse impacts on the marine, coastal and human environment and various species.

10. Throughout Melone's life he has enjoyed observing marine life and enjoying the recreational, conservation, environmental well-being and aesthetic benefits from doing so. From local places such as the Jersey shore as a child, to far flung locations as an adult, such as Point Barrow, Alaska, Norway, and Australia, he has enjoyed observing marine life and enjoying the recreational, conservation, environmental well-being and aesthetic benefits from doing so. He has enjoyed observing dolphins and whales off the coast of Malibu on visits to California and enjoyed the recreational, conservation, environmental well-being and aesthetic benefits from doing so. He has enjoyed looking for marine life and polar bears off the beach in Point Barrow, Alaska and enjoyed the recreational, conservation, environmental well-being and aesthetic benefits from doing so. He has enjoyed observing marine life including humpback and orca whales in Prince William Sound, Alaska, and enjoyed the recreational, conservation, environmental well-being and aesthetic benefits from doing so. He has enjoyed sitting on the beach at night observing penquins march to the ocean in Philip Island, Australia, and enjoyed the recreational, conservation, environmental well-being and aesthetic benefits from doing so.

11. In respect of the NARW, he first expressed his concerns to the Defendants regarding the Vineyard Wind project in 2019 in a public comment. Since that time, he has watched

in disbelief as the NARW population declines at an alarming rate and the Defendants authorize exponential increase in the “take” of the NARW.

12. Melone’s first trip planned for observing the NARW in Florida was in December 2020 at Amelia Island, however, due to the COVID-19 pandemic, that trip was cancelled. In respect of the NARW, Plaintiff Melone went whale watching on New England Aquarium’s Whale Watch Cruise on October 1, 2021, looking for the NARW. Melone did not observe a NARW on that trip, but did observe a handful of humpback whales, another species that Melone derives recreational, conservation, environmental well-being and aesthetic benefits from. On October 26-27, 2021, Melone attended two full days of events of the NARW Consortium Annual Meeting, learning from experts about the plight of the NARW. From December 28, 2021, to December 31, 2021, Melone engaged in a NARW-watch in Fernandina Beach, Florida, from a fifth-floor room at the Ritz Carlton using Celestron – SkyMaster 25X100 Astro Binoculars. Melone observed many porpoises each of the four days, and observed a NARW (Derecha) and her calf on December 30, 2021, at 7:40am. Melone observed them until 8:00am at which point he reported the sighting on the WhaleAlert app. After he reported the sighting, he continued to search for them but did not see them. Shortly after 9am he received a call from a representative from the Florida Fish & Wildlife Conservation Commission (“FL FWCC”) asking him about the sighting. He gave her the information and then she said that their people would be taking off to soon to verify the sighting. The following day the FL FWCC let him know they confirmed the sighting. Melone intends to annually attend the NARW Consortium Annual Meeting continuing to learn and study the NARW and to annually engage in a NARW watch from Fernandina Beach in December or early January, which is the time of year that NARWs are present in the waters off Fernandina Beach. Melone has registered to attend virtually the 2022 NARW Consortium Annual Meeting. Melone’s next

scheduled trip to Fernandina Beach for NARW watching is December 28 to December 31, 2022.

13. The Defendants' failure to comply the MMPA will result in an inadequate mitigation of harm to the NARW and their habitats that benefit Plaintiff Melone. This harms Plaintiff Melone's past, present and future enjoyment of this species and their habitats. The Defendants' approvals and failure to adhere to the MMPA would imminently harm Melone because it would reduce his likelihood of spotting NARWs in his planned annual trips to Fernandina Beach for NARW watching lessening the aesthetic, environmental well-being, recreational, conservation, and benefits Melone derives from the NARW. The Defendants' approvals cause the NARW to be taken, interfere with the NARW's natural state and increase their risk of death and serious injury, reducing the likelihood that Plaintiff Melone will observe the NARW in their natural state on future visits. Requiring the Defendants to comply with the MMPA would ensure that the NARW and Plaintiff Melone's cognizable interests in that species would not be substantially adversely affected and would redress those harms to Plaintiff Melone.

14. Janet Coit is the Assistant Administrator, NMFS, and is sued in her official capacity.

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

STANDING

A. Procedural Standing

16. Plaintiff has standing to challenge the Defendants' action and standing to ensure that the Defendants' follow all procedural and substantive requirements in their decision-making

and under the MMPA.

17. Plaintiff has a procedural right to comment on the proposed mitigation measures for the NARW. Defendants have denied the Plaintiff those procedural rights. If Plaintiff were able to exercise his procedural rights to comment on such issues, his concrete interest could be protected. Because part of the MMPA requires the Defendants to follow certain procedures including notice and comment, injury alleged to have occurred as a result of violating those procedures confers standing.

18. Plaintiff's procedural standing would be redressed by an order that requires the Defendants to follow procedural requirements that make it less likely that the Defendants' action will be finalized and ultimately upheld in legal challenges, and less likely that the VW Project would be built.

B. Informational Standing.

19. Plaintiff Melone engages in advocacy before Congress, federal agencies and State legislatures and agencies to ensure that such entities recognize the benefits of solar energy and the detriments of OSW and implement policy and programs accordingly.

20. A proper legal and factual analysis by the Defendants under the MMPA would produce key information that Plaintiff would use to engage in his regulatory advocacy. Defendants are required by the MMPA to prepare such information and make it available to Plaintiff.

21. A proper legal and factual analysis under the MMPA would produce information from a neutral federal agency that has greater credibility and weight than any such information developed and produced by private entities.

22. The Defendants' failure to prepare a proper legal and factual analysis under the MMPA denies Plaintiff the key, credible, and weighty information that he would use in engaging

in his regulatory advocacy, which information the Defendants are required under the MMPA to prepare and provide to Plaintiffs.

23. An order for the Defendants to prepare a proper legal and factual analysis under the MMPA would redress the denial of the information by requiring the Defendants to provide a proper legal and factual analysis under MMPA, which will cause the information to be produced and available to Plaintiff for his use in regulatory advocacy.

C. Species Impacts Standing.

24. The Plaintiff's cognizable interests as stated above in the NARW has been and would be continued to be harmed by the Defendants' actions, which would harm habitat, reduce the population of the NARW, result in take of the NARW and fail to ensure that not a single whale suffers death or serious injury from the construction and operation activities of Vineyard Wind.

25. An order vacating the IHA would redress the Plaintiff's injuries. An order declaring that no permitting may be issued under the MMPA for the Vineyard Wind Project because any approval would need to account for decommissioning which is beyond the statutory five-year limit would redress the Plaintiff's injuries. An order declaring that no permitting may be issued for the Vineyard Wind Project because take of the NARW by the VW Project is not incidental to the carrying out the construction, operation and decommissioning of the Project would make it less likely that Defendants' action will be finalized and the Project approved and thereby redress the Plaintiff's injuries.

D. MMPA Standing.

26. Plaintiff Melone has standing because as stated above Melone derives concrete aesthetic, environmental well-being, recreational, and conservation benefits from the NARW that would be imminently harmed by the Defendants' failure to follow the requirements of the MMPA.

E. Administrative Exhaustion.

27. While no administrative exhaustion is required, Plaintiff is a party that submitted a comment during the environmental review of the Project. A commenter during the environmental review of the VW Project filed a sufficiently detailed comment so as to put the lead agency on notice of the issue on which Plaintiffs seek judicial review to the extent necessary.

LEGAL AND FACTUAL BACKGROUND

I. The Marine Mammal Protection Act.

28. The MMPA prohibits, with certain exceptions, the “take” of marine mammals in U.S. waters and by U.S. citizens on the high seas, and the importation of marine mammals and marine mammal products into the U.S. The primary purpose of MMPA is protection of marine animals and the MMPA was not intended to balance interests between other industries and the protected marine mammals. *Committee for Humane Legislation, Inc. v. Richardson*, 414 F. Supp. 297 (D.D.C.), *aff'd*, 540 F.2d 1141 (D.C. Cir. 1976).

**COUNT I (formerly COUNT IV)
FAILURE TO ADHERE TO THE MMPA NOTICE REQUIREMENTS
(VIOLATION OF THE MMPA)**

29. Plaintiff re-alleges and incorporates by reference the allegations contained in each of the forgoing paragraphs as though fully set forth herein.

30. 16 U.S.C. §1371(a)(5)(D), provides that “[u]pon request therefor by citizens of the United States who engage in a specified activity (other than commercial fishing) within a specific geographic region, the Secretary shall authorize, for periods of not more than 1 year, subject to such conditions as the Secretary may specify, the incidental, but not intentional, taking by harassment of small numbers of marine mammals of a species or population stock by such citizens while engaging in that activity within that region if the Secretary finds that such harassment during

each period concerned [] will have a negligible impact on such species.”

31. On September 7, 2018, NMFS received a request from Vineyard Wind for an IHA to take marine mammals incidental to pile driving associated with the construction of an offshore wind energy project south of Massachusetts. NMFS000000000003392. Vineyard Wind submitted revised versions of the application on October 11, 2018 and on January 28, 2019. *Id.* The application was deemed adequate and complete on February 15, 2019. *Id.* A notice of proposed IHA was published in the Federal Register on April 30, 2019 (84 FR 18346). *Id.*

32. VW submitted a revised application on April 19, 2019. NMFS000000000003144. The Notice of Proposed IHA made no mention of the revised IHA application submitted in April 19, 2019.

33. The Notice of Proposed IHA defined the “Specific Geographic Region” as follows: “Vineyard Wind’s proposed activity would occur in the northern portion of the 675 square kilometer (km) (166,886 acre) Vineyard Wind Lease Area OCS– A 0501 (Figure 1 in the IHA application), also referred to as the WDA. At its nearest point, the WDA is just over 23 km (14 mi) from the southeast corner of Martha’s Vineyard and a similar distance from Nantucket. Water depths in the WDA range from approximately 37–49.5 meters (m) (121– 162 feet (ft)).” NMFS000000000003393.

34. 16 U.S.C. §1371(a)(5)(D)(iii) states that the “Secretary shall publish a proposed authorization not later than 45 days after receiving an application [] and request public comment through notice in the Federal Register, newspapers of general circulation, and appropriate electronic media and to all locally affected communities for a period of 30 days after publication.”

35. The Administrative Record contains no record of notices having been issued requesting public comment through or in newspapers of general circulation, and appropriate

electronic media and to all locally affected communities.

36. The proposed IHA's comment period closed on May 30, 2019. NMFS000000000003392.

37. 16 U.S.C. §1371(a)(5)(D)(iii) provides that "Not later than 45 days after the close of the public comment period, if the Secretary makes the findings set forth in clause (i), the Secretary shall issue an authorization with appropriate conditions to meet the requirements of clause (ii)." 50 C.F.R § 216.107(c) requires that an "incidental harassment authorization [to] be either issued or denied within 45 days after the close of the public review period." 50 C.F.R. § 216.107(d) requires the notice of issuance or denial of an incidental harassment authorization to be published in the Federal Register within 30 days of issuance of a determination.

38. NMFS issued the IHA on May 21, 2021 (NMFS000000000003509 and NMFS000000000003514). The notice of IHA was published in the Federal Register on June 25, 2022. NMFS000000000003515. The IHA states that it is valid from May 1, 2023 through April 30, 2024. *Id.*

39. The NMFS finding that the total taking by the specified activity during the specified time period will have a negligible impact on species of marine mammals must be based upon "the best scientific evidence available." 50 C.F.R. §216.102(a).

40. The IHA is invalid because it was issued the IHA without observance of the following procedures required by law:

- a. NMFS failed to publish a proposed authorization not later than 45 days after receiving the VW application;
- b. NMFS failed to comply with the requirement of 16 U.S.C. §1371(a)(5)(D)(iii) and 50 C.F.R § 216.107(c) to issue or deny the IHA within 45 days of the end of the public

comment period;

- c. NMFS failed to request public comment through newspapers of general circulation, and appropriate electronic media and to all locally affected communities for a period of 30 days after publication, which affected communities include the entire range of the NARW (including Martha's Vineyard and Amelia Island);
- d. NMFS failed to publish the notice of issuance of the IHA within 30 days of issuance;

41. Plaintiff Melone has been harmed and will continue to be harmed by NMFS's issuance of the IHA without having observed the procedure required by law because Melone was unaware of the application for the IHA during the comment period because of NMFS's failure to issue the required notice and request public comment through newspapers of general circulation (such as the Vineyard Gazette and the Boston Globe both of which Melone reads regularly), and appropriate electronic media and to all locally affected communities, such as Martha's Vineyard, and would have commented if Melone had proper notice.

42. Plaintiff Melone has been harmed and will continue to be harmed by NMFS's issuance of the IHA without having observed the procedure required by law and NMFS's violations of the various mandatory time restrictions for the issuance of an IHA to Vineyard Wind in additional ways. First, the MMPA makes it clear that an application needs to be approved or denied within a strict timeframe. If it is not approved within that timeframe, Melone (like the public) is entitled to consider the application dead, without prejudice to the filing of a new application. Second, as someone that has a special interest in the NARW, Melone has a valid legal interest in relying on agency accountability and compliance with the procedural requirements for issuance of an IHA which are intended to benefit the public (of which Melone is a member), and persons such as Melone that have a special interest in marine mammals. NMFS's violation of

procedural requirements harms Melone and completely upends the detailed process specified by Congress. Third, the law permits the issuance of an IHA only for an application whose notice of proposed IHA is issued no more than 75 days earlier than the IHA, and permits the issuance of an IHA only for an application whose public comment period occurred no later than 45 before the issuance of the IHA. Those requirements benefit Melone as a member of the public and as a person that has a special interest in marine mammals because they ensure agency decisionmaking and the public right to comment based upon current data, not data that is years old. Fourth, NMFS's violations have deprived Melone of the ability to comment on a proper notice of proposed IHA. Fifth, NMFS's violation of issuing an IHA that was not immediately preceded by a public comment period as prescribed by the statute, has deprived Melone of the ability to comment on a notice of proposed IHA based upon current scientific information. Sixth, NMFS's violation of issuing an IHA that was not immediately preceded a notice of proposed IHA, has deprived Melone of receiving information that is based upon current and best scientific information that would explain NMFS's basis for proposing to issue an IHA.

43. The Vineyard Wind IHA was issued without observance of the procedure required by law, it therefore must be set aside and vacated.

COUNT II (formerly COUNT XIII)

**NMFS'S VINEYARD WIND INCIDENTAL HARASSMENT AUTHORIZATION
VIOLATES THE MMPA**

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

45. Section 101(a) of the MMPA (16 U.S.C. §1361) prohibits persons or vessels subject to the jurisdiction of the United States from taking any marine mammal in waters or on lands under the jurisdiction of the United States or on the high seas (16 U.S.C. §1372(a) (1), (a)(2)). Sections

101(a)(5)(A) and (D) of the MMPA provide exceptions to the prohibition on take, which give NMFS the authority to authorize the incidental but not intentional take of small numbers of marine mammals, provided certain findings are made and statutory and regulatory procedures are met. Incidental Take Authorizations (“ITAs”) may be issued as either (1) regulations and associated Letters of Authorization or (2) an IHA.

46. 50 C.F.R. §216.103 provides the following definitions:

- “Negligible impact is an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.”
- “Small numbers means a portion of a marine mammal species or stock whose taking would have a negligible impact on that species.”
- “Specified activity means any activity, other than commercial fishing, that takes place in a specified geographical region and potentially involves the taking of small numbers of marine mammals.”
- “Specified geographical region means an area within which a specified activity is conducted and that has certain biogeographic characteristics.”

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

48. Activities that have the potential to result in serious injury or mortality must be authorized under 50 C.F.R. § 216.105, which is through regulations, not an IHA. *See* 50 C.F.R. § 216.107.

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

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

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

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

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

54. An IHA is inappropriate for the Project for multiple reasons. First, the proposed action for the Project will certainly require more than 1 year for construction, causing noise from pile driving, dredge from the disturbance of the sea floor, increased vessel traffic and other effects discussed in the FEIS. Second, the Project would be operated and then would need to be decommissioned. Noise from operation and from vessel traffic will result in take of the NARW. Decommissioning will also result in noise and vessel traffic that will cause take of the NARW. The need to decommission the Project removes any ability of the Defendants to issue a permit of any kind under the MMPA because the take will clearly occur at the end of the useful life of the Project far exceeding the five-year statutory limitation when taking into account the construction and operation of the Project.

55. Third, Vineyard Wind's activities under the COP (including those that relate to pile driving) have the potential to result in serious injury or mortality and therefore must be authorized under 50 C.F.R. § 216.105, which is through regulations, and not through an IHA.

56. In a memorandum dated April 22, 2019, Jolie Harrison, the Chief of the NMFS

Permits and Conservation Division concluded that “[t]he possibility of take by serious injury or death is considered unlikely, based on the best available information. Unlike the use of explosives or mid-frequency sonar, which can kill or seriously injure marine mammals, the sound from pile driving is very unlikely to result in the types of physiological or behavioral reactions that could result in serious injury or death.” NMFS 0000003559. The Permits and Conservation Division’s conclusion that serious injury is very unlikely means that the activity still has the potential to result in serious injury or mortality.

57. Fourth, numerous vessel transits that will be made for pile-driving activities (including high-speed vessel transits) and the other activities under the COP have the potential to result in serious injury or mortality from vessel strikes and therefore must be authorized under 50 C.F.R. § 216.105, which is through regulations, and not through an IHA.

58. NMFS ignored (and did not take the required hard look at) the potential take from Vineyard Wind’s vessels striking the NARW—vessels that in general will have no speed limits—and that will be under severe financial pressure to hit maximum throttle. The crew transfer vessels (“CTVs”) for Vineyard Wind will be more than 98 feet long, with a maximum speed of 29 knots (33mph).¹ Crew members can work a maximum of 12 hours/day. NMFS000000000015814. Construction of the project will be based out of New Bedford, MA, which by vessel is a 50 to 60 mile trip to the wind development area (WDA), depending on the route taken. *Id.* The CTVs will transport crews from New Bedford to the WDA and bring crews back to New Bedford, as crews work on a rotational basis. *Id.* The 50 to 60 mile trip at 10 knots would take approximately 4.5 to 5 hours each way, which is not feasible when workers can only work offshore a maximum of 12 hours a day. *Id.* As Vineyard Wind told NMFS: “Simply put, the project could not be constructed

¹ <https://www.oedigital.com/news/498226-st-johns-shipbuilding-starts-building-ctv-for-u-s-offshore-wind-farm>.

within one season if there was a 10 knot speed restriction during construction.” *Id.*

59. The EIS indicates that these large and fast crew transfer vessels will account for the lion’s share all the Project’s vessel trips. (BOEM 34746.) The Notice of Proposed IHA states that “an average of ~25 vessels will be involved in construction activities on any given day.”

60. So what will that mean for the NARW? It will mean, for example, that during all times of the year including the peak season for NARW presence—December through early May—the CTVs will be moving at maximum speed in almost all circumstances, far too fast for Protected Species Observers (“PSOs”) or other measures to be of any value. A strike of a NARW by a CTV travelling at 30 mph will result in certain death of the whale. Construction of the Vineyard Wind project “within one season” is no justification for dramatically increasing the risk to death to a whale from a vessel strike.

61. The only reason Vineyard Wind wants to try to construct its project within one season is because it wants to improperly use a 1-year IHA instead to applying for the issuance of 5-year regulations.

62. NMFS issued proposed regulations on August 1, 2022, proposing new speed limits in the area that all Vineyard Wind vessels will travel.² NMFS’s discussion in the proposed regulations confirms that Vineyard Wind’s vessel transits have the potential to cause serious injury or mortality of the NARW, thus eliminating the use of an IHA. NMFS’s discussion in the proposed regulations also confirms NMFS did not take the required hard look at risk to the NARW from vessel strikes.

63. Crucially, NMFS’s proposed regulation are based upon information that it already

² Federal Register, Vol. 87, No. 146 at 46921 (August 1, 2022), <https://www.federalregister.gov/documents/2022/08/01/2022-16211/amendments-to-the-north-atlantic-right-whale-vessel-strike-reduction-rule>.

had in its possession when it issued the Vineyard Wind IHA. NMFS simply did not take the required hard look, or indeed any look, at the risk to the NARW from vessel strikes and authorizing Vineyard Wind vessels to travel at a speed greater than 10 knots.

64. In the Notice of Proposed IHA, NMFS described the specific activity as the construction of the Vineyard Wind Offshore Project. NMFS000000000002974 (“Vineyard Wind, LLC (Vineyard Wind) is proposing to construct an 800 megawatt (MW) commercial wind energy project (the Project) in Lease Area OCS-A 0501, offshore Massachusetts.”) But then illogically, NMFS analyzed take from only the noise from the driving of piles into the ocean floor. NMFS failed to analyze the entire construction activities offshore. NMFS also failed to analyze the activities integral to pile driving and construction, such as vessel transits (including CTVs) to and from New Bedford, Massachusetts.

65. The Defendants’ have also failed to provide substantial evidence that the take from the Project will only affect small numbers of marine mammals. The noise and other harassment from the Project will affect a greater than small number of NARWs and other marine mammals and NMFS’s decision was based on outdated data.

66. The IHA authorized the take, Level B Harassment, at 20 individual NARWs. NMFS000000000003510. NMFS based the calculation of twenty on a spreadsheet provided by Vineyard Wind. NMFS000000000014612. The spreadsheet calculates the 20 from the following equation: (A) divided by (B) where (A) equals the number of individual NARW sighted in 2018 = 9, (B) 58 equals the number of days in year in which bottlenose dolphin, Short-beaked common dolphin, Fin whale, Gray Seal, Harbor Porpoise, Harbor Seal, Humpback Whale, Long-finned pilot whale, Minke Whale, NARW, Pilot Whale, Seal, Sei whale, Sperm whale, Unidentified Dolphin, Unidentified Mysticete Whale, Unidentified Shelled Sea Turtle, Unidentified Whale, white-sided

dolphin were sighted.

67. Even assuming NMFS’s calculation of take methodology were correct (which it is not), NMFS’s methodology shows that the take is more than “small numbers,” and above what NMFS concluded was “small numbers.” NMFS concluded that up to 5.4% of a species constituted “small numbers.” NMFS000000000003486. The NMFS calculation of takes was based upon a methodology proposed by Vineyard Wind. NMFS000000000014612. The “small number” conclusion was reached because the take of the NARW was 5.0% of the species using the Vineyard Wind methodology. But no analysis was performed by NMFS supporting its conclusory statement that 5.4% of a species is “small numbers.”

68. The 5.0% was reached by dividing the calculated take—20—by the abundance of the species. Vineyard Wind and NMFS used old data—394. The NMFS’s conclusion when the IHA was issued was that the population of NARW had dwindled to 356 (i.e., 5.6%). NMFS000000000003484. The most recent scientific evidence is that the NARW population is now at 336,³ increasing the take number to 6.0%.

69. In addition to the denominator being wrong, the numerator is as well. The NMFS analysis hinges on manifestly erroneous assumptions, such as an extremely low level of NARWs in the wind energy area, and ignoring vessel transits and other activity (except for pile driving noise). NOAA’s April 15, 2021, featured story entitled: *North Atlantic Right Whales On the Move in the Northeast*: “A very small portion of the right whale population heads south to the waters off northern Florida and Georgia in the winter—mostly just the moms—to give birth,” said Tim Cole,

³ H.M. Pettis, et al., *North Atlantic Right Whale Consortium 2021 Annual Report Card: Report to the North Atlantic Right Whale Consortium* (2022), https://www.narwc.org/uploads/1/1/6/6/116623219/2021report_cardfinal.pdf. 7 North Atlantic Right Whale, NMFS (last accessed June 6, 2022), <https://www.fisheries.noaa.gov/species/northatlantic-right-whale>.

a marine mammal researcher and lead of the center’s aerial whale survey team. We try to determine where the rest of the population is and have found them so far this year in large numbers on Nantucket Shoals south of Martha’s Vineyard and Nantucket, and in Cape Cod Bay.”⁴

70. Small numbers under the MMPA cannot exceed the PBR, which for the NARW is less than one. The IHA therefore violates the MMPA for this reason as well.

71. The significant increase of the NARW in the wind energy lease areas south of Martha’s Vineyard has been reported in two studies. E. Quintana-Rizzo et al., “*Residency, demographics, and movement patterns of North Atlantic right whales *Eubalaena glacialis* in an offshore wind energy development area in southern New England, USA,*” *Endangered Species Research*, Vol. 45: 251–268 (2021) (NMFS 53318-53335) (“Quintana 2021”). O. O’Brien, D. E. Pendleton, L. C. Ganley, K. R. McKenna, R. D. Kenney, E. Quintana-Rizzo, C. A. Mayo, S. D. Kraus & J. V. Redfern, *Repatriation of a historical North Atlantic right whale habitat during an era of rapid climate change* (July 20, 2022). <https://www.nature.com/articles/s41598-022-16200-8> (“O’Brien 2022”). Both studies were based on information NMFS had when it issued the Vineyard Wind IHA. NMFS acted arbitrarily and capriciously by using Vineyard Wind’s calculation and old data and by ignoring the increased presence of the NARW in, and its increased use of, the wind energy lease areas south of Martha’s Vineyard as foraging, socializing and mating grounds.

72. Even if NMFS’s taking calculation of the NARW at 5% of the species were correct (which it is not), that “small numbers” cannot mean five percent of a species facing extinction is confirmed by that phrase’s use elsewhere in the MMPA. Congress imposed an identical “small numbers of marine mammals” requirement on authorizing activities that may seriously injure or

⁴ <https://www.fisheries.noaa.gov/feature-story/north-atlantic-right-whales-move-northeast>.

kill marine mammals. 16 U.S.C. § 1371(a)(5)(A)(i); 50 C.F.R. § 216.107(a). In general, “identical words used in different parts of the same act are intended to have the same meaning.” *Healthkeepers, Inc. v. Richmond Ambulance Auth.*, 642 F.3d 466, 472 (4th Cir. 2011) (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)). If NMFS is right that five percent is a “small number,” that would mean Congress intended to allow *each* permittee to injure or kill one out of every twenty animals in each affected marine mammal population. Yet allowing such extensive harm would directly conflict with the MMPA’s protective purpose, as it could quickly lead to the extinction of the species. *See* 16 U.S.C. § 1361(1), (2), (6) (describing the purposes of the MMPA).

73. To be lawful, an agency’s action must “be the product of reasoned decisionmaking.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). An agency must “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made,” and must not “entirely fail[] to consider an important aspect of [a] problem.” *Id.* at 43. NMFS’s negligible- impact and small numbers determinations violate these commands by failing to account for the overlapping, additive impacts of the full panoply of Vineyard Wind’s COP activities and the other IHAs issued that involve “take” of the NARW.

74. Under the MMPA, NMFS cannot lawfully authorize any action unless it will have “a negligible impact on [each marine mammal] species or stock.” 16 U.S.C. § 1371(a)(5)(D)(i)(I). An impact is “negligible” if it “cannot be reasonably expected” to “adversely affect the species” by reducing “annual rates of recruitment or survival.” 50 C.F.R. § 216.103. Here, NMFS authorized multiple IHAs during similar time periods in areas occupied by the NARW. But NMFS never evaluated whether all the IHAs it authorized would have more than a negligible impact on

marine mammal populations. Instead, the agency “consider[ed] the potential impacts” of each application “independently”—that is, in isolation. The same is true with respect to Vineyard Wind’s COP activities. NMFS acted arbitrarily and capriciously by only looking at take from noise from pile-driving.

75. NMFS’s approach is irrational because it ignores the reality that Vineyard Wind’s pile-driving activities will not take place in isolation and marine mammals will not experience its effects in isolation. Instead, months of survey activity, nearly a year of pile driving, more than a year of construction from Vineyard Wind and then from other offshore wind projects will hit the same marine mammal populations—driving them from their food, potentially separating them from their vulnerable calves, and disrupting their behavior. The combined activity will have more significant impacts on affected species than a single segmented activity would: they will harass more animals, and they will harass individual animals more times than a single segmented activity would. By looking at each segmented activity’s “impact” in isolation, and ignoring all the other Vineyard Wind COP activities, NMFS refused to consider the ways in which those impacts will build on one another, which refusal was arbitrary and capricious.

76. NMFS also acted arbitrarily and capriciously and ignored the law when it came to defining the specific geographical region. The Notice of Proposed IHA unlawfully defined the “specific geographic region” extremely narrowly as “the northern portion of the 675 square kilometer (km) (166,886 acre) Vineyard Wind Lease Area OCS–A0501.” NMFS000000000003393. The result is an understatement of impacts. NMFS’s statement of the specified geographical region is unlawful and arbitrary and capricious because it is not based upon any analysis of *biogeographic* characteristics. Even the narrowest approach would include in the “specified geographic region” at a minimum the entire area south of Martha’s Vineyard that has

now become an important mating, socializing and foraging habitat for the NARW, as depicted in Figure 1 from the O'Brien study and shown below:

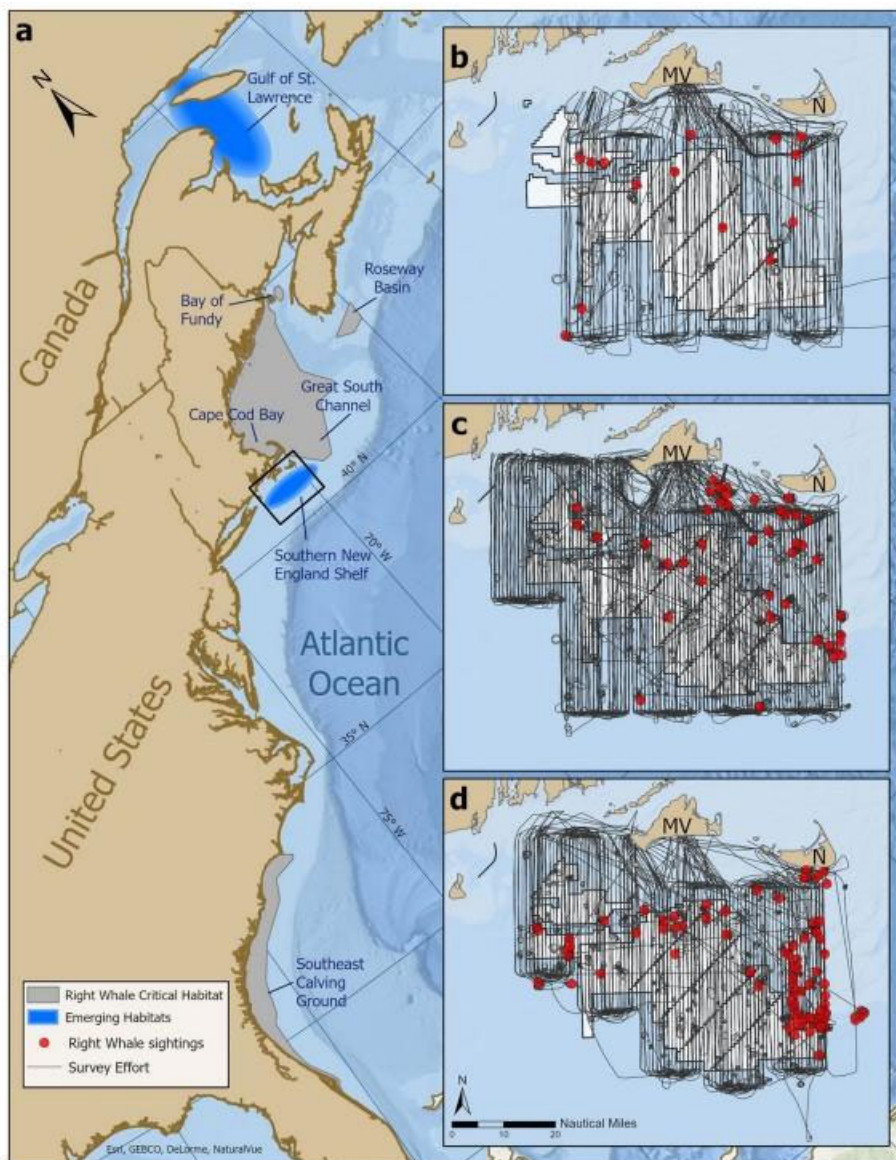


Figure 1. Known right whale habitats in the Northwest Atlantic. (a) Gray polygons encompass known right whale habitats; blue ovals represent emerging habitats. Black box and insets show the New England Aquarium broad-scale survey area. (b–d) Broad-scale survey effort (black lines) and right whale sightings (red circles) during three different time periods: (b) 2011–2012, (c) 2013–2015, (d) 2017–2019. White shading represents MA/RI wind energy lease areas. MV = Martha’s Vineyard, N = Nantucket. Figure was created using ArcGIS Pro (version 2.9.2).

77. More broadly, the specified region should be based upon the range of the NARW

in the United States because from a biogeographic standpoint, the region in which the NARW exists defines the biogeographic region as to them. But here the Court does not need to decide at this point which region is the appropriate based certain biogeographic characteristics. That is because NMFS took no look, much less a hard look, at the proper specified geographical region based upon biogeographic characteristics.

78. Under NMFS's approach there is no limit to how small Vineyard Wind could slice its activities so it appears that the "take" of the NARW represents small numbers. Under NMFS's irrational approach Vineyard Wind would be able to divvy even its pile driving activities into one IHA for each pile even though driving all piles, like all Vineyard Wind's COP activities are necessary for the construction of its project.

79. The Notice of Proposed IHA states that "an average of ~25 vessels will be involved in construction activities on any given day," yet NMFS assumes away any noise impact from the 25 vessels each day based upon the unproven and arbitrary assumption that "marine mammals in the area are presumably habituated to vessel noise," because "[e]xisting vessel traffic in the vicinity of the project area south of Massachusetts is relatively high."

80. The Defendants' have also failed to provide substantial evidence that using the best available scientific information that the take would have a negligible impact on the NARW. NMFS failed to use the best scientific evidence in issuing the IHA and calculating take. NMFS erroneously limited the take analysis to noise from pile driving. NMFS did not analyze any other COP activity of Vineyard Wind and did not take into account the cumulative effect on the NARW of all the take authorized by NMFS. The take and small numbers analyses were based off old data. The NMFS analysis used the number 9 for the number of sightings of NARW in an undefined area. Even assuming that number were true in some prior year, the most recent scientific data

shows (which NMFS possessed at the time the Vineyard Wind IHA was issued) that the NARW have moved-in to the Wind Energy Area all year round, are arriving earlier, staying longer and increasing in numbers, and that the area is an important foraging and socialization area. The most recent surveys conducted by Quintana 2021 and O'Brien 2022 indicate that right whale presence in the RI/MA WEA, which includes the project development area (WDA), is quite high during the summer and extends into the fall. (NMFS 53329, 53331.) This finding is consistent with the growing body of evidence that right whale migration and behavior patterns have shifted dramatically due to environmental conditions. (BOEM 77331.) Right whales now spend time in the Vineyard Wind WDA year-round. (NMFS 53324, 53329, 53331.)

81. NMFS also failed to take a hard look at whether all VW's construction activities have the potential to result in serious injury or mortality to the NARW. NMFS failed to make a finding that the VW construction activities do not have the potential to result in serious injury or mortality of the NARW. In order to go down the path of an IHA rather than regulations, NMFS must first find that the VW construction activities do not have the potential to result in serious injury or mortality of the NARW. *See* 50 C.F.R. § 216.107. NMFS failed to make such a finding.

82. NMFS improperly segmented its analysis, considering Vineyard Wind's construction surveys and pile driving as unrelated activities, and ignoring all other Vineyard Wind construction, and operation and decommissioning activities.

83. By its plain language the incidental harassment take authorization under Section 1371(a)(5)(D) requires the aggregation of all "request[s] by citizens" for the same kind of activity within the same specified geographical region. "Specified geographical region means an area within which a specified activity is conducted and that has certain biogeographic characteristics." 50 C.F.R. §216.103. NMFS unlawfully ignored the other requests by citizens for the same type of

activity—construction and operation of offshore wind farms in the geographical region.

84. An IHA may not authorize the intentional taking by harassment of even a single marine mammal. Vineyard Wind’s soft-start is intentional take. The IHA requires and authorizes, as Level B harassment, Vineyard Wind to initiate each pile driving event with a “soft start” where the pile driving hammer will be throttled back to less than maximum power, thus giving the whales a “warning” of what is to come. (BOEM 34742, 77310, 77458.) The theory is that the “soft start” will convince the whales to leave the construction zone before the full-magnitude pile driving begins. (BOEM 77458.) The “soft start”, however, is not incidental harassment but purposeful, intentional harassment, a type of hazing, designed to push the NARW out of their habitat. It is not accidental. *See*, 50 C.F.R. 216.103 (“Incidental harassment, incidental taking and incidental, but not intentional, taking all mean an accidental taking.”) Thus Vineyard Wind’s soft start constitutes an intentional take that NMFS cannot authorize.

85. Vineyard Wind’s soft start also constitutes unauthorized Level A harassment. Level A harassment, as defined in the MMPA for non-military readiness activities (Section 3(8)(A)), is any act of pursuit, torment, or annoyance that has the potential to injure a marine mammal or marine mammal stock in the wild. Even if the “soft start” strategy effectively pushes all right whales out of the Level A exposure zone (i.e., 7.25 km from the pile driving area), there is no evidence the whales will be safe. On the contrary, there is considerable evidence that the whales will be exposed to increased threats from fishing gear entanglement and vessel strikes. For example, Area 537 is one of the most heavily fished areas in the Massachusetts OCS with hundreds perhaps thousands of VBR trap/pots for lobster and crab. (BOEM 77581; BOEM 194539.) By forcing right whales out of the WDA, the Vineyard Wind soft start program will drive the whales right into this network of fishing ropes, heightening the threat of entanglement. The threat of

vessel strikes against whales will also increase outside the WDA, as vessels in this area are not subject to NMFS's sometimes applicable 10 knot speed limit; nor are they required to have a PSO onboard looking for whales.

86. In addition, to the extent the soft start forces feeding whales to leave and try to locate food elsewhere, the loss of foraging opportunity, in itself, may be damaging, especially given data showing that malnutrition has caused female North Atlantic right whales to lose weight and exhibit signs of reduced physical health. (NMFS 26386-26401.) NMFS contends that right whales which have been prevented from foraging in the WDA during pile driving will simply come back and resume feeding once the pile driving stops. (BOEM 77460-63.) There is, however, no evidence to support this argument.

87. Vineyard Wind's pile-driving activities do not constitute incidental take. Vineyard Wind is conducting its construction activities in the region where the NARW now live year-round and which is now critical foraging and mating grounds. Quintana 2021, O'Brien 2022. Justice (then Judge) Ketanji Brown Jackson stated that "[K]nowing and intentional takes cannot be deemed incidental." *Pac. Ranger, LLC v. Pritzker*, 211 F. Supp. 3d 196, 202 (D.D.C. 2016).

88. Justice Jackson's opinion in *Pritzker* with amazing prescience is precisely on point with the facts of Vineyard Wind:

Applied to the "take" context, the terms "accidental" and "non-intentional" therefore plainly do not describe the harassment of whales that occurs when commercial fishermen know that whales are in the vicinity of where they wish to conduct a highly disruptive multi-hour tuna-fishing operation and nevertheless press on with that operation.

89. Here, Vineyard Wind will be conducting a highly disruptive multi-hour pile-driving operation knowing that whales are in the vicinity. Therefore, the "take" involved in the Vineyard Wind pile driving operation is "knowing," and is neither "accidental" nor "non-intentional." As

such, under Justice Jackson’s MMPA definition, none of the Vineyard Wind pile driving can be authorized under the MMPA using an IHA.

90. NMFS’s determination that the measures incorporated into the IHA result in the least practicable impact on the NARW is arbitrary and capricious. NMFS failed to pay particular attention mating and foraging grounds of the NARW in the wind energy lease areas south of Martha’s Vineyard.

91. “North Atlantic right whales are vulnerable to vessel strike due to their coastal distribution and frequent occurrence at near-surface depths, and this is particularly true for females with calves. The proportion of known vessel strike events involving females, calves, and juveniles is higher than their representation in the population (NMFS 2020).” Federal Register, Vol. 87, No. 146, at 46922-46923 (2022) (“NMFS Proposed Speed Rules”). “Reducing vessel speed is one of the most effective, feasible options available to reduce the likelihood of lethal outcomes from vessel collisions with right whales.” *Id.* at 46923. “Vessel strikes continue to occur all along the U.S. coast from the Gulf of Maine to the Florida coast. There is no indication that strike events only occur in “hot spots” or limited spatial/ seasonal areas.” *Id.* at 46924. in many cases, the location of the strike event remains unknown.” *Id.* “[T]he current speed rule and other vessel strike mitigation efforts are insufficient to reduce the level of lethal right whale vessel strikes to sustainable levels in U.S. waters.” *Id.* at 46925. “It remains unclear how right whales respond to close approaches by vessels (<1509 ft (460 m)) and the extent to which this allows them to avoid being struck.” *Id.* at 46926.

92. NMFS has determined that the Potential Biological Removal (“PBR”) for the NARW, defined by the MMPA as “the maximum number of individuals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach

or maintain its optimum sustainable population” is 0.7 whales. NMFS Proposed Speed Rules at 46922. “This means that for the species to recover, the population cannot sustain, on average over the course of a year, the death or serious injury of a single individual due to human causes.” *Id.* NMFS has determined that speed of vessels is the most relevant factor in causing death from vessel strikes. *Id.* at 46923. Yet NMFS has failed to proscribe a speed limit on all Vineyard Wind’s vessels, all the time, as part of the measures so as to result in the least practicable impact on the NARW. NMFS has failed to take a hard look at the measures needed to ensure that there is no death or serious injury to even a single whale from Vineyard Wind’s COP activities. But what is clear from the NMFS Proposed Speed Rules is that a 10-knot speed limit on all vessels at all times of the year (with no exceptions) practicable and is the *maximum* that could be allowed but even with speed limit below 10-knots a strike to a single NARW would cause serious injury.

93. NMFS failures are arbitrary and capricious and fail to observe the requirements of the MMPA. NMFS’s failure to impose a 10-knot (or under) speed limit for all vessels all of the time is arbitrary and capricious and violates its obligation to prescribe measures that result in the least practicable impact on the NARW. NMFS’s failure to impose a complete shut-down of all Vineyard Wind activity for a minimum number of days (such as 10 days as proposed in NMFS Proposed Speed Rules in the case of dynamic speed zones) if a whale of any kind is located either through passive acoustic monitoring or sonar or visually by anyone, including a report made to WhaleAlert app is arbitrary and capricious and violates NMFS’s obligation to prescribe measures that result in the least practicable impact on the NARW.

94. NMFS is also violating its obligations under 16 U.S.C. §1371(a)(5)(D)(iv) which *requires* NMFS to “modify, suspend, or revoke an authorization if the Secretary finds that the provisions of clauses (i) or (ii) are not being met.” 16 U.S.C. §1371(a)(5)(D)(iv) thus requires an

ongoing review of whether the take involves small numbers, the take would have a negligible impact of the species, and the measures satisfy the least practicable impact standard. The evidence discussed in the NMFS Proposed Speed Rules establishes that NMFS must modify, suspend, or revoke an authorization because the provisions of clauses (i) or (ii) are not being met based upon current scientific information.

95. NMFS is also violating its obligations under 16 U.S.C. §1371(a)(5)(D)(iv) and 16 U.S.C. §1371(a)(5)(D)(ii)(II) because it has issued numerous other IHAs authorizing take of the NARW that precede the authorized dates of the Vineyard Wind IHA. Those numerous IHAs continue the death by a thousand cuts for the NARW. By the time the Vineyard Wind IHA dates kick-in, the NMFS will have already authorized take since 2019 of 310 NARW (252 of which have been authorized since the Vineyard Wind IHA was issued) as shown below:

Project	Covered activities	Beginning of covered period	End of covered period	NARW Level B Harassment Takes	Date IHA Issued
Vineyard Wind 1	Pile driving only	5/1/2023	4/30/2024	20	5/21/2021
South Fork Wind LLC	Construction	11/15/2022	11/14/2023	13	12/21/2021
Park City Wind LLC	Marine surveys	9/1/2022	8/31/2023	30	7/19/2022
NextEra	Marine surveys	7/1/2022	6/30/2023	8	6/29/2022
VEPCO	Marine surveys	5/27/2022	5/26/2023	5	5/27/2022
Ocean Wind II LLC	Marine surveys	5/10/2022	5/9/2023	11	5/9/2022
Orsted Wind Power North America LLC (Delaware)	Marine surveys	5/10/2022	5/9/2023	11	5/6/2022
Ocean Wind LLC	Marine surveys	5/10/2022	5/9/2023	9	5/9/2022
Kitty Hawk	Marine surveys	8/1/2022	7/31/2023	2	4/20/2022
Atlantic Shores Offshore Wind LLC	Marine surveys	4/20/2022	4/19/2023	17	4/18/2022
Orsted Wind Power NA	Marine surveys	3/3/2022	9/24/2022	37	3/3/2022
Vineyard Wind 1 LLC	Marine surveys	7/21/2021	7/20/2022	10	7/21/2021
Vineyard Wind LLC	Marine surveys	6/21/2021	6/20/2022	10	7/15/2021

Vineyard Wind 1	Marine surveys	7/21/2021	7/20/2022	10	7/21/2021
Mayflower Wind Energy LLC	Marine surveys	7/1/2021	6/30/2022	9	7/1/2021
Vineyard Wind LLC	Marine surveys	7/15/2021	6/20/2022	10	7/15/2021
Garden State Offshore Energy LLC	Marine surveys	6/11/2021	6/10/2022	14	6/11/2021
Ocean Wind LLC	Marine surveys	5/10/2022	5/9/2023	9	5/9/2022
Atlantic Shores Offshore Wind LLC	Marine surveys	4/20/2021	4/19/2022	8	4/16/2021
Skipjack Offshore Energy LLC	Marine surveys	4/5/2021	4/4/2021	3	4/5/2021
Orsted Wind Power North America	Marine surveys	3/3/2022	9/24/2022	37	3/3/2022
Equinor Wind, LLC	Marine surveys	9/20/2020	9/19/2021	14	9/20/2020
Mayflower Wind Energy, LLC	Marine surveys	7/23/2020	7/22/2021	3	7/23/2020
Vineyard Wind LLC	Marine surveys	6/21/2020	6/20/2021	10	4/15/2020
Skipjack Offshore Energy, LLC	Marine surveys	11/25/2019	11/24/2020	3	11/25/2019
Ørsted Wind Power LLC	Marine surveys	9/26/2019	9/25/2020	10	9/26/2019
Equinor Wind U.S. LLC	Marine surveys	4/25/2019	4/24/2020	7	4/25/2019

96. NMFS has an obligation under 16 U.S.C. §1371(a)(5)(D)(iv) and 16 U.S.C. §1371(a)(5)(D)(ii)(II) to take all these IHAs into account (particularly those issued after the Vineyard Wind IHA was issued) and to make new determinations that the requirements of the MMPA would still be met (which they would not be). NMFS's failure to make new determinations is arbitrary and capricious and contrary to its obligations under the MMPA.

97. NMFS has also acted arbitrarily and capriciously and failed to adhere to its obligation under 16 U.S.C. §1371(a)(5)(D)(iv) and 16 U.S.C. §1371(a)(5)(D)(ii) by failing analyze how the proposed Vineyard Wind activities and the activities of the other IHAs that are in effect will also increase the risk of collisions between NARWs and vessel traffic unrelated to offshore wind activities as both navigate around the various offshore wind activities in question while they occur.

98. The issuance of, and failure to modify, suspend, or revoke, the IHA for the Project violates the MMPA. In issuing the IHA and failing to modify, suspend, or revoke, the IHA, NMFS acted arbitrarily, capriciously, abused its discretion, and acted not in accordance with law. As a result, the Vineyard Wind IHA should be vacated.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Vacate and set aside the IHA issued to Vineyard Wind on May 21, 2021;
- B. Enjoin Defendants from issuing future 1-year IHAs for the Vineyard Wind project;
- C. Declare that no harassment authorizations may be issued under the MMPA for the Vineyard Wind Project because any approval would need to account for decommissioning which is beyond the statutory five-year limit;
- D. Declare that no harassment authorizations may be issued for the Vineyard Wind Project because take of the NARW is not incidental to the carrying out the construction, operation and decommissioning of the Project;
- E. Declare that “small numbers” under the MMPA means a number no greater than the PBR for the NARW;
- F. Award Plaintiff his costs and other expenses as provided by applicable law; and
- G. Issue such relief as Plaintiff subsequently requests or that this Court may deem just, proper, and equitable.

Respectfully submitted,

THE PLAINTIFF,

Dated: August __, 2022

/s/Thomas Melone
Thomas Melone
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Certificate of Service

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

/s/Thomas Melone

EXHIBIT B

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 PAUL DOREMUS, in her official
capacity of Assistant Administrator, of the National
Marine for Fisheries Service, 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, and the
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

~~SECOND~~**FIRST** AMENDED
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

~~SECOND~~**FIRST** AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE
RELIEF

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

1.— This case challenges the issuance of the incidental harassment authorization (“IHA”) issued by the ~~approvals of the proposed Vineyard Wind Project and South Fork Wind project by the~~ Defendants to Vineyard Wind 1 LLC (“Vineyard Wind” or “VW”). It asks the Court to set aside the IHA ~~ose approvals~~ as having been issued in violation ~~ng the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§4321–4370h, the Outer Continental Shelf Lands Act (“OCSLA”), 43 U.S.C. §1337(p), section 404 of the Clean Water Act (“CWA”), 33 U.S.C. §1344, section 101 of the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. §1371 *et seq.*, and the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, and the Defendants’ rules and regulations, and to ensure that federal review of the proposed projects comply with the~~ law.

INTRODUCTION

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

~~the VWROD, which in turn was based upon the final environmental impact statement issued in March 2021 (the “VWEIS”). The VWROD and the VWEIS were also based upon a Biological Opinion issued by the NMFS dated September 11, 2020 (the “Old VW Biop”).~~

~~4. The VWEIS was performed by BOEM as lead agency for all the agencies that issued Approvals. Plaintiffs submitted comments on the VWEIS, which included comments for each agency’s consideration. The VWEIS is part of each agency’s administrative record.~~

~~5. Prior to issuing their VW Approvals, the Defendants engaged in re-consultation under the ESA. That re-consultation resulted in a new Biological Opinion on October 18, 2021 (the “New VW Biop”). The New VW Biop was 178 pages longer than the Old VW Biop.~~

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

~~7. The SFEIS was performed by BOEM as lead agency for all the agencies that issued SF Approvals. Plaintiffs submitted comments on the SFEIS, which included comments for each agency's consideration. The SFEIS is part of each agency's administrative record.~~

~~8.1. The Defendants' SF Approvals and VW Approvals left for the future, the preparation of measures intended to protect species covered under the ESA, the MMPA and the MBTA denying the Plaintiffs and other members of the public the right to comment on the proposed measures under the NEPA process.~~

JURISDICTION AND VENUE

~~9.2.~~ This action arises under ~~NEPA, 42 U.S.C. §§4321-4370h, 36 C.F.R. Part 25,~~ the MMPA, ~~the OCSLA, the ESA~~ and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

~~10.3.~~ Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 because the action raises a federal question. The Court has authority to issue the requested declaratory and injunctive relief pursuant to 28 U.S.C. §§2201, 2202, and 5 U.S.C. §§705, 706.

~~11.4.~~ This action reflects an actual, present, and justiciable controversy between Plaintiffs and the Defendants within the meaning of the Declaratory Judgment Act, 28 U.S.C. §2201. Plaintiff's² interests will be imminently adversely affected and irreparably injured if the Defendants continue to violate the MMPA and if the IHA is not rescinded or set aside. ~~NEPA and other federal law as alleged herein, and if they affirmatively implement the decisions challenged herein.~~ These injuries are concrete and particularized, and fairly traceable to the Defendants' challenged decisions, providing the requisite personal stake in the outcome of this controversy necessary for this Court's jurisdiction.

~~12.5.~~ The requested relief would redress the actual, concrete injuries to the Plaintiffs' caused by the Defendants' failure to comply with the MMPA and the APA ~~duties mandated by NEPA and its implementing regulations and federal law.~~

~~13.6.~~ The challenged agency actions are final and subject to judicial review pursuant to 5 U.S.C. §§702, 704 and 706.

~~14.7.~~ Plaintiffs ~~has~~ ve exhausted administrative remedies to the extent required to do so.

~~15.8.~~ Venue in this Court is proper pursuant to 28 U.S.C. §1391(e) because ~~an officer of the United States is named as a Defendant in his or her official capacity and resides in this judicial district, and~~ a substantial part of the events or omissions giving rise to this suit occurred in this district ~~in the case of both the proposed Vineyard Wind project and the South Fork Wind project,~~ and the proposed Vineyard Wind project would be partially located in this district, and ~~in the case of both projects,~~ the principal place of business of the developer is in Massachusetts.

THE PARTIES

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

~~17.~~ The Defendants' failure to comply with duties mandated by NEPA and the OCSLA and their implementing regulations and federal law will have a substantial adverse impact on the development of QF solar electric generation in the Northeastern United States, including Plaintiffs'.

18. — Thomas Melone lives part-time in Edgartown, Massachusetts, on Nantucket Sound. Plaintiff Melone lives part-time at his home in Edgartown during the months of May through November with the bulk of the time being from June through September. ~~Plaintiff Melone purchased his residence in Edgartown in 2000. Part of Plaintiff Melone's property includes and is adjacent to what is generally known as "Little Beach." A part of Little Beach is known in the Melone family as "Bird Island," being named by Plaintiff Melone's children after the thousands of migratory birds that nest and habitat there each year while Plaintiff Melone resides there, and because at high tide the area primarily occupied by the migratory birds would become an island. Plaintiff Melone and his family have regularly observed the migratory birds on Little Beach for two decades since 2000. That observation has occurred daily while Plaintiff Melone resides in Edgartown. That observation is made from inside the house, outside the house on land and from Eel Pond and the Nantucket Sound. Plaintiff Melone and his family derive, recreational, conservation, environmental well-being and aesthetic benefits from the existence and observation of the migratory birds on Little Beach and their properly functioning habitat. The species of migratory birds that habitat on Little Beach year after year and observed by Plaintiff Melone include, ESA listed species such as the Piping Plover and the Roseate Tern, and other species such as the Common Tern, the Least Tern, the Willet, the Black Skimmer, the Oystercatcher, and the Purple Sandpiper. Plaintiff Melone intends to continue in the future residing part-time in Edgartown during the months that he has historically done so. Plaintiff Melone intends to continue during each of his future visits to continue regularly observing the migratory birds on Little Beach (such as the Piping Plover, the Roseate Tern, the Common Tern, the Least Tern, the Willet, the Black Skimmer, the Oystercatcher, and the Purple Sandpiper) and deriving recreational, conservation, environmental well-being and aesthetic benefits from the existence and observation~~

~~of those migratory birds on Little Beach, “Bird Island” and their properly functioning habitat. Plaintiff Melone’s next scheduled trip to his home in Edgartown is on June 29, 2022, on the 2:30pm boat to Oak Bluffs.~~

~~19. — Plaintiff Melone has a particularized interest in the migratory birds that live and habitat on Little Beach and is concerned with the substantial adverse effects on those birds from the Defendants’ failure to comply with duties mandated by NEPA, the ESA, the OCSLA and their implementing regulations and federal law. — In particular Plaintiff Melone is concerned about the adverse effect of the Vineyard Wind project, South Fork project and all the other foreseeable offshore wind projects on all the migratory birds that live on Little Beach. — The wind turbines of the Vineyard Wind project, South Fork project and all the other foreseeable offshore wind projects are practically certain to kill one or more of the migratory birds that habitat on Little Beach as those birds migrate to and from Little Beach and as they forage for food. — The killing of those Little Beach migratory birds will reduce the number of birds that Plaintiff Melone can observe on Little Beach, which directly and imminently harms the recreational, conservation, environmental well-being and aesthetic benefits from the existence and observation of the migratory birds on Little Beach and their properly functioning habitat that Plaintiff Melone derives.~~

~~20. — In addition to the harm to those migratory birds from the wind turbines themselves, the habitat on Little Beach would be adversely affected by discharges into the Atlantic Ocean and/or Nantucket Sound and/or Vineyard Sound (including oil and other contaminant spills) from the wind turbines from a Category 3 or above Atlantic storm. — No wind turbine that exists today has been shown to be able to survive a Category 3 or above Atlantic hurricane, which is likely to occur during the operational life of the Projects. — Those discharges would harm the habitat on Little Beach, which in turn would harm the migratory birds on Little Beach which creates a direct and~~

~~imminent harm to the recreational, conservation, environmental well-being and aesthetic benefits from the existence and observation of the migratory birds on Little Beach and their properly functioning habitat that Plaintiff Melone derives.~~

~~21.—The latest research regarding endangered species of migratory birds such as the Piping Plover⁺ indicates that the birds' flight paths cross the Vineyard Wind area and South Fork Wind area and the area of other foreseeable offshore wind projects, and with the new enlarged wind turbines that are nearly as tall as the Chrysler building, it is practically certain that deaths of those and other birds protected by the ESA and the MBTA will be caused by the Vineyard Wind project, the South Fork wind project and other foreseeable offshore wind projects.—Vineyard Wind's and other foreseeable offshore wind projects such as the South Fork Wind project's causing the death of those birds is a strict liability crime, 16 U.S.C. § 703, and there is no authority for exemptions from such conduct.~~

~~22.—Each death of one of the Little Beach migratory birds caused by the Vineyard Wind project, the South Fork wind project and other foreseeable offshore wind projects is unlawful and would harm Melone's cognizable interests in the continued recreational, conservation, environmental well-being and aesthetic benefits from the existence and observation of the migratory birds on Little Beach and their properly functioning habitat.~~

~~23.—The harm from the Vineyard Wind and South Fork Wind Projects and the Defendants' failure to follow the law in issuing the Approvals is a concrete and imminent harm to Melone's cognizable interests in the continued recreational, conservation, environmental well-~~

⁺ Loring, P., et al., *Supportive wind conditions influence offshore movements of Atlantic Coast Piping Plovers during fall migration 2 Piping Plover migration*, September 2020), https://www.researchgate.net/publication/343084422_Supportive_wind_conditions_influence_of_fshore_movements_of_Atlantic_Coast_Piping_Plovers_during_fall_migration_2_Piping_Plover_migration.

~~being and aesthetic benefits from the existence and observation of the migratory birds on Little Beach and their properly functioning habitat.~~

24.9. Plaintiff Melone has a particularized interest in and is ~~also~~ concerned about the adverse effect of the Vineyard Wind ~~and South Fork Wind~~ projects and other foreseeable offshore wind projects will have on the North Atlantic Right Whale (“NARW”) whose critical habitat includes Nantucket Sound. Plaintiff Melone derives recreational, conservation, environmental well-being and aesthetic benefits from the existence of the NARW and their properly functioning habitat through wildlife observation, study, and education. Melone believes in developing sustainable and economically viable renewable energy generation in the United States, while maximizing the creation of United States jobs and minimizing the impact to the environment. Melone believes that offshore wind has too many adverse impacts and creates too much risk and adverse impacts on the marine, coastal and human environment and various species, ~~such as the NARW, migratory birds that live on Little Beach, and the impact off shore wind (“OSW”) would have on sustainable and benign renewable energy, such as solar and hydrogen generators.~~

10. Throughout Melone’s life he has enjoyed observing marine life and enjoying the recreational, conservation, environmental well-being and aesthetic benefits from doing so. From local places such as the Jersey shore as a child, to far flung locations as an adult, such as Point Barrow, Alaska, Norway, and Australia, he has enjoyed observing marine life and enjoying the recreational, conservation, environmental well-being and aesthetic benefits from doing so. He has enjoyed observing dolphins and whales off the coast of Malibu on visits to California and enjoyed the recreational, conservation, environmental well-being and aesthetic benefits from doing so. He has enjoyed looking for marine life and polar bears off the beach in Point Barrow, Alaska and enjoyed the recreational, conservation, environmental well-being and aesthetic benefits from doing

so. He has enjoyed observing marine life including humpback and orca whales in Prince William Sound, Alaska, and enjoyed the recreational, conservation, environmental well-being and aesthetic benefits from doing so. He has enjoyed sitting on the beach at night observing penquins march to the ocean in Philip Island, Australia, and enjoyed the recreational, conservation, environmental well-being and aesthetic benefits from doing so.

11. In respect of the NARW, he first expressed his concerns to the Defendants regarding the Vineyard Wind project in 2019 in a public comment. Since that time, he has watched in disbelief as the NARW population declines at an alarming rate and the Defendants authorize exponential increase in the “take” of the NARW.

25.12. Melone’s first trip planned for observing the NARW in Florida was in December 2020 at Amelia Island, however, due to the COVID-19 pandemic, that trip was cancelled. In respect of the NARW, Plaintiff Melone went whale watching on New England Aquarium’s Whale Watch Cruise on October 1, 2021, looking for the NARW. Melone did not observe a NARW on that trip, but did observe a handful of humpback whales, another species that Melone derives recreational, conservation, environmental well-being and aesthetic benefits from. On October 26-27, 2021, Melone attended two full days of events of the NARW Consortium Annual Meeting, learning from experts about the plight of the NARW. From December 28, 2021, to December 31, 2021, Melone engaged in a NARW-watch in Fernandina Beach, Florida, from a fifth-floor room at the Ritz Carlton using Celestron – SkyMaster 25X100 Astro Binoculars. Melone observed many porpoises each of the four days, and observed a NARW (Derecha) and her calf on December 30, 2021, at 7:40am. Melone observed them until 8:00am at which point he reported the sighting on the WhaleAlert app. After he reported the sighting, he continued to search for them but did not see them. Shortly after 9am he received a call from a representative from the Florida Fish &

Wildlife Conservation Commission (“FL FWCC”) asking him about the sighting. He gave her the information and then she said that their people would be taking off to soon to verify the sighting. The following day the FL FWCC let him know they confirmed the sighting. Melone intends to annually attend the NARW Consortium Annual Meeting continuing to learn and study the NARW and to annually engage in a NARW watch from Fernandina Beach in December or early January, which is the time of year that NARWs are present in the waters off Fernandina Beach. Melone has registered to attend virtually the 2022 NARW Consortium Annual Meeting. Melone’s next scheduled trip to Fernandina Beach for NARW watching is December 28 to December 30, 2022. ~~Melone’s next on New England Aquarium’s Whale Watch Cruise to seek to observe the NARW and the humpback whale is June 10, 2022, at 10am.~~

~~26.13.~~ The Defendants’ failure to comply ~~with duties mandated by NEPA and its implementing regulations and federal law, such as~~ the MMPA, ~~the ESA and the OCSLA,~~ will result in an inadequate mitigation of harm to ~~listed species, migratory birds on Little Beach,~~ the NARW and their ~~designated habitats, including but not limited to, the examples listed above~~ that benefit Plaintiff Melone. This harms Plaintiff Melone’s past, present and future enjoyment of ~~these~~ species and their habitats. The Defendants’s approvals and failure to adhere to the MMPA federal law would imminently harm Melone because it would reduce his likelihood of spotting NARWs in his planned annual trips to Fernandina Beach for NARW watching lessening the aesthetic, environmental well-being, recreational, conservation, and benefits Melone derives from the NARW. ~~The Defendant’s approvals and failure to adhere to federal law would imminently harm Melone because it would reduce and lessen the aesthetic, environmental well-being, recreational, and conservation benefits Melone derives from the migratory birds on Little Beach.~~ The Defendants’ approvals ~~by~~ cause the NARW ~~and migratory birds from Little Beach~~ to

be taken, interfere with the NARW's ~~and those migratory birds'~~ natural state and ~~may~~ increase their risk of death and serious injury, reducing the likelihood that Plaintiff Melone will observe the NARW ~~and those migratory birds~~ in their natural state on future visits. Requiring the Defendants to comply with ~~duties mandated by NEPA and its implementing regulations and federal law~~ the MMPA would ensure that ~~the NARW~~ ose species and Plaintiff Melone's cognizable interests in ~~that~~ ese species would not be substantially adversely affected and would redress those harms to Plaintiff Melone.

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

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

~~29. Gary Frazer is the Assistant Director for Endangered Species, U.S. Fish and Wildlife Service, and is sued in his official capacity.~~

~~30.14. Janet Coit~~Paul Doremus is the Assistant Administrator ~~for Fisheries~~, NMFS, and is sued in ~~her~~his official capacity.

~~31. Martha Williams is the Principal Deputy Director, U.S. Fish and Wildlife Service, and is sued in her official capacity.~~

~~32. Colonel John A. Atilano II is the Commander and District Engineer, U.S. Army Corps of Engineers, New England District, and is sued in his official capacity.~~

~~33. The U.S. Fish and Wildlife Service (“FWS”) is a bureau within the Department of the Interior. The FWS is the primary government agency dedicated to the conservation, protection, and enhancement of fish, wildlife and plants, and their habitats.~~

~~34. NMFS is an office of the National Oceanic and Atmospheric Administration within the Department of Commerce. NMFS is responsible for the stewardship of the Nation’s ocean resources and their habitat. NMFS issues IHAs under section 101(a)(5)(D) of the MMPA, 16 U.S.C. §1371(a)(5)(D)).~~

~~35. The USACE is an engineer formation of the United States Army. The USACE issues permits pursuant to Section 404 and Section 10.~~

~~36.15. BOEM is a bureau within the Department of the Interior. BOEM issues approvals under section 8(p) of the OCSLA, 43 U.S.C. §1337(p).~~

STANDING

~~A. Economic Injury and Procedural Standing~~

~~37. Alleo is a business that develops QF solar projects that sell the output of their solar energy facilities under long term power purchase agreements. Plaintiff Melone is the owner of~~

~~Alleo. The Defendants' action will reduce Alleo's opportunities and ability to develop QF solar projects because the VW Project, SF Project and the foreseeable OSW projects decimate U.S. onshore renewable energy producers in the Northeastern United States, including Alleo. If the Projects and those foreseeable are not approved, the New England States need for renewable energy will be fulfilled by solar and other onshore renewables, including Alleo's. The promise of offshore wind, and the related Defendants' Approvals have already harmed Plaintiffs, and continue to harm Plaintiffs' development of solar projects in Connecticut and Massachusetts. In Massachusetts, the Defendants' Approvals have eliminated and continue to eliminate opportunities for the development of the Plaintiffs' solar project in Ashburnham, Massachusetts, which is located in the service territory of Ashburnham Municipal Light Plant. In Connecticut, the promise of offshore wind has reduced the electric distribution utilities' procurement of solar generation facilities and economic opportunity for Plaintiffs' proposed projects in Connecticut, such as Plaintiffs' proposed solar projects in Plainfield, CT, Griswold, CT, and Hampton, CT. But for the State of Connecticut's and State of Massachusetts's requirements for the procurement of offshore wind projects such as the Vineyard Wind Project and other foreseeable OSW projects, the Plaintiffs' projects would have increased opportunities, and those States would need to require the electric distribution utilities to provide more contractual opportunities for Plaintiffs' solar projects. The Connecticut Department of Energy and Environmental Protection conceded in its most recent comprehensive energy strategy that because of the OSW procurements that it has already conducted that it would not need to conduct procurements for solar energy, creating direct ongoing harm to Plaintiffs' efforts to develop its solar projects in Connecticut. The same is true for the State of Massachusetts. Because of its OSW procurements, Massachusetts requires the electric distribution companies to acquire less solar energy which has and continues to harm Plaintiffs'~~

~~ability to develop its solar energy facility in Ashburnham, Massachusetts. Alleo's economic interests are part of the human environment affected by the Defendants' actions.~~

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

39. — 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.

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

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

~~42.16. Plaintiffs also have a procedural right to comment on material changes to the EIS. The New VW Biop is such a material change. The increased size of the proposed wind turbines is such a material change. Defendants have denied the Plaintiffs those procedural rights. If Plaintiffs were able to exercise their procedural rights to comment on such issues, their concrete interest could be protected.~~

~~43.17. Plaintiff hass ~~have~~ a procedural right to comment on the proposed mitigation measures for ~~to the migratory birds on Little Beach and~~ the NARW. Defendants have denied the Plaintiffs those procedural rights. ~~Defendants have left the determination of final mitigation measures to the future.~~ If Plaintiffs were ~~were~~ able to exercise his ~~their~~ procedural rights to comment on such issues, his ~~their~~ concrete interest could be protected. Because part of the MMPA requires the Defendants to follow certain procedures including notice and comment ~~NEPA is essentially a procedural statute~~, injury alleged to have occurred as a result of violating those ~~ese~~ procedures esal ~~rights~~ confers standing.~~

~~44.18. Plaintiff's' economic and procedural standing would be redressed by an order that requires the Defendants to follow procedural requirements that make it less likely that the Defendants' action will be finalized and ultimately upheld in legal challenges, and less likely that the VW Project, SF Wind Project and the balance of the 2,021 turbines that the FEIS concludes are cumulative impacts of the proposed actions would be built.~~

B. Informational Standing.

~~45.19. Plaintiff Melone engages in As part of its business developing QF solar projects, Alteo needs to engage in advocacy before Congress, federal agencies and State legislatures and agencies to ensure that the requirements of PURPA are implemented as required by Congress and that such entities recognize the benefits of solar energy and the detriments of OSW and other forms~~

~~of electrical generation~~ and implement policy and programs accordingly. ~~Plaintiff Melone also engages in the same regulatory advocacy.~~

~~46.20. Proper consultation as required by the ESA and the preparation of an environmental impact statement (“EIS”) that complies with NEPA and~~ A proper legal and factual analysis by the Defendants under the ~~OCSLA, the CWA and the~~ MMPA would produce key information that Plaintiffs would use to engage in ~~his~~their regulatory advocacy. Defendants are required by the MMPA ~~NEPA and federal law~~ to prepare such information and make it available to Plaintiffs.

~~47.21. Proper consultation as required by the ESA and the preparation of an EIS that complies with NEPA and a supplemental EIS and~~ A proper legal and factual analysis under the ~~OCSLA, the CWA and the~~ MMPA would produce information from a neutral federal agency that has greater credibility and weight than any such information developed and produced by private entities.

~~48.22. The Defendants’ failure to properly consult as required by the ESA and the failures to prepare an EIS that complies with NEPA and a supplemental EIS, and~~ a proper legal and factual analysis under the ~~OCSLA, the CWA and the~~ MMPA denies Plaintiffs the key, credible, and weighty information that ~~he~~it would use in engaging in ~~his~~their regulatory advocacy, which information the Defendants are required under the MMPA ~~EPA and federal law~~ to prepare and provide to Plaintiffs.

~~49.23. An order for the Defendants to consult using the standards mandated by the ESA and requiring the preparation of an EIS that complies with NEPA and a supplemental EIS and~~ a proper legal and factual analysis under the ~~OCSLA, the CWA and the~~ MMPA, would redress the denial of the information by requiring the Defendants to ~~consult and prepare a supplemental EIS and to~~ provide a proper legal and factual analysis under ~~the OCSLA, the CWA~~

~~and the~~ MMPA, which will cause the information to be produced and available to Plaintiffs for ~~his~~their use in regulatory advocacy.

C. Species Impacts Standing.

~~50.24.~~ The Plaintiff's² cognizable interests as stated above in the NARW ~~has been and~~ and ~~Little Beach migratory birds~~ would be continued to be harmed by the Defendants' actions, which would ~~exacerbate climate change~~, harm habitat, reduce the population of the NARW affected species, ~~and~~ result in take of the NARW and fail to ensure that not a single whale suffers death or serious injury from the construction and operation activities of Vineyard Wind affected species.

~~YY.~~—An order vacating the IHA requiring the Defendants to prepare an EIS that complies with NEPA and prepare proper legal and factual analysis by the Defendants under the OCSLA, the CWA, the ESA and the MMPA would ~~make it less likely that Defendants' action will be finalized and the Projects approved and thereby~~ redress the Plaintiff's² injuries. An order declaring that no permitting may be issued under the MMPA for either the Vineyard Wind Project or the South Fork Wind Project because any approval would need to account for decommissioning which is beyond the statutory five-year limit would redress the Plaintiff's injuries. ~~An order and~~ declaring that no permitting may be issued for ~~either the Vineyard Wind Project or the South Fork Wind Project~~ because take of the NARW; ~~the Piping Plover and other ESA listed species~~ by the VW Project ~~and the SF Wind Project~~ is not incidental to the carrying out the construction, operation and decommissioning of ~~the each~~ Project would make it less likely that Defendants' action will be finalized and the Projects approved and thereby redress the Plaintiff's² injuries.

~~ZZ.~~ OCSLA Standing.

~~53.25. § 1349(a)(1) allows any person having a valid legal interest which is or may be adversely affected by the terms of any permit issued by the Secretary to bring suit. The Plaintiffs' cognizable interests stated above would be harmed by Defendants' action and reasonably foreseeable actions. The Plaintiffs' harms would be redressed by an order vacating the Defendants' approvals of the Projects and that requires the Defendants to follow the requirements of the federal law.~~

D. MMPA Standing.

~~54.26. Plaintiff Melone has standing under 16 U.S.C. §1374(d)(6) because as stated above Melone derives concrete aesthetic, environmental well-being, recreational, and conservation benefits from the NARW that would be imminently harmed by the Defendants' failure to follow the requirements of NEPA, the OCSLA, and the MMPA.~~

E. Administrative Exhaustion.

~~55. While no administrative exhaustion is required, Plaintiff iss-are a party that submitted a comment during the environmental review of each the Project. A commenter during the environmental review of the VW Project and the SF Project filed a sufficiently detailed comment so as to put the lead agency on notice of the issue on which Plaintiffs seek judicial review to the extent necessary.~~

~~56.27. Plaintiffs provided to Defendants notices of suit under the OCSLA on September 17, 2021, December 31, 2021, January 5, 2022 and January 7, 2022, and under the ESA on September 3, 2021, and January 7, 2022, copies of which are attached as Exhibit A.~~

LEGAL AND FACTUAL BACKGROUND

I. National Environmental Policy Act.

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

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

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

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

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

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

8. — NEPA requires the Defendants to consider “any adverse environmental effects which cannot be avoided.” 42 U.S.C. §4332(C)(ii). In so doing, the Defendants must “identify and develop methods and procedures . . . which will insure that presently unquantified

environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations.” *Id.* §4332(B).

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

10. — 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.

11. — 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.

~~12. — 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).~~

~~13. — The Defendants’ analysis must do more than merely identify impacts; it must also “evaluate the severity” of effects. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989); 40 C.F.R. §1502.16(a) (b) (recognizing that agency must explain the “significance” of effects).~~

~~14. — “NEPA is ‘essentially procedural,’ designed to ensure ‘fully informed and well-considered decision[s]’ by federal agencies.” *Del. Riverkeeper Network v. FERC*, 753 F.3d at 1309-10 (quoting *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978)). The statute serves that purpose by requiring federal agencies to take a “hard look” at “their proposed actions’ environmental consequences in advance of deciding whether and how to proceed.” *Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31, 37 (D.C. Cir. 2015). NEPA “does not dictate particular decisional outcomes, but ‘merely prohibits uninformed — rather than unwise — agency action.’” *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989)). Under NEPA regulations, agencies must consider all reasonable alternatives, *including those not specifically under their authority to implement.* See <https://ceq.doe.gov/nepa/regs/40/1-10.HTM>. See also *NRDC v. Morton*, 458 F.2d 827 (D.C. Cir 1972).~~

~~**XV. — The Endangered Species Act.**~~

~~16. — Congress passed the ESA, 16 U.S.C. §§ 1531 *et seq.*, in 1973 to affirm our nation’s commitment to the conservation of threatened and endangered species and their habitat — the forests, rangeland, prairies, rivers, and seas these species need to survive. Congress purposefully gave “conservation” a sweeping definition — the use of all methods and procedures necessary to~~

~~recover threatened and endangered species so that they no longer need the Act's protections. 16 U.S.C. §1532(3). The ESA works, in part, by placing the survival and recovery of imperiled animals, fish, and plants at the forefront of every federal action and decision.~~

~~17.—The ESA requires that each federal agency initiate and complete consultation with the Department of the Interior, the FWS or the NMFS (the “Services”) before taking any action that may jeopardize the continued existence of endangered or threatened species, or result in the destruction or adverse modification of critical habitat.~~

~~XVIII.I. The Marine Mammal Protection Act.~~

~~LVI.—The MMPA prohibits, with certain exceptions, the “take” of marine mammals in U.S. waters and by U.S. citizens on the high seas, and the importation of marine mammals and marine mammal products into the U.S. The primary purpose of MMPA is protection of marine animals and the MMPA was not intended to balance interests between other industries and the protected marine mammals. *Committee for Humane Legislation, Inc. v. Richardson*, 414 F. Supp. 297 (D.D.C.), *aff'd*, 540 F.2d 1141 (D.C. Cir. 1976).~~

~~LVIII. The Outer Continental Shelf Lands Act.~~

~~60.—Subsection 8(p)(4) of the OCSLA authorizes the Secretary of the Interior, “in consultation with the Secretary of the Department in which the Coast Guard is operating and other relevant departments and agencies of the Federal Government” to “grant a lease, easement, or right of way on the outer Continental Shelf for activities ...if those activities ... produce or support production, transportation, or transmission of energy from sources other than oil and gas.” Subsection 8(p)(4) of the OCSLA sets forth certain requirements that the Secretary “shall ensure” are met.~~

~~LXI.—Legal Framework for the USACE's Approvals.~~

~~62.—Section 404(a) of the CWA authorizes the Secretary of the Army, acting through the Army Corps of Engineers, to issue permits for the discharge of dredged or fill material into navigable waters “after notice and opportunity for public hearings.” 33 U.S.C. §1344(a). In~~

~~making permitting decisions, the Corps must follow a set of guidelines developed by the Environmental Protection Agency (“EPA”) in conjunction with the Secretary of the Army (the “404(b)(1) Guidelines” or “Guidelines”). See *id.*, § 1344(b); *Bersani v. EPA*, 850 F.2d 36, 39 (2d Cir. 1988). These Guidelines prohibit the Corps from granting a Section 404 permit “if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.” 40 C.F.R. §230.10(a). The Corps’ own regulations further require the Corps to conduct a public interest review for each proposed discharge, and prohibit the Corps from granting a permit that (1) would “not comply with [EPA’s] 404(b)(1) [G]uidelines” and/or (2) that would be “contrary to the public interest.” 33 C.F.R. §320.4(a)(1).~~

~~63. — Under EPA’s 404(b)(1) Guidelines, an alternative to the proposed discharge is practicable if it is “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” 40 C.F.R. §230.10(a)(2). Alternatives need not be in locations that are presently owned by a permit applicant so long as they are otherwise practicable and could “reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity.” *Id.*; accord *Bersani*, 850 F.2d at 39.~~

~~64. — “[P]racticable alternatives include, but are not limited to: (i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters,” see 40 C.F.R. §230.10(a)(1)(i), such as onshore renewable energy generation.~~

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

~~67. — Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.~~

~~68. — Subsection 8(p)(4) of the OCLSA sets forth certain requirements that the Secretary “shall ensure” are met. In approving the COP for each Project, the Secretary failed to comply with the requirements in subsection 8(p)(4) that she ensure the construction, operation and decommissioning of such Project be carried out in a manner that ensures each of those requirements are met. Specifically, the Secretary has failed to ensure the protection of the migratory birds that habitat on Little Beach, and the NARW which the Secretary has an obligation to do as part of her obligation to ensure the protection of the environment, and conservation of the natural resources of the outer Continental Shelf. The Projects individually and cumulatively with other foreseeable and planned offshore wind projects will result in the death of migratory birds, which is unlawful.~~

~~69. — The Secretary has failed, and continues to fail, to ensure safety and protection of the environment and conservation of the natural resources of the outer Continental Shelf because no structural analysis was done or reviewed in connection with the Defendants’ Approvals of either Project. No offshore wind turbine that exists today can survive a Category 3 or greater Atlantic hurricane. Neither the ROD nor the FEIS examine any safety or engineering issues with respect to the untested and unbuilt wind turbines planned for each Project.~~

~~70. — In the draft EIS (“DEIS”) for the VW Project, BOEM stated at 2-18:~~

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

~~73. — In Plaintiffs’ comments on the DEIS, they brought to BOEM’s attention that meant the WTGs would not survive a Category 3 or greater Atlantic storm. Since the submission of~~

~~Plaintiffs' comments, BOEM deleted its reference to the WTGs' survivability and has omitted such information in subsequent versions of the EIS for the VW Project and the SF Project.~~

~~74. — An adverse weather event of a category 3 or greater hurricane, which is likely to occur during the next thirty years, would likely lead to a release (and possibly catastrophic release) of the WTGs' oil and contaminants, thus causing the take of, and possibly extinction of, multiple endangered species including the NARW and the migratory birds that habitat on Little Beach, and destroying the fishing grounds off the coast of Rhode Island and Massachusetts for generations. The evidence is overwhelming that climate change will result in more frequent and more intense tropical cyclones in the Atlantic Ocean.~~

~~75. — In addition, the Secretary also failed to adequately explain how each of those requirements in subsection 8(p)(4) are met.~~

~~76. — The Secretary also failed to take a hard look at the Vineyard Wind project's effect and the South Fork Wind project' effect, both individually and cumulatively, and cumulatively with other foreseeable actions (the "Foreseeable Actions")² on marine environment, coastal environment, and human environment. The human environment includes the physical, social, and economic components, conditions, and factors which interactively determine the state, condition, and quality of living conditions, employment, and health of those affected, directly or indirectly, by activities occurring on the outer Continental Shelf. The Secretary has failed, and continues to fail, to ensure protection of the environment, and failed to take a hard look at the effects from the VW and SF Projects and the Foreseeable Actions of: (i) the impact on, and displacement of,~~

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

~~development of onshore renewable energy resources, (ii) the acoustic impact of the wind turbine generators that are proposed for the Vineyard Wind project, the South Fork Wind project and the Foreseeable Actions on the NARW and migratory birds including impacts on habitat and breeding patterns, (iv) the transmission infrastructure that is required to be built to accommodate the Vineyard Wind and South Fork Wind projects and the Foreseeable Actions, (v) impacts on the NARW from vessel strikes, construction, operation, and decommissioning; (vi) impacts on other endangered or threatened species such as the Piping Plover and the Roseate Tern., (vii) impacts on migratory birds protected by the Migratory Bird Treaty Act, such as the Piping Plover, the Roseate Tern, the Common Tern, the Least Tern, the Willet, the Black Skimmer, the Oystercatcher, and the Purple Sandpiper.~~

~~77. — The Secretary's approving the Vineyard Wind project while consultation with the NMFS was still in process violates the OCSLA, NEPA and the ESA.~~

~~78. — The Secretary's approval of the Vineyard Wind project and the South Fork Wind project on the basis of biological opinions that were incomplete and not based upon the latest scientific data violates the OCSLA, NEPA and the ESA.~~

~~79. — The Secretary's failure to impose adequate measures, including disapproval of each project, to ensure each of the requirements (A) through (L) are independently satisfied violates the OCSLA, NEPA and the ESA~~

~~80. — Those failures and actions are arbitrary and capricious, violate the OCSLA, NEPA and the ESA and require the Approvals for both Projects to be vacated.~~

~~**COUNT II**
UNLAWFUL DELEGATION (VW AND SF)~~

~~83. — Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.~~

~~84. The Secretary has interpreted the OCSLA as leaving to the Secretary to decide which, if any, of the requirements in Subsection 8(p)(4) of the OCSLA are observed.~~

~~85. As interpreted and applied by the Secretary, that broad discretion is an unconstitutional delegation of legislative authority. There is no intelligible principle that must be observed if the Secretary has the discretion to discard some or all of the requirements in Subsection 8(p)(4) of the OCSLA.~~

~~86. Because the authority given to the Secretary to approve the COP for each Project is an unconstitutional delegation of legislative authority, the Approvals for both Projects must be vacated.~~

~~**COUNT III**
UNLAWFUL REDELEGATION (VW AND SF)~~

~~89. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.~~

~~90.28. The Approvals for each Project were not issued by the Secretary but by a subordinate. Under any interpretation of Subsection 8(p)(4) of the OCSLA, that redelegation of legislative authority is unlawful and as a result the Approvals for each Project must be vacated.~~

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

~~91.29. Plaintiffs re-alleges and incorporates by reference the allegations contained in each of the forgoing paragraphs as though fully set forth herein.~~

~~30. 16 U.S.C. §1371(a)(5)(D), provides that “[u]pon request therefor by citizens of the United States who engage in a specified activity (other than commercial fishing) within a specific geographic region, the Secretary shall authorize, for periods of not more than 1 year, subject to such conditions as the Secretary may specify, the incidental, but not intentional, taking by~~

harassment of small numbers of marine mammals of a species or population stock by such citizens while engaging in that activity within that region if the Secretary finds that such harassment during each period concerned [] will have a negligible impact on such species.”

31. On September 7, 2018, NMFS received a request from Vineyard Wind for an IHA to take marine mammals incidental to pile driving associated with the construction of an offshore wind energy project south of Massachusetts. NMFS000000000003392. Vineyard Wind submitted revised versions of the application on October 11, 2018 and on January 28, 2019. *Id.* The application was deemed adequate and complete on February 15, 2019. *Id.* A notice of proposed IHA was published in the Federal Register on April 30, 2019 (84 FR 18346). *Id.*

32. VW submitted a revised application on April 19, 2019. NMFS000000000003144. The Notice of Proposed IHA made no mention of the revised IHA application submitted in April 19, 2019.

33. The Notice of Proposed IHA defined the “Specific Geographic Region” as follows: “Vineyard Wind’s proposed activity would occur in the northern portion of the 675 square kilometer (km) (166,886 acre) Vineyard Wind Lease Area OCS– A 0501 (Figure 1 in the IHA application), also referred to as the WDA. At its nearest point, the WDA is just over 23 km (14 mi) from the southeast corner of Martha’s Vineyard and a similar distance from Nantucket. Water depths in the WDA range from approximately 37–49.5 meters (m) (121– 162 feet (ft)).” NMFS000000000003393.

34. 16 U.S.C. §1371(a)(5)(D)(iii) states that the “Secretary shall publish a proposed authorization not later than 45 days after receiving an application [] and request public comment through notice in the Federal Register, newspapers of general circulation, and appropriate electronic media and to all locally affected communities for a period of 30 days after publication.”

35. The Administrative Record contains no record of notices having been issued requesting public comment through or in newspapers of general circulation, and appropriate electronic media and to all locally affected communities.

36. The proposed IHA's comment period closed on May 30, 2019. NMFS000000000003392.

37. 16 U.S.C. §1371(a)(5)(D)(iii) provides that "Not later than 45 days after the close of the public comment period, if the Secretary makes the findings set forth in clause (i), the Secretary shall issue an authorization with appropriate conditions to meet the requirements of clause (ii)." 50 C.F.R § 216.107(c) requires that an "incidental harassment authorization [to] be either issued or denied within 45 days after the close of the public review period." 50 C.F.R. § 216.107(d) requires the notice of issuance or denial of an incidental harassment authorization to be published in the Federal Register within 30 days of issuance of a determination.

38. NMFS issued the IHA on May 21, 2021 (NMFS000000000003509 and NMFS000000000003514). The notice of IHA was published in the Federal Register on June 25, 2022. NMFS000000000003515. The IHA states that it is valid from May 1, 2023 through April 30, 2024. *Id.*

39. The NMFS finding that the total taking by the specified activity during the specified time period will have a negligible impact on species of marine mammals must be based upon "the best scientific evidence available." 50 C.F.R. §216.102(a).

40. The IHA is invalid because it was issued the IHA without observance of the following procedures required by law:

- a. NMFS failed to publish a proposed authorization not later than 45 days after receiving the VW application;

b. NMFS failed to comply with the requirement of 16 U.S.C. §1371(a)(5)(D)(iii) and 50 C.F.R § 216.107(c) to issue or deny the IHA within 45 days of the end of the public comment period;

c. NMFS failed to request public comment through newspapers of general circulation, and appropriate electronic media and to all locally affected communities for a period of 30 days after publication, which affected communities include the entire range of the NARW (including Martha's Vineyard and Amelia Island);

d. NMFS failed to publish the notice of issuance of the IHA within 30 days of issuance;

41. Plaintiff Melone has been harmed and will continue to be harmed by NMFS's issuance of the IHA without having observed the procedure required by law because Melone was unaware of the application for the IHA during the comment period because of NMFS's failure to issue the required notice and request public comment through newspapers of general circulation (such as the Vineyard Gazette and the Boston Globe both of which Melone reads regularly), and appropriate electronic media and to all locally affected communities, such as Martha's Vineyard, and would have commented if Melone had proper notice.

92.—Plaintiff Melone has been harmed and will continue to be harmed by NMFS's issuance of the IHA without having observed the procedure required by law and NMFS's violations of the various mandatory time restrictions for the issuance of an IHA to Vineyard Wind in additional ways. First, the MMPA makes it clear that an application needs to be approved or denied within a strict timeframe. If it is not approved within that timeframe, Melone (like the public) is entitled to consider the application dead, without prejudice to the filing of a new application. Second, as someone that has a special interest in the NARW, Melone has a valid legal interest in relying on agency accountability and compliance with the procedural requirements for

issuance of an IHA which are intended to benefit the public (of which Melone is a member), and persons such as Melone that have a special interest in marine mammals. NMFS's violation of procedural requirements harms Melone and completely upends the detailed process specified by Congress. Third, the law permits the issuance of an IHA only for an application whose notice of proposed IHA is issued no more than 75 days earlier than the IHA, and permits the issuance of an IHA only for an application whose public comment period occurred no later than 45 before the issuance of the IHA. Those requirements benefit Melone as a member of the public and as a person that has a special interest in marine mammals because they ensure agency decisionmaking and the public right to comment based upon current data, not data that is years old. Fourth, NMFS's violations have deprived Melone of the ability to comment on a proper notice of proposed IHA. Fifth, NMFS's violation of issuing an IHA that was not immediately preceded by a public comment period as prescribed by the statute, has deprived Melone of the ability to comment on a notice of proposed IHA based upon current scientific information. Sixth, NMFS's violation of issuing an IHA that was not immediately preceded a notice of proposed IHA, has deprived Melone of receiving information that is based upon current and best scientific information that would explain NMFS's basis for proposing to issue an IHA. ~~16 U.S.C. §1374(d) requires that the notice of the issuance of an incidental harassment authorization "must be published in the Federal Register within ten days after the date of issuance or denial."~~

~~93. — The SF IHA was issued on December 21, 2021. Notice of issuance was published on January 6, 2022. The permit is invalid as it was not published within the required ten-day timeframe.~~

~~42. — The VW IHA was issued on May 21, 2021. Notice of issuance was published on June 25, 2021. The permit is invalid as it was not published within the required ten-day timeframe.~~

94.—~~The Vineyard Wind IHA was issued without observance of the procedure required by law, it therefore must be set aside and vacated.~~

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

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

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

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

~~102.—Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.~~

~~103.—NEPA requires all federal agencies to consider the potential environmental impacts of their actions and to identify and evaluate reasonable alternatives to proposed actions and those alternatives' environmental impacts, including taking no action. The FEIS's assumption that, compared to No Action, approving the proposed Projects would have a positive impact on total greenhouse gas emissions is wrong and departs from basic economic principles and vastly overstates each Project's purported positive climate impacts.~~

~~104.—The Defendants' assumption that the No Action will have no net effect on onshore renewable energy generation, economic benefits or climate benefits contradicts fundamental economic principles. Significant changes in renewable energy supply will affect renewable energy's price and, therefore, consumption and emission levels. The Defendants failed to properly~~

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

~~105.—The Defendants wholly ignored the alternative generation resources that would fill the void if either Project was not approved. The Defendants assume that the Projects would~~

~~prevent future natural gas electric generating plants. Such an assumption is absurd and defeats the entire purpose of analyzing viable replacements when the No Action alternative is selected. It is also inconsistent with BOEM and Interior's use of market modeling in other environmental impact statements. Such inconsistent action is itself arbitrary and capricious agency action.~~

~~106. Under NEPA regulations, agencies must consider all reasonable alternatives, including those not specifically under their authority to implement. See 40 C.F.R. §1502.14; see also *NRDC v. Morton*, 458 F.2d 827 (D.C. Cir 1972) (explaining that it is the essence and thrust of NEPA that impact statements serve to gather in one place discussion of relative environmental impact of alternatives, and although alternatives required for discussion are those reasonably available, they should not be limited to measures which particular agency or official can adopt; when proposed action is integral part of coordinated plan to deal with broad problem, range of alternatives which must be evaluated is broadened). Thus, the failure to consider and take a hard look at onshore renewable generation resources because they would not require a permit within BOEM's or the cooperating agencies' jurisdiction or are not located offshore is clear error.~~

~~107. 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.~~

~~108. The Defendants assume without adequate support that offshore electricity generation is needed, a need that was never analyzed. There surely cannot be informed decision~~

~~making when the threshold question—need for the proposed Projects—is based merely upon conjecture or an unlawfully narrowly defined focus limited to use of the outer continental shelf.~~

~~109.—Local taxing jurisdictions would realize increases in tax revenues as a result of the renewable generators that would be built onshore instead of the proposed Projects and the cumulatively foreseeable OSW projects. Similarly, direct or indirect economic impacts for those alternative onshore renewable United States-based generators would occur within the region under the No Action Alternative, and indeed would *far exceed* those from the Projects and the cumulatively foreseeable OSW projects.~~

~~110.—Quite simply, the conclusions used for the No Action Alternative baseline are preposterous, fail to use accepted substitution analysis used by Interior and BOEM and other federal agencies in conducting environmental impact statements, and are the type of uninformed review that has been rejected by the courts.~~

~~111.—The “Socioeconomic” impacts of the No Action alternative are manifestly wrong for each Project. The No Action alternative would result in different renewable energy projects filling its place. And because those alternative projects would be located entirely onshore in the United States, they would far surpass the Projects in economic benefits to the United States.~~

~~112.—The analysis of the No Action alternative for Air Quality is incorrect. The Projects would be replaced with renewable energy projects located closer to the actual electrical load. Those projects would have the higher air quality benefits, and GHG benefits compared to the Projects. Further, the farther generation is from actual load, the more electrical losses incurred. The EPA classifies the Projects as a major source of air pollution and thus is subject to Prevention of Significant Deterioration and Nonattainment New Source Review Permitting requirements.~~

~~113.—The Defendants’ failures to properly analyze the no-action alternative also violates the duty to ensure protection of the environment under section 8(p)(4) of the OCSLA. The term environment is broad and includes the marine environment, coastal environment, and human environment.³—The Secretary has failed to comply and continues to fail to comply with her duties to ensure the protection of the environment and the other requirements of subsection 8(p)(4) by approving, and failing to revoke her approval of the proposed Vineyard Wind offshore wind project and the South Fork Wind project.~~

~~114.—The Defendants’ failures are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”~~

~~115.—For the foregoing reasons, the Defendants have failed to comply with NEPA, the OCSLA and the Defendants’ approvals for both Projects should be vacated.~~

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

~~118.—Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.~~

~~119.—Section 404(a) of the CWA authorizes the Secretary of the Army, acting through the Army Corps of Engineers, to issue permits for the discharge of dredged or fill material into~~

~~³(g) The term “marine environment” means the physical, atmospheric, and biological components, conditions, and factors which interactively determine the productivity, state, condition, and quality of the marine ecosystem, including the waters of the high seas, the contiguous zone, transitional and intertidal areas, salt marshes, and wetlands within the coastal zone and on the outer Continental Shelf;~~

~~(h) The term “coastal environment” means the physical atmospheric, and biological components, conditions, and factors which interactively determine the productivity, state, condition, and quality of the terrestrial ecosystem from the shoreline inward to the boundaries of the coastal zone;~~

~~(i) The term “human environment” means the physical, social, and economic components, conditions, and factors which interactively determine the state, condition, and quality of living conditions, employment, and health of those affected, directly or indirectly, by activities occurring on the outer Continental Shelf.~~

~~navigable waters “after notice and opportunity for public hearings.” 33 U.S.C. § 1344(a). In making permitting decisions, the Corps must follow the 404(b)(1) Guidelines. See *id.* § 1344(b); *Bersani v. EPA*, 850 F.2d 36, 39 (2d Cir. 1988). These Guidelines prohibit the Corps from granting a Section 404 permit “if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.” 40 C.F.R. §230.10(a). The Corps’ own regulations further require the Corps to conduct a public interest review for each proposed discharge, and prohibit the Corps from granting a permit that (1) would “not comply with [EPA’s] 404(b)(1) [G]uidelines” and/or (2) that would be “contrary to the public interest.” 33 C.F.R. §320.4(a)(1). The Projects will discharge into a “special aquatic site.”~~

~~120.— Under EPA’s 404(b)(1) Guidelines, an alternative to the proposed discharge is practicable if it is “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” 40 C.F.R. §230.10(a)(2). Alternatives need not be in locations that are presently owned by a permit applicant so long as they are otherwise practicable and could “reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity.” *Id.*; accord *Bersani*, 850 F.2d at 39.~~

~~121.— “[P]racticable alternatives include, but are not limited to: (i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters,” see 40 C.F.R. §230.10(a)(1)(i), such as onshore renewable energy generation. The USACE correctly concluded that the project is not water dependent, but then illogically restricted the overall purpose to a water dependent purpose, i.e., placing wind turbines in the water. “[A]n applicant cannot define a project in order to preclude the existence of any alternative sites and thus make what is practicable appear impracticable.” *Sylvester v. U.S. Army Corps of Engineers*, 882~~

F.2d 407, 409 (9th Cir. 1989).

~~122.—The Defendants’ violated the CWA’s requirements by not taking a hard look— indeed not taking any look— at the proposed purpose of the Projects being able to be accommodated by onshore renewable energy.~~

~~123.—A Section 404 permit will not issue "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences" (the least environmentally damaging practicable alternative). 40 C.F.R. §230.10(a). The regulations define a "practicable alternative" as one that "is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." *Id.* §230.10(a)(2). When, as here, a non-water dependent project would discharge pollutants into a "special aquatic site," the regulations establish a presumption that practicable alternatives not involving special aquatic sites are available, "unless clearly demonstrated otherwise." *Id.* §230.10(a)(3).~~

~~124.—The USACE’s failure to take the required hard look at alternative violates NEPA and the Guidelines and as a result, the USACE’s approvals should be vacated.~~

~~125.—The USACE’s determination that it was clearly demonstrated that practicable alternatives not involving special aquatic sites were not available is arbitrary and capricious, an abuse of discretion, not supported by substantial evidence and a violation of the Guidelines.~~

~~126.—The USACE’s failures are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” As a result, the USACE’s approvals of each Project must be vacated.~~

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

~~130. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.~~

~~131. 40 C.F.R. § 230.1(e) explains that “dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.” Probable impacts of other activities include the balance of the 2,021 wind turbines that the Defendants conclude are foreseeable.~~

~~132. The USACE’s failure to take the required hard look at the probable impacts of the balance of the 2,021 wind turbines that the Defendants conclude are foreseeable violates the requirement that it be demonstrated that such a discharge will not have an unacceptable adverse impact. As a result, the USACE’s approvals should be vacated.~~

~~133. The USACE’s failures are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” As a result, the USACE’s approvals must be vacated.~~

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

~~137. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.~~

~~138. For the Corps to issue a permit for each proposed Project, the proposed use must be in the public interest. The public interest review must be “based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest.” 33 CFR §320.4(a)(1). “Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become~~

relevant in each particular case.” *Id.* “The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments.” *Id.* “The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources.” *Id.*

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

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

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

142. —The Defendants’ failure to properly evaluate and take a hard look at whether either proposed Project satisfies the public interest test is arbitrary, capricious, an abuse of discretion, not

~~supported by substantial evidence and a violation of the Guidelines. As a result, the USACE's approvals for both Projects must be vacated.~~

~~**COUNT X**~~

~~**THE USACE'S FAILURE TO TAKE A HARD LOOK AT WHETHER ONSHORE RENEWABLE ENERGY IS A PRACTICABLE ALTERNATIVE IS CLEARLY ERRONEOUS, ARBITRARY AND CAPRICIOUS AND UNSUPPORTED BY SUBSTANTIAL EVIDENCE (VW AND SF)**~~

~~146. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.~~

~~147. If the Corps finds that a proposed project by its general nature is not water dependent, the Corps must presume that practicable alternatives to the project are available in less sensitive areas. See 40 C.F.R. § 230.10(a)(3). Likewise, the Corps must presume that such practicable alternatives have less adverse impact on the aquatic ecosystem. See *id.* Once a project is determined to be non-water dependent, the burden shifts to the permit applicant to rebut the first presumption by "clearly demonstrat[ing]" that a practicable alternative is not available, *id.*, and to rebut the second presumption with "detailed, clear, and convincing information proving that an alternative with less adverse impact is impracticable." *Sierra Club*, 362 F. App'x at 106 (quoting *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1269 (10th Cir. 2004)). If the basic purpose of a proposed project is water dependent, then these presumptions do not apply.~~

~~148. Thus, if a project is located in a special aquatic site, Corps' determination of the "project's basic purpose and whether it is water dependent are threshold questions that determine the procedure the Corps must follow in granting the applicant a permit." *Id.* If the Corps incorrectly defines the project's basic purpose or improperly determines that the project is water dependent, then it will not follow the procedure set forth by the 404(b)(1) Guidelines, resulting in a decision that is arbitrary and in violation of the APA. See *id.*; see also, e.g., *Nat. Res. Def. Council*~~

~~v. EPA, 808 F.3d 556, 570 (2d Cir. 2015) (agency action violates APA where agency followed incorrect procedure).~~

~~149.—The FEIS for each Project makes little mention of “special aquatic sites” as defined in 40 C.F.R. §§ 230.40–230.45. The FEIS makes no mention of the permit applicant’s evidence to rebut the second presumption with “detailed, clear, and convincing information proving that an alternative with less adverse impact is impracticable.”~~

~~150.—In addition, where a discharge is proposed for a special aquatic site (as is the case here), “all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.” 230.10(a)(3) (emphasis added.)~~

~~151.—The failure of the USACE to review onshore renewable energy as a practicable alternative to the proposed discharge and to adhere to the presumption that there are alternatives presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise, is clear error, and arbitrary and capricious and contrary to law.~~

~~152.—To the extent the USACE did review onshore renewable energy as a practicable alternative and concluded that it was not a practicable alternative, such a conclusion is arbitrary and capricious, unsupported by substantial evidence and clearly erroneous.~~

~~153.—As a result, the USACE’s approvals for both Projects must be vacated.~~

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

~~157.—Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs as though fully set forth herein.~~

~~158.—The FEIS’ analysis for each Project of severe weather events is seriously flawed.~~

~~159.—Each FEIS fails to properly analyze the effects of climate change on hurricane activity in the Project areas over the next 30 years, and the likelihood of a catastrophic failure of the WTGs, and the likelihood of turbine parts and oil and chemical spills in the Atlantic, reaching the shores of New York, Rhode Island, Connecticut, Martha’s Vineyard, Nantucket, and Cape Cod, including the individual Plaintiff’s property in Edgartown, and the effects of such an event on the NARW and the migratory birds on Little Beach.~~

~~160.—It is certainly not a low probability that the Northeast would experience a category 3 or above hurricane over the next 30 years. To the contrary, it is virtually certain that one or more such events would occur. The taller the WTGs get, the more susceptible they are to higher wind speeds. The Defendants did not perform any analysis related to the experimental WTGs for each Project, much less take the required hard look. The Defendants must make an informed decision, and cannot ignore the virtual certainty that a hurricane of category 4 or 5 strength will directly hit the wind energy area for each Project over the next 30 years. They cannot ignore the likelihood of a catastrophic oil spill from a category 4 and 5 hurricane over the next 30 years the devastation on the marine environment and migratory birds.~~

~~161.—The failure of the Defendants to review the effects of climate change on hurricane activity in the Northeast and each Project area over the next 30 years is clear error, and arbitrary and capricious, violates NEPA, the OCSLA, the MMPA, the Guidelines and is contrary to law.~~

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

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

~~166.—The Defendants assume that taking no action on either Project would have, compared to approval, no net negative effects on various resource values or climate change. The preceding paragraphs of these comments have explained why that assumption is entirely inconsistent with economic theory, real market conditions, and past agency practices. Consequently, the Defendants and the FEIS for each Project present a deeply inaccurate and misleading comparison of the approval options and No Action Alternative.~~

~~167.—Similarly, the analysis of the No Action Alternative regarding Air Quality is incorrect. Each Project would be replaced with renewable energy projects located closer to the actual electrical load. Those projects would have the higher air quality benefits, and GHG and climate benefits compared to each Project because they would be more efficient. The FEIS for each Project is riddled with over assessments of the purported benefits of each Project.~~

~~168.—The FEIS for each Project must subtract from its calculation of the Project's economic, energy supply and climate benefits, the lost benefits from all those onshore sources of renewable energy generation that would no longer be built and the decimation of the commercial fishing industry. Once that is done, each Project may (and likely would) have a net negative impact on economics, climate benefits, fisheries, marine mammals, endangered species, commercial fishing, and all other resource values compared to its substitutes.~~

~~169.43._____The FEIS for each Project does not comply with NEPA and the ROD for each Project does not comply with the Guidelines, the MMPA, the OCSLA because they fail to analyze those effects. The FEIS's and the ROD's failure for each Project to properly evaluate those effects is arbitrary, capricious, an abuse of discretion, unlawful and requires that the Defendants' approvals for both Projects be vacated.~~

COUNT II (formerly COUNT XIII)

NMFS'S VINEYARD WIND INCIDENTAL HARASSMENT AUTHORIZATION VIOLATES THE MMPA FAILURE TO SATISFY THE TAKE REQUIREMENT UNDER THE MMPA (VW AND SF)

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

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

46. 50 C.F.R. §216.103 provides the following definitions:

- "Negligible impact is an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."
- "Small numbers means a portion of a marine mammal species or stock whose taking would have a negligible impact on that species."
- "Specified activity means any activity, other than commercial fishing, that takes place in a specified geographical region and potentially involves the taking of small numbers of marine mammals."
- "Specified geographical region means an area within which a specified activity is conducted and that has certain biogeographic characteristics."

~~171.~~—

~~172.~~47. Letters of Authorizations may be issued for up to a maximum period of 5 years, and IHAs may be issued for a maximum period of 1 year. NMFS has also promulgated regulations to implement the provisions of the MMPA governing the taking and importing of marine mammals (50 C.F.R. §216) and has published application instructions that prescribe the procedures necessary to apply for an ~~Incidental Take Authorization~~ (“ITA”). U.S. citizens seeking to obtain authorization for the incidental take of marine mammals under NMFS's jurisdiction must comply with these regulations and application instructions in addition to the provisions of the MMPA.

48. Activities that have the potential to result in serious injury or mortality must be authorized under 50 C.F.R. § 216.105, which is through regulations, not an IHA. See 50 C.F.R. § 216.107.

~~173.~~49. Once NMFS determines an application is adequate and complete, NMFS has a corresponding duty to determine whether and how to authorize take of marine mammals incidental to the activities described in the application. To authorize the incidental take of marine mammals, NMFS evaluates the best available scientific information to determine whether the take would have a negligible impact on the affected marine mammal species or stocks and an immitigable impact on their availability for taking for subsistence uses. NMFS must also prescribe the “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, and on the availability of those species or stocks for subsistence uses, as well as monitoring and reporting requirements.

~~174.~~50. The term “take” means “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal” (16 U.S.C. §1362(3)(13)). The incidental take of a

marine mammal falls under three categories: mortality, serious injury, or harassment (i.e., injury and/or disruption of behavioral patterns). Harassment, as defined in the MMPA for non-military readiness activities (Section 3(8)(A)), is any act of pursuit, torment, or annoyance that has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment) or any act of pursuit, torment, or annoyance that has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns (Level B harassment). Disruption of behavioral patterns includes, but is not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.

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

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

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

54. An IHA is inappropriate for ~~the~~either Project for multiple reasons. First, the proposed action for ~~the~~each Project ~~individually and cumulatively for both Projects~~ will certainly require more than 1 year for construction, causing noise from pile driving, dredge from the disturbance of the sea floor, increased vessel traffic and other effects discussed in the FEIS. Second, ~~the~~each Project would be operated and then would need to be decommissioned. Noise from operation and from vessel traffic will result in take of the NARW. Decommissioning will

also result in noise and vessel traffic that will cause take of the NARW. The need to decommission the each Project removes any ability of the Defendants to issue a permit of any kind under the MMPA because the take will clearly occur at the end of the useful life of the each Project far exceeding the five-year statutory limitation when taking into account the construction and operation of the Project.

55. Third, Vineyard Wind’s activities under the COP (including those that relate to pile driving) have the potential to result in serious injury or mortality and therefore must be authorized under 50 C.F.R. § 216.105, which is through regulations, and not through an IHA.

56. In a memorandum dated April 22, 2019, Jolie Harrison, the Chief of the NMFS Permits and Conservation Division concluded that “[t]he possibility of take by serious injury or death is considered unlikely, based on the best available information. Unlike the use of explosives or mid-frequency sonar, which can kill or seriously injure marine mammals, the sound from pile driving is very unlikely to result in the types of physiological or behavioral reactions that could result in serious injury or death.” NMFS 0000003559. The Permits and Conservation Division’s conclusion that serious injury is very unlikely means that the activity still has the potential to result in serious injury or mortality.

57. Fourth, numerous vessel transits that will be made for pile-driving activities (including high-speed vessel transits) and the other activities under the COP have the potential to result in serious injury or mortality from vessel strikes and therefore must be authorized under 50 C.F.R. § 216.105, which is through regulations, and not through an IHA.

58. NMFS ignored (and did not take the required hard look at) the potential take from Vineyard Wind’s vessels striking the NARW—vessels that in general will have no speed limits—and that will be under severe financial pressure to hit maximum throttle. The crew transfer vessels

(“CTVs”) for Vineyard Wind will be more than 98 feet long, with a maximum speed of 29 knots (33mph).⁴ Crew members can work a maximum of 12 hours/day. NMFS000000000015814. Construction of the project will be based out of New Bedford, MA, which by vessel is a 50 to 60 mile trip to the wind development area (WDA), depending on the route taken. *Id.* The CTVs will transport crews from New Bedford to the WDA and bring crews back to New Bedford, as crews work on a rotational basis. *Id.* The 50 to 60 mile trip at 10 knots would take approximately 4.5 to 5 hours each way, which is not feasible when workers can only work offshore a maximum of 12 hours a day. *Id.* As Vineyard Wind told NMFS: “Simply put, the project could not be constructed within one season if there was a 10 knot speed restriction during construction.” *Id.*

59. The EIS indicates that these large and fast crew transfer vessels will account for the lion’s share all the Project’s vessel trips. (BOEM 34746.) The Notice of Proposed IHA states that “an average of ~25 vessels will be involved in construction activities on any given day.”

60. So what will that mean for the NARW? It will mean, for example, that during all times of the year including the peak season for NARW presence—December through early May—the CTVs will be moving at maximum speed in almost all circumstances, far too fast for Protected Species Observers (“PSOs”) or other measures to be of any value. A strike of a NARW by a CTV travelling at 30 mph will result in certain death of the whale. Construction of the Vineyard Wind project “within one season” is no justification for dramatically increasing the risk to death to a whale from a vessel strike.

⁴ <https://www.oedigital.com/news/498226-st-johns-shipbuilding-starts-building-ctv-for-u-s-offshore-wind-farm>.

61. The only reason Vineyard Wind wants to try to construct its project within one season is because it wants to improperly use a 1-year IHA instead to applying for the issuance of 5-year regulations.

62. NMFS issued proposed regulations on August 1, 2022, proposing new speed limits in the area that all Vineyard Wind vessels will travel.⁵ NMFS's discussion in the proposed regulations confirms that Vineyard Wind's vessel transits have the potential to cause serious injury or mortality of the NARW, thus eliminating the use of an IHA. NMFS's discussion in the proposed regulations also confirms NMFS did not take the required hard look at risk to the NARW from vessel strikes.

~~178.~~63. Crucially, NMFS's proposed regulation are based upon information that it already had in its possession when it issued the Vineyard Wind IHA. NMFS simply did not take the required hard look, or indeed any look, at the risk to the NARW from vessel strikes and authorizing Vineyard Wind vessels to travel at a speed greater than 10 knots.

64. In the Notice of Proposed IHA, NMFS described the specific activity as the construction of the Vineyard Wind Offshore Project. NMFS000000000002974 ("Vineyard Wind, LLC (Vineyard Wind) is proposing to construct an 800 megawatt (MW) commercial wind energy project (the Project) in Lease Area OCS-A 0501, offshore Massachusetts.") But then illogically, NMFS analyzed take from only the noise from the driving of piles into the ocean floor. NMFS failed to analyze the entire construction activities offshore. NMFS also failed to analyze the activities integral to pile driving and construction, such as vessel transits (including CTVs) to and from New Bedford, Massachusetts.

⁵ Federal Register, Vol. 87, No. 146 at 46921 (August 1, 2022), <https://www.federalregister.gov/documents/2022/08/01/2022-16211/amendments-to-the-north-atlantic-right-whale-vessel-strike-reduction-rule>.

179-65. The Defendants' have also failed to provide substantial evidence that the take from the each Project, ~~individually and cumulatively~~, will only affect small numbers of marine mammals. The noise and other harassment from the each Project will affect a greater than small number of NARWs and other marine mammals and NMFS's decision was based on outdated data.

66. The IHA authorized the take, Level B Harassment, at 20 individual NARWs. NMFS000000000003510. NMFS based the calculation of twenty on a spreadsheet provided by Vineyard Wind. NMFS000000000014612. The spreadsheet calculates the 20 from the following equation: (A) divided by (B) where (A) equals the number of individual NARW sighted in 2018 = 9, (B) 58 equals the number of days in year in which bottlenose dolphin, Short-beaked common dolphin, Fin whale, Gray Seal, Harbor Porpoise, Harbor Seal, Humpback Whale, Long-finned pilot whale, Minke Whale, NARW, Pilot Whale, Seal, Sei whale, Sperm whale, Unidentified Dolphin, Unidentified Mysticete Whale, Unidentified Shelled Sea Turtle, Unidentified Whale, white-sided dolphin were sighted.

67. Even assuming NMFS's calculation of take methodology were correct (which it is not), NMFS's methodology shows that the take is more than "small numbers," and above what NMFS concluded was "small numbers." NMFS concluded that up to 5.4% of a species constituted "small numbers." NMFS000000000003486. The NMFS calculation of takes was based upon a methodology proposed by Vineyard Wind. NMFS000000000014612. The "small number" conclusion was reached because the take of the NARW was 5.0% of the species using the Vineyard Wind methodology. But no analysis was performed by NMFS supporting its conclusory statement that 5.4% of a species is "small numbers."

68. The 5.0% was reached by dividing the calculated take—20—by the abundance of the species. Vineyard Wind and NMFS used old data—394. The NMFS's conclusion when the

IHA was issued was that the population of NARW had dwindled to 356 (i.e., 5.6%). NMFS000000000003484. The most recent scientific evidence is that the NARW population is now at 336,⁶ increasing the take number to 6.0%.

69. In addition to the denominator being wrong, the numerator is as well. The NMFS analysis hinges on manifestly erroneous assumptions, such as an extremely low level of NARWs in the wind energy area, and ignoring vessel transits and other activity (except for pile driving noise). NOAA’s April 15, 2021, featured story entitled: *North Atlantic Right Whales On the Move in the Northeast*: “A very small portion of the right whale population heads south to the waters off northern Florida and Georgia in the winter—mostly just the moms—to give birth,” said Tim Cole, a marine mammal researcher and lead of the center’s aerial whale survey team. We try to determine where the rest of the population is and have found them so far this year in large numbers on Nantucket Shoals south of Martha’s Vineyard and Nantucket, and in Cape Cod Bay.”⁷

70. Small numbers under the MMPA cannot exceed the PBR, which for the NARW is less than one. The IHA therefore violates the MMPA for this reason as well.

71. The significant increase of the NARW in the wind energy lease areas south of Martha’s Vineyard has been reported in two studies. E. Quintana-Rizzo et al., “*Residency, demographics, and movement patterns of North Atlantic right whales *Eubalaena glacialis* in an offshore wind energy development area in southern New England, USA*,” *Endangered Species Research*, Vol. 45: 251–268 (2021) (NMFS 53318-53335) (“Quintana 2021”). O. O’Brien, D. E. Pendleton, L. C. Ganley, K. R. McKenna, R. D. Kenney, E. Quintana-Rizzo, C. A. Mayo, S. D.

⁶ H.M. Pettis, et al., *North Atlantic Right Whale Consortium 2021 Annual Report Card: Report to the North Atlantic Right Whale Consortium* (2022), https://www.narwc.org/uploads/1/1/6/6/116623219/2021report_cardfinal.pdf. ⁷ North Atlantic Right Whale, NMFS (last accessed June 6, 2022), <https://www.fisheries.noaa.gov/species/northeast-atlantic-right-whale>.

⁷ <https://www.fisheries.noaa.gov/feature-story/north-atlantic-right-whales-move-northeast>.

Kraus & J. V. Redfern, *Repatriation of a historical North Atlantic right whale habitat during an era of rapid climate change* (July 20, 2022). <https://www.nature.com/articles/s41598-022-16200-8> (“O’Brien 2022”). Both studies were based on information NMFS had when it issued the Vineyard Wind IHA. NMFS acted arbitrarily and capriciously by using Vineyard Wind’s calculation and old data and by ignoring the increased presence of the NARW in, and its increased use of, the wind energy lease areas south of Martha’s Vineyard as foraging, socializing and mating grounds.

72. Even if NMFS’s taking calculation of the NARW at 5% of the species were correct (which it is not), that “small numbers” cannot mean five percent of a species facing extinction is confirmed by that phrase’s use elsewhere in the MMPA. Congress imposed an identical “small numbers of marine mammals” requirement on authorizing activities that may seriously injure or kill marine mammals. 16 U.S.C. § 1371(a)(5)(A)(i); 50 C.F.R. § 216.107(a). In general, “identical words used in different parts of the same act are intended to have the same meaning.” *Healthkeepers, Inc. v. Richmond Ambulance Auth.*, 642 F.3d 466, 472 (4th Cir. 2011) (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)). If NMFS is right that five percent is a “small number,” that would mean Congress intended to allow *each* permittee to injure or kill one out of every twenty animals in each affected marine mammal population. Yet allowing such extensive harm would directly conflict with the MMPA’s protective purpose, as it could quickly lead to the extinction of the species. See 16 U.S.C. § 1361(1), (2), (6) (describing the purposes of the MMPA).

~~73. Moreover, the Defendants’ actions must be measured cumulatively, otherwise developers can simply pass the baton of 1-year take cycles that in reality represent ongoing take under the Defendants’ coordinated push for OSW. To be lawful, an agency’s action must “be the~~

product of reasoned decisionmaking.” *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). An agency must “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made,” and must not “entirely fail[] to consider an important aspect of [a] problem.” *Id.* at 43. NMFS’s negligible- impact and small numbers determinations violate these commands by failing to account for the overlapping, additive impacts of the full panoply of Vineyard Wind’s COP activities and the other IHAs issued that involve “take” of the NARW.

74. Under the MMPA, NMFS cannot lawfully authorize any action unless it will have “a negligible impact on [each marine mammal] species or stock.” 16 U.S.C. § 1371(a)(5)(D)(i)(I). An impact is “negligible” if it “cannot be reasonably expected” to “adversely affect the species” by reducing “annual rates of recruitment or survival.” 50 C.F.R. § 216.103. Here, NMFS authorized multiple IHAs during similar time periods in areas occupied by the NARW. But NMFS never evaluated whether all the IHAs it authorized would have more than a negligible impact on marine mammal populations. Instead, the agency “consider[ed] the potential impacts” of each application “independently”—that is, in isolation. The same is true with respect to Vineyard Wind’s COP activities. NMFS acted arbitrarily and capriciously by only looking at take from noise from pile-driving.

75. NMFS’s approach is irrational because it ignores the reality that Vineyard Wind’s pile-driving activities will not take place in isolation and marine mammals will not experience its effects in isolation. Instead, months of survey activity, nearly a year of pile driving, more than a year of construction from Vineyard Wind and then from other offshore wind projects will hit the same marine mammal populations—driving them from their food, potentially separating them from their vulnerable calves, and disrupting their behavior. The combined activity will have more

significant impacts on affected species than a single segmented activity would: they will harass more animals, and they will harass individual animals more times than a single segmented activity would. By looking at each segmented activity’s “impact” in isolation, and ignoring all the other Vineyard Wind COP activities, NMFS refused to consider the ways in which those impacts will build on one another, which refusal was arbitrary and capricious.

76. NMFS also acted arbitrarily and capriciously and ignored the law when it came to defining the specific geographical region. The Notice of Proposed IHA unlawfully defined the “specific geographic region” extremely narrowly as “the northern portion of the 675 square kilometer (km) (166,886 acre) Vineyard Wind Lease Area OCS–A0501.” NMFS000000000003393. The result is an understatement of impacts. NMFS’s statement of the specified geographical region is unlawful and arbitrary and capricious because it is not based upon any analysis of *biogeographic* characteristics. Even the narrowest approach would include in the “specified geographic region” at a minimum the entire area south of Martha’s Vineyard that has now become an important mating, socializing and foraging habitat for the NARW, as depicted in Figure 1 from the O’Brien study and shown below:

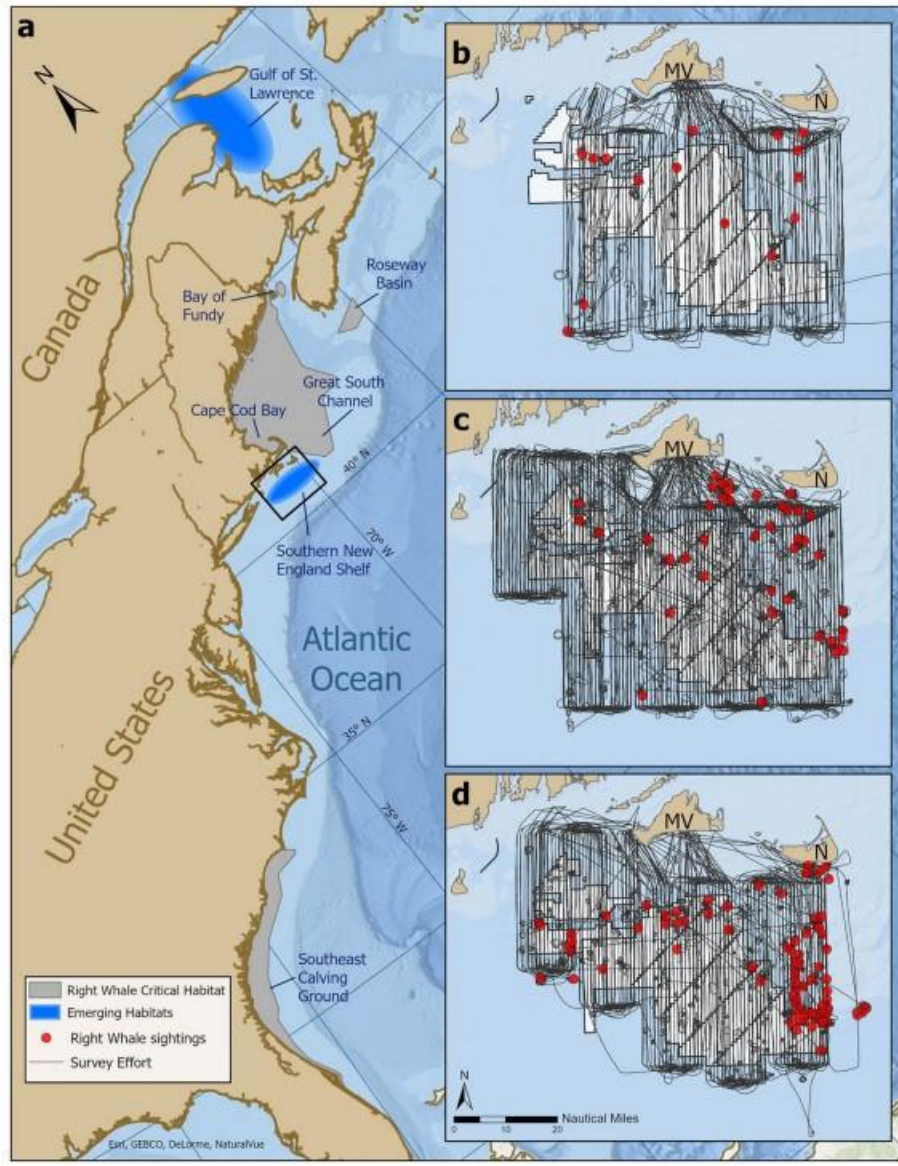


Figure 1. Known right whale habitats in the Northwest Atlantic. (a) Gray polygons encompass known right whale habitats; blue ovals represent emerging habitats. Black box and insets show the New England Aquarium broad-scale survey area. (b–d) Broad-scale survey effort (black lines) and right whale sightings (red circles) during three different time periods: (b) 2011–2012, (c) 2013–2015, (d) 2017–2019. White shading represents MA/RI wind energy lease areas. MV = Martha’s Vineyard, N = Nantucket. Figure was created using ArcGIS Pro (version 2.9.2).

77. More broadly, the specified region should be based upon the range of the NARW in the United States because from a biogeographic standpoint, the region in which the NARW exists defines the biogeographic region as to them. But here the Court does not need to decide at

this point which region is the appropriate based certain biogeographic characteristics. That is because NMFS took no look, much less a hard look, at the proper specified geographical region based upon biogeographic characteristics.

78. Under NMFS's approach there is no limit to how small Vineyard Wind could slice its activities so it appears that the "take" of the NARW represents small numbers. Under NMFS's irrational approach Vineyard Wind would be able to divvy even its pile driving activities into one IHA for each pile even though driving all piles, like all Vineyard Wind's COP activities are necessary for the construction of its project.

79. The Notice of Proposed IHA states that "an average of ~25 vessels will be involved in construction activities on any given day," yet NMFS assumes away any noise impact from the 25 vessels each day based upon the unproven and arbitrary assumption that "marine mammals in the area are presumably habituated to vessel noise," because "[e]xisting vessel traffic in the vicinity of the project area south of Massachusetts is relatively high."

180.—

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

80. NMFS failed to use the best scientific evidence in issuing the IHA and calculating take. NMFS erroneously limited the take analysis to noise from pile driving. NMFS did not analyze any other COP activity of Vineyard Wind and did not take into account the cumulative effect on the NARW of all the take authorized by NMFS. The take and small numbers analyses were based off old data. The NMFS analysis used the number 9 for the number of sightings of

NARW in an undefined area. Even assuming that number were true in some prior year, the most recent scientific data shows (which NMFS possessed at the time the Vineyard Wind IHA was issued) that the NARW have moved-in to the Wind Energy Area all year round, are arriving earlier, staying longer and increasing in numbers, and that the area is an important foraging and socialization area. The most recent surveys conducted by Quintana 2021 and O'Brien 2022 indicate that right whale presence in the RI/MA WEA, which includes the project development area (WDA), is quite high during the summer and extends into the fall. (NMFS 53329, 53331.) This finding is consistent with the growing body of evidence that right whale migration and behavior patterns have shifted dramatically due to environmental conditions. (BOEM 77331.) Right whales now spend time in the Vineyard Wind WDA year-round. (NMFS 53324, 53329, 53331.)

81. NMFS also failed to take a hard look at whether all VW's construction activities have the potential to result in serious injury or mortality to the NARW. NMFS failed to make a finding that the VW construction activities do not have the potential to result in serious injury or mortality of the NARW. In order to go down the path of an IHA rather than regulations, NMFS must first find that the VW construction activities do not have the potential to result in serious injury or mortality of the NARW. See 50 C.F.R. § 216.107. NMFS failed to make such a finding.

82. NMFS improperly segmented its analysis, considering Vineyard Wind's construction surveys and pile driving as unrelated activities, and ignoring all other Vineyard Wind construction, and operation and decommissioning activities.

83. By its plain language the incidental harassment take authorization under Section 1371(a)(5)(D) requires the aggregation of all "request[s] by citizens" for the same kind of activity within the same specified geographical region. "Specified geographical region means an area

within which a specified activity is conducted and that has certain biogeographic characteristics.”
50 C.F.R. §216.103. NMFS unlawfully ignored the other requests by citizens for the same type of
activity—construction and operation of offshore wind farms in the geographical region.

84. An IHA may not authorize the intentional taking by harassment of even a single
marine mammal. Vineyard Wind’s soft-start is intentional take. The IHA requires and
authorizes, as Level B harassment, Vineyard Wind to initiate each pile driving event with a “soft
start” where the pile driving hammer will be throttled back to less than maximum power, thus
giving the whales a “warning” of what is to come. (BOEM 34742, 77310, 77458.) The theory is
that the “soft start” will convince the whales to leave the construction zone before the full-
magnitude pile driving begins. (BOEM 77458.) The “soft start”, however, is not incidental
harassment but purposeful, intentional harassment, a type of hazing, designed to push the NARW
out of their habitat. It is not accidental. See, 50 C.F.R. 216.103 (“Incidental harassment, incidental
taking and incidental, but not intentional, taking all mean an accidental taking.”) Thus Vineyard
Wind’s soft start constitutes an intentional take that NMFS cannot authorize.

85. Vineyard Wind’s soft start also constitutes unauthorized Level A harassment.
Level A harassment, as defined in the MMPA for non-military readiness activities (Section
3(8)(A)), is any act of pursuit, torment, or annoyance that has the potential to injure a marine
mammal or marine mammal stock in the wild. Even if the “soft start” strategy effectively pushes
all right whales out of the Level A exposure zone (i.e., 7.25 km from the pile driving area), there
is no evidence the whales will be safe. On the contrary, there is considerable evidence that the
whales will be exposed to increased threats from fishing gear entanglement and vessel strikes. For
example, Area 537 is one of the most heavily fished areas in the Massachusetts OCS with hundreds
perhaps thousands of VBR trap/pots for lobster and crab. (BOEM 77581; BOEM 194539.) By

forcing right whales out of the WDA, the Vineyard Wind soft start program will drive the whales right into this network of fishing ropes, heightening the threat of entanglement. The threat of vessel strikes against whales will also increase outside the WDA, as vessels in this area are not subject to NMFS's sometimes applicable 10 knot speed limit; nor are they required to have a PSO onboard looking for whales.

86. In addition, to the extent the soft start forces feeding whales to leave and try to locate food elsewhere, the loss of foraging opportunity, in itself, may be damaging, especially given data showing that malnutrition has caused female North Atlantic right whales to lose weight and exhibit signs of reduced physical health. (NMFS 26386-26401.) NMFS contends that right whales which have been prevented from foraging in the WDA during pile driving will simply come back and resume feeding once the pile driving stops. (BOEM 77460-63.) There is, however, no evidence to support this argument.

87. Vineyard Wind's pile-driving activities do not constitute incidental take. Vineyard Wind is conducting its construction activities in the region where the NARW now live year-round and which is now critical foraging and mating grounds. Quintana 2021, O'Brien 2022. Justice (then Judge) Ketanji Brown Jackson stated that "[K]nowing and intentional takes cannot be deemed incidental." *Pac. Ranger, LLC v. Pritzker*, 211 F. Supp. 3d 196, 202 (D.D.C. 2016).

88. Justice Jackson's opinion in *Pritzker* with amazing prescience is precisely on point with the facts of Vineyard Wind:

Applied to the "take" context, the terms "accidental" and "non-intentional" therefore plainly do not describe the harassment of whales that occurs when commercial fishermen know that whales are in the vicinity of where they wish to conduct a highly disruptive multi-hour tuna-fishing operation and nevertheless press on with that operation.

89. Here, Vineyard Wind will be conducting a highly disruptive multi-hour pile-driving

operation knowing that whales are in the vicinity. Therefore, the “take” involved in the Vineyard Wind pile driving operation is “knowing,” and is neither “accidental” nor “non-intentional.” As such, under Justice Jackson’s MMPA definition, none of the Vineyard Wind pile driving can be authorized under the MMPA using an IHA.

90. NMFS’s determination that the measures incorporated into the IHA result in the least practicable impact on the NARW is arbitrary and capricious. NMFS failed to pay particular attention mating and foraging grounds of the NARW in the wind energy lease areas south of Martha’s Vineyard.

91. “North Atlantic right whales are vulnerable to vessel strike due to their coastal distribution and frequent occurrence at near-surface depths, and this is particularly true for females with calves. The proportion of known vessel strike events involving females, calves, and juveniles is higher than their representation in the population (NMFS 2020).” Federal Register, Vol. 87, No. 146, at 46922-46923 (2022) (“NMFS Proposed Speed Rules”). “Reducing vessel speed is one of the most effective, feasible options available to reduce the likelihood of lethal outcomes from vessel collisions with right whales.” *Id.* at 46923. “Vessel strikes continue to occur all along the U.S. coast from the Gulf of Maine to the Florida coast. There is no indication that strike events only occur in “hot spots” or limited spatial/ seasonal areas.” *Id.* at 46924. in many cases, the location of the strike event remains unknown.” *Id.* “[T]he current speed rule and other vessel strike mitigation efforts are insufficient to reduce the level of lethal right whale vessel strikes to sustainable levels in U.S. waters.” *Id.* at 46925. “It remains unclear how right whales respond to close approaches by vessels (<1509 ft (460 m)) and the extent to which this allows them to avoid being struck.” *Id.* at 46926.

92. NMFS has determined that the Potential Biological Removal (“PBR”) for the

NARW, defined by the MMPA as “the maximum number of individuals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population” is 0.7 whales. NMFS Proposed Speed Rules at 46922. “This means that for the species to recover, the population cannot sustain, on average over the course of a year, the death or serious injury of a single individual due to human causes.” *Id.* NMFS has determined that speed of vessels is the most relevant factor in causing death from vessel strikes. *Id.* at 46923. Yet NMFS has failed to proscribe a speed limit on all Vineyard Wind’s vessels, all the time, as part of the measures so as to result in the least practicable impact on the NARW. NMFS has failed to take a hard look at the measures needed to ensure that there is no death or serious injury to even a single whale from Vineyard Wind’s COP activities. But what is clear from the NMFS Proposed Speed Rules is that a 10-knot speed limit on all vessels at all times of the year (with no exceptions) practicable and is the *maximum* that could be allowed but even with speed limit below 10-knots a strike to a single NARW would cause serious injury.

93. NMFS failures are arbitrary and capricious and fail to observe the requirements of the MMPA. NMFS’s failure to impose a 10-knot (or under) speed limit for all vessels all of the time is arbitrary and capricious and violates its obligation to prescribe measures that result in the least practicable impact on the NARW. NMFS’s failure to impose a complete shut-down of all Vineyard Wind activity for a minimum number of days (such as 10 days as proposed in NMFS Proposed Speed Rules in the case of dynamic speed zones) if a whale of any kind is located either through passive acoustic monitoring or sonar or visually by anyone, including a report made to WhaleAlert app is arbitrary and capricious and violates NMFS’s obligation to prescribe measures that result in the least practicable impact on the NARW.

94. NMFS is also violating its obligations under 16 U.S.C. §1371(a)(5)(D)(iv) which

requires NMFS to “modify, suspend, or revoke an authorization if the Secretary finds that the provisions of clauses (i) or (ii) are not being met.” 16 U.S.C. §1371(a)(5)(D)(iv) thus requires an ongoing review of whether the take involves small numbers, the take would have a negligible impact of the species, and the measures satisfy the least practicable impact standard. The evidence discussed in the NMFS Proposed Speed Rules establishes that NMFS must modify, suspend, or revoke an authorization because the provisions of clauses (i) or (ii) are not being met based upon current scientific information.

95. NMFS is also violating its obligations under 16 U.S.C. §1371(a)(5)(D)(iv) and 16 U.S.C. §1371(a)(5)(D)(ii)(II) because it has issued numerous other IHAs authorizing take of the NARW that precede the authorized dates of the Vineyard Wind IHA. Those numerous IHAs continue the death by a thousand cuts for the NARW. By the time the Vineyard Wind IHA dates kick-in, the NMFS will have already authorized take since 2019 of 310 NARW (252 of which have been authorized since the Vineyard Wind IHA was issued) as shown below:

<u>Project</u>	<u>Covered activities</u>	<u>Beginning of covered period</u>	<u>End of covered period</u>	<u>NARW Level B Harassment Takes</u>	<u>Date IHA Issued</u>
<u>Vineyard Wind 1</u>	<u>Pile driving only</u>	<u>5/1/2023</u>	<u>4/30/2024</u>	<u>20</u>	<u>5/21/2021</u>
<u>South Fork Wind LLC</u>	<u>Construction</u>	<u>11/15/2022</u>	<u>11/14/2023</u>	<u>13</u>	<u>12/21/2021</u>
<u>Park City Wind LLC</u>	<u>Marine surveys</u>	<u>9/1/2022</u>	<u>8/31/2023</u>	<u>30</u>	<u>7/19/2022</u>
<u>NextEra</u>	<u>Marine surveys</u>	<u>7/1/2022</u>	<u>6/30/2023</u>	<u>8</u>	<u>6/29/2022</u>
<u>VEPCO</u>	<u>Marine surveys</u>	<u>5/27/2022</u>	<u>5/26/2023</u>	<u>5</u>	<u>5/27/2022</u>
<u>Ocean Wind II LLC</u>	<u>Marine surveys</u>	<u>5/10/2022</u>	<u>5/9/2023</u>	<u>11</u>	<u>5/9/2022</u>
<u>Orsted Wind Power North America LLC (Delaware)</u>	<u>Marine surveys</u>	<u>5/10/2022</u>	<u>5/9/2023</u>	<u>11</u>	<u>5/6/2022</u>
<u>Ocean Wind LLC</u>	<u>Marine surveys</u>	<u>5/10/2022</u>	<u>5/9/2023</u>	<u>9</u>	<u>5/9/2022</u>
<u>Kitty Hawk</u>	<u>Marine surveys</u>	<u>8/1/2022</u>	<u>7/31/2023</u>	<u>2</u>	<u>4/20/2022</u>
<u>Atlantic Shores Offshore Wind LLC</u>	<u>Marine surveys</u>	<u>4/20/2022</u>	<u>4/19/2023</u>	<u>17</u>	<u>4/18/2022</u>
<u>Orsted Wind Power</u>	<u>Marine surveys</u>	<u>3/3/2022</u>	<u>9/24/2022</u>	<u>37</u>	<u>3/3/2022</u>

<u>NA</u>					
<u>Vineyard Wind 1 LLC</u>	<u>Marine surveys</u>	<u>7/21/2021</u>	<u>7/20/2022</u>	<u>10</u>	<u>7/21/2021</u>
<u>Vineyard Wind LLC</u>	<u>Marine surveys</u>	<u>6/21/2021</u>	<u>6/20/2022</u>	<u>10</u>	<u>7/15/2021</u>
<u>Vineyard Wind 1</u>	<u>Marine surveys</u>	<u>7/21/2021</u>	<u>7/20/2022</u>	<u>10</u>	<u>7/21/2021</u>
<u>Mayflower Wind Energy LLC</u>	<u>Marine surveys</u>	<u>7/1/2021</u>	<u>6/30/2022</u>	<u>9</u>	<u>7/1/2021</u>
<u>Vineyard Wind LLC</u>	<u>Marine surveys</u>	<u>7/15/2021</u>	<u>6/20/2022</u>	<u>10</u>	<u>7/15/2021</u>
<u>Garden State Offshore Energy LLC</u>	<u>Marine surveys</u>	<u>6/11/2021</u>	<u>6/10/2022</u>	<u>14</u>	<u>6/11/2021</u>
<u>Ocean Wind LLC</u>	<u>Marine surveys</u>	<u>5/10/2022</u>	<u>5/9/2023</u>	<u>9</u>	<u>5/9/2022</u>
<u>Atlantic Shores Offshore Wind LLC</u>	<u>Marine surveys</u>	<u>4/20/2021</u>	<u>4/19/2022</u>	<u>8</u>	<u>4/16/2021</u>
<u>Skipjack Offshore Energy LLC</u>	<u>Marine surveys</u>	<u>4/5/2021</u>	<u>4/4/2021</u>	<u>3</u>	<u>4/5/2021</u>
<u>Orsted Wind Power North America</u>	<u>Marine surveys</u>	<u>3/3/2022</u>	<u>9/24/2022</u>	<u>37</u>	<u>3/3/2022</u>
<u>Equinor Wind, LLC</u>	<u>Marine surveys</u>	<u>9/20/2020</u>	<u>9/19/2021</u>	<u>14</u>	<u>9/20/2020</u>
<u>Mayflower Wind Energy, LLC</u>	<u>Marine surveys</u>	<u>7/23/2020</u>	<u>7/22/2021</u>	<u>3</u>	<u>7/23/2020</u>
<u>Vineyard Wind LLC</u>	<u>Marine surveys</u>	<u>6/21/2020</u>	<u>6/20/2021</u>	<u>10</u>	<u>4/15/2020</u>
<u>Skipjack Offshore Energy, LLC</u>	<u>Marine surveys</u>	<u>11/25/2019</u>	<u>11/24/2020</u>	<u>3</u>	<u>11/25/2019</u>
<u>Orsted Wind Power LLC</u>	<u>Marine surveys</u>	<u>9/26/2019</u>	<u>9/25/2020</u>	<u>10</u>	<u>9/26/2019</u>
<u>Equinor Wind U.S. LLC</u>	<u>Marine surveys</u>	<u>4/25/2019</u>	<u>4/24/2020</u>	<u>7</u>	<u>4/25/2019</u>

96. NMFS has an obligation under 16 U.S.C. §1371(a)(5)(D)(iv) and 16 U.S.C. §1371(a)(5)(D)(ii)(II) to take all these IHAs into account (particularly those issued after the Vineyard Wind IHA was issued) and to make new determinations that the requirements of the MMPA would still be met (which they would not be). NMFS's failure to make new determinations is arbitrary and capricious and contrary to its obligations under the MMPA.

97. NMFS has also acted arbitrarily and capriciously and failed to adhere to its obligation under 16 U.S.C. §1371(a)(5)(D)(iv) and 16 U.S.C. §1371(a)(5)(D)(ii) by failing analyze how the proposed Vineyard Wind activities and the activities of the other IHAs that are in effect

will also increase the risk of collisions between NARWs and vessel traffic unrelated to offshore wind activities as both navigate around the various offshore wind activities in question while they occur.

182.98. The issuance of, and failure to modify, suspend, or revoke, the IHA for the each Project violates the MMPA. In issuing the IHA and failing to modify, suspend, or revoke, the IHA, NMFS acted ~~The Defendants' failures are~~ "arbitrarily, capriciously, ~~an~~ abused ~~itself~~ discretion, and acted ~~or otherwise~~ not in accordance with law." As a result, the Vineyard Wind IHA ~~Defendants' approvals~~ should be vacated.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~**COUNT XVIII**
VIOLATION OF NEPA (VW AND SF)~~

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

~~The Defendants’ SF Approvals and VW Approvals left for the future (i.e., after the issuance of the Approvals), the preparation of measures intended to protect species covered under the ESA, the MMPA and the MBTA denying the Plaintiffs and other members of the public the right to comment on the proposed measures under the NEPA process. Such measures are a material part of the environmental review and protection of affected species.~~

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

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

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

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

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

~~Second, remand and vacatur is required by *Dep't of Homeland Security v. Regents of the Univ. of California*, 591 U.S. ___, 140 S. Ct. 1891 (2020) ("*Regents*") so that the Defendants can take new agency action. Sometime on or before May 7, 2021, the Defendants realized that the environmental analysis that was done to that point on the VW Project was seriously deficient. The Defendants also had realized that because of those deficiencies further consultation with the NMFS was required by law. Thus, on May 7, 2021, BOEM, as lead agency, requested re-consultation with NMFS. Notwithstanding the fact that required consultation was not complete, and that the Defendants were operating under an admittedly seriously deficient record, the Defendants issued approvals for the VW Project, even though the Defendants knew their analysis at that point in time did not pass~~

~~muster for informed decision-making. Rather, the Defendants gambled that the political pressure to advance offshore wind would produce a consultation that would provide post-hoc justification for the Defendants' VW Approvals.~~

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

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Vacate and set aside the IHA issued to Vineyard Wind on May 21, 2021;

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

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

B. Enjoin Defendants from issuing future 1-year IHAs for the Vineyard Wind project;

~~C. approving or otherwise taking action on any applications for permits for the Vineyard Wind Project and South Fork Wind Project until Defendants have fully complied with NEPA, the ESA, the MMPA, the OCSLA, the Guidelines, and the APA and their implementing regulations, and prepared an EIS comprehensively analyzing the all direct, indirect, and cumulative effects of the authorizations challenged herein, and taken the required hard look analysis~~

~~required by the Guidelines, NEPA, the MMPA and the OCSLA;~~

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

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

~~E.~~ Declare that “small numbers” under the MMPA means a number no greater than the PBR for the NARW; ~~Retain continuing jurisdiction of this matter until Defendants fully remedy the violations of law complained of herein, in particular to ensure Defendants take a meaningful hard look at the direct, indirect, and cumulative impacts of the proposed Vineyard Wind Project and South Fork Wind Project and all Foreseeable Actions;~~

~~F.~~ _____

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

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

Respectfully submitted,

THE PLAINTIFFS,

By their attorney, _____

Dated: ~~August~~ February 23, 2022

/s/Thomas Melone

Thomas Melone

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Certificate of Service

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

/s/Thomas Melone