

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

ACK RESIDENTS AGAINST )  
TURBINES: and VALLORIE )  
OLIVER, )

Plaintiffs, )

v. )

U.S. BUREAU OF OCEAN ENERGY )  
MANAGEMENT; NATIONAL OCEANIC )  
AND ATMOSPHERIC )  
ADMINISTRATION; NATIONAL )  
MARINE FISHERIES SERVICE; DEB )  
HALLAND Secretary of the Interior; GINA )  
M. RAIMONDO, Secretary of Commerce, )

Defendants, )

Civil Action No. 1:21-cv-11390-IT

**AMERICAN CLEAN POWER ASSOCIATION AND NATIONAL OCEAN  
INDUSTRIES ASSOCIATION MOTION FOR LEAVE TO FILE *AMICI  
CURIAE* BRIEF IN SUPPORT OF DEFENDANTS' MOTIONS FOR  
SUMMARY JUDGMENT**

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The American Clean Power Association (“ACP”) and the National Ocean Industries Association (“NOIA”) (collectively, “*Amici*”) respectfully move this Court for leave to file an *amici curiae* brief in support of Defendants’ Motions for Summary Judgment filed in this case. *Amici*’s proposed brief accompanies this motion.

Counsel for *Amici* conferred with the lead counsel for the parties in this case regarding this motion for leave to file an *amici curiae* brief. Federal Defendants take no position on this motion. Intervenor-Defendant Vineyard Wind consents to this motion. Plaintiffs do not consent to this motion.

*Amici* are national trade associations representing a broad range of entities with the common purpose of encouraging the expansion and facilitation of renewable energy resources in the United States, including offshore wind. *Amici* support and share an interest in defending the federal agency actions that Plaintiffs challenge here. The matters that will be addressed in *Amici*’s brief are relevant to the disposition of this case, as *Amici* have long been actively involved in the development of American offshore wind, and support the Vineyard Wind 1 project. The points and authorities raised in *Amici*’s brief will aid the Court in adjudicating Plaintiffs’ claims. *Amici*’s brief also is desirable because they bring the unique perspective of other offshore wind lessees on the Outer Continental Shelf at various stages of site assessment and construction plan development.

Accordingly, *Amici* respectfully request that this Court grant their motion for leave and accept the accompanying *amici curiae* brief for filing.

Dated: September 23, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 23, 2022, the foregoing was filed with the Clerk of the United States District Court for the District of Massachusetts by using the Court's CM/ECF system, which sends a notice of filing to all registered CM/ECF users.

/s/ Brian C. Levey  
Brian C. Levey

**UNITED STATES DISTRICT COURT  
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**BRIEF OF *AMICI CURIAE* AMERICAN CLEAN POWER ASSOCIATION  
AND NATIONAL OCEAN INDUSTRIES ASSOCIATION IN SUPPORT OF  
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

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## STATEMENT OF INTEREST

The American Clean Power Association (“ACP”) is a non-profit national trade association representing a broad range of entities with the common purpose of encouraging the expansion and facilitation of renewable energy resources in the United States, particularly the wind, solar, energy storage and transmission industries. ACP represents the interests of wind turbine manufacturers, component suppliers, project developers, project owners and operators, financiers, researchers, renewable energy supporters, utilities, marketers, customers, and their advocates. Through actions such as participation as *amicus curiae* in state and federal courts, ACP seeks to promote offshore wind energy as a clean, low-cost source of electricity for consumers.

The National Ocean Industries Association (“NOIA”) is a national trade organization that represents and advances a dynamic and growing offshore energy industry, including federal wind lessees. NOIA and its members provide solutions that support communities and protect workers, the public, and the environment. For nearly 50 years, NOIA has been committed to ensuring a strong, viable U.S. offshore energy industry capable of meeting the energy needs of our nation in an efficient and environmentally responsible manner.

ACP and NOIA (collectively, *Amici*) member companies are actively pursuing offshore wind energy projects, including several companies that already

hold renewable energy leases on the United States Outer Continental Shelf (“OCS”) issued by the Bureau of Ocean Energy Management (“BOEM”). These leases are in various stages of site assessment and construction plan development, within the associated time periods specified in the leases. Several of these lessees have submitted a Construction and Operations Plan (“COP”) to BOEM, as well as applications for necessary permits from other federal and state agencies, and those submissions are at various points of ongoing agency reviews under applicable laws. Federal approval of the commercial-scale Vineyard Wind 1 project represents a watershed point in the nascent offshore wind industry. Yet, Plaintiffs (as plain from their organizational name) oppose offshore wind development and seek judicial endorsement and enforcement of their parochial policy views—and notwithstanding agencies’ consideration thereof and responses thereto in rendering their decisions for the project that Plaintiffs now seek to relitigate here.

*Amici* concur with Federal Defendants and Intervenor-Defendant Vineyard Wind 1 LLC that Federal Defendants complied with the National Environmental Policy Act (“NEPA”) and the Endangered Species Act (“ESA”), and that Plaintiffs’ kitchen-sink contrary arguments are legally and factually meritless.

*Amici* thus incorporate Defendants’ arguments by reference.

Unfortunately, Plaintiffs are targeting the Vineyard Wind 1 project in hopes of substantially moving the goalposts for, and thereby impairing, all offshore wind

development in this country. In light of the potential implications of the issues presented in this case for the federal offshore wind program, *Amici* respectfully submit this brief to provide the Court with the offshore wind industry's unique perspective and broader interest in ensuring the realization of the Vineyard Wind 1 project, the importance of certainty for offshore wind to be constructed on leases issued and ones to be auctioned in the near future (possibly as soon as later this year) with generation of significant national revenues, and the rejection of futile attempts to delay or prevent critically needed offshore wind projects.

### **BACKGROUND**

Since 1901, the average surface temperature of the Earth has risen at an average rate of 0.17 degrees Fahrenheit per decade, with the most recent decades seeing a rate more than twice as high.<sup>1</sup> If further increase is not prevented, this climate change will have wide-ranging effects on human life and ecosystems across the globe.<sup>2</sup> Any plan to meaningfully combat climate change must incorporate a robust renewable energy program. Offshore wind has the potential to be a major element, but thus far has been largely undeveloped in the United States.

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<sup>1</sup> U.S. Environmental Protection Industry, *Climate Change Indicators: U.S. and Global Temperatures*, <https://www.epa.gov/climate-indicators/climate-change-indicators-us-and-global-temperature#:~:text=Global%20average%20surface%20temperature%20has,faster%20than%20the%20global%20rate>.

<sup>2</sup> *Id.*

The entire OCS is estimated to contain enough wind energy to provide nearly double the total electric generation needs of the United States.<sup>3</sup> Even if less than one percent of that resource area is actually developed, the energy generated would supply seven percent of total U.S. electricity consumption.<sup>4</sup>

Offshore wind development also represents a rare economic opportunity to launch a new domestic industry. In March 2020, ACP (then the American Wind Energy Association, or “AWEA”) published a study that analyzed the economic impacts from offshore wind. The analysis found the offshore wind industry is expected to invest \$57 billion domestically in offshore wind energy development (of \$106 billion in total investment, including investment outside the United States), and expected that offshore wind development activity and project deployment contribute \$25.4 billion in annual economic output and approximately 82,500 jobs by 2030. The Biden Administration also has taken several steps to promote growth of domestic supply chains and skilled workers for wind projects.

The United States is also playing catch-up with much of the rest of the world on offshore wind. The world’s first offshore wind turbines were installed off the Danish coast in 1991. For much of the subsequent two decades, however, the

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<sup>3</sup> U.S. Department of Energy and U.S. Department of the Interior, *National Offshore Wind Strategy*, at viii (Sept. 2016), <https://www.energy.gov/sites/default/files/2016/09/f33/National-Offshore-Wind-Strategy-report-09082016.pdf>.

<sup>4</sup> *Id.* at 9.

United States lacked a clear federal regulatory process to facilitate the development of offshore wind on the OCS. Fourteen years after the first offshore turbines were built in Europe, Congress passed the Energy Policy Act of 2005 (“EPAAct”), which amended Section 8 of the Outer Continental Shelf Lands Act (“OCSLA”), 43 U.S.C. § 1337, to authorize the Secretary of the Interior to issue leases, easements, or rights-of-way on the OCS for alternative energy, including offshore wind.

Now, under OCSLA, offshore wind developers must participate in a rigorous multiphase process that includes a competitive bidding auction for leasing areas and—once a bid is won—development of a site assessment plan (“SAP”). Both stages require considerable capital and time investment and environmental review under NEPA.<sup>5</sup> Lessees initially spend several years conducting a battery of surveys and studies of their lease areas.<sup>6</sup> These leasing and SAP stages must be completed before a company can even submit its COP consistent with its lease. BOEM approval of the COP is necessary to finally be able to develop the lease area. As a result, companies must front large bonus bids in OCS lease sales, as well

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<sup>5</sup> In the most recent offshore wind lease auction in New York, winning bids rose up to \$1.1 billion for 125,964 acres of land. U.S. Department of the Interior, *Biden-Harris Administration Sets Offshore Energy Records with \$4.37 Billion in Winning Bids for Wind Sale*, (Feb. 25, 2022), <https://www.doi.gov/pressreleases/biden-harris-administration-sets-offshore-energy-records-437-billion-winning-bids-wind>.

<sup>6</sup> See, e.g., 30 C.F.R. §§ 585.605-.613, 585.626-.629.

as invest many millions into site assessment and development planning, before ever seeking and receiving rights to develop those offshore leases.

Thus, in large part because of regulatory uncertainty regarding how this new federal authority would be implemented, as well as the challenges associated with federal permitting processes and huge economic investments necessary for a commercial-scale offshore wind farm, the United States has fallen far behind Europe and Asia in offshore wind deployment. Despite widespread demonstrated enthusiasm for offshore wind lease sales, none has yielded an approved commercial offshore project until Vineyard Wind 1. Today, the U.S. has a total of just seven offshore turbines producing 42 megawatts (“MW”), compared to Europe’s 21,900 MW and China’s 6,800 MW installed through the end of 2019.<sup>7</sup>

## ARGUMENT

### **I. The United States Cannot Afford Further Delay on Its Deployment of Offshore Wind.**

In this action, Plaintiffs seek vacatur of permits granted for the Vineyard Wind 1 project after what has been a nearly 13-year-long federal leasing and permitting process. The multiphase procedure prescribed by Congress under OCSLA included a comprehensive planning and leasing process that commenced

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<sup>7</sup> Glob. Wind Energy Council, *Global Wind Report 2019*, at 44 (2020), [https://gwec.net/wp-content/uploads/2020/08/Annual-Wind-Report\\_2019\\_digital\\_final\\_2r.pdf](https://gwec.net/wp-content/uploads/2020/08/Annual-Wind-Report_2019_digital_final_2r.pdf).

in late 2009 with the first Massachusetts Intergovernmental Renewable Energy Task Force Meeting,<sup>8</sup> identification in mid-2012 of a Wind Energy Area in Massachusetts for development of one or more commercial wind farms with minimized resource and use conflicts (even before development of project-specific mitigation),<sup>9</sup> a competitive lease auction in early 2015,<sup>10</sup> and multiple extensive environmental reviews by nearly two dozen federal, state, and local agencies in compliance with all NEPA requirements. While this process is costly and time consuming, developers realize the importance of such exhaustive planning and review in a new, complex, and growing field. However, continued delays *even after* completion of such a process will only serve to create regulatory uncertainty and discourage future developers from investing the requisite time and capital in building out the country's offshore wind infrastructure.

Furthermore, the United States can ill afford such delay. To meet the Administration's goals of 50 percent emission reductions by 2030 and net zero emissions by 2050,<sup>11</sup> the United States will need to greatly increase its deployment

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<sup>8</sup> See <https://www.boem.gov/renewable-energy/state-activities/first-massachusetts-intergovernmental-renewable-energy-task-force>.

<sup>9</sup> See <https://www.boem.gov/renewable-energy/state-activities/what-wind-energy-area-wea>.

<sup>10</sup> See <https://www.boem.gov/renewable-energy/state-activities/massachusetts-leases-ocs-0500-bay-state-wind-and-ocs-0501>.

<sup>11</sup> The White House, *FACT SHEET: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target* (2021), <https://www.whitehouse.gov/briefing->

of renewable energy. The development of offshore wind is a critical step in achieving these goals, as well as opening the door to other wide-ranging benefits.

**A. Domestic Offshore Wind Will Grow Jobs, Revitalize Heavy Manufacturing, and Have Wide-Ranging Benefits.**

The offshore wind industry is on the verge of becoming a substantial source of clean energy close to the largest population centers on the U.S. East, West, and Gulf Coasts. The United States currently only has seven turbines in the water—five in state waters offshore Rhode Island (off Block Island) and a two-turbine pilot project in Virginia (27 miles off the coast of Virginia Beach). Neither is a large commercial-scale project. The Vineyard Wind 1 project alone is projected to reduce Massachusetts’ carbon emissions by more than 1.6 million tons per year when it becomes operational—the equivalent of removing 325,000 cars from state roads—while offering \$3.7 billion in energy-related cost savings to the New England region over the life of the project.<sup>12</sup> There are 13 other COPs for offshore wind projects in progress, and BOEM has pledged to initiate the environmental reviews for up to ten additional projects this year. AWEA’s March 2020 report found that a 20-30 gigawatt buildout of offshore wind by 2030 would support up to 83,000 jobs and \$25 billion in annual economic output.

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[room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies.](https://www.vineyardwind.com/vineyard-wind-1)

<sup>12</sup> *Vineyard Wind 1: Overview*, <https://www.vineyardwind.com/vineyard-wind-1>.



As these projects come online, many benefits will come along with them in addition to the U.S. jobs. These benefits include:

- Providing environmental and public health benefits. U.S. Department of Energy, Strategy, *supra*, at 1, 22 (offshore wind reduces mortality by displacing harmful sulfur dioxide, nitrogen dioxide, and fine particulate matter emissions); *id.* at 38 (“[O]ffshore wind development carries with it substantial positive environmental benefits, both on land and at sea, including significant reduction in cumulative GHG [greenhouse gas] emissions, air pollution, and water usage by the energy sector.”).
- Harnessing an abundant, clean fuel source as thousands of megawatts of legacy fossil fuel, nuclear, and renewable generators are set to retire. U.S. Department of Energy, Strategy, *supra*, at vii. This will help to support a reliable electric grid in New England. The Independent System Operator-New England’s (ISO-NE) data shows that from 2013 to 2022, 5,000 MW of thermal (fossil fuel and nuclear) generation will have retired; and another 5,000 MW of fossil fuel generation is at-risk.<sup>13</sup> Similarly, the New York Independent System Operator indicates that by 2028, over 8,300 MW of thermal capacity in New York will be at or past the

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<sup>13</sup> ISO-NE, *Power Plant Retirements*, <https://www.iso-ne.com/about/what-we-do/in-depth/power-plant-retirements>.

retirement age for 95% of similar units.<sup>14</sup> Vineyard Wind 1 and other planned offshore wind projects are a logical, climate-conscious solution to replacing these conventional resources as they retire. Planning, procurement, and deployment of offshore wind will ensure that electric reliability is maintained as older thermal units retire.

- Developing domestic energy sources near coastal states, where 80% of electricity demand is located.<sup>15</sup> Additionally, because wind is a zero-marginal cost resource, development of Vineyard Wind 1 and other offshore wind projects that replace older, higher-marginal cost units will tend to reduce energy prices in the New England region—which are the highest in the lower 48 states.<sup>16</sup>
- Creating high-quality, high-wage jobs in construction, and permanent jobs for the operation and maintenance of the wind facilities over their expected life.<sup>17</sup> Many of these jobs, including those created by Vineyard

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<sup>14</sup> N.Y. Indep. Sys. Operator, *2018 Power Trends Report*, at 16 (2018), <https://www.nyiso.com/documents/20142/2223020/2018-Power-Trends.pdf/4cd3a2a6-838a-bb54-f631-8982a7bdfa7a>.

<sup>15</sup> U.S. Department of Energy, *Offshore Wind Fact Sheet* (Feb. 2017), <https://energy.gov/sites/prod/files/2017/02/f34/EERE-offshore-wind-fact-sheet-02072017.pdf>.

<sup>16</sup> See Energy Information Association, *Electric Power Annual 2020*, Table 2.10 (March 2022), <https://www.eia.gov/electricity/annual/pdf/epa.pdf>.

<sup>17</sup> Ross Gould & Eliot Cresswell, *Workforce Dev. Inst., New York State and The Jobs of Offshore Wind Energy* (2017),

Wind 1, will be in high-paying, skilled trades, spanning over 70 different occupations.<sup>18</sup> And related activity, such as port development activity, also plays a role. Vineyard Wind has committed to redevelop facilities at the port of Bridgeport, Connecticut for steel fabrication and outfitting, as well as serving as the long-term operations and maintenance hub for the project life.<sup>19</sup>

- Increasing domestic energy production to enhance U.S. energy security. Exorbitant gas prices arising from the war in Ukraine have served as a stark reminder of the risks associated with reliance on foreign fuel sources.<sup>20</sup> Growing the country's output of domestic energy will limit dependence on foreign fuel commodities and ensure greater reliability for consumers.

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[https://wdiny.org/Portals/0/New%20York%20State%20and%20The%20Jobs%20Offshore%20Wind%20Energy\\_%20WDI2017.pdf?ver=2017-05-03-150746-023](https://wdiny.org/Portals/0/New%20York%20State%20and%20The%20Jobs%20Offshore%20Wind%20Energy_%20WDI2017.pdf?ver=2017-05-03-150746-023).

<sup>18</sup> *Id.*

<sup>19</sup> Vineyard Wind, *Park City Wind Will Transform Bridgeport into Offshore Wind Hub*, (Oct. 11, 2019), <https://www.vineyardwind.com/press-releases/2019/10/28/park-city-wind-will-transform-bridgeport-into-offshore-wind-hub>.

<sup>20</sup> CATO Institute, Alan Reynolds, *Yes, Russia's War on Ukraine Did Raise the Price of Gasoline* (Apr. 6, 2022), <https://www.cato.org/blog/yes-russias-war-ukraine-did-raise-price-gasoline-0>.

- Raising considerable revenue for all levels of government and taxpayers.

The latest offshore wind lease auction alone raised \$4.37 billion—from bidders for six lease areas that totaled 488,000 acres.<sup>21</sup> Successful development of U.S. offshore wind projects, thereby demonstrating concrete returns on large upfront investments, may translate to even more robust bidding in future offshore wind lease sales.

### **B. Vineyard Wind 1 Is an Essential, Pathbreaking Offshore Wind Project for the United States.**

Despite facing hurdles inherent to a nascent U.S. industry, offshore wind developers are actively looking to expand and develop projects in the United States. Vineyard Wind 1 will set a precedent for subsequent projects as the first utility-scale offshore wind project, at an approximately 800-MW capacity capable of powering over 400,000 homes.<sup>22</sup> By contrast, the Block Island project has a maximum 30-MW capacity able to power 17,000 homes.<sup>23</sup> The Vineyard Wind 1

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<sup>21</sup> U.S. Department of the Interior, *Biden-Harris Administration Sets Offshore Energy Records with \$4.37 Billion in Winning Bids for Wind Sale* (Feb. 25, 2022), <https://www.doi.gov/pressreleases/biden-harris-administration-sets-offshore-energy-records-437-billion-winning-bids-wind>.

<sup>22</sup> *Vineyard Wind 1: Overview*, <https://www.vineyardwind.com/vineyard-wind-1>.

<sup>23</sup> <https://us.orsted.com/renewable-energy-solutions/offshore-wind/block-island-wind-farm>.

project will have an outsized impact on whether energy demands will be met, and whether developers will pursue opportunities in the U.S. market.

In short, successful development of the Vineyard Wind 1 project has the potential to kickstart the entire industry—including the supply chain and marine vessel commitments that will provide certainty for subsequent projects and represent the first step in the Biden Administration’s offshore wind target to achieve 30 GW of capacity by 2030. The project will also contribute to Massachusetts’ aim of having 3,200 MW of offshore wind by 2035, representing over 20% of electricity consumed in the state.<sup>24</sup> Completion of Vineyard Wind 1 would represent a crucial chance to signal to developers, stakeholders, and the world at large that the United States is prepared to take the steps necessary to meaningfully deploy offshore wind at this critical juncture.

## **II. Further Delay Would Undermine Regulatory Certainty and Send a Strong Negative Signal to the Offshore Wind Industry.**

A ruling for Plaintiffs in this case would send a catastrophic signal to the entire U.S. offshore wind industry. Future projects and lessees will ascertain that they can navigate a complex permitting process, do everything reasonably possible to make the project stand up to scrutiny, obtain a robust federal agency review and approval, and *still* not be able to build a wind farm in the end. Any decision

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<sup>24</sup> *Vineyard Wind 1: Overview*, <https://www.vineyardwind.com/vineyard-wind-1>.

destabilizing BOEM's permitting process would chill the growth of this nascent industry in the United States, including the businesses of *Amici's* members, by introducing uncertainty for future developers and investors at a critical juncture. *See* U.S. Department of Energy, *Strategy, supra*, at ix ("Offshore wind developers, financiers, and power purchasers need confidence in a project's ability to navigate regulatory and environmental compliance requirements in a predictable way."). This uncertainty would jeopardize future investments, inhibit procurement of supplier contracts to meet contractual commitments to states, and further delay the United States' ability to realize the benefits of offshore wind. *See id.* at 34 ("It is important for developers to have certainty when navigating the regulatory and environmental compliance processes.").

**A. An Adverse Ruling Would Prevent the United States from Being Able to Compete with Other Countries for Offshore Wind Investment.**

Without certainty in the long-term project pipeline, offshore wind manufacturers, currently clustered in Europe, will be less likely to invest in U.S. facilities specific for offshore wind. *See id.* at 32. The offshore wind industry depends on a critical mass of wind projects to establish a domestic supply chain that can significantly reduce costs in the same way it has in Europe. *Id.* at 23 n.13.

To justify large investments required for an offshore wind project, the industry needs consistency, clarity, and certainty in the regulatory process. *Id.* at

52. Even under the current process, “[t]he number of permits and authorizations required for the realization of an offshore wind project can be daunting for developers.” *Id.* at 37.

Meanwhile, other countries that have established and maintained predictable regulatory frameworks for offshore wind development have made considerable progress in deploying offshore wind.<sup>25</sup> European governments have limited risk and attracted private investment with ambitious national programs where the national government is not only the lessor but also provides long-term policy and financial support through the form of aggressive renewable energy targets and price support mechanisms. U.S. Department of Energy, *Strategy*, *supra*, at 23 n.13, 43. These structural factors allowed European developers to have already built 2,267 first-generation turbines by the time BOEM’s OCS wind leasing regulations were finalized in 2009, *see* 74 Fed. Reg. 81 (April 29, 2009), with another 2,558 under construction at the time.<sup>26</sup>

The United States’ ability to achieve comparable progress and gain a similar level of investment and interest is dependent on the vitality of the permitting

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<sup>25</sup> *See* Wind Europe, *The European Offshore Wind Industry Key Trends and Statistics 2016* (Jan. 26, 2017), <https://windeurope.org/about-wind/statistics/offshore/european-offshore-wind-industry-key-trends>.

<sup>26</sup> KPMG, *Offshore Wind in Europe, 2010 Market Report*, at 16 (2010), <https://www.offshore-stiftung.de/sites/offshorelink.de/files/documents/KPMG-Studie%20english%2C%20Offshore%20Wind%20in%20Europe%20-%202010%20Market%20Report.pdf>.

process for developing issued offshore wind leases. While agencies and applicants legally cannot ignore requirements or cut corners in developing offshore wind projects, at the same time they should not be vulnerable to second-guessing in lawsuits by insatiable project opponents notwithstanding the robust reviews readily evidenced by the extensive administrative record in this case. Many of the companies pursuing offshore wind projects in the United States invest many millions of dollars globally, so the United States needs to provide a stable, predictable regulatory environment to attract financial, material, and human capital, and courts must defer to such agency expertise and reject misplaced policy disputes by project opponents.

**B. Offshore Wind Developers Are Taking Significant Financial Risks in Reasonable Reliance on Rigorous Permitting Decisions Being Good Enough to Survive Judicial Scrutiny.**

The experience of the offshore wind industry shows that permitting, planning, financing, and ultimately constructing and operating an offshore wind project is a complex, years-long process in which the lease is only an early step. After wind energy areas are identified and leased, the lessee then prepares and submits a SAP to BOEM, analyzing the resource potential and commercial viability of the leasehold. Various surveys and geological, wind, and biological data that underlie a lessee's development of a COP take years and require tens of millions of dollars to complete before an offshore wind project is ready for BOEM



to evaluate technically and to fully assess under NEPA. See *Pub. Emps. For Envtl. Responsibility v. Hopper*, 827 F.3d 1077, 1087 (D.C. Cir. 2016) (geologic surveys at issue for Cape Wind were estimated to cost \$30 million); Crown Estate, A Guide to an Offshore Wind Farm 17-32 (Jan. 2019), <https://www.thecrownestate.co.uk/media/2861/guide-to-offshore-wind-farm-2019.pdf> (estimating various costs of European developers).

In its multi-phase statutory process, BOEM acknowledges that it would not be possible for offshore wind developers to expend the years and tens of millions of dollars necessary to collect data, submit site assessment plans, and develop a COP prior to obtaining the exclusivity provided by an offshore wind lease. Even if they could afford it, developers simply will not undertake the risk of conducting multi-million dollar site assessment activities without the exclusive right to submit a COP for the area at a later date. See J.A. 416 (AR-0074238). A developer must obtain rights to a site, then assess the development potential of that site by collecting data on the quality of the wind resources, water depths and sea bottom features, other uses in the area, the presence of biological resources, and access to onshore electrical interconnection points, which cumulatively can cost tens of millions of dollars. See *Hopper*, 827 F.3d at 1085 (geologic surveys alone for Cape Wind were estimated to cost \$30 million). For developers to make these investments, they need assurance that if they comply with the steps as the

government has formulated them, they will then get their approvals, and those approvals will be upheld against lawsuits by those who simply prefer the projects not be built. In particular, vacatur of agency approvals as Plaintiffs seek here adds huge costs and risks projects' very viability, which is what Plaintiffs ultimately desire. The investments necessary to develop offshore wind projects become far more difficult to justify if courts give credence to opponents' flyspecking of the administrative record to derive some shortcoming to delay the project. The Court should decline Plaintiffs' request for stricter scrutiny here.

### **III. The Federal Government Has Given Vineyard Wind 1 Robust Scrutiny.**

Under NEPA's purely procedural requirements, an agency merely must take a "hard look" at environmental impacts. See, e.g., *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). Courts have made clear that an agency has taken such a look at the environmental impacts if the analysis contains "sufficient discussion of the relevant issues and opposing viewpoints" and the decision is "fully informed and well-considered." *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1368 (D.C. Cir. 2017) (citation omitted); *Food & Water Watch v. U.S. Dep't of Agric.*, No. CV 17-1714 (BAH), 2020 WL 1479462, at \*14 (D.D.C. Mar. 26, 2020) (quoting *Myersville Citizens for a Rural Cmty., Inc. v. Fed. Energy Regulatory Comm'n*, 783 F.3d 1301, 1325 (D.C. Cir. 2015)).

Here, as Defendants' briefs explain in detail, BOEM's analysis more than satisfies NEPA's requirement. Over a 12-year process, BOEM's and other agencies' independent environmental reviews included, but were not limited to:

- Vineyard Wind's COP analysis (3 volumes, 2,857 pages);<sup>27</sup>
- Vineyard Wind 1 Final EIS (4 volumes, 2,422 pages);<sup>28</sup>

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<sup>27</sup> Vineyard Wind L.L.C., *Draft Construction and Operations Plan: Volume I*, BOEM (Sept. 30, 2020), [https://www.boem.gov/sites/default/files/documents/renewable-energy/Vineyard%20Wind%20COP%20Volume%20I\\_Complete.pdf](https://www.boem.gov/sites/default/files/documents/renewable-energy/Vineyard%20Wind%20COP%20Volume%20I_Complete.pdf); Vineyard Wind L.L.C., *Draft Construction and Operations Plan: Volume II*, BOEM (Oct. 22, 2018), <https://www.boem.gov/sites/default/files/renewable-energy-program/State-Activities/MA/Vineyard-Wind/Vineyard-Wind-COP-VolumeII-Combined.pdf>; Vineyard Wind L.L.C., *Draft Construction and Operations Plan: Volume III*, BOEM (Oct. 22, 2018), <https://www.boem.gov/renewable-energy/vineyard-wind-cop-volume-iii-seperated>.

<sup>28</sup> U.S. Department of the Interior, *Vineyard Wind 1 Offshore Wind Energy Project Final Environmental Impact Statement Volume I*, BOEM (Mar. 2021), <https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Vineyard-Wind-1-FEIS-Volume-1.pdf>; U.S. Department of the Interior, *Vineyard Wind 1 Offshore Wind Energy Project Final Environmental Impact Statement Volume II*, BOEM (Mar. 2021), <https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Vineyard-Wind-1-FEIS-Volume-2.pdf>; U.S. Department of the Interior, *Vineyard Wind 1 Offshore Wind Energy Project Final Environmental Impact Statement Volume III*, BOEM (Mar. 2021), <https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Vineyard-Wind-1-FEIS-Volume-3.pdf>; U.S. Department of the Interior, *Vineyard Wind 1 Offshore Wind Energy Project Final Environmental Impact Statement Volume IV*, BOEM (Mar. 2021), <https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Vineyard-Wind-1-FEIS-Volume-4.pdf>.

- Vineyard Wind 1 Supplement to the Draft Environmental Impact Statement (420 pages);<sup>29</sup>
- A series of consultations between BOEM, National Oceanic and Atmospheric Administration (“NOAA”), and the U.S. Fish and Wildlife Service that spanned the below documents (culminating in over 980 pages of discussion and analysis regarding the Endangered Species Act):<sup>30</sup>
  - Biological Assessment Submitted to NOAA Fisheries;
  - Supplemental Biological Assessment Submitted to NOAA Fisheries;
  - Essential Fish Habitat Assessment Submitted to NOAA Fisheries;
  - Revised Biological Assessment Submitted to the U.S. Fish and Wildlife Service;
  - Supplemental Information Submitted to NOAA Fisheries;
  - Letter of Concurrence from the U.S. Fish and Wildlife Service;
  - Final Biological Opinion from NOAA Fisheries; and

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<sup>29</sup> U.S. Department of the Interior, *Vineyard Wind 1 Offshore Wind Energy Project Supplement to the Draft Environmental Impact Statement* (“SDEIS”), BOEM (June 2022), <https://www.boem.gov/sites/default/files/documents/renewable-energy/Vineyard-Wind-1-Supplement-to-EIS.pdf>.

<sup>30</sup> BOEM, *Consultation Documents Associated with the Vineyard Wind Construction and Operations Plan*, <https://www.boem.gov/renewable-energy/state-activities/consultation-documents-associated-vineyard-wind-construction-and>.

○ Biological Assessment for Data Collection and Site Survey

Activities for Renewable Energy on the Atlantic Outer Continental Shelf; and

- Numerous public hearings in Rhode Island and Massachusetts.

Furthermore, BOEM dedicated at least one-third of its analysis to analyzing supplemental information on vessel navigation, including creating a new alternative, and analyzed both the direct and cumulative impacts of 17 other different factors. SDEIS at ES-5; *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006) (finding DOE had taken a requisite “hard look” in dedicating substantial portion of analysis to important factor and analyzing more than 12 others). Many of these factors were analyzed in consultation with the stakeholders for those resources. *See* Comments of the Special Initiative on Offshore, Supplement to the Draft Environmental Impact Statement for Vineyard Wind 1 LLC’s Proposed Wind Energy Facility Offshore Massachusetts at Appendix (July 27, 2020) (detailing in-depth fisheries involvement in BOEM’s offshore wind energy leasing processes in the Atlantic). In the areas where BOEM did not have institutional expertise, it properly consulted with and incorporated studies from other agencies with “special expertise” and evaluated the environmental impacts in light of those studies. 42 U.S.C. § 4332(c); *EarthReports, Inc. v. Fed. Energy Regulatory Comm’n*, 828 F.3d 949, 956–57 (D.C. Cir. 2016) (concluding that the Federal

Energy Regulatory Commission satisfied NEPA by determining that “currently-required measures for all ships entering U.S. waters” and “new rules and discharge standards approved by the Coast Guard” would adequately address energy project's identified environmental impacts) (quotations omitted). BOEM’s consideration of the Coast Guard MARIPARS report (discussed *infra* Section III) and the National Marine Fisheries Service’s surveys (discussed *infra* Section IX) is therefore proper and adequate. BOEM has gone above and beyond its duty to take a “hard look” at the environmental consequences of Vineyard Wind 1.

Upholding BOEM’s review and allowing the project to move forward will be a critical step to narrowing the gap between leases being held and projects actually being built and moving forward. It will affirm the structure for considering the impacts of offshore wind energy development that can be used to help expedite future offshore wind projects, and should provide the industry and investors with certainty that they can secure permits in reasonable time periods and retain them against meritless lawsuits by project opponents.

## **CONCLUSION**

This Court should not support Plaintiffs’ attempts to delay much-needed and beneficial energy infrastructure projects like Vineyard Wind. The totality of the circumstances demonstrates that the government has given Vineyard Wind the requisite hard look. For the reasons stated above, and explained by Federal

Defendants' and Vineyard Wind's merits briefs, *Amici* ACP and NOIA respectfully request that this Court grant summary judgment for Defendants.

Dated: September 23, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 23, 2022, the foregoing was filed with the Clerk of the United States District Court for the District of Massachusetts by using the Court's CM/ECF system, which sends a notice of filing to all registered CM/ECF users.

/s/ Brian C. Levey  
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