

**UNITED STATES DISTRICT COURT
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;
DEBRA HAALAND, Secretary of the Interior;
GINA M. RAIMONDO, Secretary of Commerce,

Defendants.

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

Hon. Allison D. Burroughs

**MEMORANDUM OF LAW IN SUPPORT OF
VINEYARD WIND 1 LLC'S MOTION FOR LEAVE TO INTERVENE**

Jack W. Pirozzolo (BBO # 564879)
SIDLEY AUSTIN LLP
60 State Street, 36th Floor
Boston, MA 02109
(617) 223-0304
jpirozzolo@sidley.com

Counsel for Vineyard Wind 1 LLC

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Vineyard Wind 1 LLC (“Vineyard Wind” or “Company”) hereby submits this Memorandum of Law in Support of its Motion for Leave to Intervene filed pursuant to Rules 24(a)(2) and (b)(1)(B) of the Federal Rules of Civil Procedure and Local Rule 7.1.

Plaintiffs challenge federal approval of Vineyard Wind’s offshore wind energy project in Bureau of Ocean Energy Management Lease Area OCS-A 0501, alleging, among other things, that federal agency Defendants have violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, the Endangered Species Act (“ESA”), 16 U.S.C. § 1531, *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 551, *et seq.* The relief Plaintiffs seek would substantially impair Vineyard Wind’s ability to proceed with constructing and operating this project, likely cause significant financial hardship to the Company, and jeopardize the project’s viability.

Vineyard Wind seeks to intervene in this action to protect its direct, substantial, and legally protected interest in Lease Area OCS-A 0501, thereby giving it the right to continue developing the project as approved and permitted by Defendants. Vineyard Wind won the exclusive right to develop the project in Lease Area OCS-A 0501 after a competitive auction lease. Vineyard Wind’s project has undergone a rigorous and comprehensive multi-year review by almost two dozen federal, state, and local agencies to obtain permitting authorizations and approvals now being challenged by Plaintiffs, including approval of Vineyard Wind’s Construction and Operations Plan and issuance of a Biological Opinion pursuant to the ESA. Vineyard Wind promptly filed this motion to intervene 41 days after Plaintiffs filed the Complaint, 20 days after Defendants were served with the Complaint, and before Defendants have entered an appearance. Currently, Defendants have not responded to the Complaint, no substantive issues have been raised or decided, and the Court has not set a briefing schedule.

Thus, intervention would not disrupt the proceedings or prejudice any parties. Therefore, Vineyard Wind is entitled to intervention as of right, or alternatively, should be granted permission to intervene.

I. BACKGROUND

A. The Vineyard Wind Project

Vineyard Wind is developing an offshore wind energy project (the “Project”) in Bureau of Ocean Energy Management (“BOEM” or “Bureau”) Lease Area OCS-A 0501 off the coast of Massachusetts that is poised to provide 800 megawatts of clean, renewable, and cost-competitive energy for over 400,000 homes and businesses throughout Massachusetts. *See* Declaration of Rachel Pachter, ¶¶ 5, 7 (Oct. 4, 2021) (“Pachter Decl.”). To produce this amount of renewable electricity and send it to the grid, the Project will consist of 62 offshore wind turbine generators, an electrical service platform, an onshore substation, offshore and onshore cabling, and onshore operations and maintenance facilities. *Id.* Constructing a project of this magnitude is complex and required Vineyard Wind to participate directly in extensive regulatory proceedings at the local, state, and federal levels. Declaration of Klaus Skoust Moeller, ¶ 4 (Oct. 4, 2021) (“Moeller Decl.”). These efforts are expensive and time consuming. To date, Vineyard Wind has invested over \$300 million in the decade-long process of developing, permitting, engineering, and preparing for construction of the Project. *Id.*; Pachter Decl. ¶ 6.

Upon completion, the Project will provide substantial benefits to the Commonwealth of Massachusetts and the United States. The Project is expected to reduce carbon emissions by over 1.6 million tons per year while simultaneously providing an estimated \$1.4 billion in total net benefits to Massachusetts ratepayers under the Company’s 20-year power purchase agreements with Massachusetts distribution companies. Pachter Decl. ¶ 7. Additionally, the

Project will directly support approximately 1,100 to 1,142 full-time equivalent jobs¹ during pre-construction, construction, and installation in Massachusetts and another 73 to 80 full-time equivalent jobs over the Project's operational life. *Id.* ¶ 10. The Project is also likely to create an additional 898 to 932 indirect and induced jobs during pre-construction, construction, and installation, and 81 to 89 each year during operations and maintenance. *Id.* Moreover, the Project should generate between \$13.6 million and \$14.7 million in personal income, sales, and property tax revenue in the Commonwealth of Massachusetts. *Id.*

The financial benefits to Massachusetts extend beyond job creation, as Vineyard Wind has committed tens of millions of dollars to: (1) accelerate the development of the offshore wind supply chain, businesses, and infrastructure in Massachusetts; (2) recruit, mentor, and train residents of Massachusetts, particularly southeast Massachusetts, for careers in the new offshore wind industry; (3) advance marine mammal protection as the offshore wind industry develops along the East Coast; and (4) establish a fund to support low-income ratepayers, promote clean energy projects in communities on the Cape and Islands, and fund distributed battery energy storage and solar projects to enhance the resiliency of local coastal communities in the face of climate change. *Id.* ¶ 8.

B. The Company

Vineyard Wind is based in New Bedford, Massachusetts and is jointly owned by Copenhagen Infrastructure Partners P/S, and Avangrid Renewables, LLC. *Id.* ¶ 3.²

¹ "Full-time equivalent jobs" is the equivalent of one person working full-time for one year. Pachter Decl. ¶ 10.

² Vineyard Wind was called Offshore MW LLC prior to October 2016. Pachter Decl. ¶ 3.

Vineyard Wind has also entered into a Community Benefits Agreement with Martha's Vineyard-based non-profit renewable energy cooperative Vineyard Power. *Id.* ¶ 9. The Company's partnership with Vineyard Power has supported and promoted considerable community input into Project design. And, Vineyard Wind's project team has engaged extensively with local towns, federally recognized and historic tribes, environmental interests, and commercial and recreational fisheries. *Id.*

C. The Project Lease

The Project is eleven years in the making. The process began with BOEM evaluating the suitability for offshore wind development along the Atlantic coast in 2009 by convening a public stakeholder and desktop screening process. Pachter Decl. ¶ 12; *see also* Moeller Decl. ¶ 4. Over the next six years BOEM engaged in a variety of assessments, including public notice and comment, to support the eventual lease sale. Pachter Decl. ¶¶ 11-17.

In January 2015, BOEM held a competitive lease sale auction within the Massachusetts "Wind Energy Area." Vineyard Wind (then operating as Offshore MW) won the competitive lease auction for BOEM Lease Area OCS-A 0501, an area of approximately 166,886 acres. Pachter Decl. ¶ 4.

Vineyard Wind's lease became effective April 1, 2015. *Id.* The lease affords Vineyard Wind a five-year site assessment term and a 25-year operations term and grants Vineyard Wind the exclusive right and privilege to prepare and submit a Site Assessment Plan and Construction and Operations Plan for the Project. *Id.*

D. Endangered Species Act Consultation

As required by section 7 of the ESA, 16 U.S.C. § 1536(a)(2), BOEM engaged in a consultation with the National Oceanic and Atmospheric Administration's National Marine Fisheries Service ("NMFS") to assess the likelihood that the Project's construction, operation,

maintenance, and decommissioning would jeopardize the continued existence of marine species listed as endangered or threatened under the ESA, or destroy or adversely modify critical habitat for those federally listed species. Pachter Decl. ¶ 19.

BOEM submitted a Biological Assessment (“BA”) and request for consultation to NMFS in December 2018. The BA identified several federally listed marine mammal, sea turtle, and marine fish species that may be affected by the Project. Pachter Decl. ¶ 19. One of the marine mammal species identified by BOEM was the North Atlantic Right Whale (“NARW”).³ NMFS formally initiated a section 7 consultation with BOEM on April 10, 2019. Pachter Decl. ¶ 20. Over the next two years, BOEM continued to provide NMFS additional information to inform its review under the ESA. *Id.*

On September 11, 2020, at the conclusion of its consultation, NMFS issued its Biological Opinion (“BiOp”) for the Project. Pachter Decl. ¶ 20. The BiOp presented NMFS’s assessment of the current status of the federally-listed species identified in the BA, the environmental baseline within the Project area, the Project’s effects, and any effects of interrelated and independent actions, and cumulative effects, and concluded that the Project: i) is not likely to jeopardize the continued existence of or adversely affect federally-listed species; and ii) will have no effect on critical habitat designated for the NARW. The BiOp also included an Incidental Take Statement (“ITS”), which included a number of non-discretionary reasonable

³ The BA identified three additional endangered whale species that could be affected (the fin whale, sei whale, and sperm whale), four federally-listed sea turtle species that may occur in the area of the Project (leatherback, loggerhead, Kemp’s ridley, and green), and one federally-listed marine fish species that may be affected (the Atlantic sturgeon). BOEM submitted a revised BA in March 2019. Pachter Decl. ¶ 19.

and prudent measures that Vineyard Wind is required to implement to minimize the impacts from any incidental take of federally-listed species. *Id.*

On May 7, 2021, supported by a Biological Assessment Supplement, BOEM requested that NMFS reinitiate ESA section 7 consultation to assess potential impacts from Vineyard Wind monitoring survey activity that was not evaluated in the BiOp and new information and analyses regarding the status of the NARW. Pachter Decl. ¶ 34. In letters to BOEM dated May 27, 2021 and June 8, 2021, NMFS agreed that reinitiating ESA section 7 consultation was appropriate and that the result of this consultation may be a new BiOp and ITS for the Project that would supersede those issued on September 11, 2020. *Id.* Pending completion of this reinitiated ESA consultation, the September 11, 2020 BiOp and ITS remain in effect. *Id.*

E. Securing Approvals for Project Construction and Operation

Vineyard Wind has invested over \$300 million to develop, permit, and engineer the Project to secure the multiple federal approvals needed to construct the Project. Moeller Decl. ¶ 4; Pachter Decl. ¶ 6. The Company has also entered numerous contracts with a combined value over \$3 billion for the manufacture, transport, and installation of Project components, so offshore construction work can commence in mid-2022. Moeller Decl. ¶ 5. Separately, Vineyard Wind has entered into power purchase agreements with three electric distribution utilities in Massachusetts. Moeller Decl. ¶ 4. Under these power purchase agreements, the distribution companies will purchase Vineyard Wind's energy output from the Project for 20 years. *Id.*

Over the last several years, Vineyard Wind has worked to secure authorizations to construct the Project. Vineyard Wind submitted its initial Site Assessment Plan in March 2017 and received approval from the Bureau in May 2018. Pachter Decl. ¶ 17. Vineyard Wind submitted its initial Construction and Operations Plan ("COP") in December 2017. Pachter

Decl. ¶ 18.⁴ BOEM then began a lengthy process to assess potential environmental, social, economic, or cultural impacts of the Project under NEPA. As a first step in the process, BOEM issued a draft environmental impact statement in December 2018. *Id.* ¶ 23. In August 2019, BOEM announced it would conduct additional review by preparing a supplemental draft environmental impact statement to study the cumulative impacts of offshore wind development along the East Coast of the United States. *Id.* ¶¶ 25, 26. BOEM published the draft environmental impact statements in the Federal Register and invited public comment—ultimately receiving nearly 30,000 comments on the supplemental environmental impact statement, the overwhelming majority of which supported the Project. *Id.* ¶ 26.

Recognizing the rapid pace of technological development within the offshore wind industry, in conducting the Project’s environmental review, BOEM used a “project design envelope” concept—in accordance with its established guidance—which allowed Vineyard Wind to describe the broad parameters of certain features of the Project, like the size and number of wind turbine generators, while retaining flexibility in the future to procure specific components that fit within those parameters. Pachter Decl. ¶ 18. Consequently, the draft environmental impact statements evaluated the maximum potential Project impacts based on the maximum parameters in the “project design envelope.” COP, Vol. I at 1-8 & Table 1.5-1.

After Vineyard Wind selected the General Electric (“GE”) Haliade-X 13 megawatt wind turbine generator for the final Project design, it notified BOEM on December 1, 2020 that it was temporarily withdrawing the COP to conduct a technical and logistical review of the turbines to ensure that their selection would not require a modification of the COP. Pachter Decl. ¶ 27. On

⁴ A revision to the COP was submitted in September 2020. Pachter Decl. ¶ 18.

January 22, 2021 Vineyard Wind informed the Bureau that it had completed its technical review of the GE wind turbine generator, confirmed that the specific Haliade-X turbines were within the “project design envelope” parameters, and determined that no changes to the draft COP were necessary. *Id.* ¶ 28. Vineyard Wind requested that the Bureau resume its review of the COP and all other administrative and environmental review processes. *Id.*

On February 3, 2021 the Bureau announced it had independently confirmed Vineyard Wind’s technical and logistical assessment of the GE wind turbine generators and would resume administrative review of the COP and preparation of a final environmental impact statement under NEPA. Pachter Decl. ¶ 29.

F. Final Approvals of the Project

The Bureau issued a final environmental impact statement for the Project on March 8, 2021, nearly two years after the original expected date of completion. Pachter Decl. ¶ 29. On May 10, 2021 BOEM, NMFS, and the U.S. Army Corps of Engineers (“Army Corps”) issued the joint Record of Decision (the “ROD”), which primarily served as BOEM’s approval of the COP under the Outer Continental Shelf Lands Act (“OCSLA”). *Id.* ¶ 31.⁵ Included with the ROD, BOEM issued a memorandum finding that the COP complied with section 8(p)(4) of OCSLA, 43 U.S.C. § 1337(p). Pachter Decl. ¶ 32.

On July 15, 2021, BOEM issued a letter to Vineyard Wind formally approving the Company’s COP and granting the Project easement, subject to the terms and conditions included in the Bureau’s letter. Pachter Decl. ¶ 37.

⁵ While not directly relevant to this immediate action, the ROD also documented the Army Corps’s decision to issue Vineyard Wind permits under section 404 of the Clean Water Act (“CWA”), 33 U.S.C. § 1344, and section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 and NMFS’s decision to issue an incidental harassment authorization pursuant to the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. § 1371(a)(5)(D). Pachter Decl. ¶ 33.

G. This Action

On May 24, 2021 Plaintiffs submitted a 60-day Notice of Intent to sue (“NOI”) BOEM and NMFS pursuant to the ESA, 16 U.S.C. § 1540(g)(2)(A)(i). Complaint ¶ 49.⁶ Plaintiffs alleged in the NOI that NMFS’s “no jeopardy” decision in the BiOp was arbitrary and capricious and violated the ESA. *Id.* ¶ 67. Plaintiffs threatened to file suit and request an order invalidating the BiOp if BOEM and NMFS did not correct the alleged deficiencies. *Id.* ¶ 49.

On August 25, 2021, Plaintiffs filed the Complaint for Declaratory and Injunctive relief with the Court. Plaintiffs allege that Defendants have: (i) violated the NEPA and APA by issuing a final environmental impact Statement and a ROD that approved the Project’s COP (Complaint ¶¶ 60-63); (ii) violated the ESA and APA by issuing a BiOp that failed to adequately address the Project’s individual and cumulative impacts on federally listed marine species, such as the NARW, and that included a deficient ITS (Complaint ¶¶ 64-67); and (iii) violated the ESA by issuing a BiOp with an inadequate assessment of the potential to jeopardize federally listed species (Complaint ¶¶ 68-69). Plaintiffs request that the Court declare the ROD, final environmental impact statement, and BiOp unlawful; vacate these various Project approvals and authorizations; and enjoin Defendants from approving any further permit, approval, or other action within the Vineyard Wind lease area or that “might adversely affect the human or natural environment” until the alleged deficiencies in the BiOp or final environmental impact statement are cured. Prayer for Relief §§ 1-8.

Given the number of contracts that Vineyard Wind has executed to prepare for offshore Project construction in mid-2022, plus the complex commercial obligations, tight construction

⁶ Plaintiffs reference the 60-day NOI in the Complaint but do not attach a copy of the document as an exhibit for cross-reference.

schedules, and limited availability of contractor and material resources needed to complete construction, the Project likely would not survive any significant delay that could result from Plaintiffs' requested relief. Moeller Decl. ¶ 5.

II. VINEYARD WIND IS ENTITLED TO INTERVENE AS OF RIGHT

Pursuant to Federal Rule of Civil Procedure 24(a)(2), “[o]n timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.”

The First Circuit requires a party to satisfy four conditions to intervene as of right: 1) “[t]he application must be timely”; 2) “[t]he applicant must claim an interest relating to the property or transaction which is the subject of the action”; 3) “[d]isposition of the action may, as a practical matter, impair or impede that applicant’s ability to protect the interest”; and 4) “[t]he applicant must show that the interest will not be adequately represented by existing parties.”⁷

⁷ The First Circuit has not taken a position on whether an intervenor-defendant must demonstrate Article III standing. *See Cotter v. Mass. Ass’n of Minority Law Enf’t Officers*, 219 F.3d 31, 33-34 (1st Cir. 2000) (citing *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986)); *see also Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 308 F.R.D. 39, n.4 (D. Mass. 2015); *cf. Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017) (holding that parties seeking to intervene as of right must establish Article III standing when pursuing relief not requested by a plaintiff, but not addressing requirement for proposed intervenor-defendants). Yet, Vineyard Wind satisfies the requirements for Article III standing because Plaintiffs are seeking a judgment invalidating the federal approvals the Company needs to construct and operate the Project. Pachter Decl. ¶¶ 20, 31, 34; Moeller Decl. ¶ 4. Thus, Vineyard Wind has a “concrete stake in the outcome” sufficient to confer Article III standing. *See Daggett v. Comm’n on Governmental Ethics & Election Pracs.*, 172 F.3d 104, 109 (1st Cir. 1999); *Cotter*, 219 F.3d at 33-34 (“[I]n the ordinary case, an applicant who satisfies the ‘interest’ requirement of the intervention rule is almost always going to have a sufficient stake in the controversy to satisfy Article III as well.”); *see also, Crossroads Grassroots Pol’y Strategies v. Fed. Election Comm’n*, 788 F.3d 312, 316-19 (D.C. Cir. 2015) (finding a proposed intervenor-defendant had Article III standing—in a circuit that requires the analysis—and explaining that the critical “injury in fact”

Conservation Law Found. of New England, Inc. v. Mosbacher, 966 F.2d 39, 41 (1st Cir. 1992) (citing *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 637 (1st Cir. 1989)); *see also Ungar v. Arafat*, 634 F.3d 46, 50-51 (1st Cir. 2011) (citations omitted); *Strahan v. Sec’y, Mass. Exec. Off. of Energy & Env’t Affairs*, No. 19-cv-10639-IT, 2021 WL 621202, at *2 (D. Mass. Feb. 17, 2021). Given the “inherent imprecision of Rule 24(a)(2)’s individual elements” this Circuit applies the Rule 24(a) analysis “with an eye toward the commonsense view of the overall litigation.” *Ungar*, 634 F.3d at 51 (internal quotations and citations omitted).

Vineyard Wind, the Project owner and recipient of the federal authorizations challenged in this matter, would be directly, and uniquely, impacted if Plaintiffs were to prevail. Consequently, Vineyard Wind satisfies each of the four conditions and is therefore entitled to intervene in this action as of right.

A. Vineyard Wind’s Motion Is Timely

A motion to intervene as of right must be timely filed. Fed. R. Civ. P. 24(a)(2). Timeliness, which is of “great importance,” is determined “on a case by case basis, examining the totality of the relevant circumstances.” *Banco Popular de P.R. v. Greenblatt*, 964 F.2d 1227, 1230 (1st Cir. 1992) (citations omitted). “[T]he purpose of the basic requirement that the application to intervene be timely is to prevent last minute disruption of painstaking work by the parties and the court.” *Id.* at 1232 (quoting *Culbreath v. Dukakis*, 630 F.2d 15, 22 (1st Cir. 1980)).

Vineyard Wind’s motion to intervene is timely. Vineyard Wind made this motion to intervene 41 days after petitioners filed the Complaint, 20 days after Defendants were served,

requirement is typically met where “a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party’s benefit.”).

and before Defendants have entered an appearance. No briefing schedule has been set, no substantive issues have been raised, and no hearings on the merits have been held. Simply put, allowing Vineyard Wind to intervene will not cause any disruption or delay to the case, given its relative infancy, and will therefore not prejudice any existing parties.

B. Vineyard Wind Has A Substantial, Direct Interest in the Subject of This Action

As the sponsor of the Project at the heart of this litigation, Vineyard Wind can “claim[] an interest relating to the property or transaction which is the subject of the action.” Fed. R. Civ. P. 24(a)(2); *Conservation Law Found.*, 966 F.2d at 41. The First Circuit states that movant’s interests must “bear a sufficiently close relationship to the dispute between the original litigants” and the “interest must be direct, not contingent.” *Travelers Indem. Co.*, 884 F.2d at 638 (internal quotations and citations omitted). Moreover, the First Circuit has found that “[a]n intervenor has a sufficient interest in the subject of the litigation where the intervenor’s contractual rights may be affected by a proposed remedy.” *B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc.*, 440 F.3d 541, 545 (1st Cir. 2006).

This lawsuit is ultimately about Vineyard Wind’s Project. Vineyard Wind is the holder of the lease, sponsor of the COP, and developer of the Project assessed in the BiOp that Plaintiffs challenge in this case. To date Vineyard Wind has invested over \$300 million to develop, permit, and construct the Project. Moeller Decl. ¶ 4; Pachter Decl. ¶ 6. Additionally, Plaintiffs’ requested relief seeks to set aside the approval or permits that Vineyard Wind needs to proceed with constructing the Project. It would “defy common sense” to say that the Company lacks a direct and substantial interest in the subject and outcome of this action. *Cotter*, 219 F.3d at 35 (when white officers sued Boston Police Department alleging that they were denied the

promotions on account of race, black officers were entitled to intervene to defend their promotions).

Under similar circumstances, courts have permitted other offshore wind project sponsors intervention as of right in actions challenging federal approvals of their projects. *See, e.g.*, Minute Order, *Fisheries Survival Fund v. Jewell*, No. 1:16-cv-02409 (TSC) (D.D.C. Jan. 16, 2017) (granting offshore wind development company motion to intervene in challenge to Bureau's approval of the project); Minute Order, *Pub. Emps. for Env't Resp. v. Bromwich*, No. 1:10-cv-01067-RBW, (D.D.C. Sept. 8, 2010) (same).⁸ The same result should apply here.

C. Vineyard Wind's Interest May Be Impaired Or Impeded By The Disposition Of This Action

Vineyard Wind is also "so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a)(2). The relief Plaintiffs seek could result in significant delays to the Project construction schedule. Such delays carry substantial consequences, including the possibility that the Project will have to be abandoned. Moeller Decl. ¶ 5. *See, e.g., Conservation Law Found.*, 966 F.2d at 43 (finding that motion to intervene should have been granted where "[t]he fishing groups seeking intervention are the real targets of the suit and are the subjects of the regulatory plan. Changes in the rules will affect the proposed intervenors' business, both immediately and in the future.").

⁸ *See also, S.C. Coastal Conservation League v. Ross*, No. 2:18-cv-03326-RMG, 2019 WL 5872423, at *3 (D.S.C. Feb. 8, 2019) (granting intervention as of right to private companies issued incidental harassment authorizations by BOEM to conduct oceanic seismic airgun surveys in challenge brought pursuant to the MMPA, ESA, NEPA, and APA); *Ohio Valley Env't Coal. v. U.S. Army Corps of Eng'rs*, 243 F.R.D. 253, 257 (S.D. W.Va. 2007) (granting intervention as of right to mining companies holding Army Corps permits being challenged under NEPA and CWA where "if successful, [the lawsuit] could jeopardize [mining companies'] use of those permits.").

If Vineyard Wind has to abandon the Project, the public will lose many benefits (including a reliable source of renewable energy to the people of Massachusetts, job creation, and tax revenues), and the Company would lose its substantial investment in the Project and forfeit construction and supply contracts worth billions of dollars. Moeller Decl. ¶ 5. Thus, if the Court grants Plaintiffs’ requested relief an “adverse effect is certain.” *See Conservation Law Found.*, 966 F.2d at 43.

D. Other Parties Do Not Adequately Represent Vineyard Wind’s Interests

Vineyard Wind seeks intervention here because the federal agency Defendants cannot “adequately represent [movant’s] interest.” Fed. R. Civ. P. 24(a)(2). The Supreme Court has found this requirement satisfied “if the applicant shows that representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.” *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972).

Where a movant seeks intervention to support a governmental defendant, the First Circuit starts “with a rebuttable presumption that the government will defend adequately its action.” *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 207 (1st Cir. 1998); *Cotter*, 219 F.3d at 35.⁹ But the government’s interests and those of a private party regulated and licensed by the government are not completely aligned. *See Conservation Law Found.*, 966 F.2d at 44 (recognizing that the

⁹ To the extent the First Circuit’s presumption requires an intervenor to make more than a minimal showing that the government will not adequately defend its interests, the First Circuit precedent is incorrect and inconsistent with the Supreme Court’s interpretation of Rule 24(a) set forth in *Trbovich*. *See* Petition for Writ of Certiorari, *Found. for Individual Rights in Educ. v. Victim Rights Law Ctr.* (U.S. July 21, 2021) (No. 21-84) (seeking review of *Victims Rights Law Ctr. v. Rosenfelt*, 988 F.3d 556 (1st Cir. 2021), and presenting the question whether “a movant who seeks to intervene as of right on the same side as a governmental litigant must overcome a presumption of adequate representation.”). In any event, even if the First Circuit’s standard is more onerous than that set forth in *Trbovich*, Vineyard Wind has demonstrated that the government cannot adequately represent its interests under either standard.

“[Secretary of Commerce’s] judgments are necessarily constrained by his view of the public welfare” whereas a commercial fishing group seeking intervention has its specific business interest to consider and represent); *see also Massachusetts v. Andrus*, 594 F.2d 872 (1st Cir. 1979) (reflecting that in a NEPA and OCSLA challenge to the Secretary of Interior’s proposal to open bids for commercial oil and gas leasing in the Outer Continental Shelf offshore New England, oil and gas companies were permitted to intervene to support the federal agency defendants). Counsel for Plaintiffs—who indicated that he plans to oppose intervention because the federal agency Defendants can adequately represent Vineyard Wind’s interests—has similarly argued that the government’s interest is not completely aligned with private parties that hold a government permit or benefit from regulatory actions in other cases in which he represented private parties seeking to intervene in support of federal agencies. *See, e.g.* Defendant-Intervenor’s Notice of Unopposed Motion and Motion to Intervene; Memorandum of Points and Authorities in Support Thereof, at 16-17, *Ctr. for Biological Diversity v. U.S. Army Corps of Engr’s*, No. 2:14-cv-01667-PSG-CW (C.D. Cal. June 5, 2014), ECF No. 17 (“Here, it is unlikely that the Federal Defendants—both governmental agencies—could or would advance all of [movant’s] arguments. As an initial matter, the Federal Defendants cannot be expected to adequately represent [movant]; those government agencies must weigh competing interests, not just pursue the interests of the Permittee ([movant]).”); Memorandum of Points and Authorities in Support of Motion to Intervene, at 13, *Ctr. for Biological Diversity v. Norton*, No. 3:01-cv-02101-IEG-LAB (S.D. Cal. Mar. 11, 2002), ECF No. 12 (“In this case, Applicants-Intervenors bring ‘unique private perspectives’ that are not, and cannot be, represented by Defendants.”) Here too, no other existing party adequately represents the unique interests of Vineyard Wind, which has invested hundreds of millions of dollars over the course of several years to secure the

legal right to develop, construct, and operate the Project that Plaintiffs challenge in this action. Moeller Decl. ¶ 4; Pachter Decl. ¶ 6; *see also* 7C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1909 (“[T]here is good reason in most cases to suppose that the applicant is the best judge of the representation of the applicant’s own interests and to be liberal in finding that one who is willing to bear the cost of separate representation may not be adequately represented by the existing parties.”).

It is not uncommon for other federal courts to find that federal agency defendants do not adequately represent the interests of private parties that seek to intervene in actions challenging federal permitting and approvals for large-scale commercial developments. *See, e.g., Red Lake Band of Chippewa Indians v. U.S. Army Corps of Engr’s*, 338 F.R.D. 1, 6 (D.D.C. 2021) (finding federal government did not adequately represent energy company’s interests in action challenging discharge permit it had been granted for construction and replacement of pipeline).¹⁰

¹⁰ *See also Kleisser v. U.S. Forest Serv.*, 157 F.3d 964, 973-74 (3d Cir. 1998) (finding federal defendant did not adequately represent interests of private timber companies in action challenging logging in national forest); *Sierra Club v. Espy*, 18 F.3d 1202, 1207-08 (5th Cir. 1994) (finding federal defendant did not adequately represent interest of timber purchasers’ associations in action challenging national forest service management plans); *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1025-26 (8th Cir. 2003) (finding federal agency defendant did not adequately represent private party movants when “[t]he [Army Corps] is charged with managing the Missouri River system as a whole—a charge that requires it to balance the interests of the upstream and downstream users” whereas movants “wish to represent exclusively downstream interests.”); *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996-97 (10th Cir. 2009) (finding federal defendant did not adequately represent interests of private mining company in action challenging permits to vent methane); *Nat’l Farm Lines v. Interstate Com. Comm’n*, 564 F.2d 381, 382-84 (10th Cir. 1977) (finding “minimal burden” of showing inadequacy of representation satisfied in “familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which is on its face impossible.”); *Georgia v. U.S. Army Corps of Eng’rs*, 302 F.3d 1242, 1259 (11th Cir. 2002) (finding federal agency defendant did not adequately represent interests of private party movant because “[the court] do[es] not believe that a federal defendant with a primary interest in the management of a resource has interests identical to those of an entity with economic interests in the use of that resource”); *Env’t Def. Ctr. v. Bureau of Safety & Env’t Enf’t*, No. CV 14-9281, 2015 WL 12734012, at *4-5 (C.D. Cal. Apr. 2, 2015)

Vineyard Wind believes the Defendants will defend their approvals of the Project, but the defenses the government chooses to raise may be affected by policy and litigation objectives unrelated to the Project, and may not fully protect Vineyard Wind's interest in having the Project completed in a timely and cost-effective manner. The possibility of such a "conflict or divergence between the intervention applicants and the named defendants" is sufficient to overcome any presumption of adequate representation. *Cotter*, 219 F.3d at 36 (allowing black police officers who were promoted to intervene in lawsuit by white officers claiming they were denied promotions on account of race because the Police Department might not raise the same defenses as the intervenors).

The Defendants' litigation choices under NEPA or the ESA may also be affected by a desire to address concerns of other users of the Outer Continental Shelf or to achieve policy objectives for offshore wind in the aggregate that differ from Vineyard Wind's interest in constructing this particular Project. These federal agencies have been tasked with vigorously promoting offshore wind projects in numerous areas of the nation's Outer Continental Shelf. *See White House, Fact Sheet: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs* (Mar. 29, 2021).¹¹ Vineyard Wind, in contrast, has made a significant financial investment in this Project in reliance on the specific permits and approvals challenged by Plaintiffs in this case. The Company is committed to meeting numerous contractual obligations for procurement, construction, and electric power generation—this involves consideration of

(finding federal defendants did not adequately represent interest of industry trade association and energy company in action challenging approval of permits for oil and gas development in the Outer Continental Shelf).

¹¹ <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-biden-administration-jumpstarts-offshore-wind-energy-projects-to-create-jobs/>.

project financing timelines, construction schedules, and contractor availability, factors that are unique, complex, and go well beyond the knowledge or jurisdiction of the Defendants. *See* Moeller Decl. ¶ 6. But if Plaintiffs prevail, and the timeline for final construction approval is significantly delayed, the viability of the Project will be threatened and the Company could lose its entire investment—a consequence the government defendants do not face. *Id.* ¶ 4. Indeed, given the tight timelines under which the Company is operating and its low tolerance for uncertainty or delay in the construction schedule, Vineyard Wind has a significant interest in reaching a final disposition on an expedited basis that the Defendants do not necessarily share.

Beyond these divergent interests, Vineyard Wind also brings a considerable technical expertise that will assist the Court in evaluating the merits of this action. *See, e.g., Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 913 (D.C. Cir. 1977) (companies regulated by the Environmental Protection Agency allowed to intervene in case involving agency decisions that “turn on questions of very technical detail and data,” and the companies’ “experience and expertise in their relevant fields” can “contribute to the informed resolutions of these questions” by district court). As discussed *supra*, Vineyard Wind has been studying potential environmental and archaeological impacts of this Project, as well as the commercial and technical opportunities with offshore wind energy development offshore Massachusetts, for over a decade. As the developer of America’s first commercial-scale wind farm, Vineyard Wind is a pioneer in the field.

Accordingly, this Court should permit Vineyard Wind to represent and protect its considerable, legally protected interests by granting leave to intervene as of right.

III. IN THE ALTERNATIVE, THE COURT SHOULD EXERCISE ITS DISCRETION TO GRANT VINEYARD WIND PERMISSIVE INTERVENTION

In the alternative, this Court should exercise its discretion and grant Vineyard Wind permissive intervention pursuant to Federal Rule of Civil Procedure 24(b), which provides, in relevant part:

On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact. . . . In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Fed. R. Civ. P. 24(b).

Vineyard Wind easily satisfies this legal standard as well. Plaintiffs seek to void federal permits, authorizations, and approvals provided for the Project, so Vineyard Wind's defense of those permits and approvals shares common questions of law and fact with the main action. Beyond that, this Court has "broad discretion" to grant intervention to ensure that an applicant's interests are protected and where "intervention would not result in undue delay or prejudice to the original parties." *In re Thompson*, 965 F.2d 1136, 1142 n.10 (1st Cir. 1992); *see also Strahan*, 2021 WL 621202, at *7 (considering "almost any factor rationally relevant" to grant permissive intervention where the motion did not prejudice or delay adjudication of the dispute between the original parties and where movant's defenses shared common questions of law and fact with the main action) (citation omitted)).

As discussed *supra*, courts routinely grant intervention to companies whose federal licenses and permits to operate are put at issue in federal court challenges. *See supra* §§ II.B, II.D, n.10. Vineyard Wind should likewise be allowed to defend the authorizations and approvals being challenged here. Because the Project cannot proceed

without these approvals, Vineyard Wind has a substantial and identifiable stake in the disposition of this action. And as the Project sponsor, Vineyard Wind brings a unique perspective and technical expertise not represented by any existing parties to this action. *See Daggett*, 172 F.3d at 113 (“The fact that the applicants may be helpful in fully developing the case is a reasonable consideration in deciding on permissive intervention.”). Finally, Vineyard Wind’s motion is timely, so its intervention will not unduly delay or prejudice the rights of any existing party to this action.

CONCLUSION

For the foregoing reasons, Vineyard Wind respectfully requests that the Court enter an order granting it leave to intervene in support of Defendants in this action.

Dated: October 5, 2021

Respectfully submitted,

/s/ Jack W. Pirozzolo
Jack W. Pirozzolo (BBO # 564879)
SIDLEY AUSTIN LLP
60 State Street, 36th Floor
Boston, MA 02109
(617) 223-0304
jpirozzolo@sidley.com

Counsel for Vineyard Wind I LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of October 2021, 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 Plaintiffs' counsel of record via the Court's electronic filing system and served on anticipated counsel for Defendants via electronic mail.

Dated: October 5, 2021

/s/ Jack W. Pirozzolo

Jack W. Pirozzolo