

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RESPONSIBLE OFFSHORE
DEVELOPMENT ALLIANCE

Plaintiffs,

v.

THE UNITED STATES DEPARTMENT
OF THE INTERIOR, *et al.*

Defendants;

and

VINEYARD WIND I, LLC

Intervenor Defendant.

Civil Action No. 1:22-cv-11172-IT

Hon. Indira Talwani

**MEMORANDUM OF *AMICUS CURIAE* CLEAN OCEAN ACTION, INC.
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY
PLAINTIFF RESPONSIBLE OFFSHORE DEVELOPMENT ALLIANCE**

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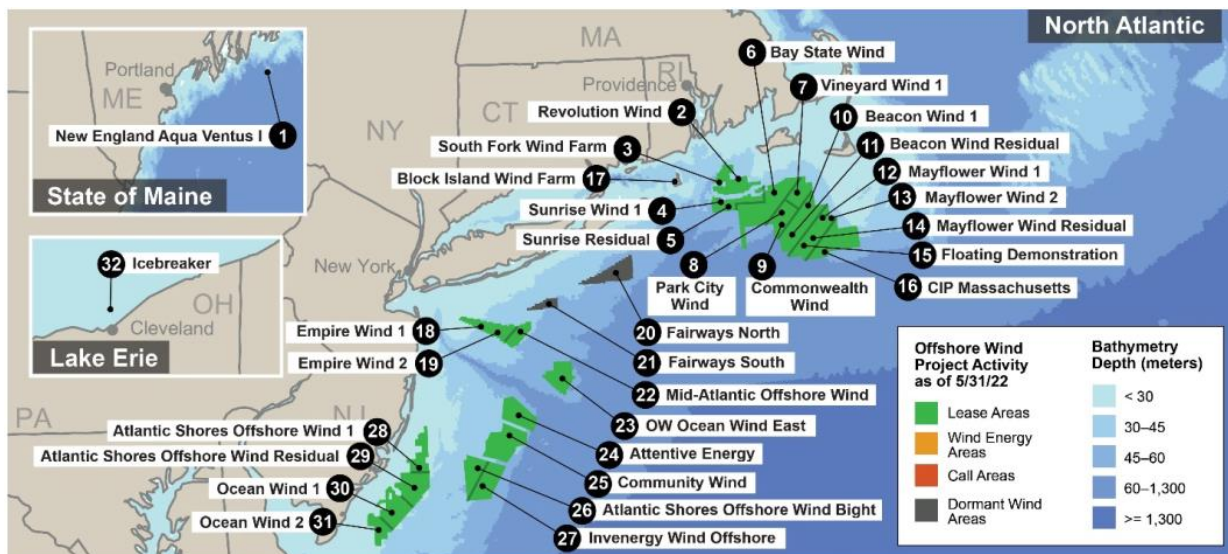
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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

The North Atlantic¹ presently teems with marine life. Highly migratory species like whales, turtles, seals and a variety of finfish utilize the North Atlantic (and beyond) to feed, shelter, breed and migrate. Many navigate and communicate by sonar, an evolutionary ability that has proven vulnerable to man-made underwater noise. This region also supports a robust commercial fishing industry, led by fishing expeditions that “move with the fish.” However, for the first time since the dawn of creation, large sections of these ocean waters will no longer be available to or inhabitable by many marine animals due to the offshore wind industry.

While offering “greener” energy, the offshore wind industry would transform large swaths of the North Atlantic into a massive industrial energy complex:²



As proudly announced on its website, Vineyard Wind is the “Nation’s first commercial-scale offshore wind project.”³ This project (“Project”) is one of 16 offshore wind (“OSW”)

¹ The region of the Atlantic Ocean extending from Virginia to Maine. See Regions, NOAA, <https://www.noaa.gov/regions/regional-collaboration-regions> (last visited Jan. 21, 2023).

² See Offshore Wind Market Report: 2022 Edition, U.S. Dep’t of Energy, <https://www.energy.gov/eere/wind/articles/offshore-wind-market-report-2022-edition> (last visited Jan. 30, 2023). Four OSW projects offshore of Delaware and Virginia are not shown.

projects in the Rhode Island/Massachusetts Wind Energy Area (“RI/MA WEA”) and the first of 38 OSW projects in the North Atlantic. In total, these projects will occupy over 2,400,000 acres of ocean and result in the installation of 10,000 miles of submarine cables, and 3,400 massive turbines,⁴ each standing as tall as a New York City skyscraper with blades the length of a football field. Thus, Vineyard Wind represents a new industrial use of the North Atlantic, and part of a cumulative effort to radically transform who and what can use and occupy its waters.

Clean Ocean Action, Inc. (“COA”) is a nonprofit environmental organization with a mission of improving the water quality of an area of the North Atlantic known as the New York/New Jersey Bight. Hundreds of species of fish and birds depend on the NY/NJ Bight environs for shelter, food, breeding and/or migration. The NY/NJ Bight also provides habitat to 32 species of whales, dolphins, and porpoises, five (5) species of sea turtles, and four (4) species of seals. Many threatened and endangered species, including the Atlantic and Shortnose Sturgeons, the Loggerhead and other sea turtles, and several whales, including the near-extinct North Atlantic Right Whale (“NARW”), utilize the NY/NJ Bight either seasonally or during their life-cycle.⁵ The NY/NJ Bight also supports robust commercial and recreational fishing industries that provide sustainable seafood for millions of people each year, as well as whale-watching experiences for thousands of enthusiasts annually.

Fourteen (14) OSW projects are planned to soon occupy over 1,000,000 acres of the NY/NJ Bight. COA supports responsible offshore wind development but has grave concerns

³ <https://www.vineyardwind.com/vineyardwind-1> (last visited Jan. 24, 2023).

⁴ NOAA, Fisheries, Protected Species, and Ecosystem Science in a New Era of Offshore Wind Energy Development (Mar 9, 2022), <https://www.youtube.com/watch?v=Dh7yBEDHzL8> (stated in description).

⁵ NYS Dep’t of Env’tl. Conservation, Protecting and Conserving Marine Life, <https://www.dec.ny.gov/lands/111160.html#:~:text=The%20New%20York%20Bight%20is,and%20six%20large%20whale%20species> (last visited on Jan 24, 2023).

regarding the individual and cumulative impacts of the unprecedented, numerous OSW projects planned for the North Atlantic. OSW inarguably damages and eliminates vast areas of marine habitat and available fishing grounds, generates underwater noise, increases vessel traffic, emits air pollutants, and creates obstacles to vessel navigation and marine life migration. Accordingly, OSW has the potential to profoundly impact marine life, including from increased vessel strikes, disruption of feeding, breeding and migratory patterns, and alterations of the food web.

Bureau of Ocean and Energy Management, the National Marine Fisheries Service and the Army Corps of Engineers are the federal agencies responsible for reviewing OSW proposals. These agencies are tasked with ensuring OSW proposals comply with laws and regulations that protect the ocean environment, marine life and human interests. This litigation raises a basic question: With respect to the first of these commercial OSW projects—Vineyard Wind—how have these agencies performed?

As detailed in the memoranda of Responsible Offshore Development Alliance (“RODA”) and the plaintiffs in the related actions, these agencies have failed to review the Project as carefully as the law requires. Whether it be issuing key approvals on grossly incorrect facts, proceeding as if pending approvals were formalities or totally ignoring the reality of 37 future projects (and the cumulative impacts that will result), the federal agencies have proceeded as if the application of Vineyard Wind is a *fait accompli*. Given President Biden’s goal of 30,000 megawatts of wind energy by 2030,⁶ the political pressure for OSW projects to be approved is apparent. However, these federal agencies are still bound to review OSW projects in accordance

⁶ Executive Order (13807) on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/> (last visited Jan. 26, 2023).

with the letter of numerous laws intended to protect the marine environment and the life and traditional uses it supports.

As amicus, COA asks this Court to grant the summary judgment motion submitted by RODA because the federal review of this project was too lax and not in accordance with applicable federal laws enacted to ensure the protection of natural resources held in trust by the federal government. If fishermen and others are to retain the right to use and navigate the North Atlantic, if endangered species like the North Atlantic Right Whale are to survive, if the marine ecosystem is to be protected from clearly foreseeable and yet unevaluated cumulative impacts, these federal agencies must do a more competent job of reviewing OSW applications. If such lack of diligence and good governance is not corrected now by this Court, with respect to this first commercial-scale OSW project, it will be repeated time and time again until the North Atlantic is fully developed into massive, industrial complex that will irreparably harm the ocean environs, marine life and human interests.

LEGAL ARGUMENT

I. THE LAW REQUIRES BOEM TO DO MORE TO PROTECT THE MARINE ENVIRONMENT AND THE RIGHTS OF FISHERMEN

A. BOEM Violated the Mandatory Requirements of OCSLA

The Outer Continental Shelf Lands Act (“OCSLA”), 43 U.S.C. § 1331 et seq., regulates industrial development of submerged lands lying more than three (3) miles off the U.S. coast. Under OCSLA, BOEM may lease such public lands for OSW development if the proposed activity meets numerous statutory requirements, which include safety, environmental protection, and conservation of natural resources. See 43 U.S.C. § 1337(p)(4). BOEM is further tasked with ensuring that the proposed activity would not interfere with other reasonable uses, such as

commercial and recreational fishing, whale watching, and diving. See id. When OCSLA was amended in 2005 to include renewable energy leases, Congress specifically stated the right of fishermen would not be affected. See id. §§ 1332, 1337 (p)(4)(j). Yet, BOEM does not directly analyze these statutory requirements in its Environmental Assessment of the offshore lease for the Project, in contravention of OCSLA.

BOEM had ample reasons to know that the Project would impact fishermen and the marine environment. BOEM specifically found, in its Record of Decision, that over 75,000 acres of sea would no longer be available to fishermen due to navigation concerns.⁷ BOEM knew that EFH exists within the RI/MA WEA,⁸ but did not know whether some of the Project's structures would be built in the EFH.⁹ Most significantly, BOEM did not adequately consider the cumulative impacts of the Project considering the numerous other OSW projects planned for the RI/MA WEA and the North Atlantic in general.

In support of its motion for summary judgment, SeaFreeze Shoreside, Inc. ("SeaFreeze")¹⁰ argues that BOEM's approval of the Project was unduly influenced by Vineyard Wind's contractual obligation to expeditiously deliver 800 MW of power.¹¹ This is the type of the concern that COA set forth at the beginning of this memorandum. Our federal regulators—facing external pressures such as a Presidential mandate—are the public's only safeguard against irresponsible development of the North Atlantic. BOEM must carry out its statutory duties in a manner far more rigorous, accountable and legally cognizable manner.

⁷ USACE_AR_011479.

⁸ AR BOEM_0000229-0000231.

⁹ AR BOEM_0000387.

¹⁰ SeaFreeze Shoreside, Inc. v. United States Dept. of the Interior, Case No. 1:21-cv-11091-IT (Nov. 7, 2022), ECF No. 67 ("SeaFreeze Mem.").

¹¹ SeaFreeze Mem. at 28-32.

B. BOEM Failed to Demonstrate Under NEPA that the Project is Safe for the Environment.

Enacted in 1970, the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq., is regarded as our Nation’s first major environmental law. NEPA sets forth a national environmental policy that requires our government to “use all practicable means and measures ... to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” Id. § 4331(a). In adopting NEPA, Congress further recognized that “each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.” Id. § 4331(c).

Consistent with this policy, NEPA requires federal agencies to assess the environmental impacts of proposed major federal actions prior to approving same. See id. § 4332. NEPA generally requires federal agencies to prepare an environmental assessment to determine if the proposed project is likely to have significant environmental effects. See id. If found, NEPA then requires the federal agency to develop, through a public process, an Environmental Impact Statement to review the need for, environmental impacts of, and reasonable alternatives to the proposed action. See id.; see also, 40 C.F.R. § 1502.13-16. Those findings are then incorporated into a Record of Decision as to whether and how to proceed with the proposed action.

For OSW projects, BOEM has the duty to prepare an EIS. In performing this critical function for the Vineyard Wind project, BOEM made numerous substantive and procedures errors. These failures are detailed in the memoranda of Sea Freeze¹² and ACK Nantucket Residents Against Turbines (“ACK”)¹³, which COA adopts by reference, as amplified herein.

¹² Seafreeze Mem., § II, III, VII, and VIII at 19-43 ,45-49.

¹³ ACK Residents Against Turbines v. U.S. Bureau of Ocean Energy Management, Case

1. In the EIS, BOEM Failed to Properly Evaluate the Air Emissions.

A common misperception about modern wind turbines is that they are powered solely by the wind, akin to the classic windmills that adorn the countryside of Holland. Modern turbines are powered by the wind but when there is not sufficient wind, modern wind turbines rely upon diesel engines. The Vineyard Wind turbines will rely upon at least one (and as many as three) diesel engines during commissioning, and up to one thereafter.¹⁴ Modern wind turbines also emit a greenhouse gas known as sulfur hexafluoride. According to USEPA Region 2:

Emissions of sulfur hexafluoride (SF₆) are expected from gas-insulated switchgears on the wind turbine generators (WTG) and electric service platform (ESP). SF₆ is the most potent known greenhouse gas. Approximately 23,000 times more effective at trapping infrared radiation than carbon dioxide, SF₆ is also a very stable chemical, with an atmospheric lifetime of 3,200 years. Thus, a relatively small amount of SF₆ can have a significant impact on global climate change.¹⁵

These air emissions cast a brownish hue over this “green” energy source. Accordingly, BOEM must properly evaluate air quality impacts of OSW projects like Vineyard Wind.

Here, as argued by ACK, BOEM failed to properly evaluate the emission of key air pollutants, namely carbon monoxide, sulfur dioxide, particulates, nitrogen oxide, ozone and lead.¹⁶ In fact, the EIS does not contain any emission numbers for these key pollutants at all.¹⁷ Nor does the EIS disclose the Project’s direct and indirect emissions of SF₆.¹⁸ It is illogical to

No. 1:21-cv-11390-IT (July 15, 2022), ECF No. 89. (“ACK Mem.”), § V(B), at 43-49.

¹⁴ USEPA, Region 1, Fact Sheet and Statement of Basis, <https://www.epa.gov/sites/default/files/2021-06/documents/vineyard-wind-1-llc-fs-sob.pdf> (last visited Jan 7, 2023) at 32.

¹⁵ USEPA Region 2, Programmatic Environmental Impact Statement for Future Wind Energy Development in the New York Bight: EPA Detailed Comments (Aug. 10, 2022) at 3, https://cleanoceanaction.org/fileadmin/editor_group1/Issues/Wind/OSW_-_Agency_Letters/USEPA_Comments__PEIS_BOEM-2022-0034-0006.pdf.

¹⁶ ACK Mem. at 43-44.

¹⁷ ACK Mem. at 43 (citing BOEM 34766-69).

¹⁸ ACK Mem. at 45 (citing BOEM 68852-53).

conclude that this Project will not significantly impact the human environment without a proper and public evaluation of these dangerous air pollutants.

2. BOEM Failed to Analyze the Cumulative Impacts of OSW, Particularly with Respect to the Endangered NARW.

One of the most significant concerns COA has with OSW is the potential for cumulative impacts of the 38 projects planned for the North Atlantic. The totality of these projects can be expected to stress ocean environs and marine life (such as the NARW) far more than any singular project. In analyzing this very first commercial-scale wind energy project, BOEM failed to include any cumulative impacts in the Final EIS, in contravention of NEPA.

BOEM is required to assess these OSW projects in a comprehensive, cumulative manner. “NEPA requires that where several actions have a cumulative or synergistic effect, this consequence must be considered in an EIS.” Tenakee Springs v. Clough, 915 F.2d 1308, 1312 (9th Cir. 1990). BOEM is not permitted to segment its NEPA analysis of this concerted OSW push into bite-sized chunks. See Del. Riverkeeper Network v. FERC, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (prohibiting “divid[ing] connected, cumulative, or similar federal actions into separate projects”). Where several foreseeable similar projects in a geographical region have a cumulative impact, they should be evaluated in a single EIS. See LaFlamme v. Federal Energy Regulatory Commission, 852 F.2d 389, 401-02 (9th Cir. 1988).

Contrary to its duty under NEPA, BOEM limited its EIS to the Vineyard Wind project only. In its memorandum, ACK adeptly argues that the “EIS makes no attempt to describe, quantify, or analyze the cumulative impacts of the various RI/MA WEA offshore wind projects . . . on the North Atlantic right whale.”¹⁹ This is a salient point, particularly considering Vineyard Wind is only one (1) of 31 OSW projects planned for the North Atlantic. BOEM has failed to

¹⁹ ACK Mem. at 49.

show that the NARW will be left with adequate habitat to breed, forage or seek shelter anywhere in the RI/MA WEA or North Atlantic if OSW is built out as contemplated.

RODA similarly argues that BOEM failed to analyze the cumulative impacts of the Government's expansive OSW program on the fishing industry.²⁰ In Section 3.10.1 of the EIS, BOEM finds that future OSW projects will cause permanent, adverse impacts to commercial fisheries and recreational fishing, but then uses this tragic conclusion to excuse the impacts of this Project and to rule out the No Action Alternative.²¹ Rather than protect North Atlantic fisheries from the first of these OSW projects, BOEM gave the Project a pass because these resources are effectively doomed by OSW anyway. This is untenable and inexcusable logic. As the natural ecosystem is about to be radically altered by the construction and presence of OSW, BOEM has a duty under NEPA to review such cumulative impacts, and to deem this Project's contribution thereto to be unacceptable.

3. BOEM Failed to Properly Consider Alternatives that Would Not Jeopardize Marine Life and Fishing Interests.

Under NEPA, BOEM has an affirmative duty to “[e]valuate reasonable alternatives to proposed action,” 40 C.F.R. § 1502.14(a), and compare the environmental impacts of such alternatives to the proposed action, 40 C.F.R. § 1502.16(a)(1). This duty to is “the heart of an EIS.” NRDC v. U.S. Forest Service, 421 F.3d 797, 813 (9th Cir. 2005). Despite concluding in its EIS that the Project would cause numerous, significant environmental impacts, BOEM failed to seriously consider reasonable alternatives.

As argued by SeaFreeze, BOEM's Supplemental Draft EIS confirmed that the special aquatic sites for coral, eelgrass, and wetlands that exist in and near the Project area may be

²⁰ RODA Mem. at 36.

²¹ BOEM_0068707-15.

permanently damaged during Project construction.²² BOEM acknowledged that “the overall cumulative impacts on navigation and vessel traffic would be **major**, due primarily to the increased loss of life due to maritime incidents, which would produce significant local and possibly regional disruptions for ocean users”.²³ BOEM further found that the Project would have “**major**” cumulative impacts on scientific research, surveys, monitoring of endangered species, fishery stock assessment and the commercial fisheries community.²⁴

Nevertheless, BOEM did not consider alternatives that would locate the Project outside of endangered species’ habitat, increase the spacing between turbines, reorient the turbines, or limit the Project’s size.²⁵ Instead, BOEM impermissibly limited its consideration of reasonable alternatives only to those within the Project’s lease area.²⁶ BOEM explained that it had committed to those boundaries when the lease was issued and because of the timing requirements of President Biden’s Executive Order 13807 and Vineyard Wind’s energy supply contract with Massachusetts.²⁷ However, BOEM is not permitted to consider such external factors. See Nat’l Ass’n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 658 (2007) (an agency’s decisions must not rely “on factors which Congress had not intended it to consider”).

The number of OSW projects that are planned for the North Atlantic and their inherent impacts to our marine environs demand serious consideration to reasonable alternatives, as required by NEPA. The potential for wind-energy generation is not exclusive to any designated lease area or the North Atlantic and is not a water dependent activity. Wind turbines can be located on land with far less logistical and environmental complications than in the North

²² SeaFreeze Mem. at 30-31 (citing AR BOEM_0057214, 0057220, 0057226).

²³ Id. at 31 (citing AR BOEM_0057090; emphasis in original).

²⁴ Id. (citing AR BOEM_0057104; emphasis in original).

²⁵ See id. (citing AR BOEM_0057320–0057322).

²⁶ See id. (citing AR BOEM_0068472–0068474; 0069186–0069190).

²⁷ See id. at 48 (citing AR BOEM_0076808-0076809; 0057320-0057322).

Atlantic. BOEM’s failure to consider onshore alternatives is compounded by the fact that U.S.-flag vessels required under the Jones Act for construction of OSW do not yet exist.²⁸

C. BOEM Lacked Authorization to Approve of the Project Before Completing the Consultation Required Under the ESA

In 1973, Congress passed the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 et seq., recognizing that various species of fish, wildlife and plants in the United States—having “esthetic, ecological, educational, recreational, and scientific value to our Nation and its people”—are in danger of or are threatened with extinction. 16 U.S.C. § 1531(a). Accordingly, the express purpose of the ESA is to conserve threatened and endangered species and their ecosystems. See 16 U.S.C. § 1531(b). To achieve this purpose, it is unlawful to kill or harass (called a “take”) of any such species. See id. §§ 1538, 1532(19). The ESA also prohibits Federal agencies from authorizing, funding, or carrying out any action that would jeopardize a listed species or destroy or modify its habitat. See id. § 1536(a)(2).

To avoid jeopardizing any species or habitat, Section 7 of the ESA requires federal agencies to engage in consultation process with the US Fish and Wildlife Service and/or the National Marine Fisheries Service (depending on the species and their respective territorial jurisdictions) before the agencies authorize any action. See id. § 1536. The consultation process involves an initial determination as to the species of concern that “may be present” in the project area, the preparation of a biological assessment by the federal agency, and the preparation by USFWS and/or NMFS of a biological opinion as to whether the project is permissible under the ESA and whether any “reasonable and prudent alternatives” exist. See id. § 1536(b)-(c). Key to the integrity of the consultation process is statutory prohibition against the federal agency

²⁸ Eduardo Garcia, U.S. Wind Vessel Investors on Standby Until Market Forces Align, (Oct. 26, 2022 12:11 PM), <https://www.reuters.com/business/energy/us-wind-vessel-investors-standby-until-market-forces-align-2022-10-26/> (only 1 of 6 installations vessels needed is being built).

making any final decisions or commitment of resources during the process. See id. § 1536(d).²⁹

Here, BOEM short-circuited the ESA consultation process by approving the Project before NMFS had issued its Biological Opinion concerning the North Atlantic Right Whale (“NARW”). Prior to October 18, 2021, NMFS had not reached a conclusion as to whether the Project would jeopardize the continued existence of the NARW. BOEM nevertheless issued its Record of Decision authorizing the Project (May 7, 2021) and approved the Construction and Operations Plan and cable easement (July 15, 2021), giving Vineyard Wind the final authorization needed to start the Project.³⁰ BOEM did so in direct violation of the ESA.

We respectfully submit that BOEM’s stunning disregard for the ESA consultation process—particularly with respect to a highly-endangered species—cannot stand. There are too many OSW projects planned for the North Atlantic and too many threatened and endangered species to allow BOEM to act before consideration of all relevant factors, particularly those to be reviewed with NMFS during the ESA consultation process. BOEM’s rush to judgment before the conclusion of the ESA consultation process was a clear violation of its duty under the ESA and would serve as dangerous precedent for the numerous OSW projects in the North Atlantic that BOEM will review for ESA compliance.

II. THE LAW REQUIRES NMFS TO DO MORE TO PROTECT MARINE LIFE, PARTICULARLY THE NARW AND OTHER MARINE MAMMALS.

A. NMFS Issued a Deficient Biological Opinion in Contravention of its Responsibility under the Endangered Species Act

Under the ESA, NMFS has a crucial role to ensure that marine projects do not jeopardize

²⁹ A federal agency may not make “any irreversible or irretrievable commitment of resources with respect to the agency action” once consultations have been initiated.

³⁰ See generally, USACE_AR_011441-011541 and USACE_AR_011773-01188.

94 marine species (presently),³¹ including the endangered NARW, or their habitats. For proposed projects that are likely to affect any of those species, NMFS must issue a Biological Opinion (“BiOp”) as part of the Section 7 ESA consultation process (as described in Section I(C) above) as to how the proposed action will affect the subject marine species and/or its critical habitat and to suggest reasonable and prudent alternatives. See 16 U.S.C. § 1536(b). COA adopts by reference the arguments made by ACK, as amplified herein, as to how NMFS failed to fulfill its duties under the ESA by issuing a legal-deficient BiOp.³²

We start with the plight of the endangered NARW. BOEM and NOAA have recently affirmed the dire status of the NARW:

The most recent population estimate is 336 individuals...The potential biological removal (PBR) level for the species, defined as the maximum number of animals that can be removed annually while allowing the stock to reach or maintain its optimal sustainable population level, is less than 1 ... The species has low genetic diversity, as would be expected based on its low abundance, and the species’ resilience to future perturbations is expected to be very low.³³

Even before any OSW activities, more than six (6) NARW have been killed annually.³⁴ While it is generally illegal to “harass” any endangered species, NMFS expects that from the piling driving operations alone, this Project will harass 20 of the remaining NARWs. As described in the BiOp, the extent of this harassment is multi-faceted:

there will be a significant disruption of their behavior because they may abandon that activity *for up to three hours* while they swim to an alternate area to resume this behavior or they will avoid the area extending approximately 4 km from the pile being driven for the three hour duration of the pile driving. *This means they will need to find an alternate*

³¹ NOAA, The Endangered Species Act – Protecting Marine Resources, <https://www.boem.gov/sites/default/files/oil-and-gas-energy-program/GOMR/NMFS-ESA-Fact-Sheet.pdf> (last visited Jan. 24, 2023).

³² ACK Mem. at 17-43.

³³ Draft BOEM and NOAA Fisheries North Atlantic Right Whale and Offshore Wind Strategy (Oct. 2022), <https://www.regulations.gov/document/BOEM-2022-0066-0003> (last visited Jan. 31, 2023) at 5.

³⁴ See NMFS 33684, 63325.

migration route or alternate place for foraging. These whales will also experience masking and [temporary loss of hearing sensitivity], which would affect their ability to detect certain environmental cues for the duration of pile driving and may impact their ability to communicate.³⁵

Nevertheless, the BiOps found the Project could proceed without jeopardy to the NARW based upon several implausible assumptions.

First, NMFS appears to assume that pile-driving noise from the installation of a single monopole—estimated to take “about three hours”—constitutes an “infrequent exposure[] of a single day or less”. In not less than six (6) instances, NMFS asserts that “infrequent exposures of a single day or less are unlikely to impact an individual [whale]’s overall energy budget.”³⁶ But this assumption is grossly incorrect: (1) the applicant may drive multiple monopoles a day, which could mean an exposure of six (6) or more hours,³⁷ and (2) the Project may have as many as 100 monopoles.³⁸ Far from an “infrequent exposure” of a “single day,” this Project will harass the NARW with underwater noise for about three (3) to six (6) hours a day for 50 to 100 days. The BiOp does not examine harassment of this duration and frequency.

Second, NMFS assumes the NARW can simply vacate the Project area and migrate or forage elsewhere.³⁹ NMFS ignores the reality that 33 more OSW projects, with more turbines that need to be pile driven, are planned for the North Atlantic. Vast swaths of open waters may soon be unavailable to the NARW. Like roadkill whose woodland shelter was bulldozed for yet another residential subdivision, the NARW may find starvation or a vessel strike before finding suitable alternative habitat. Clearly, NMFS underestimated the Project’s impact on the NARW.

³⁵ BOEM_0077465 (emphasis added).

³⁶ BOEM_0077463, 0077464, 0077466, 0077467, 0077630.

³⁷ BOEM_0077448, 0077286. See also, BOEM_0077290 (concurrent driving would not occur).

³⁸ BOEM_0077286-0077287.

³⁹ BOEM_0077465.

Another flawed component of NMFS’ jeopardy analysis is its reliance and endorsement of an illegal act—the intentional harassment of the NARW and other marine mammals—as pile driving activities begin.⁴⁰ In its BiOp, NMFS relies upon a “soft start” to pile driving operations to “provide [marine mammals] with a chance to leave the area” before operations intensify.⁴¹ In reality, this allows Vineyard Wind to annoy the NARW “to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering.”⁴² Under NMFS’s own ESA guidance, that constitutes “harassment” and under the ESA, harassment constitutes an unlawful take on par with killing an animal.⁴³

If the NARW and other threatened and endangered species are to survive the wave of OSW projects planned for the North Atlantic, it is critical that NMFS prepare BiOps in a more competent manner. Reviewing NMFS’ performance regarding a single project—Vineyard Wind—one is left to wonder how the NARW can possibly avoid extinction.

B. NMFS’s Incidental Harassment Authorization Violates MMPA

In 1972, Congress enacted the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. § 1361 *et seq.*, to protect marine mammal populations “in danger of extinction or depletion as a result of man’s activities.” 16 U.S.C. §1361(1). The MMPA generally prohibits the “taking”—including the killing or harassment—of marine mammals. *See id.* §§ 1371(a), 1372(a). Congress intended that “the taking of even a single marine mammal is to be avoided.” *NRDC v. Evans*, 364 F. Supp. 2d 1083, 1104 (N.D. Cal. 2003).

⁴⁰ BOEM_0077458.

⁴¹ *Id.*

⁴² NMFS Procedural Instruction 02-110-19: Interim Guidance on the Endangered Species Act Term “Harass”, <https://media.fisheries.noaa.gov/dam-migration/02-110-19.pdf> (Dec. 21, 2016) at 2.

⁴³ *Id.* See also, 16 U.S.C. §§ 1532(19), 1538.

Under MMPA, NMFS is permitted to issue an “incidental harassment authorization” (“IHA”) to an applicant for an activity that may incidentally (not intentionally) take a limited number of marine mammals. See 16 U.S.C. § 1371(a)(5)(D). NMFS may grant such IHAs where the anticipated number of incidental takes will only have a negligible impact on such species or stock. See NRDC v. Evans, 364 F. Supp. 2d at 1104. As OSW projects require IHAs due to the certainty of incidental takes of marine mammals, including by vessel strikes, NMFS has a critical role in assuring compliance with the MMPA.

Here, NMFS failed to follow numerous procedural and substantive provisions of the MMPA in issuing an IHA for the Project. COA incorporates by reference the arguments presented by Allco Renewable Energy Limited, which address, in detail, these failures, which are to the detriment of the NARW.⁴⁴ These arguments include how the “soft-start” to pile driving activity (described above as an ESA violation) will result in intentional (not incidental) takes of the NARW in contravention of the MMPA (and the ESA as argued above).⁴⁵

COA submits NMFS has made a grave and unlawful error in judgment by authorizing the take of 10 NARW in one year by this single project. As acknowledged in the EIS, Vineyard Wind will take approximately two (2) years to construct, let alone to operate and to decommission.⁴⁶ And yet, NMFS does not review the incidental takes that will be caused over the 30-year life of this single Project. Is it even plausible to believe that the NARW—with a declining population of less than 340 individuals—can withstand incidental takes for the entire life of the Project? NMFS certainly has not analyzed this.

⁴⁴ Allco Renewable Energy Limited v. Haaland, Case No. 1:21-cv-11171-IT (Sept. 7, 2022), ECF No. 145 (“Allco Mem.”) at 4-20.

⁴⁵ See id. at 17-18.

⁴⁶ AR BOEM_0068581.

Moreover, as stated throughout, there are many more OSW projects for the RI/MA WEA and the North Atlantic, that will also present similar threats of incidental takes to the declining NARW population. If NMFS continues to evaluate each OSW project without regard for the impacts of others, **the NARW may become the first species to go extinct via authorized incidental take.** Other endangered and protected marine mammals, including dolphins, porpoises, seals and other species of whales, many similarly be impacted. Clearly, NMFS must be more thorough and rigorous in performing its duties under the MMPA.

III. THE LAW REQUIRES THE CORPS TO DO MORE TO PROTECT THE MARINE ENVIRONMENT

The U.S. Army Corps of Engineers (“the Corps”) is a third agency charged with compliance and enforcement of laws enacted to protect our ocean environs, its users and wildlife inhabitants. The Corps is the agency designated under the federal Clean Water Act to issue dredge-and-fill permits (“a 404 Permit”), which OSW projects need for the installation of turbine foundations and cables to be buried under the sea floor. To issue a 404 Permit for an OSW project, the Corps must understand the extent of the proposed project, analyze the environmental impacts of said project in accordance with NEPA, and consult with NMFS concerning possible jeopardy to the threatened and endangered species under the ESA. And yet, with all that is at stake in this first commercial-scale OSW project, the Corps failed to meet all three of these obligations in issuing a 404 Permit for the Project, as detailed by RODA in its memorandum,⁴⁷ which is incorporated herein and amplified below.

A. The Corps Did Not Comply with the Requirements of the CWA.

In 1972, the federal Clean Water Act (“CWA”), 33 U.S.C. § 1251 et seq., was enacted to

⁴⁷ RODA Mem. at 21-42.

“restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA prohibits the discharge of any pollutants into navigable waters without a permit. See id. § 1319(c)(1). While EPA has authority to issue permits for the discharge of most pollutants, Section 404 of the CWA authorizes the Corps to issue permits for the discharge of dredged or fill material into the navigable waters. See 33 U.S.C. § 1344(a). As OSW projects fill the sea floor with turbine foundations, substations and thousands of miles of buried cable, the Corps has an important role in ensuring the CWA is properly implemented.

Here, the Corps made a series of errors and omissions that render its authorization of the Project in conflict with the CWA. First, the Corps issued a 404 Permit for a 49-mile-long export cable corridor.⁴⁸ However, the Corps only analyzed, in its Record of Decision, a 23.3-mile-long export cable corridor.⁴⁹ Accordingly, the Corps failed to consider the actual extent to which the Project would destroy sea floor and create turbidity, both detrimental to the marine ecosystem.

Second, the Corps violated its own CWA regulations by failing to review land-based alternatives to the Project. In its ROD, the Corps appropriately recognized that wind energy is not a water dependent activity.⁵⁰ In such instances, the Corps own regulations provide that “practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise.” 40 C.F.R. § 230.10(a)(3). Nevertheless, the Corps issued the 404 Permit without requiring Vineyard Wind to make such a demonstration in violation of its own regulations.

Third, in issuing the 404 Permit, the Corps failed to consider the cumulative impacts of all of the pending OSW projects on the ecosystem and present uses it supports. In a stunning

⁴⁸ See USACE_AR_011891-92.

⁴⁹ See USACE_AR_011470, 011892. In its 2018 Biological Assessment, the Corps similarly evaluated an export cable corridor having a length of 23.3 miles. See USACE_AR_005028.

⁵⁰ USACE_AR_011471.

example of tunnel vision, and in contravention of its own regulations, the Corps' ROD did not review the cumulative effects of this Project with any of the other 33 OSW projects, each with its own extensive network of buried cables. See 40 C.F.R. § 230.11(g).

B. The Corps Did Not Comply with the Requirements of NEPA.

As detailed by RODA,⁵¹ in issuing a 404 Permit, the Corps did not adequately analyze the significant environmental impacts of this Project. The point COA wishes to emphasize, once again, is that the Corps reviewed this Project in a vacuum. With so many OSW projects planned to help satiate the Presidential mandate for 30 Gigawatts of OSW by 2030, the Corps failed to consider the cumulative impacts of this Project and those the many other reasonably foreseeable OSW projects in the RI/MA WEA and North Atlantic.

C. The Corps Did Not Comply with the Requirements of the ESA.

Finally, the Corps authorized a 404 Permit for the Project before its ESA consultation with NMFS had concluded, in contravention of the ESA. As stated in Section I(C) above, NMFS was still reviewing the Project's impacts on the NARW as part of its consultation process with BOEM and the Corps through October of 2021. Although the ESA expressly prohibits any agency action from being finalized during the Section 7 consultation process, 16 U.S.C. § 1536(d),⁵² the Corps nevertheless authorized the subject 404 Permit on May 7, 2021.⁵³ In so doing, the Corps demonstrated a lack of regard for the strictures of ESA, its consultation process with NMFS, and the fate of the NARW. Such conduct should not and cannot be condoned as OSW developers descend upon the North Atlantic region to the potential jeopardy of numerous threatened and endangered marine species.

⁵¹ RODA Mem. at 22-43.

⁵² A federal agency may not make "any irreversible or irretrievable commitment of resources with respect to the agency action" once consultations have been initiated.

⁵³ USACE_AR_011441.

CONCLUSION

For the foregoing reasons, COA respectfully urges this Court to grant the summary judgment of RODA in this litigation, which has ramifications for the entire North Atlantic.

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Respectfully submitted,

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