IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RESPONSIBLE OFFSHORE DEVELOPMENT ALLIANCE,

Plaintiff,

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

FEDERAL DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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TABLE OF ACRONYMS

BA	Biological Assessment
BiOp	Biological Opinion
BOEM	U.S. Bureau of Ocean Energy Management
COP	Construction and Operations Plan
Corps	U.S. Army Corps of Engineers
CEQ	Council on Environmental Quality
CWA	Clean Water Act
DEIS	Draft Environmental Impact Statement
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
FWS	U.S. Fish & Wildlife Service
IHA	Incidental Harassment Authorization
JROD	Joint Record of Decision
MMPA	Marine Mammal Protection Act
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NMFS/GAR	NMFS Greater Atlantic Region Office
NMFS/OPR	NMFS Office of Protected Resources
OCS	Outer Continental Shelf
OCSLA	Outer Continental Shelf Lands Act
RHA	Rivers and Harbors Act
RODA	Responsible Offshore Development Alliance
SDEIS	Supplemental Draft Environmental Impact Statement

INTRODUCTION

This case is one of several pending before this Court that challenge federal approvals associated with the Vineyard Wind Project (the "Project"), an offshore wind energy project planned for an area in the Atlantic Ocean more than 14 miles off the coast of Martha's Vineyard and Nantucket Island. The Project will have the capacity to generate approximately 800 megawatts of electricity, which would supply renewable energy to about 400,000 homes in Massachusetts. Plaintiff, Responsible Offshore Development Alliance ("RODA"), is an association of commercial fishing companies and fishing industry organizations that operate across the United States.

Before issuing the approvals that RODA challenges, Federal Defendants undertook an extensive, multi-year environmental review that involved cooperation between the Bureau of Ocean Energy Management ("BOEM"), the National Marine Fisheries Service ("NMFS"), the U.S. Army Corps of Engineers ("Corps"), the U.S. Coast Guard, and several other agencies. As part of that review, BOEM prepared a four-volume final environmental impact statement ("FEIS") pursuant to the National Environmental Policy Act ("NEPA"). BOEM and the NMFS Greater Atlantic Region Office ("NMFS/GAR") also completed consultation under Section 7 of the Endangered Species Act ("ESA"), which culminated in a 500-page biological opinion ("BiOp") assessing the potential environmental impacts of the Project. The NMFS Office of Protected Resources ("NMFS/OPR") separately issued an incidental take authorization ("IHA") pursuant to the Marine Mammal Protection Act ("MMPA"). And the Corps issued authorizations under Section 404 of the Clean Water Act ("CWA"), that allow Vineyard Wind to deposit a limited amount of fill on the ocean floor in conjunction with laying transmission cables, and under Section 10 of the River and Harbors Act ("RHA"), that separately allows for the placement of the turbines and cables for the Project. BOEM issued final approval of Vineyard Wind's

Construction and Operations Plan ("COP") in July 2021. And in October 2021, NMFS/GAR issued a new BiOp following reinitiated ESA consultation.

By its own admission, RODA participated extensively in Federal Defendants' environmental review, including by submitting numerous comments throughout BOEM's NEPA process. In the end, however, RODA disagreed with several aspects of the approvals that Federal Defendants issued, and it brought this action. As shown below, RODA lacks standing to maintain this suit, and, in any event, has not shown that Federal Defendants violated any law or regulation in issuing the challenged approvals. To the contrary, the agencies acted reasonably and in accord with the various statutory provisions at issue. Summary judgment should be granted in favor of Federal Defendants.

LEGAL BACKGROUND

I. Renewable energy leasing under the Outer Continental Shelf Lands Act (OCSLA)

In 2005, Congress amended OCSLA to authorize the Secretary of the Interior to issue leases on the outer continental shelf to "support production, transportation, storage, or transmission of energy from sources other than oil and gas," including wind energy. 43 U.S.C. § 1337(p)(1)(C); *see also* Energy Policy Act of 2005 § 388, Pub. L. No. 109-58, 119 Stat. 594, 744-45 (2005). Pursuant to subsection 8(p) of OCSLA, the Secretary, in consultation with the U.S. Coast Guard and other relevant federal agencies, may grant a lease, easement, or right-of-way on the Outer Continental Shelf for the purpose of renewable energy production. 43 U.S.C. § 1337(p)(1)(C). Congress instructed the Secretary to ensure that "any activity" that she authorizes is "carried out in a manner that provides for" 12 specific enumerated goals. *Id.* § 1337(p)(4)(A)-(L). Those goals include: safety; protection of the environment; conservation of natural resources; "prevention of interference with reasonable uses (as determined by the Secretary)" of the outer continental shelf; and consideration of other uses of the sea and seabed,

including the use of the area for fishing and marine navigation. *Id.*; *see also* 30 C.F.R. § 585.102(a). Consistent with this Court's instructions that the parties limit duplicative briefing among the various cases challenging the Project, Federal Defendants incorporate by reference the further discussion in the legal background section on OCSLA in their brief in support of their cross-motion for summary judgment in *Seafreeze* brief, *Seafreeze Shoreside, Inc. v. United States Dep't of Interior, et al.*, No. 1:22-cv-11091-IT, filed contemporaneously in the related case.

II. National Environmental Policy Act

Congress enacted NEPA to establish a process for federal agencies to consider the environmental impacts of their actions. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978). NEPA is a strictly procedural statute. It does not mandate particular results. *Allen v. Nat'l Insts. of Health*, 974 F. Supp. 2d 18, 36 (D. Mass. 2013)). After agencies have conducted the necessary environmental review, "NEPA does not prevent agencies from then deciding that the benefits of a proposed action outweigh the potential environmental harms: NEPA guarantees process, not specific outcomes." *Town of Winthrop v. FAA*, 535 F.3d 1, 4 (1st Cir. 2008).

NEPA's procedural requirements obligate federal agencies to "take a 'hard look' at environmental consequences." *Beyond Nuclear v. U.S. Nuclear Regul. Comm'n*, 704 F.3d 12, 19 (1st Cir. 2013). An agency gives a sufficient "hard look" when it obtains opinions from experts inside and outside the agency, provides scientific scrutiny, and offers responses to legitimate concerns. *Massachusetts v. U.S. Nuclear Regul. Comm'n*, 708 F.3d 63, 78 (1st Cir. 2013) (citing *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999)).

Council on Environmental Quality ("CEQ") regulations guide NEPA implementation.[1]

[1] The CEQ promulgated regulations implementing NEPA in 1978, 43 Fed. Reg. 55978 (Nov. 29, 1978), and made a minor substantive amendment to those regulations in 1986, *see* 51 Fed. Reg.

See 40 C.F.R. §§ 1500-1508. NEPA, and the applicable CEQ regulations, generally require an agency to prepare an environmental impact statement before proceeding with any major federal action that the agency concludes will "significantly affect[]" the quality of the human environment. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.11.

III. Endangered Species Act

ESA section 7(a)(2) requires each federal agency to ensure that any action it authorizes, funds, or carries out is not likely to "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." 16 U.S.C. § 1536(a)(2).[2] To that end, the ESA requires the action agency to consult with NMFS or FWS whenever a federal action "may affect" an endangered or threatened species. 50 C.F.R. § 402.14(a).

Section 7 and its implementing regulations set out consultation procedures designed to provide action agencies with expert advice to determine the biological impacts of their proposed activities. 16 U.S.C. § 1536(b); 50 C.F.R. pt. 402. "Formal consultation," which is described at length at 50 C.F.R. § 402.14, culminates in the issuance of a "biological opinion" by NMFS or

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15618 (Apr. 25, 1986). The CEQ revised the regulations again in 2020. *See* 85 Fed. Reg. 43304 (July 16, 2020). More recently, the CEQ published a new rule, effective May 20, 2022, further revising the regulations. 87 Fed. Reg. 23453 (Apr. 20, 2022). The claims in this case arise under the 1978 regulations, as amended in 1986. *See* BOEM_0068440 n.1. All citations to the Council's regulations in this brief refer to those regulations as codified at 40 C.F.R. §§ 1500-1508 (2018). For the Court's convenience, a copy of the 1978 regulations is attached as Ex. 1.

[2] In the ESA, "Secretary" means the Secretary of the Interior or the Secretary of Commerce, who have delegated their responsibilities to the U.S. Fish & Wildlife Service ("FWS") and NMFS, respectively. 16 U.S.C. § 1532(15). NMFS generally has authority over marine species. 50 C.F.R. § 222.101, 224.101(h), 226. To "jeopardize the continued existence" means "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. "Destruction or adverse modification" of critical habitat is also defined. *Id.*

FWS, which advises the action agency whether jeopardy or adverse modification is likely to occur for any listed species and, if so, whether "reasonable and prudent alternatives" exist to avoid jeopardy or adverse modification. *Id.* § 402.14(h)(3).

After consultation is completed, the action agency may need to reinitiate formal consultation where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

> (1) If the amount or extent of taking specified in the incidental take statement is exceeded; (2) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (4) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16(a). During the pendency of consultation, ESA Section 7(d) provides that an action agency may proceed with their action as long as it does not make "any irreversible or irretrievable commitment of resources" which would "foreclose[e]the formulation or implementation of any reasonable and prudent alternative measures" that might be developed during the consultation. 16 U.S.C. § 1536(d).

IV. Marine Mammal Protection Act

With some exceptions, the MMPA establishes a general "moratorium" prohibiting the taking or importation of marine mammals, including marine mammal parts and products. 16 U.S.C. § 1371(a). The term "take" means "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362 (13); 50 C.F.R. § 216.3. "Harassment" is defined as "any act of pursuit, torment, or annoyance which – (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing,

nursing, breeding, feeding, or sheltering [Level B harassment]." 16 U.S.C. § 1362 (18)(A); 50 C.F.R. § 216.3; *see also* 50 C.F.R. § 216.103.

The MMPA provides some exceptions to the moratorium on taking marine mammals. The exception at issue in this case establishes that, upon request "by [U.S. citizens] who engage in a specified activity (other than commercial fishing) within a specific geographic region, the Secretary shall authorize, for periods of not more than 1 year, [. . .] the incidental, but not intentional, taking by harassment of small numbers of marine mammals of a species or population stock [. . .] if the Secretary finds that such harassment during each period concerned will have a negligible impact on such species or stock." 16 U.S.C. § 1371(a)(5)(D)(i)(I). This authorization is referred to as an Incidental Harassment Authorization, or IHA.

V. Clean Water Act & Rivers and Harbors Act

The Corps issued the permit challenged by RODA to Vineyard Wind under both the RHA and the CWA. USACE AR 011449; USACE AR 012637. Section 10 of the RHA prohibits the creation of any obstruction or structure in navigable waters or on the outer continental shelf, absent a permit from the Corps. 33 U.S.C. § 403; 43 U.S.C. § 1333(a), (e). RHA Section 10 is not designed to address impacts to water quality or aquatic resources, but instead is applied to prohibit "unreasonable obstructions to navigation and navigable capacity." *Wisconsin v. Illinois*, 278 U.S. 367, 413 (1929). *See also* 33 C.F.R. § 320.1(b).

In contrast to the RHA, the CWA was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To accomplish those goals, the Act prohibits the "discharge of any pollutant" into "navigable waters" unless authorized by a permit or specific exemption. *Id.* §§ 1311(a) , 1362(12) . Pollutants subject to this prohibition include dredged or fill material (as opposed to chemical and other pollutants, which are governed by CWA § 402). *Id.* at §§ 1344(a) , 1362(6) . A project proponent may

dispose of dredged or fill material into waters of the United States if it obtains a permit from the Corps, pursuant to CWA § 404. *Id*. at § 1344 ("Section 404").

The Corps's role under CWA § 404 was limited to the issuing a permit for the portion of the Vineyard Wind Project involving fill being placed in "navigable waters." 33 U.S.C. § 1344(a); USACE AR 011449. "Navigable waters," for purposes of CWA § 404, means "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7); 33 C.F.R. §§ 328.2, 328.3(a)(1) & 328.4(a). The "territorial seas" are the waters generally extending seaward three nautical miles from the coast in direct contact with the open sea but may extend elsewhere, such as bays, inlets or three miles from islands. 33 U.S.C. § 1362(8); 33 C.F.R. §§ 328.4(a), 329.12(a) . Applying these parameters, a permit for the Project issued under CWA § 404 is required only for "the [fill] disposal site [which] consists of the transmission cable route from the WDA [Wind Development Area] to the Covell's Beach landfill site, when the transmission cable route is within the 3 nautical mile limit area where [CWA Section 404 regulatory] jurisdiction is present." USACE AR 011473-74. Because the three-mile limit of the territorial seas subject to CWA § 404 jurisdiction measures from islands as well as the coastline, the portion of the Project subject to Section 404 jurisdiction applies – and is limited to -- the 23.3 miles of the transmission cable corridor originating from the coast and near islands, not to the portion in proximity to the wind turbines. USACE AR 011470 (JROD at 30); AR 000140 (map).

While RODA complains of navigational difficulties associated with the Project, it makes no claim that the disposal of fill on the ocean floor will cause navigational difficulties such as those governed by the RHA. Indeed, RODA has not challenged the portion of the Corps permit issued under RHA § 10. Doc. No. 53 at 1-44. Instead, it challenges only the portion of the Corps permit issued under CWA § 404. *Id.* at. 22-41. Accordingly, RODA challenges the Corps permit

only to the extent it allows for the deposit of fill along the 23.3 miles of the cable corridor within the territorial seas.

STATEMENT OF MATERIAL FACTS

Federal Defendants' Statement of Material Facts and Response to Plaintiffs' Statement of Material Facts, filed concurrently with this memorandum, are incorporated by reference.

STANDARD OF REVIEW

Plaintiffs bear the burden of proof in challenging an agency's action. *Fund for Animals v. Mainella*, 283 F. Supp. 2d 418, 429 (D. Mass. 2003). RODA's claims are reviewed pursuant to the Administrative Procedure Act. *Mass. ex rel. Div. of Marine Fisheries v. Daley*, 170 F.3d 23, 28 (1st Cir. 1999); 5 U.S.C. § 702.

Under the APA, a court may set aside "agency action, findings, and conclusions" that it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Airport Impact Relief, Inc. v. Wykle*, 192 F.3d 197, 202 (1st Cir. 1999); § 706(2)(A). In APA cases, a court does not resolve factual questions because "the real question is not whether the facts [can establish some dispute]," but whether the administrative record "support[s] a finding that the agency acted arbitrarily or capriciously." *Allen*, 974 F. Supp. 2d at 36 (quoting *Massachusetts v. Sec'y of Agric.*, 984 F.2d 514, 525 (1st Cir. 1993)); *Bos. Redevelopment Auth. v. Nat'l Park Serv.*, 838 F.3d 42, 47 (1st Cir. 2016) (on summary judgment in an APA case, "an inquiring court must review an agency action not to determine whether a dispute of fact remains but, rather, to determine whether the agency action was arbitrary and capricious"). The reviewing court should make this determination based solely on the record on which the decision was made. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). Review under this standard is "highly deferential, and the agency's actions are presumed to be valid." *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 114 (1st Cir. 2009).

ARGUMENT

I. RODA lacks Article III standing for all claims, and lacks prudential standing for its claims under NEPA and the Jones Act.

To satisfy Article III, a plaintiff must establish an injury that is (i) "concrete, particularized, and actual or imminent"; (ii) "fairly traceable to the challenged action"; and (iii) "redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). An organizational plaintiff can establish standing in one of two ways. *First*, it "can sue on its own behalf" if "it independently satisfies the elements of Article III standing." *Md. Shall Issue, Inc. v. Hogan*, 963 F.3d 356, 361 (4th Cir. 2020) ("organizational standing"), *cert denied*, 141 S. Ct. 2595 (2021). *Second*, it can sue on behalf of its members so long as "at least one of the members possesses standing to sue in his or her own right." *United States v. AVX Corp.*, 962 F.2d 108, 116 (1st Cir. 1992) ("associational standing"). Either way, the organization must establish that it or its members have suffered a concrete and particularized injury beyond their "special interest" in the subject of the litigation. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). "A mere interest in an event—no matter how passionate or sincere the interest and no matter how charged with public import the event—will not substitute for an actual injury." *AVX Corp.*, 962 F.2d at 114; *Diamond v. Charles*, 476 U.S. 54, 62 (1986) ("[A] disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements.").

The plaintiff bears the burden of establishing its right to sue. *Strahan v. Sec'y, Mass. Exec. Office of Energy & Envtl. Affairs*, 2021 WL 9038570 at *5 (D. Mass. Nov. 30, 2021) (Talwani, J.). And plaintiffs must establish standing "for each claim that they press and for each form of relief that they seek." *TransUnion, LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021); *Katz v. Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012) ("The standing inquiry is claim-specific: a

plaintiff must have standing to bring each and every claim that she asserts."). At summary judgment, a plaintiff's standing must be proven (not merely alleged) through "affidavit[s] or other evidence." *Wittman v. Personhuballah*, 578 U.S. 539, 545 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (standing must be established in the same manner and with the same degree of evidence as required in the various stages of litigation)). Here, RODA has failed to establish its right to bring suit under either organizational or associational standing.

A. RODA has not established any injury to itself as an organization.

RODA is a nonprofit trade association headquartered in Washington, D.C. Doc. No. 53 at 8. It says that its members "consist of 150 vessels operating in more than 30 fisheries throughout the country, including the area slated for the Vineyard Wind Project construction." *Id.* RODA describes its goals as including such things as "provid[ing] a unified voice regarding issues of mutual interest to the commercial fishing industry," "act[ing] as a bridge between offshore developers and fishermen," "coordinat[ing] among existing local, project-specific, and state advisory groups," and "serv[ing] as a clearinghouse of scientific information and project updates." *Id.* 8-9. It "has submitted dozens of comment letters" related to offshore wind energy, and "participated extensively in the Vineyard Wind 1 permitting process at the federal and state levels and through direct communications with the developer." *Id.* at 10. Despite that extensive participation, RODA claims that Federal Defendant's approvals caused it injury because those approvals "directly and palpably frustrated" the Alliance's purpose of "promot[ing] cooperation and reasonable development standards in the deployment of offshore wind facilities." *Id.*

RODA's purported organizational injury is precisely the type of generalized "special interest" that courts routinely find insufficient to establish standing. *See, e.g.*, *Md. Shall Issue*, 963 F.3d at 361 (no standing where organization alleged that legislation injured it "by undermining its message and acting as an obstacle to the organization's objectives and

purposes"); *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 428 (1st Cir. 1983) (organization lacked standing because it failed to establish it would suffer "diminished stature, diminished volunteer power [or] perhaps even diminished funding"); *Nat'l Ass'n of Realtors v. National Real Estate Ass'n, Inc.*, 894 F.2d 937, 942 (7th Cir. 1990) (plaintiff "'not entitled to sue as the private attorney general of the American real estate industry").[3]

In fact, although RODA claims that the challenged approvals frustrated its purpose, it does not explain how those approvals in any way hindered its stated goals to "provide a unified voice" for the commercial fishing industry or to "act as a bridge" between industry and offshore developers. In fact, RODA appears to claim that it *achieved* those goals through its admittedly extensive participation in the Vineyard Wind NEPA process. Doc. No. 53 at 10. The only injury RODA actually claims to have suffered is disappointment with the decisions that Federal Defendants ultimately reached. But "disagreement with the policy decisions" of a defendant "is insufficient to meet the constitutional threshold for an injury in fact." *Md. Shall Issue*, 963 F.3d at 362. And standing is not present when the "injury" is to one's lobbying or issue advocacy efforts. *Equal Means Equal v. Ferriero*, 3 F.4th 24, 30 (1st Cir. 2021); *Elec. Priv. Info. Ctr. v. FAA*, 892 F.3d 1249, 1255 (D.C. Cir. 2018); *PETA v. USDA*, 797 F.3d 1087, 1093-94 (D.C. Cir. 2015); *Env't Working Grp. v. U.S. Food & Drug Admin*., 301 F. Supp. 3d. 165, 172 (D.D.C. 2018). Because RODA has failed to provide evidence of any injury-in-fact, it has not established standing to sue on its own behalf.

[3] The case RODA relies upon, Doc. No. 53 at 7 n.32,) speaks to specific injury established *to the organization*, namely a "drain on the organization's resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Courts have explained that *Havens* is limited to injury to an organization's pecuniary interests and that *Havens* itself "recognized that standing cannot be asserted based on a mere 'setback of the organization's abstract social interests.'" *Young Advocs. for Fair Educ. v. Cuomo*, 359 F. Supp. 3d 215, 233 (E.D.N.Y. 2019) (citation omitted). RODA does not claim injury to its pecuniary interests. *See* Hawkins Declaration, Doc. No. 53-1.

B. RODA has not established standing based on injury to its members.

To maintain suit on behalf of its members, RODA must establish that "at least one of the members possesses standing to sue in his or her own right." *AVX Corp.*, 962 F.2d at 116. RODA attempts to meet that burden with generalized claims of injury to "fishing interests," such as the bare contention that "more and more fishermen will find themselves unable to support themselves and their families" as a result of the challenged approvals. Doc. No. 53 at 11. But RODA does not offer any particularized facts (much less evidence) to support its conclusory allegations. Indeed, it does not identify a single member who fishes in the Project's vicinity, much less provide specific facts or evidence to show how such a member would be harmed. That omission is fatal. The First Circuit has rejected similarly "nebulous allegations regarding [an organization's] members' identities and their connection to the relevant geographic area." *AVX Corp.*, 962 F.2d at 117.[4] And the First Circuit has made clear that, to establish standing, "the association must, at the very least, identify [a] member[] who ha[s] suffered the requisite harm." *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016); *Associated Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1194-1195 (9th Cir. 2013) (association lacked standing where it failed to identify a single member who had suffered injury in fact).

An affidavit from the association itself, like the one submitted by RODA's Executive Director Anne Hawkins, Doc. No. 53-1, "is insufficient unless it names an injured individual." *Draper*, 827 F.3d at 3 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009)). Despite that settled principle, the Hawkins Declaration fails to identify any individual member, much less

[4] The *AVX* court found standing lacking on this basis at the motion-to-dismiss stage, where the burden of proof was lower than that which RODA faces here. In *AVX*, given the procedural posture, the plaintiffs needed only to offer particularized allegations. 962 F.2d at 117. RODA, by contrast, must set forth particularized facts "by affidavit or other evidence" in order to defeat summary judgment. *Defs. of Wildlife*, 504 U.S. at 561.

explain in detail such member's injury. *See* Doc. No. 53-1. As a result, the Hawkins declaration cannot support RODA's associational standing here. *See AVX Corp.*, 962 F.2d at 117 (no standing where "the members are unidentified; their places of abode are not stated; the extent and frequency of any individual use of the affected resources is left open to surmise").

Nor can RODA rely on affidavits filed by plaintiffs in the *Seafreeze* litigation. *See* Doc. No. 53 at 11 n.44. RODA does not identify any particular *Seafreeze* plaintiff nor claim that a plaintiff in that case is a RODA member. *See Hope, Inc. v. DuPage County, Ill.*, 738 F.2d 797, 814 (7th Cir. 1984) (association could not rely on injury to nonmembers); *Sierra Club v. EPA*, 755 F.3d 968, 976-77 (D.C. Cir. 2014).[5]

Because RODA has not provided any particularized evidence to establish that any one of its members has standing, it cannot maintain this suit on its members behalf. And because RODA also has not offered particularized evidence to show organizational injury independent of its members, RODA has failed to establish that it is entitled to maintain this suit. The Court should therefore dismiss RODA's suit in its entirety for lack of jurisdiction.

C. RODA's claims of economic injury fall outside of NEPA's zones of interest.

RODA also lacks prudential standing for its NEPA claims because the claimed injuries do not "fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v.*

[5] RODA particularly cannot rely on the declarations of the *Seafreeze* plaintiffs to establish standing to pursue claims against the Corps because none of the *Seafreeze* plaintiffs allege any concrete injury resulting from the actions of the Corps, either in their declarations or otherwise. *See* Doc. No. 68 ¶¶ 6-11, *Seafreeze Shoreside, Inc. v. United States Dep't of Interior, et al.*, No. 1:22-cv-11091-IT. Each of those paragraphs claim injury from BOEM's issuance of the original lease and the COP, not from *any* action of the Corps. *Id*. Those declarations further describe each declarant's alleged injury as the "cessation of commercial fishing activities in the Vineyard Wind lease area …." *Id*. The Vineyard Wind lease area is located on the continental shelf and does not include the 23.3 miles of the cable corridor within the territorial seas, which is the *only* area for which RODA brings claims against the Corps in this action. *See infra* section V.B. Accordingly, even if RODA was allowed to rely on the *Seafreeze* declarations, they would fail to establish standing for RODA's claims against the Corps.

Static Control Components, Inc., 572 U.S. 118, 129 (2014) (citation omitted). NEPA is an environmental law that Congress enacted to promote environmental interests. 42 U.S.C. § 4321; *see Am. Waterways Operators v. U.S. Coast Guard*, 2020 WL 360493, at *6 (D. Mass. Jan. 22, 2020). As a result, numerous courts have concluded that purely economic interests fall outside NEPA's zone of interest. *Id.* (collecting cases); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1235-36 (D.C. Cir. 1996) (NEPA's zone of interests "do not include purely monetary interests"). Here, RODA's only allegations of injury are based solely on the economic interests of its members. As a result, RODA lacks prudential standing under NEPA.

D. RODA lacks Article III and prudential standing to bring a Jones Act suit.

As discussed *supra*, RODA has failed to establish injury to itself or its members sufficient to sustain standing under any claim it raises. But RODA's failure to establish its standing to bring a Jones Act claim is particularly glaring.

Congress passed the Merchant Marine Act of 1920, Pub. L. No. 66-261, 41 Stat. 988, commonly referred to as the Jones Act, "to benefit American shipowners competing economically in the coastwise trade." *Alaska Excursion Cruises, Inc. v. United States*, 603 F. Supp. 541, 546 (D.D.C.1984). The Jones Act provision cited by RODA requires that merchandise transported between two points in the United States be carried by a U.S. owned and operated vessel. Doc. No. 53 at 42 n.159 (citing 46 U.S.C. § 501).

RODA does not claim that any of its members compete economically in coastwise trade. In fact, RODA never alleges that it or its members will be harmed by any potential violation of the Jones Act. Instead, it simply speculates that the Project and other future offshore wind projects will be unable to comply with the Jones Act. That assertion, even if true, is merely a generalized grievance that cannot support standing. *Novak v. United States*, 2013 WL 1817802, at *4 (D. Haw. Apr. 26, 2013) (plaintiffs lacked prudential standing based on general grievances

common to any resident of Hawaii). RODA has not even attempted to establish either Article III or prudential standing under the Jones Act, and its Jones Act claim should be dismissed.

II. BOEM's approval of the Vineyard Wind Construction and Operations Plan complied with OCSLA.

RODA makes the same arguments as the *Seafreeze* plaintiffs, and Federal Defendants incorporate by reference the arguments in section V of their summary judgment brief filed in *Seafreeze*. Defendants separately address just two points in RODA's brief.

First, RODA's citation to section 3 of OCSLA, 43 U.S.C. § 1332, is misleading when used to support the suggestion that the section precludes any interference with fishing. Section 3(2) is a general declaration of policy, stating that, "the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected." 43 U.S.C. § 1332(2). The First Circuit has interpreted subsection 3(2) to mean only that, in granting mineral leasing rights, Interior may not interfere with "the legal right to fish." *Mass. v. Andrus*, 594 F.2d 872, 889 (1st Cir. 1979) (citing Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578). And more broadly, the Secretary has the discretion "to achieve a proper balance" between fishing interest and mineral leasing. *Id.*

Second, RODA has no basis for asserting, without citation, that "the Vineyard Wind Project will exclude fishermen from their traditional fishing grounds." Doc. No. 53 at 17. To the contrary, the record repeatedly reflects that fishermen would *not* be excluded from the project area and would be able to fish within the area. *See*, *e.g.*, BOEM_0076942 ("The navigational risk assessment prepared for the Project shows that it is technically feasible to navigate and maneuver fishing vessels and mobile gear through the [project area]."); BOEM_0076944 ("[T]he Proposed Project would not limit the right to navigate or fish within the Project area."); BOEM_0076944 ("BOEM expects that with time, many fishermen will adapt to spacing and be able to fish

successfully in the [Project area]."); *see also* BOEM_0068718-19, 68743-44. Summary judgment should be granted in favor of Federal Defendants on the OCSLA claims.

III. Summary judgment should also be granted in favor of Federal Defendants on the NEPA claims.

A. The FEIS considered cumulative impacts, including to commercial fisheries.

RODA contends that BOEM failed to analyze the cumulative impacts of the Vineyard Wind project and other foreseeable offshore wind projects on the fishing industry.[6] Doc. No. 53 at 38. The FEIS flatly contradicts that argument, instead illustrating BOEM's hard look at these potential impacts. Section 3.10.1.1 of the FEIS discusses possible impacts to commercial and for-hire recreational fisheries from future offshore wind activities without the Vineyard Wind project. BOEM_0068707-14. That analysis is organized by each impact producing factor (e.g., anchoring, new cable emplacement, etc.). *Id.* The FEIS then goes on to analyze the likely impact of each Vineyard Wind-related alternative, both in isolation and cumulatively—the latter of which was within the broader context of reasonably foreseeable trends, ongoing and future planned actions (including other foreseeable offshore wind projects). *See, e.g.*, BOEM_0068728 (discussing cumulative impacts of Alternative A); BOEM_0068729 (same for Alternative C); BOEM_0068731 (same for Alternative D); BOEM_0068731-32 (same for Alternative E); BOEM_0068733 (same for Alternative F).

In total, the FEIS dedicates more than thirty pages to possible impacts to commercial and

[6] Applicable CEQ regulations define a cumulative impact as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. Under BOEM regulations, reasonably foreseeable actions are those "for which there are existing decisions, funding, or proposals," but that are not "highly speculative or indefinite," 43 C.F.R. § 46.30. BOEM complied with the regulations here by including "projects for which the developer has publicly announced development plans," but for which no COP had been submitted to BOEM, and no power purchase agreements had been awarded. BOEM_0068469.

for-hire recreational fishing. Appendix A in Volume II of the FEIS further describes BOEM's methodology for analyzing cumulative impacts. BOEM_0068796-0068975. Section A.4 and Table A-4 describe in depth the offshore wind projects and related assumptions that were utilized in the cumulative impacts/planned action analysis. BOEM_0068808-16. Rather than engage with that analysis, RODA claims it does not exist. But the FEIS evidences BOEM's analysis of cumulative impacts, including impacts to commercial fishing, and RODA has failed to show that BOEM's analysis was arbitrary or capricious.[7]

B. RODA's claim that BOEM failed to adopt vigorous mitigation measures lacks any legal or record support.

RODA lacks any legal basis for its broad contention that BOEM had an obligation to consider mitigation measures for the "entire Atlantic Coast offshore wind program," including future projects beyond Vineyard Wind, to both "fishing and the environment." Doc. No. 53 at 39. The guidance document that RODA cites plainly confirms the settled principle that "NEPA itself does not create a general substantive duty on Federal agencies to mitigate adverse environmental effects."[8] Instead, the applicable regulations require an agency to include in its alternatives analysis a discussion of "appropriate mitigation measures not already included in the proposed action or alternatives," 40 C.F.R. § 1502.14(f), and to include in its discussion of environmental impacts "means to mitigate adverse environmental impacts (if not fully covered by § 1502.14(f))," § 1502.16(h) . Notably, neither provision requires agencies to impose mitigation

[7] RODA asserts that the Corps also violated certain requirements under NEPA. Because BOEM generated the FEIS under NEPA, which the Corps reviewed and adopted, RODA's argument with respect to the Corps should be denied for the same reasons it should be denied as to BOEM.

[8] Nancy Stutley, *Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact*, Memorandum for Heads of Federal Departments and Agencies Council on Environmental Quality (Jan. 14, 2011), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf

measures. And, as a corollary, NEPA does not require an agency to consider or impose mitigation measures on all foreseeable future projects.

Regardless, the record confirms that BOEM did consider reasonable mitigation measures related to the Vineyard Wind project in the FEIS, and subsequently adopted many of those measures in the ROD, notwithstanding RODA's claim to the contrary, Doc. No. 53 at 39. The FEIS discussed mitigation measures, and specifically addressed measures proposed by RODA. *See* BOEM_0068733-34 ("BOEM has qualitatively evaluated the collective impacts of implementing all six RODA-recommended transit lanes . . . ."). And the Preferred Alternative includes mitigation and monitoring measures to avoid or reduce impacts to existing ocean uses and other resources. For example, Section 3.10.8 discusses proposed mitigation measures relevant to commercial fishing, including moving the six northernmost wind turbine generators to a different location, which would provide additional unobstructed space for navigation in area commonly used by commercial fisheries. BOEM_0068734.

As explained in FEIS Appendix D, BOEM considered 101 potential measures, several of which relate to commercial fishing. BOEM_0069194-0069231. Some measures related to commercial fishing were voluntarily proposed by Vineyard Wind. *See, e.g.*, BOEM_0069201, lines 25-26 (describing trawl and ventless trap surveys); BOEM_0069223, lines 73-74 (daily two-way communication during construction and electronic charting information for Project infrastructure). Others were not. *See, e.g.,* BOEM_0069199, line 18 (post-installation cable monitoring proposed by BOEM); BOEM_0069207, line 40 (use of automatic identification systems on project construction and operations vessels proposed by U.S. Coast Guard); BOEM_0069221, line 65 (removal of northernmost turbine placement locations proposed by BOEM). Vineyard Wind also voluntarily proposed several compensation funds to compensate

various fisheries interests for any claims of direct impacts related to the Project. BOEM_0069223-24, lines 75-79. Each of those measures related to commercial fisheries were then adopted by the agencies in the joint Record of Decision ("JROD"). USACE_AR_011495-540. There is no question, then, that BOEM considered reasonable mitigation measures, and RODA has not shown that consideration to be arbitrary or capricious.

C. **BOEM did not impermissibly segment its NEPA analysis**.

RODA also contends that BOEM "impermissibly segmented its NEPA analysis of its massive new offshore wind program on the Northeast Outer Continental Shelf." Doc. No. 53 at 39. RODA cites no legal or other support for that contention, but to the extent it is arguing that BOEM should have prepared an EIS addressing several projects together, it is incorrect. An agency's "scoping determinations are entitled to deference under NEPA," including decisions about whether to consider related projects within a single EIS. *Standing Rock Sioux Tribe v. USACE*, 301 F. Supp. 3d 50, 65 (D.D.C. 2018). The rule against improper segmentation is intended to prevent agencies from "evad[ing] their responsibilities under NEPA by artificially dividing a major federal action into smaller components, each without 'significant impact.'" *Jackson Cnty., N.C. v. FERC*, 589 F.3d 1284, 1290 (D.C. Cir. 2009). The major federal action before BOEM here was approval of the Vineyard Wind project, which the FEIS analyzes as the single project that it is. NEPA does not require an agency to prepare a single EIS to address multiple independent federal actions where each has its own independent utility and the approval of one project does not "automatically trigger" other actions. *Standing Rock Sioux Tribe*, 301 F. Supp. 3d at 67.

RODA does not attempt to show that each separate wind project lacked independent utility and are, in fact, segmented parts of one larger federal action. And, in any case, the record confirms that BOEM did not seek to avoid its NEPA obligations here. Although the FEIS was

limited to the Vineyard Wind project, it considered the cumulative impacts of other planned offshore wind projects. *See supra* section III.A. BOEM's scoping decision was reasonable and RODA offers no ground to find it arbitrary or capricious.

RODA's other argument—that BOEM impermissibly segmented its review of the Vineyard Wind project by preparing an FEIS prior to issuing its COP approval rather than at some prior stage of its NEPA review—fares no better. As explained in our *Seafreeze* brief section II, NEPA did not require BOEM to prepare an EIS at the leasing stage. *See Fisheries Survival Fund v. Haaland*, 858 F. Appx. 371, 372 (D.C. Cir. 2021) (NEPA claims were not ripe at leasing stage). Instead, the obligation to analyze the potential impacts of an offshore wind project under NEPA does not mature until BOEM approves a COP. *Id.* at 372-73. Moreover, RODA is wrong that BOEM never prepared a "holistic 'hard look' at a single offshore wind energy project." Doc. No. 53 at 40. BOEM prepared a draft EIS, supplement to the draft EIS, and the FEIS, which comprehensively analyzed the potential environmental impacts of the Vineyard Wind project. RODA does not seriously contest that point, and its claims of improper segmentation should be rejected.

D. BOEM's purpose and need statement and selection of alternatives fully complied with NEPA.

RODA next turns to NEPA's requirements for project alternatives. Applicable regulations require an agency to "briefly specify the underlying purpose and need to which the agency is responding," 40 C.F.R. § 1502.13, and to "[r]igorously explore and objectively evaluate all reasonable alternatives," *Id.* § 1502.14(a). In addition, BOEM's NEPA regulations require the agency to "consider the needs and goals of the parties involved in the application or permit as well as the public interest" in crafting its purpose and need and related alternatives. 43 C.F.R. § 46.420(a)(2). RODA contends that, by taking into account the goals of Massachusetts

and Vineyard Wind, BOEM erroneously limited the purpose and need statement and selection of alternatives in the FEIS. Doc. No. 53 at 40-41. Both arguments lack merit. Courts "uphold an agency's definition of objectives so long as the objectives that the agency chooses are reasonable, and [they] uphold its discussion of alternatives so long as the alternatives are reasonable and the agency discusses them in reasonable detail." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). The FEIS easily clears that hurdle.

BOEM's purpose and need statement. RODA first contends that BOEM's purpose and need statement was "overly narrow," suggesting that it improperly considered Massachusetts' interest in developing renewable energy, and Vineyard Wind's interests in meeting Massachusetts' renewable energy requirements. Doc. No. 53 at 40-41. Far from being arbitrary, BOEM's purpose and need statement properly accounted for (i) the objectives of the project applicant, (ii) the public interest, (iii) Congress's policy that the outer continental shelf be "made available for expeditious and orderly development, subject to environmental safeguards" (43 U.S.C. § 1332(3)), and (iv) Congress's grant of authority to BOEM to authorize renewable energy projects on the outer continental shelf (43 U.S.C. § 1337(p)).

As the D.C. Circuit has explained, "[w]hen an agency is asked to sanction a specific plan," it "should take into account the needs and goals of the parties involved in the application" and "the views of Congress" as expressed "in the agency's statutory authorization to act, as well as in other congressional directives." *Busey*, 938 F.2d at 196. And that is precisely what BOEM did here. The FEIS articulates its purpose and need as follows:

> The purpose of the federal agency action in response to the Vineyard Wind project COP (Epsilon 2018a, 2019c, 2020a, 2020b) is to determine whether to approve, approve with modifications, or disapprove the COP to construct, operate, and decommission an approximately 800-[megawatt], commercial-scale wind energy facility within the area of the Lease to meet New England's demand for renewable energy. More specifically, the proposed Project would deliver power to the New

> England energy grid to contribute to Massachusetts's renewable energy requirements—particularly, the Commonwealth's mandate that distribution companies jointly and competitively solicit proposals for offshore wind energy generation 220 Code of Massachusetts Regulations § 23.04(5)). BOEM's decision on Vineyard Wind's COP is needed to execute its duty to approve, approve with modifications, or disapprove the proposed Project in furtherance of the United States' policy to make [Outer Continental Shelf (OCS)] energy resources available for expeditious and orderly development, subject to environmental safeguards 43 U.S.C. § 1332(3)), including consideration of natural resources and existing ocean uses.

BOEM_0068446.

This language makes clear that BOEM did not adopt private interests as its own. Rather, its purpose and need statement referenced BOEM's own obligation to satisfy its duties under OCSLA. BOEM's statement therefore is very different than the one invalidated by the Ninth Circuit in the case RODA cites. Doc. No. 53 at 41 n.156 (citing *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2010)). There, the agency's description of the "primary purpose of the Project" included purposes that solely would benefit private interests, such as "provid[ing] a longterm income source," where the sole beneficiary of that income source was a private entity. *Nat'l Parks*, 606 F.3d 1070-71. By contrast, BOEM's purpose and need statement is framed around BOEM's own OCSLA duties, which included determining whether to approve Vineyard Wind's proposed COP. In that context, there was nothing improper about BOEM referencing the stated objectives of Massachusetts and Vineyard Wind; indeed, BOEM's NEPA regulations specifically call for the agency to "consider the needs and goals of the parties involved in the application or permit as well as the public interest." 43 C.F.R. § 46.420(a)(2).

Further, the purpose and need statement did not foreordain BOEM's approval of the COP. Quite the contrary: the statement expressly permitted BOEM to approve, modify, or disapprove Vineyard Wind's COP. Nothing in the purpose and need statement constrained

BOEM's ability to take any of those actions. That BOEM understood and articulated the project proponent's goals in seeking approval of its COP in no way undermines that agency discretion. *See Beyond Nuclear*, 704 F.3d at 19 (rejecting similar "outcome-rigging" argument).

BOEM's alternatives analysis. RODA's argument that BOEM failed to consider a reasonable range of alternatives fares no better. RODA contends that "the power purchase agreement between Vineyard Wind and the Commonwealth of Massachusetts . . . greatly and improperly limit[ed] BOEM's analysis and consideration of an appropriate range of alternatives." Doc. No. 53 at 41. But RODA offers no record or other support for its argument. It does not even describe a single alternative that BOEM should have but failed to consider.

Moreover, First Circuit case law makes clear that where, as here, "the agency is not itself the project's sponsor, 'consideration of alternatives may accord substantial weight to the preferences of the applicant.'" *Beyond Nuclear*, 704 F.3d at 19 (citing *City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994)). That principle is grounded in the well-settled NEPA concept that "'alternatives must be bounded by some notion of feasibility,' which includes alternatives that are 'technically and economically practical or feasible.'" *Id.* (citing *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 551, and *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 69 (D.C. Cir. 2011)). As courts have long recognized, the limits of practicality and feasibility also mean that "an agency need only consider alternatives that will 'bring about the ends' of the proposed action." *Id.* (citation omitted).

That is so "for reasons both of law and common sense." *Id.* It would make little sense for BOEM to analyze an alternative that would not satisfy the objectives of Vineyard Wind, because Vineyard Wind would have no reason (nor obligation) to move forward with such a project. *See Busey*, 938 F.2d at 195 ("If licensing the Vernon reactor is meant . . . to stimulate the Vernon job

market, licensing a reactor in Lake Placid would be far less effective. The goals of an action delimit the universe of the action's reasonable alternatives."). To be sure, BOEM could not define its alternatives so that project approval was a foregone conclusion. And it did not do that here: As the JROD explains, "BOEM considered a total of 20 alternatives during the preparation of the EIS and carried forward 6 for detailed analysis in the FEIS." USACE_AR_0011451. The alternatives considered in detail included alternatives that modified the project to reduce impacts on commercial fisheries. In fact, one of them—Alternative F—was based on a proposal that RODA submitted. USACE_AR_001459. BOEM's selection of alternatives was eminently reasonable, and RODA has offered no valid basis on which the Court could find otherwise.

IV. RODA's ESA claims fail.

A. BOEM lawfully approved the Vineyard Wind COP subject to compliance with all terms and conditions and reasonable and prudent measures resulting from a reinitiated ESA consultation.

1. RODA's claims concerning the 2021 reinitiation of ESA consultation are moot.

It is unnecessary to reach the merits of RODA's claims concerning Federal Defendants' decisions to proceed with their respective agency actions in the summer of 2021 relying on the "no jeopardy" determinations of the 2020 NMFS BiOp. Federal courts lack jurisdiction "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). The reinitiated ESA consultation was concluded *prior to* the filing of both the Seafreeze complaint on December 15, 2021, and the RODA complaint on January 31, 2022, respectively. Therefore, following issuance of the 2021 BiOp, RODA's request for declaratory or other relief based on their ESA claims concerning Federal Defendants' reliance on the 2020 BiOp and/or any alleged failure to

complete the reinitiated ESA consultation with NMFS/GAR prior to COP approval is moot.[9] *See Oceana, Inc. v. Evans*, 2004 WL 1730340, *3, (D. Mass. July 30, 2004) ("With the expiration of Framework 15 and the issuance of the new biological opinion and implementing regulations for Amendment 10, the February 2003 biological opinion and Framework 15 are no longer in effect, and no interest would be served by invalidating them now.").[10] Plaintiff's ESA claims with respect to Federal Defendants' agency actions in summer 2021 fail because they are moot, and in any event, Federal Defendants complied with ESA Sections 7(a)(2) and 7(d).

2. RODA's claims concerning the 2021 reinitiation of ESA consultation claims fail on the merits.

On September 11, 2020, the NMFS/GAR issued a Biological Opinion ("2020 BiOp") pursuant to section 7(a)(2) of the ESA. NMFS_00016027 (transmittal letter to BOEM); NMFS_00016029 (2020 BiOp).[11] About eight months later, BOEM requested reinitiation of

[9] Even assuming that RODA could demonstrate that some ESA violation occurred at the time of COP approval, their ESA claims would still be moot since the Federal action agency Defendants would no longer be in violation of the ESA. The ESA's citizen suit provision waives sovereign immunity only for claims seeking injunctive relief against a defendant who is alleged to be "in violation of" the ESA. 16 U.S.C. § 1540(g)(1)(A). The ESA's citizen suit provision does not confer jurisdiction over claims alleging "wholly past violations." *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987) (interpreting similar citizen suit provision in the CWA); *Ctr. For Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d 794, 804 (9th Cir. 2009) ("The ESA allows a citizen suit for the purpose of obtaining injunctive relief only. . . . Of course, that is forward looking . . .").

[10] *See also Defs. of Wildlife v. BOEM, Regul., & Enf't,* 791 F. Supp. 2d 1158, 1170 (S.D. Ala. 2011) ("Courts in analogous circumstances have deemed ESA claims moot and have declined to order federal agencies to reinitiate consultation when those agencies have already done so."); *S. Utah Wilderness All. v. Smith*, 110 F.3d 724, 728 (10th Cir. 1997) (noting that the agencies already had reinitiated consultation and ESA claims were moot because "[t]here is no point in ordering an action that has already taken place"); *Greenpeace Found. v. Mineta*, 122 F. Supp. 2d 1123, 1128 (D. Haw. 2000) ("It would serve no purpose to order [the agency] to do what it has already done.").

[11] NMFS/GAR concluded that the proposed action may adversely affect but is not likely to jeopardize the continued existence of listed species including the North Atlantic right whale. NMFS_16027. The 2020 Biological Opinion included an incidental take statement (ITS) that specified Reasonable and Prudent Measures (RPMs) and their implementing Terms and

consultation with NMFS/GAR to consider effects of monitoring surveys that BOEM proposed to require as conditions of COP approval and were not fully assessed in BOEM's 2019 Biological Assessment (BA) or NMFS/GAR's 2020 BiOp. BOEM_0076721.[12] Shortly thereafter, on May 10, 2021, BOEM, the Army Corps, and NMFS/OPR issued the JROD. BOEM_0076799–76898. As stated in the JROD Appendix A, "any mitigation measures requiring additional consultation under the ESA will not be authorized to be conducted until said consultation is completed." BOEM_0076852. BOEM's July 15, 2021, decision to approve the Vineyard Wind COP was expressly conditioned on the applicant's compliance with all terms and conditions of any biological opinion resulting from the reinitiated consultation. BOEM_0077152 ("Activities authorized herein will be subject to any terms and conditions and reasonable and prudent measures resulting from a BOEM-reinitiated consultation for the Project's BiOp."). NMFS concluded the reinitiated consultation with the 2021 BiOp.[13]

RODA argues that Federal Defendants did not know whether the Project would or would not jeopardize the existence of the right whale during the pendency of the reinitiated consultation during the summer of 2021. Doc. No. 54 ¶ 32. To the contrary, BOEM's decision to approve the

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Conditions to minimize and document the amount or extent of any incidental taking of protected species. NMFS_16027; NMFS 16029 at 16317-16328.

[12] BOEM noted that new information regarding the status of the North Atlantic right whale had become available after the consultation was completed. *Id.* BOEM provided a supplemental biological assessment ("BA") it had prepared in support of the request to reinitiate consultation. BOEM_0076721-22 (BOEM Request to Reinitiate); BOEM_0076723-49 (BOEM BA Supplement); NMFS_16634 (BOEM BA Supplement); BOEM_0077276-70 (2021 BiOp).

[13] No further action by BOEM was necessary to effectuate the 2021 BiOp, because the COP approval was already conditioned upon compliance with the terms of the biological opinion. BOEM_0077789 ("Because the activities authorized under BOEM's COP approval—including the monitoring surveys—are subject to the terms and conditions and reasonable and prudent measures found in the 2021 BiOp, no further action is required in order for Vineyard Wind to proceed with construction and operation of the Project."). Nevertheless, BOEM memorialized its decision to adopt the 2021 BiOp and advised NMFS/GAR of its determination pursuant to 50 C.F.R. § 402.15(a). BOEM_0077788.

COP, with conditions, was informed by the "no jeopardy" determination in the extant 2020 BiOp, (*see* NMFS_00016029 and NMFS_00016027), plus BOEM's BA supplement, NMFS 16634. BOEM's decision to reinitiate consultation did not automatically invalidate the 2020 BiOp or render its conclusions a nullity. *Defs. of Wildlife v. BOEM*, 684 F.3d 1242, 1252 (11th Cir. 2012) (holding a BiOp is not withdrawn if agency reinitiates consultation).

Moreover, ESA Section 7(d) provides that an agency may move forward with its action following initiation (or reinitiation) of consultation, provided that the agency does not make an "irreversible or irretrievable commitment of resources" that would foreclose the formulation or implementation of any reasonable and prudent alternatives that would be needed to avoid jeopardy.[14] Accordingly, the ESA does not preclude an agency from proceeding with its proposed action until consultation is complete. *See Bays' Legal Fund v. Browner*, 828 F. Supp. 102, 112 (D. Mass. 1993) ("The critical question under § 7(d) is whether continued construction . . . will preclude the development of ecologically safer discharge alternatives, should the tunnel ultimately be deemed a threat to the survival of endangered species in the bays.").[15]

Here, BOEM made its determination pursuant to ESA Section 7(d) concurrent with its request to NMFS/GAR to reinitiate consultation. BOEM_0208700 (Doc. No. 27-2). BOEM's

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[14] *See also* FWS and NMFS, Interagency Consultation Handbook at 2-7 ("Not all irreversible and irretrievable commitments of resources are prohibited. [. . . .] [R]esource commitments may occur as long as the action agency retains sufficient discretion and flexibility to modify its action to allow formulation and implementation of an appropriate reasonable and prudent alternative."), *available at* https://media.fisheries.noaa.gov/dam-migration/esa_section7_handbook_1998_opr5.pdf (last visited November 16, 2022).

[15] *See also N. Slope Borough v. Andrus*, 486 F. Supp. 332, 357 (D.D.C. 1979), ("[T]he ESA does not require that the government halt all activities, unless the intermediate activities violate s 7(a)(2) *aff'd in part & rev' d in part*, 642 F.2d 589 (D.C. Cir. 1980). Rather, the ESA permits non-jeopardizing activities, so long as the s 7(d) mandate is not violated."). *Pac. Rivers Council v. Thomas*, 936 F. Supp. 738, 746 (D. Idaho 1996) (after examining the legislative underpinnings of section 7(d), court concluding that it "cannot agree with Plaintiffs' suggestion that no agency can ever proceed with proposed action until consultation is complete.").

7(d) determination was informed by new information regarding the status of the right whale as described in the Supplemental Biological Assessment. BOEM_0076723-49. BOEM concluded that the new information for right whales does not change the analysis or conclusions reached for right whales in the 2020 BiOp. BOEM_0208704. Therefore, BOEM made an express determination that approval of the COP with conditions (including compliance with the FEIS's mitigations measures, the IHA, and the 2020 BiOp's RPMs) will not jeopardize the continued existence of ESA-listed species nor destroy or adversely modify designated critical habitat:

> It is anticipated that following reinitiation of formal consultation on May 7, 2021, it will take no longer than 90 days to complete consultation, with an additional 45 days required to prepare the revised biological opinion 50 CFR 402.14 (e)). Furthermore, authorization of Vineyard Wind 1 to continue construction and operation activities during the consultation period on the fishery monitoring plan will not result in any irreversible or irretrievable commitment of resources that would have the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives in the completion of the consultation and revised biological opinion, as may be required.

BOEM_0208700.

BOEM's 7(d) determination was entirely reasonable based on the proposed project activities and corresponding schedule. No in-water work associated with the Project was anticipated to occur before the reinitiated consultation was complete. *See* NMFS 17681. Moreover, BOEM's discretion to act for the benefit of listed species following COP approval was expressly retained. For example, BOEM had the discretion to order cessation of construction activities and/or to suspend the lease terms, in the event NMFS issued a jeopardy Biological Opinion as a result of reinitiation of consultation. 30 C.F.R. §§ 585.415, 585.417. BOEM's COP approval letter also specified that the trawl surveys were not authorized until BOEM notified Vineyard Wind that the consultation on those had concluded. BOEM_0077186. Therefore, pending completion of the reinitiated consultation with NMFS/GAR, BOEM lawfully

determined that it could proceed with approving the Vineyard Wind COP pursuant to ESA Section 7(d), 16 U.S.C. § 1536(d). *Id.*

In sum, BOEM complied with its ESA obligations prior to approving the Vineyard Wind COP through: 1) project-specific ESA consultations with NMFS/GAR that resulted in the "no jeopardy" 2020 BiOp, NMFS_00016029; 2) analysis of the latest information about right whales in its 2021 BA Supplement, BOEM_0076723-49; and 3) BOEM's own ESA Section 7(a)/7(d) determination that approval of the project pending completion of the reinitiated consultation was neither likely to jeopardize the continued existence of ESA-listed species or likely to destroy or adversely modify designated critical habitat, or lead to an irreversible or irretrievable commitment of resources, BOEM_0208700. Under these circumstances, it was legally unnecessary for BOEM to wait to approve the Vineyard Wind COP until *after* the reinitiated consultation was concluded. The Court should grant summary judgment in favor of Federal Defendants on RODA's Third Cause of Action, set forth in the Complaint ¶¶ 101-120.[16]

B. The Corps did not violate the Endangered Species Act.

The Corps's role with regard to the ESA is to ensure that its action (the Corps permit) is not likely to jeopardize threatened or endangered species or result in the destruction or adverse modification of their designated critical habitat. 16 U.S.C. §1536(a)(2). In making this determination, the Corps may rely upon the review conducted by the lead action agency (BOEM) and on the biological opinion ("BiOp") generated by NMFS or FWS. *See* 50 C.F.R. § 402.07 ("When a particular action involves more than one Federal agency, the consultation and

[16] *See* Doc. No. 1 ¶¶ 101-120. To the extent that RODA seek to challenge any of the Federal Defendants' decisions to rely on the 2021 BiOp, it failed to satisfy the mandatory pre-suit notice requirement as to such claims. 16 U.S.C. § 1540(g)(2)(A)(i). RODA's notice of intent to sue letter dated October 19, 2021, does not reference the 2021 BiOp or allege any ESA violations resulting therefrom. *See* Complaint, Doc. No. 1-3.

conference responsibilities may be fulfilled through a lead agency."); USACE AR 000019. After reviewing the actions and findings of its fellow agencies and considering impacts associated specifically with the portion of the Project over which it has regulatory jurisdiction, the Corps determined that these actions would have negligible overall effects on threatened and endangered species and would not jeopardize the continued existence of such species or their habitat. USACE 011475; 011478; 011486; 014375.

RODA does not challenge the substance of the Corps's determination under the ESA. Instead, RODA argues that the Corps acted improperly because it issued its permit approving fill operations for the Project after the original 2020 BiOp was issued, but prior to receiving the new, reinitiated BiOp. Doc. No. 53 at 34-35.

In issuing the permit, the Corps included a number of required special conditions. Special Condition 5 states that the Corps's approval is conditioned upon compliance with all conditions set forth in "the attached [September 11, 2020 Biological Opinion] *and any future [Biological Opinion] that replaces it*, which terms and conditions are incorporated by reference in this permit." USACE AR012636; USACE AR014379 (emphasis added). On October 18, 2021, NMFS/GAR issued the 2021 BiOp. USACE AR 013869. The Corps found that the 2021 BiOp did not change any of its ultimate findings regarding threatened or endangered species as expressed in its prior determination. USACE AR014381-83. And, as stated in its permit, the permit is subject to all conditions contained in the updated 2021 BiOp. *See* USACE AR 012636; 014383.

As outlined *supra*, the generation of a new BiOp does not form a basis for overturning the Corps permit. Moreover, the Corps was free to continue to rely on the original BiOp. *See Friends of the Santa Clara River v. USACE*, 887 F.3d 906, 925-26 (9th Cir. 2018) (Corps could

rely on analysis issued after its final EIS because supplemental analysis "merely confirmed the Corps's initial conclusion" and the analysis in the Corps's final EIS "was sufficient to support the Corps's determination."); *See also Nat'l Wilderness Inst. v. USACE*, 2005 WL 691775 at *16 (D.D.C. 2005) (rejecting claim that permit must be vacated because it was issued prior to completion of formal consultation under the ESA).

In any case, because nothing had materially changed with regard to the effects of the Corps's action, and the initial decision was conditioned upon including any updated conditions or requirements, and no irreversible or irretrievable commitment of resources had been made, the fact that the permit was issued while the BiOp was being updated does not invalidate or undermine the Corps's Section 404 permit. *See supra* section IV.A.

C. NMFS's 2021 BiOp is supported by the record.

As to RODA's argument that the 2021 BiOp was "too late and not supported by the record," Doc. No. 53 at 44, Federal Defendants hereby incorporate by reference the ESA-related arguments set forth in Federal Defendants' summary judgment briefing in the ACK Residents case. *ACK Residents Against Turbines, et al. v. BOEM, et al.,* Case No. 1:21-cv-11390-IT, Doc. Nos. 96 & 114.[17]

[17] However, to the extent RODA seeks to incorporate by reference claims concerning the merits of the 2021 BiOp, such claims are not available here because RODA did not allege them in its own Complaint, Doc. No. 1. As the Supreme Court has made clear, "[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 809 n.6 (1986) citing *Healy v. Sea Gull Specialty Co.*, 237 U.S. 479, 480 (1915) ("[T]he Plaintiff is absolute master of what jurisdiction he will appeal to.") and *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). Further, RODA may not assert claims that the Federal Defendants violated the ESA by relying on the 2021 BiOp, because it did not provide the requisite notice of intent to sue pursuant to the ESA's citizen-suit provision, 16 U.S.C. § 1540(g)(2)(A)(i).

V. The Corps properly considered all aspects of the Project within its permitting authority.

RODA first argues that, in granting a permit for the disposal of fill, the Corps acted arbitrarily because it considered impacts from fill disposal along only a portion of the cable transmission corridor. Doc. No. 53 at 23-27. Specifically, RODA asserts that the Corps reviewed only 23.3 miles of the 49-mile export cable corridor and only 15 acres along the ocean floor associated with the cable, when the Corps permit authorizes scour protection of 35 acres of seabed. *Id.* at 23.[18] RODA argues that because the Corps misstated the mileage and acreage associated with fill and scour protection in the JROD, the Corps permit for such operations must be deemed invalid. Doc. No. 53 at 23-27. RODA contends that the Court must ignore the fact that, soon after the JROD was issued, the Corps corrected its misstatement of the mileage and associated acreage figures in a supplement to the JROD. *See* USACE AR 11889-11893.[19] RODA's argument is unsupportable on multiple grounds.

A. RODA's claim that the Corps reviewed the incorrect mileage and acreage is waived.

In conjunction with its review of the Project, the Corps issued a public notice soliciting

[18] While the Corps did, in fact, review the entire 49-mile cable corridor, (*see infra* at V.C), the final approved project includes a cable corridor of only 39.4 miles. USACE AR 011772; 012635.

[19] RODA is correct that in conjunction with its review of the proposed permit, Vineyard Wind brought to the Corps's attention that it had incorrectly described the length of the export cable and associated acreage of scour protection in certain sections of the Joint ROD. Having been made aware of this misstatement, the Corps issued an amendment to the JROD, which simply explained its transcription error in that document. USACE AR 011889 (August 2021 JROD Supplement). RODA argues the Corps's explanation of its own clerical error may not be considered, but that is incorrect. An agency is always free to correct clerical errors in its decision documents. *Am. Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133, 145 (1958) ("The presence of authority in administrative officers and tribunals to correct such [ministerial] errors has long been recognized – probably so well recognized that little discussion has ensued in the reported cases.") (citation omitted); *Howard Sober, Inc. v. ICC*, 628 F.2d 36, 41 (D.C. Cir. 1980) (both courts and agencies may correct clerical mistakes in their "orders or other parts of the record.").

comment on Vineyard Wind's permit application. USACE AR 003865-003885. That public notice contained the same incorrect 23.3 mileage figure associated with the full cable corridor that RODA cites as the basis for vacating the final Corps permit. *Id.* at 003865. The Corps received no comments in response to its call for comments, neither from RODA nor from any other party. AR 011445, 011470; USACE AR 003865, 003868. Nor did RODA submit comments on the EIS asserting that impacts from the full cable corridor were not being considered. *See* USACE AR 009515, 009671-93, 010122, 010127, 010774-94, 010914. Thus, RODA failed to bring to the Corps's attention that it was poised to approve a permit for fill associated with a potential 49-mile cable corridor when it had supposedly reviewed only a 23.3-mile corridor.

It is a bedrock rule of administrative law that courts may not consider arguments that were not raised during an agency proceeding that provided an opportunity for comments on the proposed agency action. This doctrine, known as "issue exhaustion," is essential to the integrity of the administrative process, and therefore is strictly enforced.[20]

This rule is not some mere technical hurdle; it is designed to prevent the very type of "gotcha" argument that RODA raises here. RODA reports that the incorrect mileage/acreage figures associated with the fill and scour protection of the cables appeared in Corps public statements as early as 2018, including in the Corps's public notice. Doc. No. 53 at 25; Doc. No. 54 ¶¶ 27-28. Yet, in response to the Corps's call for comments, RODA failed to submit any

[20] *See, e.g.*, *United States v. L.A. Trucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("[C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."); *Mazariegos–Paiz v. Holder,* 734 F.3d 57, 62 (1st Cir. 2013) (issue exhaustion ensures that courts do not "effectively usurp the agency's function."); *Massachusetts, Dep't of Pub. Welfare v. Sec'y of Agric.*, 984 F.2d 514, 522-23 (1st Cir. 1993); *Quincy Com. Ctr., LLC v. Mar. Admin*, 451 F.3d 1, 6 (1st Cir. 2006).

comment to the Corps (or to the other Defendant Agencies) to the effect that the Corps was supposedly reviewing the incorrect mileage and acreage associated with the cables.

As outlined below, the Corps did, in fact, review the correct (greater) mileage and acreage in issuing its permit. Accordingly, if RODA had raised this issue in public comments, the Corps could have simply corrected the misstated total figures of what it had reviewed when the JROD was ultimately issued. But even if the Corps had, in fact, failed to review the actual length and acreage that might be affected by fill and scour protection, a comment from RODA—or anyone—that the Corps was supposedly reviewing less than the actual area that might be impacted would have led the Corps to correct its review. Indeed, that is the very purpose of requiring the opportunity for public comment on a proposed permit (or other proposed administrative action).[21] That is why "[t]he failure to raise an argument before an agency constitutes a waiver of that argument on judicial review." *Padgett v. Surface Transp. Bd.*, 804 F.3d 103, 109 (1st Cir. 2015) (citing cases). Having failed to identify the issue and thereby provide the Corps with an opportunity to correct its error – either ministerial or otherwise – RODA may not raise it in these proceedings as a basis to challenge the permit.

B. There is no dispute that the Corps reviewed all impacts associated with the disposal of fill approved under Section 404 the Clean Water Act, which is RODA's only claim against the Corps.

As outlined at *supra* at 7-8, the portion of the cable corridor subject to review under the

[21] *Ezratty v. Puerto Rico*, 648 F.2d 770, 774 (1st Cir. 1981) (requiring a party to submit comments challenging an agency action "allows the agency to develop a factual record, to apply its expertise to a problem, to exercise its discretion, *and to correct its own mistakes*, all before a court will intervene.") (emphasis added); *Vt. Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. at 519, 553-54; *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 30-31 (1st Cir. 2012) (quoting *Mass., Dep't of Pub. Welfare v. Sec'y of Agric.*, 984 F.2d 514, 523-24 (1st Cir. 1993), (this rule "accords respect to the agency decisionmaking process by providing the agency with the 'opportunity to address a party's objections, . . . apply its expertise, exercise its informed discretion, and create a more finely tuned record for judicial review.'")

CWA (as opposed to the RHA) is limited to the 23.3 mile corridor within the territorial seas. RODA complains: "In its Record of Decision, the Corps stated that it was authorizing a 23.3 mile-long export cable corridor, when, in fact, the permit authorizes a corridor over twice that length." Doc. No. 53 at 23. While, as explained *infra*, the Corps considered the impacts from fill along the entire 49-mile cable corridor under the CWA and the RHA, RODA challenges the Corps permit only to the extent issued under the CWA, i.e., only as to the 23.3 miles under the Corps's CWA jurisdiction. Doc. No. 53 at 22-44. Thus, pursuant to RODA's own allegation that the Corps analyzed the impacts of only the 23.3 miles of the cable corridor within the territorial seas, the Corps reviewed the impacts of *exactly* the portion of the project that RODA is challenging. On that basis alone, RODA's challenge to the Corps permit must be denied.

C. The Corps did review and consider impacts along the entire cable corridor for which the Corps permit was issued.

Although the Corps described the cable corridor in the JROD as being 23.3 miles, the record reflects that it reviewed the impacts from fill being placed along the entire cable length, since that was required under the RHA. For instance, the Corps's portion of the JROD describes the "transmission cable route from the WDA [Wind Development Area] to the Covell's Beach landfill site." USACE AR 011473. This includes the full 49-mile cable corridor and associated scour acreage. USACE AR 008514. Indeed, as reflected in both the permit application Vineyard Wind submitted to the Corps and the FEIS, which the Corps reviewed and adopted (USACE AR 011449), the Corps reviewed the impacts associated with an export cable corridor of 49 miles, ten miles more than which was ultimately approved.[22]

[22] USACE AR 000237, 000260 (describing "Maximum Length of Offshore Export Cables (for two export cables) [as]158 km (98 mi)," which divided by two results in a maximum single cable corridor length of 79 km or 49 miles); *id.* at USACE 000289, 000297 (an overall offshore export cable route of 70-80 km or 38-43 nautical miles, a maximum of approximately 49 miles)); USACE AR 000866, 000868, 000873, 001105, 001131 (describing maximum project design

Ultimately, even if RODA *had* challenged the portion of the Corps permit governed by RHA, (it does not), RODA fails to demonstrate that the Corps missed any alleged impacts in the 16.1 miles (39.4 miles ultimately approved minus 23.3 authorized under the CWA) of the cable corridor beyond the territorial seas. Nor does RODA assert that the impacts along that 16.1-mile stretch differ in any way from the impacts associated with depositing fill or conducting scour protection along the challenged 23.3 miles. Thus, even if the Corps's consideration of impacts stopped at the 23.3 mile point, it would be harmless error and not a basis to set aside the permit. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife,* 551 U.S. 644, 659-60 (2007) ("If the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration."); 5 U.S.C. § 706 (courts should take "due account . . . of the rule of prejudicial error."); *Ali v. United States*, 849 F.3d 510, 514-15 (1st Cir. 2017).

There is no doubt that the harmless error doctrine applies to challenges to agency environmental reviews. *United States v. Coal. for Buzzards Bay*, 644 F.3d 26, 37 (1st Cir. 2011). And there is no doubt that it is "the party asserting error [that] bears the burden of demonstrating that the error was harmful, i.e., that it affected that party's substantial rights." *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 102 (1st Cir. 1997). *See also Shinseki v. Sanders*, 556 U.S. 396, 409 (2009); *Coal. for Buzzards Bay*, 644 F.3d 26, 37 (1st Cir. 2011). Because RODA's claim is limited to the 23.3 miles of the cable corridor under the Corps's CWA jurisdiction, and there is *no dispute* that the Corps considered the impacts of fill in *that* area, and RODA does not allege any materially different impacts associated with the balance of the cable corridor, there is no basis to vacate the permit.

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scenario of approximately 158 km/98 miles of offshore export transmission system, assuming two cables); USACE AR 008178, 008201, 008227, 008235 (describing maximum design scenario); USACE AR 008514 (describing maximum length of export cables).

D. The Corps considered alternatives to the Project in accordance with applicable regulatory requirements.

The Environmental Protection Agency, in conjunction with the Secretary of the Army, has issued guidelines that provide a framework for review of a discharge of dredged or fill material permitted under the CWA. 40 C.F.R. § 230. *See* 33 U.S.C. § 1344(b)(1); 33 C.F.R. § 320.2(f). These guidelines apply solely under the CWA, 33 C.F.R. § 320.2(f), so again any Corps actions that might apply beyond the 23.3 mile portion of the cable corridor are irrelevant to a review of the Corps's compliance with the guidelines.

Pursuant to these guidelines, the Corps looks at various factors in conducting its review, although "it is unlikely that the guidelines will apply in their entirety to any one activity, no matter how complex." 40 C.F.R. § 230.6(a). Under the guidelines there are certain instances where a permit is not to be issued, such as where a proposed discharge would violate State water quality standards, exceed toxic effluent standards, or violate requirements implemented to protect federal marine sanctuaries. 40 C.F.R. § 230.10(b). None of those instances is present here, nor does RODA allege that they are.

Instead, RODA relies on 40 C.F.R. § 230.10(a), which states that the Corps should not issue a permit for the disposal of dredged or fill materials "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." Doc. No. 53 at 28-29.[23] RODA then relies on 40 C.F.R. § 230.10(a)(3), which states: "Where the activity

[23] Citing 40 C.F.R. § 230.10(a)(2), RODA asserts that this assessment involves a "three-part analysis," under which the Corps must also seek to modify the project and then impose mitigation. Doc. No. 53 at 29. This provision includes no such requirements. Nevertheless, in conjunction with its full review process, the Corps approved the permit only after the number of turbines was reduced and other modifications were made to the Project and only after extensive mitigation was imposed, including direct payments to commercial fishermen. *See infra* at 45-46.

associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or siting within *the special aquatic site in question* to fulfill its basic purpose (i.e., is not 'water dependent'), practicable alternatives that do not involve special aquatic sites are presumed to be available . . . [and] are presumed to have less adverse impact on the aquatic ecosystem." Doc. No. 53 at 29-30 (emphasis added). RODA then misapprehends the term "water dependent," arguing that, because a wind project can be constructed on land, the Corps must presume that there is an alternative site for this Project that will result in less adverse impact on the aquatic ecosystem. *Id.*; Doc. No. 1 ¶ 90. That position appears nowhere in the Corps's regulations and misconstrues the provision RODA relies upon.

40 C.F.R. § 230.10(a)(3)'s presumption applies only to a project involving the discharge of dredged material into a *special* aquatic site, not merely a site in the water. Special aquatic sites are sanctuaries, refuges, wetlands, mud flats, vegetated shallows, coral reefs and riffle pools. 40 C.F.R. §§ 230.40 to 230.45; 40 C.F.R. § 230.3(m). RODA correctly states that the Vineyard Wind Project does not require access to a special aquatic site to fulfill its basic project purpose of "wind energy generation," and therefore is deemed not to be "water dependent," because the fill will not be placed in wetlands, coral reefs, or any other special aquatic site. Doc. No. 53 at 29-30. *See also* USACE AR 011471, 011474, 011476, 011486.

The fact that a project is deemed not to be "water dependent" because it does not require, for a proposed discharge of fill, access, proximity, or siting in a special aquatic site to fulfill its basic purpose, does not mean that it should be located instead on land or in some other area. To the contrary, the presumption that there are practicable alternatives to placing the project in a special aquatic site is inapplicable where the Project is not even proposed to be in a special aquatic site. Neither Vineyard Wind's application nor the Corps permit calls for any portion of

the Project, including the portion covered by the Corps's permit, to be in a special aquatic site, a fact RODA concedes. Doc. No. 53 at 30. Thus, there is no presumption that alternatives to the proposed Project exist that have less adverse impact than if placed in a special aquatic site, because the Project *already* is located in area that does not include a special aquatic site.

Presumption or not, the Corps considered various alternatives that might result in fewer adverse impacts, including: (a) the no-action alternative; (b) a largely land-based alternative; (c) alternatives that would bring the cable on shore in a different location; (d) two off-site alternatives in other zones of the ocean; and (e) seven different on-site alternatives. USACE AR 011451-52, 011471-73. The Corps found, for instance, that a land-side project would require tens of thousands of acres of unencumbered land in Massachusetts that was generally unavailable and would likely result in significant potential environmental impacts, such as destruction of wetlands (a special aquatic site) necessary to build construction and access roads and other project elements, i.e., it would not have fewer adverse impacts. USACE AR 000113-14.

Additionally, the Corps evaluates whether an alternative is practicable in light of its overall project purpose. 40 C.F.R. § 230.10(a)(2). As the Corps stated, the "overall project purpose as determined by USACE is the construction and operation of a commercial scale wind energy project and associated transmission lines for renewable energy generation and distribution to the Massachusetts energy grid." USACE AR 011471. The Corps examined various alternatives to the Project and found them not to be practicable because they facially would not fulfill the purpose of the Project (e.g., the no-action alternative) or they would not fulfill the project purpose after considering costs and logistics. USACE AR 011451-52, 011471-73. In conducting its alternatives analysis under 40 C.F.R. § 230.10, the Corps may rely in whole or in part on the alternatives analysis performed under NEPA as set forth in an EIS. 40 C.F.R.

§230.10(a)(4). That is what the Corps did here when it reviewed and adopted the FEIS, adding to its own independent analysis of alternatives. USACE AR 011449.

RODA argues that, in assessing alternatives for the Project, the Corps may not define the Project's purpose based on a contract that Vineyard Wind had with Massachusetts to deliver 800 megawatts of power to the State grid, asserting that the Corps was required to explore other ways to meet the Project's purpose. Doc. No. 53 at 30-32. RODA's argument is based on the notion that the Corps may redefine the Project purpose to be merely providing energy, such that "the Corps was required to examine other ways renewable energy could have been produced without polluting the ocean." Doc. No. 53 at 31 (equating fill around a cable as "polluting the ocean."). This argument misconstrues the Corps' role and its statutory and regulatory requirements in acting upon a request by a third party to issue a permit under Section 404 of the CWA.

An alternative is practicable only if it is "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 C.F.R. § 230.10(a)(2); 40 C.F.R. § 230.3(l). And in considering these factors, the Corps not only *can* consider the specific project proponent's purpose, costs, and logistical issues, it *must* do so:

> In defining the overall project purpose, the Corps must consider the applicant's needs "in the context of the desired geographic area of the development, and the type of project being proposed." Under the guidelines, "not only is it permissible for the Corps to consider the applicant's objective; the Corps has a duty to take into account the objectives of the applicant's project.

Town of Abita Springs v. USACE, 153 F. Supp. 3d 894, 920 (E.D. La. 2015) (citations omitted). *See also La. Wildlife Fed'n, Inc. v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985); *Friends of the Santa Clara River v. USACE*, 887 F.3d 906, 921 (9th Cir. 2018).

RODA complains that the Corps paid too much attention to Massachusetts's policy promoting offshore wind as an alternative energy source in assessing the purpose of the Project.

Doc. No. 53 at 30. But when the Corps considers approving a project requiring the discharge of fill into territorial seas, it must consider "officially adopted state, regional, or local land use classifications, determinations, or policies." 33 C.F.R. § 336.1(c)(11)(ii). *See also Friends of the Santa Clara River*, 887 F.3d at 912.

As explained, the Corps found that the offered alternatives, including the no-action and off-site alternatives, were not practicable because they would not achieve the stated purpose or they would result in increased costs or logistic difficulties. This is exactly the type of analysis of the availability of alternatives that courts have upheld time and again. *See, e.g., Wild Va. v. U.S. Forest Serv.*, 24 F.4th 915, 930, n. 9 (4th Cir 2022) (citing *Friends of Santa Clara*, 887 F.3d at 912, 921–22, noting that courts "defer to the Corps's practicability determinations and uphold its consideration of factors such as increased cost, construction delays, logistical feasibility, and the objectives of the applicant's project, which is supported by EPA's regulations, 40 CFR §§ 230.3(l), 230.10(a)"); *Friends of the Earth v. Hintz*, 800 F.2d 822, 833 (9th Cir. 1986) ("The regulations explicitly charge the Corps with taking cost, existing technology, and logistics in light of overall project purposes."); *Great Rivers Habitat All. v. Corp*s, 437 F. Supp. 2d 1019, 1024, 1027 (E.D. Mo. 2006); *Sylvester v. USACE,* 882 F.2d 407, 409 (9th Cir. 1989).

In this case the Corps considered the purpose of the Project, the level of impact, available alternatives in light of costs and logistics, and whether and how various alternatives might reduce adverse impacts with regard to the portion of the Project under its regulatory jurisdiction, and found no basis to withhold the granting of the permit for the disposal of fill along the 23.3 miles of the cable corridor in the territorial seas (or the rest of the cable corridor).

E. The Corps properly considered cumulative impacts.

RODA argues in two different sections of its brief that the Corps purportedly failed to consider cumulative impacts of the Project, first under the CWA (Doc. No. 53 at 31-32) and then

along with BOEM under NEPA (Doc. No. 53 at 35-41). RODA explains that one of the factors the Corps considers in evaluating whether to issue a permit is the cumulative impacts that may be attributable to a collective number of discharges of dredged or fill material. Doc. No. 53 at 32 (citing 40 C.F.R. § 230.11(g)).

First, the Corps's cumulative impact analysis under § 230.11(g) is limited to the same 23.3-mile portion of the territorial seas over which its CWA authority spans.[24] Moreover, as RODA explains, the Corps's analysis is limited to any cumulative impacts that may be associated with "a number of individual discharges of dredged or fill material." Doc. No. 53 at 32 (quoting 40 C.F.R. § 230.11(g)). It does not cover impacts associated with "thousands more turbines on millions of acres of seabed" that RODA alleges the Corps failed to consider. Doc. No. 53 at 32. *See Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1063 (10th Cir. 2015) (McHugh, J., concurring) (the Corps's cumulative effects analysis under the CWA is limited to changes in the "aquatic ecosystem" that are attributable to the collective effect of a number of individual discharges of dredged or fill material); *Utahns for Better Transp v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1190-91 (10th Cir. 2002) (the CWA's definition of cumulative impacts is different and narrower than NEPA's).

Once again, because RODA failed to raise this issue in comments to the Corps, its argument in this regard is waived. Beyond that, RODA fails to allege how *any* aspect of *any*

[24] *See* 40 C.F.R. § 230.11(g)(1) (defining cumulative impacts under the CWA as "changes in an aquatic ecosystem"); 40 C.F.R. § 230.3(b) (defining "aquatic ecosystem" as a subset of CWA-jurisdictional "waters of the United States," which do not extend beyond the territorial seas); 40 C.F.R. § 232.2 (defining discharges of dredged or fill material as the addition of such material into CWA-jurisdictional "waters of the United States."); *Wetlands Action Network v. U.SACE*, 222 F.3d 1105, 1116–17 (9th Cir. 2000) (fact that construction of a project covering hundreds of acres was dependent on a Corps § 404 permit to fill sixteen acres of wetlands did not suffice to make the Corps responsible for including the entire project in the scope of its NEPA analysis); *Ctr. for Biological Diversity v. USACE*, 941 F.3d 1288, 1302 (11th Cir. 2019).

other wind project will cause impacts along the 23.3 miles of the cable corridor that is the subject of the challenged Corps permit. On these bases alone, RODA's claim must be rejected.

In any event, the Corps did consider cumulative impacts as they may affect the area under the Corps's CWA § 404 regulatory jurisdiction, i.e., the 23.3 miles of the cable corridor within territorial seas (and RHA Section 10 jurisdiction over structures on the outer continental shelf). *See, e.g.,* USACE AR 011471 ("Reasonably foreseeable activities within the larger overall wind lease area were considered to account for potential cumulative effects."). Further, as noted above, the Corps may rely on analysis performed as part of a NEPA review, which in this case the Corps adopted, and it did so specifically with regard to cumulative effects in the context of fill associated with the cable corridor. *See, e.g.*, USACE AR 08677, 08685, 08699, 08703 (considering, for instance, sediment suspension during cable-laying for other projects). These and other cumulative impacts Federal Defendants examined are addressed *supra* section III.A.

F. The Corps did not violate other unidentified regulatory provisions.

RODA declares: "Throughout the Record of Decision the Army Corps concludes that the impact of this project will have minor effects on commercial fisheries, wildlife, and the marine environment" and that "the Corps's conclusion that the Project's impacts are minor is not supported by the record," citing the JROD as support for this statement. Doc. No. 53 at 33 and subheading 3. Without citing to any statute or regulation, RODA apparently believes this is a basis to challenge the Corps permit. RODA's position has no support in fact or law.

RODA cites to nothing more than the front page of the JROD to support its view that the Corps found the impacts of the Project to be "minor." *Id*. In fact, the JROD affirmatively states that the Corps carefully considered myriad potential impacts from the project that could have

effects on "fisheries, wildlife, and the marine environment."[25] Doc. No. 53 at 33.

Contrary to RODA's assertion, the Corps did not find all of these impacts to be minor. For instance, the Corps found that: (a) parts of the substrate bottom would be impacted from fill for the cable and from pre-cable installation dredging, which the Corps found to be "significant;" (b) "the discharge of fill material associated with the project will result in *major* impacts to mollusks, fish, and crustaceans in the project area;" (c) "the placement of the fill material" may result in "smothering due to discharges of fill or turbidity and the egg/larvae's inability to relocate;" and (d) "local fish stocks will likely be negatively affected by the discharge of fill and turbidity." USACE AR 011474-76 (emphasis added). The JROD further describes impacts to commercial fisheries as "major." USACE AR 011455. Indeed, RODA's brief cites to such comments in the JROD. *See* Doc. No. 53 at 16-17, reciting findings in the JROD stating that "[i]t is anticipated that there will be negative economic impacts to commercial fisheries" and that the "impact to commercial fisheries and loss of economic income is estimated to total $14 million." USACE AR 011479.

Furthermore, as noted, the Corps considered and adopted the FEIS and its analysis, which sets out other impacts classified as "major" or significant, a number of which RODA repeats in its brief. Doc. No. 53 at 33-34. And RODA itself asserts that the Corps found that commercial fishing in the area of the turbines would likely be abandoned (Doc. No. 53 at 14), which they classify as a major impact and which the Corps relied upon in conducting its economic analysis,

[25] These include impacts to: (a) the sand substrate of the ocean floor; (b) suspended particulates; (c) turbidity; (d), water quality, including effects on the water's clarity, color, odor, and taste; (e) water circulation and currents; (f) water fluctuations; (g) salinity gradients; (h) threatened and endangered species; (i) fish, crustaceans, mollusk, and other organic organisms; (j) other wildlife; (k) special aquatic sites; (l) municipal and private water supplies; (m) water-related recreation; (n) aesthetics; (o) seashores, preserves, and wilderness areas; and (p) recreational and commercial fisheries. USACE AR 011473-77.

in explaining that impacts to commercial fishing interests were mitigated through compensation and other factors.[26] Accordingly, RODA's argument that the Corps acted arbitrarily, which is based on its statement that "the Corps's conclusion that the Project's impacts are minor," Doc. No. 53 at 33, is facially inaccurate and nonsensical, as it misstates the Corps's findings.

While implying that the Corps did not understand the full ("major") impacts of the Project, RODA cites to no statute or regulation that the Corps supposedly violated in this regard. Furthermore, RODA fails to explain how the Corps's findings were supposedly misapplied with regard to the Corps's issuance of the permit. There are almost always impacts associated with virtually any project requiring CWA Section 404 approval. Yet, RODA cites to no statute or regulation that requires the Corps to deny a permit because there will be impacts or even because there will be "major" impacts. Instead, the Corps reviews and considers the impacts of the portion of a project within its jurisdiction to determine whether those impacts are likely to be so adverse impacts as to be considered "unacceptable." Doc. No. 1 at ¶ 86; 33 C.F.R. § 320.2(f) (the Corps is to refrain from issuing a permit if the disposal of fill will have an "*unacceptable* adverse effect." (emphasis added)). The Corps is tasked with making the determination of what level of impact is unacceptable and its evaluation process may vary to reflect the seriousness of the potential adverse impacts on the aquatic ecosystems. 40 C.F.R. § 230.10.

Here, the Corps did not find the level of impairment associated with the approved project

[26] As previously explained, the Corps did not perform an independent analysis of how use of the lease area by commercial fishing interests would be affected by the Project, as that area is outside of the cable corridor that is the subject of the permit. Doc. No. 44 (Opp. to Mot. to Strike). Instead, BOEM conducted an in-depth analysis of the potential effects of the Project on commercial fishing, concluding that full abandonment was not likely. *See* Doc. No. 44-2 (FEIS) at 3-211 to 3-232; Doc. No. 44-1, Appx. B (COP Compliance Review) at 23-25. Nevertheless, for the purpose of conducting the economic portion of its public interest assessment under 33 C.F.R. § 320.4, the Corps accepted the assertion by commercial fishermen that they would be forced to abandon fishing in the Project area.

to be unacceptable, particularly when changes and mitigation were considered. In this case, the project approval included requirements to avoid, minimize, and mitigate impacts, e.g., reducing the number of turbines and their placement. USACE AR 011482-86. It also included a long list of mitigation actions, including monetary payments from Vineyard Wind to commercial fishermen. USACE AR 012636 (Permit at Special Condition 2), incorporating the mitigation conditions at pp. 55-100 of the JROD, a number of which deal specially with dredging and fill for the cable corridor). And pursuant to its public interest review conducted under 33 C.F.R. §§ § 320.4(a)(1), (p), (q), the Corps is to balance impacts against benefits. Here, the Corps found the environmental and economic benefits from creating a significant source of alternative energy that reduces greenhouse gas emissions to be significant. *See, e.g.*, USACE AR USACE AR 011480, 011485, explaining that the project will satisfy approximately 10% of Massachusetts's energy needs and will result in annual emission reductions of carbon dioxide equivalent to removing 325,000 cars off the road.[27]

Moreover, RODA makes no attempt to argue that there are alternatives to the 23.3 miles of cable corridor under the Corps's CWA jurisdiction that will reduce significant impacts, or any impacts for that matter. Commercial fishermen supported Alternative F in the FEIS (Seafreeze Br., Doc. No. 67 at 29), which was based on a proposal RODA submitted. USACE AR 011459. That alternative still calls for a cable corridor to stretch through the same 23.3 miles of the territorial seas. Nor does RODA argue that placing the cable corridor in any other location will result in any different level or type of impacts. Such an alternative would likely require a similar

[27] RODA does not challenge any aspect of the Corps's public interest determination, including its economic analysis, and it may not do so in its reply brief. *United States v. Toth*, 33 F.4th 1, 19 (1st Cir. 2022); *Sierra Club v. USACE*, 997 F.3d 395, 404 (1st Cir. 2021); *Villodo v. Castro Ruz*, 821 F.3d 196, 206, n.5 (1st Cir. 2016) ("[N]ew arguments may not be raised for the first time in a reply brief.").

amount of fill and scour protection and, unlike the Project, could affect a special aquatic site.

To the extent RODA is arguing that the Corps's issuance of the permit is arbitrary and capricious under 5 U.S.C. § 706, "[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Indeed, agency actions and determinations are presumed to be valid. *Sustainable Fisheries Coal. v. Raimondo*, 589 F.Supp.3d 162, 167 (D. Mass. 2022); *Overton Park*, 401 U.S. at 415. "Pursuant to this 'highly deferential' standard of review, courts should uphold an agency determination if it is 'supported by any rational view of the record.'" *Marasco & Nesselbush, LLP v. Collins*, 6 F.4th 150, 172 (1st Cir. 2021) (quoting *Atieh v. Riordan*, 797 F.3d 135, 138 (1st Cir. 2015)). That standard is even more deferential in the case of Section 404 (and RHA) permits, given the technical nature of the issues considered by the Corps. *Historic Bridge Found. v. Chao*, 517 F. Supp. 3d 9, 27 (D. Me. 2021), quoting *DiPerri v. FAA*, 671 F.2d 54, 58 (1st Cir. 1982) ("[A]n agency's application of its own expert judgment to technical considerations within its purview is deserving of 'great deference.'").

The Corps examined the various impacts from the Project, found some to be minor and some to be significant or "major," weighed project changes that reduced the Project's impacts, required a menu of mitigation actions, considered the limited scope of its CWA Section 404 permit, addressed the environmental benefits of the Project, and made a determination that the permit should be granted. That determination is well-supported by the record that was before the Corps at the time of its decision. While RODA may disagree with the Corps's conclusions, those conclusions are not arbitrary or capricious.

VI. NMFS's issuance of the Incidental Harassment Authorization complied with the Marine Mammal Protection Act.

As to RODA's Fifth Cause of Action, Doc. No. 1 ¶¶ 176 – 182, Federal Defendants hereby incorporate by reference the arguments regarding the MMPA as set forth in Federal Defendants' summary judgment briefing in the ALLCO case. *See Melone v. Coit et al.*, Case No. 1:21-cv-11171-IT, Doc. No. 153.

VII. RODA's Jones Act claim lacks any legal or record basis.

RODA's claim related to hypothetical future Jones Act violations lacks merit. To start, it is unclear what agency action RODA is challenging. The federal agencies themselves would not be operating vessels, let alone in violation of the Jones Act. RODA thus appears to try to wedge its Jones Act point into other claims. RODA argues that "BOEM's action in issuing the Vineyard Wind lease"—an action that took place in 2015—"was *ultra vires*, arbitrary, [and] capricious." Doc. No. 53 at 43. But the reason RODA offers for that argument is that BOEM "assum[ed] a reasonably foreseeable impacts scenario that is not achievable" in the FEIS—a document that was released six years later, in 2021. *Id.* If RODA intended to challenge BOEM's lease issuance, that challenge is time-barred. *See* Fed. Defs' *Seafreeze* Br. section II.C. It is also nonsensical, as the basis for RODA's challenge post-dates the lease issuance.

RODA's arguments also lack merit to the extent RODA intended to challenge the assumptions that BOEM adopted in the FEIS's cumulative impacts analysis (which RODA cites on page 43 of its brief despite previously claiming it did not exist (*see supra s*ection III.A.)). To assess cumulative impacts of reasonably foreseeable offshore wind development, BOEM necessarily made a series of assumptions about the future wind projects encompassed by its analysis, including the assumption that "challenges of vessel availability and supply chain will be overcome" such that future "projects will advance at the schedule the states and developers have

announced." USACE_AR_008869. BOEM utilized that assumption, along with others such as the types of turbines likely to be used, to devise a methodology for assessing cumulative impacts. *Id.* But BOEM's cumulative impacts analysis does not dictate anything with respect to those future projects, including how developers associated with any such projects will comply with the Jones Act. Indeed, BOEM's cumulative impacts analysis has nothing to do with the Jones Act at all.

The argument also fails if RODA instead intended to challenge the JROD on the basis that it "authorizes the transport of goods from points in the United States to and within the Vineyard Wind Project site" when "no Jones Act qualified vessels exist to perform these activities," Doc. No. 53 at 43. The JROD does not on its face authorize any "transport of goods," much less the transport of goods on non-qualified vessels. And BOEM conditioned its project approval on Vineyard Wind's compliance with all applicable statutes and regulations. BOEM_0077152.

Further, even setting aside RODA's failure to identify the action it is challenging, its claims also fail because it has not identified what law or standard BOEM supposedly violated. Indeed, RODA fails to cite a single case or legal authority in support of its argument. Its Jones Act claims should be rejected on that basis alone.

At bottom, RODA's Jones Act claim consists of conjecture about the supposedly "widely known" challenges that offshore wind developers will face in complying with the Jones Act. Doc. No. 53 at 42-43. RODA's speculation lacks any basis in the record, is untethered to any final agency action, and is unsupported by applicable law, and should be rejected.

VIII. Summary Judgment should be granted to Federal Defendants on all remaining claims.

To the extent that RODA has not briefed claims that were pled in its complaint, summary

judgment should be granted to Federal Defendants on all such claims. *See Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 678 (1st Cir. 1995) ("[A]n issue raised in the complaint but ignored at summary judgment may be deemed waived.").

IX. If the Court finds a legal error, it should remand without vacatur.

As explained above, summary judgment should be granted in favor of Federal Defendants. If the Court were to find any legal deficiency, however, it should exercise its discretion to remand the agency decision(s) without vacatur. A court's decision to remand without vacatur "depends inter alia on the severity of the errors, the likelihood that they can be mended without altering the order, and on the balance of equities and public interest considerations." *Central Me. Power Co.v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001) (citing *Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 966–67 (D.C.Cir.1990)). Here, even if RODA had demonstrated that the agencies committed any legal errors, the errors RODA alleges to have occurred could be corrected without altering the ultimate decision. The equities and public interest also would favor allowing this Project to proceed during the course of any remand. To the extent there is any doubt on this score, Federal Defendants request that the Court provide an opportunity for arguments as to any appropriate remedy.

CONCLUSION

For the foregoing reasons, summary judgment should be granted to Federal Defendants on all claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filings to the attorneys of record for Plaintiff and all other parties, who have registered with the Court's CM/ECF system.

So certified this 20th day of December 2022 by

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