

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PRESERVATION SOCIETY OF NEWPORT)
COUNTY and SOUTHEAST LIGHTHOUSE)
FOUNDATION,)
)
 Plaintiffs,)
)
 v.)
)
 DEB HAALAND, *et al.*,)
)
 Defendants,)
)
 and)
)
 REVOLUTION WIND, LLC,)
)
 Defendant-Intervenor.)
_____)

Case No.: 1:23-cv-3513-RCL
Case No.: 1:23-cv-3515-RCL
(consolidated)

Hon. Royce C. Lamberth

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

TABLE OF ABBREVIATIONS..... iv

TABLE OF EXHIBITS v

SUMMARY OF ARGUMENT 6

STATEMENT OF UNDISPUTED MATERIAL FACTS 9

 Newport County, Block Island, and their Historic Context 10

 The Revolution Wind Project..... 12

 The Rushed Agency Approval Process..... 13

 Proceedings in this Court 15

ARGUMENT 15

 1. The Administrative Record does not support BOEM’s Decision to Authorize Revolution Wind under the Applicable Standard of Review 15

 2. The Plaintiffs Have Standing to Appeal..... 16

 2.1 The Preservation Society Has Standing to Appeal..... 19

 2.2 The Southeast Lighthouse Foundation Has Standing to Appeal..... 20

 3. BOEM Violated the National Historic Preservation Act Because it Failed to Comply with the Procedural Protections of Section 110(f) and Section 106..... 21

 3.1 BOEM Failed to Comply With Section 110(f), Which Required BOEM to Undertake Planning and Actions Necessary to Minimize Harm to NHLs..... 22

 3.2 BOEM Failed to Comply with Section 106 Because it Failed to Assess the Adverse Effects to Historic Properties..... 25

 3.3 BOEM Failed to Comply with Section 106 because it Failed to Avoid, Minimize, or Mitigate Harm to Historic Properties Prior to Approving the Project..... 29

 4. BOEM Violated the National Environmental Policy Act By Failing to Adequately Analyze the Adverse Impacts of Revolution Wind on the Environment..... 32

 4.1 BOEM Violated the National Environmental Policy Act by Failing to Properly Analyze the Project’s Significant Impacts on Plaintiffs’ Historic Properties 32

 4.2 The EIS Fails to Consider Cumulative Effects on Historic and Cultural Resources as Required by the National Environmental Policy Act 35

CONCLUSION 38

TABLE OF AUTHORITIES**CASES**

<i>Airport Impact Relief, Inc. v. Wykle</i> , 192 F.3d 197 (1 st Cir. 1999)	11
<i>Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n</i> , 988 F.2d 146 (D.C. Cir. 1993)	33
<i>Amgen, Inc. v. Smith</i> , 357 F.3d 103 (D.C. Cir. 2004).....	13
<i>Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.</i> , 462 U.S. 87 (1983)	28
<i>Blue Ocean Institute v. Gutierrez</i> , 585 F. Supp. 2d 36 (D.D.C. 2008).....	11
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	11
<i>Cent. S. Dakota Co-op. Grazing Dist. v. Sec’y of U.S. Dep’t of Agric.</i> , 266 F.3d 889 (8th Cir. 2001)	13
<i>Citizens to Preserve Overton Park v. Volpe</i> , 401 U.S. 402 (1971).....	11, 18
<i>City of Dania Beach v. Federal Aviation Admin.</i> , 485 F.3d 1181 (D.C. Cir. 2007)	13
<i>CSL Plasma Inc. v. U.S. Customs and Border Prot.</i> , 33 F.4th 584 (D.C. Cir. 2022).....	13
<i>Delaware Riverkeeper Network v. FERC</i> , 753 F.3d 1304 (D.C. Cir. 2014).....	31
<i>Friends of the Earth v. Laidlaw</i> , 528 U.S. 167 (2000)	12
<i>Greater Box. Television Corp. v. FCC</i> , 444 F.2d 841 (D.C. Cir. 1970).....	27
<i>Gunpowder Riverkeeper v. FERC</i> , 807 F.3d 267 (D.C. Cir. 2015).....	13
<i>Loper Bright Enterprises v. Raimondo</i> , 144 S. Ct. 2244 (2024).....	11
<i>Lujan v. Defendants of Wildlife</i> , 504 U.S. 555 (1992)	12
<i>Lujan v. Nat’l Wildlife Fed’n</i> , 497 U.S. 871 (1990).....	13
<i>Maine Lobstermen’s Ass’n v. Nat’l Marine Fisheries Serv.</i> , 70 F.4th 582 (D.C. Cir. 2023)	11
<i>Marsh v. Oregon Nat. Res. Council</i> , 490 U.S. 360 (1989).....	29
<i>Metcalf v. Daley</i> , 214 F.3d 1135 (9th Cir. 2000)	30
<i>Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983) .	11
<i>Munoz-Mendoza v. Pierce</i> , 711 F.2d 421 (1st Cir. 1983).....	12
<i>Myersville Citizens for a Rural Cmty., Inc. v. FERC</i> , 783 F.3d 1301 (D.C. Cir. 2015).....	32
<i>Nat’l Ass’n of Home Builders v. U.S. Army Corps of Engineers</i> , 417 F.3d 1272 (D.C. Cir. 2005)	13
<i>National Park Conservation Ass’n v. Semonite</i> , 916 F.2d 1075 (D.C. Cir. 2019).....	18, 28
<i>New Mexico ex rel. Richardson v. Bureau of Land Mgmt.</i> , 565 F.3d 683 (10th Cir. 2009).....	3
<i>Quechan Tribe of Fort Yumah Indian Reservation v. U.S. Dep’t of Int.</i> , 755 F. Supp. 2d 1104 (S.D. Cal. 2012).....	19
<i>Realty Income Tr. v. Eckerd</i> , 564 F.2d 447 (D.C. Cir. 1977)	13
<i>Reed v. Salazar</i> , 744 F. Supp. 2d 98 (D.D.C. 2009).....	11
<i>Robertson v. Methow Valley Citizens Council</i> , 490 U.S. 332 (1989).....	27, 28
<i>Sierra Club v. U.S. Army Corps of Engineers</i> , 803 F.3d 31 (D.C. Cir. 2015).....	27
<i>Weinberger v. Catholic Action of Hawaii/Peace Education Project</i> , 454 U.S. 139 (1981).....	28

STATUTES

23 U.S.C. § 138(a).....	18
42 U.S.C. § 4331(b).....	3
42 U.S.C. § 4332	28, 30, 33
42 U.S.C. § 4332(C)	28
42 U.S.C. §§ 4321-4345	27
42 U.S.C. §§ 4321-4370m.....	1

49 U.S.C. § 303(c)..... 18
 5 U.S.C. § 706 10
 5 U.S.C. § 706(2)..... 29, 33
 5 U.S.C. §§ 701–706..... 1
 54 U.S.C. § 306107 3, 17, 19
 54 U.S.C. § 306108 17, 20, 25, 27
 54 U.S.C. § 306108..... 3
 54 U.S.C. §§ 300101–320303..... 1
 Pub. L. No. 89-665, 80 Stat. 915 (Oct. 15, 1966)..... 16

RULES

Fed. R. Civ. P. 56(c)..... 11

REGULATIONS

36 C.F.R. § 800.4..... 20
 36 C.F.R. § 800.5..... 20, 21
 36 C.F.R. § 800.6..... 20, 25, 26
 36 C.F.R. § 800.3..... 20
 36 C.F.R. §§ 65.2(a), 65.4..... 18
 36 C.F.R. Part 800 20
 40 C.F.R. § 1500.1(a) 27
 40 C.F.R. § 1502.1..... 29
 40 C.F.R. § 1502.2(g)..... 29
 40 C.F.R. § 1508.25..... 30, 31
 40 C.F.R. § 1508.7..... 31, 33
 40 C.F.R. §§ 1500-15184..... 27
 63 Fed. Reg. 20495, 20496 (Apr. 24, 1998) 17
 63 Fed. Reg. 20503..... 19
 83 Fed. Reg. 53104..... 8

TABLE OF ABBREVIATIONS

Abbreviation	Definition
APA	Administrative Procedure Act
BOEM	Bureau of Ocean Energy Management
COP	Construction and Operations Plan
EIS	Environmental Impact Statement
MOA	Memorandum of Agreement
NEPA	National Environmental Policy Act
NHL	National Historic Landmark
NHPA	National Historic Preservation Act
ROD	Record of Decision
HRVEA	Historic Resources Visual Effects Analysis
CHRVEA	Cumulative Historic Resources Visual Effects Analysis

TABLE OF EXHIBITS

EXHIBIT NO.	DESCRIPTION
Ex. 1	Declaration of James M. Burress (Sept. 4, 2024)
Ex. 2	Declaration of Gerald F. Abbott (Sept. 4, 2024)

Defendant Bureau of Ocean Energy Management (“BOEM”), acting as lead federal agency, violated federal law when it approved an industrial-scale energy project known as Revolution Wind. BOEM approved this project without considering its adverse effects on National Historic Landmarks (NHLs) and other historic properties within one of the most historically and culturally significant communities in the country. BOEM also failed to take a “hard look” at Revolution Wind’s impacts on the environment, leaving unanswered questions even though the law required BOEM to inform the public about the project’s environmental benefits and costs.

The Preservation Society of Newport County and Southeast Lighthouse Foundation (“Preservation Society” and “Southeast Lighthouse”) are historic preservation organizations based in Rhode Island. They ask this Court to grant their motion for summary judgment and vacate the permits and approvals BOEM issued for Revolution Wind as arbitrary, capricious, and contrary to law—the National Historic Preservation Act (NHPA),¹ the National Environmental Policy Act (NEPA),² and the Administrative Procedure Act (APA).³

SUMMARY OF ARGUMENT

Next to Newport’s and Block Island’s nationally significant historic properties is the Revolution Wind Project, an industrial-scale offshore wind energy project in an area of the Atlantic Ocean leased by the United States to two major offshore energy companies, Orsted (Danish) and Eversource (U.S.). Revolution Wind is intended to provide intermittent electricity

¹ 42 U.S.C. §§ 4321–4370m.

² 54 U.S.C. §§ 300101–320303.

³ 5 U.S.C. §§ 701–706.

to Connecticut and Rhode Island.⁴ Massive wind turbines will connect to the power grid through an underwater cable to North Kingstown, RI, and span nearly 83,000 acres.⁵

Revolution Wind is part of a trio of three industrial wind farm projects in an offshore wind energy lease area known originally as Deepwater Wind, and now approved as three separate projects along with South Fork Wind and Sunrise Wind.⁶ Adding to South Fork's 12 turbines at 840 tall,⁷ Revolution Wind proposes to add 96 turbines at 873 feet tall⁸ and Sunrise Wind proposes to add up to 94 turbines at 968 feet tall.⁹ Among other errors, BOEM has reviewed each project separately, effectively minimizing Revolution Wind's projected harms. BOEM compounded this error by not taking a hard look at cumulative impacts and finding appropriate ways to lessen the harm of those impacts, even though the combined visual impacts of South Fork, Revolution Wind, and Sunrise Wind will harm the context and setting of some of the nation's most valued NHLs.¹⁰

⁴ Because wind is not always reliable as an energy source, fossil fuel plants must be built or relied on to provide a supplemental, reliable source of electricity. *See* World Economic Forum, *How Reliable Are Wind Farms?* (Jan. 5, 2015), <https://www.weforum.org/agenda/2015/01/how-reliable-is-wind-power/>.

⁵ BOEMPSNC_74436 (ROD); BOEMPSNC_25780 (NHPA Section 106 and 110(f) Consultation Meeting Summary for the Revolution Wind Farm and Revolution Export Cable Project); BOEMPSNC_16766 (Revolution Wind Visual Impact Assessment Stakeholder Informational Meeting).

⁶ BOEMPSNC__72474 (ROD).

⁷ Bureau of Ocean Energy Management, *South Fork Wind Farm Record of Decision* (Nov. 24, 2021), <https://www.boem.gov/renewable-energy/state-activities/record-decision-south-fork>.

⁸ Bureau of Ocean Energy Management, *Revolution Wind Record of Decision* (Aug. 21, 2023), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Revolution-Wind-Record-of-Decision-OCS-A-0486_3.pdf (Revolution Wind Record of Decision).

⁹ Bureau of Ocean Energy Management, *Sunrise Wind Record of Decision* (Mar. 25, 2024), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/05579_Record%20of%20Decision_Sunrise%20Wind_OCS-A%200487.pdf (Sunrise Wind Record of Decision).

¹⁰ Ex. 1, Decl. of J. Burress ¶¶ 9-10 (Sept. 5, 2024); *see also* Ex. 2, Decl. of G. Abbott. ¶ 8 (Sept. 5, 2024).

BOEM approved Revolution Wind without adequately considering its adverse effects on NHLs owned by the Preservation Society and Southeast Lighthouse:

- Section 106 of the Historic Preservation Act provides:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property.¹¹

- Section 110(f) of the NHPA provides:

Prior to the approval of any Federal undertaking that may directly and adversely affect a National Historic Landmark, the head of the responsible Federal agency shall *to the maximum extent possible* undertake such planning and actions as may be necessary *to minimize harm to the landmark*.¹²

Notwithstanding Section 106 and Section 110(f), BOEM failed to consider adequately how Revolution Wind would adversely affect historic properties, including NHLs, and failed to use all possible planning to minimize harm to those landmarks.

BOEM also failed to comply with NEPA by failing to take a “hard look” at the impacts of the Project on the human environment and the marine environment prior to its approving the Project.¹³ Congress drafted NEPA to protect the environment by “fulfill[ing] the responsibilities of each generation as trustee of the environment for succeeding generations [and] attain[ing] the widest range of beneficial uses of the environment [human environment] without degradation.”¹⁴

The Preservation Society and Southeast Lighthouse have legal, economic, and real property interests that Revolution Wind adversely affects as evidenced by their unchallenged

¹¹ 54 U.S.C. § 306108.

¹² 54 U.S.C. § 306107 (emphasis added).

¹³ See, e.g., *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009).

¹⁴ 42 U.S.C. § 4331(b).

recognition by BOEM as consulting parties. Therefore, they have standing to bring these appeals and ask this Court to grant their motion for summary judgment, holding as a matter of law that the Government violated the NHPA, NEPA, and the APA in approving Revolution Wind.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Rhode Island's coastline is home to some of the nation's most significant historic and cultural resources, including Newport and Block Island, Rhode Island.¹⁵ For more than a century, the federal government, the state of Rhode Island, and local governments have worked to protect and maintain the historic character of this area so that present and future generations can study and appreciate the architecture and design features unique to Newport County and Block Island.¹⁶ Until the South Fork Project was constructed, that effort has succeeded: Newport's NHL Districts¹⁷ and Block Island's NHL Southeast Lighthouse House, traditional cultural properties, and National Natural Monuments connected to Native American tribes have kept their historic context and scenic attributes. Millions of visitors come each year to see first-hand this remarkably intact historical treasure.¹⁸

2. On August 21, 2023, Defendant, BOEM authorized Defendant-Intervenor, Revolution Wind, LLC, to build the Revolution Wind Farm, an industrial-scale turbine field of 96 wind turbines placed in the ocean approximately 15 miles from the Preservation Society's

¹⁵ See generally Ex. 1; Ex. 2.

¹⁶ See The Preservation Society of Newport County, *History of Newport and the Mansions*, <https://www.newportmansions.org/gilded-age/history-of-newport-mansions/> (last visited Sept. 5, 2024).

¹⁷ See National Parks Service, *National Historic Landmarks Program*, <https://www.nps.gov/orgs/1582/index.htm> (last visited Sept. 5, 2024).

¹⁸ See The Providence Journal, *Report: Historic preservation generates \$1.4 billion for R.I.*, <https://www.providencejournal.com/story/news/politics/2018/03/21/report-historic-preservation-generates-14-billion-for-ri/12931752007/> (last visited May 20, 2024).

NHL properties and the Southeast Lighthouse NHL.¹⁹ Revolution Wind is jointly owned by Orsted, a Danish wind energy company, and Eversource Energy, a U.S.-based commercial energy company.²⁰

3. Orsted and Eversource plan to construct over 100 more wind turbines nearby.²¹ After construction, these turbines will form a mass of giant wind turbines that will be highly visible from the coastline equipped with flashing and stationary lights and other infrastructure,²² permanently marring one of the most historically significant and best-preserved cultural areas along the Atlantic Ocean. This landscape also includes areas important to Tribes who depend on this context to maintain their cultural heritage.²³ Revolution Wind will also eliminate dark night skies, part of the historic aesthetics of the area connected to its context, atmosphere, and setting, interfering with the migrating birds and fish species that are part of the aesthetics of the area.²⁴

Newport County, Block Island, and their Historic Context

4. Newport County and Block Island are well-preserved areas not only known for their high concentration of NHLs and properties listed in the National Register of Historic Places, but are communities that continue to preserve, maintain, and associate these properties

¹⁹ See BOEMPSNC_53424 (CHRVEA).

²⁰ See Construction & Operations Plan Revolution Wind Farm Vol. 1 (March 21, 2023), § 1.1 at 1-2; see also BOEMPSNC_36948 (Benthic Habitat Mapping to Support Essential Fish Habitat Consultation Revolution Wind Offshore Wind Farm).

²¹ See Revolution Wind ROD *supra* note 8 (approving construction of up to 100 giant turbines); see also Sunrise Wind ROD *supra* note 9 (approving construction of up to 94 turbines).

²² BOEMPSNC_213523 (CHRVEA).

²³ BOEMPSNC_65729 to 65730 (listing federally recognized tribes impacted by the proposed project).

²⁴ See BOEMPSNC_149; BOEMPSNC_336; BOEMPSNC_501 to 504 (FEIS) (discussing impact of project related artificial lighting on species).

with cultural practices, traditions, and lifestyles.²⁵ Residents and visitors enjoy and value the unobstructed ocean views of the Cliff Walk, Brenton Point, and Sachuest National Wildlife Refuge.²⁶

5. Newport is inseparable from the Atlantic Ocean and its uninterrupted views. Known as “The City-By-The-Sea” and for its “spectacular assemblages of architecture,” Newport’s beauty and connections to the sea have inspired not only writers and other artists, but also property owners whose families have treasured their houses and history for hundreds of years, as well as those who preserve sporting traditions, including world class ocean sailing—all part of Newport’s look, feel, and association that gives it a unique sense of place that places a premium on historic preservation. The Preservation Society owns historic properties, operated as museums, within the Bellevue Avenue Historic District, one of the most recognized NHL districts in the country.²⁷

6. Block Island represents the traditional, historic relationship that historic seafaring communities continue to maintain to their pristine ocean settings.²⁸ Like Newport, Block Island maintains a high concentration of historic and culturally significant resources. Block Island is commonly described as a place of landscapes of sandy beaches, oceanfront bluffs, historic

²⁵ See Preservation Society Complaint, Case No. 1:23-cv-3513-RCL (Nov. 22, 2024), ECF No. 1 at ¶¶ 21-27; Southeast Lighthouse Complaint, Case No. 1:23-cv-3515-RCL (Nov. 22, 2023), ECF No. 1 at ¶¶ 21-28.

²⁶ See, e.g., Preservation Society Complaint, Case No. 1:23-cv-3513-RCL (Nov. 22, 2024), ECF No. 1 at ¶¶ 21-27.

²⁷ See, e.g., Preservation Society Complaint, Case No. 1:23-cv-3513-RCL (Nov. 22, 2024), ECF No. 1 at 7; see also Bellevue Avenue Historic District at 7 REV_NHL Supplemental Documentation v2_09302022. BOEMPSNC_53480 (CHRVEA).

²⁸ Block Island has already had its historic landscape adversely affected by the Block Island Wind Farm, a five-turbine test project located 3.8 miles from the Southeast Lighthouse NHL and now owned by Orsted.

harbors, historic lighthouses and inns, historic oceanfront houses, and “spectacular panoramas.”²⁹

One of the most famous panoramas can be experienced by looking to and from the Southeast Lighthouse, a NHL, one of the most sophisticated lighthouses in the nation of the nineteenth century.³⁰

7. Perched on the Mohegan Bluffs overlooking the Atlantic Ocean, historic descriptions call the Southeast Lighthouse “one of the wonders of our coast.”³¹ The Southeast Lighthouse and its surrounding structures have been the focus of preservation campaigns at the local and national level. Today they serve as a popular tourist attraction and important historic site for the area. The Southeast Lighthouse is the highest in New England and has served as a primary coastal light within the U.S. Lighthouse Service and its successor organization, the U.S. Coast Guard. In 1991, the Nature Conservancy named Block Island one of “12 Last Great Places in the Western Hemisphere” because of its unique connection to conservation.³² As one commentator wrote: “There may be no better place to salute the summer on the Eastern Seaboard than at sunset . . . as the sky turns hues of orange, purple and red.”³³

The Revolution Wind Project

8. Revolution Wind Project is an industrial-scale offshore wind farm project within a 97,498-acre-lease area granted by the United States and now held by Orsted and Eversource off

²⁹ See generally GERARD P. CLOSSET, BLOCK ISLAND REVEALED (2020); GERALD P. BLOCK ISLAND: ONE OF THE LAST GREAT PLACES (2020).

³⁰ *Id.*

³¹ Mariana M. Tallman, *Pleasant Places in Rhode Island, Providence* (1893).

³² See The Nature Conservancy, *Block Island*, <https://www.nature.org/en-us/get-involved/how-to-help/places-we-protect/block-island/>.

³³ David G. Allen, *On Tiny Block Island, Summer Lasts Longer*, THE NEW YORK TIMES (Sept. 10, 2009).

the coast of Rhode Island to provide intermittent electricity to Connecticut and Rhode Island.³⁴ Fitted with flashing and stationary red, yellow, and white lights,³⁵ the 96-turbine wind turbine will be constructed approximately 15 miles from Rhode Island's Block Island and about 15 miles from Newport.³⁶ Revolution Wind's turbines will be 873 feet tall.³⁷ Revolution Wind is the second phase of a single industrial wind farm project, originally known as Deepwater Wind, and now approved as Revolution Wind and Sunrise Wind—as well as other proposed wind power plants in the vicinity.³⁸ Sunrise Wind as proposed, which will be built next to Revolution Wind and South Fork Wind, will add up to 94 turbines at 968 feet tall.³⁹ The combined visual impacts of South Fork, Revolution Wind, and Sunrise Wind will adversely affect the integrity of historic properties by creating an industrialized viewshed that will despoil the historic oceanfront context.⁴⁰

The Rushed Agency Approval Process

9. On April 30, 2021, BOEM issued a Notice of Intent to prepare an Environmental Impact Statement (EIS) for Revolution Wind as required by NEPA.⁴¹ In response, many

³⁴ Because the wind does not always blow, fossil fuel plants must be built or relied on to provide a supplemental, reliable source of electricity. *See* World Economic Forum, *How Reliable Are Wind Farms?* (Jan. 5, 2015), <https://www.weforum.org/agenda/2015/01/how-reliable-is-wind-power/>; *see also* BOEMPSNC_74436 (ROD).

³⁵ BOEMPSNC_74357 (ROD); BOEMPSNC_53470 - 53471 (CHRVEA).

³⁶ BOEMPSNC_53424 (CHRVEA); BOEMPSNC_53430 to 53431 (CHRVEA).

³⁷ BOEMPSNC_25780 (NHPA Section 106 and 110(f) Consultation Meeting Summary for the Revolution Wind Farm and Revolution Export Cable Project); BOEMPSNC_16766 (Revolution Wind Visual Impact Assessment Stakeholder Informational Meeting).

³⁸ BOEM, *Rhode Island Activities*, <https://www.boem.gov/renewable-energy/state-activities/rhode-island-activities> (last visited Sept. 4, 2024); *see also* BOEM, *Revolution Wind*, <https://www.boem.gov/renewable-energy/state-activities/revolution-wind> (last visited Sept. 4, 2024).

³⁹ *See* Sunrise Wind ROD *supra* note 9.

⁴⁰ Ex. 1 ¶ 10; *see also* Ex. 2 ¶ 8.

⁴¹ 83 Fed. Reg. 53104.

stakeholders complained about the Project's impacts on both the natural and human environment, including Rhode Island's historic properties.⁴²

10. During the consultation process, the Preservation Society and Southeast Lighthouse raised significant concerns about the Project's impacts on historic and cultural resources because they include NHLs and other historic properties listed in the National Register of Historic Places.⁴³ They pointed out BOEM's failure to identify historic properties, failure to adequately assess adverse effects on those properties, and failure to comply with Section 110(f) of the NHPA. The Preservation Society and the Southeast Lighthouse also noted that the Project poses a grave threat to their local economies, revenues, and property values, which is largely based on heritage tourism.⁴⁴ They were not alone in voicing these concerns. Other interested parties submitted comments criticizing BOEM's analysis and approach.⁴⁵

11. Notwithstanding these concerns, on August 18, 2023, BOEM executed a Memorandum of Agreement (MOA) to conclude the NHPA's Section 106 consultation process—on which the Final EIS and Record of Decision (ROD) depend.⁴⁶

12. The MOA acknowledged that the Project will adversely affect a wide swath of many historic properties within a 40-mile radius, including the historic properties owned by the

⁴² See, e.g., BOEMPSNC_36889 to 36894 (Comment Matrix);

⁴³ *Id.* See also BOEMPSNC_217142 to 217147 (June 1, 2021 Letter from Cultural Heritage Partners to BOEM); BOEMPSNC_149216 to 149231 (Cultural Heritage Partners comments on DEIS and USACE's connected permits); BOEMPSNC_148608 to 148613 (Cultural Heritage Partners comments on Technical Reports); BOEMPSNC_150075 to 150085 (Cultural Heritage Partners comments on Finding of Adverse Effect) [hereinafter "Cultural Heritage Partners Comments"].

⁴⁴ BOEMPSNC_149214 to 149244 (Cultural Heritage Partners comments on DEIS and USACE's connected permits).

⁴⁵ See, e.g., BOEMPSNC_36889 to 36894 (Comment Matrix); BOEMPSNC_53721 to 53723 (Comment Matrix Round 9.1); BOEMPSNC_16786 to 16787 (COP - Updated Comment Matrix).

⁴⁶ BOEMPSNC_65729 to 66624 (MOA).

Preservation Society and Southeast Lighthouse.⁴⁷ The Agreement also purported to resolve those adverse effects by including a combination of a few minimization measures and undetermined compensatory mitigation, leaving unresolved issues in the hands of Revolution Wind.⁴⁸ The Agreement, however, has no findings, explanation or analysis addressing how BOEM analyzed cumulative effects or satisfied Section 110(f) of the NHPA.

13. Notwithstanding these unresolved issues, BOEM issued the ROD approving the Project on August 21, 2023.⁴⁹

Proceedings in this Court

The Preservation Society and Southeast Lighthouse filed their appeals of BOEM's decision to approve the South Fork project on November 22, 2023, Case No. 1:23-cv-03513-RCL and Case No. 1:23-cv-03515-RCL, respectively. The Court consolidated these appeals under Case No. 1:23-cv-03513. On May 3, 2024, the Court ordered the Preservation Society and Southeast Lighthouse Foundation to file their motion for summary judgment.⁵⁰

ARGUMENT

1. The Administrative Record does not support BOEM's Decision to Authorize Revolution Wind under the Applicable Standard of Review

The Court should set aside BOEM's decision to issue a ROD to Revolution Wind. The APA authorizes a court to "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law."⁵¹ "Summary judgment is the proper mechanism for deciding, as a matter of law, whether an

⁴⁷ BOEMPSNC_53427 (CHRVEA); BOEMPSNC_55601 (Finding of Adverse Effect).

⁴⁸ See BOEMPSNC_65841 to 65850 (MOA).

⁴⁹ BOEMPSNC_74264 to 74462 (ROD).

⁵⁰ See Order (Feb. 28, 2024), Case No. 1:23-cv-03513-RCL (D.D.C.), ECF No. 28.

⁵¹ 5 U.S.C. § 706.

agency action is supported by the Administrative Record and consistent with the APA standard of review.”⁵²

Under the arbitrary-and-capricious standard, courts engage in a “thorough, probing, in-depth review” of agency decision-making.⁵³ Courts do not substitute their judgment for that of agencies, but neither should they “rubber-stamp” agency decisions.⁵⁴ BOEM is owed no deference.⁵⁵ An agency’s decision may only be upheld on grounds articulated in the Administrative Record of the decision.⁵⁶ Courts may not make up for deficiencies in an agency decision by “supply[ing] a reasoned basis for the agency’s action that the agency itself has not given.”⁵⁷ And where, as here, the claim is failure to comply with the law, the Court does not defer to a federal agency’s opinions of the lawfulness of its actions.⁵⁸

2. The Plaintiffs Have Standing to Appeal

The Preservation Society and Southeast Lighthouse have standing to appeal BOEM’s decision to authorize Revolution Wind not only because BOEM recognized their legal and economic interests throughout the permitting process, but also because they are expected to suffer direct, indirect, and cumulative injuries once Revolution Wind is constructed.

To establish Article III standing, an individual or an organization must show (1) an injury-in-fact that is actual or imminent, (2) that is fairly traceable to the challenged action, and

⁵² *Blue Ocean Institute v. Gutierrez*, 585 F. Supp. 2d 36, 41 (D.D.C. 2008); see Fed. R. Civ. P. 56(c); see also *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Airport Impact Relief, Inc. v. Wykle*, 192 F.3d 197, 202–03 (1st Cir. 1999).

⁵³ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971).

⁵⁴ *Reed v. Salazar*, 744 F. Supp. 2d 98, 110 (D.D.C. 2009).

⁵⁵ *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2263 (2024).

⁵⁶ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁵⁷ *Id.*

⁵⁸ See *Maine Lobstermen’s Ass’n v. Nat’l Marine Fisheries Serv.*, 70 F.4th 582, 597 (D.C. Cir. 2023).

(3) that can probably be “redressed by a favorable decision.”⁵⁹ The principles of standing are aimed at determining whether “a particular plaintiff is the type of person the law intends to protect against the type of harm about which he complains.”⁶⁰

An organization has standing to sue on behalf of its members if the members “would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”⁶¹

To have standing under the NHPA, a plaintiff must show an interest in the historic property being threatened. This can be done by showing ownership or injuries to aesthetics, architecture, culture, the environment, historic values, or injury to the plaintiff’s enjoyment or use of the property. Here, the Preservation Plaintiffs can show protectable interests in historic properties they own, historic landmarks, and properties within historic districts, and an interest in the historic values, aesthetics, use, enjoyment, and the environment which are jeopardized by the Revolution Wind Project. This Project has—and will continue to cause—concrete and particularized injuries to the Preservation Society and Southeast Lighthouse including their ability to preserve, maintain, and enjoy their historic properties and communities, and will adversely affect their property values.⁶²

The harm to these historic properties that Revolution Wind will cause is directly traceable to BOEM’s issuance of permits and approvals for Revolution Wind. A favorable decision requiring BOEM to comply with applicable federal historic preservation law and NEPA would

⁵⁹ See *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180-81 (2000); *Lujan v. Defendants of Wildlife*, 504 U.S. 555, 560-61 (1992).

⁶⁰ *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 424 (1st Cir. 1983) (citations omitted).

⁶¹ *Laidlaw*, 528 U.S. at 181.

⁶² See Ex. 1 ¶¶ 5, 9-10; see also Ex. 2 ¶ 9.

redress Plaintiffs' injuries because it could lead to the modification and moving of the turbines, or removal of the Project's turbines as part of the Court's equitable relief.⁶³

To have standing under NEPA, Plaintiffs must fall within the statute's zone of interests.⁶⁴ NEPA's zone of interests "encompasses environmental values" and is construed "very broadly."⁶⁵ NEPA's protected environmental values include human health and welfare, the quality of urban life (socio-economic effects, historic and cultural resources), and aesthetic values.

The Supreme Court has held that NEPA protects a broad range of harms, including recreational or aesthetic enjoyment of the environment.⁶⁶ While purely economic injuries do not meet the NEPA zone of interest, plaintiffs who allege environmental and economic injuries have satisfied the zone of interest test.⁶⁷ Courts

have often observed that a party is not precluded from asserting cognizable injury to environmental values because his real or obvious interest may be viewed as monetary or disqualified from asserting a legal claim under NEPA because the 'impetus' behind the NEPA claim may be economic. []. Parties motivated purely by commercial interests routinely satisfy the zone of interests test . . . [w]e have even observed that it surely does not square with the broad Congressional purpose in NEPA of assuring that environmental values would be adequately and pervasively considered in federal decision-making for private parties who may not be pure of heart to be excluded from vindicating the Act.⁶⁸

⁶³ See *City of Dania Beach v. Federal Aviation Admin.*, 485 F.3d 1181, 1185-87 (D.C. Cir. 2007).

⁶⁴ *CSL Plasma Inc. v. U.S. Customs and Border Prot.*, 33 F.4th 584, 588 (D.C. Cir. 2022).

⁶⁵ *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267 (D.C. Cir. 2015).

⁶⁶ *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990).

⁶⁷ See *Cent. S. Dakota Co-op. Grazing Dist. v. Sec'y of U.S. Dep't of Agric.*, 266 F.3d 889, 896 (8th Cir. 2001).

⁶⁸ *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1287-88 (D.C. Cir. 2005) (citing *Realty Income Tr. v. Eckerd*, 564 F.2d 447 (D.C. Cir. 1977)); also citing *Amgen, Inc. v. Smith*, 357 F.3d 103 (D.C. Cir. 2004)).

The Preservation Society and Southeast Lighthouse have cognizable aesthetic and conservation interests and injuries resulting from the Government's approval to construct Revolution Wind Project. The construction of this project, which could only happen with the Government's approval, has degraded the previously pristine, unimpeded views of the ocean that the Preservation Society and Southeast Lighthouse have appreciated and which provide the context, atmosphere, and setting for the historic they own.

2.1 The Preservation Society Has Standing to Appeal

Plaintiff Preservation Society of Newport County, headquartered at 424 Bellevue Avenue, Newport, Rhode Island, is the state's largest cultural organization. Preservation was founded in 1945 to protect Newport County's architectural heritage. The Preservation Society owns and works to preserve historic properties within one of the NHL Districts that South Fork Wind will adversely affect. Six of its historic properties are NHLs.⁶⁹ Through its historic properties, educational programs, and related preservation advocacy, the Preservation Society fosters public engagement in America's heritage.⁷⁰

The Preservation Society has legal and economic interests in Revolution Wind's outcome because, in addition to the Preservation Society's historic preservation mission, it owns several properties that will be adversely affected by the Project and that are designated as NHLs. Those properties include The Breakers, Marble House, the Elms, Chateau-sur-Mer, Kingscote, Isaac Bell House, and Hunter House.⁷¹ The Preservation Society also participated as a consulting party in BOEM's permitting reviews of South Fork Wind and Sunrise Wind and is currently appealing

⁶⁹ See National Parks Service, *National Historic Landmarks Program*, <https://www.nps.gov/orgs/1582/index.htm>.

⁷⁰ Ex. 1 ¶ 3.

⁷¹ The Preservation Society of Newport County, *Mansions & Gardens*, <https://www.newportmansions.org/plan-a-visit/mansions-gardens/>.

BOEM's ROD in South Fork.⁷² During all three of these interrelated BOEM consultations, the Preservation Society has consistently objected to BOEM's failure to adequately consider cumulative effects of all three projects, among other legal errors.⁷³

2.2 The Southeast Lighthouse Foundation Has Standing to Appeal

Plaintiff Southeast Lighthouse Foundation, Inc., is the non-profit owner of the Southeast Lighthouse, the only NHL within the Town of New Shoreham, Rhode Island, on Block Island.⁷⁴ The Southeast Lighthouse is also listed in the National Register of Historic Places, the nation's official list of historic places worthy of preservation.⁷⁵ The Foundation's mission is to "restore, preserve and protect the Southeast Lighthouse on Block Island" and to support its ongoing maintenance.⁷⁶ The Southeast Lighthouse is the first and only NHL in the country to have been subjected to the adverse effects of offshore wind development due to its proximity to Block Island Wind.⁷⁷

Established in 1986, the Foundation was created to guide a ten-year campaign to save the historic Southeast Lighthouse on Block Island from being lost due to erosion at the edge of Block Island's Mohegan Bluff. Because of the Foundation's efforts, historic preservation advocacy and stewardship, the Foundation successfully lobbied Congress to pass legislation to authorize the Southeast Lighthouse's relocation three times, raised \$2 million, and coordinated national, state, and local agencies to assist in achieving the Foundation's goals. The Foundation's

⁷² Preservation Society Complaint, Case No. 1:23-cv-3510-APM (Nov. 22, 2023), ECF No. 1.

⁷³ See Ex. 1 ¶ 12. See also BOEMPSNC_149216 to 149231 (Cultural Heritage Partners comments on DEIS and USACE's connected permits).

⁷⁴ See Ex. 2 ¶ 3.

⁷⁵ See National Parks Service, *National Historic Landmarks Program*, available at <https://www.nps.gov/orgs/1582/index.htm>.

⁷⁶ See Ex. 2 ¶ 3.

⁷⁷ See *id.* ¶ 7.

continued mission is to serve as the steward of the Southeast Lighthouse and maintain a public museum about the lighthouse. The Foundation has a direct interest in preserving the Southeast Lighthouse as a national cultural and historic treasure, which it owns. The Foundation and its members have concluded that Southeast Lighthouse, a NHL, will be adversely affected by the Revolution Wind. For that reason, the Foundation participated as a consulting party in BOEM's Revolution Wind consultation and now participates as a Plaintiff in this lawsuit.⁷⁸ The Southeast Lighthouse also participated as a consulting party in BOEM's permitting reviews of South Fork Wind and Sunrise Wind and is currently appealing BOEM's ROD in South Fork.⁷⁹ During all three of these interrelated BOEM consultations, the Southeast Lighthouse has consistently objected to BOEM's failure to adequately consider cumulative effects of all three projects, among other legal errors.⁸⁰

3. BOEM Violated the National Historic Preservation Act Because it Failed to Comply with the Procedural Protections of Section 110(f) and Section 106

Congress enacted the NHPA in 1966 to preserve “the historical and cultural foundations of the United States” and “ensure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation: in the face of proposals to extend “urban centers, highways, and residential, commercial, and industrial developments.”⁸¹ But in approving

⁷⁸ *Id.* ¶ 4.

⁷⁹ Southeast Lighthouse Complaint, Case No. 1:23-cv-3510-APM (Nov. 22, 2023), ECF No. 1.

⁸⁰ *See* Ex. 2 ¶ 11. *See also* BOEMPSNC_149216 to 149231 (Cultural Heritage Partners comments on DEIS and USACE's connected permits); BOEMPSNC_217142 to 217147 (June 1, 2021 Letter from Cultural Heritage Partners to BOEM).

⁸¹ Pub. L. No. 89-665, 80 Stat. 915 (Oct. 15, 1966).

Revolution Wind, BOEM failed to comply with two of the key provisions of the NHPA: Section 110(f)⁸² and Section 106.⁸³

BOEM's sloppy attempts to comply with the NHPA fall far short of its requirements—a condition precedent to approving Revolution Wind. BOEM's ROD should therefore be vacated and set aside as arbitrary, capricious, and contrary to law.

3.1 BOEM Failed to Comply With Section 110(f), Which Required BOEM to Undertake Planning and Actions Necessary to Minimize Harm to NHLs

Section 110(f) of the NHPA mandates that “[p]rior to the approval of any Federal undertaking that may directly and adversely affect any NHL, the head of the responsible Federal agency shall to the maximum extent possible undertake such planning and actions as may be necessary to minimize harm to the landmark.”⁸⁴

The Section 110(f) Guidelines, applicable to all federal agencies,⁸⁵ state that Section 110(f) “requires that Federal agencies exercise a higher standard of care when considering undertakings that may directly and adversely affect NHLs [National Historic Landmarks].”⁸⁶ In addition, the Guidelines further mandate that agencies “consider all prudent and feasible alternatives to avoid an adverse effect on the NHL [National Historic Landmark].”⁸⁷ This directive, read in light of Section 110(f)'s plain language and legislative history, provides clear guidance as to the statute's mandate—to set the strongest and highest standard of care possible

⁸² 54 U.S.C. § 306107.

⁸³ 54 U.S.C. § 306108.

⁸⁴ 54 U.S.C. § 306107.

⁸⁵ 63 Fed. Reg. 20495, 20496 (Apr. 24, 1998).

⁸⁶ *Id.* at 20503.

⁸⁷ *Id.*

for the protection of NHLs, including those owned by Preservation Society and Southeast Lighthouse.⁸⁸

NHLs are properties that have “exceptional value to the nation as a whole rather than to a particular State or locality,” must retain a high degree of historic integrity, and may only be designated by the Secretary of the Interior.⁸⁹ The National Park Service maintains a National Register of Historic Places, “the official list of the Nation’s historic places worthy of preservation,” which “is part of a national program to coordinate and support public and private efforts to identify, evaluate, and protect America’s historic and archeological resources.”⁹⁰

The D.C. Circuit has held that adverse visual effects are direct effects on landmark properties, and trigger Section 110(f)’s application.⁹¹ However, the Administrative Record proves, and BOEM admits, that Revolution Wind will adversely affect designated landmark properties, including the Plaintiffs’ historic properties, yet BOEM did not comply with Section 110(f)’s heightened level of scrutiny.⁹² The Administrative Record shows that the only communication BOEM had with the National Park Service, with whom BOEM was required to consult for Section 110(f) purposes, is a smattering of references that do nothing but reference

⁸⁸ The requirement that agencies “consider all prudent and feasible alternatives to avoid an adverse effect on [an] NHL” mirrors that of Section 4(f) of the Department of Transportation Act (23 U.S.C. § 138(a); 49 U.S.C. § 303(c)), which the Supreme Court has referred to as a “plain and explicit bar” prohibiting damage to historic resources. *Citizens to Preserve Overton Park*, 401 U.S. at 411.

⁸⁹ 36 C.F.R. §§ 65.2(a), 65.4

⁹⁰ See National Parks Service, *National Historic Landmarks Program*, available at <https://www.nps.gov/orgs/1582/index.htm>.

⁹¹ *National Park Conservation Ass’n v. Semonite*, 916 F.2d 1075, 1088-89 (D.C. Cir. 2019).

⁹² See, e.g., BOEMPSNC_55621 to 55624 (Finding of Adverse Effect); BOEMPSNC_53472 (CHRVEA); BOEMPSNC_53484 (CHRVEA); BOEMPSNC_53476 to 53483 (CHRVEA); BOEMPSNC_74326 (ROD); BOEMPSNC_366 (FEIS).

the name of the statute or recite its requirements.⁹³ But pro forma recitations of law do not, by themselves, show evidence of compliance.⁹⁴

BOEM cannot point to evidence within the Administrative Record to show how it complied with Section 110(f). Even the ROD—BOEM’s decision document—fails to address the issue. It provides no explanation as to how BOEM complied with Section 110(f)’s stringent mandates to exercise a “higher standard of care,”⁹⁵ “consider all prudent and feasible alternatives to avoid an adverse effect on the NHL[,]”⁹⁶ and “to the maximum extent possible undertake such planning and actions as may be necessary to minimize harm.”⁹⁷

For example, the EIS merely notes that seven NHLs will not be affected under 110(f), but does not provide any explanation of how BOEM complied with Section 110(f)’s heightened standard to minimize harm to NHLs.⁹⁸ Next, the MOA references Section 110(f), but like the EIS, fails to demonstrate compliance.⁹⁹ Finally, the ROD states only that BOEM conducted consultations under Section 110(f), which led to identifying adversely affected NHLs. However, merely identifying that NHLs will be adversely affected does not rise to the heightened standard

⁹³ See, e.g., BOEMPSNC_150094 (describing BOEM’s Section 110(f) process).

⁹⁴ *Quechan Tribe of Fort Yumah Indian Reservation v. U.S. Dep’t of Int.*, 755 F. Supp. 2d 1104, 1118 (S.D. Cal. 2012).

⁹⁵ 63 Fed. Reg. 20503.

⁹⁶ *Id.*

⁹⁷ 54 U.S.C. § 306107. The most obvious way to minimize harm to NHLs like Newport’s Bellevue Avenue and Ocean Drive Historic Districts and the Southeast Lighthouse would have been at the earliest stage of planning to consider lease areas that were far enough from shore—40-45 miles—to avoid harm so that all wind turbines would be invisible. But BOEM never did this. Instead, federal wind energy leasing was segmented in such a way so lease area locations would never receive the full scrutiny that NEPA and NHPA would provide.

⁹⁸ See BOEMPSNC_368; BOEMPSNC_384; BOEMPSNC_406 (FEIS).

⁹⁹ To show how BOEM references Section 110(f), but then does nothing to demonstrate compliance with BOEM’s heightened duty to use all possible planning to minimize harm to NHLs as required by Section 110(f), see BOEMPSNC_66199, 65952, 66005, 66006, 65730, 65731, 65752 (MOA).

of care required by Section 110(f) to use all possible planning to minimize harm because it does not document how BOEM complied with this standard.¹⁰⁰

For this reason alone, the Court should grant summary judgment and find that BOEM's decision to authorize Revolution Wind is arbitrary, capricious, and contrary to law. Therefore, the Court should vacate Revolution Wind's permit and remand the matter to BOEM with directions that BOEM redo the ROD so that it complies with Section 110(f) as to all adversely affected NHLs, including those in Newport and the Southeast Lighthouse.

3.2 BOEM Failed to Comply with Section 106 Because it Failed to Assess the Adverse Effects to Historic Properties

In addition to the enhanced protections intended for NHLs provided by Section 110(f), Congress enacted Section 106 of the NHPA to require federal agencies must consider the effects on historic properties before allowing any federal undertaking to proceed (here, BOEM's ROD): "prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property."¹⁰¹ BOEM failed to comply with Section 106's mandate.

Section 106 regulations require federal agencies to follow a sequencing process where the legal correctness of each step depends on correct application of the one before it.¹⁰² These steps include providing notice that Section 106 review is underway, identifying historic properties, determining how those historic properties will be affected, and exploring ways to avoid, minimize, or mitigate harm.¹⁰³

Assessing adverse effects requires agencies to "apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any

¹⁰⁰ See BOEMPSNC_74441 (ROD).

¹⁰¹ 54 U.S.C. § 306108.

¹⁰² 36 C.F.R. Part 800.

¹⁰³ 36 C.F.R. § 800.3 (initiation of the process), § 800.4 (identification of historic properties), § 800.5 (assessment of adverse effects), and § 800.6 (resolution of adverse effects).

views concerning such effects that have been provided by consulting parties and the public.”¹⁰⁴

The Section 106 regulations provide:

An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association. . . . Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.¹⁰⁵ Adverse effects include “introduction of visual atmospheric elements that diminish the integrity of the property’s historic features.”¹⁰⁶

Here, BOEM erred in assessing adverse effects because BOEM (1) used inadequate visual simulations that minimized the appearance of Revolution Wind’s visual effects and (2) failed to consider adequately the cumulative effects of South Fork and Sunrise Wind, adjacent projects by the same developer that BOEM was in the process of authorizing.

First, one of the major flaws in BOEM’s Section 106 process is that no one ever understood the full extent of Revolution Wind’s adverse visual effects because BOEM’s visual simulations did not account for Revolution Wind’s worst-case scenarios, only its best-case ones on hazy, low-contrast days from an inappropriately narrow set of observation points.¹⁰⁷ For this reason, the Preservation Society and the Southeast Lighthouse requested repeatedly for BOEM to provide additional visual simulations to and from historic properties because without them, it is impossible for anyone to comprehend South Fork’s direct, indirect, and cumulative effects on all historic properties.¹⁰⁸

¹⁰⁴ 36 C.F.R. § 800.5.

¹⁰⁵ 36 C.F.R. § 800.5(a)(1).

¹⁰⁶ 36 C.F.R. § 800.5(a)(2).

¹⁰⁷ See BOEMPSCN_53520 to 53521 (CHRVEA, Visibility Analysis, describing the approach to visual simulations for South Fork).

¹⁰⁸ See also Cultural Heritage Partners Comments *supra* note 43 (objections to South Fork’s visual simulations).

BOEM had a duty to provide this information during consultation so that BOEM, consulting parties, and the public would understand how Revolution Wind's direct, indirect, and cumulative effects might harm historic properties. The number and density of Revolution Wind, South Fork, and Sunrise Wind Farms will create a visual mass that will have a presence of large-scale modern infrastructure on the horizon that cannot be avoided.¹⁰⁹ These wind farms will inexorably change the historic nature of these communities, their feeling, their association, and the connections of these historic places to the ocean and its unimpeded horizon, all of which were purpose built to take advantage of the view.¹¹⁰

The visual simulations BOEM provided were in a format and quality impossible for anyone to reasonably judge or interpret and far too limited in scope.¹¹¹ They also do not allow BOEM, consulting parties, or the public to understand the actual, lived experience of seeing and understanding what massive offshore turbines look like and how they intrude on the oceanfront context of historic properties. There were no simulations depicting construction lighting impacts, for example, and all simulations used a single viewpoint at ground level.¹¹² So not only did BOEM guess, consulting parties were forced to guess, too. For this reason, consulting parties requested additional simulations representing each season at different times of day, including

¹⁰⁹ BOEMPSNC_53447 (CHRVEA).

¹¹⁰ BOEMPSNC_53476 to 53483 (CHRVEA Cumulative Effects Considerations Specific to NHLs).

¹¹¹ BOEMPSNC_53488 to 53516 (CHRVEA APPENDIX A Mapping of Revolution Wind Farm Potential Adverse Impacted Above-Ground Historic Properties from Offshore Facilities by Environmental Design and Research); BOEMPSNC_214281 to 214343 (HRVEA); BOEMPSNC_120057 to 120062 (Revolution Wind Cumulative Visual Simulations BI04 Night)

¹¹² *Id.*; see also BOEMPSNC_52831 (HRVEA).

high sunlight contrast, with strict adherence to guidelines and methodology recommended by BOEM.¹¹³ However, BOEM ignored this request.

Next, the Preservation Society and Southeast Lighthouse lodged repeated objections during the Section 106 process because BOEM never adequately assessed cumulative effects to all of the Preservation Society's historic properties and others within the City of Newport or to the Southeast Lighthouse NHL or Block Island as a whole, forcing everyone to unreasonably extrapolate or guess what adverse effects would look like.¹¹⁴ BOEM overlooked that the Preservation Society's and Southeast Lighthouse Foundation's historic properties were purpose-built to take advantage of uninterrupted ocean views, an inseparable part of their historic context, setting, location, and atmosphere.¹¹⁵ The development of these properties also demonstrates broad patterns of history, particularly in terms of the evolution, preservation, and maintenance of summer resort communities—not visual blight associated with massive turbine arrays.¹¹⁶ Furthermore, their historic properties maintain connections to living communities who visit Newport and Block Island for multiple generations.¹¹⁷

But BOEM never took these connections into account even though BOEM acknowledged that the Revolution Wind Project was found to “alter the characteristics of the setting” for Breakers NHL, Marble House NHL, Bellevue Avenue Historic District and Ocean Drive Historic

¹¹³ U.S. BUREAU OF OCEAN ENERGY MANAGEMENT, RENEWABLE ENERGY VIEWSHED ANALYSIS AND VISUAL SIMULATIONS FOR THE NEW YORK OUTER CONTINENTAL SHELF CALL AREA: COMPENDIUM REPORT, *available at* <https://www.boem.gov/sites/default/files/renewable-energy-program/State-Activities/NY/Visual-Simulations/Compendium-Report.pdf>.

¹¹⁴ Cultural Heritage Partners Comments *supra* note 43.

¹¹⁵ *Id.*

¹¹⁶ *See, e.g.*, Ex. 1 ¶ 5; Ex. 2 ¶ 3; *see also* BOEMPSNC_66010 (MOA - Historic Property Treatment Plan) (describing the historical importance placed on the viewsheds and location).

¹¹⁷ *Id.*

District “in a manner that would diminish the integrity of the propert[ies].”¹¹⁸ BOEM similarly acknowledged Revolution Wind’s capacity to “diminish the characteristic setting” of Block Island Southeast Lighthouse due to the site’s “connect[ion] to the sea” and because its “integrity of location, setting, and feeling [is] primarily associated with open views of the sea, resulting in high sensitivity to visual effects.”¹¹⁹

Along with BOEM’s failure to consider adequately the cumulative effects in its permitting for South Fork Wind, a related project resulting in ongoing litigation against BOEM,¹²⁰ BOEM repeated nearly all of the same mistakes in Revolution Wind that are described in this Memorandum. Nor did BOEM provide any analysis of economic impacts to the owners of historic properties who often depend on tourism revenues or a potential loss in property values that could be diminished by Revolution Wind and other wind farms’ cumulative effects, even though consulting parties requested the information.¹²¹ Because BOEM failed to assess all adverse effects to all historic properties as Section 106 requires, its ROD approving Revolution Wind was arbitrary, capricious, and contrary to law.

3.3 BOEM Failed to Comply with Section 106 because it Failed to Avoid, Minimize, or Mitigate Harm to Historic Properties Prior to Approving the Project

The final step in the Section 106 process, which depends on the correctness of the steps before it, is to “resolve” adverse effects in a binding MOA. Resolution of adverse effects is the

¹¹⁸ See BOEMPSNC_53482; BOEMPSNC_53483; BOEMPSNC_53480 to BOEMPSNC_53481; BOEMPSNC_53479 (CHRVEA Cumulative Effects Considerations Specific to NHLs).

¹¹⁹ See BOEMPSNC_53478 (CHRVEA Cumulative Effects Considerations Specific to NHLs).

¹²⁰ *Preservation Society of Newport County v. Haaland*, Case No. 1:23-cv-3510-APM (D.D.C.); *Southeast Lighthouse Foundation v. Haaland*, Case No. 1:23-cv-3514-APM (D.D.C.).

¹²¹ BOEM also failed to analyze economic impacts to Newport and Block Island and cumulative impacts, a NEPA violation. See Section 4 below.

technical term that describes how federal agencies are required to find ways through consultation to avoid, minimize, or mitigate adverse effects and execute an MOA that memorializes these measures.¹²² Agencies must invite any individual or organization that will assume a specific role or responsibility in an MOA to participate as a consulting party.¹²³ The MOA “evidences the agency official’s compliance with [Section 106] and shall govern the undertaking and all of its parts.”¹²⁴ Section 106 makes clear that agencies must complete this final step to resolve adverse effects *prior to* issuing a permit.¹²⁵

Here, on top of BOEM’s failure to assess all adverse effects on all historic properties, BOEM failed to avoid, minimize, or mitigate adverse effects prior to issuance of Revolution Wind’s permit.¹²⁶ First, BOEM has not avoided harm to historic properties because it has allowed Revolution Wind to construct its wind farm exactly where Revolution Wind wanted to build it. Second, BOEM has not minimized harm because the MOA’s so-called minimization measures are standard features of all wind farms that BOEM would have required anyway—the offshore wind developer’s equivalent of a car manufacturer trying to make a claim of minimizing harm to drivers by equipping cars with seatbelts that are required by federal law. Third, BOEM failed to mitigate harm because it never measured how to offset it, but rather foisted mitigation measures on consulting parties that they did not request, are not needed, or that will never offset anything.

Moreover, the MOA is rife with uncompleted and vague details, such as its so-called “mitigation fund” that fails to identify the criteria or process for awarding for funds, or determine

¹²² 36 C.F.R. § 800.6.

¹²³ 36 C.F.R. § 800.6(a)(2).

¹²⁴ 36 C.F.R. § 800.6(c).

¹²⁵ 54 U.S.C. § 306108.

¹²⁶ *Id.*

how those funds will be awarded or used, especially where the proposed projects were never requested by consulting parties and depend on the cooperation of property owners with whom BOEM never consulted,¹²⁷ yet another Section 106 violation.¹²⁸ In addition, BOEM appears to have already violated the Section 106 MOA by failing to identify an administrator to oversee the mitigation fund by MOA's one-year deadline following its execution.¹²⁹ This demonstrates that the operating features of Revolution Wind's mitigation fund are unresolved and incomplete, and therefore unreliable and have not resolved adverse effects. Finally, because it is highly unlikely that the funding BOEM has approved will be used for its intended earmarks,¹³⁰ adverse effects to those historic resources will never be mitigated, yet another reason why BOEM's mitigation

¹²⁷ For example, the MOA provides that Revolution Wind's obligation to mitigate visual effects is satisfied upon depositing the mitigation fund into escrow. BOEMPSNC_65750 (Section III(C)(6)(iv)). The funds are to be withdrawn by an administrator to provide mitigation grants to "support mitigation activities for the preservation, interpretation, or commemoration of historic sites, buildings, or events" with priority given to the sites listed in the MOA. BOEMPSNC_65750 (Section III(C)(6)(iv)). However, the operation of the fund is yet to be established. The fund will be governed by operating procedures which will be established by BOEM and the third-party administrator, who has not been appointed yet. BOEMPSNC_65751-65752 (Section III(C)(6)(viii)). Because of this, it is uncertain when these operating procedures will be established. Additionally, in the list of criteria BOEM agrees to provide in the operating procedures, there is not a provision for how the funds should be requested or awarded. BOEMPSNC_65752 (Section III(C)(6)(ix)). Furthermore, as additional proof of the MOA's unresolved nature, Revolution Wind is not required to deposit funds into the escrow account until after the complete Facility Design Report/Fabrication and Installation Report receives no objections. BOEMPSNC_65750 (Section III(C)(6)(iv)). There is no alternative deadline for the escrow payment to be made should that Report receive objections within a reasonably practicable period.

¹²⁸ For example, agencies must provide notice to consulting parties and involve the public at later stages of the Section 106 process during consultation to explore ways to avoid, minimize, or mitigate adverse effects and invite anyone to consult who will assume a role or responsibility in a MOA. 36 C.F.R. § 800.6(a)(2), 36 C.F.R. § 800.6(a)(4).

¹²⁹ BOEMPSNC_65751 (MOA Section III(C)(6)(vi)) (providing that BOEM must appoint an administrator within 1 year of the MOA's execution).

¹³⁰ BOEMPSNC_65748 to 65752 (MOA Section III(C)(6)); BOEMPSNC_65812 to 65820 (MOA Attachment 5); BOEMPSNC_65994 to 66049 (MOA Attachment 10 Historic Property Treatment Plans).

proposals are useless. In summary, BOEM executed a flawed MOA that did not resolve adverse effects prior to its execution, a clear violation of the letter and spirit of Section 106.¹³¹ For these reasons BOEM's Section 106 process was arbitrary, capricious, and contrary to law.

4. BOEM Violated the National Environmental Policy Act By Failing to Adequately Analyze the Adverse Impacts of Revolution Wind on the Environment

Congress passed NEPA so that the federal agencies and the public could understand the anticipated environmental effects of major infrastructure projects on the human environment prior to their approval.¹³² As with other effects on the environment, NEPA requires that BOEM take a "hard look" at the effects of offshore wind energy developments on historic and cultural resources before approving them for construction.¹³³

4.1 BOEM Violated the National Environmental Policy Act by Failing to Properly Analyze the Project's Significant Impacts on Plaintiffs' Historic Properties

NEPA serves as our "basic national charter for the protection of the environment"¹³⁴ and requires "the federal government to identify and assess in advance the likely environmental impact of its proposed actions, including its authorization or permitting of private actions" like Revolution Wind.¹³⁵ NEPA achieves its purpose by "action forcing procedures . . . requir[ing] that agencies take a hard look at environmental consequences" of their proposed actions.¹³⁶ NEPA's "hard look" requires federal agencies to analyze and consider "any adverse environmental effects which cannot be avoided."¹³⁷ To comply with NEPA, agencies must

¹³¹ 54 U.S.C. § 306108.

¹³² 42 U.S.C. §§ 4321-4345; 40 C.F.R. §§ 1500-15184.

¹³³ See *Greater Box. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

¹³⁴ 40 C.F.R. § 1500.1(a).

¹³⁵ *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 36 (D.C. Cir. 2015).

¹³⁶ *Robertson v. Methow Valley Citizens Counsel*, 490 U.S. 332, 350 (1989).

¹³⁷ 42 U.S.C. § 4332(C)(ii).

consider “[b]oth short- and long-term effects . . . [b]oth beneficial and adverse effects . . . [e]ffects on public health and safety . . . [and e]ffects that would violate Federal . . . law protecting the environment.”¹³⁸

As the D.C. Circuit has held, federal agency authorizations like the approval of the Revolution Wind Project require the preparation of prepare an EIS that analyzes the project’s significant impacts on our nation’s historic heritage:

In order to “create and maintain conditions under which man and nature can exist in productive harmony,” the National Environmental Protection Act (NEPA), 42 U.S.C. § 4331(a), requires any federal agency issuing a construction permit, opening new lands to drilling, or undertaking any other “major” project to take a hard look at the project’s environmental consequences, *id.* § 4332(2)(C), including the impacts it may have on “important historic . . . aspects of our national heritage,” *id.* § 4331(b).¹³⁹

The statutory requirement that a federal agency contemplating a major action prepare an EIS serves NEPA’s “action-forcing” purpose in two important respects.¹⁴⁰ NEPA

ensures that the agency, in reaching its decision, will have available and will carefully consider detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision.¹⁴¹

NEPA regulations require that environmental impact statements “shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.”¹⁴² The regulations further require that environmental

¹³⁸ *Id.*

¹³⁹ *Nat’l Parks Conservation Ass’n v. Semonite*, 916 F.3d 1075, 1077 (D.C. Cir.).

¹⁴⁰ *See Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983); *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 143 (1981).

¹⁴¹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

¹⁴² 40 C.F.R. § 1502.1.

impact statements “shall be . . . supported by evidence that the agency has made the necessary environmental analyses[]”¹⁴³ and “shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.”¹⁴⁴ Thus, “[b]y so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.”¹⁴⁵

As described in Section 3 above that details BOEM’s clear legal errors in applying the NHPA, BOEM’s analysis of Revolution Wind’s impacts on Rhode Island’s historic and cultural resources, including the Plaintiffs’ NHLs, fell far short of NEPA’s requirements, too, rendering BOEM’s ROD arbitrary, capricious, and contrary to law.¹⁴⁶

Among other errors, and because BOEM “integrated” its NEPA and NHPA reviews so that the EIS depends on the legal correctness of BOEM’s Section 106 and Section 110(f) compliance, the EIS likewise fails to adequately consider impacts on historic and cultural resources owned by the Preservation Society and Southeast Lighthouse Foundation—including cultural assets like historic landscapes and dark night skies—as well as other historic property owners in the City of Newport’s and Block Island’s historic districts. BOEM then compounded this error by relying on vague, unrequested, and uncompleted mitigation measures that flowed from violations of Section 106 and Section 110(f) of the NHPA.¹⁴⁷ Section 3, *supra*, explains these errors in detail.

¹⁴³ *Id.*

¹⁴⁴ 40 C.F.R. § 1502.2(g).

¹⁴⁵ *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 371 (1989) (citing *Robertson*, 490 U.S., at 349).

¹⁴⁶ *See* 5 U.S.C. § 706(2).

¹⁴⁷ Cultural Heritage Partners Comments *supra* note 43; *see also* BOEMPSNC_148614 to 148616 (Cultural Heritage Partners concerns about Revised Technical Report).

By shirking its duty to ensure that adverse effects to historic properties are analyzed, considered, and mitigated to the maximum degree possible during its environmental review process—and by depending on flawed NHPA analyses for the reasons discussed in Section 3 above to satisfy NEPA—BOEM unlawfully committed to approving Revolution Wind before fully resolving adverse effects to historic properties.¹⁴⁸ Therefore, BOEM failed to comply with NEPA’s requirements concerning the timing of its environmental analysis as well as NEPA’s requirements to consider impacts to historic and cultural properties and mitigate those impacts, thereby seriously impeding the degree to which BOEM’s planning and decisions could reflect environmental values.¹⁴⁹

4.2 The EIS Fails to Consider Cumulative Effects on Historic and Cultural Resources as Required by the National Environmental Policy Act

Because Congress wanted the American public to understand the effects that federally permitted projects would have on the environment, including impacts that flow from or are connected to a development project and are additive, NEPA regulations require that an EIS include an analysis of “[c]umulative actions [that] when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement”¹⁵⁰ and “[s]imilar actions [that] when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together.”¹⁵¹ This cumulative impact requirement ensures that agencies consider

¹⁴⁸ 42 U.S.C. § 4332(C).

¹⁴⁹ *Metcalf v. Daley*, 214 F.3d 1135, 1143–44 (9th Cir. 2000) (citing *Save the Yaak Committee v. Block*, 840 F.2d 714, 718–19 (9th Cir. 1988)).

¹⁵⁰ 40 C.F.R. § 1508.25(a)(2).

¹⁵¹ 40 C.F.R. § 1508.25(a)(3).

the collective effects of individually minor but related actions over time when analyzing the environmental impacts of a proposed government action.¹⁵²

The cumulative impact is

the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.¹⁵³

Here, BOEM's EIS improperly analyzes the impacts of Revolution Wind as though they were isolated. But Revolution Wind is merely part of the much larger Deepwater Wind Project that, together with the adjacent South Fork Wind and Sunrise Wind, will fill the ocean panorama from the Preservation Society's and Southeast Lighthouse Foundation's historic properties with hundreds of giant turbines standing nearly twice the height of the Washington Monument or a New York City skyscraper and covering thousands of acres of ocean surface.

Notwithstanding the fact that BOEM conducted environmental reviews for South Fork Wind, Revolution Wind, and Sunrise Wind in an overlapping sequence and in some cases simultaneously—all Orsted-led projects—BOEM effectively treated each one in a vacuum because BOEM never presented the public a full picture of what the cumulative impacts of these and other reasonably foreseeable wind farms would actually look like—and relied on inadequate visual simulations for the reasons discussed above.¹⁵⁴ When fully built out, these three Orsted projects (Revolution, South Fork, and Sunrise) will present an uninterrupted vista of giant

¹⁵² *Accord Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1314 (D.C. Cir. 2014). (“The justification for the rule against segmentation is obvious: it “prevent[s] agencies from dividing one project into multiple individual actions each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.”) (quoting *NRDC v. Hodel*, 865 F.2d 288, 297 (D.C. Cir.1988)).

¹⁵³ 40 C.F.R. § 1508.7.

¹⁵⁴ See Section 3.3, *supra*.

windmills sprawling across the ocean and marring the formerly pristine ocean context connected to the Preservation Society's and Southeast Lighthouse Foundation's NHLs.

But, instead of analyzing BOEM's action as authorization of the massive 200-plus-turbine installation as a whole it will be when completed, which BOEM should have done in its review of South Fork, BOEM repeated its South Fork mistakes by effectively limiting its review to Revolution Wind's 96 turbines alone as if South Fork Wind's and Sunrise Wind's 100-plus turbines did not exist. Yet BOEM had full or close to full information about all three Orsted projects at or about the same time which the Federal Infrastructure Permitting Dashboard makes clear.¹⁵⁵ BOEM's approach defies common sense.

NEPA regulations are supposed to ensure that an agency cannot "impermissibly segment its NEPA analysis" by "dividing one project into multiple individual actions each of which individually has an insignificant environmental impact, but which collectively have a substantial impact."¹⁵⁶ Because BOEM segmented Revolution, South Fork, and Sunrise Wind for separate analysis, and failed to analyze the cumulative effects of Revolution Wind—that is, "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions"¹⁵⁷—the EIS failed to comply with NEPA's requirement to fully inform BOEM

¹⁵⁵ For example, compare overlapping development timelines for South Fork Wind, Revolution Wind, and Sunrise Wind under BOEM's review at the same time: Revolution Wind (<https://www.permits.performance.gov/permitting-project/fast-41-covered-projects/revolution-wind-farm-project>); South Fork Wind (<https://www.permits.performance.gov/permitting-project/fast-41-covered-projects/south-fork-wind-farm-and-south-fork-export-cable>); and Sunrise Wind (<https://www.permits.performance.gov/permitting-project/fast-41-covered-projects/sunrise-wind-farm>).

¹⁵⁶ *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1326 (D.C. Cir. 2015).

¹⁵⁷ 40 C.F.R. § 1508.7.

and the public of Revolution Wind’s “significant impacts on the human environment[.]”¹⁵⁸

Therefore, BOEM’s ROD was arbitrary, capricious, and contrary to law.

CONCLUSION

For the reasons stated above, the Preservation Society and Southeast Lighthouse ask this Court to grant their Motion for Summary Judgment, vacate the BOEM’s approvals and permits for Revolution Wind, and remand the matter to BOEM for further proceedings consistent with the NHPA and NEPA.¹⁵⁹

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Respectfully submitted,

s/ William J. Cook
William J. Cook, Bar No. SC0009
CULTURAL HERITAGE PARTNERS, PLLC
2101 L St. NW; Ste. 300
Washington, DC 20037
(202) 567-7594
will@culturalheritagepartners.com
Attorneys for Plaintiffs Preservation Society of
Newport County and Southeast Lighthouse
Foundation

¹⁵⁸ 42 U.S.C. § 4332(C)(2).

¹⁵⁹ Remand with vacatur is the presumptively appropriate remedy for violations of the APA. 5 U.S.C. § 706(2). The rare circumstances justifying remand without vacatur are not present here because Plaintiffs’ claims identify serious deficiencies at the heart of BOEM’s decision-making process and because vacatur will not disrupt BOEM’s statutory mission. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150 (D.C. Cir. 1993).