UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ALLCO RENEWABLE ENERGY LIMITED, *et al.*, Plaintiffs, vs. DEBRA HAALAND, *et al.*, Defendants.	Civil Action No. 1:21-cv-11171-IT Hon. Indira Talwani

MEMORANDUM OF LAW IN SUPPORT OF
VINEYARD WIND 1 LLC'S MOTION FOR JUDGMENT ON THE PLEADINGS

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Vineyard Wind 1 LLC ("Vineyard Wind" or "Company") hereby submits this Memorandum of Law in Support of its Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure and Local Rule 7.1.[1]

The Plaintiffs, developers of small-scale solar energy projects, sued to block construction and operation of the Vineyard Wind 1 Project (the "Project") using federal environmental and wildlife laws. This Project would be the nation's first large-scale (800 megawatt) offshore wind energy project, located in the Outer Continental Shelf approximately fourteen miles south of Martha's Vineyard. Plaintiffs Allco Renewable Energy Limited and Allco Finance Limited (collectively, "Allco") and owner, Thomas Melone, would have this Court vacate the Project's federal approvals because the Defendants allegedly violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq.*, the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq.*, and the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, and the Administrative Procedure Act. 5 U.S.C. § 706. However, Plaintiffs are not entitled to that or any other relief.

Plaintiffs failed to plead a cognizable injury that would confer Article III standing. Nor do their interests fall within the zone of interests of the MMPA, NEPA, or the CWA. Further, several of Plaintiffs claims should also be dismissed for a failure to state a claim.

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[1] Vineyard Wind filed its answer to the amended complaint on March 9, 2022. It avoided filing a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) in order to review the Defendants' Motion to Dismiss, Doc. No. 64 (Mar. 9, 2022) ("Defendants' Motion to Dismiss") and avoid raising duplicative arguments. Therefore, since "the pleadings are closed," Vineyard Wind is filing this motion for judgment on the pleadings at a time that is "early enough not to delay trial." Fed. R. Civ. P. 12(c).

STANDARD OF REVIEW

"A motion for judgment on the pleadings is treated much like a Rule 12(b)(6) motion to dismiss." *Perez-Acevedo v. Rivero Cubano*, 520 F.3d 26, 29 (1st Cir. 2008). Accordingly, Vineyard Wind's motion is governed by the same legal standards as the Defendants' Motion to Dismiss. Doc. No. 65 at 4-5.

ARGUMENT

I. Plaintiffs Lack Article III Standing

The Amended Complaint's allegations that Mr. Melone's observes birds near his vacation home and has gone on far-flung whale watching trips outside of the Project area cannot establish standing. Nor can Plaintiffs plead a plausible injury by speculating about future storms.[2]

A. Mr. Melone Lacks Standing for Aesthetic and Recreational Harms

Standing for environmental injuries requires a "geographic nexus" to the area affected by an agency action. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 565-66 (1992) ("a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area … 'in the vicinity' of it."); *Fla. Audubon Soc'y v. Benson*, 94 F.3d 658, 662 (D.C. Cir. 1996) (plaintiff must establish "a geographic nexus between the harm they asserted" and the lands that it uses). The First Circuit also recognizes this requirement without using the "geographic nexus" label. *See*, *e.g.*, *Save Our Heritage, Inc. v. FAA*, 269 F.3d 49, 55 (1st Cir. 2001) (neighboring land owners "would be affected by both noise and air pollution, given their function

[2] Vineyard Wind adopts by reference the arguments on standing, and all other grounds for dismissal, made in Defendants' Memorandum in Support of Federal Defendants' Motion to Dismiss the First Amended Complaint. Doc. No. 65 (Mar. 9, 2022) at 5-9; *see also* See Intervenor-Defendant Vineyard Wind 1 LLC's Notice of Joinder in Defendants' Motion to Dismiss, Doc No. 69 (Mar. 14, 2022). In order to conserve the resources of the Court and the parties, this Motion raises only issues that the Motion to Dismiss did not raise or where Vineyard Wind may contribute an additional point of argument.

and proximity to" airport where FAA authorized new passenger services); *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 27 (1st Cir. 2007) (plaintiffs challenging construction of industrial facility "not only live very near" the site, "but they also use the land and surrounding waters for a variety of ceremonial and community purposes.").

Mr. Melone's interest in watching various bird species at Little Beach near his vacation home in Edgartown, Amended Complaint, Doc. No. 58 ("AC") ¶¶ 17, 18, lacks this necessary geographic nexus. Mr. Melone alleges he observes various birds "from inside the house, outside the house on land and from Eel Pond and the Nantucket Sound," *id.* ¶ 17, not at the Project Area which is approximately 19 miles away (as the bird flies).[3] Nor has Mr. Melone pursued his new-found interest in North Atlantic right whales anywhere near the Project area. Mr. Melone has looked for North Atlantic right whales from a Ritz Carlton hotel room in Fernandina Beach, Florida, *id.* ¶ 24, approximately 934 miles south of the Project area[4] and attended New England Aquarium's Whale Watch Cruise, *id.*, but did not allege where this cruise ventures. In fact, the New England Aquarium's Whale Watch Cruise leaves from Boston Harbor and goes to the Stellwagen Bank National Marine Sanctuary,[5] approximately 91 miles north of the Project Area.[6]

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[3] Exh. A, Vineyard Wind Lease area to Little Beach. The Court may take judicial notice of distances as calculated by well known websites, such as Google Earth. *See Saco v. Tug Tucana Corp.*, 483 F. Supp. 2d 88, 93 n.4 (D. Mass. 2007) (taking judicial notice of the driving distances between various relevant points based on mapquest.com).

[4] Exh. B., Vineyard Wind Lease Area to The Ritz Carlton, Amelia Island, FL.

[5] Under Federal Rule of Evidence 201(b)(2), the Court may take judicial notice of any "fact that is not subject to reasonable dispute because it … can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." The New England Aquarium's public statement of where its Whale Watch Cruise goes, https://www.neaq.org/exhibits/whale-watch/, meets this standard. *See*, *e.g.*, *Delaney v. Baker*, 511 F. Supp. 3d 55 (D. Mass. 2021) (taking judicial notice of Archdiocese of Boston website providing COVID-19 protocols for parishioners); *Piper v. Talbots, Inc.*, 507 F. Supp. 3d 339, 343 (D. Mass. 2020) (taking judicial notice of Talbots, Inc.'s websites regarding frequently asked questions and credit card programs).

[6] Exh. C, Vineyard Wind Lease Area to Stellwagen Bank National Marine Sanctuary.

Mr. Melone does not allege that he has ever gone to the Project Area to watch for birds or whales. Instead, his theory is that Defendants' actions *may* reduce the number of species that *may* then travel to the places that Mr. Melone does go. *Id.* ¶¶ 18 (the Project and other wind turbines would purportedly kill birds "migratory birds … that [plaintiff] can observe on Little Beach"); 21-22 (same); 25 (potential harm to whales by the Project would purportedly "reduce his likelihood of spotting NARWs in his planned annual trips to Fernandina Beach for NARW watching"). The Supreme Court already rejected this theory.

In *Lujan*, plaintiffs had no future plans to visit the area at issue and observe endangered animals, requiring them to rely on "a series of novel standing theories," 504 U.S. at 564-65, as Mr. Melone does here. The Court rejected the "inelegantly styled 'ecosystem nexus'" theory, namely that "any person who uses any part of a 'contiguous ecosystem' adversely affected by [an agency] activity has standing even if the activity is located a great distance away." *Id.* at 565. It held that such an approach, as Mr. Melone uses here, "is inconsistent with our opinion in *National Wildlife Federation*, which held that a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it." *Id.* at 565-66 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 887-89 (1990)).

Nor can Mr. Melone establish standing on an "'animal nexus' approach, whereby anyone who has an interest in … seeing the endangered animals anywhere on the globe [may have] standing." *Id.* at 566. "It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes … an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more

specific connection." *Id.* at 567.[7] Under such a theory, a bird or whale watcher in Maine could sue to stop agency actions in Florida, Georgia, and so on up the Eastern Seaboard, because those projects may harm a whale or bird that may, someday, migrate to Maine. The Supreme Court has made clear that, without actually going to the Project Area to observe birds or whales, Mr. Melone cannot establish standing.

B. Mr. Melone's Fears of Future Hurricanes are Too Speculative and Improbable to Establish Standing

Mr. Melone also alleges standing based on an elaborate, compound hypothetical where *if* the Project was in the path of a Category 3-plus hurricane, and *if* some or all of the wind turbines were destroyed, and *if* they released oil or other contaminants, that oil *may* travel many miles northeast (apparently uninhibited by legally required spill response and abatement measures under the CWA), hook west around Chappaquiddick Island, turn south to Edgartown, and ultimately wash up on Little Beach where it may harm birds. AC ¶ 19. This is too speculative a theory to establish standing. The last Category 3 hurricane to reach Massachusetts was Hurricane Carol in 1954 (and that made landfall as a Category 2 hurricane).[8] Despite not seeing a storm of this magnitude in 68 years, Plaintiffs prophesize it "is *virtually certain* that one or more" Category 3 hurricanes will occur "over the next 30 years." *Id.* ¶ 142 (emphasis added). Even with the prospect of climate change, a hurricane of this magnitude occurring near the Project is not "virtually

[7] Even if the Supreme Court had not rejected this theory, Mr. Melone could not use it. With the exception of the Piping Plover, AC ¶ 17, he never alleges that any of the bird species named in Paragraph 17, or the North Atlantic right whales he observes in Florida or Boston, travel through the Project area. Thus, he failed to allege even the possibility that the animals he observes elsewhere could be impacted by the Project.

[8] *See* Exh. D, National Oceanic and Atmospheric Administration, Hurricane Research Division, Atlantic Oceanographic & Meteorological Lab, Continental United States Hurricane Impacts/Landfalls 1851-2020 at 5.

certain." It is "a purely theoretical possibility" of future injury that "does not rise to the level of a reasonably impending threat." *Katz v. Pershing, LLC*, 672 F.3d 64, 79 (1st Cir. 2012).

C. Plaintiffs Lack Standing to Raise Counts IV and XII

Plaintiffs' Counts IV and XII lack any obvious allegation of injury. Count IV alleges that the National Marine Fisheries Service ("NMFS") delayed publishing a public notice that it issued Vineyard Wind's Incidental Harassment Authorization. *See* AC ¶¶ 93-95 (alleging that notice published more than 10 days after issuance). Plaintiffs' Count IV simply recites a chronology of events without ever explaining how they were injured by an alleged delay in publication. With respect to such "a bare procedural violation, there may be no cognizable harm to the plaintiff and thus no" concrete injury. *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 731 (1st Cir. 2016) (internal quotations omitted). Here, Plaintiffs lack any injury to establish standing.

Count XII complains that the Final Environmental Impact Statement failed to properly analyze a laundry list of issues, including unidentified "various resource values," climate change, air quality, greenhouse gas emissions, and the Project's purported effects on the commercial fishing industry. AC ¶¶ 145-47. But Plaintiffs failed to allege a potential injury from any of these concerns. Without even an allegation of injury, Plaintiffs lack standing.

II. Allco Lacks Prudential Standing Under NEPA, the CWA, and the MMPA

In addition to lacking Article III standing, Allco lacks prudential standing to raise its NEPA, CWA, and MMPA claims. "The doctrine of standing also includes [a] prudential … requirement that 'a plaintiff's complaint fall within the zone of interests protected by the law invoked.'" *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1281 (1st Cir. 1996) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). This considers whether Congress intended that "a particular plaintiff should be heard to complain of a particular agency decision." *Impson*, 503 F.3d at 29. Allco's alleged economic injuries fall outside the zone of interests protected by each statute.

Allco's interests in this case, and those of Mr. Melone as Allco's owner, are purely economic. Plaintiffs seek to stop the Project because it would purportedly "decimate U.S. onshore renewable energy producers in the Northeastern United States, including Allco." AC ¶ 36. If the Project is stopped, Allco believes that "the New England States need [sic] for renewable energy will be fulfilled by solar and other onshore renewables, including Allco's." *Id.* Economic injuries are not within the zone of interests protected by NEPA, the CWA, or the MMPA.

NEPA promotes "efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. Economic injuries are not within NEPA's zone of interests. *See*, *e.g.*, *ANR Pipeline Co. v. FERC*, 205 F. 3d 403, 408 (D.C. Cir. 2000) (pipeline could not bring NEPA challenge to approval of a competitor's project because "suppressing competition from" a competitor is an "economic interest … not within the zone of interests protected by NEPA"); *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 274 (D.C. Cir. 2015) (plaintiffs "must assert an environmental harm in order to come within the relevant zone of interests" not "monetary interests alone") (internal quotations omitted); *Maiden Creek Assocs., L.P. v. U.S. Dep't of Transp.*, 823 F.3d 184, 194 (3rd Cir. 2016) (same) (collecting cases). Since Allco alleges no environmental harm, it lacks prudential standing under NEPA.

Similarly, with respect to the Clean Water Act, courts have denied prudential standing to plaintiffs lacking "an interest in the environment and clean water" who "do[] not seek to vindicate environmental concerns." *Dan Caputo Co. v. Russian River Cnty. Sanitation Dist.*, 749 F.2d 571, 575 (9th Cir. 1984) (quoting *Gonzales v. Gorsuch*, 688 F.2d 1263, 1268 (9th Cir. 1982)). Allco never pleads an interest in clean water, or any other interest protected by the Clean Water Act.

"The MMPA is intended to protect marine mammals so that they continue 'to be a significant functioning element in the ecosystem of which they are a part.'" *City of Sausalito v.*

O'Neill, 386 F.3d 1186, 1202 (9th Cir. 2004) (quoting 16 U.S.C. § 1361(2)). The zone of interests protected by the MMPA cover "parties with conservationist, aesthetic, recreational, or economic interests in marine mammal protection." *Id.*at 1203. Allco alleges none of these types of injuries, precluding prudential standing under the MMPA.

III. Multiple Counts Fail to State a Claim

A. Counts II and III Fail to State a Claim

Plaintiffs' facial attack on OCSLA Section 8(p)(4) as an unconstitutional delegation of legislative authority from Congress to the Secretary of the Interior – and then an unconstitutional "redelegation" of authority by the Secretary of the Interior to BOEM – fail as a matter of law. "[T]he nondelegation principle is extraordinarily difficult to violate" and the Supreme Court has not invalidated a statute on such grounds since 1935. *United States v. Martinez-Flores*, 428 F.3d 22, 27 (1st Cir. 2005); *see also United States v. Alves*, 688 F. Supp. 70, 78-79 (D. Mass. 1988) (courts use "an extremely deferential standard"). A statute is constitutional if it provides an "intelligible principle" for the agency to follow. *Id.* (citing *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)); *see also Yakus v. United States*, 321 U.S. 414, 426 (1944) (nondelegation doctrine violated if "there is an absence of standards … so that it would be impossible … to ascertain whether the will of Congress has been obeyed"); *United States v. Klubock*, 832 F.2d 664, 669 (1st Cir. 1987) (Congress need only provide "a modicum of legislative guidance.").

Here, OCSLA Section 8(p) meets the "intelligible principle" standard. "The Secretary shall ensure that" lease issuances consider 12 factors, ranging from safety to national security to providing a fair return to the taxpayer. *See generally*, 43 U.S.C. § 1337(p)(4)(A)-(L). These factors "establish[ ] the standards of legal obligation, thus performing [Congress'] essential legislative function." *ALA Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935); *see also Alves*,

688 F. Supp. at 79 (statute "indicated Congress' purpose in establishing specific standards"). The Secretary's duties under Section 8(p) do not involve making law, untethered from any Congressional guidance, but are the quintessential example of "the determination of facts to which the policy as declared by the [l]egislature is to apply." *ALA Schechter Poultry Corp*, 295 U.S. at 530. Given that there was no unlawful delegation of legislative authority from Congress to the Secretary of the Interior (Count II), there can be no unconstitutional "redelegation" of legislative authority to BOEM (Count III).

B. Counts V, XIV, and XVIII Fail to State a Claim

Count V, alleging the "scope of the objective … was unlawfully narrow," is a two-sentence legal conclusion. *See* AC ¶ 97. Similarly, Count XIV provides only a boilerplate allegation that "Defendants have failed to take a hard look at the risks to the [North Atlantic right whale]," migratory birds, "and other" unidentified "ESA-listed species." *Id.* ¶ 164. There is no explanation of what made the scope of the objective "unlawfully narrow," what "risks" the agency failed to sufficiently examine, or what "ESA-listed species" are at issue. Count XVIII alleges that unspecified "Approvals" left unspecified "measures intended to protect" unspecified "species" to be developed in the future. *Id.* ¶ 177.

All three claims lack "sufficient detail" under Federal Rule of Civil Procedure 8 to provide "fair notice of the claim and the grounds upon which it rests." *Ocasio-Hernandez v. Fortuño-Burset*, 640 F.3d 1, 8 (1st Cir. 2011). Vineyard Wind and Defendants should not be left "to forage in forests of facts, searching at their peril for every legal theory that a court may some day find lurking in the penumbra of the record. Under the Civil Rules, notice of a claim is a defendant's entitlement, not a defendant's burden." *Rodriguez v. Doral Mortg. Corp.*, 57 F.3d 1168, 1172 (1st Cir. 1995). Without some further understanding of the alleged violations, Vineyard Wind and Defendants lack "adequate notice … and a meaningful opportunity to mount a defense."

Rodriguez, 57 F.3d at 1172. Therefore, the Court should grant Defendants judgment on Counts V and XVIII for failure to state a claim.

C. Plaintiffs Fail to State a Claim for Violations of Corps Guidelines

Plaintiffs' Counts VIII and IX erroneously claim that the U.S. Army Corps of Engineers ("Corps") violated the Clean Water Act 404(b)(1) Guidelines.

1. *Count VIII Cannot Rely on a General Policy Statement*

Count VIII's claim that the Corps violated 40 C.F.R. § 230.1(c), AC ¶¶ 122-24, has no legal basis. Section 230.1 is titled "Purpose and policy" and § 230.1(c) lays out the general "precept that dredged or fill material should not be discharged into the aquatic ecosystem" where it would have "an unacceptable adverse impact." "[A] general statement of policy is one that does not impose any rights [or] obligations." *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (internal quotations omitted); *see also Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251-52 (D.C. Cir. 2014) (a "general statement of policy … merely explains how the agency will enforce a statute or regulation" or "exercise its broad … permitting discretion under some extant statute or rule"). Because 40 C.F.R. § 230.1(c) is merely a policy statement that does not impose binding legal obligations on the Corps, Count VIII should be dismissed.

2. *Count IX Fails to State a Claim*

Count IX alleges that the Corps' public interest evaluation under 33 C.F.R. § 320.4 failed to consider issues that are either not required by the regulation or for which Plaintiffs lack standing. First, nothing in the regulation requires the Corps to analyze the "electricity supply and alternatives to meet renewable energy demand" or "potential competitive effects on United States onshore based generators" of electricity (meaning, the Plaintiffs' own businesses). AC ¶¶ 128-29. The regulation defines "the public interest" factors the Corps must examine. Plaintiffs do not identify any specific factor listed in 33 C.F.R. § 320.4 that would require analyses of alternative renewable

energy sources or competitive effects on their businesses and they are not free to add new factors to the public interest analysis.

Second, Plaintiffs allege that the Corps' public interest analysis inadequately considered greenhouse gas emissions "and other" unspecified "resource values." AC ¶ 129. Plaintiffs not only lack standing to raise either concern, *see* Section I.C., *supra*, but they fail to even identify the "resource values" at issue. Thus, even if Plaintiffs had standing to raise portions of Count IX, the Amended Complaint fails to state a claim. *See*, *e.g.*, *Rodriguez*, 57 F.3d at 1172 (allegations must provide fair notice for the preparation of a defense).

D. Count XVI Fails to Plead an ESA Violation

Count XVI's fails to allege an unlawful "take" of a listed species. To "take" a listed species "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19). An "incidental take" may be authorized after consultation with the appropriate federal agency. 16 U.S.C. § 1536(b)(4). Plaintiffs' claim that the incidental takes authorized by Defendants are actually unlawful "knowing and intentional" takes "because [they are] practically certain to occur." AC ¶ 170. This is not how an "incidental take" is defined under the Endangered Species Act.

An incidental taking is one that "is incidental to, and *not the purpose of*, the carrying out of *an otherwise lawful activity*." 16 U.S.C. § 1539(a)(1)(B) (emphases added). By contrast, an unlawful "intentional take" would be a deliberate act intended to kill or harm a listed species. *See*, *e.g.*, *Babbitt v. Sweet Home Chapter Communities for Greater Oregon*, 515 U.S. 687, 700-01 (1995) ("No one could seriously request an 'incidental' take permit to avert [Endangered Species Act] liability for direct, deliberate action against a member of an endangered or threatened species…."); *United States v. McKittrick*, 142 F.3d 1170, 1177 (9th Cir. 1998) ("McKittrick cannot qualify for the incidental take exception. He deliberately shot the wolf; he did not kill it

unintentionally in the course of some other activity. The incidental take exception does not apply to 'deliberate action.'"). The Amended Complaint does not allege that Vineyard Wind is constructing offshore wind turbines for "the purpose of" taking any listed species. Even if Plaintiffs were correct that a take "is practically certain to occur," AC ¶ 170, it would still be an incidental take. *See Babbitt*, 515 U.S. at 700 ("Congress had in mind foreseeable rather than merely accidental effects on listed species.") (footnote omitted). Because Plaintiffs failed to allege that Vineyard Wind is acting for the purpose of taking a listed species, Count XVI fails to state a claim.

E. Plaintiffs' Second Count XVIII Fails to Allege a Violation of Either the Endangered Species Act or the Administrative Procedure Act[9]

Plaintiffs' claim that Defendants violated the Endangered Species Act by issuing Vineyard Wind approvals before NMFS issued a second Biological Opinion, AC ¶¶ 180-81, is baseless. First, Plaintiffs failed to allege an actual violation of the Endangered Species Act. Second, there is no legal authority for Plaintiffs' theory that Defendants must "affirm[ ] or revis[e] their approvals" based on a new Biological Opinion. *Id.* ¶ 180.

1. *Plaintiffs Fail to Allege Any Improper Commitment of Resources During the Pendency of the Second Biological Opinion*

Section 7(d) of the Endangered Species Act, 16 U.S.C. § 1536(d), only prohibits actions that "make any irreversible or irretrievable commitment of resources … which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures." *See also Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 177 (D.C. Cir. 2017) (quoted in AC ¶ 181) (agencies must "consult with certain wildlife services before taking any action that 'may affect' an endangered species or its habitat."). Plaintiffs, however, identify no action taken by the Defendants or Vineyard Wind that made an "irreversible or irretrievable

[9] The Amended Complaint contains two counts denominated as "Count XVIII."

commitment of resources" that "foreclos[ed] the formulation or implementation of any reasonable and prudent alternative measures," 16 U.S.C. § 1536(d), *before* NMFS issued the new Biological Opinion. This Court previously declined to halt the actual *construction* of a sewage discharge tunnel prior to the completion of a Biological Opinion because it would "not preclude the development of reasonable and prudent alternatives." *Bays' Legal Fund v. Browner*, 828 F. Supp. 102, 112 (D. Mass. 1993). Plaintiffs identify nothing about the mere issuance of approvals that would have a more preclusive effect. *See Oceana v. BOEM*, 37 F. Supp. 3d 147, 175-76 (D.D.C. 2014) ("While the plaintiffs argue that under the ESA, BOEM had to *complete* its consultation with the NMFS before it issued its Record of Decision for Lease Sales 216/222 and 218, neither the ESA nor the case law interpreting the ESA require completion of a [Biological Opinion] before action in all instances.").

2. *Count XVIII's Alleged Endangered Species Act Violation is Moot*

The alleged Endangered Species Act violation is moot because the second Biological Opinion has already issued. "A case is moot when the issues are no longer live or the parties no longer have a legally cognizable interest in the outcome" or "when the court cannot give any 'effectual relief' to the … prevailing party." *Horizon Bank & Tr. Co. v. Massachusetts*, 391 F.3d 48, 53 (1st Cir. 2004). Here, the Endangered Species Act prohibits the "irreversible or irretrievable commitment of resources" *prior to* the issuance of a Biological Opinion. NMFS has already issued the "New VW Biop." AC ¶ 180. This interregnum between the Biological Opinions has passed without any allegation that Defendants or Vineyard Wind took some action to "foreclos[e] the formulation or implementation of any reasonable and prudent measures" in the new Biological Opinion. 16 U.S.C. § 1536(d). The Court cannot provide any relief, such as barring an "irreversible or irretrievable commitment of resources" until NMFS issues the new Biological Opinion, because that time has already passed. *See Strahan v. Linnon*, 967 F. Supp. 581, 590 (D. Mass. 1997) ("the

claim against the 1995 Biological Opinion is now moot because the 1995 Biological Opinion is no longer in effect and 'the challenged actions are now water over the spillway, as it were.'") (quoting *Idaho Dep't of Fish & Game v. NMFS*, 56 F.3d 1071, 1074 (9th Cir. 1995)).

3. *Plaintiffs Fail to State a Claim Under the Administrative Procedure Act*

There is no legal authority supporting Plaintiffs' theory that Defendants must "take new agency action" based on the second Biological Opinion, AC ¶ 183, by which they appear to mean that Defendants should rescind and then re-issue every approval they challenge here. *Id.* ¶ 180. Plaintiffs appear to presume that some unidentified "approval" or "Approvals" were "based upon the Old VW Biop," *id.*, but declined to name which approval or approvals those are, or allege that the second Biological Opinion reached a different conclusion than the first. In other words, Plaintiffs assume, without actually alleging, that the underlying basis for any "approval" changed.

This makes the Amended Complaint's citation of *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020) inapposite. There, after a court remanded a decision to rescind a policy memorandum for further explanation, the Secretary of Homeland Security "chose to elaborate on the reasons for the initial rescission rather than take new administrative action." *Id.* at 1908. The Court found that, because "she was limited to the agency's original reasons," creating a new rationale to justify the rescission was an impermissible *post hoc* rationalization created for litigation purposes. *Id.* at 1908-09. Here, however, Plaintiffs have not identified any change in the second Biological Opinion that could have altered the rationale supporting any permit or authorization. In other words, while it is true that the Administrative Procedure Act requires an agency provide a "reasoned explanation for [a] change of direction," *NLRB v. Lily Transp. Corp.*, 853 F.3d 31, 36 (1st Cir. 2017), Plaintiffs failed to allege a "change of direction." Without such a change, Plaintiffs cannot state a claim.

CONCLUSION

For the foregoing reasons, Intervenor-Defendants' Motion for Judgment on the Pleadings should be granted.

Dated: March 14, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th of March 2022, a true and complete copy of the foregoing has been filed with the Clerk of the Court pursuant to the Court's electronic filing procedures, and served on Plaintiffs' counsel of record via the Court's electronic filing system and served on anticipated counsel for Defendants via electronic mail.

Dated: March 14, 2022

/s/ Jack W. Pirozzolo
Jack W. Pirozzolo