UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ACK RESIDENTS AGAINST TURBINES, *et al.*, Plaintiffs, v. U.S. BUREAU OF OCEAN ENERGY MANAGEMENT, *et al.*, Defendants, and VINEYARD WIND 1 LLC Intervenor-Defendant.	Case No. 1:21-cv-11390-IT Hon. Indira Talwani REQUEST FOR ORAL ARGUMENT

VINEYARD WIND 1 LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS NANTUCKET (ACK) RESIDENTS AGAINST TURBINES AND VALLORIE OLIVER'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION AND SUMMARY 1

I. Factual Background 1

II. LEGAL BACKGROUND AND STANDARD OF REVIEW 2

III. PLAINTIFFS LACK STANDING 2

A. Plaintiffs Must Establish Article III Standing 2

B. Plaintiffs Lack Standing to Raise NEPA Claims Regarding Air Issues 3

IV. THE BIOP COMPLIES WITH THE ENDANGERED SPECIES ACT 6

A. Area 537 Does not Present an Unusual Threat to Right Whales 6

B. The BiOp Considered and Rejected Plaintiffs' Operational Noise Study 9

C. The BiOp Established a Well-Supported Environmental Baseline for Its Right Whale Analysis 11

1. Plaintiffs Raise no Substantive Dispute With the Baseline Discussion of Vessel Traffic 11

2. Plaintiffs Identify no Relevant Take Authorizations 12

D. The Record Amply Supports Vineyard Wind's Reasonable and Prudent Measures to Minimize Right Whale Impacts 12

1. Invalidating a Reasonable and Prudent Measure Does not Affect the "No Jeopardy" Determination 12

2. Plaintiffs' Allegations of Harm to Right Whales from Pile Driving are Contradicted by the Record 13

3. Plaintiffs Misunderstand the "Soft Start" Procedure and Their Objections Have no Record Support 15

4. The 'Soft Start' Process is not an Intentional Take 16

5. Using Protected Species Observers is a Well-Established Means of Reducing Risk to Right Whales 17

6. Passive Acoustic Monitoring Reliably Locates Right Whales 18

7. Crew Transfer Vessels May Exceed 10 Knots Only Under Certain Conditions 20

V. PLAINTIFFS' COMPLAINTS ABOUT REDACTED AIR QUALITY INFORMATION ARE BARRED AND, IF CONSIDERED, ARE CONTRADICTED BY THE RECORD 21

A. Plaintiffs' Claims are Barred by the Doctrine of Administrative Waiver 22

B. The Referenced Construction and Operations Plan Included Unredacted Emissions Data 23

VI. VINEYARD WIND IS ENTITLED TO SUMMARY JUDGMENT ON ALL CLAIMS RAISED IN PLAINTIFFS' COMPLAINT BUT NOT IN PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. EPA,
38 F.3d 43 (1st Cir. 1994) 22

Babbitt v. Sweet Home Ch. Communities for Greater Or.,
515 U.S. 687 (1995) 17

Balt. Gas & Elec. Co. v. Nat. Res. Def. Council,
462 U.S. 87 (1983) 11

Blue Water Fishermen's Ass'n v. NMFS,
226 F. Supp. 2d 330 (D. Mass. 2002) 11

Bos. Redev. Auth. v. Nat'l Park Serv.,
838 F.3d 42 (1st Cir. 2016) 25

Cook Inletkeeper v. Raimondo,
541 F. Supp. 3d 987 ..... 18, 19

Corrada Betances v. Sea-Land Serv., Inc.,
248 F.3d 40 (1st Cir. 2001) 25

Ctr. for Biological Diversity v. NMFS,
977 F. Supp. 2d 55 (D.P.R. 2013) 10

De Giovanni v. Jani-King Int'l, Inc.,
968 F. Supp. 2d 447 (D. Mass. 2013) 10

Dubois v. U.S. Dep't of Agric.,
102 F.3d 1273 (1st Cir. 1996) 3

Grenier v. Cyanamid Plastics, Inc.,
70 F.3d 667 (1st Cir. 1995) 25

Heinrich v. Sweet,
308 F.3d 48 (1st Cir. 2002) 4

Intertribal Sinkyone Wilderness Council v. NMFS,
970 F. Supp. 2d 988 (N.D. Cal. 2013) 18

Jackson v. Johnson & Johnson,
330 F. Supp. 3d 616 (D. Mass. 2018) 4, 5

Libertad v. Welch,
53 F.3d 428 (1st Cir. 1995) 3

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 3

Mass. Dep't of Pub. Welfare v. Sec'y of Agric.,
984 F.2d 514 (1st Cir. 1993) 23

Nat'l Wildlife Fed'n v. EPA,
286 F.3d 554 (D.C. Cir. 2002) 22

NRDC, Inc. v. Winter,
530 F. Supp. 2d 1110 (C.D. Cal, 2008) 19, 20, 21

Ocean Mammal Inst. v. Gates,
546 F. Supp. 2d. 960 (D. Haw. 2008) 16

Pac. Shores Subdiv. Cal. Water Dist. v. U.S. Army Corps of Eng'rs,
538 F. Supp. 2d 242 (D.D.C. 2008) 11

Padgett v. Surface Transp. Bd.,
804 F.3d 103 (1st Cir. 2015) 22

Pagán v. Calderón,
448 F.3d 16 (1st Cir. 2006) 2

Photographic Illustrators Corp. v. Orgill, Inc.,
118 F. Supp. 3d 398 (D. Mass. 2015) 10

Pyramid Lake Paiute Tribe v. U.S. Dep't of Navy,
898 F.2d 1410 (9th Cir. 1990) 12

Strahan v. Linnon,
967 F. Supp. 581 (D. Mass. 1997) 18

Strahan v. Roughead,
910 F. Supp. 2d 358 (D. Mass. 2012) 17

Town of Winthrop v. FAA,
535 F.3d 1 (1st Cir. 2008) 2

United States v. AVX Corp.,
962 F.2d 108 (1st Cir. 1992) 2

United States v. McKittrick,
142 F.3d 1170 (9th Cir. 1998) 17

Statutes

5 U.S.C. § 551, *et seq.* 1

5 U.S.C. § 706 25

16 U.S.C. § 1361, *et seq* 17

16 U.S.C. § 1531, *et seq.* 1

16 U.S.C. § 1532 14

16 U.S.C. § 1536 13

16 U.S.C. § 1539 17

42 U.S.C. § 4321, *et seq.* 1

42 U.S.C. § 7627 ..... 5, 6

Other Authorities

50 C.F.R. § 402.02 13

50 C.F.R. § 402.14 ..... 13, 14

U.S. Fish & Wildlife Serv., Endangered Species Act Consultation Handbook (Mar. 1998) 13, 14

INTRODUCTION AND SUMMARY

Plaintiffs Nantucket (ACK) Residents Against Turbines ("ACK RATs"), a non-profit corporation, and Plaintiff Vallorie Oliver (collectively, "Plaintiffs") argue in Plaintiffs Nantucket (ACK) Residents Against Turbines and Vallorie Oliver's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, Doc. No. 89 (July 25, 2022) that the Federal Defendants violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.* in issuing a Biological Opinion ("BiOp") and a Final Environmental Impact Statement ("Final EIS") for constructing and operating the Vineyard Wind 1 LLC ("Vineyard Wind") offshore wind energy project (the "Project").

Vineyard Wind hereby incorporates by reference the arguments presented in Federal Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, and in Support of Cross-Motion, Doc. No. 96 (Sept. 8, 2022) ("Defendants' Opposition") and presents the following arguments as a supplement to Defendants' Opposition. First, Plaintiffs lack Article III standing with respect to Project-related air emissions because they present no evidence that those emissions would cause them a concrete and particularized injury. Second, Plaintiffs' Endangered Species Act claims fail on the merits. In particular, Plaintiffs' arguments regarding NMFS Statistical Area 537, operational turbine noise, and the environmental baseline used during ESA consultation lack a record basis. Third, Vineyard Wind's minimization measures for right whales are amply supported by the record and the record also shows that certain air emissions data were not redacted from the public record.

I. Factual Background

Vineyard Wind adopts by reference the factual background presented in Defendants' Opposition. Doc. No. 96 at 1–2.

II. LEGAL BACKGROUND AND STANDARD OF REVIEW

Vineyard Wind adopts by reference the Legal Background and Standard of Review sections presented in Defendants' Opposition. Doc. No. 96 at 2–6.

III. PLAINTIFFS LACK STANDING

Neither Plaintiff has established a cognizable injury from potential harms to right whales or from air emissions related to the Vineyard Wind offshore wind energy project (the "Project"). As a result, both Plaintiffs lack standing. In addition to the Federal Defendants' argument that Plaintiff Vallorie Oliver and Declarant Amy DiSibio cannot establish standing for potential injuries to right whales, which Vineyard Wind incorporates by reference, Plaintiffs also lack standing to raise NEPA claims for air emissions related to the Project.

A. Plaintiffs Must Establish Article III Standing

"If a party lacks standing to bring a matter before the court, the court lacks jurisdiction to decide the merits of the underlying case." *United States v. AVX Corp.*, 962 F.2d 108, 113 (1st Cir. 1992). To establish standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984) (alteration in original)). At least one plaintiff must demonstrate standing for each claim raised. *Pagán v. Calderón*, 448 F.3d 16, 26 (1st Cir. 2006).

NEPA plaintiffs must allege a "procedural injury." *Town of Winthrop v. FAA*, 535 F.3d 1, 6 (1st Cir. 2008). In "procedural injury" cases, a plaintiff must still demonstrate "an injury-in-fact to a cognizable interest" with "a causal link between that injury and respondent's action, and a likelihood that the injury could be addressed by the requested relief." *Id.* This means that "petitioners must show 'that the government act performed without the procedure in question'"

such as a NEPA review, "will cause a distinct risk to a particularized interest of the plaintiff." *Id.* (quoting *City of Dania Beach v. FAA*, 485 F.3d 1181, 1185 (D.C. Cir. 2007)).

"The burden falls on the plaintiff 'clearly to allege facts demonstrating that he is a proper party to invoke' federal jurisdiction." *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1281 (1st Cir. 1996) (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). To establish the "elements of standing at the summary judgment stage of a proceeding, a plaintiff cannot rest on mere allegations, *but must set forth by affidavit or other evidence specific facts* which for purposes of the summary judgment motion will be taken to be true." *Libertad v. Welch*, 53 F.3d 428, 436 (1st Cir. 1995) (emphasis added), *abrogation on other grounds recognized by United States v. Velazquez-Fontanez*, 6 F.4th 205 (1st Cir. 2021); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563 (1992) (at summary judgment "respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened" by the government action "but also that one or more of respondents' members would thereby be 'directly' affected"). Although Plaintiffs have the burden to establish standing, their Motion presents no argument on the issue. On that basis alone the Court should hold that Plaintiffs lack standing.

B. Plaintiffs Lack Standing to Raise NEPA Claims Regarding Air Issues

Plaintiff ACK RATs is a non-profit corporation representing the interests of its members, including Ms. Oliver and Ms. DiSibio. Vineyard Wind's Statement of Additional Undisputed Material Facts ("VWSOF") ¶¶ 1–2, 7. Ms. Oliver resides at an unspecified location on Nantucket Island and is a founding member of ACK RATs. *Id.* ¶¶ 2–3. Ms. DiSibio also resides at an unspecified location on Nantucket Island and is a member of ACK RATs. *Id.* ¶¶ 7–8. Plaintiffs' Motion argues that the Draft EIS lacked information on air quality and the FEIS inadequately analyzed the impacts of direct and indirect air pollutant and greenhouse gas emissions. Doc. No. 89 at 43–45. Yet, Plaintiffs provided no evidence that ACK RATs' members could be injured by

such alleged impacts. Although Plaintiffs submitted declarations by Ms. Oliver and Ms. DiSibio, neither declaration mentions air quality or greenhouse gas emissions. VWSOF ¶¶ 4,9. The Final EIS states that the Project may generate air emissions affecting three Massachusetts counties and "offshore Nantucket only." *Id.* ¶ 27. Ms. Oliver and Ms. DiSibio never state that they live in, or will regularly travel to, any area that may be affected by the Project's air emissions. *Id.* ¶¶ 5, 10.

Even if they did, that would not be enough for Article III standing. Demonstrating that one is actually affected by a specific source of air pollutant emissions requires expert testimony. *See Heinrich v. Sweet*, 308 F.3d 48, 61 (1st Cir. 2002) (where a subject "is not a topic of common experience; it requires expert testimony"); *Jackson v. Johnson & Johnson*, 330 F. Supp. 3d 616, 625 (D. Mass. 2018) ("Without such expert testimony, 'a fact finder would have no basis other than conjecture, surmise, or speculation upon which to conclude that the injuries of which [a plaintiff] complains were cause by the impact' of the Defendants'" actions) (quoting *Pritchard v. Stanley Access Techs., LLC*, 2011 WL 309662, at *5 (D. Mass. Jan. 27, 2011) (alteration in original)). The Plaintiffs have not provided any such expert testimony.

Even if Ms. Oliver and Ms. DiSibio had actually claimed they will be harmed by air emissions, there is no indication that either declarant is qualified to provide such evidence. VW SOF ¶¶ 6, 11. Air emission impacts, such as whether emissions will travel to where one lives, works, or recreates, and whether they could injure a person, is not a topic of common experience. "Evaluating impacts of air emission sources requires substantial knowledge of the science, methodologies and tools that are employed for this purpose." *Id.* ¶ 31 (Declaration of air modeling expert Shari Libicki). Although exposure to air pollutant emissions can lead to potential health and environmental impacts, *id.* ¶ 30, one must first determine whether a person, or area, is exposed to those emissions. *Id.* ¶ 32. Plaintiffs cannot simply assume exposure to air pollutant emissions 14

miles or more away.[1] *Id.* ¶¶ 33–34 ("The Plaintiffs have not asserted any potential air quality impacts and could not do so by simply reviewing the materials provided in the COP appendix or Final EIS."). Understanding exposure first requires air quality dispersion modeling. *Id.* ¶ 34. "An air quality dispersion model uses mathematical techniques to simulate the air and chemical processes that affect air pollutants as they disperse and react in the atmosphere." *Id.* ¶ 35 (internal quotations omitted). This modeling requires "[c]omplex data sets … including meteorological data (a historical record of wind speed, wind direction, atmospheric stability, temperatures, and other meteorological parameters)" as well as "the location, configuration, and emission patterns of the emissions sources." *Id.* This type of modeling is commonly performed pursuant to a set of publicly available standards established by EPA called "Appendix W." *Id.* ¶ 36. Plaintiffs, however, have not provided any evidence, expert or otherwise, that could allow the Court to conclude that they will be exposed to, much less injured by, the Project's air pollutant emissions.

Moreover, the Final EIS shows that residents of Nantucket Island are not likely to be harmed by air pollutant emissions. Unredacted information provided in Vineyard Wind's Construction and Operations Plan ("COP") describes the emission calculations methods and models, the equations used to calculate that information, emissions factors derived from the BOEM Emissions Estimating Tool, an emissions summary for each phase (construction, operations, and maintenance) covering criteria pollutants, other regulated pollutants, hazardous air pollutants and greenhouse gases submitted to obtain an Outer Continental Shelf air permit. *Id.* ¶ 23.[2] Using this

[1] Neither Ms. Oliver nor Ms. DiSibio identified where on Nantucket Island they live, VWSOF ¶¶ 3, 8 meaning that any Project-related air pollutants may need to travel more than 14 miles to reach them. *Id.* ¶ 33.

[2] The air permit is required under the Clean Air Act. 42 U.S.C. § 7627. The U.S. Environmental Protection Agency issued a draft air permit for Vineyard Wind on June 28, 2019 and sought public comment. VWSOF ¶ 19. Plaintiffs did not submit comments. *Id.* ¶ 21. EPA issued a final air permit to Vineyard Wind on May 19, 2021. *Id.* ¶ 20.

information, the Final EIS concluded that the air quality impacts of the Proposed Action are *negligible to minor* and *minor beneficial* and that "BOEM does not anticipate projected air quality impacts to exceed the" National Ambient Air Quality Standards for surrounding onshore areas. *Id.* ¶ 28. In other words, nothing in the Final EIS could lead a non-expert declarant to conclude that any ACK RATs members could suffer a concrete injury from exposure to Project-related air emissions. *Id.* ¶ 37. In sum, absent competent expert testimony describing why the expert analysis in the FEIS is wrong, and a showing of how Plaintiffs could be exposed to, and injured by, Project-related emissions, Plaintiffs lack standing.

IV. THE BIOP COMPLIES WITH THE ENDANGERED SPECIES ACT

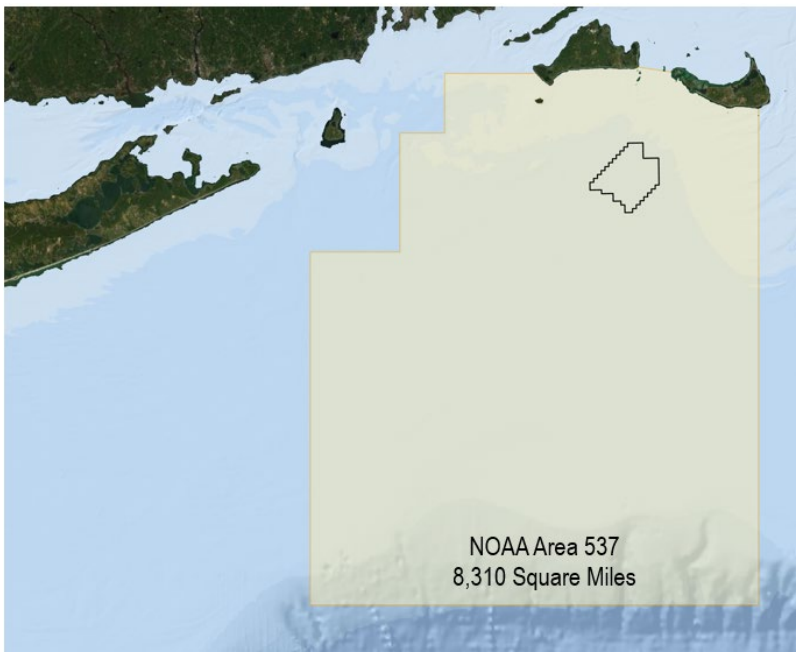
If, despite the serious defects with Plaintiffs' standing, as described in the Federal Defendants' Opposition, the Court is inclined to examine the merits of Plaintiffs' ESA claims, the Court should still deny Plaintiffs' Motion. The Motion raises some 25 pages of arguments and highly technical objections to the 504 page BiOp and its conclusion that the Project is not likely to jeopardize the right whale. The Federal Defendants' Motion addresses many of these arguments by showing that they are either unsupported by law or the administrative record. *See generally* Doc. No. 96 at 11–37. Vineyard Wind adopts the Federal Defendants' arguments by reference and further explains why certain of Plaintiffs' challenges to the BiOp must fail.

A. Area 537 Does not Present an Unusual Threat to Right Whales

Plaintiffs raise several claims that turn on an inaccurate presentation of NMFS Statistical Area 537 as presenting an unusual danger to right whales, characterizing it as a "small piece of ocean" that is "heavily" fished and presenting "entanglement threats." Doc. No. 89 at 21–22. According to Plaintiffs, Vineyard Wind's pile driving activities, and particularly its "soft start" safety precaution, "will drive the whales right into this network of fishing ropes" where, if they are not entangled then they will starve. *Id.* at 33–34. The Federal Defendants addressed these

claims in certain ways, including Plaintiffs' waiver of arguments related to Area 537 by failing to raise them in their 60-day pre-suit notice, Doc. No. 96 at 9, and that the BiOp considered potential entanglement risks in the area. *Id.* at 15. Vineyard Wind adopts those arguments and further explains why Plaintiffs' "Area 537 Theory" has no record basis.

First, Plaintiffs misunderstand the geography of the Project Area and Area 537. Contrary to Plaintiffs' claim that Area 537 "happens to be located very near the Vineyard Wind WDA," Doc. No. 89 at 21, the Project Area is wholly within Area 537. VWSOF ¶ 75. Area 537 is not a "small piece of ocean." Doc. No. 89 at 21. This area actually exceeds 8,300 square miles, making it nearly the size of New Jersey. *Id.* ¶ 76. By contrast, the entire lease area is 419 square miles with the Project Area approximately half of that. *Id.* ¶ 77. This means that the Project Area occupies only about 2.5% of Area 537. *Id.*



Thus, arguing that right whales in or around the Project area will be harmed by fishing in another unidentified section of Area 537 is akin to claiming that an activity in Cape May, New Jersey could have grave consequences in Hoboken.

Second, Plaintiffs' theory that the "soft start" process will "push" right whales into Area 537 ignores years of data showing there will be very few right whales, if any, in and around the Project Area during pile driving. *Id.* ¶¶ 40, 50, 82. Although the BiOp acknowledged that observations in nearby Nantucket Shoals

(west of the Project area) showed a recent increase in Summer and Fall observations, right whale presence remains seasonal. *Id.* ¶ 82**.** Seasonal prohibitions on pile driving (January to April) ensure that turbine foundations are installed only when right whales are unlikely to be present. *Id.* ¶¶ 40, 50, 82. And, to the extent there is a seasonal transition period (early May and November to December) in which whales may be present in relatively low numbers, Vineyard Wind will use enhanced mitigation measures. *Id.* ¶¶ 43, 50. When "soft start" pile driving begins, there should be few whales, if any, present to "push" into other sectors of Area 537, even without accounting for mitigation measures.

Third, Plaintiffs' claim that "Area 537 is one of the most heavily fished areas in the Massachusetts OCS," Doc. No. 89 at 33, misstates the record. Specifically, Plaintiffs mistakenly interpret a statement about lobster fishermen using "*heavy gear*," *see* VWSOF ¶ 79, as meaning the area is "heavily fished." Doc. No. 89 at 47. Nothing in the record describes Area 537 as "heavily fished," much less "one of the most heavily fished areas," *id.* at 33, home to "intense fishing activity," *id.* at 26, a "heavily favored area[ ] for lobster and crab fishing," *id.* at 40, or "known to have a high concentration of [vertical buoy rope] gear." *Id.* at 40–41. Further, Plaintiffs presented no evidence of where in Area 537's 8,310 square mile area fishing occurs or when. For Plaintiffs' theory of a "heighten[ed] threat of entanglement," *id*. at 33–34, to gain traction, they must show that fishing occurs relatively close to the Project area and overlaps with when Vineyard Wind will be pile driving. Plaintiffs do not anchor this theory to any record evidence.[3]

[3] Plaintiffs' entanglement threat theory is discredited further because, when turbine installation begins next Summer, new rules will be in effect that will limit the number of buoy lines lobstermen can use and require "weak rope measures" so lines will break away to reduce right whale entanglements. VWSOF ¶ 80.

Fourth, Plaintiffs' fear that right whales will starve, Doc. No. 89 at 34, has no record basis. As noted above, Plaintiffs ignore that pile driving occurs only during the months when right whales are rarely present. VWSOF ¶¶ 40, 50, 82. And they cite no evidence regarding malnutrition or other health effects. Nor could they, since there is no evidence that the Project Area provides significant foraging opportunities. On the contrary, the record shows that the waters east of the Project—the very place that Plaintiffs claim right whales would go—contain significant food supplies beginning in late Summer. *See id.* ¶ 82 ("The Nantucket Shoals area does not overlap with the area where Vineyard Wind 1 will be built" but whales have been congregating there "in August and staying through the winter.").

Finally, Plaintiffs' perfunctory claim that Area 537 presents an increased risk of vessel strikes, Doc. No. 89 at 34, is unaccompanied by evidence of vessel traffic in the area or any real argument. The Court should hold that this argument is waived. *See De Giovanni v. Jani-King Int'l, Inc.*, 968 F. Supp. 2d 447, 450 (D. Mass. 2013) (rule of waiver "provides that 'issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argument[] are deemed waived.") (quoting *United States v. Zannino*, 894 F.2d 1, 17 (1st Cir. 1990)); *Photographic Illustrators Corp. v. Orgill, Inc.*, 118 F. Supp. 3d 398, 411 (D. Mass. 2015) (applying waiver rule to summary judgment).

B. The BiOp Considered and Rejected Plaintiffs' Operational Noise Study

Plaintiffs' claim that the BiOp ignored a relevant study on operational noise by "mak[ing] only passing reference" to it, Doc. No. 89 at 24, disregards the BiOp's actual discussion of that study. Far from "mak[ing] only passing reference" to the Stober, *et al.* (2021) paper, the BiOp rejects it as inappropriate for understanding operational turbine noise. VWSOF ¶ 85.[4] The BiOp

[4] Plaintiffs raise the same argument elsewhere in their Motion, claiming that the BiOp "mentions" Stober *et al.* (2021) "but does not engage with it," and criticizing the use of a different study in

did so for several reasons: first, the paper's "authors note[d] that there is unresolved uncertainty in their methods;" second, it used generic assumptions without site-specific information; and third, it analyzed different, noisier turbines employing gearboxes. *Id.* ¶ 52. "That NMFS's BiOp ultimately disagreed with" a study "favorable to Plaintiffs' position is a far cry from saying that such stud[y was] not 'used.'" *Ctr. for Biological Diversity v. NMFS*, 977 F. Supp. 2d 55, 75 (D.P.R. 2013). Instead, the BiOp found Elliott, *et al.* (2019) more relevant due to its measurement of quieter direct-drive turbines, such as those that Vineyard Wind will use, at a location with similar characteristics to the Project area. VWSOF ¶ 86. Plaintiffs do not challenge any substantive aspect of this analysis.

Plaintiffs' fallback position is that "NMFS and BOEM … don't really know how or to what extent the Project will affect right whales" as the Project will be "the first of its kind." Doc. No. 89 at 24–25. This does not make the BiOp "legally deficient." *Id.* at 25. NMFS and BOEM acknowledged that most information on underwater noise "is based on monitoring of existing windfarms in Europe" that are "not necessarily representative of current generation direct-drive systems." VWSOF ¶ 53. Agencies may rely upon imperfect data if it is the best data available. *See*, *e.g.*, *Blue Water Fishermen's Ass'n v. NMFS*, 226 F. Supp. 2d 330, 338 (D. Mass. 2002) ("imperfections in the available data do not doom any agency conclusion"); *Pac. Shores Subdiv. Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 538 F. Supp. 2d 242, 250 (D.D.C. 2008) ("Even if that data is imperfect or inconclusive, an agency may rely upon that data"). Here, the BiOp undertook a detailed analysis of anticipated underwater noise levels using what it held to be the best scientific data available. VWSOF ¶¶ 84–86. By quibbling over what scientific data is best for

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arguing that NMFS' "no jeopardy" finding was inadequate. Doc. No. 89 at 38–39. That argument fails for the same reasons as those presented here.

a "first of its kind" project, Doc. No. 89 at 24–25, Plaintiffs are picking a fight where agency deference is at its zenith. *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 103 (1983) ("a reviewing court must generally be at its most deferential" when an agency "is making predictions, within its area of special expertise, at the frontiers of science"). Thus, Plaintiffs' appeal to the scientific unknown cannot establish that the BiOp's analysis is arbitrary and capricious.

C. The BiOp Established a Well-Supported Environmental Baseline for Its Right Whale Analysis

Many of Plaintiffs' criticisms of the BiOp's environmental baseline, Doc. No. 89 at 25–27, are refuted by the Federal Defendants, Doc. No. 96 at 18–21, and Vineyard Wind incorporates those arguments by reference here. Vineyard Wind, however, separately addresses Plaintiffs' claims regarding baseline vessel traffic and existing take authorizations. Doc. No. 89 at 26–27. As discussed in more detail below, Plaintiffs' claims have no record basis.

1. *Plaintiffs Raise no Substantive Dispute With the Baseline Discussion of Vessel Traffic*

Plaintiffs demand a listing of "existing vessel speeds, broken down by vessel size, in the waters immediately surrounding the WDA," Doc. No. 89 at 26, bullet 4, but never explain how this information would substantively contribute to the environmental baseline. Nor do they identify any existing source for such information. *See Pyramid Lake Paiute Tribe v. U.S. Dep't of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990) (plaintiff must identify "information the Service did not take into account – which challenges the opinion's conclusions."). Vessel traffic in and around the Project Area is discussed extensively, VWSOF ¶¶ 87-89, and Plaintiffs raise no dispute with that discussion other than the metric used (which is addressed in Doc. No. 96 at 31, n.29).

Similarly, Plaintiffs vaguely complain that the "BiOp does not adequately describe baseline conditions along the transit routes between supply ports and the WDA" or "vessel traffic or fishing activity in these areas." Doc. No. 89 at 27, bullet 5. This ignores the BiOp's discussion of vessel

traffic and recreational and commercial fishing in the action area as well as right whale presence and critical habitat. *See* VWSOF ¶ 88 (describing fishing activities and vessel strikes in the North Atlantic and Canada). Plaintiffs do not dispute that discussion with any particularity, such as describing *how* the description of baseline conditions is purportedly inadequate or *what* available information the BiOp overlooked. Without such necessary elaboration, Plaintiffs cannot meet the high standard of demonstrating that the environmental baseline is arbitrary and capricious.

2. *Plaintiffs Identify no Relevant Take Authorizations*

Plaintiffs complain that the "BiOp does not provide an accurate or complete accounting of the existing 'take' authorizations for right whale[s]," Doc. No. 89 at 27, bullet 6, but do not identify any relevant take authorizations omitted. The BiOp includes in its baseline analysis those other offshore wind projects that have undergone Endangered Species Act consultation (the Block Island and South Fork projects). VWSOF ¶ 91. But NMFS only "anticipated short term behavioral disturbance of ESA listed sea turtles and whales exposed to pile driving noise" with no right whale injuries or mortalities authorized. *Id.* Plaintiffs' one sentence lament does not identify any right whale take authorizations within the relevant action area that should have been included.

D. The Record Amply Supports Vineyard Wind's Reasonable and Prudent Measures to Minimize Right Whale Impacts

Plaintiffs' various attacks on the several Reasonable and Prudent Measures Vineyard Wind will employ to minimize right whale impacts shows a misunderstanding of both their legal and factual underpinnings.

1. *Invalidating a Reasonable and Prudent Measure Does not Affect the "No Jeopardy" Determination*

Plaintiffs' discussion of Reasonable and Prudent Measures, and their role in a jeopardy determination, Doc. No. 89 at 28, is wrong. In the ESA universe, there is a world of difference between Reasonable and Prudent *Alternatives* and Reasonable and Prudent *Measures*. Reasonable

and Prudent Alternatives are only raised when the consulting agency will issue a "jeopardy opinion" and requires alternatives to avoid that determination. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(5); *see also* U.S. Fish & Wildlife Serv., Endangered Species Act Consultation Handbook, at 4-43 (Mar. 1998) ("ESA Handbook") ("it is imperative that the opinion contain a thorough explanation of how each component of the" Reasonable and Prudent Alternatives "is essential to avoid jeopardy").

Reasonable and Prudent Measures, by contrast, are devised *after* the responsible agency issues a "no jeopardy" determination. *See* 50 C.F.R. § 402.14(i)(1)(ii) (if the agency determines "no jeopardy" then it issues an Incidental Take Statement that "[s]pecifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact"); *see also id.* § 402.02 (Reasonable and Prudent Measures "minimize the impacts, i.e., amount or extent, of incidental take"). They are limited in scope in that they "cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes." *Id.* § 402.14(i)(2). Even if a Reasonable and Prudent Measure was deemed arbitrary and capricious, that would not invalidate the "no jeopardy" determination. *See* ESA Handbook at 4-54 ("Reasonable and prudent measures are not a substitute for a finding of jeopardy"). Therefore, although all of the Reasonable and Prudent Measures discussed below are well supported by the record, even if they were not, the BiOp's "no jeopardy" determination for the Project would still stand.

2. *Plaintiffs' Allegations of Harm to Right Whales from Pile Driving are Contradicted by the Record*

Plaintiffs incorrectly claim that the Project will require 102 days of pile driving over two years, that right whales could be exposed to noise constituting Level A harassment, and that "the BiOp contends no take of right whales will occur." Doc. No. 89 at 29, 41. The Project will involve a *maximum* of 62 days of pile driving, all during one year, no Level A harassment is authorized,

and the BiOp includes an Incidental Take Statement prohibiting more than 20 right whales being taken by Level B Harassment. VWSOF ¶¶ 40–41.[5]

Plaintiffs' assertion that "pile driving could expose 1.39 right whales to Level A harassment noise" causing "auditory injury and permanent hearing loss," Doc. No. 89 at 29, is taken from modeling figures that include an unrealistic "Maximum Design scenario" of 90 monopiles and 12 jacket foundations while only achieving six decibels of noise attenuation. VWSOF ¶ 47. The BiOp explained that installing fewer foundations would reduce exposure estimates. *Id.* ¶¶ 40, 45; *id.* ¶ 46 ("Installing 57 foundations would require 43% less pile driving and estimates of exposure would likewise by 43% less than the maximum impact scenarios presented above."). Here, Vineyard Wind will install 62 foundations, with only one being a jacket foundation, and achieve 12 decibels of noise attenuation VWSOF ¶¶ 40–41. *All* scenarios modeled with 12 decibels of attenuation concluded that no right whales would be subjected to Level A harassment. *Id.* ¶ 42. Further, both this modeling (and Plaintiffs) disregard mitigation measures that further reduce the chance that a right whale will be present during pile driving. *Id.* ¶ 43 ("Vineyard Wind requested no authorization for Level A harassment takes of North Atlantic right whales" as "Level A harassment threshold will be avoided through enhanced mitigation and monitoring measures").

These multiple overlapping mitigation measures will reduce construction impacts on right whales. Many of these measures derived from a 2019 agreement between Vineyard Wind and environmental groups with a history of advocating on behalf of right whales based, in part, on experiences elsewhere. VWSOF ¶¶ 51–52 (use of "soft start" process, Protected Species Observers

[5] Contrary to Plaintiffs' apparent belief, Level B harassment is a "take" for Endangered Species Act purposes. *See* 16 U.S.C. § 1532(19) ("'take' means to harass").

("PSOs"), passive acoustic monitoring, and 1 km exclusion zone at Scotland turbine project); *id.* at ¶ 52 (use of PSOs, 500 meter exclusion zone, and "ramp up" process similar to "soft start" for seismic surveys). Plaintiffs' Motion misleadingly treats each minimization measure in isolation and claims it is inadequate. As the record makes clear, each of these minimization measures work together, not alone.

3. *Plaintiffs Misunderstand the "Soft Start" Procedure and Their Objections Have no Record Support*

The "soft start" process is one of these minimization measures. After the PSOs have determined there are no right whales in the two kilometer visual clearance zone and passive acoustic monitoring operators have detected no whales in a five kilometer clearance zone for 60 minutes, pile driving will begin by striking the pile "at a reduced energy level followed by a one-minute waiting period." VWSOF ¶ 56.[6] Thus, the "soft strike" procedure is not intended as the principal protection for whales, but a last check "designed to provide a warning to marine mammals or provide them with a chance to leave the area prior to the hammer operating at full capacity." *Id.* Notably, Vineyard Wind is restricted to pile driving in the months where few right whales, if any, are expected to be in the area. *Id*. ¶¶ 40, 50, 82**.** This means that the chances of *any* right whales being exposed to the reduced energy warning is very low even without other measures.

The soft start would build "to exceed the Level B harassment threshold and therefore, is expected to cause any whales exposed to the noise to swim away from the source." *Id.* ¶ 57. The Vineyard Wind BiOp did not invent this process. At least one court has *required* a similar "ramp

[6] The clearance zones expand to as much as 10 kilometers depending on the time of year, with larger clearance zones corresponding to a higher probability of right whales being in the general vicinity of the Project area. VWSOF ¶ 59. The clearance zones presented above are the smallest zones that begin in June. *Id.*

up" measure for sonar. *See Ocean Mammal Inst. v. Gates*, 546 F. Supp. 2d. 960, 994 (D. Haw. 2008) (ordering sonar to "gradually 'ramp up' … to allow marine mammals to depart the area before transmissions reach harmful levels."). Based on observations, Level B impulsive noise may induce behavioral responses in marine mammals but does not cause injury. VWSOF ¶ 55.

Plaintiffs do not dispute this threshold for behavioral responses. Instead, they argue that "whale behavior in response to noise stimuli var[y] dramatically" and "varies depending on context," Doc. No. 89 at 30. However, their cited record source, Southall, *et al.* (2007), provides no support for this assertion. Vineyard Wind's Response to Plaintiffs' Statement of Facts (VW Resp.) ¶¶ 115–116. The pages Plaintiffs cite speak generally of "animals" responding to undefined sounds at unidentified received noise exposure levels. *Id*. But other data in Southall actually supports the "soft start" process' effectiveness. Its summary of behavioral responses by low frequency cetaceans (which include right whales) to pulse sounds shows that whales move away from the sounds. *Id.* ¶ 116. Therefore, the study cited by Plaintiffs undercuts their case and supports the Defendants instead.

4. *The 'Soft Start' Process is not an Intentional Take*

Plaintiffs' argument that the "soft start" process "is a form of animal hazing and thus constitutes" unlawful "*intentional* harassment," Doc. No. 89 at 30, has no support in either the law or the record.[7] An incidental take "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" is the deliberate killing or harming of a listed species. *See*, *e.g.*, *Babbitt v. Sweet Home Ch. Communities for Greater Or.*, 515 U.S. 687, 700–01 (1995) ("No one could seriously

[7] Plaintiffs did not raise a claim under the Marine Mammal Protection Act, 16 U.S.C. § 1361, *et seq*., in their amended complaint. Therefore, Vineyard Wind discusses Plaintiffs' allegations of an intentional taking only in the context of the Endangered Species Act.

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.'").[8]

Vineyard Wind will use pile driving to install wind turbines, not to kill or injure whales. *See*, *e.g.*, VW Resp. ¶ 103; VWSOF ¶¶ 55–56. The "soft start" procedure only requires Vineyard Wind to begin pile driving at reduced hammer energy, *id.* ¶ 56, with any potential exposure to the resulting noise incidental to installing a foundation. Plaintiffs forget that pile driving is scheduled for the season when few, if any, right whales would be in the vicinity and begins only after PSOs and passive acoustic monitoring operators confirm there are no whales in the clearance zone. Vineyard Wind cannot intentionally "haze" right whales it believes to be absent.

5. *Using Protected Species Observers is a Well-Established Means of Reducing Risk to Right Whales*

Vineyard Wind will use trained, third-party PSOs to visually monitor for right whales during pile driving and vessel transit. VWSOF ¶¶ 62, 67. Courts have previously upheld their use in avoiding harm to marine species. *See Strahan v. Linnon*, 967 F. Supp. 581, 600–01 (D. Mass. 1997) (upholding Coast Guard's use of PSOs to avoid right whale vessel strikes); *Cook Inletkeeper v. Raimondo*, 541 F. Supp. 3d 987, 993–94 & n. 51 (use of PSOs and other mitigation measures to reduce noise impacts to beluga whales); *Intertribal Sinkyone Wilderness Council v. NMFS*, 970 F. Supp. 2d 988, 1009–11 (N.D. Cal. 2013) (PSOs as mitigation measure to avoid impacts to killer whales). Plaintiffs, however, treat PSOs as a novel and ineffective measure. Doc. No. 89 at 30.

[8] Plaintiffs' Motion cites to *Strahan v. Roughead*, 910 F. Supp. 2d 358, 367 (D. Mass. 2012), Doc. No. 89 at 30, however, the *Roughead* case does not discuss intentional takes.

Plaintiffs incorrectly claim that "the BiOp admits that a PSO cannot accurately detect and identity a right whale beyond 1,500 meters." The BiOp actually states that PSO effectiveness beyond 1,500 meters "is highly dependent on the elevation and visibility provided by the PSO platform and visibility may be such that monitoring a significantly larger area is possible." VW Resp. ¶ 119.[9] Further, Reasonable and Prudent Measure 4/ Term and Condition 7 requires Vineyard Wind to "ensure that there are enough PSOs and/or PSO platforms to ensure adequate coverage of the areas required for monitoring" and "to effectively implement the clearance and shutdown requirements." VWSOF ¶ 63. Although Plaintiffs may imagine that the Project would rely on a single PSO with a limited sight range, the record shows that Vineyard Wind will use multiple PSOs at intervals necessary to ensure complete coverage. *Id.*

Plaintiffs' claims about PSOs' inability to detect right whales ignore the record. *See* Doc. No. 89 at 31 (claiming that PSOs are "useless" and will be "blind" in the evening). Vineyard Wind must develop an Alternative Monitoring Plan that includes "alternative monitoring technologies such as night vision, thermal, [or] infrared … in the event of unexpected poor-visibility conditions." VWSOF ¶ 65. Plaintiffs never acknowledge this requirement, much less argue it is arbitrary and capricious. Further, Plaintiffs provide no record citation supporting their claims that right whales are "even harder to spot" than other whales and that PSOs "will miss all the whales *under* the water." Doc. No. 89 at 31. PSOs will be aided by elevated platforms and passive acoustic monitoring. VWSOF ¶¶ 53, 63–64. Plaintiffs, again, ignore this record evidence.

6. *Passive Acoustic Monitoring Reliably Locates Right Whales*

[9] Plaintiffs' Motion also misstates the Level A harassment threshold as "extend[ing] 7,253 meters." Doc. No. 89 at 30. This threshold is for the single jacket foundation that will be installed, VWSOF ¶ 48, and assumes only 6 decibels sound attenuation. The other 61 are monopile foundations with a Level A harassment threshold of 3,191 meters, assuming 6 decibels sound attenuation. *Id.*

Plaintiffs' complaints regarding passive acoustic monitoring (referred to as "PAM"), a system for monitoring whale vocalizations, VWSOF ¶ 53, lack record support. Plaintiffs cannot demonstrate that passive acoustic monitoring, in conjunction with the other measures, is arbitrary and capricious. Plaintiffs raise two main complaints, neither of which has merit.

First, Plaintiffs complain that the ocean is noisy, Doc. No. 89 at 33, but they present no record evidence that the Project area environment is so unusually noisy that passive acoustic monitoring effective elsewhere will be significantly impaired in the Project area. Plaintiffs are correct that "PAM was never intended to be a perfect backstop capable of catching every possible sound a right whale might make," *id.*, which is why passive acoustic monitoring is one of multiple overlapping measures to detect right whales and it has been mandated by at least one court in a similar context. *See NRDC, Inc. v. Winter*, 530 F. Supp. 2d 1110, 1120 (C.D. Cal. 2008) (granting injunction requiring use of passive acoustic monitoring to detect beaked whales), *rev'd*, 555 U.S. 7 (2008).

Second, Plaintiffs protest that mothers and calves generally communicate with each other by visual contact and surmise that they would be undetectable to passive acoustic monitoring. Doc. No. 89 at 33. Plaintiffs cite no record evidence that mother or calf right whales are mute. Right whales issue a variety of vocalizations at all ages, including calf "warbles" that "may represent 'practice' screams." VWSOF ¶ 54; *see also id.* ("Upcalls may be used for long distance communication (McCordic et al. 2016), including to reunite calves with mothers (Parks and Clark 2007; Tennessen and Parks 2016)."); *id.* (discussing "total" calls by calves); *id.* (when mothers and calves are separated "contact is maintained acoustically'). Thus, while mother-calf pairs visually communicate for the first three to four months, *id.*, the record indicates that mothers and calves also vocalize in other contexts. *Id.* This means they can be detected.

7. *Crew Transfer Vessels May Exceed 10 Knots Only Under Certain Conditions*

Plaintiffs' portrayal of crew transfer vessels as "big and fast – 75 feet long and running at 25 knots," Doc. No. 89 at 4, but exempted from a 10 knot speed limit with "no rationale" whatsoever, *id.* at 37, has no record basis. Contrary to Plaintiffs' claims, *id.* at 4, 35, 36, 38, nothing in the record states that crew transfer vessels will travel at 25 knots under any scenario. VW Resp. ¶ 155. And Plaintiffs' depiction of crew transfer vessels as uninhibited, turbo-powered whale killers ignores the several conditions that, if not met at all times, subjects them to the general 10 knot speed limit. These include:

- Transit corridors must be monitored with passive acoustic monitoring;
- The use of at least two dedicated visual observers to monitor for whales;
- An additional observer or the use of advanced monitoring technology (such as thermal cameras), plus passive acoustic monitoring, if transiting a Right Whale Slow Zone;
- The vessels must be smaller than 65 feet if transiting a Seasonal Management Area above the 10 knot speed limit; and
- If transiting a Dynamic Management Area, the route must be clear of right whales for two consecutive days based on vessel surveys and passive acoustic monitoring.

See VWSOF ¶¶ 66–73.

Plaintiffs, to the extent they substantively dispute any of these conditions, fail to ground their complaints in the record. For instance, they speculate, without any record basis, that PSOs will be "largely ineffectual." Doc. No. 89 at 37–38. As Plaintiffs acknowledge, PSOs will typically have a visual range of one kilometer. *Id.* at 37; VW Resp. ¶ 161. Plaintiffs argue that this is inadequate to warn a vessel captain of a right whale's presence, Doc. No. 89 at 37–38, but cite to

nothing in the record supporting that claim.[10] Plaintiffs also disregard the use of binoculars, night vision, and thermal cameras to enhance visual capabilities. VWSOF ¶ 65. Lastly, Plaintiffs ignore supplementation by "the use of PAM during the time of year when right whales are at the highest density in the action area" and "allow[ ] for significantly earlier notification of whale presence and further increases time available to avoid a strike." *Id.* ¶¶ 50, 53.

Plaintiffs counter that passive acoustic monitoring is ineffective for vessel transit, apparently believing that it involves only shore-based systems. Doc. No. 89 at 38. They argue, without any record citation, that passive acoustic monitoring "will cover only a small fraction of the vessel transit area." *Id*. Passive acoustic monitoring involves several systems, including those that may be moored at any point along the transit route, towed from vessels, or paired with autonomous surface or underwater vehicles. VWSOF ¶ 53. This flexibility allows passive acoustic monitoring to cover any area that must be monitored.

V. PLAINTIFFS' COMPLAINTS ABOUT REDACTED AIR QUALITY INFORMATION ARE BARRED AND, IF CONSIDERED, ARE CONTRADICTED BY THE RECORD

Most of Plaintiffs' arguments against the Final EIS are simply their ESA claims re-packaged as purported NEPA violations. Plaintiffs' sole claim unique to NEPA – arguing that the Draft EIS failed to provide an opportunity for public comment on air pollution issues by referencing redacted emissions data – must be dismissed for Plaintiffs' lack of standing. *See*, *supra*, Section III.B. But even if Plaintiffs had standing, the claim would be dismissed under the administrative waiver doctrine and, if reviewed on the merits, it lacks a record basis.

[10] Even assuming a maximum speed of 25 knots, this equates to traveling approximately 12.86 meters per second. Metric Conversions, https://www.metric-conversions.org/speed/knots-to-meters-per-second.htm (last visited Sept. 12, 2022). Should a PSO spot a right whale one kilometer distant, the PSO would have over 77 seconds to notify the captain and for the captain to reduce speed and take evasive measures (1,000 meters/ 12.86 = 77.76 seconds).

A. Plaintiffs' Claims are Barred by the Doctrine of Administrative Waiver

Plaintiffs' assert they were unable to comment on air quality issues because the Draft EIS referenced redacted data in Vineyard Wind's Construction and Operations Plan. Doc. No. 89 at 44. Plaintiffs' Motion improperly raises this issue for the first time. It should have been included in their comments on the Draft EIS. The Court must dismiss claims where they are predicated on issues not raised in comments to the agency and, therefore, not part of the administrative record. "In reviewing agency action, this Court will not consider issues which a petitioner failed to present during the administrative process" under "the doctrine of procedural default." *Adams v. EPA*, 38 F.3d 43, 50 (1st Cir. 1994). The "failure to raise an argument before an agency constitutes a waiver of that argument on judicial review." *Padgett v. Surface Transp. Bd.*, 804 F.3d 103, 109 (1st Cir. 2015) (citing cases); *see also Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002) ("It is well established that issues not raised in comments before the agency are waived and this Court will not consider them.").

The reason for such "strict rules of procedural default in the administrative context" is to allow an agency to "apply its expertise, exercise its informed discretion, … create a more finely tuned record for judicial review," and "allow[ ] it the opportunity to monitor its own mistakes." *Mass. Dep't of Pub. Welfare v. Sec'y of Agric.*, 984 F.2d 514, 523 (1st Cir. 1993). An agency cannot create a record for this Court to review when a party never raises an issue in comments. To do otherwise would convert the APA's customary record review standard to *de novo* review of an issue never before presented for an agency's consideration. Here, Plaintiffs' comments on the Draft EIS never protested that air quality information was redacted. VWSOF ¶ 15.[11] If Plaintiffs had raised this in their comments, then BOEM could have responded on the record. Instead, by not

[11] Notably, no other commenter complained of redacted air quality information, either. VWSOF ¶ 15.

raising this issue during the administrative review phase, Plaintiffs deprived the agency of an opportunity to provide an explanation

Plaintiffs' claim that the Final EIS omits indirect criteria and greenhouse gas ("GHG") emissions, Doc. No. 89 at 44–45, is barred for the same reason. Plaintiffs' Motion argues that "the Project's *indirect* emissions – i.e., those attributable to the Project but not immediately caused by it" such as "vehicle emissions from employees associated with the Project" are inadequate. *Id.* at 45. Plaintiffs' comments, however, only discussed "construction-related emissions" and whether the operational "use of … oil (and diesel fuel) will result in air emissions." VWSOF ¶ 16. Because Plaintiffs never raised concerns with indirect emissions in their comments, they are barred from doing so now.

B. The Referenced Construction and Operations Plan Included Unredacted Emissions Data

Even if not barred, Plaintiffs' claims fail on the merits. The Draft EIS stated that "[Construction and Operations Plan] Appendix III-B provides a complete description of all emission points associated with the construction phase of the Proposed Action, including engine sizes, hours of operation, load factors, emission factors, and fuel consumption rates, along with a description of air emission calculation methodology (Volume III; Epsilon *2018a*)." VWSOF ¶ 24 (emphasis added). Appendix III-B, dated March 15, 2018, provides an extensive discussion, exceeding 50 pages, on Project air emissions and the related methodologies for calculating them. *Id.* ¶¶ 22–23. This includes estimated pollutant emissions for construction (year one, year two, and total emissions), the 30 year operation and maintenance emissions, and average annual emissions. *Id.* ¶ 23; *see also id.* (emissions for New Bedford terminal operations and scenarios where operations would also include Bridgeport and New London); *id.* (breakdown of Project emission estimates to include those covered by the U.S. Environmental Protection Agency's Outer

Continental Shelf air permit); *id.* (charts summarizing emissions under various scenarios. This collection of numeric emissions data for Project construction, operations, maintenance, and decommissioning is not redacted.

Plaintiffs' Motion cites to the *wrong version* of Appendix III-B, one dating from 2017, not the 2018 version actually referenced in the Draft EIS. *See* Doc. No. 89 at 44; VWSOF ¶ 24. Therefore, the record flatly contradicts Plaintiffs' claim that redacted information deprived them of a meaningful opportunity to comment.

VI. VINEYARD WIND IS ENTITLED TO SUMMARY JUDGMENT ON ALL CLAIMS RAISED IN PLAINTIFFS' COMPLAINT BUT NOT IN PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs raised several claims in their First Amended Complaint for Declaratory and Injunctive Relief Under the National Environmental Policy Act and the Endangered Species Act, Doc. No. 59, Feb. 10, 2022, that were omitted from their motion for summary judgment. These claims are:

- The Final EIS does not analyze an adequate range of alternatives under NEPA, Doc. No. 59 ¶ 68;
- The Oct. 18, 2021 BiOp post-dates the ROD and, therefore, cannot be used to support the ROD; *id.* ¶ 69;
- The BiOp failed to adequately address the Project's impacts on federally-listed species other than the North Atlantic Right Whale, *id.* ¶ 72;
- The Incidental Take Statement underreported and underestimated the number of federally-listed species other than the North Atlantic Right Whale that would be taken by the Project, *id.* ¶ 73;
- The Incidental Take Statement also failed to include a complete or effective set of reasonable and prudent measures for each listed species, *id.*;
- BOEM and NMFS violated the ESA by failing to ensure that the Project will not jeopardize federally-listed species other than the North Atlantic Right Whale, *id.* ¶ 75; and

- BOEM is violating the ESA by carrying out unspecified actions to implement the Project despite the fact that the October 2021 BiOp is purportedly defective, *id.* ¶ 76.

Because the plaintiffs are challenging final agency action, it is their burden under the Administrative Procedure Act to demonstrate that the Federal Defendants' actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706. And summary judgment is the "vehicle to tee up a case for judicial review and, thus, an inquiring court must review an agency action not to determine whether a dispute of fact remains but, rather, to determine whether the agency action was arbitrary and capricious." *Bos. Redev. Auth. v. Nat'l Park Serv.*, 838 F.3d 42, 47 (1st Cir. 2016). Therefore, Plaintiffs' failure to raise the claims listed above in their summary judgment should be construed as abandonment or waiver. Accordingly the Defendants and Vineyard Wind are entitled to summary judgment on those claims. *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667 (1st Cir. 1995) (issue raised in complaint but not at summary judgment is deemed waived); *cf. Corrada Betances v. Sea-Land Serv., Inc.*, 248 F.3d 40, 43 (1st Cir. 2001) (because plaintiff's brief "contains no developed argument[] in support of [plaintiff's] defamation claim, we deem that claim abandoned"). Moreover, the Plaintiffs' waiver of these arguments in their Motion forecloses them from making any arguments addressing these issues in their reply.

CONCLUSION

For the foregoing reasons, Vineyard Wind respectfully requests that the Court deny Plaintiffs' Motion for Summary Judgment and grant Vineyard Wind's cross-motion for summary judgment in all respects.

Dated: September 13, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of September 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 counsel of record via the Court's electronic filing system.

Date: September 13, 2022

/s/ Jack W. Pirozzolo
Jack W. Pirozzolo