UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ACK RESIDENTS AGAINST TURBINES AND VALLORIE OLIVER,

Plaintiffs,

v.

U.S. BUREAU OF OCEAN ENERGY MANAGEMENT; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; NATIONAL MARINE FISHERIES SERVICE; DEBRA HAALAND, Secretary of the Interior; GINA M. RAIMONDO, Secretary of Commerce,

Defendants.

Civil Action No. 1:21-cv-11390-IT

Hon. Indira Talwani

VINEYARD WIND 1 LLC'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND SUMMARY

Vineyard Wind submits this reply in support of its Motion for Summary Judgment. Doc. No. 99. To avoid unnecessary duplication of arguments raised by the Federal Defendants, Vineyard Wind incorporates by reference the arguments presented in Federal Defendants' Reply Memorandum in Support of Cross-Motion for Summary Judgment (Doc. No. 114).[1]

In addition to the defects identified by Federal Defendants, Plaintiffs' substantive case has three other critical problems. First, Plaintiffs' Opposition, Doc. No. 105, largely ignores the arguments and record evidence that Vineyard Wind and Federal Defendants raised on the key issue of Article III standing. Second, Plaintiffs' Opposition frequently disputes facts that Plaintiffs conceded in Plaintiffs' Response to Federal Defendants' and Vineyard Wind's Separate Statements of Material Facts in Support of Their Respective Cross-Motions for Summary Judgment, Doc. No. 107. Third, Plaintiffs improperly attempt to introduce new evidence and unsupported opinions that are outside of the administrative record.

At the end of the day, Plaintiffs' catalog of minor quibbles cannot clear the high bar of demonstrating that NMFS' determination that the Project "is not likely to jeopardize the continued existence" of the North Atlantic Right Whale, 16 U.S.C. § 1536(a)(2), is arbitrary, capricious, or unsupported by the voluminous administrative record. This is especially true because analysis of the relevant record documents "requires a high level of technical expertise" where courts "must defer to the informed discretion of the responsible federal agencies." *Marsh v. Or. Nat. Res.*

[1] Vineyard Wind also incorporated 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. 100 at 1. Such incorporation by reference is necessary to avoid Vineyard Wind unnecessarily raising arguments duplicative of those raised by the Defendants. This incorporation by reference means that Plaintiffs' claim that Vineyard Wind waived various arguments raised in Defendants' Cross-Motion by not duplicatively raising them in its own motion, Doc. No. 105 at 62, nn.12–13, is incorrect.

Council, 490 U.S. 360, 377 (1989) (citation omitted). Plaintiffs' differing opinions and conclusions regarding the potential impacts of the Project and risks to right whales cannot overcome the "extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise." *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 21 (1st Cir. 2012) (quoting *Coal. for Responsible Regul., Inc. v. EPA*, 684 F.3d 102, 120 (D.C. Cir. 2012)).

I. PLAINTIFFS LACK STANDING TO RAISE CLAIMS REGARDING RIGHT WHALES, AIR QUALITY, AND GREENHOUSE GAS EMISSIONS

A. Plaintiffs Fail to Offer Necessary Standing Evidence Regarding Right Whales

From the advent of environmental litigation more than fifty years ago, the federal courts have consistently demanded that a plaintiff opposing government action on environmental grounds have a "direct stake" in the outcome of a case. *Sierra Club v. Morton,* 405 U.S. 727, 740 (1972). This constitutional hurdle precludes judicial review involving parties "who seek to do no more than vindicate their own value preferences through the judicial process." *Id.* The standing test is unapologetically demanding. For example, a plaintiff who "some day" intends to view a threatened or endangered species "without any description of concrete plans, or indeed even any specification of *when* the some day will be" – has not demonstrated the actual or imminent injury that the standing inquiry demands. *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 564 (1992).

Here, Plaintiffs offered no evidence establishing that Ms. Oliver or any ACK RATs member expects to personally observe North American right whales. Despite their "sincere and passionate interest in the well-being of the whales," Plaintiffs have not established "injury-in-fact." *Strahan v. Sec'y, Mass. Exec. Off. of Energy*, No. 1:19-cv-10639-IT, 2021 WL 9038570, at *8 (D. Mass. Nov. 30, 2021) (Talwani, J.). Their personal concerns and feelings regarding these mammals are, as a matter of law, akin to the injury claimed by opponents of the proposed development of

Mineral King in *Sierra Club v. Morton*. And the vagueness of their claimed injury is no more specific than that deemed inadequate in *Lujan v. Defenders of Wildlife.*

B. Plaintiffs Failed to Offer Necessary Standing Evidence Regarding Air Pollution or Greenhouse Gas Emissions

Plaintiffs offered no evidence of how they could be exposed to, or injured by, air pollution or greenhouse gas emissions related to the Project. Plaintiffs also declined to substantively contest Vineyard Wind's expert declaration regarding what, as a matter of the science of air pollution, Plaintiffs must show to establish Article III standing. Instead, Plaintiffs claim, without any fact or expert evidence, they have standing because (1) "Ms. Oliver resides on Nantucket Island, just 14 miles from the Vineyard Wind WDA," and (2) "she might inhale air carrying pollutants from the project." Doc. No. 105 at 17 (emphasis added); *see also id.* at 9-10 (breathing is enough to establish standing). This cannot support Article III standing. Further, Plaintiffs' Opposition failed to address Article III standing for greenhouse gas emissions at all. Although this claim should be considered abandoned, even if the Court did consider the lone paragraph on greenhouse gas emissions in Ms. Oliver's supplemental declaration, it provides no evidence of standing.

1. *Plaintiffs' Concessions Preclude Article III Standing for Air Pollutant Emission Claims*

Plaintiffs offer no serious rebuttal to Ms. Libicki's expert declaration that air dispersion modeling or similar analysis is necessary to determine where air pollutants will flow and whether the level of air pollutants will exceed the health hazard threshold in any given area. *See* Doc. No. 100 at 4-5. In fact, Plaintiffs concede that such an analysis requires substantial scientific knowledge, methodologies, and tools. *See* Doc. No. 101 ¶¶ 31, 32; Doc. No. 107 at 2-3 (Paragraphs 31 and 32 undisputed). Despite this, Plaintiffs claim it is "Ridiculous" for Vineyard Wind to say that one cannot simply assume that Plaintiffs will be harmed by air emissions generated out in the ocean at least 14 miles away. Doc. No. 105 at 20.

Plaintiffs also err in claiming that, while such evidence may be needed to establish tort liability, they have no similar obligation to prove injury for Article III standing. *See* Doc. No. 107 ¶ 6 (disputing, in part, Paragraph 34 of Vineyard Wind's Statement of Additional Undisputed Facts, Doc. No. 101). Article III standing requirements are "not mere pleading requirements, but rather an indispensable part of the plaintiff's case" that "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan*, 504 U.S. at 561. Thus, Plaintiffs must have evidence that emissions from the Project, not only would actually reach Plaintiffs, but also that such emissions could do so at a level that could cause an increased risk of harm. *See, e.g. Shrimpers & Fishermen v. Tex. Comm'n on Env't Quality*, 968 F.3d 419, 425 (5th Cir. 2020) (per curiam) (association lacks standing to challenge air quality permits that allegedly "would cause ozone levels to be 'very close to violating the federally mandated' NAAQS," where there is "no evidence concerning the extent to which the expected omissions would increase [the] risks for Petitioners' members").

Plaintiffs' cited case, *Hall v. Norton*, 266 F.3d 969, 976-77 (9th Cir. 2001), does not say otherwise. There, the plaintiff alleged he could be harmed by driving through an area with air pollutants "that exceed levels deemed safe under federal air-quality standards." *Id.* at 977. For purposes of a motion to dismiss, the court found "it is not an implausible inference" that the plaintiff "will be affected by the increased emissions." *Id.* Thus, *Hall* involved uncontested allegations that plaintiff was (1) exposed to (2) harmful level of emissions. At summary judgment, Plaintiffs need proof of the two key facts that the *Hall* court assumed to be true: exposure and harm. Plaintiffs provided none.

Plaintiffs did not dispute Ms. Libicki's explanation that "air quality dispersion modeling or similar analyses" is required "to first determine whether Project-related air emissions would

reach the Plaintiffs and whether those emissions would exceed any health hazard threshold." Doc. No. 101 (emphasis added). Instead, they offer a perfunctory statement in a supplemental declaration that Project emissions "will affect" the region where Ms. Oliver "live[s] and breathe[s]." Doc. No. 108 ¶ 12. Such a conclusory, unsupported allegation cannot survive a motion for summary judgment. *See*, *e.g.*, *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 301 F. Supp. 3d 248, 263 (D. Mass. 2018) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)) (at summary judgment "[s]pecific facts, not 'general averments,' are required"), *vacated and remanded on other grounds*, 923 F.3d 209 (1st Cir. 2019). Ms. Oliver's supplemental declaration lacks specific facts supporting her allegation, and she lacks the necessary expertise to determine if the Project's air emissions would reach Nantucket Island.[2] *See* Doc. No. 101 ¶ 6 (Ms. Oliver has no expertise in air emissions or their effects); Doc. No. 107 at 2-3 (Paragraph 6 undisputed).

The Final EIS determined that air emissions would reach just three Massachusetts counties and "offshore Nantucket only." *See* Doc. No. 101 ¶ 27. This means that Project air emissions would not reach onshore Nantucket where Ms. Oliver lives. Doc. No. 108 ¶ 2. Plaintiffs declined to dispute this, effectively conceding that Ms. Oliver will not be exposed to air emissions where she lives. *See* Doc. No. 107 at 2-3.[3] Therefore, Plaintiffs (1) concede they need expert evidence to prove where air emissions will go and at what level, (2) fail to provide any evidence that Ms.

[2] Ms. Oliver adds that the Project's air emissions "will affect my respiratory health," Doc. No. 108 ¶ 12, but provides no evidentiary support for her predictive medical diagnosis. Nor does Ms. Oliver explain how she would be qualified to provide such expert medical testimony.

[3] The Final EIS's conclusion is consistent with the U.S. Environmental Protection Agency's Outer Continental Shelf Air Permit for the Project and its accompanying Fact Sheet and Statement of Basis. BOEM 50091; BOEM 50163. There, EPA carefully examined the Project's emission impacts on ambient air quality standards. BOEM 50141-42. Plaintiffs neither commented on the draft air permit nor appealed it.

Oliver will be exposed to, or harmed by, Project emissions, (3) offer only Ms. Oliver's unsupported statement that she will be "affected," (4) while conceding that the air emissions will not reach onshore Nantucket where she resides. This cannot establish Article III standing.

2. *Plaintiffs Lack Evidence to Establish Standing for Injuries from Air Emissions During Trips to Barnstable or New Bedford*

Although not raised in either Plaintiffs' opening or reply briefs, Plaintiffs raise a *sub rosa* standing argument in their Supplemental Statement of Undisputed Material Facts and Ms. Oliver's supplemental declaration. They claim that by merely traveling to Barnstable or New Bedford, the "project's landside emissions" (whatever those are) will "affect" Ms. Oliver. Doc. No. 108 ¶ 12. Neither Plaintiffs' amended complaint nor their motion mention air emissions in or around Barnstable.[4] Vineyard Wind will use New Bedford as a port for construction and maintenance activities, BOEM 0068626, which is expected to increase employment opportunities and provide some economic benefits. BOEM 0068630-31, 68640. The Final EIS notes that there could be some localized increases in air emissions but they would "have negligible impacts" on those living nearby. BOEM 0068655. Plaintiffs cite no record evidence to the contrary, much less evidence that Ms. Oliver could be harmed by occasionally passing through town.

At summary judgment, Article III standing turns on evidence of actual or imminent injury, not vague allegations of being "affected." "[T]o defeat a motion for summary judgment, plaintiffs cannot rest on mere allegations, or arguments in their memoranda of law, because those are not 'materials of evidentiary quality.'" *Conservation Law Found., Inc. v. EPA*, 964 F. Supp. 2d 175, 186 (D. Mass. 2013) (internal citations omitted) (quoting *Hannon v. Beard*, 645 F.3d 45, 49 (1st Cir. 2011)). Because Plaintiffs raise no admissible evidence that Ms. Oliver could be injured by

[4] The offshore cable will make landfall at Covell's Beach in Barnstable. BOEM 0068442.

air emissions while visiting Barnstable or New Bedford, Plaintiffs lack Article III standing to raise claims regarding "landside" air emissions.

3. *Plaintiffs Provide No Evidence Supporting Standing Related to the Project's Greenhouse Gas Construction Emissions*

Lastly, Plaintiffs provide no evidence they would be harmed by the Project's greenhouse gas emissions. Further, the Final EIS determined that the Project would result in a net reduction in greenhouse gas emissions. BOEM 0068843. Plaintiffs never contested this conclusion, provided no expert testimony on the point, and never explained how fewer net greenhouse gas emissions harm them. Ms. Oliver's supplemental declaration states, without any evidence or elaboration, that "[f]or similar reasons, I would be affected by the project's greenhouse gas emissions, especially since those emissions may exacerbate climate change as experienced on and near Nantucket." Doc. No. 108 ¶ 13. The "similar reasons" phrase appears to reference the preceding paragraph discussing ozone pre-cursor emissions. *See id.* ¶ 12. Ms. Oliver declines to explain the purported similarities between ozone pre-cursor emissions and greenhouse gas emissions and, even if she attempted to do so, there is no indication that she has the expertise required to opine on this issue.

Similarly, Ms. Oliver does not attempt to explain how the Project's greenhouse gas emissions would "exacerbate climate change … on and near Nantucket." *Id.* ¶ 13. Whether it is even possible to attribute specific climate change affects to a specific project is, at best, an open question that could only be addressed with expert evidence. *See*, *e.g.*, *Wash. Env't Council v. Bellon*, 732 F.3d 1131, 1143-44 (9th Cir. 2013) (crediting expert testimony that it is impossible to attribute any particular local climate change affect to five in-state oil refineries); *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1140 (9th Cir. 2011) (airport's current and future activities "represent less than 0.03 percent of U.S.-based greenhouse gases" and this "does not translate into locally-quantifiable environmental impacts given the global nature of climate change"). There is

no indication that Ms. Oliver is such an expert. Therefore, Plaintiffs have no admissible evidence supporting Article III standing with respect to greenhouse gas emissions.

II. THE OCTOBER 2021 BIOLOGICAL OPINION COMPLIES WITH THE ENDANGERED SPECIES ACT

With respect to the October 2021 Biological Opinion ("BiOp"), Plaintiffs' Opposition largely retreads the same ground as their motion and, in many instances, disregards the facts and law Vineyard Wind raised in opposition. Where Plaintiffs do contest Vineyard Wind's arguments, they often misunderstand the record, misunderstand the law, or advance unsupported opinions on highly complex scientific and technical matters.

A. Plaintiffs Lack Evidence for Their "Area 537 Theory"

Vineyard Wind explained how the record does not support Plaintiffs' theory that the Project will harm right whales by "push[ing]" them into NMFS Statistical Area 537 where they will purportedly face increased risks of harm. Doc. No. 100 at 7-8. With two arguable exceptions discussed below, Plaintiffs refused to contest Vineyard Wind's arguments and elected to repeat unsupported claims from their opening brief. *Compare* Doc. No. 89 at 21-22, 33-34, 40-41 *with* Doc. No. 105 at 33, 50-52. Vineyard Wind showed that pile driving would take place at a time when very few, if any, right whales would be near the Project Area, meaning that there will be no whales to "push" out. Doc. No. 100 at 7-8. Plaintiffs did not contest this argument. Indeed, Plaintiffs conceded the underlying facts. *See* Doc. No. 101 ¶¶ 78, 81, 82 (best available information, including Quintana-Rizzo, *et al.* (2021), indicates that right whale density in the Project Area is seasonal and lowest when pile driving is authorized); Doc. No. 107 at 2-3 (Paragraphs are undisputed). Vineyard Wind showed there is no evidence that Area 537 is "heavily fished" as Plaintiffs claimed. Doc. No. 100 at 8. Plaintiffs conceded this issue. *See* Doc. No. 101 ¶ 79 (Key Outcomes Memorandum stated that Area 537 is fished with "heavy gear" not that it is

"heavily fished"); Doc. No. 107 at 2-3 (Paragraph 79 undisputed). Vineyard Wind showed that Plaintiffs presented no evidence that pile driving could cause right whales to starve. Doc. No. 100 at 8-9. Plaintiffs did not contest that argument.

Plaintiffs also did not contest Vineyard Wind's argument that Plaintiffs' speculation that right whales will be injured by strikes from fishing vessels in Area 537 is so perfunctory and devoid of record support that it should be considered waived. *Id.* Instead, Plaintiffs now make the new and unsubstantiated claim that Defendants "*know* where these 987 to 2,659 vertical buoy lines are concentrated, just as they *know* the travel routes of the fishing vessels that set and retrieve these buoy lines." Doc. No. 105 at 33. That assertion violates Local Rule 56.1 and cannot save the claim, because Plaintiffs cite no record evidence that NMFS ignored relevant "commerical fishing data from Area 537" that was in the agency's possession. *Id.*

Plaintiffs also incorrectly claim that Vineyard Wind argued "that whales cleared from the WDA during pile driving can swim up and forage at Nantucket Shoals, an area known to support dense pockets of copepods" and respond to this straw argument by stating that "the BiOp does not analyze what threats the right whales might encounter" while swimming there. Doc. No. 105 at 51-52. In fact, Vineyard Wind demonstrated that the BiOp's mitigation measures ensure there will be few or no whales in the vicinty of the pile driving that could be "pushed" into Nantucket Shoals. Vineyard Wind then showed that Plaintiffs "starvation theory" is contradicted by the record because even if right whales leave the area they would be "pushed" into a prime feeding ground. Doc. No. 100 at 8-9. Plaintiffs did not respond to these arguments.[5]

[5] As noted in the Federal Defendants' brief, Doc. No. 114 at 39-40, the record indicates that any right whales that may be in the vicinity will not go far before resuming their prior behavior.

B. The BiOp's Environmental Baseline was Supported by the Record

Vineyard Wind's motion rebutted Plaintiffs' complaint that the BiOp's description of baseline conditions did not adequately describe transit routes, vessel traffic, or fishing activity, and the cursory accusation that the BiOp failed to accurately account for other take authorizations. Doc. No. 100 at 11-12. Plaintiffs' Opposition does not contest these arguments.

C. The Record Supports the Reasonable and Prudent Measures to Minimize Right Whale Impacts

Plaintiffs fail to muster any record evidence or legal authority in response to Vineyard Wind's arguments that the Project's mitigation measures are lawful, reasonable, and have record support. Plaintiffs' Opposition misunderstands both the applicable law and the record.

1. *Reasonable and Prudent Measures Do not Affect a "No Jeopardy" Determination*

Vineyard Wind's brief explained that, because the Reasonable and Prudent Measures in the BiOp are not required to support a finding of "no jeopardy," invalidating one of those measures would not invalidate the "no jeopardy" determination. *See* Doc. No. 100 at 12-13. Plaintiffs declare that the mitigation measures could not possibly be "reasonable and prudent measures" because Plaintiffs view them as "integral to, and form part of, the BiOp's 'no jeopardy' determination." Doc. No. 105 at 40, n.9. Plaintiffs' record citation states that mitigation measures "are part of the proposed action," not that the mitigation measures were necessary to avoid a "jeopardy" opinion as required under 50 C.F.R. § 402.14(g)(5). The BiOp explicitly labels the mitigation measures as "Reasonable and Prudent Measures," NMFS 17563-79, not the type of reasonable and prudent alternatives required for a "no jeopardy" determination. *See* Doc. No. 100 at 12-13 (explaining legal distinction between reasonable and prudent measures and alternatives).

2. *Plaintiffs' Alleged Harms to Right Whales from Pile Driving Have no Record Support*

Plaintiffs erroneously claim that the "BiOp never discusses [the] highly probable-scenario" in which a "whale would be exposed to Level A pile driving noise, resulting in take and potential jeopardy." Doc. No. 105 at 46. Plaintiffs cite modeling of a "Maximum Design Scenario," for a project consisting of 90 monopile foundations and 12 jacket foundations, which produced a conservative estimate that 1.39 right whales may be subject to Level A harassment from cumulative sound exposure to noise over a 24-hour period. Doc. No. 105 at 28-29, 46; NMFS 17346, Table 7.1.12.[6] But those modeling results were for a Project Design Envelope that was larger than the actual Project and did not include all the mitigation measures the Project will use to avoid pile driving when right whales are present. BOEM and NMFS evaluated the COP using a Project Design Envelope of up to 100 wind turbine generators capable of producing 8 to 14 megawatts of electricity. NMFS 17185. They did so because 100 wind turbine generators would be needed to generate 800 MW of power if the Project used the smallest wind turbine generators (8 megawatts). But the agencies recognized that as few as 57 wind turbine generators would be needed if the Project used 14 megawatt wind turbine generators. *Id.* The Project Design Envelope allowed the agencies to consider the largest potential impact, while giving Vineyard Wind the flexibility to choose the final design of the Project in the most efficient manner. NMFS 17327.

[6] The BiOp cites modeling for two types of sound exposure that could lead to Level A harassment—acute hearing damage (permanent threshold shift) and cumulative exposure over a 24-hour period. *See* NMFS 17342 (explaining peak sound pressure and the cumulative sound exposure level (SEL) metric). As the Federal Defendants explain, Doc. No. 114 at 26-27, the 7.25 kilometer area that concerns Plaintiffs is the area where a right whale could develop hearing damage if it were cumulatively exposed to sound for a 24-hour period. NMFS 17343, Table 7.1.9 (Level A (SEL)). To experience acute hearing damage from pile driving (with six decibels noise attenuation), a right whale would have to be within 17 meters of pile driving. NMFS 17343, Table 7.1.9 (Level A harassment (peak)).

In the end, Vineyard Wind determined that its Project will have 62 13 megawatt wind turbine generators—a fact Plaintiffs concede. *See* Doc. No. 107 ¶ 8 (conceding there are 62 turbines in "Vineyard Wind's current project design"); Doc. No. 101 ¶¶ 45, 46 (fewer turbines would reduce the number of right whale exposures to Level B harassment); Doc. No. 107 at 2-3 (Paragraphs 45 and 46 undisputed).[7] Thus, Plaintiffs' repeated reference to the "Maximum Design Scenario" modeling for a project with 100 wind turbine generators is not representative of the impact the Project will have. Instead—and as the BiOp makes clear—the Project with 62 wind turbine generators will have much less impact than the modeled 100-turbine project because "the number of whales expected to be exposed to pile driving noise is proportional to the number of piles to be installed." NMFS 17347 ("Installing 57 foundations would require 43% less pile driving and estimates of exposure would likewise be 43% less than the maximum impact scenarios….").

Moreover, even if one assumes (counter-factually) that the Project would have 100 turbines, the BiOp's "Maximum Design Scenario" modeling would still overstate the harm that is reasonably likely to occur because that modeling did not account for Protected Species Observers ("PSOs") or passive acoustic monitoring to prevent pile driving when right whales might be present. *See* NMFS 17356-58 (pile driving will not begin "if any right whales are observed within

[7] To the extent Plaintiffs imply that Vineyard Wind might change its "current project design" to use more wind turbine generators (Doc. No. 107 ¶ 8), they are wrong. Vineyard Wind contracted to buy 13 megawatt Haliade-X wind turbine generators from General Electric Company ("GE") and it needs just 62 of those turbines to generate the 800 MW of electricity it has contracted to supply to Massachusetts utilities. In addition, GE was enjoined from supplying more than 62 wind turbine generators for Vineyard Wind's Project. *See Siemens Gamesa Renewable Energy A/S v. Gen. Elec. Co.*, No. 21-cv-10216-WGY (D. Mass. Sept. 7, 2022) (Doc. No. 466 at 1-4) (finding that GE infringed patent by "offering for sale and selling Haliade-X wind turbines" and enjoining GE from selling Haliade-X wind turbines for the life of the patent ("through June 12, 2034"), but making a carve-out that allows GE to provide "62 (sixty-two) infringing Haliade-X turbines for the Vineyard Wind 1 Offshore Energy Project in accordance with the Turbine Supply Agreement and/or the Service and Maintenance Agreement between GE and Vineyard Wind 1, LLC," and to pay a royalty of "$30,000 per megawatt of rated capacity").

the clearance zone"). As Vineyard Wind previously explained (Doc. No. 100 at 14-15), these mitigation measures will further reduce the model's (already small) possibility that a whale would be subject to Level A harassment. Thus, the BiOp properly concluded that "exposure of any right whales to noise that could result in Level A harassment is extremely unlikely to occur." NMFS 17351-52. Plaintiffs have not shown that conclusion was arbitrary and capricious.

Plaintiffs complain that the monitoring and clearance zones are not large enough, because Level A noise could extend for 7.25 km. Doc. No. 105 at 46. But this ignores that (1) the clearance zone is 10 km during November and December and in early May; (2) only pile driving for the two jacket piles could produce Level A noise that could extend to 7.25 km; and (3) all other pile driving will be for monopiles, where the Level A noise could extend for no more than 3.191 km—which is within even the smallest (3.2 km) clearance zone. NMFS 17342, 17343 (Table 7.1.9), 17356. Thus, the BiOp reasonably concluded that, with the mitigation measures in place, it is "extremely unlikely that any right whales will experience permanent threshold shift or any other injury." NMFS 17358.

3. *Plaintiffs' Objections to the "Soft Start" Procedure Have no Record Support*

Vineyard Wind explained that the "soft start" process is a last check to avoid Level A exposure, begun only after PSOs and passive acoustic monitoring operators determined right whales have been absent from the applicable clearance zone for at least 60 minutes. Doc. No. 100 at 15; Doc. No. 101 ¶ 59 (statement of undisputed facts). Plaintiffs conceded this fact, Doc. No. 107 at 2-3, yet Plaintiffs' Opposition continues to dispute the point. Plaintiffs claim, without any record support, that the "soft start" process will "'clear' the pile driving noise impact area of all right whales whenever Vineyard Wind decides it wants to start installing" turbines. Doc. No. 105

at 44; *see also id.* ("they don't have to wait for the whales to leave on their own volition."). Nothing in the record supports such claims, as Plaintiffs have already admitted.

Vineyard Wind provided a lengthy, record-based explanation of how the "soft start" process would work, including prior experience with a "'ramp up' process for seismic surveys similar to the 'soft start' process anticipated for pile driving activities. NMFS 6074-6075." Doc. No. 101 ¶ 52; *see also id.* ¶¶ 55-58 (describing record basis for "soft start"); Doc. No. 100 at 15-17 (same). Those facts are undisputed. *See* Doc. No. 107 at 2-3. Plaintiffs argue there is "no evidence that the soft start procedure has been used successfully in the past." Doc. No. 105 at 44. This is incorrect. The Block Island Wind Farm and Coastal Virginia Offshore Wind Project used the "soft start" procedure prior to pile driving for wind turbine foundations. *See* NMFS 45590 (discussing "soft start" process in Block Island Wind Farm biological opinion); BOEM 182928 (discussing Coastal Virginia Offshore Wind Project "Soft-start mitigation procedures … to reduce sound levels during the initial stages of driving a pile"). Even if Plaintiffs were right, however, they must demonstrate that using the "soft start" process is arbitrary, capricious, and unsupported by the record. Merely claiming (incorrectly) that the "soft start" process is a novel innovation cannot meet that standard.

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

Plaintiffs' argument that the "soft start" process is an intentional take of right whales disregards the administrative record, Vineyard Wind's arguments on the issue, and the Endangered Species Act. First, Vineyard Wind explained that the "soft start" process does not begin until visual and acoustic observers determine that no right whales are present – a fact that Plaintiffs already conceded. *See* Doc. No. 101 ¶ 59 (clearance zones must be established at least 60 minutes before pile driving begins); Doc. No. 107 at 2-3 (Paragraph 59 undisputed). This means that Vineyard

Wind cannot "intentionally" take right whales reasonably believed to be absent. Doc. No. 100 at 15-17. Plaintiffs do not contest this argument.

Second, Vineyard Wind argued that, under the Endangered Species Act, incidental taking means any take incidental to an otherwise lawful activity. *Id.* at 16. Plaintiffs bizarrely respond that Vineyard Wind "acknowledges" that incidental takes are actually "intentional" and persist that the "soft start" process is illegal without citing to any statute, regulation, case law, or record citation.[8] Doc. No. 105 at 45. The "soft start" is merely a slow start to pile driving – pile driving performed to install wind turbines, not to harass whales. Initiating a slow start to avoid a potentially greater harm to right whales is not an "intentional" take under any definition.

5. *Protected Species Observers Will Reduce Risks to Right Whales*

Vineyard Wind explained that courts have previously upheld PSOs as effective mitigation measures to avoid harm to whales. Doc. No. 100 at 17. Plaintiffs never contested this argument. Vineyard Wind also explained that it must use as many PSOs as necessary to obtain full coverage of clearance zones, not just a single PSO as Plaintiffs assume. *Id.* at 18. Plaintiffs' Opposition, without any citation to the record, argues that Vineyard Wind will only use a single PSO, watching from a single platform, during pile driving. Doc. No. 105 at 5, 46-47. But Plaintiffs already conceded that Vineyard Wind will use multiple PSOs and platforms during pile driving. *See* Doc. No. 101 ¶¶ 63, 64; Doc. No. 107 at 2-3 (Paragraphs 63 and 64 undisputed). Plaintiffs also dismiss the requirement that Vineyard Wind use technologies such as night vision or thermal cameras to

[8] Plaintiffs claim that Vineyard Wind's purported "acknowledgement" is at Doc. No. 100 at 22-23, but these pages discuss how Plaintiffs waived NEPA claims by failing to comment on the Draft Environmental Impact Statement. *See* Doc. No. 105 at 45.

help detect whales as ineffective "given their limitations as to distance and resolution," Doc. No. 105 at 42, but provide no citation to the record for these purported deficiencies.[9]

Plaintiffs make similar arguments against vessel PSOs, claiming they have a sight range of 1,000 meters. Doc. No. 105 at 41 (citing BOEM 77524-25). But Plaintiffs cite nothing in the administrative record indicating that this is inadequate for a vessel to avoid striking a right whale. Further, Plaintiffs claim that PSOs cannot see whales below the water's surface and "whales swimming as deep as 30 feet can still be caught in the 'draft pull' of the boat's hull, resulting in a collision," Doc. No. 105 at 6, has no record support. *See id.* at 41 (same) (citing NMFS 6117). The cited study states that whales "in the upper 10 meters of the water column [are] within the draft of large commercial ships (e.g., tankers, container ships, bulk carriers; Rodrigue et al. 2017)." NMFS 6117 at 11 (emphasis added).[10] But Vineyard Wind's crew transfer vessels are not large commercial ships and PSOs are not the only measure Vineyard Wind will take to avoid whales.

6. *Passive Acoustic Monitoring Reliably Detects Right Whales*

a. Barkaszi, *et al.* (2020) does not support Plaintiffs' claims

Vineyard Wind agrees with the Federal Defendants that Barkaszi, *et al.* (2020) is inadmissible for several reasons, Doc. No. 114 at 18 & n.22, but even if the Court considered the study, it does not say what Plaintiffs claim. Plaintiffs say that "right whales, often go hours, even days, without vocalizing." Doc. No. 105 at 4-5 and n.1 (citing Barkaszi, *et al.* (2020) Executive Summary and Section 2.1.1.3). Barkaszi's Executive Summary does not say this and Section 2.1.1.3 says that "some species of baleen whale may only vocalize rarely or at certain times of year." Barkaszi, *et al.* (2020) at 7. The section does not say that right whales are among those

[9] Even if the Court could consider such extra-record opinion testimony, Plaintiffs provided no indication that either they or their counsel have any expertise with respect to such monitoring technology.

[10] Although "6117" appears in the file name, none of this document's pages have Bates numbers.

species of baleen whales. Nor does it support Plaintiffs' claim that "baleen whales like the North Atlantic right whale … tend to vocalize much less frequently than other cetaceans." Doc. No. 105 at 35; *see also id.* at 37 (same). Plaintiffs do not cite any page in Barkaszi, *et al.* (2020) supporting that claim, and Vineyard Wind cannot find any passage in the paper that could. The remainder of Plaintiffs' quotations from Barkaszi, *et al.* (2020) are irrelevant or make observations that present no conflict with the BiOp's reliance on passive acoustic monitoring as a mitigation measure.[11] Therefore, even if considered, Barkaszi, *et al.* (2020) cannot overcome NMFS' expert judgment that passive acoustic monitoring may be an important part of Vineyard Wind's advanced monitoring and detection measures.

b. Plaintiffs offer inadmissible opinion testimony about the combined efficacy of the mitigation measures

Lastly, Plaintiffs offer various extra-record and inadmissible opinions about the combination of passive acoustic monitoring and PSOs. For instance, Plaintiffs opine that "the chances that a PSO will see ***all*** the right whales that avoid detection by [passive acoustic monitoring] is virtually nil" and that it is "simply not possible" for mitigation measures "to throw a no-hitter, every day … given the inherent limitations of both PAM and PSOs." Doc. No. 105 at 47. They provide no record citations for these opinions, which is fatal to their claim. *See, e.g.*, *City of Taunton v. EPA*, 895 F.3d 120, 127 (1st Cir. 2018) ("the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the

[11] Plaintiffs cite Barkaszi, *et al.* (2020)'s observations that the efficacy of a passive acoustic monitoring system may vary with the knowledge and skill of the operator. *See* Doc. No. 105 at 35. But the BiOp requires that the Project use "PAM operators [who] must have completed a commercial PSO training program for the Atlantic with an overall examination score of 80 percent or greater (Baker et. al 2013)." NMFS 17207-08. It also requires Vineyard Wind to prepare a "*Passive Acoustic Monitoring Plan* that describes all equipment, procedures, and protocols related to the required use of PAM for monitoring" that "must be submitted to NMFS and BOEM for review and approval at least 90 days prior to the planned start of pile driving." NMFS 17566.

reviewing court") (quoting *Camp v. Pitts*, 411 U.S. 138. 142 (1973)). And even where judicial review is not limited to the agency record, Plaintiffs cannot defeat summary judgment by relying on their own opinions. *See*, *e.g.*, *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 49-50 (1st Cir. 1990) (party must adduce admissible evidence to defeat summary judgment and opinions "may defeat summary judgment only where it appears the affiant is competent to give an expert opinion") (emphasis omitted); *United States v. Ayala-Pizarro*, 407 F.3d 25, 28 (1st Cir. 2005) (Federal Rule of Evidence 701 prohibits lay testimony involving scientific, technical, or other specialized knowledge). Therefore, Plaintiffs identify no record evidence questioning the utility of passive acoustic monitoring or PSOs.

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.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of December 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 for Plaintiffs and Defendants via the Court's electronic filing system.

/s/ Jack W. Pirozzolo
Jack W. Pirozzolo