UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ALLCO RENEWABLE ENERGY LIMITED, *et al.*,

Plaintiffs,

vs.

DEB HAALAND, *et al.*,

Defendants.

Civil Action No. 1:21-cv-11171-IT

Hon. Indira Talwani

MEMORANDUM IN SUPPORT OF INTERVENOR-DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

The Plaintiffs invoke federal environmental and wildlife laws to block construction and operation of the Vineyard Wind 1 Project (the "Project"). This Project would be the nation's first large-scale (800 megawatt) offshore wind energy project, located in the Outer Continental Shelf ("OCS") approximately fourteen miles south of Martha's Vineyard. Plaintiffs, being solar power development corporations Allco Renewable Energy Limited and Allco Finance Limited (collectively, "Allco"), and owner Thomas Melone, ask this Court vacate the Project's federal approvals because the Defendants allegedly violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq.*, among other laws.

Vineyard Wind 1, LLC ("Vineyard Wind") moves to dismiss Counts III (NEPA), VIII, IX, XI, and Second XI (Clean Water Act), and Count XV (MMPA) for failure to state a claim.[1] In addition, Vineyard Wind incorporates by reference the arguments made in the Federal Defendants'

[1] The Complaint includes two claims denominated as Count XI. *See* Complaint, Doc. # 1 (July 18, 2021) ("Compl.") ¶¶ 214, 228.

Motion to Dismiss the Complaint and Memorandum in Support of that Motion, Doc. # 48, 49 (Feb. 2, 2022) ("Motion").

STATEMENT OF FACTS

The Project is an approximately 800-megawatt offshore wind energy facility that will be constructed in a section of the OCS leased to Vineyard Wind by the U.S. Bureau of Ocean Energy Management ("BOEM"). Compl. ¶ 59; *Id.*, Ex. 1, at 5 & 7 (Figure 1). As approved, the Project will have a maximum of 84 wind turbines that will be spaced at least one nautical mile apart. *Id.*, Ex. 1 at 23, 26-27. The Project will sell energy to Massachusetts utilities under power purchase agreements approved by the Massachusetts Department of Public Utilities ("MDPU") pursuant to a Massachusetts law requiring utilities to solicit proposals for offshore wind generation. *See id.* ¶ 184; *see also* MDPU, DPU Nos. 18-76, 18-77, 18-78 (Apr. 12, 2019) (approving power purchase agreements under Mass. Green Communities Act, St. 2008, c. 169, § 83C, and 220 Code of Massachusetts Regulations § 23.00).[2]

Allco, by contrast, develops, owns, and operates solar electric generating facilities that are "Qualifying Facilities ('QFs')" under the federal Public Utility Regulatory Policies Act ("PURPA"). 16 U.S.C. § 2601, *et seq.* Compl. ¶ 14. QFs are small facilities that each produce less than 80 megawatts of electricity, *see* 16 U.S.C. § 796(17); *Allco Renewable Energy Ltd. v. Mass. Elec. Co.*, 875 F.3d 64, 67 (1st Cir. 2017), about one-tenth the output of Vineyard Wind's Project. PURPA requires utilities to purchase electricity from QFs pursuant to rules issued by the Federal Energy Regulatory Commission ("FERC") and implemented by state regulatory authorities like the MDPU. *See* 16 U.S.C. § 824a-3. PURPA allows QFs to sell power at favorable rates. *See Allco*

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[2] *Available at*, https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/10617250.

Renewable Energy, 875 F.3d at 67 (FERC rules require utilities to purchase from QFs at their "avoided cost rate," which "usually exceeds the market price for wholesale power").

Vineyard Wind will not sell power under PURPA as its 800 megawatt Project is too large to be a "QF." Instead, the Project will sell its energy to three large electric utilities under power purchase agreements approved by the MDPU pursuant to a Massachusetts law requiring utilities to solicit proposals for offshore wind generation. Allco's small solar facilities could not compete for those offshore wind solicitations.[3]

The Project, and the OCS area covered by Vineyard Wind's lease, have been subjected to extensive environmental reviews, public comment, and intergovernmental consultation, beginning in 2009, when BOEM started evaluating the potential for wind energy development offshore of Massachusetts. Compl., Ex. 1, at 4. After winning a competitive lease sale in January 2015, Vineyard Wind sought BOEM's approval of the Project's Construction and Operations Plan ("COP"). This request triggered a lengthy NEPA review that included public hearings and an opportunity for public comment and culminated in a four-volume final environmental impact statement ("EIS"). *Id.* at 5-6. BOEM also initiated Endangered Species Act consultation with the National Marine Fisheries Service ("NMFS"), which issued a biological opinion addressing the Project's potential effects on listed species and designated habitat. *Id.* at 6; Compl. ¶ 6.

On May 14, 2021, BOEM, the U.S. Army Corps of Engineers ("Corps"), and NMFS issued a Joint Record of Decision ("ROD") for its approval of the COP and the final EIS. *Id.*, Ex. 1; 86 Fed. Reg. 26,541 (May 14, 2021). In addition to this Joint ROD, (1) the Corps issued a permit for

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[3] Under Massachusetts law, the procurement process for offshore wind is governed by Section 83C of the Mass. Green Communities Act, St. 2008, c. 169. Solar power procurement is governed by Section 83D of the same statute, meaning that the two procurement processes are completely separate.

the Project under CWA § 404, 33 U.S.C. § 1344, and Rivers and Harbors Act § 10, 33 U.S.C. § 403, and (2) NMFS issued an Incidental Harassment Authorization ("IHA") under the MMPA, for a relatively small number of marine mammals that may be harassed during Project construction.[4] Plaintiffs' allege that these approvals are unlawful and should be vacated.

STANDARD OF REVIEW

In reviewing a motion to dismiss, the "sole inquiry under Rule 12(b)(6) is whether, construing the well-pleaded facts of the complaint in the light most favorable to the plaintiffs, the complaint states a claim for which relief can be granted." *Ocasio-Hernandez v. Fortuño-Burset*, 640 F.3d 1, 7 (1st Cir. 2011). This review includes "identifying and disregarding statements in the complaint that merely offer 'legal conclusions couched as fact' or 'threadbare recitals of the elements of a cause of action.'" *Id.* at 12 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (cleaned up)). In its review, the court should "draw on' [its] 'judicial experience and common sense" and may also "consider (a) 'implications from documents' attached to or fairly 'incorporated into the complaint,' (b) 'facts' susceptible to 'judicial notice,' and (c) 'concessions' in [the] plaintiff's 'response to the motion to dismiss.'" *Lyman v. Baker*, 954 F.3d 351, 360 (1st Cir. 2020).

ARGUMENT

I. Count III (NEPA) is Moot

Count III, alleging that BOEM violated NEPA by not preparing a new Supplemental EIS analyzing the use of a larger turbine, Compl. ¶¶ 108-11, is moot as that analysis has already been performed. "The doctrine of mootness enforces the mandate 'that an actual controversy must be

[4] The IHA, which is valid from May 1, 2023 through April 30, 2024, was published in the Federal Register on June 25, 2021. *See* 86 Fed. Reg. 33,810 (June 25, 2021).

extant at all stages of the review….'" *Mangual v. Rotger-Sabat*, 317 F.3d 45, 60 (1st Cir. 2003) (quoting *Steffel v. Thompson*, 415 U.S. 452, 460 n.10 (1974)). "[A] case is moot when the court cannot give any 'effectual relief' to the potentially prevailing party." *Horizon Bank & Tr. Co. v. Massachusetts*, 391 F.3d 48, 53 (1st Cir. 2004). Here, Plaintiffs are asking this Court to order Defendants to do what has already been done.

Plaintiffs, citing a page from the June 3, 2020 COP appendix, mistakenly claims that BOEM based its analyses on a turbine smaller than the Haliade-X turbines that Vineyard Wind will use. Compl. ¶¶ 108-11.[5] As stated on *page one* of that appendix, "Vineyard Wind has recently modified its COP to expand the envelope to include up to ~14 [megawatt wind turbine generators ("WTGs")]; the modified envelope includes a modest increase in the WTG rotor diameter and tip and hub heights." Intervenor's Exh. A, COP, Vol. III, Appx. III-Ha (excerpts) (June 3, 2020) at 1. That page includes a chart for the "Modified Envelope Maximum," accounting for a larger turbine height of 255 meters and a larger rotor diameter of 222 meters. *Id.*, Table 1. "The Addendum provides a revised viewshed for the maximum [wind turbine generator] included in the modified envelope, revised visual simulations for the maximum [wind turbine generator] included in the modified envelope, and updated conclusions." *Id.* Thus, the updated visual assessment that Plaintiffs claim was never performed, Compl. ¶¶ 110-11, is in the same appendix they cite. *Id.* at 1-6 (pages 8-15 of PDF).

Further, the analyses of impacts on migratory birds, Compl. ¶ 112, were also updated in the June 2020 Supplemental EIS to account for the larger turbine size. *See* Intervenor's Exh. B,

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[5] On a motion to dismiss, the Court may consider "documents central to plaintiffs' claim" without converting the motion to one for summary judgment. *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993). The Complaint's reliance on a specific appendix of Vineyard Wind's COP, *Vineyard Wind Project Visual Impact Assessment*, COP Vol. II, Appx. III-Ha (June 3, 2020), as the basis for their claim, Compl. ¶ 110, fairly makes the appendix "central" to that claim.

Supplement EIS (excerpts) at ES-2 to ES-3, Table ES-1, 2-2, and 3-86 to 3-87; *see also* Intervenor's Exh. C, Final EIS (excerpts) at A-108 to A-112 (analysis of bird collision risk under larger turbine scenario as referenced in 2020 COP) Appx. G-1 to G-2 (comparing project design envelope maximum to GE Haliade-X turbine).[6] Plaintiffs do not challenge the adequacy of either analysis. Instead, they incorrectly allege that these analyses do not exist and that NEPA requires they be performed in the first instance. Compl. ¶¶ 110-13. As these analyses were already performed, "there is literally no controversy left for the court to decide," *ACLUM v. Conference of Cath. Bishops*, 705 F.3d 44, 53 (1st Cir.), and the Court "is not capable of providing any relief which will redress the alleged injury." *Gulf of Me. Fishermen's All. v. Daley*, 292 F.3d 84, 88 (1st Cir. 2002). Therefore, Count III should be dismissed as moot.

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

Plaintiffs' Counts VIII, IX, XI, and Second XI all erroneously claim that the Corps violated the Clean Water Act 404(b)(1) Guidelines.

A. Count VIII Challenges the Wrong Document

Count VIII incorrectly claims that the Corps' evaluation of potentially practicable alternatives under 40 C.F.R. § 230.10(a)(1) only considered fossil-fuel plants as alternative energy supplies. Compl. ¶¶ 179-80, citing Final EIS at 3-94. The Final EIS does not contain the Corps' alternatives analysis. That is in the ROD. *See* Intervenor's Exh. D, ROD (excerpts) at 32-33.[7] Contrary to Plaintiffs' claim that the Corps failed to consider onshore renewable energy generation

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[6] As Plaintiffs' NEPA claims directly challenge the adequacy of the Supplemental EIS on this issue, Compl. ¶¶ 67, 109, it is "central" to Plaintiffs' claims and may be considered on a motion to dismiss. *Watterson*, 987 F.2d at 3.

[7] Count VIII asks this Court to vacate the ROD based on the Corps' alleged Clean Water Act violations. This make the ROD "central" to Plaintiffs' claims and it may be considered on a motion to dismiss. *Watterson*, 987 F.2d at 3.

as an alternative, Compl. ¶¶ 179, 186, the Corps considered (and rejected) "Off-site alternative 1" consisting of an onshore wind energy project in "a majority upland area." Intervenor's Exh. D at 32. Since Plaintiffs failed to challenge the Corps' actual alternatives analysis, and do not contest its conclusion, Count VIII fails to state a claim.

B. Count IX Cannot Enforce a General Statement of Policy

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

C. Count XI Fails to Allege a Discharge Into a Special Aquatic Site

Count XI misreads the regulations on discharges of dredged or fill material into "special aquatic sites." Where a project "involve[s] a discharge *into* a special aquatic site," the Corps must use a series of presumptions in its alternatives analysis. 40 C.F.R. § 230.10(a)(3) (emphasis added). Here, Plaintiffs never allege a discharge *into* a "special aquatic site," defined as, *inter alia*, wetlands, vegetated shallows, and coral reefs. *Id.* §§ 230.41-44. Instead, Plaintiffs point to a 10-mile radius around the Project area used for analyzing *vessel traffic*, Compl. ¶ 220 (quoting Final EIS, Appx. K), and claim that this entire area is a "special aquatic area" because wetlands, coral, or eel grass exist somewhere within it. *See* Compl. ¶¶ 224-25 (eel grass "exists in Edgartown

Harbor;" wetlands "exist in Eel Pond in Edgartown"). Plaintiffs cannot merely allege that special aquatic sites "exist" in the Project area; they must allege a discharge *into* special aquatic sites. Because they do not, Count XI must be dismissed.

D. Count Second XI Merely Combines Counts VIII and XI

The Second XI Count amalgamates claims found in Counts VIII and XI, alleging that the Corps failed to consider onshore renewable energy as a practicable alternative and failing to allege that the Project discharges into a special aquatic site and that. Compl. ¶¶ 229-35. For the same reasons as those discussed above, Count Second XI fails to state a claim.

III. **Count XV Fails to State a Claim for a Violation of the MMPA**

Count XV alleges that Vineyard Wind's IHA is invalid because it is effective for more than one year. *See*, *e.g.*, Compl. ¶¶ 264 (claiming Project construction will exceed one year), 265 (claiming the Project will cause "warming" during its operational life), 269-70 (decommissioning at the end of the Project's useful life).[8] These allegations fail to state a claim for three reasons. First, Vineyard Wind's IHA *is* only valid for one year. *See* Intervenor's Exh. E, IHA at 1 ("This incidental harassment authorization (IHA) is valid from May 1, 2023 through April 30, 2024.");[9] *see also* 86 Fed. Reg. at 33,815 ("NMFS issued a one-year IHA").

Second, IHAs "may be renewed for additional periods of time not to exceed 1 year for each reauthorization." 50 C.F.R. § 216.107(e). NMFS expressly stated that it "makes the decision of whether or not to issue a Renewal after one is requested based on current information, the best available science, and the renewal criteria…." 86 Fed. Reg. at 33,815. Plaintiffs cannot challenge

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[8] The remainder of the allegations in Count XV claim that NMFS lacked record support to issue the IHA. Compl. ¶¶ 267, 271-72. These remaining allegations are duplicative of Count XVIII.

[9] As Plaintiffs are challenging the terms of the IHA, the IHA itself is "central" to Plaintiffs' claims and may be considered on a motion to dismiss. *Watterson*, 987 F.2d at 3.

potential future renewals of the IHA before NMFS has decided whether or not to issue them. *See W.R. Grace & Co. v. EPA*, 959 F.2d 360, 365 (1st Cir. 1992) (where an agency has not yet taken action on a submission "[t]here is … no … final agency action … before us"). Thus, Plaintiffs are impermissibly attempting to challenge a future, non-final agency action with respect to these activities.

To the extent that Plaintiffs speculate that there may be takes of marine mammals after Project construction, Compl. ¶¶ 265-70, Plaintiffs' claim encounters two additional problems. First, the IHA is only authorized for construction activities, not operations or decommissioning. *See* 86 Fed. Reg. at 33,816 ("NMFS has issued a 1-year IHA for the take of marine mammals incidental to *construction* of the Vineyard Wind Project.") (emphasis added). As NMFS has not authorized takes during operations and decommissioning, there is no final agency action to challenge.

Further, claims of unauthorized takes after the IHA's expiration is effectively an allegation that Vineyard Wind – not NMFS – will violate the MMPA in the future. Although Plaintiffs lack standing to bring any MMPA claim at all, *see* Motion at 12-14, Plaintiffs certainly lack "standing where 'hypothetical,' 'speculative,' or 'conjectural' injury is at issue." *McInnis-Misenor v. Maine Med. Ctr.*, 319 F.3d 63, 71 (1st Cir. 2003). Alleging that someday, in an undefined future, Vineyard Wind (but not the Defendants) might take an unidentified marine mammal species without authorization "is precisely the sort of speculative argumentation that cannot pass muster where standing is contested." *United States v. AVX Corp.*, 962 F.2d 108, 117 (1st Cir. 1992); *see also Los Angeles v. Lyons,* 461 U.S. 95, 103 (1983) (injury that allegedly will result from unlawful future action is too speculative to confer standing because courts assume that people "will conduct their activities within the law"). Even if Plaintiffs alleged more than speculative fears, their allegation

is that Vineyard Wind would violate the MMPA sometime in the future, not the Defendants. Yet, "[t]here is no citizen suit provision under the MMPA" that would authorize Plaintiffs to sue Vineyard Wind for such future violations. *Strahan v. Coxe*, 939 F. Supp. 963, 975 (D. Mass. 1996), *aff'd in part and vacated in part*, 127 F.3d 155 (1st Cir. 1997). Due to these multiple legal defects, Claim XV should be dismissed.

CONCLUSION

For the foregoing reasons, Intervenor-Defendant's Motion to Dismiss should be granted.

Dated: February 8, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 8, 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.

Dated: February 8, 2022

/s/ Jack W. Pirozzolo
Jack W. Pirozzolo