UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

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

Jack W. Pirozzolo (BBO # 564879)
SIDLEY AUSTIN LLP
60 State Street, 36th Floor
Boston, MA 02109
(617) 223-0304
jpirozzolo@sidley.com

Counsel for Vineyard Wind 1 LLC

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Vineyard Wind 1 LLC ("Vineyard Wind") hereby submits this Reply in Support of its Motion for Judgment on the Pleadings ("Motion") pursuant to Rule 12(c) of the Federal Rules of Civil Procedure and Local Rule 7.1. Plaintiffs Allco Renewable Energy Limited and Allco Finance Limited (collectively, "Allco"), and Thomas Melone filed an Opposition to Vineyard Wind's Motion. Doc. No. 90 (Mar. 28, 2022) ("Opp."). For the reasons contained in the Motion, and those herein, the Court should grant judgment on the pleadings to Vineyard Wind and Defendants.

I. Mr. Melone Lacks Standing for Purported Recreational and Aesthetic Harms

Mr. Melone concedes that he does not watch whales or birds at the Project Area. Instead, he alleges, for the first time, that he would be able to see the Project from his residence, despite the Project being 19 miles away, and therefore, this is close enough for standing purposes. Opp. at 1. To begin, the Court should not consider these new allegations. *Keane v. Navarro*, 345 F. Supp. 2d 9, 12 (D. Mass. 2004) (disregarding "new allegations in [plaintiff's] opposition memorandum" as "the Court confines itself to the allegations of the complaint."). Even if it did, being able to see an affected area from 19 miles away is not enough to establish standing. "[A] plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 565-66 (1992) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 887-89 (1990)). Mr. Melone cannot dodge this requirement by relying upon an "animal nexus" theory, Opp. at 1-2, that *Lujan* rejected. *See* Motion at 4-5.

This court also rejected the "animal nexus" theory in *Citizens v. New England Aquarium*, 836 F. Supp. 45, 53 (D. Mass. 1993), where groups alleged that the Department of "Commerce's actions … will result in fewer dolphins in the wild for plaintiffs' members to observe and study." (footnote omitted). This Court held that *Lujan* "expressly rejected the 'animal nexus' test for standing," precluding standing on the theory that an agency's action that might kill dolphins at

some location could harm the plaintiffs' ability to observe dolphins elsewhere. *Id.* As with the plaintiffs in *New England Aquarium*, Mr. Melone cannot acquire standing based on a "general concern for the depletion of" right whales or birds. *Id.*

II. Mr. Melone Lacks Standing Based on a Hypothetical Future Hurricane

Plaintiffs' Opposition, based on the hypothetical and speculative prospect of an historically unprecedented hurricane does not establish a legally cognizable concrete and imminent injury-in-fact. Plaintiffs primarily rely on a Nuclear Regulatory Commission report ("NRC Report"), Doc. No. 86-2, that was neither attached to, nor incorporated by reference in, the amended complaint. Therefore, the Court should not consider it. *Keane*, 345 F. Supp. 2d at 12.[1]

If, however, the Court does consider Plaintiffs' argument on this point, Doc. No. 86 at 7, the NRC Report does not predict a Hurricane Sandy-like storm hitting the East Coast in general, or Martha's Vineyard in particular, at any time, much less during the Project's 30-year lifespan. In fact, the NRC Report disclaims Plaintiffs' speculative fears of such a storm. *See* NRC Report at 4.13 ("Overall the [Coupled Model Intercomparison Project phase 5] projections do not favor the atmospheric circulation features experienced by Sandy that helped steer it toward the coast.") (emphasis added); *id.* at 4.4. ("Future changes in large-scale circulation are not favorable for a Sandy-like storm that went through (incomplete) transition from tropical cyclone to extratropical cyclone following an unprecedented track steered by anomalous circulation….") (emphasis

[1] If the Court were inclined to consider the NRC Report, converting Vineyard Wind's motion for judgment on the pleadings to a motion for summary judgment, *see* Fed. R. Civ. P. 12(d), Plaintiffs still fail to provide any admissible testimony regarding the NRC Report. Mr. Melone is a lawyer and business owner, not a climatologist or climate modeler. He cannot provide (via briefing) the type of expert testimony required under Federal Rule of Evidence 702. *See*, *e.g.*, *Downey v. Bob's Disc. Furniture Holdings, Inc.*, 633 F.3d 1, 10 (1st Cir. 2011) ("expert testimony is required in certain circumstances in which a factfinder cannot reasonably be expected to make a judgment without the benefit of technical expertise…."). Here, Mr. Melone lacks the expertise to characterize the NRC Report's methodology and conclusions.

added); *id.* at 5.39 ("The return period of a storm surge of a Sandy-like storm (2.8 m) is 398 y[ears] in 2000….") (emphasis added).

Plaintiffs reproduce figure 4.11 from the NRC Report and incorrectly claims it demonstrates that "a future Sandy would arrive as a category 4 or 5 storm and directly hit the Rhode Island/Massachusetts wind energy Area." Opp. at 3. To begin, Figure 4.11(c), labeled "Sandy Future Merged All and Best Track," shows the probable path of a "future Sandy," in the unlikely event it were to even come ashore, is through Long Island, not the Project area. This "future" scenario "does not rise to the level of a reasonably impending threat" sufficient for standing, *Katz v. Pershing, LLC*, 672 F.3d 64, 79 (1st Cir. 2012), because Figure 4.11(c) was created by modeling conditions "corresponding roughly to projected thermodynamic conditions 100 years in the future."[2] Thus, the amended complaint's already attenuated chain of events, whereby a hurricane leads to a "catastrophic failure" of wind turbines, AC ¶ 141, leading to an oil spill that was never contained or remediated, leading to oil on Mr. Melone's property, would not even begin until 60 to 70 years beyond the Project's lifespan (and Mr. Melone's).

Given Plaintiffs' misunderstanding of the NRC Report, *Kerin v. Titeflex Corp.*, 770 F.3d 978, 983 (1st Cir. 2014), provides no support for Plaintiffs' hurricane-based standing theory. Standing sometimes may be based on a risk of future harm but Plaintiffs omit *Kerin*'s imposition of a higher burden on those making such claims. "Cases" alleging risk of future injury "require greater caution and scrutiny because the assessment of risk is both less certain and whether the risk

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[2] Figure 4.11(c) was taken from Lackmann (2015). Opp. at 3. Lackmann (2015) at 551, Intervenors Exh. 1, explains that to create the "future" scenario shown in Figure 4.11(c), the authors used "[t]hermodynamic change fields … based on the A2 emissions scenario and differences" which "were calculated between the 1990s and 2090s (Figs. 4c, d). These change fields were again applied to the initial and boundary conditions used in the current simulations, this time to generate 'future' versions of Sandy, corresponding roughly to projected thermodynamic conditions 100 years in the future." (emphasis added).

constitutes injury is likely to be more controversial." *Id.* at 982. *Kerin*forecloses standing based on speculative risks of injury, such as that offered here. "As the D.C. Circuit has noted 'were all purely speculative increased risks deemed injurious, the entire requirement of actual or imminent injury would be rendered moot, because all hypothesized, non-imminent injuries could be dressed up as increased risk of future injury." *Id.* at 983 (quoting *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1161 (D.C. Cir. 2005)). Plaintiffs' assertion that Mr. Melone could be injured if there is a hurricane of unprecedented scope that topples all of the wind turbines and causes a massive and uncontained oil spill, is exactly the type of "hypothesized, non-imminent injuries" that cannot support standing.

III. Plaintiffs Lack Standing for Count XII

The Opposition provides no substantive response to Vineyard Wind's argument that Plaintiffs alleged no injury from the Final Environmental Impact Statement's purported failure to analyze various issues, such as unidentified "resource values," climate change, air quality, greenhouse gas emissions, and the commercial fishing industry. *See* AC ¶¶ 145-47. Instead citing allegations in the amended complaint identifying such injuries, Plaintiffs state only that "the approvals are connected to the alleged harms to Plaintiffs' economic, procedural, informational and aesthetic and environmental interests." Opp. at 5-6. Plaintiffs have "the burden of clearly alleging facts sufficient to ground standing," and "where standing is at issue, heightened specificity is obligatory at the pleading stage." *United States v. AVX Corp.*, 962 F.2d 108, 115 (1st Cir. 1992). The "purely conclusory allegations" Plaintiffs offer in their Opposition cannot satisfy that burden.

Id. Therefore, Plaintiffs have failed to establish an injury-in-fact necessary for standing with respect to Count XII.[3]

IV. The Allco Plaintiffs Lack Prudential Standing to Assert National Environmental Policy Act, Clean Water Act, and Marine Mammal Protection Act Claims

Plaintiffs incorrectly assert that the Allco corporate plaintiffs have prudential standing because their "economic interest is tied to their interest in the environment and clean water." Opp. at 9. The amended complaint alleges no such interest by Allco and Plaintiffs cannot raise such allegations in an opposition. *See Keane*, 345 F. Supp. 2d at 12 (plaintiff's opposition to a motion to dismiss must be limited to the allegations in the complaint). "Plaintiffs" do not "assert claims of environmental and aesthetic harm," Opp. at 9; only Mr. Melone asserts those alleged injuries. *Compare* AC ¶¶ 15-16, 36-43 (allegations of economic harm to Allco plaintiffs) *with id.* ¶¶ 17-26 (alleged environmental injuries of Mr. Melone).[4]

As the Allco corporate plaintiffs allege only economic injuries, they are outside the zone of interest and lack prudential standing to assert claims under the National Environmental Policy Act ("NEPA"), the Clean Water Act, and the Marine Mammal Protection Act. *See* Motion at 6-8. Plaintiffs' sole authority in support of their argument, *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d 1078 (9th Cir. 2015), Opp. at 4, involves a broader prudential standing test that the First Circuit has not adopted. Even if the First

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[3] Vineyard Wind also challenged Plaintiffs' standing with respect to Count IV. Motion at 6. However, given that Plaintiffs have stated that they will seek leave to amend the allegations in Count IV, *see* Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss the First Amended Complaint, Doc. No. 86 at 20, Vineyard Wind maintains its position that Plaintiffs lack standing to raise Count IV as currently written and reserves the right to further challenge Plaintiffs' standing with respect to Count IV if and when Plaintiffs file a second amended complaint.

[4] Plaintiffs' sole citation to the amended complaint in support of their claim that all plaintiffs' "solar interest … is driven by environmental concerns," Opp. at 9; AC ¶ 23, is limited to "Plaintiff Melone" and does not mention the Allco plaintiffs.

Circuit were to embrace such a concept, the Allco corporate plaintiffs would still lack prudential standing. "[T]o assert a claim under NEPA, a plaintiff must allege injury to the environment; economic injury will not suffice." *Id.* at 1103. *Ranchers Cattlemen* is broader in that it will allow for economic injuries so long as they "are causally related to an act within NEPA's embrace," *id.*, but the Allco corporate plaintiffs' purported economic injuries are not. The alleged reduced opportunities to build solar plants, or sell solar power, AC ¶ 36, are not attributable to alleged harms to whales or birds, and thus have "no connection to the physical environment." *Id.* at 1103. Thus, the Allco corporate plaintiffs, and Mr. Melone to the extent he alleges economic injuries as the owner, lack prudential standing.

V. Counts II and III Fail to State a Claim for "Unconstitutional Delegation"

Plaintiffs assert, for the first time, that Defendants' actions purportedly violate the Property Clause in Article IV of the Constitution and the "Major Questions Doctrine." Opp. at 10. As these allegations were not raised in the amended complaint the Court should not consider them now. *Keane*, 345 F. Supp. 2d at 12. For the same reason, the Court should decline to consider the Department of Interior Solicitor Opinions, Opp. at 11-12, again, raised by the Plaintiffs for the first time.

With respect to the allegations Plaintiffs actually raised in the amended complaint, Plaintiffs ignore Vineyard Wind's arguments, opting instead to raise a new legal theory that three Department of Interior memoranda can somehow establish that the statutory language in 43 U.S.C. § 1337(p)(4) is an unconstitutional delegation of legislative authority. Opp. at 10-12. That statute specifically authorizes the Secretary of Interior to issue leases for wind power projects, and to approve or deny applications for their construction and operation, based on establish standards. *See* 43 U.S.C. § 1337(p)(4)(A)-(L). That Plaintiffs disagree with the Department's interpretation of those standards, or that Department officials internally debate those interpretations, does not

render the statute unconstitutional. It is black-letter law that an agency may interpret a statute that it administers, including where that "statute is silent or ambiguous with respect to a specific issue." *Chevron USA Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Agencies are free to change their interpretations, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), and merely changing an interpretation does not establish that a statute provides no "intelligible principle" for the agency to follow. *United States v. Martinez-Flores*, 428 F.3d 22, 27 (1st Cir. 2005); *see also* Motion at 8-9.

The Court cannot accept Plaintiffs' invitation "for a different approach" to the non-delegation doctrine based on dissenting Supreme Court opinions. Opp. at 13. It is the Supreme "Court's prerogative alone to overrule one of its precedents," *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997), and its "decisions remain binding precedent until" the Supreme Court sees "fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing validity." *Hohn v. United States*, 524 U.S. 236, 252-53 (1998).

Plaintiffs' exegesis on Supreme Court dissenting opinions reveals another key flaw in their argument. The dissents advocate a non-delegation doctrine focusing on the text of the statute itself. Yet, Plaintiffs never attempt to show that Section 1337(p)(4)'s 182-word, twelve-part standard leaves the Secretary with "unbounded policy choices," *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting), or "unfettered discretion to decide which requirements to impose." *Id.* at 2143. In other words, Plaintiffs' failure to engage the statutory text means that their argument fails even under the dissents' own standard. Plaintiffs face an extremely high burden under the non-delegation doctrine. *See Martinez-Flores*, 428 F.3d at 27 ("nondelegation principle is extraordinary difficult to violate"); *United States v. Alves*, 688 F. Supp. 70, 78-79 (D. Mass.

1988) (courts use "an extremely deferential standard"). They cannot meet this heavy burden by relying on internal agency debates over statutory construction and dissenting opinions.

VI. Counts V, XIV, and (First) XVIII Fail to State a Claim

Plaintiffs provided only a partial and inadequate response to Vineyard Wind's arguments that Counts V, XIV, and (First) XVIII provide impermissible legal conclusions. *See generally*, Motion at 9-10.[5] With respect to Count V, the amended complaint provides only a two sentence legal conclusion that the "scope of the objective … was unlawfully narrow." AC ¶ 97. Instead of identifying allegations in the amended complaint fleshing out this bare legal conclusion, Plaintiffs provide entirely new allegations in their Opposition. Opp. at 16. In ruling on a motion for judgment on the pleadings, however, "the Court confines itself to the allegations of the complaint." *Keane*, 345 F. Supp. 2d at 12; *see also Jacobson v. Peat, Marwick, Mitchell & Co.*, 445 F. Supp. 518, 526 (S.D.N.Y. 1977) ("a party is not entitled to amend his pleading through statements in his brief"). Plaintiffs must seek leave to plead new allegations. Fed. R. Civ. P. 15(a)(2). Absent that, the Court should grant Vineyard Wind and Defendants judgment on Count V.

Vineyard Wind moved for judgment on Count XIV, wherein Plaintiffs alleged that "Defendants have failed to take a hard look at the" unspecified "risks to the [North Atlantic right whale]," migratory birds, "and other" unidentified "ESA-listed species." AC ¶ 164. Plaintiffs' only response to the motion for judgment on this claim is to assert that Count XIV is "neither moot nor lack standing [sic]" and to reiterate that Defendants failed "to take a hard look at various" unidentified "resources values and effects on various" unidentified "species." Opp. at 5-6. This does not address Vineyard Wind's argument, Motion at 9-10, that Count XIV fails to provide fair notice of Plaintiff's claims. "[N]otice of a claim is a defendant's entitlement, not a defendant's

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

burden," and it is entitled to "a meaningful opportunity to mount a defense." *Rodriguez v. Doral Mortg. Corp.*, 57 F.3d 1168, 1172 (1st Cir. 1995). In a case with no discovery, and where the administrative record will involve thousands of pages in support of multiple permits and authorizations from multiple agencies, Vineyard Wind and Defendants should not have to guess at what defense they must make in response to Plaintiffs' impermissibly conclusory allegations.

Vineyard Wind also moved for judgment on First Count XVIII, alleging that unspecified "Approvals" left unspecified "measures … to protect" unidentified "species" to be developed in the future. AC ¶ 177. Plaintiffs' Opposition never directs the Court or the parties to any portion of the amended complaint identifying these "Approvals," "measures," or "species." Instead, it appears to address the wrong Count XVIII (*i.e.*, Second Count XVIII). *Compare* Opp. at 6-8 *with* AC ¶¶ 179-83. Thus, for the reasons discussed above and in Vineyard Wind's Motion, the Court should grant judgment to Vineyard Wind and Defendants on First Count XVIII.

VII. Counts VIII and IX Fail to State a Claim

Plaintiffs provide no valid legal authority in support of Count VIII, which attempts to state a claim based on 40 C.F.R. § 230.1, a general policy statement imposing no binding legal obligations on the U.S. Army Corps of Engineers ("Corps"). Motion at 10. *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 207 (4th Cir. 2009), Opp. at 17, is consistent with Vineyard Wind's argument in that the *Aracoma Coal* relied on Section 230.1 to generally describe the Corps' policies for evaluating Section 404 Permits. *Aracoma Coal* never discussed or acknowledged an independent cause of action under Section 230.1. Instead, the Fourth Circuit reviewed the substantive Clean Water Act regulations found elsewhere. *See*, *e.g.*, *id.* at 194-95 (NEPA implementing regulations at 33 C.F.R., Part 325, Appx. B), *id.* 198 (cumulative impacts on aquatic ecosystems under 40 C.F.R. § 230.11(e)), *id.* at 202 (mitigation

measures under 40 C.F.R. § 230.10). Plaintiffs do not offer any case recognizing Section 230.1 as supporting an independent claim for relief.

With respect to Count IX, Vineyard Wind argued that nothing in 33 C.F.R. § 320.4's list of public interest factors requires the Corps to analyze the "electricity supply and alternatives to meet renewable energy demand" or "potential competitive effects on United States onshore based generators," such as Allco. Motion at 10. Plaintiffs, without any legal support, argue that Section 320.4's general language imposes a highly specific requirement for the Corps to analyze potential impacts to Allco's business. *See* Opp. at 17-18 (highlighting the phrases "economics," "energy needs," "the needs and welfare of the people"). Nothing in Section 320.4 supports this.

Section 320.4(q) explains that the Corps' economics analysis largely defers to the permit applicant. Only "in appropriate cases" will the district engineer "make an independent review of the need for the project from the perspective of the overall public interest." *Id.* If the district engineer performs such an economics review, it is limited to impacts on "the local community," such as "employment, tax revenues, community cohesion, community services, and property values." *Id.* Further, the analysis "is limited to the effects of impacts on the physical environment, such as the commercial or recreational value of areas directly affected by a change in the environment." *Mall Props. v. Marsh*, 672 F. Supp. 561, 567-68 (D. Mass. 1987); *id.* at 568 (Corps considers only "relevant economic considerations … directly linked to the physical environment, such as navigation and anchorage."). Thus, this Court has already rejected Plaintiffs' view of Section 320.4. The economics analysis does not include whether Allco, which does not use the "area[ ] directly affected by a change in the environment," *id.* at 567-68, might lose revenue.

With respect to "energy needs" under Section 320.4(j)(2), the district engineer typically defers to state agency decisions "unless there are significant issues of overriding national

importance" on the level of "national security," "national economic development," "and national energy needs." Plaintiffs do not allege, and could not plausibly allege, that the potential reduction in "Allco's opportunities and ability to develop QF solar projects," AC ¶ 36, rises to the level of national importance.

The "needs and welfare of the people" factor, Opp. at 17-18, does not require a boundless study of anything and everything potentially related to a project's operation. The Corps' analysis is limited to the "proposed activity," 33 C.F.R. § 320.4(a)(1), which "is the proposed federal action that triggers NEPA – here, the issuance of the discharge permit." *Ctr. for Biological Div. v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1299 (11th Cir. 2019). The Eleventh Circuit harshly criticized Plaintiffs' broad view of Section 320.4, holding that such an "unbounded view of the public-interest review would be to appoint the Corps *de facto* environmental-policy czar." *Id.* Focusing on the "needs and welfare" analysis in particular, another court held that it "is limited to the … effects caused by the discharge of pollutants into jurisdictional waters" authorized by the Section 404 Permit, not every potential effect from the project itself. *Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 963 F. Supp. 2d 670, 684 (W.D. Ky. 2013), *aff'd*, 746 F.3d 698 (6th Cir. 2014); *see also id.* at 685 (rejecting argument that "the Corps was required to examine the impacts of overall mining operations" under the "needs and welfare of the people" factor). Plaintiffs allege no injury from the discharge authorized by the permit. *See* Defendants' Motion to Dismiss, Doc. No. 65 at 16-17. Therefore, Plaintiffs fall outside of the "needs and welfare of the people" factor for purposes of Section 320.4.[6]

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[6] Vineyard Wind also argued that Plaintiffs lack standing to assert in Claim IX that the Corps' public interest analysis failed to adequately consider greenhouse gas emissions and other unspecified "resource values." Motion at 11. For the same reasons discussed above with respect to Count XII, Plaintiffs lack standing with respect to any analysis of "the direct, indirect and cumulative effects on [greenhouse gases] and other resource values," AC ¶ 129.

VIII. Count XVI Fails to Plead an Endangered Species Act Violation

A "take" under the Endangered Species Act resulting from the construction or operation of the Project is incidental as a matter of law, contrary to Plaintiffs' argument. Opp. at 14-16. The statute itself provides that a taking incidental to lawful activity is not a violation if it is covered by an incidental take statement. 16 U.S.C. § 1536(b)(4); *see also id.* § 1536(o)(2) ("any taking that is in compliance with the terms and conditions specified in a" biological opinion "shall not be considered to be a prohibited taking of the species concerned."); 50 C.F.R. § 402.02 (incidental takes are "takings that result from, but are not the purpose of, carrying out an otherwise lawful activity"). Here, the Project's purpose is to generate electricity, AC ¶¶ 39, 100, not to kill whales or birds. Consequently, any take resulting from the construction and operation of the Project is incidental, not intentional.

Pacific Ranger LLC v. Pritzker, 211 F. Supp. 3d 196, 202 (D.D.C. 2016) does not support Plaintiffs' argument as that case involved fishermen who knowingly deployed a net to take a whale. The court found that such an action was intentional, not incidental to any lawful activity, and akin to the deliberate conduct in *United States v. McKittrick*, 142 F.3d 1170, 1177 (9th Cir. 1998). Plaintiffs do not muster a single case supporting their theory that, where a take that "is practically certain to occur," it is an "intentional take." Opp. at 14. The Endangered Species Act consultation regulations acknowledge such scenarios. *See*, *e.g.*, 50 C.F.R. § 402.14(g)(7) (consulting agency must "[f]ormulate a statement concerning incidental take, if such take is reasonably certain to occur") (emphasis added); *id.* § 402.14(i)(1)(i) (incidental take statement must "set[ ] a clear standard for determining when the level of anticipated take has been exceeded"). Incidental take statements often specify the number of species anticipated to be taken. *See*, *e.g.*, *Mausolf v. Babbitt*, 125 F.3d 661 (8th Cir. 1997) (no more than two wolves); *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441 (9th Cir. 1992) (six red squirrels per year); *Ctr for Marine Conserv. v. Brown*, 917

F. Supp. 1128 (S.D. Tex. 1996) (four hawksbill turtles, four leatherback turtles, ten Kemp's ridley turtles, 370 loggerhead turtles). An incidental take statement is not insurance against unforeseeable accidents; it is a permit authorizing anticipated, and even certain, takes. Under Plaintiffs' theory the entire incidental take scheme would be prohibited and formal consultation for anticipated takes would be pointless. There is simply no legal authority supporting that position.

IX. Second Count XVIII Fails to State a Claim

Vineyard Wind argued that Plaintiffs' Second Count XVIII, alleging that the Defendants violated the Endangered Species Act by re-initiating consultation, does not identify the necessary irreversible or irretrievable commitment of resources required for such a violation, and even if it did, the claim was mooted by NMFS' issuance of the Second Biological Opinion. Motion at 12-14. Plaintiffs' opposition does not respond to this argument. Without an allegation of an irreversible or irretrievable commitment of resources prior to the completion of consultation, Plaintiffs cannot state a claim. *Oceana v. BOEM*, 37 F. Supp. 3d 147, 175-76 (D.D.C. 2014).

Instead, Plaintiffs allege that Defendants "robbed the Plaintiffs and the public of the procedural requirement[s] of commenting" by violating NEPA. Opp. at 6 (citing NEPA statute at 42 U.S.C. § 4332(C)).[7] First, this allegation is made for the first time in Plaintiffs' Opposition, not in their amended complaint. Second, Plaintiffs are now arguing that Second Count XVIII alleges a NEPA violation but the amended complaint does not. *See* ¶¶ AC 179-83. The Court should decline to consider this argument. *Keane*, 345 F. Supp. 2d at 12.

However, even if the Court were to accept this improper amendment-via-briefing, NEPA does not require the completion of Endangered Species Act consultation prior to issuing an

[7] The Opposition also cites to a non-existent "16 U.S.C. § 1371(c)(5)." Opp. at 6. Plaintiffs never explain the intended relevance of this citation.

Environmental Impact Statement. The language quoted by Plaintiffs, "[p]rior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise," Opp. at 6 (quoting 42 U.S.C. § 4332(C)) (emphasis added), refers to federal agency consultation on an Environmental Impact Statement – the "detailed statement" required by NEPA. *See*, *e.g.*, *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 757 (2004) ("This detailed statement is called an Environmental Impact Statement") (citing 42 U.S.C. § 4332(C)); AC ¶ 61 (same). The "consultation" requirement does not refer to the Endangered Species Act. *See* 40 C.F.R. §§ 1503.1 (describing NEPA federal agency consultation requirements for Environmental Impact Statements); 1503.2 (describing duty of cooperating federal agencies to comment on Environmental Impact Statements). Even if Plaintiffs' argument had any legal basis, its conclusion that Endangered Species Act consultation must be completed "prior to issuance of the 'recommendation,' here the [Record of Decision]," Opp. at 6 (emphasis in original), would still fail. As Plaintiffs acknowledge, NMFS completed consultation by issuing a Biological Opinion on September 11, 2020, prior to the May 10, 2021 Record of Decision. AC ¶ 2.

The balance of Plaintiffs' argument in defense of Section Count XVIII simply restates their allegations from their Amended Complaint. *Compare* Opp. at 6-7 *with* AC ¶¶ 180-83. It never engages Vineyard Wind's arguments that Plaintiffs failed to state a claim under the Endangered Species Act, and even if they did, that claim would be moot. Motion at 12-14.

CONCLUSION

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

Dated: April 18, 2022

Respectfully submitted,

/s/ Jack W. Pirozzolo

Jack W. Pirozzolo (BBO # 564879)
SIDLEY AUSTIN LLP
60 State Street, 36th Floor
Boston, MA 02109
(617) 223-0304
jpirozzolo@sidley.com

David T. Buente, Jr. (*pro hac vice*)
Peter C. Whitfield (*pro hac vice*)
Brooklyn Hildebrandt (*pro hac vice*)
SIDLEY AUSTIN LLP
1501 K Street N.W.
Washington, DC 20005
(202) 736-8000
dbuente@sidley.com
pwhitfield@sidley.com
bhildebrandt@sidley.com

Counsel for Vineyard Wind 1 LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of April 2022, a true and complete copy of the foregoing has been filed with the Clerk of the Court pursuant to the Court's electronic filing procedures, and served on Plaintiffs' counsel of record via the Court's electronic filing system and served on anticipated counsel for Defendants via electronic mail.

Dated: April 18, 2022

/s/ Jack W. Pirozzolo
Jack W. Pirozzolo