IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ALLCO RENEWABLE ENERGY LTD., ALLCO FINANCE LTD., and THOMAS M. MELONE, Plaintiffs, v. DEBRA HAALAND, MARTHA WILLIAMS, U.S. DEPARTMENT OF THE INTERIOR, U.S. BUREAU OF OCEAN ENERGY MANAGEMENT, JOHN ATILANO, GARY FRAZER, U.S. ARMY CORPS OF ENGINEERS, U.S. FISH AND WILDLIFE SERVICE, and NOAA FISHERIES DIRECTORATE, Defendants.	Civil Action No. 1:21-cv-11171-IT Hon. Indira Talwani

MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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GLOSSARY

BiOp	Biological Opinion
BOEM	U.S. Bureau of Ocean Energy Management
CAA	Clean Air Act
COP	Construction and Operations Plan
Corps	U.S. Army Corps of Engineers
CWA	Clean Water Act
DEIS	Draft Environmental Impact Statement
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
IHA	Incidental Harassment Authorization
JROD	Joint Record of Decision
MMPA	Marine Mammal Protection Act
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
OCS	Outer Continental Shelf
OCSLA	Outer Continental Shelf Lands Act
PURPA	Public Utility Regulatory Policies Act
RHA	Rivers and Harbors Act
SEIS	Supplemental Environmental Impact Statement

INTRODUCTION

Plaintiffs are owners and operators of solar electric facilities who view the development of offshore wind energy as an existential threat to their business. According to their complaint (the "Complaint" or "Compl."), the U.S. energy market cannot sustain both solar and wind power, such that any increase in offshore wind energy will lead to reduced demand for Plaintiffs' product. While there are many reasons to reject Plaintiffs' zero-sum economic theory, Plaintiffs' immediate problem is that it does not—and cannot—provide them with standing. For that and multiple independent reasons, the Complaint should be dismissed.

To start, the Complaint fails to adequately allege the injury-in-fact or causation elements of standing. Plaintiffs' primary allegations of injury rest on the theoretical possibility that the challenged government actions *might* set into motion a series of events that *could*, at some unspecified future time, permit conditions under which wind power *might* outcompete solar power produced by Plaintiffs. That future economic injury is neither actual nor imminent. Instead, it relies on an attenuated chain of possibilities, the occurrence of which depends on hypothetical independent actions of third parties outside Federal Defendants' control. The alleged injury therefore cannot provide standing under Article III. Plaintiffs' claims based on this theoretical injury should also be dismissed because it is beyond the zones of interest that Congress designed the environmental statutes at issue to protect.

Plaintiffs also fail to salvage standing based on purported injury to their corporate officer, Thomas Melone. Mr. Melone's standing allegations are premised on his professed interest in the Piping Plover and the Right Whale, and his purported desire to "recreate" in the "areas of the Atlantic Ocean" where the proposed turbines would be erected, more than fourteen miles off the southern coast of Martha's Vineyard. But each of those interests is either too generalized or too

speculative to establish standing under Article III. Because the Complaint fails to plausibly plead standing, it should be dismissed in its entirety.

In addition, numerous claims should be dismissed for reasons other than standing. Plaintiffs' claims under the Outer Continental Shelf Lands Act ("OCSLA") and the Endangered Species Act ("ESA") should be dismissed because Plaintiffs failed to provide statutorily-mandated pre-suit notice. Several other claims should be dismissed because they raise issues that Plaintiffs never previously presented to the relevant agencies. Finally, the claim concerning the 2020 biological opinion ("BiOp") should be dismissed as moot.

BACKGROUND

A. The Parties

Plaintiffs are Allco Renewable Energy Limited and Allco Finance Limited (collectively, "Allco"), along with their owner, Thomas Melone. Compl. ¶¶ 14, 30. Allco owns, operates, and develops "various solar electric generating facilities that are Qualifying Facilities ('QFs') located in Connecticut, Vermont, Massachusetts, as well as other states." *Id.* ¶ 14. The Complaint alleges that "part of" Allco's "corporate mission" is to "combat climate change," and that Allco carries out that mission by "seek[ing] to enforce rights" of QFs by "interven[ing] in various regulatory proceedings." *Id.* ¶¶ 16-17. Mr. Melone is a part-time resident of Edgartown, Massachusetts, which is situated on the northeastern coast of Martha's Vineyard on Nantucket Sound. *Id.* ¶¶ 18, 30.

B. The Project

The Vineyard Wind 1 Project (the "Project") is an offshore wind energy project planned for an area on the Outer Continental Shelf ("OCS") that, at its closest point, is more than

fourteen miles from the southern coast of Martha's Vineyard.[1] The Project will include a maximum of 84 turbines spaced one nautical mile apart from each other. Compl. Ex. 1, ECF No. 1-1, at 23. It is expected to produce 800 megawatts of electricity, supplying electricity to approximately 400,000 homes.[2]

C. The Challenged Government Actions

The U.S. Bureau of Ocean Energy Management ("BOEM") began evaluating the potential for wind energy leasing and development off the shore of Massachusetts in 2009. Compl. Ex. 1 at 4. In January 2015, following several years of extensive efforts by an intergovernmental task force comprised of representatives from State, local, and tribal governments and other Federal agencies, BOEM held a competitive lease sale. *Id.* at 4, 5. The auction was won by Offshore MW LLC, which subsequently changed its name to Vineyard Wind. *Id.* at 5. In December 2017, Vineyard Wind sought BOEM's approval of the Project's Construction and Operations Plan ("COP"). *Id.* BOEM then initiated a review pursuant to the National Environmental Policy Act ("NEPA"). *Id.* As part of that NEPA review, BOEM held numerous public hearings and received thousands of submissions from the public, government agencies, and other stakeholders. *Id.* at 6. BOEM also initiated ESA consultation with the National Marine Fisheries Service ("NMFS"). *Id.*

In December 2018, the U.S. Army Corps of Engineers (the "Corps") received an application from Vineyard Wind for a permit under 33 U.S.C. § 1344 for the discharge of

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[1] *See* Vineyard Wind Draft Construction and Operations Plan Vol. 1 at 1-2 (Sep. 30, 2020), https://www.boem.gov/sites/default/files/documents/renewable-energy/Vineyard%20Wind%20COP%20Volume%20I_Section%201.pdf.

[2] *Id.* at 10; Press Release, U.S. Dep't of the Interior, *Biden-Harris Administration Approves First Major Offshore Wind Project in U.S. Waters* (May 11, 2021), https://www.doi.gov/press releases/biden-harris-administration-approves-first-major-offshore-wind-project-us-waters.

dredged or fill material and 33 U.S.C. § 403 for the Project's structures. *Id.* at 5. The Corps issued a public notice of the permit application and solicited comments, but it did not receive any comments. *Id.* On September 13, 2020, NMFS issued a BiOp that addressed the Project's potential effects on listed species and designated habitat pursuant to the ESA. *Id.* at 6.

On March 12, 2021, following years of work, including publication of a draft Environmental Impact Statement ("DEIS") and supplement to the DEIS ("SEIS"), BOEM issued a Final Environmental Impact Statement ("FEIS"). *Id.*[3] Subsequently, on May 7, 2021, BOEM reinitiated ESA consultation with NMFS pursuant to 50 C.F.R. § 402.16, explaining that consultation was necessary to consider the effects of several surveys that BOEM planned to require as conditions of COP approval, which had not been considered in connection with NMFS' September 2020 BiOp.[4]

On May 10, 2021, BOEM, the Corps and NMFS issued a Joint Record of Decision ("JROD") for the Project. Compl. Ex. 1. The JROD summarized the agencies' respective decisions, including: (i) BOEM's decision to approve the COP; (ii) the Corps' issuance of a permit for limited aspects of the Project under Clean Water Act ("CWA") § 404, 33 U.S.C. § 1344, and the Rivers and Harbors Act ("RHA") § 10, 33 U.S.C. § 403; and (iii) NMFS's issuance of an Incidental Harassment Authorization ("IHA") under the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq*.[5] On July 15, 2021, BOEM issued a letter

[3] The FEIS is available at https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Vineyard-Wind-1-FEIS-Volume-1.pdf.

[4] NMFS, ESA Sec. 7 Consultation Biological Opinion, at 6 (Oct. 18, 2021), https://www.boem.gov/sites/default/files/documents/renewable-energy/2021-Vineyard-Wind-1-BiOp-Final.pdf.

[5] 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).

approving Vineyard Wind's COP for the Project, subject to various terms and conditions, including that any activities authorized in the COP would be "subject to any terms and conditions and reasonable and prudent measures resulting from a BOEM-reinitiated consultation for the Project's BiOp."[6] Following reinitiation of ESA consultation, NMFS issued a new biological opinion on October 18, 2021, as corrected on November 1, 2021.[7] The Corps issued corrections to its portions of the JROD on August 6, 2021, and January 14, 2022. *See* https://www.boem.gov/vineyard-wind.

LEGAL STANDARDS

"In ruling on a motion to dismiss, whether for failure to state a claim or lack of standing, the court must accept the plaintiffs' well-pleaded factual allegations and draw all reasonable inferences in the plaintiffs' favor." *Gathers v. 1-800-Flowers.com, Inc.*, 2018 WL 839381, at *1 (D. Mass. Feb. 12, 2018) (Talwani, J.). The Court need not, however, credit "statements in the complaint that offer legal conclusions couched as facts or are threadbare or conclusory." *Kerin v. Titeflex Corp.*, 770 F.3d 978, 985 (1st Cir. 2014) (citations omitted). In resolving a Rule 12(b)(6) motion, the court may consider documents incorporated by reference into the Complaint and "matters of public record." *Giragosian v. Ryan*, 547 F.3d 59, 65 (1st Cir. 2008). On a Rule 12(b)(1) motion, the Court may also consider documents outside the pleadings for purposes of determining its subject matter jurisdiction. *Gonzalez v. United States*, 284 F.3d 281, 288 (1st Cir. 2002).

"A plaintiff invoking federal jurisdiction bears the burden of establishing standing."

[6] BOEM, Ltr. of Approval at 2, https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/VW1-CO P-Project-Easement-Approval-Letter_0.pdf.

[7] NMFS, ESA Sec. 7 Consultation Biological Opinion, https://www.boem.gov/sites/default/files/documents/renewable-energy/2021-Vineyard-Wind-1-BiOp-Final.pdf

Strahan v. Sec'y, Mass. Exec. Office of Energy & Envtl. Affairs, No. 19-cv-10639, slip op. at 10 (Nov. 30, 2021) (Talwani, J.). "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). Thus, "the plaintiff bears the burden of establishing sufficient factual matter to plausibly demonstrate his standing to bring the action. Neither conclusory assertions nor unfounded speculation can supply the necessary heft." *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 731 (1st Cir. 2016).

DISCUSSION

I. Plaintiffs lack Article III standing.

To satisfy the standing requirements of Article III, a plaintiff must establish an injury that is (i) "concrete, particularized, and actual or imminent"; (ii) "fairly traceable to the challenged action"; and (iii) "redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Where an alleged injury has not yet occurred, it must be "*certainly impending*"; "allegations of *possible* future injury are not sufficient." *Id.* (emphasis in original).

A. Plaintiffs' speculation that they might someday suffer economic harm cannot establish standing.

The driving force of the Complaint is Plaintiffs' assertion that the Project's approval could (at some unspecified future time) result in economic loss for Plaintiffs because "offshore wind energy producers intend to decimate U.S. onshore renewable energy producers in the Northeastern United States, including Allco." Compl. ¶¶ 30, 150. But the Complaint offers only bare conclusions that fail to establish that any such injury is plausible, much less imminent. It also fails to offer plausible allegations that such an injury—if it *ever* were to occur—would be caused by the challenged government actions. The Complaint fails to satisfy Article III.

1. Injury in fact

As an initial matter, the Complaint fails to plead facts to support its theory of future

economic injury. Apart from the general allegation that it sells its power through the Public Utility Regulatory Policies Act ("PURPA") and other state programs, Compl. ¶ 30, the Complaint does not describe how Allco's business is awarded, much less explain how (or on what timeframe) the development of offshore wind production would impact that business. In lieu of such details, the Complaint simply alludes to "basic economic principles of supply and demand," and leaves the Court to fill in the gaps. *Id.* ¶ 146. Such "purely conclusory" assertions of future harm fall short of this Circuit's heightened standard for pleading standing. *See Munoz-Mendoza v. Pierce*, 711 F.2d 421, 425 (1st Cir. 1983) ("Where 'injury' and 'cause' are not obvious, the plaintiff must plead their existence in his complaint with a fair degree of specificity.").

The Complaint's future economic harm theory also fails because the injury it alleges is wholly speculative, and certainly not imminent. That is a fatal flaw. The Supreme Court has "repeatedly reiterated" that "threatened injury must be *certainly impending* to constitute injury in fact," and that "'[a]llegations of *possible* future injury' are not sufficient." *Clapper*, 568 U.S. at 410 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 158) (1990) (emphasis in original). Thus, where a plaintiff alleges a risk of future harm, the First Circuit requires the pleading of specific facts sufficient to allow a court to "assess the likelihood of future injury." *Kerin*, 770 F.3d at 985.

The Complaint offers no such facts. Whether Plaintiffs will someday suffer economic injury depends on numerous contingencies—future demand for renewable energy, state policies or programs incentivizing renewable energy, consumer preferences, relative prices of various energy sources, to name just a few—that the Complaint does not attempt to articulate. Instead, the Complaint offers only a bare accusation about offshore energy's supposed "inten[t] to decimate" onshore energy producers, Compl. ¶ 30, and an unsupported conclusion that any

increase in offshore wind power will "lower[] demand for U.S.-based onshore renewable energy generation," *id*. ¶ 147. These allegations treat future injury as a foregone conclusion, without pleading the requisite facts and underlying assumptions that would allow the Court to assess the likelihood of future injury and determine whether it is "*certainly* impending," as the standard requires.[8] *Clapper*, 568 U.S. at 410. As a result, the Complaint's future economic harm theory is too speculative to sustain standing. *See, e.g.*, *Kerin*, 770 F.3d at 985 (dismissing complaint for failure to allege "facts sufficient to assess the likelihood of future injury" because "alleged risk of harm [was] too speculative to give rise to a case or controversy"); *Clapper*, 568 U.S. at 410 (no standing because actual injury depended on a "highly attenuated chain of possibilities"); *Swanson Group Mfg. LLC v. Jewell*, 790 F.3d 235, 242 (D.C. Cir. 2015) ("uncertain and unspecific prediction of future harm" "inadequate" to establish injury).[9]

2. Causation

The Complaint also fails to plausibly plead causation because it does not—and cannot—establish that the economic injury it posits is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (cleaned up). As the First Circuit has explained,

[8] That the injury is framed as arising from competitive harm is of no moment. The Complaint offers no facts to explain how a large-scale offshore wind facility that is projected to produce 800 megawatts of electricity could compete directly with a "qualifying small power producer" such as Allco. And in any event, "the competitor standing doctrine is a method of analyzing the likelihood and imminence of a particular type of actual economic injury," which in no way excuses a plaintiff from the burden to "allege sufficient facts to demonstrate that under the circumstances presented, the defendant's conduct threatens imminent and concrete harm." *Katin v. Nat'l Real Estate Info. Servs., Inc.*, 2009 WL 929554, at *6 (D. Mass. Mar. 31, 2009). The Complaint fails to meet that burden. *See supra* at 7-8.

[9] Several courts have dismissed similarly speculative allegations of standing brought by Allco. *See, e.g.*, *Allco Finance Ltd. v. Klee*, 805 F.3d 89, 98 (2d Cir. 2015); *Allco Finance Ltd. v. Klee*, 2016 WL 4414774, at *18 (Aug. 18, 2016); *In re Green Mountain Power Corp.*, 198 A.3d 36, 43 (Vt. 2018) (no standing to intervene based on competitive economic interest).

Article III "requires the plaintiff to show a sufficiently *direct causal connection* between the challenged action and the identified harm" that is not "overly attenuated." *Dantzler, Inc. v. Empresas Berríos Inventory & Operations, Inc.*, 958 F.3d 38, 47 (1st Cir. 2020) (emphasis added).

Plaintiffs allege no such direct causal connection here. In fact, the Complaint lacks any specific allegations connecting the challenged government actions to a concrete future injury. Instead, it offers the unsupported, predictive conclusion that the Project will "increase[] the supply of offshore wind generated electricity, lowering demand for U.S.-based onshore renewable energy generation," Compl. ¶ 147, without pleading facts to establish a plausible chain of events that would lead to that outcome. For instance, the Complaint appears to assume without support that energy demands are static or that the energy the Project will likely generate will outpace demand. The Complaint never pleads facts to support that assumption, but even if it had, Plaintiffs still would not have met their burden. The Complaint makes no attempt to explain why demand would decrease for solar energy rather than other forms of energy (such as power generated by fossil fuels), let alone for the specific portion of solar energy supplied by Plaintiffs.

What is more, the facts the Complaint *does* allege suggest that any causal chain here is unlikely. According to the Complaint, Allco generates business by "enter[ing] into long-term commitments to sell the output of [Allco's] facilities at fixed rates" under PURPA, and to "sell the output of [Allco's] solar energy facilities under State programs designed to facilitate the development of solar energy electric generation facilities." Compl. ¶ 30. But the Complaint does not allege that Vineyard Wind will compete for contracts under PURPA, nor explain how the Project could possibly interfere with Allco's ability to participate in State programs designed to promote solar energy facilities. And Plaintiffs' claim of injury is even more attenuated, because

it is based on not just the Project challenged here, but on other *future* wind projects that have not even been approved. *See, e.g., id*. ¶ 168 (asserting future injury based on "[t]he Project and the cumulatively foreseeable offshore wind projects"). Plaintiffs' allegation of injury is based solely on a basic economic precept that cannot establish the "*direct causal connection*" that the First Circuit requires. *Dantzler*, 958 F.3d at 47.

Furthermore, even if Plaintiffs had pled a causal chain with specificity (which they have not), they still could not establish causation because any such chain would necessarily include the independent actions of numerous third parties who are not before the court. *Lujan*, 504 U.S. at 560. That is unavoidably so because the challenged government actions, standing alone, have no direct impact on Plaintiffs' business at all; they do not regulate Plaintiffs' business or relate to land or resources used by Plaintiffs for their business. Thus, any causal chain would depend on a theory that the challenged government actions will set into motion a cascade of decisions by separate actors (e.g., public utility commissions, state governments, consumers) that might ultimately end in harm to Plaintiffs' business. Such a theory, even if Plaintiffs had pled it, would be too attenuated to satisfy Article III.[10]

[10] The First Circuit recently dismissed claims for lack of standing where the alleged causal chain was considerably more direct than anything alleged here. *See Dantzler*, 958 F.3d 38. In *Dantzler*, plaintiffs were product shippers who challenged a cargo scanning program instituted by the Puerto Rico Ports Authority. *Id*. at 42. The program was funded by fees charged to freight carriers, and plaintiffs alleged that the freight carriers passed the costs of those fees to them. The court held that plaintiffs failed to allege a direct causal connection, because the challenged regulation did not compel the carriers to pass those costs to the plaintiffs. *Id.* at 48-49. Plaintiffs' theory here is far more attenuated, because (unlike the *Dantzler* plaintiffs, whose purported injury had already occurred) Plaintiffs are alleging a theoretical *future* injury, the occurrence of which depends on a "multitude of other factors" that Plaintiffs made no effort to plead, and that in any event bear no direct relationship to the challenged government actions. *See Perez-Kudzma v. United States*, 940 F.3d 142, 145 (1st Cir. 2019) (dismissing complaint for failure to allege injury traceable to government action rather than "multitude" of economic and other factors).

B. Plaintiffs' alleged procedural and informational harm does not establish standing.

Plaintiffs' allegations of procedural and informational harm also fail to plausibly plead standing. As to supposed procedural harm, the Complaint offers only a bare allegation that Plaintiffs have "standing to ensure that the Federal Defendants[] follow all procedural requirements in their decision-making." Compl. ¶ 31. That allegation is insufficient under settled law holding that an alleged procedural right alone, without concrete injury, does not satisfy Article III. *See, e.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing."); *AVX Corp.*, 962 F.2d at 119 ("There is nothing talismanic about the phrase 'procedural harm.' A party claiming under that rubric is not relieved from compliance with the actual injury requirement for standing.").

Plaintiffs' allegations of informational standing fare no better. In fact, the Complaint does not allege any deprivation of information at all. Instead, it claims that Plaintiffs did not receive an FEIS "*that complies with NEPA*" or "a *proper* legal and factual analysis by the Federal Defendants." Compl. ¶ 34 (emphasis added). In other words, Plaintiffs admit they received information from Federal Defendants, but complain about the content of that information. Plaintiffs' dissatisfaction with the contents of Federal Defendants' analyses does not amount to any deprivation of required information. *Cf. TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021) ("The plaintiffs did not allege that they failed to receive any required information. They argued only that they received it in the wrong format.").

Further, Plaintiffs fail to plead any cognizable injury related to their supposed informational deficit. The Complaint merely alleges that, if Federal Defendants' analysis had met Plaintiffs' definition of "proper," then Plaintiffs could have used the information generated in the analysis "in their regulatory advocacy." Compl. ¶ 36. But Plaintiffs' desire for ammunition to aid

in their lobbying efforts is not an injury sufficient to establish Article III standing. *Electronic Privacy Information Ctr. v. FAA*, 892 F.3d 1249, 1255 (D.C. Cir. 2018) ("Impediments to 'pure issue-advocacy' cannot establish standing."); *People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1093-94 (D.C. Cir. 2015) (same); *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1161 (D.C. Cir. 2013) (no standing "when the only 'injury' arises from the effect of the regulations on the organizations' lobbying activities."). *See also Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 84 (D.C. Cir. 1991) ("[W]e have never sustained an organization's standing in a NEPA case solely on the basis of 'informational injury'. . . .").

C. Plaintiffs have not established standing based on purported injury to their CEO, Mr. Melone.

Lacking standing related to their business interest, Plaintiffs alternatively seek to rely for standing on purported injury to Mr. Melone, a part-time resident of Martha's Vineyard. The Complaint alleges that Mr. Melone is "concerned about the adverse effect of the Vineyard Wind Project" on the Piping Plover and the North Atlantic Right Whale. Compl. ¶ 18. Mr. Melone does not assert any unique or particular interest in these species, but rather alleges that he generally derives "recreational, scientific, conservation and aesthetic benefits" from them. *Id*.[11]

Notably, the Complaint does not allege that Mr. Melone regularly observes, studies, or photographs the Piping Plover or Right Whale, nor claim that he has any concrete future plans sufficient to establish standing. "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be" are insufficient to

[11] The Complaint fails to plausibly plead that Right Whales inhabit Nantucket Sound or "its watersheds" much less explain how the Project—located many miles away in the open ocean—could impact habitat in Nantucket Sound (which is tucked between Nantucket and Cape Cod to the north) or its watersheds (which are located on land). https://oceanservice.noaa.gov/facts/watershed.html.

plead injury. *Lujan*, 504 U.S. at 564 (emphasis in original); *see AVX Corp.*, 962 F.2d at 117 ("A barebones allegation, bereft of any vestige of a factual fleshing-out, is precisely the sort of speculative argumentation that cannot pass muster where standing is contested."); *Strahan*, No. 19-cv-10639, slip op. at 15 (finding plaintiffs' "'sincere and passionate interest in the well-being of [Right] whales' alone" insufficient for purposes of establishing standing).

In addition to failing to allege that Mr. Melone has a particularized interest in the Right Whale or Piping Plover, the Complaint also fails to plausibly allege any concrete or imminent injury to either species (a necessary predicate to any harm associated with an impact on species), much less an injury fairly traceable to challenged government decisions. As to the Right Whale, the Complaint offers no specific allegations at all. And as to the Piping Plover, the Complaint alleges a speculative and hypothetical injury that depends on a highly-attenuated chain of causation.[12] The Complaint lacks any well-pled factual allegations to plausibly show that this threatened injury to the Piping Plover is actual and imminent, nor that there is a "direct causal connection," *Dantzler*, 958 F.3d at 47, between that hypothetical harm and the challenged government actions, as is required to establish standing. *See Clapper*, 568 U.S. at 410 (theory of standing that "relies on a highly attenuated chain of possibilities[] does not satisfy the requirement that threatened injury must be certainly impending"); *Kerin*, 770 F.3d 978 (plaintiffs alleging threatened future harm must allege "facts sufficient to assess the likelihood" of such

[12] According to the Complaint, *if* a severe hurricane were to occur at the Project site, and *if* the wind turbines could not withstand the storm intensity, a disaster could ensue that *might* result in "oil and other contaminant spills," which *could* "discharge[] into the Atlantic Ocean and/or Nantucket Sound and/or Vineyard Sound," thereby *possibly* adversely affecting species habitat in a manner that *might* appreciably harm the Piping Plover. Compl. ¶ 18. The Complaint goes so far as to allege that a hurricane-related incident at the Project site *could* result in an oil spill "greater than that of the Exxon Valdez" (*id.* ¶ 3). But the Complaint does not explain how an accident involving wind turbines could be comparable to an accident involving an oil tanker that carried tens of millions of gallons of crude oil.

future injury). And the Complaint lacks allegations as to how this unsupported string of future events, *more than fourteen miles southeast* of Martha's Vineyard, could actually injure Mr. Melone, whose part-time home is in Edgarton, on the *northeastern shore* of Martha's Vineyard.

Mr. Melone's allegation that he "has recreated on . . . the areas of the Atlantic Ocean in which the Vineyard Wind project would be located," and has "specific intentions to continue to do so," Compl. ¶ 19, fails for similar reasons. It is not clear how broadly he defines the "areas" at issue—for instance, whether he would ever be in a place to see the turbines at least fourteen miles offshore—nor does he explain exactly how the project would adversely affect his recreational and other interests. Citing concerns that commercial fishing operations might have difficulty navigating the immediate project area, the Complaint asserts that "[i]t is foreseeable that those navigational difficulties will apply equally" to *future* wind turbine projects, and that "[l]ogically, the difficulties of navigation will also apply to non-commercial uses, such as Plaintiff Melone's." *Id.*[13] But the Complaint never specifies what "non-commercial use" Mr. Melone has made of the specific area of the Atlantic Ocean where the Project will be located. The Court therefore has no basis to evaluate what supposed navigational needs Mr. Melone has, much less how they compare to those of commercial fisheries.

D. Plaintiffs do not allege any injury to support a facial challenge to the "2019 ESA Rule," the Clean Water Act, or the Rivers and Harbors Act.

Plaintiffs' claims under the 2019 ESA Section 7(a)(2) Rule, the CWA, and the RHA also

[13] To the extent that Melone also asserts standing based on potential injuries to commercial fisheries (*see, e.g.*, Compl. ¶ 2 (alleging that "off-shore wind will eventually kill" the "fishing industry" and "the livelihoods of generations of New England fisherman and women"), that theory also fails. Melone does not claim to engage in commercial or recreational fishing, and cannot assert standing on the basis of potential injury to a group of which he is not a member. *See Hochendoner*, 823 F.3d at 731-32 ("[T]he party asserting standing must not only allege injurious conduct attributable to the defendant but must also allege that he, himself, is among the persons injured by that conduct.").

must be dismissed because Plaintiffs assert no injuries related to those statutes. *Katz v. Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012) ("The standing inquiry is claim-specific: a plaintiff must have standing to bring each and every claim she asserts.").

Paragraphs 298-305 of the Complaint appear to assert a facial challenge to the 2019 ESA Section 7(a)(2) Rule, 84 Fed. Reg. 44,976 (Aug. 27, 2019). Paragraph 309 also appears to seek relief with respect to the 2019 ESA Section 7(a)(2) Rule, and Plaintiffs' Request for Relief Paragraph D asks the Court to vacate it. However, Plaintiffs fail to allege any injury caused by the 2019 ESA Section 7(a)(2) Rule itself or its application in the challenged 2020 BiOp. Plaintiffs fail to identify effects of the Project that were not considered in the 2020 BiOp that would have been considered under the prior regulations, or otherwise explain how the 2019 ESA Section 7(a)(2) Rule changed the analysis or affected the outcome of the 2020 BiOp in a manner that caused them harm. Even assuming Plaintiffs had alleged some injury resulting from application of the 2019 ESA Section 7(a)(2) Rule, that claim still must be dismissed because none of the Prayers for Relief seek a remedy with regard to the 2020 BiOp. As a result, it is unclear how any alleged injuries resulting from the issuance of the 2019 ESA Section 7(a)(2) Rule or its application in the 2020 BiOp could be redressed by this Court, and there is no Article III case or controversy with regard to the 2020 BiOp.

Plaintiffs likewise fail to allege injuries related to the actions of the Corps or the applicable provisions of the CWA or RHA. Plaintiffs allege that the Corps improperly granted a permit under 33 U.S.C. § 1344, Compl. ¶¶ 176-190, which is for the placing of fill or dredged material on the sea floor within three miles from shore, in conjunction with the laying of transmission cables. *See* Compl. Ex. 1 at 33-34. Nowhere do Plaintiffs allege how such an action causes them concrete and imminent injury. Mr. Melone alleges that he owns property adjacent to

wetlands and eelgrass habitat. Compl. ¶ 20. But he does not, and cannot, allege that the Corps' permit allows for the laying of cables or discharge of fill into wetland or eelgrass habitat, much less in any areas that could impact him. Plaintiffs lack standing to challenge the Corps' actions.

II. Even if Plaintiffs could establish Article III standing, their claims of economic injury fall outside the relevant statutes' zones of interest.

In addition to establishing Article III standing, Plaintiffs must plausibly allege injuries that "fall within the zone of interests protected by the laws [they] invoke"—a doctrine sometimes referred to as prudential standing. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (citation omitted). Here, the relevant statutes were not intended to prevent economic injury of the type Plaintiffs allege.[14]

NEPA is an environmental law that Congress enacted to promote environmental interests. 42 U.S.C. § 4321; *see American Waterways Operators v. U. S. Coast Guard*, 2020 WL 360493, at *6 (D. Mass. Jan. 22, 2020). As a result, numerous courts have concluded that purely economic interests fall outside NEPA's zones of interest. *Id.* (collecting cases); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1235-36 (D.C. Cir. 1996) (NEPA's zone of interests "do not include purely monetary interests, such as the competitive effect that a construction project might have on plaintiff's commercial enterprise").

Congress enacted OCSLA to regulate the development of the OCS to ensure, among other things, that it is "made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." 43 U.S.C. § 1332(3). OCSLA's Congressional declaration of policy also expresses particular concern for coastal States and local governments that may be uniquely

[14] Although Allco asserts a "corporate mission to combat climate change," Compl. ¶ 16, the only particularized injury it asserts is purely economic. *See, e.g.*, *id*. ¶ 30.

affected by OCS development. § 1332(4). As a result, courts have found claims brought by plaintiffs with particularized, statutorily-granted interests in the OCS to be within OCSLA's zone of interest.[15] Plaintiffs offer no similar allegations here: Allco is a corporation engaged in *onshore* energy development with no direct connection to or interest in the OCS. Thus, Plaintiffs' interests in securing business to provide solar energy are not even "marginally related to" OCSLA's zone of interests. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987).[16]

The Congressional purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *Rapanos v. United States*, 547 U.S. 715, 717 (2006). The purpose of RHA Section 10 is to prohibit "unreasonable obstructions to navigation and navigable capacity." *State of Wisconsin v. State of Illinois*, 278 U.S. 367, 413 (1929). These purposes do not encompass the competitive economic interests (or any other interests) asserted by Plaintiffs.

Similarly, the goal of the MMPA is "[m]arine mammal conservation." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1203 (9th Cir. 2004). Allco does not allege any particularized interest in marine mammal protection, and Plaintiffs' allegations of future economic injury to their onshore energy operations fall outside the MMPA zone of interests.

III. The OCSLA and ESA claims should be dismissed for failure to comply with the statutory sixty-day notice requirement.

To the extent Plaintiffs allege violations of OCSLA, Compl. ¶¶ 94-104, and the ESA, *id.* ¶ 284, such claims also should be dismissed because Plaintiffs failed to comply with the

[15] *See Ensco Offshore Co. v. Salazar*, 2011 WL 121936, at *9 (E.D. La. Jan. 13, 2011) (interests of offshore drilling company alleging a failure to timely issue permits within APA and OCSLA zone of interests), *vacated in part on other grounds*, 781 F. Supp. 2d 332 (E.D. La. 2011).

[16] Likewise, Mr. Melone's vague allusions to "recreating" in the precise Project area come nowhere close to the kinds of particularized interests in OCS development that courts have found within the OCSLA zones of interest. *See supra* n.15.

respective mandatory statutory notice requirements, which require proper notice to relevant agencies at least 60 days *prior to commencement of a lawsuit*. 43 U.S.C. § 1349(a)(2)(A) (OCSLA); 16 U.S.C. § 1540(g)(2)(A)(i) (ESA). Plaintiffs do not, and cannot, allege that they complied with these obligations, which are mandatory prerequisites to their suit. *See Garcia v. Cecos Int'l, Inc.*, 761 F.2d 76, 79 (1st Cir. 1985) (finding similar notice requirement jurisdictional). Plaintiffs commenced suit on July 18, 2021. ECF No. 1. They subsequently sent notice under the ESA on September 3, 2021, under OCSLA on September 17, 2021, and sent further notice under OCSLA on December 31, 2021 and January 5, 2022, and under both statutes on January 7, 2022.[17] Because Plaintiffs sent those notices after they filed this case, their claims under OCSLA and the ESA must be dismissed. *See Fisheries Survival Fund v. Haaland*, 858 F. Appx. 371, 374 (D.C. Cir. 2021) (affirming summary judgment for failure to comply with OCSLA sixty-day notice period); *Maine Audubon Soc. v. Purslow*, 672 F. Supp. 528, 530 (D. Me. 1987).

Further, Plaintiffs cannot cure their failure to give notice by reasserting claims under OCLSA and the ESA in an amended complaint brought at least 60 days after the January 7, 2022, notice. *See, e.g.*, *Friends of Animals v. Salazar*, 670 F. Supp. 2d 7, 13 (D.D.C. 2009) ("[A]llowing [plaintiff] leave to amend its Complaint after commencing an action without proper notice would undermine the statute and render the notice requirement meaningless."); *Envirowatch, Inc. v. Fukino*, 2007 WL 1933132, at *4 (D. Haw. June 28, 2007) (plaintiff could not cure untimely notice through amendment brought after expiration of notice period).

[17] *See* Ex. A (Sept. 3, 2021 ESA Notice Letter), Ex. B (Sept. 17, 2021 OCSLA Notice Letter), Ex. C (December 31, 2021 OCSLA Notice Letter), Ex. D (Jan. 5, 2022 OCSLA Notice Letter), and Ex. E (Jan. 7, 2022 combined OCSLA and ESA Letters).

IV. Several claims should be dismissed because Plaintiffs failed to raise those issues during the administrative processes.

It is a bedrock rule of administrative law that courts may not review arguments not raised during an agency proceeding.[18] This doctrine, known as "issue exhaustion" is essential to the integrity of the administrative process, and therefore must strictly enforced. *See, e.g.*, *United States v. L.A. Tucker Truck Line, Inc.*, 344 U.S. 33, 37 (1952) ("[C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."); *Mazariegos–Paiz v. Holder,* 734 F.3d 57, 62 (1st Cir. 2013) (issue exhaustion ensures that courts do not "effectively usurp the agency's function.").

Here, Counts VIII, IX, X, XI, XI (second) allege that the Corps failed to properly follow regulatory procedures in issuing its permit under 33 U.S.C. § 1344 for the discharge of dredge or fill material, and § 403 for the project's structures. Compl. ¶¶ 176-235. But Plaintiffs did not raise these issues during the Corps' permitting process that they challenge. *See* Compl. Ex. 1 at 5 (reporting that the Corps received no comments on the proposed permit). Likewise, Counts XV and XVIII relate to IHAs issued by NMFS pursuant to the MMPA, with respect to which Plaintiffs failed to submit any comments to NMFS.[19] *See* Compl. ¶¶ 255-75, 310-15.

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[18] *Sims v. Apfel*, 530 U.S. 103, 112 (2000) (O'Connor, J., concurring) ("In most cases, an issue not presented to an administrative decisionmaker cannot be argued for the first time in federal court. On this underlying principle of administrative law, the Court is unanimous."); *Com. of Mass., Dep't of Public Welfare v. Secr'y of Agric.*, 984 F.2d 514, 522-23 (1st Cir. 1993); *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001) (It is "black-letter administrative law" that a court cannot consider an issue unless it was raised by a party in comments to the agency "made with sufficient specificity reasonably to alert the agency.") *See also Adams v. EPA*, 38 F.3d 43, 50 (1st Cir. 1994) ("In reviewing agency action, this Court will not consider issues which a petitioner failed to present during the administrative process . . . .").

[19] NMFS posts all public comments received on MMPA IHAs on the individual webpages for each action. A compilation of all comments received on the Project-related IHA is available at https://media.fisheries.noaa.gov/dam-migration/vineyardwind_2019iha_pubcom_opr1.pdf

Plaintiffs do not allege that they presented any of these issues to the Corps or NMFS during their respective administrative processes. Instead, they allege that they raised concerns in comments on the DEIS or SEIS issued by BOEM. *See* Compl. ¶¶ 89, 90. Comments submitted during the NEPA process do not satisfy Plaintiffs' obligation to also submit comments during the separate agency processes followed by the Corps in determining whether to issue a permit under CWA Section 404 or RHA Section 10, and by NMFS in its IHA determination under the MMPA. Having failed to meet those obligations, Plaintiffs may not raise those challenges here.

V. The claim concerning the 2020 BiOp must be dismissed as moot.

A federal court does not have jurisdiction "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (citation omitted). Here, Plaintiffs' claims concerning the 2020 BiOp must be dismissed because the 2020 BiOp has been replaced by the BiOp dated October 18, 2021 (as corrected). Activities authorized in BOEM's COP approval are expressly "subject to any terms and conditions and reasonable and prudent measures resulting from a BOEM-reinitiated consultation for the Project's BiOp." *See supra* n.6. Therefore, the Project is subject to the terms of the operative 2021 BiOp, and the 2020 BiOp no longer has any legal effect. Plaintiffs' claims concerning the BiOp thus are moot. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 45 (1997); *Murphy v. Hunt*, 455 U.S. 478, 481 (1982); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937).

CONCLUSION

For the foregoing reasons, the Court should grant the United States' motion to dismiss the Complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

Date: February 2, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Local Rule 5.2, I hereby certify that a true copy of the foregoing MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS THE COMPLAINT was served upon the attorney of record for each other party by the CM/ECF electronic filing system on February 2, 2022.

/s/ Angela N. Ellis
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