**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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| ALLCO RENEWABLE ENERGY LTD., ALLCO FINANCE LTD., and THOMAS M. MELONE,<br><br>Plaintiffs,<br><br>v.<br><br>DEB HAALAND, in her official capacity of Secretary of the Interior, GARY FRAZER, in his official capacity of Assistant Director for Endangered Species, U.S. Fish and Wildlife Service, PAUL DOREMUS, in his official capacity of Assistant Administrator for Fisheries, NOAA Fisheries Directorate, MARTHA WILLIAMS in her official capacity of Principal Deputy Director, U.S. Fish and Wildlife Service, COLONEL JOHN A ATILANO II in his official capacity of Commander and District Engineer, Colonel, U.S. Army Corps of Engineers, U.S. FISH AND WILDLIFE SERVICE, NATIONAL MARINE FISHERIES SERVICE, U.S. ARMY CORPS OF ENGINEERS, BUREAU OF OCEAN ENERGY MANAGEMENT, and the U.S. DEPARTMENT OF THE INTERIOR<br><br>Defendants. | Civil Action No. 1:21-cv-11171-IT<br><br>Hon. Indira Talwani |

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

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## GLOSSARY

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| **BOEM** | U.S. Bureau of Ocean Energy Management |
| **COP** | Construction and Operations Plan |
| **Corps** | U.S. Army Corps of Engineers |
| **CWA** | Clean Water Act |
| **ESA** | Endangered Species Act |
| **FWS** | U.S. Fish and Wildlife Service |
| **IHA** | Incidental Harassment Authorization |
| **JROD** | Joint Record of Decision |
| **MMPA** | Marine Mammal Protection Act |
| **NEPA** | National Environmental Policy Act |
| **NMFS** | National Marine Fisheries Service |
| **NMFS/GAR** | NMFS Greater Atlantic Region |
| **NMFS/OPR** | NMFS Office of Protected Resources |
| **OCS** | Outer Continental Shelf |
| **OCSLA** | Outer Continental Shelf Lands Act |
| **PURPA** | Public Utility Regulatory Policies Act |
| **RHA** | Rivers and Harbors Act |
| **SF FEIS** | South Fork Final Environmental Impact Statement |
| **SF JROD** | South Fork Joint Record of Decision |
| **VW FEIS** | Vineyard Wind Final Environmental Impact Statement |
| **VW JROD** | Vineyard Wind Joint Record of Decision |

## INTRODUCTION

This case involves a challenge to federal approvals associated with Vineyard Wind, a wind project off the coast of Martha's Vineyard. Plaintiffs are Thomas Melone and the solar company he controls, who apparently view the development of offshore wind energy as an existential threat to their business. To maintain this suit, however, Plaintiffs cannot simply rely on theoretical worry. They must allege specific, plausible facts to establish that the government approvals they challenge will directly cause them to suffer a concrete and imminent injury.

Mr. Melone's Amended Complaint does not meet that burden. Instead, it concedes that his dispute is not with the Vineyard Wind project, or any particular offshore wind project approved by Federal Defendants, but with the "promise" of an entire industry that *might* someday compete with his. It even goes so far as to add a new challenge to the South Fork project—a separate wind project even farther from Mr. Melone's Edgartown vacation home—but from which he does not attempt to allege any specific harm. The effort only underscores the overarching problem with the Amended Complaint: it alleges no injury upon which Mr. Melone or his company can properly base standing.

That is true despite Mr. Melone's attempt to shore up his alternative standing theory based on his professed environmental and aesthetic interests. The Amended Complaint swaps out certain allegations (*e.g.,* it no longer claims that Mr. Melone desires to recreate in the precise area of the Atlantic Ocean where the wind turbines will be erected) and adds others (*e.g.*, that Mr. Melone spotted a North Atlantic right whale from inside a Ritz Carlton hotel in Florida). But ultimately it fails to establish that Plaintiffs have a concrete stake in the outcome of this action. For these reasons and the others set forth below, the Amended Complaint should be dismissed.

## BACKGROUND

### A. The Plaintiffs

Plaintiffs are Allco Renewable Energy Limited and Allco Finance Limited (collectively, "Allco"), along with their owner, Thomas Melone. First Am. Compl. ("AC"), Doc. No. 58, ¶¶ 15, 36. Allco owns, operates, and develops solar electric facilities "that are Qualifying Facilities ('QFs') located in Connecticut, Vermont, Massachusetts, as well as other states." *Id.* ¶ 15. Mr. Melone is a part-time resident of Edgartown, Massachusetts, on the northeastern coast of Martha's Vineyard. *Id*. ¶ 17.

### B. The Vineyard Wind Project

The Vineyard Wind 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] It is expected to generate 800 megawatts of electricity, supplying electricity to approximately 400,000 homes.[2]

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, Doc. No. 1-1, at 4. On May 10, 2021, following a lengthy review pursuant to the National Environmental Policy Act ("NEPA")—including preparation of a final environmental impact statement ("VW FEIS") and consultations with the National Marine Fisheries Services ("NMFS") and the U.S. Fish and Wildlife Service ("FWS") pursuant to the Endangered Species

[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.

Act ("ESA")—BOEM, the U.S. Army Corps of Engineers ("Corps") and the NMFS Office of Protected Resources ("NMFS/OPR") issued a joint Record of Decision ("VW JROD"). Doc. No. 1-1. The JROD summarized the agencies' respective decisions, including: (i) BOEM's decision to approve Vineyard Wind's construction and operations plan ("COP") under OCSLA § 8(p), 43 U.S.C. § 1337(p); (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/OPR's issuance of an Incidental Harassment Authorization ("IHA") under the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §§ 1361 *et seq*.

**C. The South Fork Project**

The South Fork project is a separate wind energy project planned for an area in the OCS off the coast of Rhode Island. The South Fork project will be located more than 20 miles southwest of Martha's Vineyard, approximately 19 miles southeast of Block Island, Rhode Island, and 35 miles east of Montauk Point, New York.[3] On November 24, 2021, BOEM and NMFS/OPR issued a joint Record of Decision ("SF JROD"), which summarized BOEM's decision to approve the South Fork COP under OCSLA § 8(p), 43 U.S.C. § 1337(p) , and NMFS/OPR's issuance of an IHA under the MMPA.[4] The Corps' New York District finalized its own record of decision ("Corps' SFROD") for the South Fork Project on January 14, 2022, and issued a permit based on that ROD on January 20, 2022.[5]

[3] *See* South Fork, https://www.boem.gov/renewable-energy/state-activities/south-fork.

[4] SF JROD at 2, https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Record%20of%20Decision%20South%20Fork_0.pdf at 2.

[5] The Corps' permit for the South Fork project is available at https://www.nan.usace.army.mil/Missions/Regulatory/Commonly-Requested-Issued-Permits-and-Nationwide-Permit-Verifications/.

**D. The Amended Complaint**

Plaintiffs filed their original Complaint on July 18, 2021. Doc. No. 1. Federal Defendants moved to dismiss the Complaint in its entirety. Doc. Nos. 48-49.[6] Rather than oppose Federal Defendants' motion, Plaintiffs filed the Amended Complaint on February 23, 2022. Doc. No. 58. With the Amended Complaint, Plaintiffs challenged the South Fork project for the first time. Apart from identifying Federal Defendants' decisional documents, the Amended Complaint lacks any specific allegations with respect to the South Fork project.

**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 merely offer legal conclusions couched as facts or are threadbare or conclusory." *Kerin v. Titeflex Corp.*, 770 F.3d 978, 984-85 (1st Cir. 2014) (citations omitted). In resolving a motion to dismiss, the court may consider documents relied on or incorporated by reference into a complaint and "matters of public record." *Giragosian v. Ryan*, 547 F.3d 59, 65 (1st Cir. 2008).

"A plaintiff invoking federal jurisdiction bears the burden of establishing standing." *Strahan v. Sec'y, Mass. Exec. Office of Energy & Envtl. Affairs*, No. 19-cv-10639, slip op. at 10 (D. Mass. 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

[6] Vineyard Wind moved to join Federal Defendants' motion to dismiss the Complaint, and separately filed a motion to dismiss the Complaint on Rule 12(b)(6) grounds. Doc. Nos. 50-52.

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) (citation omitted). Where an alleged injury has not yet occurred, it must be "*certainly impending;*" "allegations of *possible* future injury are not sufficient." *Id.*[7]

#### A. The Amended Complaint fails to plausibly plead standing based on purported economic injury.

Like the original Complaint, the Amended Complaint's lead standing theory rests on allegations of economic injury. But unlike the Complaint, which relied entirely on the hypothetical possibility that the Vineyard Wind Project might decrease demand for Plaintiffs' solar energy products *at some unspecified time in the future*, *see, e.g.*, Compl. ¶ 30, the Amended Complaint pivots to allegations that "[t]he promise of offshore wind, and the related Defendants' Approvals *have already harmed Plaintiffs*." AC ¶ 36 (emphasis added). Rather than curing the Complaint's deficiencies, however, the Amended Complaint underscores the disconnect between the economic injuries Plaintiffs allege and the government approvals they challenge.

[7] In addition to establishing Article III standing, Plaintiffs must plausibly allege injuries that "fall within the zone of interests protected by the law[s] [they] invoke[]." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014). As explained in Federal Defendants' prior brief, Plaintiffs' claims of economic injury fall outside the zones of interest of several statutes at issue, including NEPA, OCSLA, the CWA and the MMPA. *See* Doc. No. 49 at 16-17.

***Alleged past economic injury.*** The Amended Complaint alleges that Plaintiffs have been injured by the very "promise of offshore wind," which, together with the challenged government approvals, allegedly have led the states of Massachusetts and Connecticut to adopt "requirements for the procurement of offshore wind projects such as the Vineyard Wind project and other foreseeable [] projects" to the detriment of Plaintiffs' solar projects. AC ¶ 36. Assuming for purposes of this motion that those allegations are true, it only illustrates that Plaintiffs' purported injury is one of market competition stemming from "the independent action" of Massachusetts and Connecticut, who are "third part[ies] not before the court," rather than from any action taken by Federal Defendants. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). As a result, Plaintiffs have failed to allege the "sufficiently *direct causal connection* between the challenged action and the identified harm" that Article III requires. *Dantzler, Inc. v. Empresas Berríos Inventory & Operations, Inc.*, 958 F.3d 38, 47 (1st Cir. 2020) (emphasis added).

Indeed, the First Circuit has dismissed claims for lack of standing where the alleged causal chain was considerably more direct than anything Plaintiffs allege. 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. *Id.* at 48. The First Circuit held that the plaintiffs failed to allege a sufficiently direct causal connection because the challenged regulation did not compel the carriers to pass those costs to their customers (the plaintiffs). *Id.* at 48-49. Instead, the carriers made an independent decision to offset their costs by charging higher fees to the plaintiffs, which was not caused by the Ports Authority action. *Id.*

Plaintiffs' theory here is substantially more attenuated. Unlike the *Dantzler* plaintiffs, who could draw a direct line between the fees imposed on the freight carriers by the Ports

Authority and the freight carriers' decision to pass those fees to their clients, Plaintiffs' alleged injury here is not directly related to any challenged action by Federal Defendants. Instead, it relies on the mere "promise of offshore wind" and "other foreseeable [offshore wind] projects" that have not even been approved. AC ¶ 36. Moreover, in the same way that the *Dantzler* plaintiffs' injury was caused by the independent decisions of freight carriers rather than the challenged Ports Authority program, Plaintiffs' purported injury here depends on decisions of state governments and other market forces rather than the challenged government approvals. Indeed, the challenged government approvals 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. As a result, Plaintiffs have not established the necessary "direct causal chain" to establish causation. *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).

For essentially the same reason, Plaintiffs fail to plausibly allege redressability. *See Strahan*, No. 19-cv-10639, slip op. at 14 (causation and redressability "overlap as two sides of a causation coin") (citing *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 n.1 (D.C. Cir. 2017)). Because Plaintiffs' injury allegedly resulted not just from the challenged federal actions, but from "the promise of offshore wind," "other foreseeable [offshore wind] projects," and independent decisions allegedly made by Massachusetts and Connecticut, no order of this Court—which would necessarily be limited to the challenged approvals—could sufficiently redress that purported injury. *See Dantzler*, 958 F.3d at 50. The states would be free to continue their present policies.

***Alleged future economic injury.*** The Amended Complaint dispenses with the majority of

Plaintiffs' prior allegations regarding future economic injury. *Compare* Compl. ¶¶ 30, 146-47 *with* AC ¶ 36. To the extent Plaintiffs still seek to establish standing based on a theory of future harm, the allegations fail because Plaintiffs cannot establish injury or causation.

As to injury, Plaintiffs' future economic harm 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 409 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158) (1990)). To meet that burden, Plaintiffs must allege specific facts sufficient to allow a court to "assess the likelihood of future injury." *Kerin*, 770 F.3d at 985. The Amended Complaint, however, makes only two conclusory allegations asserting that the challenged government actions "will reduce Allco's opportunities and ability to develop QF solar projects" and that, "[i]f the Projects and those foreseeable are not approved, the New England States (sic) need for renewable energy will be fulfilled by solar and other onshore renewables, including Allco's." AC ¶ 36. Those bare allegations are far too speculative to sustain standing.[8] *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 where actual injury depended on a "highly attenuated chain of possibilities"); *Swanson Group Mfg. LLC v. Jewell*,

[8] Referencing a BOEM modelling tool called Market Simulation Model ("MarketSim"), Plaintiffs claim that Federal Defendants' "own economic models dictate" that the challenged projects and "other reasonably foreseeable" projects will "displace" opportunities for Allco. AC ¶ 39. But that allegation is entirely speculative, because (as Plaintiffs elsewhere acknowledge) BOEM did not use MarketSim here—it models changes in the supply of OCS oil and gas, *not electricity*. *Id.* ¶ 100. Plaintiffs' speculation about the potential application of MarketSim to model electrical energy markets is insufficient to confer standing.

790 F.3d 235, 242 (D.C. Cir. 2015) (finding "uncertain and unspecific prediction of future harm" "inadequate").[9]

As to causation, Plaintiffs' theory of future economic injury falters for the same reasons as its theory based on past injury. Any chain of causation connecting the challenged government approvals to a future injury to Plaintiffs would necessarily depend on a cascade of decisions by separate actors (*e.g.*, public utility commissions, state governments, consumers) and numerous economic and market factors that the Plaintiffs do not even attempt to identify, and that would in any event fail to satisfy Article III. *Dantzler*, 958 F.3d at 47; *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 178 (D.C. Cir. 2012) (no standing based on anticipated economic choices of third parties made "in [those parties'] own self-interest" and that were "not one forced by any particular administrative action").[10]

**B. The Amended Complaint fails to plausibly plead standing based on Mr. Melone's purported environmental or aesthetic interests.**

As an alternative to their economic harm theory of standing, Plaintiffs seek to establish standing based on purported injury to Mr. Melone, a part-time resident of Martha's Vineyard. In particular, Plaintiffs allege that Mr. Melone has standing based on his professed interest in (i) the Piping Plover and other bird species, and (ii) the North Atlantic right whale. AC ¶¶ 17-26. None

[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 (D. Conn. 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).

[10] That the injury is framed as arising from competitive harm is of no moment. Plaintiffs offer no facts to explain how electricity from large-scale offshore wind facilities 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 an imminent and concrete harm. *Katin v. Nat'l Real Estate Info. Servs., Inc.*, 2009 WL 929554, at *6 (D. Mass. Mar. 31, 2009). Plaintiffs have not met that burden. *See supra* at 7-9.

of the Amended Complaint's allegations adequately allege an injury in fact.

***Alleged injury based on Piping Plovers.*** With respect to birds, Plaintiffs allege that Mr. Melone has an interest in "the thousands of migratory birds that nest and habitat" annually on a portion of his Edgartown property that he refers to as "Little Beach." AC ¶ 17. Plaintiffs offer two theories for how the challenged government actions will harm Mr. Melone's interests in the Little Beach birds, neither of which plausibly pleads standing.

*First*, Plaintiffs allege that "one or more of the migratory birds that habitat on Little Beach" will be killed by a turbine. *Id.* ¶ 18. But, in support, Plaintiffs offer only the bare allegation that Little Beach birds migrate through the project areas and, therefore, wind turbines from the challenged projects "and all the other foreseeable offshore wind projects" are "practically certain to kill one or more" Little Beach birds. *Id.* ¶¶ 18, 20. Plaintiffs offer no facts to support that threadbare conclusion, and the Court need not (and should not) credit it. *AVX Corp.*, 962 F.2d at 115. The allegation is especially deficient given that a plaintiff alleging a risk of future injury must plead specific facts sufficient to allow a court to "assess the likelihood of future injury." *Kerin*, 770 F.3d at 985. Here, the Amended Complaint lacks any factual allegations that would allow the Court to assess the likelihood that a single member of the relevant bird species will be harmed by any turbine, let alone that any particular species could be harmed to the extent that fewer of those birds would visit Little Beach.[11] Indeed, Federal

[11] Plaintiffs' unsupported conclusion that the death of one or more birds "will reduce the number of birds that Plaintiff Melone can observe on Little Beach," AC ¶ 18, only highlights their failure to adequately allege standing. Plaintiffs fail to allege any facts to support that speculative conclusion, such as the degree of harm to birds that could plausibly result in fewer of them vising Little Beach. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) ("Standing is not 'an ingenious academic exercise in the conceivable' but requires a factual showing of perceptible harm.") (quoting *Lujan*, 504 U.S. at 566) (cleaned up).

Defendants' analysis regarding the likelihood of injuries to threatened or endangered bird species—included in the very government documents the Amended Complaint references—concluded that risks to Piping Plover and other threatened and endangered bird species "are expected to be discountable and insignificant."[12] Plaintiffs therefore have not adequately alleged that Mr. Melone's alleged aesthetic enjoyment of birds on his property is at risk of harm.[13] *See Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45, 53 (D. Mass. 1993) (no standing based on harm to one dolphin where plaintiffs alleged only that they had observed, and continued to observe, dolphins in general at the aquarium); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (plaintiff must show that the harm "is not injury to the environment but injury to the plaintiff").

*Second*, Plaintiffs allege that the Little Beach habitat could be adversely affected if a severe hurricane were to damage the turbines, and if such damage somehow caused an oil spill that spreads from the project areas to Mr. Melone's property. AC ¶ 19. But the likelihood of such an injury depends on a highly speculative and attenuated chain of possibilities: *If* a severe hurricane were to occur at the project sites, and *if* the wind turbines could not withstand the storm intensity, a disaster could ensue that *might* somehow result in an oil spill that *might* somehow spread from the project sites—the closest of which is fourteen miles *south* of Martha's Vineyard—northward to Mr. Melone's property on a separate body of water on the *northeastern*

[12] VW FEIS Vol. II at A-91 (Mar. 2021), *available at* https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Vineyard-Wind-1-FEIS-Volume-2.pdf; *see also* SF FEIS at H-54, *available at* https://www.boem.gov/renewable-energy/state-activities/south-fork (concluding that project's overall impacts on birds would be minor and temporary).

[13] The Court should also reject Plaintiffs' attempt to shoehorn in "other foreseeable offshore wind projects." Any such projects are not challenged in this action, and Plaintiffs cannot rely on them to establish either causation or redressability. *Simon v. E. Ky. Welfare Rights Org.,* 426 U.S. 26, 41-42, 45 (1976) (no standing where "[s]peculative inferences are necessary to connect their injury to the challenged actions of petitioners.").

coast of Martha's Vineyard. *Id.* The Amended Complaint lacks any plausible factual allegations that this threatened injury is actual and imminent, let alone that there is a "direct causal connection," *Dantzler*, 958 F.3d at 47, between that hypothetical harm and the challenged government actions. *See Clapper*, 568 U.S. at 410 (standing theory that "relies on a highly attenuated chain of possibilities[]" is not "certainly impending"); *Kerin*, 770 F.3d at 985.

***Alleged injury based on North Atlantic right whales.*** The Amended Complaint also fails to establish standing based on Mr. Melone's professed interest in North Atlantic right whales. In fact, the Amended Complaint lacks any allegations that Mr. Melone has ever observed (or even attempted to observe) a right whale in the vicinity of the challenged projects or his property on Nantucket Sound. AC ¶ 24.[14] Instead, the Amended Complaint alleges that (i) in October 2021, Mr. Melone went whale watching with Boston's New England Aquarium—dozens of miles north of the project areas—but did not see any right whales; (ii) he recently spotted a right whale from the fifth floor of the Ritz Carlton hotel in Fernandina Beach, Florida; (iii) he attended one conference about right whales in October 2021; and (iv) he has scheduled two future whale watching trips, neither of which is in the vicinity of the projects or his home in Edgartown. *Id.* None of those allegations establishes that Mr. Melone has a particularized interest in right whales, much less that he possesses an interest that could be impaired by the challenged projects.

To start, the Amended Complaint lacks a single allegation to establish that Mr. Melone was interested in right whales when he filed this lawsuit. That alone is fatal, because "standing is to be determined as of the commencement of suit. . . ." *Lujan*, 504 U.S. at 570 n.5. *See also Atl.*

[14] Plaintiffs also allege that the challenged projects might interfere with right whale critical habitat. AC ¶ 23. Federal Defendants disagree that Nantucket Sound is a critical right whale habitat, and in any event, Plaintiffs allege no facts to explain how the challenged projects could harm any right whale habitat.

*States Legal Found. v. Babbitt*, 140 F. Supp. 2d 185, 192 (N.D.N.Y. 2001) (birdwatchers lacked standing because they did not visit relevant island until after the suit had commenced). According to the Amended Complaint, Mr. Melone's first whale watching excursion occurred in October 2021, several months after he filed this action. AC ¶ 24. Plaintiffs therefore have not established that Mr. Melone had an interest in right whales when he filed suit.

Timing aside, Mr. Melone's pair of whale watching excursions also fail to give rise to standing because they occurred far away from the challenged projects, on opposite parts of the East Coast. The Supreme Court long ago rejected the "'animal nexus' approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing." *Lujan*, 504 U.S. at 566. And his limited excursions do not in any event demonstrate the type of "regular observation" that courts in this District have found sufficient for standing. *See, e.g.*, *Strahan v. Coxe,* 939 F. Supp. 963, 978 (D. Mass. 1996), *vacated in part on other grounds*, 127 F.3d 155 (1st Cir. 1997) (finding "[r]egular observation of endangered whales in Massachusetts waters" sufficient for standing). Likewise, that Mr. Melone attended a single conference on right whales does not establish that he would be "'directly affected' by harm to the whales, apart from his . . . special interest as a dedicated advocate." *Strahan*, No. 19-cv-10639, slip op. at 15 (citing *Strahan v. Linnon*, 967 F. Supp. 581, 617 (D. Mass. 1997)).

The Amended Complaint also lacks any factual allegations explaining how the challenged projects would harm North Atlantic right whales, or how any such harm would injure Mr. Melone. Instead, the Amended Complaint relies entirely on unsupported conclusions that the challenged government approvals will, for example, "cause the NARW [and other species] to be taken," will "interfere with [those species'] natural state and may increase their risk of death," or will "harm habitat." AC ¶¶ 25, 49. Those "barebones allegations" do not satisfy Plaintiffs'

burden to plead standing with "heightened specificity." *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.").

**C. Plaintiffs lack standing to challenge the South Fork project.**

Even assuming the Amended Complaint had adequately pled an injury in fact, Plaintiffs would still lack standing to challenge the South Fork project. *First*, the Amended Complaint lacks any allegations to establish that power generated by the South Fork project, which will provide electricity to New York state, will compete with Plaintiffs' solar energy projects in Massachusetts and Connecticut. *Second*, the South Fork project area—twenty miles south of Martha's Vineyard—is even farther from Mr. Melone's residence than the Vineyard Wind project, rendering Plaintiffs' allegations that it will affect Mr. Melone's aesthetic and recreational interests even more speculative.

**D. 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 Amended Complaint offers only a bare allegation that Plaintiffs have "standing to ensure that the [Federal Defendants] follow all procedural requirements in their decision-making." AC ¶ 37. That allegation is insufficient under settled law holding that a procedural right alone, without concrete injury, does not satisfy Article III. *See, e.g.*, *Summers*, 555 U.S. at 496 ("[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. Allegations of "informational injury" must be concrete and particularized, rather than "generalized." *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24-25 (1998). Here, Plaintiffs do not allege any deprivation of information. Instead, Plaintiffs claim that they did not receive an environmental impact statement "*that complies with NEPA*" or "a *proper* legal and factual analysis" by the Federal Defendants." AC ¶ 45 (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.") (emphasis omitted).

Further, Plaintiffs fail to plead any cognizable injury related to their supposed informational deficit. Plaintiffs merely allege 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." AC ¶ 47. But Plaintiffs' desire for paper ammunition to aid in their lobbying efforts is not an injury sufficient to establish Article III standing. *Elec. Privacy Info. 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 Found. on Econ. 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'. . . .").

**E. Plaintiffs do not allege any injury to support a challenge to the Corps' authorizations under the Clean Water Act and the Rivers and Harbors Act.**

Plaintiffs' claims under the CWA and the RHA must be dismissed because Plaintiffs assert no injuries related to the Corps' authorizations pursuant 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."). Plaintiffs allege that the Corps improperly granted a permit under 33 U.S.C. § 1344, AC ¶¶ 112-38, which is for placing fill or dredged material on the sea floor, in conjunction with laying transmission cables. *See* Doc. No. 1-1 at 33-34. Mr. Melone alleges that he owns property adjacent to wetlands and eelgrass habitat, AC ¶ 26, but he does not, and cannot, allege that the Corps' permit allows for laying cables or discharging fill into wetland or eelgrass habitat, much less in any areas that could impact him.[15]

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

To the extent Plaintiffs allege violations of OCSLA[16] and the ESA,[17] those claims should also be dismissed because Plaintiffs did not comply with the respective 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). These notice provisions are mandatory prerequisites to suit. *Garcia v. Cecos Int'l, Inc.*, 761 F.2d 76, 79 (1st Cir. 1985).

Plaintiffs filed suit on July 18, 2021. Doc. No. 1. They subsequently sent various notices

[15] That is particularly true of the Corps permits regarding the South Fork project, because the landing site for the South Fork export cable is in East Hampton, New York, not in waters in Massachusetts. *See* SF FEIS at p. 30, *available at* https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/SFWF%20FEIS.pdf.

[16] *See* Counts I, II, XV, and XVII, AC ¶¶ 74-89, 165-67, and 174-75.

[17] *See* Counts I, XIV, XVI, and second Count XVIII, AC ¶¶ 74-85, 162-64, 168-73, and 179-83.

as follows: under the ESA on September 3, 2021; under OCSLA on September 17, 2021; under OCSLA on December 31, 2021, and January 5, 2022; and under both statutes on January 7, 2022. Doc. No. 58-1. Plaintiffs' January 5, 2022, notice letter asserted for the first time OCSLA-related claims concerning the South Fork Project. *See* Doc. No. 58-1 at 59. Plaintiffs' January 7, 2022, notice letter alleged for the first time violations of the ESA concerning: the October 18, 2021, Vineyard Wind biological opinion ("BiOp); alleged ESA violations concerning the Piping Plover; and the South Fork BiOp.

Plaintiffs filed their Amended Complaint on February 23, 2022, less than 60 days after submitting their most recent notices on January 7, 2022. Doc. No. 58. Even if they had waited 60 days, those notices would not have cured their failure to provide at least 60 days' notice *prior to* commencing their suit. *See, e.g.*, *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520-22 (9th Cir. 1998) (notice letter must alert the recipients to the actual violation alleged in a subsequently filed complaint); *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). Because Plaintiffs sent all of their various notices *after* they filed this case, their OCSLA and ESA claims must be dismissed. *See Fisheries Survival Fund v. Haaland*, 858 F. Appx. 371, 374 (D.C. Cir. 2021); *Me. Audubon Soc'y. v. Purslow*, 672 F. Supp. 528, 530 (D. Me. 1987) (failure to comply with notice provision "requires dismissal").[18]

[18] To the extent Plaintiffs challenge BOEM's approval of the SF COP, *see* AC ¶¶ 5, 177, Plaintiffs' various notices are also deficient because they preceded that BOEM action. Such "pre-

## III. 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. *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."); *Commonwealth 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). This doctrine, known as "issue exhaustion," is essential to the integrity of the administrative process, and therefore strictly enforced. *See, e.g.*, *United States v. L.A. Tucker Truck Line, Inc.*, 344 U.S. 33, 37 (1952); *Mazariegos–Paiz v. Holder*, 734 F.3d 57, 62 (1st Cir. 2013) (issue exhaustion ensures that courts do not "usurp the agency's function.").

Here, Counts VII through X challenge the Corps' actions in issuing its permits under 33 U.S.C. § 1344 and § 403. AC ¶¶ 112-43. But Plaintiffs did not raise these issues during the Corps' permitting process; nor did anyone else. *See* Doc. No. 1-1 at 5 (reporting that the Corps received no comments on the proposed permit). Likewise, Counts IV and XIII relate to IHAs issued by NMFS/OPR pursuant to the MMPA, with respect to which Plaintiffs failed to submit any comments to NMFS/OPR.[19] *See* AC ¶¶ 92-95, 149-61.

Plaintiffs do not allege that they presented any of these issues to the Corps or NMFS/OPR during their respective administrative processes. Instead, they allege that they raised

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violation" notices are insufficient to afford BOEM the opportunity to rectify subsequent alleged violations. *E.g.*, *Moden v. FWS*, 281 F. Supp. 2d 1193, 1206 (D. Or. 2003).

[19] Compilations of all comments NMFS/OPR received on the VW and SF IHAs are available at https://media.fisheries.noaa.gov/dam-migration/vineyardwind_2019iha_pubcom_opr1.pdf, and https://media.fisheries.noaa.gov/dam-migration/vineyardwind_2019iha_pubcom_opr1.pdf, respectively.

concerns in comments on the VW FEIS and the SF FEIS issued by BOEM. *See* AC ¶¶ 3, 6. But BOEM is a separate agency with separate decision-making authority. Comments submitted during the NEPA process do not satisfy Plaintiffs' obligation to submit comments during the separate agency processes, which would have provided each agency with an opportunity to consider and address Plaintiffs' concerns in conjunction with those processes.[20] Having failed to meet those obligations, Plaintiffs may not raise those challenges here.

## IV. Several claims should be dismissed because Plaintiffs failed to identify or challenge a final agency action.

To establish jurisdiction with respect to each Defendant, Plaintiffs must identify a final "'agency action' that affects [them]." *Lujan v. Nat'l Wildlife Fed'n ("NWF")*, 497 U.S. 871, 882 (1990). Plaintiffs identify the actions challenged in this suit in Paragraphs 2 and 5 of the Amended Complaint, namely approvals of the VW COP, SF COP, CWA and relevant RHA permits, and the relevant MMPA IHAs (collectively referred to as the VW Approvals and SF Approvals, respectively). AC ¶¶ 2, 5. Plaintiffs fail to identify any specific agency action by Defendants Gary Frazer or Martha Williams, in their official capacities, or the FWS with respect to either challenged project, much less allege any specific injury resulting from an action of FWS. To the extent the Amended Complaint may be construed as asserting any claims against Mr. Frazer, Ms. Williams, or FWS, those claims must be dismissed because Plaintiffs do not identify any final agency actions that would be reviewable under the APA or the ESA. *See*

[20] *See Adams v. EPA*, 38 F.3d 43, 50 (1st Cir. 1994) (exhaustion doctrine applied where party did not comment in response to public notice on CWA permit); *Cook Inletkeeper v. Raimondo*, 533 F. Supp. 3d 739, 752 (D. Alaska 2021) (exhaustion doctrine applied where party did not comment in response to public notice on MMPA permit); *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 2015 WL 12659937, at *19, (C.D. Cal. June 30, 2015) (exhaustion doctrine applied where party failed to comment in response to public notice on CWA Section 404 permit).

*Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).[21] In the alternative, Mr. Frazer, Ms. Williams, and FWS should be dismissed as a co-Defendants pursuant to Fed. R. Civ. P. 21.

In addition, all of Plaintiffs' claims against the Corps related to the South Fork project must be dismissed for failure to identify a final agency action. *NWF,* 497 U.S. at 882. Citing the SF JROD, Plaintiffs allege that the Corps erred in granting a permit. AC ¶ 5. But the Corps was not a signatory to the SF JROD, and the Amended Complaint does not challenge (or even mention) the Corps' separate record of decision for the South Fork project.

## V. Plaintiffs fail to state a claim as to Count IV.

Plaintiffs fail to state as claim as to newly-added Count IV (AC ¶¶ 92-95), which alleges that NMFS/OPR's failed to adhere to a specific MMPA notice provision, 16 U.S.C. § 1374(d). But that notice provision pertains to MMPA permits for certain importation activities, and is irrelevant to claims concerning the IHAs here, which NMFS/OPR issued in accordance with § 1371(a)(5). *See* § 1371(a)(5)(C)(ii) ("Sections 1373 and 1374 of this title shall not apply to the taking of marine mammals under the authority of this paragraph.").

## 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).

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[21] In addition, Plaintiffs do not challenge issuance of the VW and SF BiOps by NMFS/Greater Atlantic Region ("NMFS/GAR"). Although Plaintiffs allege that the challenged government approvals were "based on" the BiOps, AC ¶¶ 2, 5, no Count directly challenges the merits of the VW or SF BiOps as issued by NMFS/GAR. *See Bennett,* 520 U.S. at 174 (distinguishing between APA claims of alleged "maladministration" of the ESA involving the merits of BiOps asserted against FWS or NMFS in their roles as consulting agencies, and ESA citizen-suit claims alleging ESA "violations," such as an agency's unlawful reliance on a NMFS or FWS BiOp). Thus, to the extent that the Amended Complaint alludes to challenges to the merits of the VW or SF BiOps issued by NMFS/GAR, *see, e.g.*, AC ¶ 172, the Court lacks jurisdiction over such claims. *NWF,* 497 U.S. at 882.

Date: March 9, 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 March 9, 2022.

*/s/ Angela N. Ellis*
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