IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ALLCO RENEWABLE ENERGY LTD., ALLCO FINANCE LTD., and THOMAS M. MELONE, Plaintiffs, v. 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, JANET COIT, in her official capacity of Assistant Administrator, National Marine Fisheries Service, 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, Defendants.	Civil Action No. 1:21-cv-11171-IT Hon. Indira Talwani LEAVE TO FILE GRANTED ON APRIL 8, 2022

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

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GLOSSARY

BOEM	U.S. Bureau of Ocean Energy Management
Corps	U.S. Army Corps of Engineers
CWA	Clean Water Act
ESA	Endangered Species Act
FWS	U.S. Fish and Wildlife Service
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NMFS/GAR	NMFS Greater Atlantic Region
NMFS/OPR	NMFS Office of Protected Resources
OCSLA	Outer Continental Shelf Lands Act
VW COP	Vineyard Wind Construction and Operations Plan
VW FEIS	Vineyard Wind Final Environmental Impact Statement

INTRODUCTION

Plaintiffs' opposition confirms the numerous deficiencies in their Amended Complaint. While Plaintiffs assert a wide range of alternative standing theories, each of those theories relies entirely on hypothetical predictions about future occurrences—fluctuations in supply and demand in regional energy markets, and the occurrence of an unprecedented weather event, to name just two—that are too speculative to establish that Plaintiffs have a concrete stake in the outcome of this litigation. And, while Plaintiffs have failed to establish their standing to challenge either the Vineyard Wind or South Fork project, their allegations are especially deficient with respect to South Fork. Rather than making particularized allegations to establish a plausible injury from South Fork, they rely entirely on their allegations with respect to Vineyard Wind, claiming without explanation that all future wind projects are "peas in the same pod." Pls.' Mem. in Opp. to Defs' Mot. to Dismiss the First Am. Compl., Doc. No. 86 at 13. Plaintiffs go so far as to suggest that their standing may be based on possible future harm caused by other proposed wind projects that have not been approved. The Court should reject Plaintiffs' attempt to use this lawsuit as a vehicle for protesting an entire industry to which they object. For these reasons and the others set forth below, the Amended Complaint should be dismissed.

DISCUSSION

I. Plaintiffs' opposition confirms that they lack Article III standing.

To establish standing, Plaintiffs must plausibly plead (i) a "concrete, particularized, and actual or imminent" injury; (ii) causation; and (iii) redressability. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). To meet that burden, Plaintiffs must allege more than a "speculative chain of possibilities." *Id.* at 414. Plaintiffs offer numerous possible standing theories, but, whether considered individually or together, those theories rely on conjectural allegations that are too speculative to establish standing, particularly under this Circuit's heightened standard for

pleading standing. *United States v. AVX Corp*., 962 F.2d 108, 117 (1st Cir. 1992).

A. Plaintiffs cannot establish standing based on alleged effects of future wind projects that have not received federal approval and are not challenged in this action.

Plaintiffs' Amended Complaint challenges federal approvals of two specific wind projects: Vineyard Wind and South Fork. Rather than seeking to establish that they have standing related to those two projects, however, Plaintiffs posit that their "claims are based upon the individual *and cumulative* impacts of the [Vineyard Wind] and [South Fork Wind] projects and the Foreseeable Actions." Doc. No. 86 at 1. And Plaintiffs define "Foreseeable Actions" to include ten separate wind projects that, apart from the South Fork project, have not yet received federal approval, along with unnamed "others."[1] *Id.* at 1 n.1. Indeed, Plaintiffs repeatedly invoke supposed harm stemming from "Foreseeable Actions" to support both their economic and environmental theories of standing.[2] But Plaintiffs cannot establish standing based on purported harm related to projects that have not received federal approval and that are not challenged in this action.

For one, Plaintiffs would need a final agency action for the Foreseeable Actions before those projects could be challenged under the Administrative Procedure Act ("APA"), 5 U.S.C. § 704. Thus, any claims concerning the Foreseeable Actions are unripe and will not ripen (if

[1] Plaintiffs' list of "Foreseeable Actions" is drawn from the planned action analysis in the Vineyard Wind Final Environmental Impact Statement ("VW FEIS"). Doc. No. 86-1 at 1-6. As discussed *infra*, the fact that Federal Defendants' NEPA analysis included consideration of "the possible extent of future offshore wind development in the United States," *id.* at 1-5, in no way confers Plaintiffs with standing based on supposed effects of possible future offshore wind projects.

[2] *See, e.g.*, Doc. No. 86 at 3 (alleging economic injury stemming from "the VW project and other Foreseeable Actions"); *id.* at 6 (arguing that "Foreseeable Actions will result in exponential addition[al] 'take'" of North Atlantic right whales); *id.* at 10 ("it is plausible that another Hurricane Sandy would occur" during the lifetime of Vineyard Wind, South Fork, and the "Foreseeable Actions"); *id.* at 13 ("the [Vineyard Wind], [Southfork Wind], and the Foreseeable Actions clearly constitute a credible threat to the migratory birds on Little Beach.").

ever) until the U.S. Bureau of Ocean Management ("BOEM") or the other Federal Defendants take some reviewable, final agency action with respect to such proposals. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990).

In addition, Plaintiffs cannot establish any element of standing based on purported harm from the Foreseeable Actions. Because no final agency action has been taken with respect to those projects, it follows that alleged future injuries that could result from them are not "actual or imminent." *Clapper*, 568 U.S. at 409. In addition, any possible harm resulting from the Foreseeable Actions would not be "fairly traceable" to the federal actions that Plaintiffs challenge in this lawsuit. *Id.* And finally, because there are no reviewable actions with respect to those projects, they could not be redressed by any order issued by this Court. *Id.*

The Supreme Court has held that a plaintiff lacks standing to challenge a series of agency actions or the implementation of an agency program, but must instead separately challenge a specific final agency action. *Lujan*, 497 U.S. at 890, 894. In *Lujan*, the Supreme Court held that a litigant cannot "seek wholesale improvement of [a federal] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Id.* at 891. Instead, "[u]nder the terms of the APA," a plaintiff "must direct its attack against some particular 'agency action' that causes it harm." *Id.* Here, Plaintiffs have only identified final agency actions with respect to two projects. As a result, any harm for Article III purposes must also emanate from those final agency actions.

Finally, the fact that the VW FEIS considered the possible scope of future offshore wind projects does not change the standing analysis here. NEPA is a procedural statute that requires agencies to consider the environmental effects of their proposed actions. *Sierra Club v. Marsh*, 872 F.2d 497, 502 (1st Cir. 1989). While the VW FEIS's planned action analysis is an important

tool for evaluating the environmental effects of the Vineyard Wind project, including within the context of proposed future wind projects, it does not initiate any decisionmaking for future actions that may or may not be approved by an agency. Plaintiffs retain an obligation to allege each element of standing for each agency action they challenge. Because Plaintiffs cannot establish any element of standing based on purported future harm from Foreseeable Actions, the Court should disregard all standing allegations that reference or rely on the Foreseeable Actions.

B. Plaintiffs have not plausibly alleged standing based on purported economic injury.

As Federal Defendants explained in their opening brief, Plaintiffs cannot establish any element of standing based on purported past or present economic harm. *See* Fed. Defs.' Mem. in Support of Mot. to Dismiss First Am. Compl., Doc. No. 65 at 5-9. Their allegations of past injury depend on the actions of Massachusetts and Connecticut—third parties not before this Court, whose alleged requirements for procurement of wind energy are not caused by any federal action, and could not be redressed by an order of this Court in this action. *Id.* at 6-7. And Plaintiffs' allegations of future economic injury are too speculative to establish injury-in-fact, and depend on an extended chain of possibilities too remote to establish causation. *Id.* at 7-9. Plaintiffs' opposition raises three arguments, none of which rebuts the fundamental deficiencies in their Amended Complaint.

First, Plaintiffs claim that "courts have repeatedly found that market participants in regional energy markets possess standing to challenge government actions affecting those markets." Doc. No. 86 at 1-2 (citing *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014); *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014); and *La. Energy & Power Authority v. FERC*, 141 F.3d 364, 367 n.5 (D.C. Cir. 1998)). That may be true as far as it goes, but it does not change the fact that Plaintiffs have not established standing here. In fact, the cases Plaintiffs cite only highlight Plaintiffs' failure to adequately allege standing. In *Nazarian* and

Solomon, standing was not contested or discussed by the courts, as both cases involved parties challenging government actions that indisputably affected them. *See Nazarian*, 753 F.3d at 474; *Solomon*, 766 F.3d at 249. The plaintiff in *Louisiana Energy* was a competitor and customer of the Central Louisiana Electric Company, and the court in that case determined that the challenged government action would allow for increased price competition. 141 F.3d at 366. *Lousiana Energy* is inapplicable here, however, because Plaintiffs are not customers or direct competitors of Vineyard Wind (or any other producers of offshore wind).

There is no generalized exception to Article III standing for participants in regional energy markets. Plaintiffs bear the burden to put forward plausible allegations that they have standing under the facts alleged in this case. They have not met that burden here.

Second, Plaintiffs contend that they must have standing based on economic harm because NEPA and OCSLA allegedly require federal agencies to consider economic impacts of their proposed actions.[3] Doc. No. 86 at 2-3. Plaintiffs fail to cite a single authority to support the proposition that either NEPA or OCSLA requires analysis of competitive economic effects. More fundamentally, no obligation imposed on federal agencies by NEPA or OCLSA can relieve Plaintiffs of Article III's requirements, which they have not met. Notwithstanding Plaintiffs' argument to the contrary, Federal Defendants do not contend that "a market participant that is

[3] To the extent Plaintiffs contend that they should be excused from establishing standing because otherwise no one will be able to seek judicial review of the challenged government actions (*see* Doc. No. 86 at 3, 4 n.4), their argument fails on the law and the facts. The Supreme Court has repeatedly held that "the assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Clapper*, 568 U.S. at 420-21 (citation omitted). *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992) did not hold to the contrary. *Holmes* involved the proximate cause requirement of a provision of a different statute, which did not excuse any class of plaintiffs from establishing standing. 503 U.S. at 261. Federal Defendants have never argued that no one can establish standing as to the challenged actions; they have argued that Plaintiffs have not adequately alleged the elements of standing here.

affected by the government's proposed action does not have standing." *Id.* at 2. The problem is that Plaintiffs have not sufficiently alleged that *they* will be affected by the government actions they challenge. No provision in OCSLA or NEPA can remedy that failure. "No concrete harm, no standing." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021).

Third, Plaintiffs' discussion of *Dantzler, Inc. v. Empresas Berrios Inventory & Operations, Inc.*, 958 F.3d 38 (1st Cir. 2020), Doc. No. 86 at 3-4, misses the point. Unlike Plaintiffs here, the plaintiffs in *Dantzler* alleged injury because it was undisputed that they had suffered economic harm by paying higher fees. Despite that fact, the First Circuit held that they nevertheless lacked standing because they failed to allege a sufficiently direct connection between that injury and the Ports Authority program they challenged. 958 F.3d at 48. *See also* Doc. No. 65 at 6-7 (discussing *Dantzler*). Plaintiffs' allegations of economic harm suffer from the same causation and redressability problem here. Like the *Dantzler* plaintiffs, whose injury was caused by the independent decision of a third party, any harm Plaintiffs might suffer here would be attributable to the policy decisions of Massachusetts and Connecticut, and not by any federal action challenged in this case—a fact that the Amended Complaint expressly concedes. *See* Am. Compl., Doc. No. 58, at ¶ 36 ("Because of its [off-shore wind] procurements, Massachusetts requires the electric distribution companies to acquire less solar energy which has and continues to harm Plaintiffs' ability to develop its solar energy facility in Ashburnham, Massachusetts."); *id.* (alleging that Connecticut's policies have led to lower procurement of solar energy). Thus, to the extent Plaintiffs have alleged any economic injury at all, that injury is caused by (and can only be redressed with regard to) independent decisions of Massachusetts and Connecticut.

C. Mr. Melone's asserted environmental interests do not establish standing.

Plaintiffs' allegations concerning Mr. Melone's purported environmental interests are

facially insufficient for the reasons explained in our opening brief. Doc. No. 65 at 9-14. In attempting to show otherwise, Plaintiffs' opposition asserts, for the first time, a host of facts that appear nowhere in their Amended Complaint.[4] Yet, even if they were, Plaintiffs still have not plausibly alleged standing based on Mr. Melone's purported aesthetic or environmental interests.

North Atlantic right whales. Mr. Melone's purported interest in right whales consists of three activities, all of which occurred after he brought this lawsuit: attendance at a single conference, and two whale watching trips, neither of which took place in the vicinity of his home in Edgartown or the projects he challenges.[5] In support of their theory that Mr. Melone nevertheless has standing with respect to right whales because of one right whale sighting off the coast of Florida, Plaintiffs incorrectly assert that "[t]he Supreme Court expressly approved the animal nexus theory" to confer standing based on an individual's intent to see endangered animals anywhere on the globe. Doc. No. 86 at 6. To the contrary, the Supreme Court expressly rejected that theory in *Lujan v. Defenders of Wildlife*, concluding that "[i]t goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project

[4] These are not properly considered. *Keane v. Navarro*, 345 F. Supp. 2d 9, 12 (D. Mass. 2004) ("On a motion to dismiss . . . the Court confines itself to the allegations of the complaint"); *Miller v. Suffolk Cnty. House of Correction*, 2002 WL 31194866, at *2 (D. Mass. Sept. 27, 2002).

[5] Plaintiffs do not dispute that Mr. Melone lacked an interest in right whales when he filed this action, but instead argue that the First Circuit does not require standing to exist when a suit is filed. Doc. No. 86 at 7 n.7 (citing *U.S. ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1, 5-6 (1st Cir. 2015)). But *PharMerica* involved a request to file a supplemental complaint under Rule 15(d), which the First Circuit permitted based on the facts of that case. 809 F.3d at 6. It did not depart more broadly from the settled rule that standing must be assessed at the time of filing. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) ("[W]e have an obligation to assure ourselves that [plaintiff] had Article III standing at the outset of the litigation."). Here, Plaintiffs have not sought relief under Rule 15(d), and even if they had, supplementation would be futile because Plaintiffs' new allegations still fail to establish standing based on Mr. Melone's purported interest in right whales. *See* Doc. No. 65 at 12-14.

affecting some portion of that species with which he has no more specific connection." 504 U.S. 555, 567 (1992). Based on the holding in *Defenders of Wildlife,* Plaintiffs may not demonstrate an alleged injury involving right whales in the Vineyard Wind project area based on Mr. Melone's stated intent to view right whales from a hotel room in Fernandina Beach, Florida. *See* Doc. No. 58 ¶ 24. And, based on the same reasoning, Plaintiff's stated intent to undertake whale watching trips with Boston's New England Aquarium dozens of miles north of the project areas, *see id.*, is also insufficient to establish standing. *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45, 53 (D. Mass. 1993) (no standing where "plaintiffs have not offered any evidence that the depletion [of wild dolphins] occurs in any particular place, or that their members have or will be harmed from depletion in that place.").

Piping Plovers and other Little Beach birds. Mr. Melone's asserted interest in observing piping plovers on Little Beach is also insufficient to confer standing to pursue the claims asserted here. Plaintiffs' assertions that Mr. Melone's interest will be harmed due to the risk of collisions with windmills are contrary to the conclusions of the U.S. Fish and Wildlife Service ("FWS") concurrence letter, a decision Plaintiffs cite in their opposition (Pls'. Ex. 3, Doc. No. 86-3) but leave unchallenged in their Amended Complaint. The concurrence letter stated that the majority of piping plovers will be flying above the rotor-swept zone during migration. Doc. No. 86-3 at 9. FWS concluded that "the estimated small number of individuals of each species occurring in the [wind development area], most individuals flying at heights outside the [rotor swept zone], and the small amount of airspace occupied by the turbines collectively indicate the collision risk to all three species will be discountable." *Id.* at 10. Mr. Melone has failed to allege facts to show, as he must, that a discountable risk to individual plovers in the project area is likely to result in a perceptible injury to his asserted interest in viewing the ESA-protected bird species at Little

Beach. *Friends of the Earth*, 528 U.S. at 181(plaintiff must show that the harm "is not injury to the environment but injury to the plaintiff").

Risk of oil spill from future hurricane. Mr. Melone's alleged injury based on a hypothetical future chain of events leading to a catastrophic oil spill is too speculative to establish standing. Plaintiffs attempt to show otherwise by relying on "worst case" analysis in the Vineyard Wind Construction and Operations Plan ("VW COP"), but the VW COP shows that the project components are designed to utilize secondary containment systems to prevent a release of oil to the environment.[6] It is unlikely that oil would escape the containment systems. VW COP at Annex 11-27. The "worst case" oil spill scenario depicted in Plaintiffs' brief, Doc. No. 86 at 13, was based on a very conservative assumption in which no oil spill response or mitigation would occur. VW COP at Annex 11-27. Contrary to that very conservative modeling assumption, the VW COP employs methods to contain and recover onshore and aquatic petroleum spills. *Id.* Moreover, the VW FEIS concluded based on "extensive modeling" that the likelihood of "a catastrophic, or maximum-case scenario" oil spill was "Very Low," "meaning it would occur one time in 1,000 or more years." VW FEIS Appendix A at A-70-71, *available at* https://www.boem.gov/renewable-energy/state-activities/vineyard-wind-1-feis-volume-2. Mr. Melone may not demonstrate standing based on conclusory allegations about highly unlikely future injuries. *Kerin v. Titeflex Corp.*, 770 F.3d 978, 983 (1st Cir. 2014) ("[W]hether a risk is

[6] VW COP at Annex 11-27, *available* at https://www.boem.gov/sites/default/files/documents/renewable-energy/Vineyard%20Wind%20COP%20Volume%20I_Appendix%20I-A.pdf. As explained in the VW COP, certain components of the wind turbines and electrical service platform (a platform that supports the transformers and other equipment that transmit electricity through the offshore cables to the bulk power grid) will rely on oil for lubrication and other purposes. *Id.* at 1. Plaintiffs incorrectly claim this will result in "millions of gallons of oil only 14 miles away from Martha's Vineyard," Doc. No. 86 at 7, but the total amount of oil anticipated to be contained in the wind turbines and electrical service platform(s) combined is less than half of one million gallons. VW COP at 1.

speculative also depends on the chances that the risked harm will occur.").

D. Plaintiffs lack standing to challenge the South Fork project.

Plaintiffs' opposition fails to rebut Federal Defendants' arguments concerning the entirely speculative nature of Plaintiffs' alleged injuries in relation to the South Fork project. Plaintiffs must establish standing for each claim and form of relief, which means that they can only pursue a claim against the South Fork project by establishing each element of standing with respect to that project specifically. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). As explained in Federal Defendants' opening brief, Plaintiffs have not alleged any particularized facts to establish standing to challenge the South Fork project. Doc. No. 65 at 14. Indeed, Plaintiffs concede that they "have not made a specific allegation that the energy from the [South Fork project] will compete with their projects in Connecticut and Massachusetts." Doc. No. 86 at 13. Further, Plaintiffs must demonstrate standing for each form of relief sought. Thus, Plaintiffs cannot support their challenge to South Fork by relying on allegations concerning the Vineyard Wind project (which are in any event inadequate). Plaintiffs' allegations concerning the South Fork project are "barebones" at best, and fall far short of the First Circuit's heightened standard for pleading standing. *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.").

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 assert standing to challenge the Corps' permit because, according to them, oil response modeling shows that any discharge of oil from wind turbines may find its way to Plaintiff's property, which Mr. Melone claims includes wetlands and eelgrass. Doc. No. 86 at 16. But the Corps permit is for discharge of fill on the ocean floor that may occur in conjunction

with erecting the wind turbine towers and laying transmission cables on the seabed floor. The Corps' permit Plaintiffs have challenged has nothing to do with discharges of oil. *See* Record of Decision, Doc. No. 1-1, at 30 (describing the scope of the Corps' permit). And although Plaintiffs allege that the discharges authorized by the Corps' permit "affect the habitat of the [North Atlantic right whale]," Doc. No. 86 at 16, there is no such claim in the Amended Complaint and Plaintiffs otherwise provide no basis to argue that placing fill on the ocean floor (i.e., moving sediment and scour protection in conjunction with laying cable and inserting the tower of a windmill into the ocean floor) will adversely affect the habitat of the right whale.

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

Under the law of the Circuit, the notice provisions of environmental statutes such as OCSLA, 43 U.S.C. § 1349(a)(2)(A), and the ESA, 16 U.S.C. § 1540(g)(2)(A)(i) , are mandatory prerequisites to suit. *Garcia v. Cecos Int'l, Inc.*, 761 F.2d 76, 79 (1st Cir. 1985). Plaintiffs do not dispute that they sent all of their various notices *after* they filed this case. Failure to comply with these notice provisions "requires dismissal." *Me. Audubon Soc'y. v. Purslow*, 672 F. Supp. 528, 530 (D. Me. 1987).

PharMerica, cited by Plaintiffs, construes Fed. R. Civ. P. 15(d) to supplement pleadings in litigation among private parties and is not applicable to a waiver of sovereign immunity. 809 F.3d at 5-6. Similarly, the cited notice provision, 16 U.S.C. § 824a-3(h), contemplates litigation against a state regulatory authority. By contrast, the environmental statutes at issue here involve waivers of sovereign immunity for litigation against the United States. Any such waiver of sovereign immunity must be "construed strictly in favor of the sovereign . . . and not enlarge[d] . . . beyond what the language requires.'" *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (citations omitted). The failure to provide mandatory pre-suit notice cannot be cured by

providing notice after filing a complaint because such an interpretation would be contrary to Congress's intent to afford a litigation-free window in which the government agency may, if warranted, cure any alleged violation prior to being forced into burdensome litigation. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987). Moreover, Plaintiffs may not collaterally attack the NMFS biological opinions or FWS concurrence letter(s) as a means of challenging various agency actions that relied on these consultation documents when Plaintiffs failed to satisfy the mandatory prerequisites for challenging the consultation documents in the first place. *Am. Canoe Ass'n v. EPA*, 30 F. Supp. 2d 908, 927 (E.D. Va. 1998) ("[T]he APA does not provide an avenue for duplicative review when a statute specifically sets out procedures for review of agency action, and so [APA-based claims alleging ESA violation] must be dismissed.").[7] The Court should dismiss Plaintiffs' OCSLA and ESA claims for failure to adhere to applicable notice provisions.

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

As Federal Defendants explained in their opening brief, Counts VII through X should be dismissed because Plaintiffs did not raise the issues asserted in those counts during the Corps' permitting process, and Counts IV and XIII should be dismissed because Plaintiffs did not raise the issues asserted in those Counts in their comments to NMFS/OPR. Doc. No. 65 at 18-19. Plaintiffs imply that the requirement that a party present its arguments to the agency must be statutorily mandated, Doc. No. 86 at 17, but that is incorrect. Courts have long recognized that,

[7] *See also McCrary v. Gutierrez*, 528 F. Supp. 2d 995, 999 (N.D. Cal. 2007) ("Since the ESA allows Plaintiff to file a citizen suit, the APA cannot provide jurisdiction for Plaintiff's action."); *Haw. Cnty. Green Party v. Clinton*, 124 F. Supp. 2d 1173, 1193 (D. Haw. 2000) ("The Court concludes that a particular claim may only be brought under either the APA or the ESA—a plaintiff may not chose [sic] her statutory weapon.").

even absent a specific statutory or regulatory requirement, "[t]he failure to raise an argument before an agency constitutes a waiver of that argument for judicial review." *Padgett v. Surface Transp. Bd.*, 804 F.3d 103, 109 (1st Cir. 2015) (citing cases). This is the rule because "it accords respect to the agency decisionmaking process by providing the agency with the opportunity to address a party's objections, . . . apply its expertise, exercise its informed discretion, and create a more finely tuned record for judicial review." *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 30 (1st Cir. 2012) (quotation and citation omitted).

Plaintiffs next assert that the issue exhaustion doctrine does not apply when the issue is raised in comments submitted to the agency by another party. Doc. No. 86 at 17-18. While that may be true, Plaintiffs point to no such comments on *this* record.[8] Plaintiffs alternatively assert that exhaustion would have been futile, but their only support for that argument is that other agencies failed to respond to their Notices of Intent under the ESA and OCSLA. *Id.* at 17. Such notices, submitted to other agencies *after* the permitting process was completed, alleging violations of other statutes, hardly establishes that the Corps would have ignored comments submitted during its comment process, alleging that its permit might violate the Clean Water Act ("CWA").[9] It also deprives the agency of the opportunity to generate the type of "finely tuned record" required to support its ultimate determination. *Upper Blackstone*, 690 F.3d at 30.

Finally, Plaintiffs argue that they submitted comments on the EIS issued by BOEM, and that this should suffice to provide a separate agency—the Corps—with notice. But Federal Defendants' issue presentation arguments do not relate to any claims that the Corps violated

[8] The Corps has now confirmed that it received just two comments on the proposed permits, neither raising the issues now asserted by Plaintiffs.

[9] *See Lazaridis v. Social Sec. Admin.*, 856 F. Supp. 2d 93, 98 (D.D.C. 2012) (futility exception applies only if exhaustion would be "'clearly useless,' such as where the agency . . . 'has evidenced a strong stand on the issue in question and an unwillingness to reconsider the issue'").

NEPA. Instead, they relate to Counts VII through X, which allege violations of the CWA that purportedly arise out of the Corps' issuance of permits under the CWA. A plaintiff may not wholly ignore an agency's permitting process, under which the agency specifically called for comments, and later argue in court that the agency was required to look to other administrative processes, led by other agencies, to consider what later court challenges might be made with regard to the permits it issues under a separate process conducted under a separate statute.

IV. Claims challenging the merits of any FWS concurrence letter or NMFS biological opinions are not pled in the Amended Complaint.

For the first time in this litigation, in their opposition to Defendants' motion to dismiss, Plaintiffs state that they intend to challenge the FWS concurrence letter dated October 16, 2020, regarding the effects of the Vineyard Wind project on the roseate tern and the piping plover. Doc. No. 86 at 24.[10] The Amended Complaint does not mention this letter at all, let alone state a claim challenging it. Doc. No. 58. Plaintiffs do not mention any specific action by FWS concerning the South Fork project in either their memorandum or Amended Complaint. The Amended Complaint also does not directly challenge the issuance of the Vineyard Wind and South Fork biological opinions by the NMFS/Greater Atlantic Region Office ("NMFS/GAR")

[10] Plaintiffs also appear to suggest, for the first time, that they intend to challenge "the biological assessments related to species under the jurisdiction of the FWS Defendants." Doc. No. 86 at 19. If Plaintiffs are referring to biological assessments ("BAs") that BOEM completed to initiate ESA consultation with FWS pursuant to 50 C.F.R. § 402.12, such BAs are not final agency actions reflecting "consummation of the agency's decision making process" or actions "from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). *See also Or. Nat. Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 995 (D. Or. 2010) (rejecting challenge to BAs, because they "did not mark the consummation of the agency's decisionmaking and were not actions from which legal consequences flowed"); *Western Watersheds Project v. Bureau of Land Mgmt.*, 552 F. Supp. 2d 1113, 1141 (D. Nev. 2008) (holding that a BA was not final agency action subject to judicial review). Accordingly, the BOEM BAs are not subject to review in this suit. *Lujan*, 497 U.S. at 882.

either. *See* Doc. No. 65 at 20 n.21. The biological opinions are not included among the enumerated "VW Approvals," *see* Doc. No. 58 at ¶ 2, or the "SF Approvals," *see id.* ¶ 5, that form the basis of the claims underlying Plaintiffs' Prayer for Relief. Indeed, Plaintiffs do not request any relief regarding either the FWS concurrence letter or the NMFS biological opinions. *See id.* The Court cannot simply overlook Plaintiffs' failure to plead such claims.[11] Claims concerning the NMFS biological opinions or any FWS concurrence letter(s) pursuant to the ESA must be dismissed for failure to actually plead or seek relief with respect to claims in the Amended Complaint concerning any particular final agency actions by FWS or the NMFS/GAR, respectively. *Lujan, supra*, 497 U.S. at 882.

V. Plaintiffs' remaining arguments fail for the reasons set forth in Federal Defendants' opening brief.

Plaintiffs' opposition fails to rebut the remaining arguments raised in Federal Defendants' opening brief, namely that Plaintiffs have not adequately alleged procedural or informational standing, and have failed to state a claim with respect to Count IV of the Amended Complaint. To avoid duplicative briefing, Federal Defendants respectfully refer the Court to their prior briefing on those issues. *See* Doc. No. 65 at 14-16 and 20.

CONCLUSION

For the foregoing reasons, and those set forth in Federal Defendants' opening brief, Doc. No. 65, the Amended Complaint should be dismissed.

[11] "Jurisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986) (citing *Healy v. Sea Gull Specialty Co.*, 237 U.S. 479, 480 (1915) and *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("[T]he party who brings a suit is master to decide what law he will rely upon.")).

Date: April 15, 2022

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CERTIFICATE OF SERVICE

Pursuant to Local Rule 5.2, I hereby certify that a true copy of the foregoing REPLY IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT was served upon the attorney of record for each other party by the CM/ECF electronic filing system on April 15, 2022.

/s/ Angela N. Ellis
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