IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, *et al.*, Defendants, and AMERICAN PETROLEUM INSTITUTE, Proposed Intervenor-Defendant.	No. 1:22-cv-01716-TSC

INTERVENOR-DEFENDANTS AMERICAN PETROLEUM INSTITUTE'S, NEW MEXICO OIL AND GAS ASSOCIATION'S, AND PEAK POWDER RIVER RESOURCES' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

This lawsuit challenges the Biden Administration's approval of more than 4,000 applications for permit to drill ("APD") for oil and gas on federal leases in New Mexico and Wyoming by Defendants U.S. Department of the Interior ("Interior"), Secretary of the Interior, the Bureau of Land Management ("BLM"), and Director of the BLM (collectively, the "Federal Defendants"). *See* Amend. Compl. (Dkt. No. 57), ¶ 1. Plaintiffs Center for Biological Diversity, Citizens Caring for the Future, New Mexico Interfaith Power and Light, and WildEarth Guardians (collectively, "Plaintiffs") contend that the Federal Defendants' APD approvals violated the National Environmental Policy Act ("NEPA), 42 U.S.C. §§ 4321, *et seq*., the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, *et seq*., the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701, *et seq*., and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, *et seq*. Amend. Compl., ¶ 1. In Plaintiffs' view, the Federal Defendants allegedly "failed to evaluate the cumulative impacts of greenhouse gas emissions that will result from these approvals under NEPA, and failed to consider the impact of these emissions as they relate to BLM's procedural and substantive obligations under the ESA and FLPMA." *Id*., ¶¶ 1, 4.

For the past several years, Plaintiffs and related groups have filed multiple lawsuits challenging onshore oil and gas lease sales and the approval of APDs based on similar alleged concerns with the Nation's congressionally-mandated oil and gas development program. But Plaintiffs' challenges to the APD approval decisions in this case are barred by three threshold limitations on judicial review of administrative agency action.[1]

[1] Proposed Intervenor-Defendant Chevron U.S.A. Inc. supports and joins in this Motion as to the first two issues, as discussed in Sections I and II, herein. Chevron has already submitted its own motion to dismiss for lack of standing, as argued in Section III.

First, the Federal Defendants issued the challenged APD approval decisions pursuant to the Mineral Leasing Act, which imposes a 90-day statute of limitations on challenges—like Plaintiffs'—to any decision "involving" any oil and gas lease. 30 U.S.C. § 226-2 ("Section 226-2"). Congress expressly imposed this short, specific limitations period as part of an effort to promote oil and gas development, and imposed it on claims—like the bulk of Plaintiffs' claims here—brought pursuant to the Administrative Procedure Act. That limitations period is broadly worded, must be strictly enforced, and had already run with respect to more than 3,800 of the challenged APD approval decisions when Plaintiffs filed their initial and amended complaints. The corresponding claims should be dismissed.

More broadly, it is a foundational principle of administrative law—in which agencies apply their expertise to the issues and actions delegated by Congress—that a party allegedly aggrieved by an agency action must first raise its grievances with the agency. As the Supreme Court has long explained, "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). Despite monitoring BLM's oil and gas leasing and development actions (and, indeed, repeatedly challenging them in court) over recent years, Plaintiffs do not allege that they raised the NEPA, ESA, or FLPMA issues underlying their claims with BLM before proceeding to this Court. Having eschewed agency review and the opportunity for agency correction, Plaintiffs cannot raise before this Court the issues they failed first to bring to the attention of Federal Defendants.

Finally, "standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). To have standing

to sue, Plaintiffs must plausibly allege (and ultimately prove) that they suffer a cognizable injury that is fairly traceable to BLM's APD approval decisions, and likely to be redressed by an order from this Court vacating the approvals. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102–03 (1998). Yet Plaintiffs challenge in bulk more than 4,000 individual APD approvals spread across tens of thousands of square miles in New Mexico and Wyoming. *See*, *e.g.*, Amend. Compl., ¶¶ 102–03. Because Plaintiffs fail plausibly to allege any particularized injury to individual members from the approval of any particular APD across that vast area, the Amended Complaint lacks the geographic nexus necessary to establish a cognizable Article III injury-in-fact. Given the extensive existing oil and gas development in these areas, and the worldwide scope of the alleged climate change impacts underlying Plaintiffs' claims, the Amended Complaint likewise fails to satisfy Article III's traceability and redressability requirements.

BACKGROUND

A. BLM's Management of Federal Lands.

Under FLPMA, BLM "manage[s] the public lands under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a). BLM must plan in a manner that: (i) will protect scenic, historical, ecological, and environmental values, *see id.* § 1701(a)(8); and (ii) "recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands," *see id.* § 1701(a)(12). While BLM has a responsibility to "prevent unnecessary or undue degradation of the [public] lands," *id.* § 1732(b), accounting for the productivity of the federal mineral estate is a FLPMA imperative. *E.g.*, *id.* § 1701(a)(12) (explaining policy that "the public lands be managed in a manner" consistent with "the Mining and Minerals Policy Act of 1970"); 30 U.S.C. § 21a ("[I]t is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in . . . the development of economically sound and stable domestic mining, minerals [including oil, gas, coals, oil shale and uranium], and minerals reclamation

industries, . . . [and] the orderly and economic development of domestic mineral resources . . . ."); *id*. ("It shall be the responsibility of the Secretary of the Interior to carry out this policy when exercising his authority under such programs as may be authorized by law[.]").

BLM "uses a multi-step planning and decisionmaking process to fulfill" the FLPMA's mandates. *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 504 (D.C. Cir. 2010). BLM "begins by creating" a resource management plan ("RMP"), which "describes, for a particular area, allowable uses, goals for future condition of the land, and specific next steps." *Id*. (quotation omitted). Thereafter, "[s]pecific projects are reviewed and approved separately, but must conform to the relevant RMP." *Id*. BLM prepares an EIS when preparing an RMP. *See* 43 C.F.R. § 1610.5-1; *id*. § 1601.0-6. "Additionally, during preparation of the RMP, the BLM considers the effects to listed and proposed species under the ESA." *Bd. of County Comm'rs of County of San Miguel v. U.S. Bur. of Land Mgmt.*, No. 17-cv-02432, 2022 WL 472990, at *4 (D. Colo. Feb. 9, 2022).

B. BLM's Management of Oil and Gas Leasing.

BLM integrates its FLPMA process with its congressionally-directed obligations under the Mineral Leasing Act ("MLA"), 30 U.S.C. § 181. Through the MLA, Congress mandated that oil and gas "[l]ease sales shall be held for each State where eligible [federal] lands are available at least quarterly," *id*. § 226(b)(1)(A). *See also* Act of Feb. 25, 1920, ch. 85, § 32, 41 Stat. 437 (purpose of MLA is "[t]o promote the mining of . . . oil . . . on the public domain"); *Conway v. Watt*, 717 F.2d 512, 514 (10th Cir. 1983) (congressional purpose behind the MLA "was the development of western portions of the country"); *Harvey v. Udall*, 384 F.2d 883, 885 (10th Cir. 1967) (MLA's "purpose . . . was to promote the orderly development of the oil and gas deposits in the publicly owned lands of the United States through private enterprise") (quotation omitted); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 52 (D.D.C. 2019) ("[W]hile oil and gas leasing

is mandatory, the Secretary has discretion to determine where, when, and under what terms and conditions oil and gas development should occur.").

Lease sales are conducted through a competitive bidding process. *See* 43 C.F.R. § 3120.1-2(b); *id*. § 3120.5-3. The Secretary of the Interior ("Secretary")—acting through BLM—awards the oil and gas lease to the party that has the highest bid at the lease sale "60 days following payment by the successful bidder of the remainder of the" bid made at the lease sale. *See* 30 U.S.C. § 226(b)(1)(A). The leases are issued "for a primary term of 10 years." 30 U.S.C. § 226(e). As an incentive to fulfill the MLA's developmental purpose, the term of the lease is extended by the lessee's diligence in conducting development operations and by production of oil or gas on the lease. *See id*. § 226(e)(2) (Each issued "lease . . . shall continue after the primary term of the lease for any period during which oil or gas is produced in paying quantities."); *id*. § 226(e)(3) ("Any lease issued under this section for land on which . . . actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time shall be extended for two years and so long thereafter as oil or gas is produced in paying quantities.").

Prior to any drilling activity, the lease "operator shall submit . . . for approval an [APD] for each well." 43 C.F.R. § 3162.3-1(c). "No drilling operations, nor surface disturbance preliminary thereto, may be commenced prior to the authorized [BLM] officer's approval of the permit." *Id*. *See also* 30 U.S.C. § 226(g). NEPA requirements must be satisfied before BLM can issue a permit, *id*. § 226(p)(2)(A), with the NEPA review "used in determining whether or not an [Environmental Impact Statement] is required and in determining any appropriate . . . conditions of approval of the submitted plan." 43 C.F.R. § 3162.5-1(a).

In 1960, Congress amended the MLA's leasing provisions. Among other things, Congress enacted Section 226-2, which provides:

> No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter.

30 U.S.C. § 226-2. Through this provision, Congress sought to create a "statute of limitations providing that any action under the Administrative Procedure Act to review a decision of the Secretary involving an oil and gas lease must be initiated within 90 days after the final decision of the Secretary." S. Rep. No. 86-1549 (1960), *as reprinted in* 1960 U.S.C.C.A.N. 3313, 3317. *See also id*. at 3337. More broadly, the 1960 MLA amendments aimed to reverse "a potentially dangerous slackening in exploration for development of domestic reserves of oil and gas" by "remov[ing] certain legislative obstacles to exploration for development of the mineral resources of the public lands and spur greater activity for increasing our domestic reserves." *Id*. at 3314–15.

C. Plaintiffs' Challenges to BLM's APD Approvals.

In compliance with its congressional directive to promote development of the Nation's onshore oil and gas resources, BLM "approved at least 4,019 APDs in the Permian and Powder River Basins" of New Mexico and Wyoming between January 21, 2021 and August 31, 2022. Amend. Compl., ¶ 102–03; *see also id*., Appx. A. On June 15, 2022, Plaintiffs Center for Biological Diversity and WildEarth Guardians first challenged the approval "[d]uring the first sixteen months of the Biden administration" "of at least 3,535 . . . [APDs] for oil and gas in New Mexico's Permian Basin and Wyoming's Powder River Basin" for alleged violations of NEPA, FLPMA, and the ESA. Compl. (Dkt. No. 1), ¶¶ 1, 3. *See also id*., Appx. A & B.

Following the Federal Defendants' answer, Plaintiffs filed the present Amended Complaint for declaratory and injunctive relief challenging the approval "[d]uring the first twenty months of the Biden administration" of "well over 4,000 APDs in the Permian and Powder River Basins" for alleged violations of NEPA, FLPMA, and the ESA. *Id*., ¶¶ 1, 3. The Amended Complaint adds two further plaintiffs—Citizens Caring for the Future and New Mexico Interfaith Power and

Light—and challenges to additional APD approval decisions. The Amended Complaint does not allege that Plaintiffs participated in any of Federal Defendants' decision-making processes regarding the challenged APD approvals before filing suit. At most, it alleges that Plaintiffs Center for Biological Diversity and WildEarth Guardians "sent a Notice of Intent to Sue . . . alleging violations of the Endangered Species Act including the failure to consult on the approval of APDs with respect to climate-imperiled species and the failure to reinitiate consultations regarding the impacts to climate-imperiled species[.]" *Id*., ¶ 18.

To remedy the alleged statutory violations, Plaintiffs ask the Court to, *inter alia*, (1) "[d]eclare that Federal Defendants' oil and gas drilling permit authorizations challenged herein violate" NEPA, the ESA, and FLPMA; (2) "[v]acate and set aside Federal Defendants' oil and gas drilling permit authorizations challenged herein"; (3) "[e]njoin Federal Defendants from approving or otherwise taking action to approve any applications for permits to drill on federal public lands and minerals until Federal Defendants have fully complied with" NEPA, the ESA, and FLPMA; and (4) "[r]emand this matter to BLM for further action[.]" *Id*., Requested Relief, ¶¶ A–F.

This lawsuit mirrors a series of NEPA challenges to Federal Defendants' onshore oil and gas leasing authorizations and drilling permit approvals filed by Plaintiffs and related groups across the country in recent years. *See*, *e.g.*, *WildEarth Guardians v. Haaland*, No. 21-cv-175-RC, Dkt. No. 1 (D.D.C. Jan. 19, 2021) (challenge to oil and gas lease sales); *WildEarth Guardians v. Bernhardt*, No. 20-cv-00056, Dkt. No. 1 (D.D.C. Jan. 9, 2020) (same); *WildEarth Guardians v. Jewell*, No. 16-cv-1724, Dkt. No. 1 (D.D.C. Aug. 25, 2016) (same); *Diné Citizens Against Ruining our Envt.*, *et al. v. Bernhardt*, No. 19-cv-00703, Dkt. No. 1 (D.N.M. Aug. 1, 2019) (challenge to drilling permit approvals); *Diné Citizens Against Ruining our Envt. v. Jewell*, No. 15-cv-209, 2015 WL 4997207 (D.N.M. Aug. 14, 2015) (same).

ARGUMENT

Despite active litigation against the BLM over recent years, Plaintiffs sat on their rights and are therefore barred from challenging the vast majority of the APD approval decisions at issue in this case for failure to comply with the applicable statute of limitations, and failure to raise its challenges initially before the expert agency charged by Congress with implementing the Nation's oil and gas program consistent with applicable environmental protections.

Plaintiffs' failures to comply with Section 226-2's limitations period, and with issue exhaustion requirements, trigger Federal Rule of Civil Procedure 12(b)(6), which "tests the legal sufficiency of a complaint." *Alford v. Providence Hosp.*, 60 F. Supp. 3d 118, 123 (D.D.C. 2014). Having failed to satisfy these threshold requirements with respect to the challenged APD approvals, Plaintiffs cannot "state a claim that is plausible on its face" with respect to those approvals. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted).[2]

Plaintiffs' failure plausibly to allege Article III standing further triggers Federal Rule of Civil Procedure 12(b)(1), and requires dismissal pursuant to Federal Rule of Civil Procedure 12(h)(3). *See*, *e.g.*, *Ctr. for Biological Diversity v. Regan*, No. 21-cv-119-RDM, 2022 WL 971067, at *6 (D.D.C. Mar. 30, 2022). Upon a motion to dismiss for lack of standing, "the Court must resolve the motion in a manner similar to a motion to dismiss under Rule 12(b)(6)." *Id*. Accordingly, the Court accepts the complaint's factual allegations, but does not "accept inferences

[2] Although Movant Intervenor-Defendants submitted their Answers to the Amended Complaint as required by Federal Rule of Civil Procedure 24(c), the Court may apply the well-known standards for failure to state a claim pursuant to Rule 12(b)(6)—rather than for a judgment on the pleadings under Federal Rule of Civil Procedure 12(c)—because, regardless of the label, this Court applies the same standard in assessing the motion. *See*, *e.g.*, *Maniaci v. Georgetown Univ.*, 510 F. Supp. 2d 50, 58 (D.D.C. 2007) ("The appropriate standard for reviewing a motion for judgment on the pleadings is virtually identical to that applied to a motion to dismiss under Rule 12(b)(6)."); *id*. at 60 (explaining that "the court may consider a premature Rule 12(c) motion under Rule 12(b)(6)").

unsupported by the facts alleged or legal conclusions that are cast as factual allegations." *Cartwright Int'l Van Lines, Inc. v. Doan*, 525 F. Supp. 2d 187, 193 (D.D.C. 2007) (citation omitted).

I. The MLA's Statute of Limitations Bars Plaintiffs' Challenges to At Least 3,869 of the APD Approvals.

"The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Block v. N. Dakota ex rel. Bd. Of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983). "A necessary corollary of this rule is that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Id*. Such conditions include statutes of limitations.

Plaintiffs' challenges to at least 3,869 of the APD approval decisions at issue are barred by Section 226-2's 90-day limitations period created by Congress as part of its MLA amendments designed to remove "obstacles" to oil and gas development. *See* 1960 U.S.C.C.A.N. at 3314–15. Failure to comply with the applicable statute of limitations triggers dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See Jackson v. Modly*, 949 F.3d 763, 767 (D.C. Cir. 2020). In making this determination, the Court may consider "the facts alleged in the complaint, any documents either attached to or incorporated in the complaint, and matters of which the court may take judicial notice." *Hurd v. District of Columbia*, 864 F.3d 671, 678 (D.C. Cir. 2017) (cleaned up). As detailed below, the Complaint and Amended Complaint make clear that at least 3,869 of Plaintiffs' APD decision challenges are barred by Section 226-2.

A. Section 226-2 Applies to Plaintiffs' Claims.

1. Section 226-2's Specific Statute of Limitations Applies to Plaintiffs' Causes of Action.

While Plaintiffs allege that Federal Defendants' challenged APD approval decisions violated the FLPMA and NEPA, *see supra*, neither statute provides an independent cause of action, *see*, *e.g.*, *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 177 (D.C. Cir. 2019) (NEPA); *Utah v. Babbitt*, 137 F.3d 1193, 1203 (10th Cir. 1998) (FLPMA). Rather, the APA supplies Plaintiffs' cause of action with respect to these statutes. *See*, *e.g.*, *Gov't of Manitoba*, 923 F.3d at 177 ("[A]ny challenge to agency action based on NEPA must be brought under the Administrative Procedure Act[.]"); *Babbitt*, 137 F.3d at 1203. In other words, by challenging Federal Defendants' APD approval decisions under NEPA and FLPMA, Plaintiffs invoke the limited waiver of sovereign immunity provided for in the APA. *E.g.*, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990); *Theodore Roosevelt Conservation P'ship*, 616 F.3d at 507.

In the absence of a specific statute of limitations, APA claims "are subject to the statute of limitations contained in 28 U.S.C. § 2401," which generally allows for claims against the United States filed within six years of accrual. *Mendoza v. Perez*, 754 F.3d 1002, 1018 (D.C. Cir. 2014). Plaintiffs' claims that the challenged APD approval decisions also violate the ESA, 16 U.S.C. § 1540(g)(1), are likewise subject to "the general six-year statute of limitations set forth in 28 U.S.C. § 2401(a)," absent a specific statute of limitations. *Ctr. for Biological Diversity v. Envt'l Protection Agency*, 847 F.3d 1075, 1087 (9th Cir. 2017).

But the general six-year limitations yields to more specific limitations. For example, the APA does not "affect[] other limitations on judicial review." 5 U.S.C. § 702(1). As the *Attorney General's Manual on the Administrative Procedure Act* ("*APA Manual*") explains, "the time within which review must be sought" for a cause of action under the APA "will be governed, as in

the past, by relevant statutory provisions," and "the general principles stated in [the APA's judicial review provisions] must be carefully coordinated with existing statutory provisions and case law."[3] ESA claims are likewise subject to specific limitations periods set forth in the underlying substantive statute under which the challenged agency action was taken—here, the MLA. *See Ctr. for Biological Diversity*, 847 F.3d at 1087 (citing, *inter alia*, *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 438 F.3d 937 (9th Cir. 2006) and *Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986)). *Cf. Ctr. for Biological Diversity*, 847 F.3d at 1087 (noting that procedural ESA claims are generally subject to the default six-year limitations period set forth in 28 U.S.C. § 2401(a)).

Indeed, a specific statute of limitations superseding the general 28 U.S.C. § 2401 limitations period otherwise applicable to Plaintiffs' claims is consistent with the "commonplace of statutory construction that the specific governs the general." *Howard v. Pritzker*, 775 F.3d 430, 438 (D.C. Cir. 2015) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)). "This is no less true with respect to statutes of limitations." *Id*. *See also*, *e.g.*, *Kannikal v. Att'y Gen. United States*, 776 F.3d 146, 155 (3rd Cir, 2015) ("Section 2401(a) is meant to apply when other limitations periods are lacking[.]"); *Nagahi v. INS*, 219 F.3d 1166, 1171 (10th Cir. 2008) ("***In the absence of a specific statutory limitations period***, a civil action against the United States under the APA is subject to the six year limitations period found in 28 U.S.C. § 2401(a).") (emphasis added); *Impact Energy Resources, LLC v. Salazar*, 693 F.3d 1239, 1245 (10th Cir. 2012) (APA "prohibits review of agency decisions 'to the extent that . . . statutes preclude judicial review.'" (quoting 5 U.S.C. § 701(a)).

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[3] *APA Manual* at 98, *available at* https://www.fsulawrc.com/fall/admin/AttorneyGeneralsManual.pdf (last visited Oct. 20, 2022). The Supreme Court has long found the *APA Manual* to be "persuasive" in interpreting the APA. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004).

"The MLA includes such a [specific] prohibition." *Id*. Section 226-2 provides:

> No action contesting ***a decision*** of the Secretary ***involving any oil and gas lease*** shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary ***relating to*** such matter.

30 U.S.C. § 226-2 (emphases added). This statutory deadline constitutes "a condition to the waiver of sovereign immunity and thus must be strictly construed." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94 (1990). The plain language, legislative history, and congressional purpose make clear that Section 226-2's 90-day limitations period applies to bar the bulk of Plaintiffs' challenges to Federal Defendants' APD approval decisions.

Construction of Section 226-2 "begin[s] . . . with the plain language of the statute." *AT&T Inc. v. FCC*, 452 F.3d 830, 835 (D.C. Cir. 2006) (quotation omitted). That language is broad. First, the term "'involving' is broad and indeed the functional equivalent of 'affecting.'" *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 273–74 (1995). Likewise, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)). Finally, the phrase "relating to" is "a broad one" that means "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association or connection with." *Morales*, 504 U.S. at 383 (quotation omitted). In short, where a party files an action contesting a decision of the Secretary that "involv[es]" at least one oil and gas lease, Congress limited such claims to those filed within 90 days of the decision.

The legislative history confirms that Section 226-2 broadly bars challenges filed more than 90 days after the final decision involving an oil and gas lease. The Conference Committee that drafted the final version of Section 226-2 "accepted the principle of the Senate language" on the statute of limitations. 1960 U.S.C.C.A.N. 3313, 3337. That language was meant to enact "[a] statute of limitations providing that ***any action under the Administrative Procedure Act*** to review

a decision of the Secretary involving an oil and gas lease must be initiated within 90 days after the final decision of the Secretary." *Id*. at 3317 (emphasis added). More broadly, the 1960 MLA amendments as a whole were designed to remove "obstacles" to oil and gas exploration and development, "and spur greater activity for increasing our domestic reserves." *Id*. at 3314–15.[4]

Here, Plaintiffs challenge Federal Defendants' decisions "involving any oil and gas lease." 30 U.S.C. § 226-2. Their challenge relates to environmental analyses performed—or analyses allegedly not performed—solely for purposes of Secretarial decisions regarding the conduct of oil and gas exploration and development operations on issued oil and gas leases, and thus plainly "involve" and "relate to" oil and gas decisions. Indeed, the Amended Complaint expressly challenges Federal Defendants' "decisions," *see*, *e.g.*, Amend. Compl., ¶ 14, to authorize oil and gas exploration and development operations by approving APDs on federal leases. The Amended Complaint further sets out the Federal Defendants' dates of decision for each challenged action. *See id*., Appx. A.

Because 3,758 (out of 4,366) of Federal Defendants' decisions to approve APDs for operations on oil and gas leases were issued more than 90 days before Plaintiffs challenged those approvals in their June 15, 2022 Complaint, Section 226-2 bars Plaintiffs' challenges to those APDs. *See*, *e.g.*, *Miami Bldg. & Constr. Trades Council v. Sec'y of Defense*, 143 F. Supp. 2d 19, 24–25 (D.D.C. 2001) (statute of limitations began to run on the date agency decided to prepare a Supplemental Environmental Impact Statement because plaintiffs challenged that decision); Exhibit A (listing challenged APD approval decisions issued before March 17, 2022 according to

[4] A conference committee report is entitled to "great weight" in assessing congressional intent. *Nat'l Ass'n of Greeting Card Publishers v. U.S. Postal Serv.*, 462 U.S. 810, 833 n.28 (1983). *See also*, *e.g.*, *Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981) ("Because the conference report represents the final statement of terms agreed to by both houses, next to the statute itself it is the most persuasive evidence of congressional intent.").

Complaint Appendices A and B). Likewise, Section 226-2 bars Plaintiffs' challenges to 111 of the 509 additional APDs included in Plaintiffs' Amended Complaint because those approvals issued more than 90 days before Plaintiffs filed their September 12, 2022 Amended Complaint. *See* Exhibit B (listing additional challenged APD approval decisions issued before June 14, 2022 according to Amended Complaint Appendix A). In total, Section 226-2 bars Plaintiffs' challenges to 3,869 of Federal Defendants' APD approval decisions.

Plaintiffs' challenges must therefore be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *E.g.*, *Jackson*, 949 F.3d at 767, 776–79.

2. NEPA Does Not Salvage Plaintiffs' Time-Barred Challenges.

That Plaintiffs allege procedural violations of NEPA does not alter application of Section 226-2. Rather, federal courts—including this Court—regularly apply to NEPA claims specific statutes of limitations that are shorter than the default six-year limitations period for APA claims under 28 U.S.C. § 2401(a). *See*, *e.g.*, *Miami Bldg. & Constr. Trades Council*, 143 F. Supp. 2d at 24–25 (NEPA challenge to disposition of former Air Force base property barred pursuant to sixty-day limitation period in Defense Base Closure and Realignment Act); *Nuclear Info. & Res. Serv. v. U.S. Dep't of Transp.*, 457 F.3d 956, 958, 962 (9th Cir. 2006) (sixty-day limitations period in 28 U.S.C. § 2344 barred NEPA challenges to agency regulations); *New Jersey Dep't of Envtl. Prot. & Energy v. Long Island Power Auth.*, 30 F.3d 403, 405–06, 410, 414 (3rd Cir. 1994) (explaining that 28 U.S.C. § 2344's sixty-day limitation period would bar petition for review of agency order); *Goos v. Interstate Com. Comm'n*, 911 F.2d 1283, 1288–89 (8th Cir. 1990) (applying sixty-day limitations period of 28 U.S.C. § 2344 to bar petitioners' NEPA claims).

These decisions are consistent with the similar rule that exclusive jurisdictional provisions restricting certain lawsuits to the Courts of Appeals equally apply to NEPA claims, and supersede the general federal questions jurisdiction conferred on district courts by 28 U.S.C. § 1331. *See*,

e.g., *Edwardsen v. U.S. Dep't of the Interior*, 268 F.3d 781, 784 (9th Cir. 2001) ("Because the alleged NEPA violation arises under [the Outer Continental Shelf Lands Act ("OCSLA")], which provides for exclusive jurisdiction in the court of appeals, we have original jurisdiction over the NEPA claim."); *City of Rochester v. Bond*, 603 F.2d 927, 936 (D.C. Cir. 1979) ("[W]e disagree that the district court may exercise concurrent jurisdiction merely because a violation of NEPA is alleged. The allegation may be raised directly in the courts of appeals; and insofar as it may affect the lawfulness of a directly appealable order we think it must be.").[5]

Again, NEPA's procedural mandates do not negate the "commonplace of statutory construction that the specific governs the general." *Howard*, 775 F.3d at 438. *See also Nuclear Info. & Res. Serv.*, 457 F.3d at 959 ("[W]here a federal statute provides for direct review of an agency action in the court of appeals, such specific grants of exclusive jurisdiction to the courts of appeals override general grants of jurisdiction to the district courts."); *California Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 911 (9th Cir. 1989) (explaining that "specific jurisdictional provisions" "control over the general and widely applicable procedures"); *Media Access Project v. FCC*, 883 F.2d 1063, 1067 (D.C. Cir. 1989) ("The courts uniformly hold that statutory review in the agency's specially designated forum prevails over general federal question jurisdiction in the district courts."); *Geertson Farms, Inc. v. Johanns*, 439 F. Supp. 2d 1012, 1020 (N.D. Cal. 2006) (explaining that "courts regularly hold that a challenge to the procedure of an agency action

[5] Exercise of exclusive jurisdiction over NEPA claims in the Court of Appeals is common for challenges to the Department of Interior's five-year leasing programs under OCSLA. *See*, *e.g.*, *Ctr. for Sustainable Economy v. Jewell*, 779 F.3d 588, 595 (D.C. Cir. 2015) (asserting OCSLA and NEPA violations); *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 471–72 (D.C. Cir. 2009) (asserting NEPA, APA and other violations); *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988) (same); *California v. Watt*, 712 F.2d 584 (D.C. Cir. 1983) (asserting NEPA and other violations); *California v. Watt*, 668 F.2d 1290 (D.C. Cir. 1981) (asserting NEPA, APA and other violations).

is tantamount to challenging the action itself"). *Cf. Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 684 (D.C. Cir. 2004) ("When an agency decision has two distinct bases, one of which provides for exclusive jurisdiction in the courts of appeals, the entire decision is reviewable exclusively in the appellate court.") (internal quotations and citation omitted).

The Ninth Circuit's application of a specific statute of limitations to environmental claims in *Turtle Island Restoration Network v. United States Department of Commerce*, 438 F.3d 937 (9th Cir. 2006), is instructive. In that case, environmental groups contended that a regulation issued pursuant to the Magnuson-Stevens Fisheries Act violated NEPA (among other statutes, including the ESA). *See Turtle Island*, 438 F.3d at 942. While the environmental groups contended that their claims were subject to the general six-year limitations period of 28 U.S.C. § 2401(a) that applies to APA claims, the Government argued that the plaintiffs' claims were barred by the Magnuson Act's specific thirty-day limitations period for challenges to "[r]egulations promulgated by the Secretary" of Commerce under the Magnuson Act. *See Turtle Island*, 438 F.3d at 940 (quoting 16 U.S.C. § 1855(f)); *id*. at 942–43. The Ninth Circuit concluded that the "plain language" of the Magnuson Act settled the dispute by broadly applying to any challenges to regulations promulgated pursuant to the Magnuson Act. *See id*. at 943–44. In short, "the decisive question [wa]s whether the regulations are being attacked, not whether the complaint specifically asserts a violation of the Magnuson Act." *Id*. at 945. And because the fisheries reopening that the environmental groups challenged "came about as a result of" a Magnuson Act regulation, *id*. at 944, the Magnuson Act's limitations period applied to bar the plaintiffs' claims, *id*. at 949. The plaintiffs could not escape that result "through careful[ly] pleading" their complaint as a NEPA challenge. *Id*. at 945 (citation omitted).

The Ninth Circuit's analysis mirrors the application of Section 226-2 here. The "decisive question" is whether the Secretary's decisions to issue the APDs "are being attacked, not whether the complaint specifically asserts a violation of the [Mineral Leasing Act]." *Id*. at 945. As in *Turtle Island*, the language of Section 226-2 is "clear and uncomplicated." *Id*. at 943. *See supra* p. 12. And just as the challenge in *Turtle Island* was aimed at the Magnuson Act regulation, Plaintiffs' complaint is "directed at," *Turtle Island*, 438 F.3d at 945, Federal Defendants' challenged "decisions," Amend Compl. ¶ 14; *see also supra*, to approve APDs and asks this Court to, among other things, "[d]eclare that Federal Defendants' oil and gas drilling permit authorizations . . . violate NEPA," *id*., Relief Requested, ¶ A. Plaintiffs likewise cannot avoid the MLA's 90-day "limitation through manipulation of form—avoiding mention of the [MLA] in the complaint—while in substance challenging" the lease-related decisions. *Turtle Island*, 438 F.3d at 945. Further, the MLA limitations period effectuates "Congress's intent to ensure" expeditious leasing and exploration of public lands for oil and gas development "and that challenges are resolved swiftly." *Id*. at 948. *See also supra* pp. 5–6, 12–13. Consistent with the reasoning in *Turtle Island* and the broad language of Section 226-2, Plaintiffs' NEPA (and other) claims are likewise barred.

Although the Tenth Circuit declined to apply Section 226-2's broad provisions to NEPA claims in *Park County Resource Council v. United States Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987), that 34 year-old out-of-Circuit decision is neither controlling nor persuasive and, indeed, was sharply criticized by the Ninth Circuit in *Turtle Island*. In rejecting application of Section 226-2, *Park County* relied on the Ninth Circuit's earlier decision in *Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986), and the twin assumptions that (1) no statute of limitations (or the APA) applies to NEPA claims, and (2) all NEPA claims must be subject to a uniform limitations

period. Each of these underlying bases were misplaced and have been further undermined during the intervening years.

First, *Park County* relied on a purported distinction in *Jones v. Gordon* between substantive challenges to an agency action—to which a statute of limitations applies—and procedural NEPA challenges—to which the limitations period does not apply. *See Park County*, 817 F.2d at 616; *see also id*. ("The thrust of our reasoning parallels that of the Ninth Circuit in *Jones v. Gordon*[.]")). But in *Turtle Island*, the Ninth Circuit noted that *Park County*'s distinction between substantive and procedural challenges for limitations purposes reflected a "misapplication of *Jones*" to the "broad wording" of Section 226-2. *Turtle Island*, 438 F.3d at 947 n.9. As the Ninth Circuit made clear, the "conclusion in *Jones* flowed not from any general proposition about NEPA but from a plain reading of the" particular limitations period at issue in that case. *Id*. at 947. Unlike the statute of limitations at issue in *Jones*, which narrowly applied to challenges to the "terms and conditions" of certain permits, *see Jones*, 792 F.2d at 824 (quoting 16 U.S.C. § 1374(d)(6)), Section 226-2 applies broadly to "a decision of the Secretary involving any oil and gas lease," 30 U.S.C. § 226-2; *supra* p. 12. Like the Magnuson Act limitations provision at issue in *Turtle Island*, "[n]othing in [Section 226-2] purports to distinguish between procedural and substantive challenges" to leasing decisions. *Turtle Island*, 438 F.3d at 946. *Cf. Block*, 461 U.S. at 285 (applying limitation period to challenge by State where "[t]he statutory language makes no exception for civil actions by States"). *Turtle Island* and the broad language of Section 226-2 thus fatally undermine *Park County*'s reasoning.[6]

[6] *Turtle Island* likewise undercuts a related decision in *Conservation Law Foundation v. Mineta*, 131 F. Supp. 2d 19 (D.D.C. 2001), which relied on *Park County* and *Jones* to conclude that "NEPA-only challenges may proceed pursuant to the APA, which has no time limitation, rather than pursuant to a more limited substantive statute." *Id*. at 24. Again, the Ninth Circuit explained

Second, applying its reading of the Ninth Circuit's decision in *Jones*, the Tenth Circuit assumed that the absence of a specific statute of limitations in NEPA meant that no limitations period applies to NEPA claims. Instead, NEPA claims were only subject to the equitable doctrine of laches. *See Park County*, 817 F.2d at 616–17. Alongside this assumption, *Park County* applied a "reasonableness standard" to the NEPA claims under review. *See id*. at 621 n.4. Taken together, these positions make clear *Park County*'s assumption that the APA—to which the general limitations period in 28 U.S.C. § 2401(a) applies and which imposes an arbitrary and capricious standard of review—does not supply the cause of action for NEPA claims. It is now well-settled, however, that the APA provides the cause of action for any NEPA claim and such claims are subject to statutes of limitations, not simply the equitable doctrine of laches. *See supra* pp. 10–11, 14–16.

Now unequivocally subject to the APA, Plaintiffs' NEPA claims are barred in order to effectuate Congress's intent to preclude "any action under the Administrative Procedure Act to review a decision of the Secretary involving an oil and gas lease [that is not] initiated within 90 days after the final decision of the Secretary." 1960 U.S.C.C.A.N. 3313, 3317. Allowing Plaintiffs to evade Section 226-2 simply "by artful[ly] pleading," *Block*, 461 U.S. at 285 (quotation omitted); *see also Turtle Island*, 438 F.3d at 945, their claim as a NEPA challenge, when their challenge so clearly and directly relates to an MLA oil and gas leasing decision, would "resurrect the very problems that Congress sought to eliminate," *Yeutter*, 887 F.2d at 912, by imposing a 90 day limitations period: late filed legal challenges and other "obstacles" that would undercut prompt development of oil and gas reserves. *See* 1960 U.S.C.C.A.N. at 3314–15.

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that *Conservation Law Foundation* reflected the same "misreading of *Jones*" without "interpreting the relevant statutory language" at issue in the case. *Turtle Island*, 438 F.3d at 947.

Finally, *Park County* erroneously assumed that claimed violations of NEPA should not be subject to differing limitations periods "depending upon which statute the underlying agency action is based." *Park County*, 817 F.2d at 616. To the contrary, federal courts have long applied specific limitations periods to NEPA claims depending upon the underlying agency action, and likewise applied specific, exclusive jurisdictional provisions depending on the context. *See supra* pp. 10–11, 14–16. In other words, it is well settled that there is no uniform time and forum for a NEPA claim.

Viewed as a whole, the reasoning of *Park County* cannot withstand decades of caselaw clarifying the nature and scope of NEPA claims. This court should, as it must, apply "the plain language," *AT&T Inc.*, 452 F.3d at 835 (quotation omitted), of Section 226-2 to bar the bulk of Plaintiffs' claims. *See supra*.

B. Plaintiffs Do Not Qualify for the Extraordinary Remedy of Equitable Tolling.

Where a statute of limitations is not jurisdictional, the doctrine of equitable tolling may "allow[] a plaintiff to avoid the bar of the limitations period[.]" *Oviedo v. Washington Metro. Area Transit Auth.*, 948 F.3d 386, 393 (D.C. Cir. 2020). But the remedy of equitable tolling is "appropriate only in rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." *Jackson*, 949 F.3d at 778 (quotation omitted). *See also*, *e.g.*, *Irwin*, 498 U.S. at 94 ("Federal courts have typically extended equitable relief only sparingly."). This case does not present the requisite rare circumstances.

To demonstrate an entitlement to this rare remedy, Plaintiffs "must show (1) that [they have] been pursuing [their] rights diligently, and (2) that some extraordinary circumstances stood in [their] way." *Jackson*, 949 F.3d at 778 (quotation omitted). For example, equitable tolling may be justified "where the claimant has actively pursued his judicial remedies by filing a defective

pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 94. *See also Impact Energy*, 693 F.3d at 1245 ("We have held that tolling is appropriate when the defendant's conduct rises to the level of active deception; where a plaintiff has been lulled into inaction by a defendant, and likewise, if a plaintiff is actively misled or has in some extraordinary way been prevented from asserting his or her rights." (quotation omitted)).

Here, Plaintiffs cannot "meet the high threshold for applying this rare remedy." *Jackson*, 949 F.3d at 778. There is no indication that any extraordinary events outside Plaintiffs' control, let alone any misconduct by Federal Defendants, concealed the APD approval decisions from Plaintiffs or otherwise misled Plaintiffs to file their claims after the 90-day limit prescribed by Section 226-2. To the contrary, Plaintiffs describe a process for searching BLM's "databases for its system of proposing, analyzing, and approving APDs." Amend. Compl., ¶ 109; *see also id*., ¶¶ 110–16. Indeed, despite their complaints regarding the user-friendliness of BLM's online databases, Plaintiffs' challenge in this case to nearly 600 APDs issued within 90 days of the Complaint—and more than 400 additional APDs issued within 90 days of the Amended Complaint—demonstrates Plaintiffs' ability timely to learn of and challenge Federal Defendants' approval decisions. *See* Exhibit C (identifying APDs issued within 90 days of the Complaint according to Complaint Appendices A & B); Exhibit D (identifying APDs issued within 90 days of the Amended Complaint according to Amended Complaint Appendix A).

Combining more than 4,000 APDs issued over a period of 20 months into one legal challenge is simply a litigation decision by Plaintiffs. In this light, Plaintiffs' decision to file their legal challenges initially in June 2022 reflects a conscious decision, and the rare remedy of equitable tolling does not protect Plaintiffs from their own decisions.

II. Plaintiffs' Failure Initially to Raise Their Challenges With Federal Defendants Bars Plaintiffs' Claims.

Even if not barred by Section 226-2's limitations period, Plaintiffs' challenges to all of the APD approval decisions are barred by Plaintiffs' failure to raise their arguments to the Federal Defendants first, before seeking judicial review.

"A party must first raise an issue with an agency before seeking judicial review." *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 962 (D.C. Cir. 2007). "This requirement serves at least two purposes. It ensures 'simple fairness' to the agency and other affected litigants." *Id*. *See also L.A. Tucker Truck Lines* 344 U.S. at 37 ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts 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."). "It also provides this Court with a record to evaluate complex regulatory issues; after all, the scope of judicial review under the APA would be significantly expanded if courts were to adjudicate administrative action without the benefit of a full airing of the issues before the agency." *ExxonMobil*, 487 F.3d at 962. *See also Weinberger v. Bentex Pharms., Inc.*, 412 U.S. 645, 654 (1973) ("Threshold questions within the peculiar expertise of an administrative agency are appropriately routed to the agency, while the court stays its hand.").

Because Plaintiffs do not allege that they raised any of their present challenges to the APD approval decision initially with BLM, these claims cannot proceed. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) ("Persons challenging an agency's compliance with NEPA must 'structure their participation so that it . . . alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration."). *See also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 10–13 (D.D.C. 2013) (holding that ESA

citizen suit provision does not preclude application of issue exhaustion). That the statute underlying the challenged APD approval decisions—the MLA—does not expressly require a litigant first to seek rehearing before the agency is irrelevant—as here, the Plaintiffs "error was not failing to seek rehearing, but rather failing to raise the issue[s] at all" before BLM. *ExxonMobil*, 487 F.3d at 962. Rather, Plaintiffs' "failure to raise these objections to the agency waives them." *New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 482 (D.C. Cir. 2012).

To be sure, Plaintiffs complain that BLM's online documentation of its APD approval process is a "labyrinthian maze" that "frustrates" public monitoring of, *inter alia*, NEPA compliance. *See* Amend. Compl., ¶¶ 109–17. In short, the Amended Complaint alleges that Plaintiffs' failures first to raise their arguments to BLM "were caused by the [agency's] untimely, 'obscure' and 'difficult to find' postings of the public versions of the [challenged actions] on the internet." *Gulf Restoration Network v. Salazar*, 683 F.3d 158, 176 (5th Cir. 2012). But Plaintiffs' allegations do not excuse Plaintiffs' failure to bring to BLM the issues raised in their legal challenges. Rather, even in these circumstances, "[u]nder ordinary principles of administrative law a reviewing court will not consider arguments that a party failed to raise in timely fashion before an administrative agency." *Id*. at 174–75 (quotation omitted).

As the Amended Complaint alleges—and the addition of further APD challenges in the Amended Complaint confirms—information regarding both pending and approved APDs is available on BLM's websites. *See* Amend. Compl., ¶¶ 109–17. While Plaintiffs complain generally that these online databases do not appear to include a mechanism "to comment," *id*., ¶ 115, Plaintiffs "have not expressly alleged . . . that they actually tried without success to access the plans at issue on the DOI website, or through visits or communications with personnel" at Interior, or attempted to submit comments—either via BLM's website or through letters to the

relevant BLM offices and officials. *Gulf Restoration Network*, 683 F.3d at 179. Nor have Plaintiffs alleged that they availed themselves of BLM's regulations providing for State Director Review. 43 C.F.R. § 3165.3 and 43 C.F.R. § 3185.1. Those provisions allow any party "adversely affected" by a BLM decision, including approval of an APD, to seek administrative review and have been used by third parties in the past when dissatisfied by BLM's decision to approve an APD. *See, e.g.*, *Adami Ranch LLC*, 173 IBLA 82, 83 (2007). Viewed as a whole, Plaintiffs' allegations therefore do not indicate that Federal Defendants' "actions or omissions, rather than their own inattention or unpreparedness, caused [Plaintiffs'] failure" to raise their challenges first with BLM. *Gulf Restoration Network*, 683 F.3d at 179.

Nor does Plaintiffs' alleged Notice of Intent to Sue letter under the ESA, *see* Amend. Compl., ¶¶ 7, 18, salvage Plaintiffs' ESA claims. While the allegations demonstrate Plaintiffs' "condemnation" of Federal Defendants' overall compliance with the ESA regarding consideration of the effects of climate change on listed species, the allegations do not indicate that the letter "specif[ies] by name or number any particular proposed" APD approval that allegedly violates the ESA. *Gulf Restoration Network*, 683 F.3d at 181. *See* Amend. Compl., ¶¶ 7, 18. Likewise, the allegations fail to indicate that Plaintiffs' letter "urge[d] the DOI to disapprove of any" APD that had "not yet been acted upon." *Gulf Restoration Network*, 683 F.3d at 181. The Notice of Intent to Sue letter therefore cannot satisfy Plaintiffs' obligations to raise their challenges first to the expert agency. *See id*. at 181 (finding that letter to agency urging changes in Interior's NEPA compliance program did not constitute participation in proceedings regarding plans at issue).

Because of their unexcused failures to present their challenges to BLM's APD approval decisions first to the expert agency, Plaintiffs' claims should be dismissed in their entirety.

III. Plaintiffs Fail Plausibly to Allege Article III Standing.

Standing is a constitutional prerequisite to the exercise of federal judicial power, and thus constitutes "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560. For a plaintiff to have standing, (1) "there must be alleged (and ultimately proved) an injury in fact—a harm suffered by the plaintiff"; (2) "there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant"; and (3) "there must be redressability—a likelihood that the requested relief will redress the alleged injury." *Steel Co.*, 523 U.S. at 102–03 (quotation marks omitted). Plaintiffs bear the burden of demonstrating Article III standing and must support each element of their standing "with the manner and degree of evidence required at [each] successive stag[e] of the litigation." *Lujan*, 504 U.S. at 561; *see also Iqbal*, 556 U.S. at 678 (explaining that, at the motion to dismiss stage, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" (quotation marks omitted)). Further, because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358, n.6 (1996), Plaintiffs are required to establish standing for "each claim [they] seek to press," *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

As fully demonstrated in Chevron U.S.A. Inc.'s Memorandum in Support of Motion to Dismiss (Dkt. No. 70-2), Plaintiffs' Amended Complaint does not plausibly allege organizational or associational standing with respect to the challenged APD approvals in New Mexico's Permian Basin. Movant Intervenor-Defendants incorporate Chevron's argument here by reference. Moreover, Chevron's showing with respect to the Permian Basin applies equally to the challenged APD approvals in Wyoming's Powder River Basin.

First, Plaintiffs have failed plausibly to allege organizational standing through a "concrete and demonstrable injury to [their] activities." *Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d

1136, 1138 (D.C. Cir. 2011). At best, the Amended Complaint alleges Plaintiffs' general organizational purposes relating to environmental protection. *See* Chevron Mem. at 10–11. But neither a "setback to [an organization's] abstract social interests," *Equal Rights Ctr.*, 633 F.3d at 1138 (internal quotations omitted), nor "[f]rustrat[ion] [of the organization's] objectives" is sufficient to satisfy Article III, *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995). Absent alleged injuries to their operations, Plaintiffs have failed to allege organizational standing to challenge the Powder River Basin APDs. *See* Chevron Mem. at 10–11. *See also Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1162 n.4 (D.C. Cir. 2005) ("[T]o hold that a lobbyist/advocacy group had standing to challenge government policy with no injury other than injury to its advocacy would eviscerate the standing doctrine's actual injury requirement.").

Second, although Plaintiffs allege procedural violations of NEPA, the ESA, and FLPMA, "the procedural-rights plaintiff must still satisfy the general requirements of the constitutional standards of particularized injury." *Id*. at 1159. *See also* Chevron Mem. at 11–12; *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."). "An interest shared generally with the public at large in the proper application of the Constitution and laws will not do." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). Instead, Plaintiffs "must show that [they are] . . . not simply injured as is everyone else, lest the injury be too general for court action, and suited instead for political redress." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 667 n.4 (D.C. Cir. 1996) (en banc).

Moreover, "[i]n environmental cases, courts must carefully distinguish between injury to the [plaintiff] and injury to the environment." *Ctr. for Biological Diversity v. U.S. Envt'l*

Protection Agency, 937 F.3d 533, 537 (5th Cir. 2019). Geographic proximity is the touchstone for such an injury-in-fact claimed from a geographically-defined agency action—like the APD approval decisions here tied to particular permits approved for operations on specific lease plots. *E.g.*, *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 181–83 (2000) (injury when declarants lived "a half-mile," "two miles," "one-quarter mile," "20 miles," and "40 miles" from site of pollution); *Clark Cty. v. FAA*, 522 F.3d 437, 438, 440 (D.C. Cir. 2008) (county had standing where challenged wind turbines would be installed "a few miles" from county airport); *City of Dania Beach v. FAA*, 485 F.3d 1181, 1185–86 (D.C. Cir. 2007) (petitioners "live in close proximity" to runway extension); *City of Olmsted Falls v. FAA*, 292 F.3d 261, 267 (D.C. Cir. 2002) (geographic proximity necessary for injury). In other words, "to establish standing, plaintiffs must show that they 'use the area affected by the challenged activity and not an area roughly in the vicinity of' the activity." *Summers*, 555 U.S. at 499 (quoting *Lujan*, 504 U.S. at 566).

Like Plaintiffs' allegations relating to New Mexico's Permian Basin, *see* Chevron Mem. at 12–17, the allegations of the Amended Complaint lack the requisite geographic proximity to any particular approved APD in Wyoming's Powder River Basin—an area covering more 43,000 square miles primarily across Wyoming and Montana.[7] Indeed, Plaintiffs' allegations "make little to no effort to show that their members' . . . activities take place" in proximity to challenged approved APDs, and "do not even identify" a particular APD approval. *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 170 F. Supp. 3d 6, 13–14 (D.D.C. 2016). Rather, the Amended Complaint generally alleges that unidentified members use unspecified "public lands across the

[7] *See* U.S. Energy Information Administration, "New petroleum technology revitalizes Powder River Basin oil production," *Today In Energy*, (Sept. 15, 2014), https://www.eia.gov/todayinenergy/detail.php?id=17971 (last visited Oct. 19, 2022).

United States as well as public lands in New Mexico and Wyoming that will be affected by the drilling permits challenged herein." Amend. Compl., ¶ 20. *See also*, *e.g.*, *id.*, ¶¶ 23, 24, 31. *See also id.*, ¶ 29 (alleging that certain Center of Biological Diversity members have an interest in observing specific species in Arizona, Florida, Hawaii, and the Arctic). The only identified individual—WildEarth Guardians member Jeremy Nichols—with an alleged interest in the Powder River Basin similarly asserts only generalized travel and recreation on unspecified "public lands in the Powder River Basin, including areas directly impacted by development of many of the challenged APDs." *Id.*, ¶ 30.

Accepting such alleged interests generally in a large geographic area "as adequate to confer standing to challenge any Government action affecting any portion" of that area—here, approved APDs for particular lease parcels—"would be tantamount to eliminating the requirement of concrete, particularized injury in fact." *Summers*, 555 U.S. at 496. *See also id.* (refusing "to assume" that the declarant "will stumble across a project tract unlawfully subject to the [challenged] regulations" or that "the tract is about to be developed . . . in a way that harms his recreational interests"). *See Ctr. for Biological Diversity*, 937 F.3d at 538 ("[P]etitioners cannot simply assert some interest somewhere within a large geographic area."); *cf. Fla. Audubon Soc'y*, 94 F.3d at 667 ("[A] court may not assume that the areas used and enjoyed by a prospective plaintiff will suffer all or any environmental consequences that the rule itself may cause."). "Without a geographic nexus, [Plaintiffs'] members cannot suffer an injury in fact." *Ctr. for Biological Diversity*, 937 F.3d at 538. *See also id.* at 539 ("A geographic area as big as the 'Western and Central portions of the Gulf [of Mexico]' cannot support Article III standing."). And

"it is not enough to aver that unidentified members have been injured." *Chamber of Com. v. EPA*, 642 F.3d 192, 199-200 (D.C. Cir. 2011).[8]

Third, Article III standing requires adequate allegations of a "causal connection between" members' claimed "injur[ies] and the conduct complained of," *Bennett v. Spear*, 520 U.S. 154, 167 (1997), that shows a "substantial probability" of harm to members' localized interests from the challenged agency action, *Florida Audubon Soc'y*, 94 F.3d at 664. For that reason, where, as here, the plaintiff "is not the object of" the challenged "government action or inaction, 'standing is not precluded, but it is ordinarily substantially more difficult to establish.'" *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 477 (D.C. Cir. 2009) (quoting *Lujan*, 504 U.S. at 562).[9]

Like New Mexico's Permian Basin, *see* Chevron Mem. at 17–19, the Powder River Basin includes a large number of existing oil and gas wells. *See*, *e.g.*, Amend. Compl., ¶ 146 (alleging that the Powder River Basin "has become a site of considerable oil and gas production"). But the Amended Complaint neither points to Plaintiffs' members' "use of the specific area" of the Powder River Basin in which particular approved activities will occur, *Friends of the Earth*, 95 F.3d at 361, nor plausibly alleges a "substantial probability" that BLM's approval of the challenged Powder River Basin APDs—as opposed to previously approved wells or other sources of

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[8] To the extent that the declarants fear harm from previously approved drilling operations in the Powder River Basin, *see* Amend. Compl., ¶ 30 ("Oil and gas development has a negative impact on the relatively undeveloped landscapes particularly enjoyed by Mr. Nichols."), such already-existing injury cannot support the present APD challenges. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983); *Coal. for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1280 (D.C. Cir. 2012).

[9] While Article III's causation and redressability requirements are relaxed in a NEPA case "once a plaintiff has established an injury in fact," *W. Watershed Project v. Kraayyenbrink*, 632 F.3d 472, 485 (9th Cir. 2011), Plaintiffs have failed to show a cognizable injury-in-fact in this case. *See supra*.

greenhouse gas emissions and worldwide climate change—"will cause the alleged injury-in-fact" Plaintiffs posit from climate change and that "local conditions will be adversely affected." *City of Waukesha v. EPA*, 320 F.3d 228, 234 (D.C. Cir. 2003) (quotation omitted). *See* Chevron Mem. at 19 (demonstrating the Plaintiffs' speculation as to climate change impacts is insufficient to satisfy Article III).

Finally, the last requirement for Article III standing—redressability—examines the "connection between the alleged injury and the judicial relief requested." *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Steel Co.*, 523 U.S. at 107. Here, Plaintiffs have failed plausibly to allege that an order vacating the challenged Powder River Basin APDs—as opposed to the existing Powder River Basin wells and other sources of greenhouse gas emissions—would redress the alleged climate change harms of their members. *See also* Chevron Mem. at 19–20.

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Taken both together and individually, the Amended Complaint should be dismissed because Plaintiffs have not plausibly alleged the elements of Article III standing. *See Steel Co.*, 523 U.S. at 94 ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)).

CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiffs' challenges to the 3,869 APD approval decisions set out in Exhibits A and B pursuant to Section 226-2's 90-day limitation period, and dismiss Plaintiffs' challenges to all of the APD approval decisions at issue in this lawsuit, in light of Plaintiffs' failure first to raise these challenges with Federal Defendants or to plausibly allege the necessary elements of Article III standing.

October 21, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2022, I caused a true and correct copy of the foregoing to be filed with the Court electronically and served by the Court's CM/ECF System upon all counsel of record.

/s/ Steven J. Rosenbaum
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