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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEREMY MATTWAOSHSHE, *et al.*,

Plaintiffs,

v. Civil Case No. 1:20-01317-TSC

NEXTERA ENERGY, INC., *et al.*,

Defendants,

and

UNITED STATES OF AMERICA, *et al.*,

Federal Defendants.

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF BOTH THEIR MOTION TO DISMISS AND MOTION FOR RELIEF FROM LOCAL CIVIL RULE 7(n)

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INTRODUCTION

The Court should grant Federal Defendants' motion to dismiss, ECF No. 36, for lack of subject matter jurisdiction. Plaintiffs' response in opposition to the motion to dismiss fails to overcome the fatal jurisdictional defects with their claims under the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA"), and the Indian Religious Freedom Act ("IRFA"). Rather than rebut the dispositive case law cited by Federal Defendants, Plaintiffs appeal to pathos and advocate what they believe the law should be. These arguments are not grounded in law and should be rejected.

ARGUMENT

Plaintiffs' claims against Federal Defendants suffer from fatal jurisdictional defects. Because this Court lacks jurisdiction over any of their claims against Federal Defendants, the Court should dismiss all of those claims under Rule 12(b)(1) for a lack of subject matter jurisdiction.

I. Plaintiffs' claims against FERC relating to a potential future interconnection order are unripe.

Any NEPA or ESA claims against FERC relating to a potential future interconnection order are unripe and therefore the Court lacks federal subject matter jurisdiction to consider them.

Article III requires as a jurisdictional prerequisite a constitutional "case or controversy" and that the issues present "a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, *not hypothetical or abstract*." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297-98 (1979) (citation omitted) (emphasis added). "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (citations omitted); *Pfizer, Inc. v. Shalala*, 182 F.3d 975, 978 (D.C. Cir. 1999). This is because, "if

the contingent events do not occur, the plaintiff likely will not have suffered an injury that is concrete and particularized enough to establish the first element of standing." *Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009). "[T]he question of ripeness may be considered on a court's own motion." *Devia v. Nuclear Regulatory Comm'n*, 492 F.3d 421, 424 (D.C. Cir. 2007) (quoting *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003); *Atl. States Legal Found. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003) (dismissing petition for review sua sponte).

In response, Plaintiffs offer colloquialisms, which fundamentally misunderstand the constitutional requirement that a case must be ripe for adjudication.[1] They argue that the "risk of harm in this case … is near absolute and thus, satisfies the pleading requirements at this early stage of litigation." Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss ("Pls.' Resp.") at 16; ECF No. 44. Plaintiffs are wrong. The Court cannot simply overlook the constitutional ripeness doctrine described above. Neither Solider Creek nor Westar have entered into an agreement to interconnect the challenged project to the national electricity grid. Unless and until that happens, and the interconnection agreement is filed with FERC and FERC accepts the agreement, the claims against FERC are not ripe for adjudication because they rest upon "'contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. at 300 (citations omitted); *Shalala*, 182 F.3d at 978. Plaintiffs' belief that an interconnection order is "imminent" does not change this.

II. Jurisdiction to review FERC orders is vested exclusively in the courts of appeals.

[1] Plaintiffs state that "[i]f this case were any riper it would be rotten…" Pls.' Resp. at 14. They ask the Court whether it believes Defendant Soldier Creek would invest "over $325 million dollars on a wind farm then not use it," *id*. at 15, and claim "the likelihood of use is just slightly less than the chance the sun will come up tomorrow." *Id*. at 16.

Even if the Court determines that Plaintiffs' claim against FERC is ripe, the claim must still be dismissed because the courts of appeals have exclusive jurisdiction over FERC orders under the Federal Power Act. *See* 16 U.S.C. § 825*l*(b). Although "the normal default rule is that persons seeking review of agency action go first to district court," that default rule is superseded "when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action." *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1332 (D.C. Cir. 2013) (citations omitted). That Plaintiffs challenge FERC's alleged failure to act in the context of a hypothetical interconnection request and order does not change the exclusive nature of judicial review in the courts of appeals. However, judicial review of a Commission order and "all objections to the order . . . must be made in the Court of Appeals or not at all." *Pub. Util. Dist. No. 1 of Snohomish Cty., Wash. v. FERC*, 270 F. Supp.2d 1, 5 (D.D.C. 2003) (citation omitted).

Plaintiffs contend that there is no "order" that they are contesting and therefore no exclusive appellate court jurisdiction under the Federal Power Act, and thus they contend that this Court has jurisdiction under the APA. Pls.' Resp. at 11. Plaintiffs are incorrect and they cite no case in support of this proposition.[2] The Supreme Court long ago rejected this kind of end-run of a statute that confers exclusive jurisdiction in the courts of appeals to allow for piecemeal litigation on collateral claims. In *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), the Supreme Court addressed this very issue when the State of Washington challenged a Federal Power Commission's license under the Federal Power Act of the City of Tacoma's application to

[2] Plaintiffs cite this Court's decision in *Frederick v. Hillyer*, 82 F. Supp.3d 435, 443 (D.D.C. 2015), but that case is inapt. *See* Pls.' Resp. at 11. In *Frederick*, this Court dismissed state law claims arising under the supplemental jurisdiction statute, 28 U.S.C. § 1367, where the plaintiff failed to plead federal claims. *Frederick* does not support plaintiffs' claim that this Court has jurisdiction to adjudicate a claim against FERC based on alleged NEPA and ESA violations in relation to a potential future interconnection order.

construct a power project, allegedly in contravention to state law. There, the Supreme Court, construing an analogous provision of the Federal Power Act concluded that its intent was to impose exclusive judicial review in the courts of appeals and "necessarily precluded de novo litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review." *Id.* at 336. It held that Congress had granted exclusive jurisdiction to affirm, modify, or set aside the Commission's order and that a plaintiff "may not reserve the point, for another round of piecemeal litigation" collateral issues. *Id.* at 339.

And as other appeals courts have held, the Federal Power Act's vesting of exclusive judicial review in the courts of appeals means that challenges brought in the district courts are "impermissible collateral attacks." *Adorers of the Blood of Christ v. FERC*, 897 F.3d 187, 197 (3d. Cir. 2018). The same is true of Plaintiffs' NEPA and ESA claims here. *See Me. Council of the Atl. Salmon Fed'n v. NMFS*, 858 F.3d 690, 693 (1st Cir. 2017); *Gen. Fin. Corp. v. F.T.C.*, 700 F.2d 366, 368 (7th Cir. 1983) (applying similar provision in the Federal Trade Commission Act: "You may not bypass the specific method that Congress has provided for reviewing adverse agency action simply by suing the agency in federal district court under 1331 or 1337; the specific statutory method, if adequate, is exclusive."); *Am. Energies Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010) (applying a similar provision in the Natural Gas Act: "Exclusive means exclusive, and the Natural Gas Act nowhere permits an aggrieved party otherwise to pursue collateral review of a FERC certificate in state court or federal district court.").

To the extent that Plaintiffs bring an unreasonable delay claim against FERC or the other Federal Defendants, the D.C. Circuit has held that a challenge to an agency's unreasonable delay in issuing a decision could be construed as an "order" for purposes of a direct-review statute because of the potential effect on the court's future jurisdiction over that decision. *See Telecomms.*

Research and Action Ctr. v. FCC ("*TRAC*"), 750 F.2d 70 (D.C. Cir. 1984). In *TRAC*, the petitioners alleged that the FCC unreasonably delayed in making certain reimbursement determinations, and the D.C. Circuit held that it had exclusive jurisdiction to review the claims because any future determination on the reimbursements would be an order within the court's exclusive jurisdiction under the FCC's direct-review statute. *Id*. at 74-79. The court explained that "where a statute commits review of agency action to the Court of Appeals, *any suit* seeking relief that *might* affect the Circuit Court's future jurisdiction is subject to the exclusive review of the Court of Appeals." *Id*. at 75 (emphasis added). The D.C. Circuit concluded that it had exclusive jurisdiction to review a challenge to agency inaction because ruling on the challenge could affect the court's future jurisdiction. *Id*.

Under *TRAC* and the Federal Power Act, 16 U.S.C. § 825*l*(b), the courts of appeals have exclusive jurisdiction over lawsuits challenging alleged inaction or delay by FERC. The D.C. Circuit issued a similar ruling in a companion case, *Air Line Pilots Association, International v. Civil Aeronautics Board* ("*ALPA*"), 750 F.2d 81 (D.C. Cir. 1984). There, the pilots' association alleged that the agency had unreasonably delayed in making financial-assistance determinations for airline employees who claimed to have lost their jobs due to deregulation. *Id*. at 83. The D.C. Circuit affirmed the district court's dismissal of the suit for lack of jurisdiction and held that exclusive jurisdiction lay in the courts of appeals under *TRAC*. *See id*. at 84. The D.C. Circuit again confirmed that in exercising direct-review jurisdiction over cases alleging agency inaction, "the Court of Appeals is acting in aid of its future jurisdiction, and has exclusive jurisdiction." *Id*.

Because the Federal Power Act vests challenges to FERC orders in the exclusive jurisdiction of the courts of appeals, the Court should dismiss Plaintiffs' claims against it.[3]

III. Jurisdiction to review the challenged FAA orders is vested exclusively in the courts of appeals.

As with challenges to FERC orders under the Federal Power Act, this Court lacks jurisdiction over Plaintiffs' claim against the FAA because Congress has vested the courts of appeals with exclusive jurisdiction to review most final orders issued by the FAA. *See* 49 U.S.C. § 46110 ("Section 46110"); *Nat'l Fed'n of the Blind v. U.S. Dep't of Transp.*, 78 F. Supp. 3d 407, 410 (D.D.C. 2015), *aff'd* 827 F.3d 51 (D.C. Cir. 2016) (Section 46110 "is a direct-review statute which vests exclusive jurisdiction in the courts of appeals for review of … actions by" the Department of Transportation and the FAA). FAA actions relating to Part 77 "no hazard" determinations are within the scope of that grant of exclusive jurisdiction.

In Section 46110, Congress specified that "a person disclosing a substantial interest in an [FAA] order issued … in whole or in part under this part … may apply for review of the order by

[3] Plaintiffs argue that as their claims arise under the APA, district courts have jurisdiction over them because "evidence is taken in the district courts" and "the district court can make the whole record" to determine compliance with NEPA and the ESA. Pls.' Resp. at 14. They also claim that "Congress clearly intended the district courts to make a single record and accomplish this task." *Id.* Plaintiffs' fundamentally misunderstand judicial review on the merits under the APA record review rule. Whether before an appeals court or a district court, the appropriate standard for judicial review under the APA is "whether the [agency's action] was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' as specified in 5 U.S.C. §706(2)(A)." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam). "In applying that standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Id.* This bedrock principle of administrative law has been applied by courts in this circuit in countless cases. *See e.g. Rhea Lana, Inc. v. U.S. Dep't of Labor*, 925 F.3d 521, 524 (D.C. Cir. 2019). Whether Congress, by statute, has vested jurisdiction to review agency action within the exclusive jurisdiction of the appeals courts (as it has with respect to challenges to FAA and FERC actions) or in the district courts, in either case, review is to be based on the administrative record.

filing a petition for review" in the federal courts of appeals. 49 U.S.C. § 46110(a). Congress further provided that the jurisdiction of the court of appeals would be "exclusive." *Id*. § 46110(c). Thus, "section 46110(a)'s direct-review provision removes [a covered FAA order] from the purview of the district court and places it within [the appellate court's] exclusive jurisdiction." *Nat'l Fed'n of the Blind*, 827 F.3d at 57; *see also St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 628 (7th Cir. 2007) (affirming district court's dismissal of suit challenging FAA approval of airport expansion because "[t]he jurisdictional language in [section 46110] could not be plainer.").

FAA "no hazard" determinations issued under Part 77 fall within the scope of Section 46110's direct-review provision. The APA defines "order" expansively as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing." 5 U.S.C. § 551(6). "This definition plainly embraces the 'no hazard' determination…" *City of Rochester v. Bond*, 603 F.2d 927, 933 (D.C. Cir. 1979).

Plaintiffs do not dispute this fact but instead claim that Section 46110 "fails to provide for Court of Appeals review of agency action *withheld*, especially withheld under NEPA or ESA." Pls.' Resp. at 12.[4] Plaintiffs fail to provide any support for this claim—and they cannot. Plaintiffs' claims seeking judicial review of alleged inaction fall within the scope of Section 46110 because the final "action" allegedly withheld is part of the "order" subject to the exclusive jurisdiction of the courts of appeals as explained above.

The D.C. Circuit recently addressed a similar argument in connection with a challenge to the Environmental Protection Agency's ("EPA") alleged inaction (failure to comply with the ESA)

[4] Note: page numbers refer to original pagination on the document and not to the ECF stamp.

when the agency registered a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174 (D.C. Cir. 2017). In that case, the Center for Biological Diversity filed both a complaint in the district court and a petition for review in the court of appeals. The parties agreed to stay the petition for review to allow the district court to decide the government's motion to dismiss on exclusive jurisdiction grounds. After the Center appealed the district court's order granting the motion to dismiss, *Center for Biological Diversity v. EPA*, 106 F. Supp. 3d 95 (D.D.C. 2015), the D.C. Circuit consolidated that appeal with the Center's petition for review. The appeals court disagreed with the Center's argument that FIFRA's exclusive jurisdiction provision did not apply, explaining that "the Conservation Groups did not object to the EPA's failure to consult *in vacuo*, *see Am. Bird Conservancy*, 545 F.3d at 1193; rather, their failure to consult claim was a means to a broader end—a challenge to the validity of the [pesticide] registration order itself. *Ctr. for Biological Diversity*, 847 F.3d at 1089 (ESA section 7(a)(2) claim "inherently challenge[s] the validity" of FIFRA registration order)." 861 F.3d at 187. The D.C. Circuit's determination in *Center for Biological Diversity* applies equally here and requires dismissal of the claim against FAA.

Here, Plaintiffs have framed their complaint as a challenge to alleged inaction by the FAA in completing environmental review under NEPA and consultation under the ESA. This challenge is within the exclusive jurisdiction of the courts of appeals because a ruling on Plaintiffs' claims would affect the court of appeal's jurisdiction over the Part 77 "no hazard" determinations being challenged. Therefore, under *TRAC* and *ALPA*, and *Ctr. for Biological Diversity*, Plaintiffs' claims fall outside the scope of this Court's jurisdiction.[5]

[5] In our opening brief, Federal Defendants indicated that the "FAA complied [with NEPA] by issuing a categorical exclusion for each of its 'no hazard' determinations." Memorandum in

IV. Plaintiffs have failed to provide the required 60-days' notice of their intent to sue under the ESA.

With respect to the ESA claim against the Corps—and to the extent that the Court finds it has jurisdiction for the ESA claims against FAA and FERC—Plaintiffs have failed to comply with the ESA's 60-day notice provision, which requires a would-be plaintiff to submit written notice of an alleged violation at least 60 days prior to filing a complaint.[6] *See* 16 U.S.C. § 1540(g)(2)(C).[7] This requirement imposes "a mandatory, not optional, condition precedent for suit." *Friends of Animals v. Ashe*, 808 F.3d 900, 903 (D.C. Cir. 2015) (quoting *Hallstrom v. Tillamook Cty.*, 493 U.S. 20 (1989)).[8] As a result, "a district court may not disregard" the requirement "at its

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Support of Federal Defendants' Motion to Dismiss ("Fed. Defs.' Br.") at 8, n.1; ECF No. 36-1. Upon additional review and consultation with FAA, this statement is incorrect. In fact, FAA did not issue categorical exclusions for its "no hazard" determinations because such determinations have been deemed to be advisory in nature and are not considered major federal actions subject to NEPA review. *See* FAA Order 1050.1F § 2-1.2(b)(1), ("Determinations under 14 CFR part 77" are advisory in nature, "not considered major Federal actions under NEPA" and "NEPA review is therefore not required."). U.S. Department of Transportation Federal Aviation Administration (July 16, 2015) at 15 *available at* https://www.faa.gov/documentLibrary/media/Order/FAA_Order_1050_1F.pdf (last visited Sept. 3, 2020).

[6] Plaintiffs again mistakenly rely on 16 U.S.C. § 1536(m) as a "waiver" of the 60-day notice requirement but fail to explain why that provision is applicable here. For all of the reasons set forth in Federal Defendants' motion to dismiss, the Court should reject that argument.

[7] Although the D.C. Circuit has not explicitly addressed whether the failure to comply with the notice requirement raises a jurisdictional issue or speaks to a failure to state a claim, this Court may resolve the issue in either context, since "dismissal is mandatory, however characterized." *Friends of Animals v. Ashe*, 51 F. Supp. 3d 77, 87 (D.D.C. 2014), *aff'd*, 808 F.3d 900, 905 (D.C. Cir. 2015) (affirming dismissal without specifying context). Additionally, the Court may address this notice issue prior to Federal Defendants' other arguments. *See Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (noting that "a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits.") (citation and internal quotation marks omitted).

[8] At issue in *Hallstrom* was an analogous notice requirement in another statute. However, the Supreme Court's reasoning in *Hallstrom* has been repeatedly applied to ESA claims because the "ESA [60-day notice] provision … is indistinguishable from the one in *Hallstrom*." *Bldg. Indus. Ass'n of S. Cal. v. Lujan*, 785 F. Supp. 1020, 1021 (D.D.C. 1992).

discretion," and the "failure to fastidiously comply with it requires dismissal." *Friends of Animals*, 51 F. Supp. 3d at 83 (citation and quotation marks omitted); *see also Research Air, Inc. v. Norton*, Civ. No. 05-623-RMC, 2006 WL 508341, at *10-11 (D.D.C. Mar. 1, 2006) (noting that the failure to strictly comply with this "preliminary but stringent" requirement "acts as an absolute bar to bringing suit under the ESA.") (citation omitted); *cf. Barkley v. U.S. Marshals Serv.*, 766 F.3d 25, 34 (D.C. Cir. 2014) (noting that "any condition on the waiver of sovereign immunity … commands strict adherence."). Additionally, since this requirement must be strictly construed, a defective notice cannot be remedied by any "equitable, flexible, or pragmatic considerations." *Conservation Force v. Salazar*, 811 F. Supp. 2d 18, 32 (D.D.C. 2011) (citation and internal quotation marks omitted); *see also Friends of Animals*, 51 F. Supp. 3d at 87 (stating that, while "dismissal on this highly technical basis may seem harsh," the court "must dismiss the action as barred by the terms of the statute.") (quoting *Hallstrom*, 493 U.S. at 33).

In response to Federal Defendants' argument that Plaintiffs have failed to comply with the notice requirement, Plaintiffs now, for the first time, offer two letters that purport to satisfy this prerequisite to suit. *See* Pls.' Resp. at 21-22. Neither letter, however, satisfies the strict requirements outlined above. To begin, Plaintiffs failed to notify both the Secretary of the Interior and the relevant action agencies of the alleged ESA violations. The ESA states that "[n]o action may be commenced … prior to sixty days after written notice of the violation has been given to the Secretary, *and* to any alleged violator." 16 U.S.C. § 1540(g)(2)(A)(i) (emphasis added). Because this requirement is phrased in the conjunctive, the 60-day notice period does not begin until *both* the Secretary of the Interior and the FAA, FERC, and Corps have received formal notices from Plaintiffs. *Cf. Ctr. for Envtl. Sci., Accuracy & Reliability v. Sacramento Reg'l Cty. Sanitation Dist.*, No. 1:15-cv-01103-LJO-BAM, 2016 WL 8730775, at *5 (E.D. Cal. June 3, 2016)

(dismissing ESA claim because "it is not unfair to require that an ESA notice be 'received'"). Here, Plaintiffs failed to provide any notice to the three action agencies—FAA, FERC, and Corps—and on that basis alone they are in violation of the ESA's 60-day notice requirement.

Furthermore, the first letter, dated May 4, 2020, and addressed only to the "Honorable Brett [sic] Bernhardt" as Secretary of the United States Department of the Interior, offers a high level overview of Plaintiffs' concerns with the challenged project. It asks the Secretary to "exercise all appropriate authority" to "halt the imminent construction of the Soldier Creek Wind LLC wind turbine towers[,] and undertake a full scope permitting and NEPA EIS process, review and reporting immediately." ECF No. 42-3 at 8. The letter also states "[i]t is likely you will be hearing from [the Kickapoo] Tribe in the very near future." *Id*. This language falls short of the requirement to put both the Secretary and the relevant action agency on notice of their alleged failure(s) under the ESA and the would-be Plaintiffs' intent to bring suit within 60 days if the alleged violations go unresolved. *See Conservation Force v. Salazar*, 715 F. Supp. 2d 99, 103 (D.D.C. 2010) (dismissing claim for lack of notice where the notice did "not explicitly challenge the Secretary's failure to issue a 12-month finding"). The second letter, dated May 6, 2020, and again addressed only to the "Honorable Brett [sic] Bernhardt" as Secretary of the United States Department of the Interior, includes virtually no mention of the ESA whatsoever. It again asks for the Secretary to "halt any further construction" but also for the "Trump Administration" to "issue and [sic] Executive Order or Council on Environmental Quality (CEQ) regulation that requires all such large future wind 'farms' undergo a full National Environmental Policy Act (NEPA) Environmental Impact Statement (EIS) review." ECF No. 42-4 at 34. The conspicuous absence of any reference to the ESA is alone enough to discredit Plaintiffs' claim that this letter was sent in satisfaction of the requirements to provide 60-days' notice of their intent to sue under the Act.

But even if these letters did include the kind of information designed to put the Secretary of the Interior and the relevant agencies on notice of Plaintiffs' intent to sue under the ESA, Plaintiffs failed to provide Federal Defendants with an "opportunity to review their actions and take corrective measures" or an "opportunity for settlement or other resolution of a dispute without litigation," as they must. *Conservation Force*, 715 F. Supp. 2d at 104 (citing *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998) (internal quotation marks omitted) *see also Hallstrom*, 493 U.S. at 29 (noting that prior "notice gives the alleged violator 'an opportunity to bring itself into complete compliance [and] thus likewise render unnecessary a citizen suit'") (citation omitted). As relevant here, the ESA's notice provision contains a simple instruction to would-be plaintiffs: "they need only give notice to the appropriate parties and *refrain from commencing their action for at least 60 days*." *Id*. at 27 (emphasis added). Plaintiffs here, however, failed to comply with this instruction. Plaintiffs' letters were sent on May 4 and May 6, 2020. *See* ECF Nos. 42-3 and 42-4. Plaintiffs filed their original complaint and motion for a temporary restraining order / preliminary injunction roughly two weeks later on May 18, 2020. ECF Nos. 1 and 3. Because these letters were sent just two weeks before the filing of the complaint, there was no "litigation-free window," as mandated by the ESA's notice provision. *Sw. Ctr.*, 143 F.3d at 521; *cf. Conservation Force*, 715 F. Supp. 2d at 104 (concluding that "it would be unfair to permit this claim to proceed" because inadequate notice allowed no opportunity to review action). "The equities do not weigh in favor of modifying statutory requirements when the procedural default is caused by petitioners' 'failure to take the minimal steps necessary.'" *Hallstrom*, 493 U.S. at 27 (noting that prospective plaintiffs "have full control over the timing of their suit"). The same is true here, where Plaintiffs' "notice" was provided just days prior to the filing of their complaint.

Plaintiffs' attempt to recast these two letters as formal 60-day notices of intent to sue under the ESA is unavailing. Because Plaintiffs failed to comply with the ESA notice requirement, those claims should be dismissed.[9]

V. Plaintiffs failed to allege a NEPA claim against the Army Corps of Engineers.

In the Complaint, Plaintiffs alleged that the Army Corps of Engineers failed to comply with the ESA when it issued verifications under Nationwide Permit 14 relating to the movement of heavy equipment over waterways without conducting ESA consultation with the Department of the Interior. Compl. ¶ 53 (citing 16 U.S.C. § 1536(a)(2)). As noted *infra*, that claim fails because Plaintiffs failed to comply with the ESA's 60-day notice provision prior to filing a complaint.

In their response, Plaintiffs now contend that paragraph 53 of their Complaint is "minimally sufficient" to put Federal Defendants on notice that they were also alleging a NEPA violation against the Army Corps of Engineers. Pls.' Resp. at 18. But NEPA is nowhere cited, nor even mentioned in the Complaint with respect to the Army Corps of Engineers. Plaintiffs should not be permitted to justify the legal sufficiency of the complaint by raising new claims that are not in the Complaint itself in response to a motion to dismiss. *See Thomason v. Nachtrieb*, 888 F.2d 1202 (7th Cir. 1989) ("It is a basic principle that the complaint may not be amended by the briefs in opposition to a motion to dismiss"). The claim that Plaintiffs have asserted against the Army Corps of Engineers—the ESA claim—is deficient and should be dismissed.[10]

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[9] Alternatively, for the same reasons, Plaintiffs' ESA claims may also be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. *See Coos Cty. Bd. of Comm'rs v. Kempthorne*, 531 F.3d 792, 801 (9th Cir. 2008) (affirming dismissal on grounds that the court "lacked jurisdiction and, in the alternative, that [plaintiff] had failed to state a claim upon which relief could be granted").

[10] In their brief, Plaintiffs challenge the validity of the Nationwide Permit that the Army Corps of Engineers relied upon ("NWP 14") in issuing the two permits that Plaintiffs cite. Pls.' Resp. at 18-21. Federal Defendants disagree with Plaintiffs as to the claimed invalidity of this permit but

VI. Neither Title 25 nor the Indian Religious Freedom Act require the Department of Justice to litigate on Plaintiffs' behalf.

In their motion to dismiss, Federal Defendants explained that absent an applicable waiver of sovereign immunity, the Attorney General's authority to control the course of federal litigation is presumptively immune from judicial review. Fed. Defs.' Br. at 18-19; ECF No. 36-1 (citing *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1480 (D.C. Cir. 1995). Here there is no waiver of sovereign immunity that requires the United States to represent Plaintiffs in this case. Nor is there anything in the laws that Plaintiffs rely upon—25 U.S.C. §§ 174, 175, 185 and the Indian Religious Freedom Act—that compels the United States to represent Plaintiffs in this case. Fed. Defs.' Br. at 19-22; *Pyramid Lake Paiute Tribe of Indians v. Morton*, 499 F.2d 1095, 1097 (D.C. Cir. 1974) (per curiam) (Section 175 "impose[s] only a discretionary duty of representation."); *Dillon v. Antler Land Co.*, 341 F. Supp. 734, 742 (D. Mont. 1972), aff'd, 507 F.2d 940 (9th Cir. 1974) (Section does not "impose[] a duty in the United States or its agents to litigate all title problems which may be created by. . . Indian[s] dealing with lands which . . . are subject to state law . . ."); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988) ("Nowhere in the [Indian Religious Freedom Act] is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights.").

Plaintiffs contest none of these points in their response to the motion to dismiss and essentially concede that they cannot assert a claim under Section 175, Section 185, and the Indian Religious Freedom Act. *See* Pls.' Resp. at 33-35. Instead, Plaintiffs contend that they have asserted a claim under the Indian Removal Act of May 28, 1830, ch. 148, 4 Stat. 411 (codified as amended

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reserve argument on this point until such time that the validity of the permit is properly challenged in a complaint.

at 25 U.S.C. § 174); Pls.' Resp. at 33 (citing —25 U.S.C. § 174). Plaintiffs cannot assert a claim under this statute, which provides that:

> The President is authorized to exercise general superintendence and care over any tribe or nation which was removed upon an exchange of territory under authority of the act of May 28, 1830, "to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi;" and to cause such tribe or nation to be protected, at their new residence, against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever.

25 U.S.C. § 174. As the language of that statute makes clear, it merely provides authority for the President to allow land exchanges to certain tribes and to protect those tribes from interruption or disturbance from other tribes or persons. Nothing in the statute suggests that it created the cause of action against the United States that Plaintiffs assert here, obligating the Department of Justice to participate in lawsuits on behalf of a member (or members) of a tribe who challenge a project that they disagree with. The absence of mandatory language compels this interpretation of the statute. And the subject matter of the statue—land exchanges and property rights—also compels the conclusion that it was not designed to allow members of tribes to compel the United States to participate in nuisance claims against private entities. *See* 17 Op. Atty. Gen. (1882).

Because Sections 174, 175 and 185 of Title 25 provide no right to compel the United States to represent a plaintiff, and because the IRFA does not create a cause of action or any judicially enforceable individual rights, the Court lacks jurisdiction to order mandamus to require DOJ to represent Plaintiffs.

VII. Federal Defendants' motion to dismiss raises purely legal questions that do not depend on an administrative record.

Plaintiffs object to Federal Defendants' motion for relief from Local Civil Rule 7(n), ECF No. 37, which the Court granted in its July 29, 2020 minute order. Pls.' Resp. at 6.[11] The extent of their objection is limited to a single paragraph in which they claim "[i]t is the Government's responsibility, with its trillions of dollars of resources, to present material evidence in its defense that it properly satisfied the statutory requirements in this matter." *Id*. Plaintiffs are wrong. Not only have they failed to engage with any of the arguments raised in Federal Defendants' motion for relief, but they confuse whose burden of proof exists at the motion to dismiss stage. Federal Defendants have moved for dismissal based on lack of subject matter jurisdiction. "To survive a motion to dismiss under Rule 12(b)(1), Plaintiff bears the burden of proving that the Court has subject-matter jurisdiction to hear his claims." *Turner v. Beers*, 5 F. Supp. 3d 115, 117 (D.D.C. 2013) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *U.S. Ecology v. U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000)).

Federal Defendants' pending motion to dismiss raises purely legal questions that do not depend on an administrative record and, as such, the Court will not require multiple agency records or certified lists of its contents. The Court no doubt recognized the potential waste of scarce agency resources for Federal Defendants to gather and review multiple administrative records before the Court decides the pending motion to dismiss when it granted Federal Defendants motion for relief. Plaintiffs have provided nothing to second guess that wisdom at this stage.

CONCLUSION

[11] In its minute order, the Court stated that "[t]o the extent the Plaintiffs take the position that [Rule 7(n)] should be enforced during the briefing of the current motions [to dismiss], Plaintiffs shall file a motion not to exceed six pages asking the court to enforce the rule." July 29, 2020 Minute Order. Plaintiffs have not filed any such motion.

For all of these reasons and the reasons set forth in Federal Defendants' motion to dismiss, the Court should dismiss all the claims against Federal Defendants for lack of jurisdiction.

Respectfully submitted September 3, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

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