UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SIMON V. KINSELLA

Plaintiff,

v.

BUREAU OF OCEAN ENERGY MANAGEMENT and in their official capacities, Director ELIZABETH KLEIN,[1] Environment Branch for Renewable Energy ("OREP") Chief MICHELLE MORIN, OREP Program Manager JAMES F. BENNETT, OREP Environmental Studies Chief MARY BOATMAN, Economist EMMA CHAIKEN, Economist MARK JENSEN, Biologist BRIAN HOOKER, and JENNIFER DRAHER; and DEB HAALAND, Secretary of the Interior, U.S. Department of the Interior; LAURA DANIELS-DAVIS, in her official capacity as Principal Deputy Assistant Secretary, Land and Mineral Management; and MICHAEL S. REGAN, Administrator, U.S. Environmental Protection Agency;

Defendants,

and

SOUTH FORK WIND, LLC,

Defendant-Internevor.

Case No. **2:23-cv-02915**

(Block, J.)
(Tiscione, M.J.)

REPLY TO FEDERAL DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO FILE A SECOND AMENDED COMPLAINT

[1] U.S. Bureau of Ocean Energy Management ("BOEM") Director was Amanda Lefton when filing the complaint on July 20, 2022, but Ms. Lefton resigned effective January 19, 2023.

I) PRELIMINARY STATEMENT

As a preliminary matter, Federal Defendants invoke this Court's ruling denying Plaintiff's motion for a preliminary injunction (May 18, 2023) (ECF 56), assuming "[t]his court is fully familiar with the relevant facts concerning the Project inasmuch as it has issued several decisions in the instant case," *citing* "Kinsella v. Bureau of Ocean Energy Mgt., No. 23-CV-02915-FB-ST, 2023 WL 3571300 (E.D.N.Y. May 18, 2023) (denying preliminary injunction)" (ECF 104, at 1, PDF 2). However, the Court issued the order denying Plaintiff's preliminary injunction request without power twenty days *before* the Court of Appeals for the D.C. Circuit's order transferring the case (May 17, 2023) (D.C. Cir., 22-5317, Doc. 1999608) had become effective. The order transferring the case became effective on ***June 7, 2023*** (twenty-one days after the D.C. Circuit had denied Plaintiff's Petition for a Writ of Mandamus).[2]

During a hearing in the U.S. District Court for D.C. on November 9, 2022, Judge Cobb made the following statement— "I have not ruled on the motion for preliminary injunction. So, Mr. Kinsella, you are free to raise your PI motion with the transferee court if you choose to do so." *See* Hearing Transcript, November 9, 2022 (D.C.C., 22-cv-02147, at 25:22-25, PDF 26), marked Exhibit B. However, Plaintiff was not "free to raise [his] PI motion with the transferee court" because the motion was denied without him even being made aware that the case had been reopened. Plaintiff neither received notice the case had been reopened nor was there a hearing. Plaintiff *pro se* only learned of the denial weeks later. Therefore, Plaintiff respectfully requests that the Court disregard Federal Defendants' (and SFW's) references to the Court's order denying Plaintiff's preliminary injunction request (May 18, 2023) (ECF 56).[3]

[2] D.C. Circuit Rule 41(3) reads: "No mandate will issue in connection with an order granting or denying a writ of mandamus … but the order or judgment … will become effective automatically 21 days after issuance …"
[3] Plaintiff concurrently filed his Motion for Leave to file a First Amended Complaint (FAC) (ECF 34) (*granted as of*

II) ARGUMENT

a) According to Second Circuit precedent, the Court should grant Plaintiff's Motion to File a Second Amended Complaint (SAC) *before* deciding Federal Defendants' and SFW's respective motions to dismiss.

Federal Defendants argue that the Court should deny Plaintiff's motion to file a Second Amended Complaint ("SAC") because the Court should *first* decide whether to dismiss Federal Defendants' and SFW's respective motions *before* addressing Plaintiff's SAC.

Federal Defendants (1) could not cite *any* case with circumstances similar to this case to support its argument; (2) its premise that the Court must determine standing at the commencement of a suit *before* other motions conflicts with this Circuit's precedent; and (3) if Federal Defendant's argument were valid (it is not), then the Court would have to deny their Motion to Dismiss because they failed to file a motion challenging standing at the commencement of the lawsuit in 2022 in the U.S. District Court for the District of Columbia.

(1) None of the cases Federal Defendants cite supporting the notion that "standing is to be determined as of the commencement of suit" (Lujan v. Defenders of Wildlife, 504 U.S. 555, 571 n.5 (1992)) have similar circumstances to the instant matter. They are all easily distinguished. The cases all concern the designation of parties and whether they are a real party in interest (*see* Federal Rule of Civil Procedure 17). In the instant matter, no party has challenged Plaintiff's designation as a real party of interest or the designation of Federal Defendants or Defendant-Intervenor South Fork Wind ("SFW"). Federal Defendants' cases do not support the argument that standing is to be determined as of the commencement of ***this suit*** because the parties were

right) with a Motion for a Temporary Restraining Order and Preliminary Injunction (ECF 35). Considering that Plaintiff's Motion to file a Second Amended Complaint (SAC) (ECF 102) is currently before the Court, which would materially effect his preliminary injunction request, there would be nothing to be gained by pursuing the Court's order denying his motion for a preliminary injunction (May 18, 2023) (ECF 56).

all correctly named as real parties of interest, and Federal Defendants have not claimed otherwise.

In Lujan, "the agencies funding the projects were not parties to the case" (*id.*, at 568). Federal Defendants quote Justice Stevens, who "filed an opinion concurring in the *judgment*" (emphasis added) (*id.*, 556-57, and 571 n.5), not the majority opinion. In Comer v. Cisneros, the Second Circuit noted that "[t]he district court … ordered the plaintiffs to separate their action into three amended complaints[,] … [and] just thirteen days after being so ordered, the various plaintiffs filed the three amended complaints … [Then] defendants filed motions to dismiss their respective complaints." (37 F.3d 775, 797 (2d Cir. 1994), and only one complaint was dismissed because "Higgins himself had no authority to intervene." (*id.*, at 803). Comer v. Cisneros cites Lujan as its authority.

In Clarex Ltd. v. Natixis Sec. Am. LLC, again, the case concerned the designation of the parties and whether they had the right to commence the action. "The decisive question is, then, whether the reassignment to Clarex and Betax occurred on December 15, 2011, the date recited as the effective date of the reassignment, or April 12, 2012, the date the reassignment contract was signed." (12 Civ. 0722 (PAE), at *7-8 (S.D.N.Y. Oct. 12, 2012)). "The Court, accordingly, finds that there is insufficient evidence to establish that the claims to the warrants were reassigned to Clarex and Betax …" (*id.*, at *9). The same is true in Cortlandt St. Recovery Corp. v. Hellas Telecomm., S.a.r.l, where the action "involve[d] a change in the *status quo ante,* in that Cortlandt would have to obtain title to claims to which it currently lacks title." (790 F.3d 411, 427 (2d Cir. 2015)).

The only exception is Equal Vote Am. Corp. v. Congress (397 F. Supp. 3d 503, 512 (S.D.N.Y. 2019)), where the court does not address the time when standing is to be determined;

therefore, it does not support Federal Defendants' argument that the Court should determine standing at the commencement of a lawsuit.

(2) Federal Defendants take their argument— that standing is to be determined as of the commencement of a lawsuit— one step further in Cortlandt St. Recovery Corp. v. Hellas Telecomm., S.a.r.l— "A court may not permit an action to continue, even where the jurisdictional deficiencies have been subsequently cured, 'if jurisdiction [was] lacking at the commencement of a suit....'" 790 F.3d 411, 422–23 (2d Cir. 2015). Federal Defendants' argument conflicts with Second Circuit precedent in Cresci v. Mohawk Valley Cmty. Coll., where this Circuit held that— "The proper time for a plaintiff to move to amend the complaint is when the plaintiff learns from the District Court in what respect the complaint is deficient. Before learning from the court what are its deficiencies, the plaintiff cannot know whether he is capable of amending the complaint efficaciously." No. 15-3234, at *5 (2d Cir. June 2, 2017). The Cresci court maintains that a court *may* permit an action to continue where the jurisdictional deficiencies have been subsequently cured, exactly the opposite to what Federal Defendants argue. This Court is bound to follow the Cresci decision and allow an action to continue where a plaintiff, learning of the deficiencies in the complaint, may "amend[] the complaint efficaciously." *Id.* Indeed, this has occurred in the case before the Court now. Here, Plaintiff learned from Federal Defendants' and SFW's memorandums in support of their respective motions to dismiss and subsequently cured the deficiencies, making the complaint stronger and more focused on the main three issues: water quality, project cost, and the SFW/Sunrise Alternative.

In a more recent ruling (ten days ago), this Circuit held as follows—

> Finally, Mackage argues that the district court erred by declining to grant an opportunity to amend its complaint. We agree. As we have written:

> Federal Rule of Civil Procedure 15(a)(2) states that court[s] should freely give leave [to amend] when justice so requires. We have upheld Rule 15(a)(2) 's liberal standard as consistent with our strong preference for resolving disputes on the merits. We have been particularly skeptical of denials of requests to amend when a plaintiff did not previously have a district court's ruling on a relevant issue, reasoning that [w]ithout the benefit of a ruling, many a plaintiff will not see the necessity of amendment or be in a position to weigh the practicality and possible means of curing specific deficiencies.

APP Grp. (Can.) v. Rudsak U.S. Inc., No. 22-1965, at *9 (2d Cir. Jan. 9, 2024). Although the case refers to the benefit of "a district court's ruling on a relevant issue," the same principle is applicable here, but instead of a court ruling, Plaintiff decided to amend sooner so defendants could not accuse him of unduly delaying proceedings, which SFW did regardless.

(3) Assuming *arguendo* Federal Defendants' argument was valid (it is not), that "[b]ecause lack of standing is considered a jurisdictional defect, 'standing is to be determined as of the commencement of suit.' Lujan v. Defenders of Wildlife, 504 U.S. 555, 571 n. 5 (1992)" (ECF 104, at 6, PDF 7). If such an argument were convincing, it would present an unwanted question for Federal Defendants— Why did they not raise the issue of standing "as of the commencement of [*this*] suit" one-and-a-half years ago (in 2022)? If it were true, as Federal Defendants argue, that "it is axiomatic ... that 'standing is to be determined as of the commencement of suit'" (Fenstermaker v. Obama, 354 F. App'x 452, 455 (2d Cir. 2009)), then Federal Defendants should have filed their Motion to Dismiss in the U.S. District Court for D.C. ***at the commencement of this suit in 2022***, but they did *not*. Instead, Federal Defendants filed a Motion to Transfer Venue (September 8, 2022) (ECF 11), a Motion to Strike Plaintiff's Motions for Summary Judgement, or in the alternative, to Stay the Briefing (October 6, 2022) (ECF 24), and motions for extensions of time. Still, contrary to its *own* argument, Federal Defendants permitted the action to continue in the District Court for D.C. for four months (until the D.C.

District Court transferred the case to the Eastern District of New York). Therefore, because Federal Defendants failed to file its motion challenging Plaintiff's standing at the ***commencement*** of the suit ***in 2022,*** it should not be permitted to do so now. It is disingenuous for Federal Defendants to claim that Plaintiff lacks standing one-and-a-half years later, belatedly.

b) Plaintiff's motion to file a Second Amended Complaint (SAC) is not futile, as he can demonstrate standing.

Federal Defendants maintain that the Court must deny Plaintiff's proposed Second Amended Complaint because it does not remedy any of the deficiencies in Kinsella's standing – "his claim of injury due to harm to the drinking water 'is the same claim raised and dismissed by this court in Mahoney' and therefore, should be denied." (ECF 104, at 7, PDF 8).

Federal Defendants parrot SFW's demonstrably false claim that Plaintiff's injury due to harm to the drinking water "is the same claim raised and dismissed by this court in Mahoney" and, therefore, should be denied (ECF 104, at 7, PDF 8). *See* Mahoney v. U.S. Dept. of the Int., No. 22-CV-1305 (FB) (ST), 2023 WL 4564912 (E.D.N.Y. July 17, 2023).

In Mahoney, this Court erred in holding that the "injuries are directly traceable to NYPSC [the New York Public Service Commission], which had exclusive jurisdiction over onshore trenching-precisely an 'independent action of some third party not before the court.'" (ECF 98, at 5) because it ignores Federal Defendants' obligations under NEPA.

Under NEPA, Congress "'*directs* that, to the *fullest extent possible*' BOEM 'shall' include a '*detailed* statement' on- '(i) reasonably foreseeable environmental effects' of its action approving SFW's Project; [and] '(ii) any reasonably foreseeable adverse environmental effects which cannot be avoided' (emphasis added) (NEPA, 42 U.S.C. § 4332). 'Effects includes ecological[,] []such as the effects on natural resources … [and] economic, social, or health, whether direct, indirect, or cumulative' (40 C.F.R. § 1508.8). In an Environmental Impact

Statement (EIS), it must be evident the agency took a 'hard look' at the environmental consequences of its decision." (SAC ¶ 377) Congress directed BOEM to prepare a detailed EIS on reasonably foreseeable environmental effects to the *fullest extent possible*, ***not*** to look *only* offshore. The impact of BOEM's action approving the Project includes the onshore part. Federal Defendants claim that the "injuries are not traceable to BOEM because its authority is limited to regulating certain activities occurring on the Outer Continental Shelf." (ECF 98, at 5-6) but provides no case supporting such a claim.

On the contrary, in *Citizens Against Burlington, Inc. v. Busey*, "[t]he city of Toledo decided to expand one of its airports, and the Federal Aviation Administration [FAA] decided to approve the city's plan." (938 F.2d 190, 191 (D.C. Cir. 1991)). The City of Toledo owns the airport in Ohio. The D.C. Circuit remanded the matter to the agency "so that it may comply with 40 C.F.R. § 1506.5" (*id.,* at 206). The Court of Appeals did *not* hold that the FAA had no jurisdiction in Ohio, as Federal Defendants argue that BOEM had no jurisdiction in New York State. Instead, the Court of Appeals remanded the decision to the agency, which is what Plaintiff requests here under his Claim Six— "DEFENDANT BOEM falsely claimed in its FEIS that "[o]verall, existing groundwater quality in the analysis area appears to be good" (FEIS at H-23, PDF p. 655 of 1,317). BOEM did not independently evaluate the information and has not taken responsibility for the inaccuracy of the statement in violation of 40 C.F.R. § 1506.5(a))." (SAC, ¶ 404). "The Court has the authority and duty to hold unlawful and set aside such agency action in whole or in relevant part pursuant to APA 5 U.S.C. § 706 and remand for reconsideration. Plaintiff is entitled to a judgment, so holding and setting aside." (SAC, ¶ 408)

Still, Federal Defendants state that although "Kinsella contends that he has suffered a concrete injury from the onshore work because of a violation of his procedural rights 'under …

NEPA …' … that is not sufficient to confer standing on him without a showing that his alleged injury was traceable to or redressable by an order against BOEM. He fails to do so." (ECF 98, ¶ at 5, PDF 9) Plaintiff has done so now (*see* above).

c) Plaintiff's motion to file a Second Amended Complaint (SAC) is not futile, as he can demonstrate that Plaintiff's injury differs from that in Mahoney.

In Mahoney v. U.S. Dept. of the Int. (No. 22-CV-1305 (FB) (ST), 2023 WL 4564912 (E.D.N.Y. July 17, 2023), the Court concerned itself with and ruled only on the effect of SFW's concrete on "preferential pathways" and did *not* address other processes such as diffusion, adsorption, entrainment, etc. Still, Federal Defendants and SFW (falsely) claim that the harm they cause to the drinking water "is the same claim raised and dismissed by this court in Mahoney." That claim is demonstrably false.

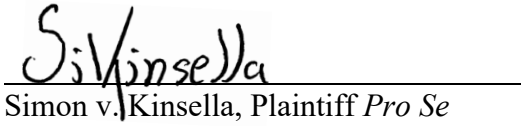
Impacts caused by the effects of SFW's underground concrete construction on groundwater PFAS contamination, as it is relevant here, fall into two categories: (a) impacts from SFW's underground construction creating "preferential pathways" that change the course of groundwater flow carrying PFAS to areas that it would not have otherwise impacted; and (b) the effect of SFW's concrete infrastructure causing PFAS contaminants within the groundwater to react with the concrete, attaching itself to or within the concrete (via processes such as diffusion, adsorption, entrainment, etc) that may then be released under changed circumstances back into groundwater flow. The first category concerns groundwater flow, where the PFAS concentration stays in and flows with the groundwater, and the concrete infrastructure affects the direction or rate of groundwater flow. On the other hand, the second category relates to instances where the PFAS contaminant reacts and attaches itself to or within the concrete, removing itself from the groundwater flow. The two impacts of SFW concrete on PFAS in groundwater are factually

different. That difference in transport mechanisms is beyond genuine dispute. *Please see* Kinsella Affidavit, marked Exhibit A.

III) CONCLUSION

For the reasons stated herein, Plaintiff respectfully requests that the Court grant his motion to file a Second Amended Complaint.

Respectfully submitted on this nineteenth day of January 2024,



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