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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SIERRA CLUB, et al.,

Plaintiffs,

v.

UNITED STATES ARMY CORP OF ENGINEERS, et al.,

Defendants,

and

CENTRAL MAINE POWER COMPANY, et al.,

Intervenor Defendant.

CIVIL NO. 2:20-CV-00396-LEW

PLAINTIFFS' SECOND MOTION FOR LEAVE TO SUPPLEMENT THE COMPLAINT

INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 15(d) and 21, Plaintiffs respectfully move the Court for leave to file Plaintiffs' [Proposed] Second Supplemental Complaint to add the U.S. Department of Energy ("DOE") as a Defendant and to add claims against DOE and the Corps related to actions that have occurred since Plaintiffs filed their First Supplemental Complaint. *See* Exhibit 1 (Plaintiffs' [Proposed] Second Supplemental Complaint). Counsel for Plaintiffs conferred via email with counsel regarding the motion. Defendants, the U.S. Army Corps of Engineers, Colonel Atilano, and Jay Clement (collectively, the "Corps") and Intervenor Defendants Central Maine Power Company and NECEC Transmission LLC (collectively, "CMP") reserved their positions on the motion. Because the proposed supplemental pleading sets out events that occurred after Plaintiffs filed their First Supplemental Complaint—namely, DOE's January 14, 2021 issuance of an Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI" and, collectively, with the EA, "EA/FONSI") and issuance of a Presidential Permit for the Project—and supplements Plaintiffs' allegations and claims to account for those events, Plaintiffs respectfully request the Court grant their motion.

PROCEDURAL BACKGROUND

Plaintiffs filed their initial Complaint on October 27, 2020, challenging the U.S. Army Corps' of Engineers' EA/FONSI for the Project. Dkt. 1. At the time Plaintiffs filed their initial Complaint, the Corps had not yet finalized the Clean Water Act ("CWA") section 404 Permit for the Project. Thus, once the Corps issued that Permit, Plaintiffs moved to supplement the Complaint to add in a claim and allegations related to the CWA Permit. *See* Dkt. 40. The Court granted Plaintiffs' motion to supplement the Complaint on December 16, 2020. *See* Dkt. 42 at 49; *see also* Dkt. 43 (First Supplemental Complaint).

On February 26, 2021, the Court held a telephonic conference to discuss the parties' status reports and proposed scheduling orders for the case. *See* Dkt. 65. As a result of the conference, the Court entered a Procedural Order requiring any party intending to move to amend the pleadings or join a party to notify the other parties of that intent by March 19, 2021. Dkt. 66 at 1. Consistent with this Order, on March 19, Plaintiffs notified the Corps and CMP of their intent to add DOE as a party to the litigation and to supplement the Complaint. In its Procedural Order, the Court also set March 26, 2021 as the deadline for parties to move for joinder of other parties or amendment of pleadings. Dkt. 66 at 1.

PROPOSED SUPPLEMENT

On January 14, 2021, after Plaintiffs supplemented their Complaint, the U.S. Department of Energy ("DOE") released its final EA/FONSI for the Project. That same day, DOE also issued the required Presidential Permit for the Project. Plaintiffs now seek to supplement their Complaint to add DOE as a Defendant in the lawsuit, and to add claims and allegations challenging DOE's actions related to the Project. Specifically, Plaintiffs seek to supplement the Complaint with claims that the DOE violated the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA") because (1) DOE's EA/FONSI was inadequate; (2) DOE failed to complete and EIS; and (3) DOE failed to comply with NEPA's requirements regarding public participation in the NEPA Process, and allegations in support of these claims, and to update the request for relief accordingly. These claims are similar to Plaintiffs' existing claims against the Corps. Plaintiffs also seek to add a claim against both the Corps and DOE, challenging the agencies' improper segmentation of the NEPA analysis for the Project by failing to complete a single, combined NEPA document for their connected actions.

Plaintiffs also seek to make several other changes to the Complaint. At the request of the

Corps, Plaintiffs' supplemental complaint removes Jay Clement as a Defendant from this action. Plaintiffs also propose to add several allegations regarding actual or potential changes to the Project and/or the Corps' CWA Permit, as well as make other small, non-substantive edits.

STANDARD OF REVIEW

Federal Rule of Civil Procedure ("FRCP") 21 provides that "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party." Fed. R. Civ. P. 21. "Courts consider requests to add or drop a party pursuant to Rule 21 under the same standard that applies to requests to amend a complaint under Rule 15." 1 Federal Rules of Civil Procedure, Rules and Commentary Rule 21 (Feb. 2021); *see also Beaulieu v. Belanger*, No. 14-cv-280-SM, 2015 WL 4067114, at *2 (D.N.H. July 2, 2015) (explaining that FRCP 15(a) "provides that the court should freely grant a plaintiff leave to amend the complaint, when justice so requires. A proposed amendment seeking to add new parties is technically governed by [FRCP] 21, but the same standard of liberality applies under either rule") (internal citation and quotations omitted); *Cook v. USAA Cas. Ins. Co.*, No. 1:16-CV-00207-JCN, 2019 WL 2418752, at *3 (D. Me. June 10, 2019) (acknowledging that "Rule 21 provides the district court with discretion to add or drop parties").

Courts may permit supplemental pleadings "setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d). The First Circuit has recognized that "courts customarily have treated requests to supplement under Rule 15(d) liberally[,]" similar to how courts treat requests to amend pleadings. *U.S. ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1, 7 (1st Cir. 2015). Consistent with this liberal standard, district courts have significant discretion to grant motions to supplement. *Id.* at 5 (explaining that a 1963 amendment to FRCP Rule 15(d) was "designed to ensure that the amended rule would give the court broad discretion in allowing a supplemental pleading") (internal quotations omitted). "In

the absence of any apparent or declared reason—such as [(1)] undue delay, [(2)] bad faith or dilatory motive on the part of the movant, [(3)] repeated failure to cure deficiencies by amendments previously allowed, [(4)] undue prejudice to the opposing party by virtue of allowance of the amendment, [(5)] futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962). The *Foman* court further noted that "the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Id*.

ARGUMENT

The Court should exercise its discretion to allow Plaintiffs to supplement their Complaint. None of the *Foman* factors apply here. First, no undue delay has occurred and allowing Plaintiffs to supplement the complaint will not prejudice CMP or the Corps. "[T]he grant of leave to amend a complaint might often occasion some degree of delay and additional expense, but leave still should be 'freely given' unless prejudice or delay is 'undue[.]'" *Barkley v. U.S. Marshals Serv. ex rel. Hylton*, 766 F.3d 25, 39 (D.C. Cir. 2014) (quoting *Foman*, 371 U.S. at 182); *see also Caribbean Broad. Sys. Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1084 (D.C. Cir. 1998) ("Rule 15(a) does not prescribe any time limit within which a party may apply to the court for leave to amend. . . . In most cases delay alone is not a sufficient reason for denying leave . . . . If no prejudice [to the non-moving party] is found, the amendment will be allowed[.]" (quoting Wright & Miller, Federal Practice & Procedure: Civil 2d § 1488 at 652, 659, 662-69 (1990 & Supp. 1997)).

Although the First Circuit has not articulated a bright line rule for what constitutes "undue delay" such that leave to amend may be denied, cases from within this circuit provide the contours

for when a delay may be considered "undue." *See e.g.*, *Hagerty ex rel. U.S. v. Cyberonics, Inc.*, 844 F.3d 26, 34–35 (1st Cir. 2016) (affirming district court's denial of motion to supplement where plaintiff waited for three years after filing initial lawsuit and 13 months after defendant moved to dismiss before seeking leave to amend); *Johnston v. Holiday Inns, Inc.*, 595 F.2d 890, 896 (1st Cir. 1979) (affirming the trial court's finding of undue and unjustified delay where the motion to amend was filed five years after the original complaint was filed and after an opinion had already been issued on parties' cross-motions for summary judgment).

Here, Plaintiffs have not unduly delayed in seeking to supplement their Complaint. Plaintiffs filed this case five months ago, *see* Dkt. 1, and are filing their motion to supplement by the Court's deadline. *See* Dkt. 66 at 1. This case is in its early stages; the Corps' administrative record is not yet final, *see* Dkt. 66 at 1–2 (setting forth timeline for review of Corps' record); and no party has moved for summary judgment. Additionally, DOE did not issue its final EA/FONSI and the Presidential Permit until January 14, 2021—less than three months ago. *See* Ex. 1, ¶10. Plaintiffs plainly did not unduly delay in seeking to supplement their complaint.

Because there has been no undue delay, granting Plaintiffs' motion will not impose any undue prejudice on the Corps or CMP. The First Circuit has generally found prejudice to be "undue" where plaintiffs have delayed in seeking to amend their complaint, and as a result, allowing the amendment would require additional discovery or would otherwise alter parties' trial strategy and tactics. *See e.g.*, *Acosta-Mestre v. Hilton Int'l*, 156 F.3d 49, 52 (1st Cir. 1998) (agreeing that "the prejudice to [defendant] resulting from a re-opening of discovery with additional costs, a significant postponement of trial, and a likely major alteration in trial strategy and tactics . . . fully support the district court's ruling [to deny the motion to amend]"); *Grant v. News Grp. Boston*, 55 F.3d 1, 5–6 (1st Cir. 1995) (finding prejudice from undue delay where

discovery would have to be re-opened and trial preparation was underway). In this case, Plaintiffs' proposed supplemental complaint will not impose any discovery on CMP or the Corps (let alone add discovery) or even require the Corps to, on the basis of the supplemental complaint alone, redo its administrative record. And this motion comes early enough in the lawsuit that it should not majorly affect the Corps' or CMP's summary judgment strategy, if it does so at all.

The Corps and CMP have raised concerns that adding DOE may slow this lawsuit by a few months, but for the reasons discussed above, this delay—and any claimed "prejudice"—would not be undue. And the fact that there may be a preliminary injunction preventing CMP from working in Segment 1 does not change this outcome. *See e.g.*, *Rauch Industries, Inc. v. Radko*, 2008 WL 11366420, at *1 (W.D.N.C. Aug. 11, 2008) (motion to amend granted while preliminary injunction was in place); *Kansas v. United States*, 171 F. Supp. 3d 1145, 1171 (D. Kan. 2016), aff'd in part sub nom. *Kansas by and through Kansas Dept. for Children and Families v. SourceAmerica*, 874 F.3d 1226 (10th Cir. 2017) (same); *Alabama v. U.S. Army Corps of Engr's*, 382 F. Supp. 2d 1301, 1333 (N.D. Ala. 2005) (same).

Second, Plaintiffs' supplemental claims are not futile. As the First Circuit explained in *Hatch v. Dept. for Children, Youth and Their Families*,

> If leave to amend is sought before discovery is complete and neither party has moved for summary judgment, the accuracy of the 'futility' label is gauged by reference to the liberal criteria of [FRCP] 12(b)(6). In this situation, amendment is not deemed futile as long as the proposed amended complaint sets forth a general scenario which, if proven, would entitle the plaintiff to relief against the defendant on some cognizable theory.

274 F.3d 12, 19 (1st Cir. 2001) (internal citation omitted). Here, Plaintiffs' claims are record-review claims, and Plaintiffs are seeking to supplement their Complaint prior to the Corps' finally certifying its administrative record. Moreover, as noted above, no party has moved for summary judgment. Therefore, Plaintiffs' supplement is not futile unless the Court determines that

Plaintiffs' proposed supplemental claims against DOE and the Corps are not legally cognizable.

Plaintiffs' supplement is not futile because Plaintiffs' proposed claims against DOE and the Corps are legally cognizable. Plaintiffs seek to add claims against DOE and the Corps under the APA and NEPA related to DOE's issuance of its EA/FONSI, and the issuance of a FONSI is a final agency action subject to the APA. *See e.g.*, *Cure Land, LLC v. U.S. Dept. of Agric*., 833 F.3d 1223, 1230–32 (10th Cir. 2016); *S.W. Williamson Cty. Cmty. Ass'n, Inc. v. Slater*, 173 F.3d 1033, 1036–37 (6th Cir. 1999). DOE's regulations are clear that DOE must comply with NEPA when issuing Presidential Permits. *See e.g.*, 10 C.F.R. § 205.321 (DOE's Presidential Permit regulations, stating that "[p]ursuant to DOE's responsibility under the [NEPA], the DOE must make an environmental determination of the proposed action."); *id.* § 1021.215(d) (DOE's NEPA-implementing regulations, providing that DOE shall start its NEPA process "as soon as possible" after receiving an application for a permit, and that "DOE shall complete any NEPA documents (or evaluation of any EA prepared by the applicant) before rending a final decision on the application and shall consider the NEPA document in reaching its decision . . . .").

In addition, DOE can be joined through Federal Rule of Civil Procedure 20, which allows for permissive joinder of defendants if: "(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a)(2). Plaintiffs' proposed claims against DOE arise out of the same transaction or occurrence as the claims against the Corps: the CMP Project, the Corp's and DOE's permit and NEPA processes for that Project. Further, the claims against both the Corps and DOE share multiple questions of law and fact. *See e.g.*, Ex. 1, ¶¶145–222 (claims). As such, Plaintiffs' supplemental claims are legally cognizable, and not futile.

Third, Plaintiffs' motion is not based on bad faith or dilatory motive. Plaintiffs are seeking to supplement the Complaint to add a new Defendant, DOE, and to add additional claims against or related to DOE's issuance of its EA/FONSI. There is no bad faith on Plaintiffs' part in seeking to add these claims, nor are Plaintiffs adding these claims based on a dilatory motive. Additionally, there is no surprise to Defendants since Plaintiffs indicated on the February 26, 2021 status conference that it was considering adding DOE as a defendant in the case.

Lastly, Plaintiffs are not seeking to supplement their complaint to fix deficiencies they could have previously cured. Plaintiffs could not have included DOE and the supplemental claims and allegations in their previous Complaints because DOE's action giving rise to the claims and allegations had not yet occurred.

Conclusion

For the forgoing reasons, Plaintiffs respectfully request the Court grant their motion for leave to file the Second Supplemental Complaint.

Respectfully submitted this 26th day of March, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2021, I electronically filed PLAINTIFFS' SECOND MOTION FOR LEAVE TO SUPPLEMENT THE COMPLAINT with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Susan Ely, Kevin Cassidy, Counsel for Plaintiffs.

Amanda Stoner, Benjamin Carlisle, Jacob Ecker, Kristofor Swanson, Counsel for Defendants.

Joshua Dunlap, Lisa Gilbreath, Matthew Manahan, Counsel for Intervenor Defendants.

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