Hornbeck Offshore Services, L.L.C. v. Salazar et al Doc. 30 Att. 7

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

HORNBECK OFFSHORE SERVICES, LLC, Plaintiff, v. KENNETH LEE "KEN" SALAZAR, in his official capacity as Secretary, United States Department of the Interior; ROBERT "BOB" ABBEY, in his official capacity as Acting Director, Mineral Management Service; and MINERALS MANAGEMENT SERVICE, Defendants, and DEFENDERS OF WILDLIFE, SIERRA CLUB; FLORIDA WILDLIFE FEDERATION, CENTER FOR BIOLOGICAL DIVERSITY, AND NATURAL RESOURCES DEFENSE COUNCIL, Defendant-Intervenors	Civil Action No. 10-1663(F)(2) Section F Judge Feldman Magistrate 2 Magistrate Wilkinson

[PROPOSED] DEFENDANT-INTERVENORS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Upon being granted intervention, Defenders of Wildlife, Sierra Club, Florida Wildlife Federation, Center for Biological Diversity, and Natural Resources Defense Council hereby move to dismiss the complaint for lack of subject matter jurisdiction because the plaintiffs failed to provide the required statutory notice. This memorandum is submitted in support of that motion.

LEGAL STANDARD

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A motion to dismiss should be granted if the complaint does not "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009), quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." Home Builders Ass'n of Miss., Inc. v. City of Madison, 143 F.3d 1006, 1010 (5th Cir.1998), quoting Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1187 (2d Cir.1996).

ARGUMENT

THIS COURT LACKS SUBJECT MATTER JURISDICTION DUE TO HORNBECK'S FAILURE TO COMPLY WITH THE NOTICE PREREQUISITE FOR BRINGING THIS CITIZEN SUIT

I. CONGRESS ESTABLISHED A NOTICE REQUIREMENT FOR CITIZEN SUITS ALLEGING VIOLATIONS OF THE OUTER CONTINENTAL SHELF LANDS ACT.

The Outer Continental Shelf Lands Act ("OCSLA") authorizes citizen suits to challenge violations of OCSLA, its implementing regulations, or permits or leases under OCSLA. Specifically, the OCSLA citizen suit provision states:

> Except as provided in this section, any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter against any person, including the United States, and any other government instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) for any alleged violation of any provision of this subchapter or any regulation promulgated under this subchapter, or of the terms of any permit or lease issued by the Secretary under this subchapter.

43 U.S.C. § 1349(a)(1) (emphasis added).

Like the citizen suit provisions in other federal statutes, OCSLA requires that, 60 days before citizens may file claims alleging violations of OCSLA, they must provide a notice to the alleged violator presenting the alleged violations:

> [N]o action may be commenced under subsection (a)(1) of this section --
>
> (A) prior to sixty days after the plaintiff has given notice of the alleged violation, in writing under oath, to the Secretary and any other appropriate Federal official, to the State in which the violation allegedly occurred or is occurring, and to any alleged violator.

Id. § 1349(a)(2)(A); see Chevron USA, Inc. v. FERC, 193 F. Supp. 2d 54, 63-64 (D.D.C. 2002) ("In accordance with this statutory provision [43 U.S.C. § 1349(a)(2)], Duke and Chevron provided the appropriate officials, including individuals at the FERC, with notice of the agency's alleged violations of the OCSLA. . . [which] were placed under oath and were quite detailed.").[1] For claims alleging a violation of OCSLA, the statute provides no exception to the notice requirement. However, the statute waives the requirement to wait to file suit for the full 60 days after providing notice if "the alleged violation constitutes an imminent threat to the public health or safety or would immediately affect the legal interest of the plaintiff." Id. § 1349(a)(3).

Under OCSLA, a plaintiff seeking to file a claim under subsection must either serve notice and wait 60 days before filing suit or must establish an imminent threat to public health or safety or immediate effects to his or her legal interests. Under either avenue, however, the plaintiff must serve notice prior to filing the complaint. If the

[1] For example, both the Clean Water Act and the Clean Air Act contain language in their respective citizen suit provisions that is virtually identical to the language found in OCSLA's citizen suit provision. See Clean Water Act, § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A) ("No action may be commenced under subsection (a)(1) of this section -- prior to 60 days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order."); Clean Air Act § 304(b)(1), 42 U.S.C. § 7604(b)(1) ("No action may be commenced under subsection (a)(1) of this section -- prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order.").

plaintiff does not serve pre-suit notice, "no action may be commenced" and the court must dismiss the complaint for lack of jurisdiction.

The notice requirement applies to all cases alleging violations of OCSLA except for challenges to approvals of leasing programs or to approvals, modifications, or disapprovals of exploration or production plan, which are reviewed directly in a United States Court of Appeals. 43 U.S.C. § 1349(c). Instead of a pre-suit notice, such suits must be preceded by the plaintiff's participation in administrative proceedings leading to the challenged decision. Id. § 1349(c)(3). All other lawsuits

> challenging actions or decisions allegedly in violation of, or seeking enforcement of, the provisions of this subchapter, or any regulation promulgated under this subchapter, or the terms of any permit or lease issued by the Secretary under this subchapter, shall be undertaken in accordance with the procedures described in this subsection.

Id. § 1349(a)(6).

II. The Complaint Alleges Violations of OCSLA and Its Implementing Regulations, and Therefore Must Be Preceded By A Pre-Suit Notice.

Hornbeck's challenge to the deepwater moratorium breaks down into two sets of claims. First, Hornbeck claims that the Department of Interior ("Interior") violated the statutory and regulatory standards for suspending offshore drilling under OCSLA. Second, Hornbeck contends that Interior violated its duties under OCSLA to balance various factors in managing offshore resources. Since both sets of claims allege violations of OCSLA and its implementing regulations, Hornbeck must comply with the pre-suit notice requirements of OCSLA's citizen suit provision.

The complaint describes the statutory and regulatory standards governing Interior's suspension of offshore operations. First Amended Compl. ¶¶ 72-75 (citing 43 U.S.C. § 1334(a)(1)(B); 30 C.F.R. §§ 250.168(a), 250.172(b), 250.172(c)). The

complaint then alleges that Interior violated these standards by issuing the moratorium without evidence showing that the suspension meets the required standards. Id. ¶¶ 78-86. In particular, the complaint contends that MMS violated OCSLA by not making the required showing of a threat of serious, irreparable, or immediate harm or damage to life. Id. ¶¶ 80-84. Additionally, Hornbeck alleges that Interior violated OCSLA implementing regulations requiring individualized determinations, on a lease or unit basis, before suspending leases. Id. ¶ 85. According to the complaint, "[i]n violation of statutory and regulatory requirements, the Report, the Moratorium and NTL [Notice to Lessees] fail to set forth or refer to any empirical data or factual findings that show Defendants made any individualized determination that operations on any particular 'lease or unit area' posed a threat of serious immediate harm to life or property." Id. ¶ 86.

Hornbeck also alleges that Interior violated a nondiscretionary duty under 43 U.S.C. § 1332(3) to balance the required factors prior to issuing the moratorium. "In addition, under OCSLA, the Defendants are required to balance orderly resource development with protection of the human, marine and coastal environments. 43 U.S.C. § 1332(3). In issuing the blanket moratorium and NTL . . . Defendants failed to conduct the required balancing." Id. ¶ 87.

In recognition of the fact that the complaint alleges violations of OCSLA, Hornbeck states that the Court "has subject matter jurisdiction pursuant to 43 U.S.C. § 1349(a), as Plaintiffs have a valid legal interest which is or may be adversely affected by a violation of 43 U.S.C. § 1331, et seq. or regulations promulgated under it." Id. at ¶ 20. However, as explained below, 43 U.S.C. § 1349(a) cannot provide jurisdiction over this Complaint because Hornbeck has not complied with the pre-suit notice requirements.

Hornbeck's attempts to base jurisdiction on other statutory provisions are unavailing. First, Hornbeck asserts that jurisdiction also exists under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, Id. However, the Supreme Court long ago held that the APA does not provide an independent basis for subject matter jurisdiction. Califano v. Sanders, 430 U.S. 99 (1977). Moreover, where Congress has prescribed the method for obtaining judicial review of particular claims, a plaintiff cannot circumvent the particular statutory scheme by resorting to the APA, particularly where Congress has specified jurisdictional prerequisites such as pre-suit notice. See 5 U.S.C. § 704 (the APA authorizes judicial review of agency action only if "there is no other adequate remedy in a court"); see also Allegheny County Sanitary Authority v. EPA, 732 F.2d 1167, 1177 (3d Cir. 1984) ("The notice requirement [of the Clean Water Act] reflects the intent of Congress to allow the EPA to react to citizen complaints before suit is filed and prevent unnecessary litigation. That aim is frustrated if a citizen complainant may by-pass the notice requirement by resorting to the APA remedy for conduct already reviewable under the citizen-suit provision.).

Second, Hornbeck asserts jurisdiction under Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202. Complaint ¶ 20. However, 28 U.S.C. §§ 2201 and 2202 authorize remedies in cases that are independently before a federal court. They do not establish subject matter jurisdiction on their own. Franchise Tax Bd. of State of Cal. v. Construction Laborers Vacation Trust for S. Cal., 463 U.S. 1, 15 (1983) quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937) ("The operation of the Declaratory Judgment Act is procedural only. Congress enlarged the range of remedies available in federal courts but did not extend their jurisdiction.").

Lastly, the complaint asserts jurisdiction under 43 U.S.C. § 1349(b)(1). As explained previously, the pre-suit notice requirements apply to all suits alleging a violation of OCSLA and its implementing regulations -- including suits that must be filed originally in a district court pursuant to section 1349(b)(1). See 43 U.S.C. § 1349(a)(6) (requiring all suits, except those filed initially in a Court of Appeals, "challenging actions or decisions allegedly in violation of . . . the provisions of this subchapter, or any regulation promulgated under this subchapter," to comply with the provisions of section 1349(a), which includes the notice requirement). Even though Hornbeck is correct in implying that its challenge to the suspensions must be filed in a district court pursuant to section 1349(b)(1), it is still required to comply with the pre-suit notice requirements. As a result, regardless of whether Hornbeck attempts to base jurisdiction on section 1349(a) or (b), it cannot evade the pre-suit notice requirements.[2]

III. Hornbeck Has Failed to Comply with the Notice Prerequisites for Filing an OCSLA Citizen Suit.

Nowhere in the First Amended Complaint does Hornbeck allege that it served notice, in writing under oath, on the Secretary of the Interior prior to filing this lawsuit. Nor has Hornbeck attached a copy of any pre-suit notice as an exhibit to the Complaint. Based on the facts alleged in the First Amended Complaint, and the exhibits attached

[2] The First Amended Complaint ¶¶ 90-91 asserts that the moratorium will result in intentional interference with existing contracts in violation of Maritime law and in a taking of vested rights in violation of the Fifth Amendment. In addition to the notice defect described above, these claims are beyond the scope of OCSLA citizen suits since they do not alleged violations of OCSLA or its implementing regulations. Nor can these claims be brought under the APA to the extent they seek monetary damages or there is another adequate judicial remedy. 5 U.S.C. § 702 (waiver of sovereign immunity does not extend to money damages); id. § 704 (APA review applies only where there is no other adequate remedy in a court).

thereto, Hornbeck has failed to demonstrate that it provided the notice required by 43 U.S.C. § 1349(a)(2).

Hornbeck may seek to excuse the failure to provide 60-days notice before filing suit by relying on 43 U.S.C. § 1349(a)(3), which allows an action to be brought immediately after serving notice of a violation in certain circumstances. However, this subsection does not apply to the instant complaint. It does not waive the requirement to provide pre-suit notice; it merely waives the requirement to wait a full 60 days before going to court. Since Hornbeck has neither alleged nor offered evidence of a pre-suit notice, it cannot come within the exception provided by 43 U.S.C. § 1349(a)(3).

Even if Hornbeck had provided pre-suit notice, it is unlikely that it would have met the conditions for filing suit before the expiration of the 60-day waiting period because Hornbeck concedes that Secretary Salazar had the authority and a sufficient factual basis to impose a moratorium supported by the 30-day Safety Report. Hornbeck's Motion for Preliminary Injunction at 7-8, 10, 14. More specifically, Hornbeck acknowledged that the Safety Report supported a six-month moratorium on new exploratory wells with a depth of 1000 feet or more in order to allow time to implement the measures outlined in the report and the recommendations from the President's commission. Exh. F at 3-4. Hornbeck similarly does not contest imposition of "a temporary pause in all current drilling operations for a sufficient length of time to perform additional blowout preventer function and pressure testing and well barrier testing for the existing 33 permitted exploratory wells currently operating in deepwater in the Gulf of Mexico." Exh. F at 4; Motion at 7-8. Given that Hornbeck mounts no challenge to this immediate suspension of operations to conform to the Safety Report's

recommendations, it cannot prove that the moratorium will "immediately affect" its interests. Without such a showing, Hornbeck cannot shorten the 60-day notice period, let alone evade the notice requirement altogether as it has apparently done.

CONCLUSION

OCSLA establishes jurisdictional prerequisites to filing suit alleging violations of OCSLA and its implementing regulations. Among other things, the citizen suit provision requires that a plaintiff to provide -suit notice to federal and state officials before filing suit. The amended complaint fails to allege nor has Hornbeck otherwise demonstrated that it has provided the required notice. Hornbeck cannot rely on either the APA or any other statute cited in the complaint to circumvent the notice requirement that Congress has imposed. "As a general rule, if an action is barred by the terms of the statute, it must be dismissed." Hallstrom v. Tillamook County, 490 U.S. 20, 31 (1989) (dismissing a citizen suit for failing to comply with the 60-day notice requirement of the Resource Conservation and Recovery Act). Accordingly, the Court should dismiss the complaint for lack of subject matter jurisdiction.

Respectfully submitted, this 16th day of June, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2010, I electronically filed the foregoing with the Clerk of court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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