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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PUBLIC WATCHDOGS,

Plaintiff,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF DEFENSE; JAMES MATTIS, in his official capacity as Secretary of Defense; UNITED STATES DEPARTMENT OF THE NAVY; RICHARD V. SPENCER, in his official capacity as Secretary of the Navy; SOUTHERN CALIFORNIA EDISON COMPANY; SAN DIEGO GAS & ELECTRIC COMPANY; and DOES 1 through 100,

Defendants.

Case No.: 17-cv-2323-JLS (BGS)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT

Date: April 5, 2018
Time: 1:30 p.m.
Ctrm: 4D (Schwartz)
Judge: Hon. Janis L. Sammartino

I. INTRODUCTION

Plaintiff Public Watchdogs filed this lawsuit to enforce Public Law 88-82, a congressional act authorizing the Department of the Navy to grant Southern California Edison ("SCE") and San Diego Gas & Electric ("SDG&E") an approximate 90-acre easement within Camp Pendleton. Sovereign immunity, however, bars this action against the federal defendants—the United States of America, the Department of Defense, Secretary of Defense James Mattis, the Department of the Navy, and Secretary of the Navy Richard V. Spencer (collectively, the "United States")—and divests this Court of jurisdiction. None of the statutes referenced in the Complaint, including 42 U.S.C. § 1983, unequivocally waives the United States' sovereign immunity for purposes of this suit. Nor can Plaintiff state a claim for relief pursuant to 42 U.S.C. § 1983 because Section 1983 does not apply to individuals acting under color of federal law. This action also suffers from another significant jurisdictional defect—the Plaintiff does not allege any injury in fact that is actual or imminent, and, as a result, Plaintiff lacks Article III standing. Accordingly, the United States respectfully requests that the Court dismiss Plaintiff's Complaint for lack of jurisdiction and failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(1), (b)(6).

II. FACTUAL BACKGROUND

Public Law 88-82, enacted by Congress in 1963, authorizes the Secretary of the Navy to grant SCE and SDG&E an easement of approximately 90 acres within Camp Pendleton for the "construction, operation, maintenance, and use of a nuclear electric generating station, consisting of one or more generating units, and appurtenances thereto." *See* ECF No. 1 ("Complaint"), Ex. A. Plaintiff filed suit on November 15, 2017 against the United States, SCE, and SDG&E (collectively "Defendants"), alleging that the storage of spent nuclear fuel ("SNF") at the San Onofre Nuclear Generating Station ("SONGS"), located on the easement site, "was not contemplated or authorized by Public Law 88-82." *Id.*, ¶ 15. According to Plaintiff, actions by the United States to allow the storage of SNF at SONGS are "illegal" and "pose a threat to the interests of the United States of America."

Id. Plaintiff seeks a declaration that the storage of SNF at SONGS is not authorized by Public Law 88-82 and an order enjoining the United States from "authorizing" SCE and SDG&E to store SNF at SONGS. *Id.*, "Prayer for Relief."

III. LEGAL STANDARD

A. Rule 12(b)(1) – Lack of Subject Matter Jurisdiction

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenges the Court's subject matter jurisdiction. A lack of jurisdiction is presumed unless the party asserting jurisdiction establishes that it exists. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Thus, a plaintiff bears the burden of proof on a Rule 12(b)(1) motion to dismiss for lack of jurisdiction. *Sopcak v. Northern Mountain Helicopter Serv.*, 52 F.3d 817, 818 (9th Cir. 1995). If the Court determines that it does not have subject matter jurisdiction, it must dismiss the claim. Fed. R. Civ. P. 12(h)(3).

B. Rule 12(b)(6) - Failure To State A Claim

A Federal Rule of Civil Procedure 12(b)(6) motion to dismiss "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id* at 678 (internal quotations omitted). While allegations of material fact are taken as true and construed in the light most favorable to the non-moving party, the Court need not accept as true allegations that are conclusory, legal conclusions, unwarranted deductions of fact, or unreasonable inferences. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

IV. ARGUMENT

A. Sovereign Immunity Bars This Action Against the United States, Its Agencies, and Agents

The United States is immune from suit unless it consents.[1] *See generally United States v. Dalm*, 494 U.S. 596, 608 (1990) ("Under settled principles of sovereign immunity, the United States, as sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.") (internal quotations omitted). Thus, the United States, including its agencies and employees, may be sued only to the extent that Congress has expressly waived the United States' sovereign immunity. *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981); *see also United States v. Mitchell*, 445 U.S. 535, 538 (1980) ("A waiver of sovereign immunity cannot be implied but must be unequivocally expressed.") (internal quotations omitted). Furthermore, "[a] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Quarty v. United States*, 170 F.3d 961, 972 (9th Cir. 1999). Absent an unambiguous waiver of sovereign immunity, federal courts have no subject matter jurisdiction in cases against the United States. *United States v. Mitchell*, 463 U.S. 206, 212 (1983). The party who sues the United States bears the burden of pointing to an unequivocal waiver of sovereign immunity. *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983).

Here, Plaintiff cannot carry its burden. The Complaint fails to identify or point to any statute where Congress unequivocally waives the sovereign immunity of the United

[1] A suit against federal agencies and its officers, acting in their official capacities, constitutes a lawsuit against the United States. *See Balser v. DOJ*, 327 F.3d 903, 907 (9th Cir. 2003) ("In sovereign immunity analysis, any lawsuit against an agency of the United States or against an officer of the United States in his or her official capacity is considered an action against the United States."). Thus, Plaintiff's suit against the Department of the Navy, the Department of Defense, and the Secretaries of the Navy and Defense, sued in their official capacities, implicates the bar of sovereign immunity. *See id.* (district court properly construed suit against the "Department of Justice, Office of the United States Trustee" as one against the United States and therefore doctrine of sovereign immunity applied unless waived by the United States).

States for purposes of this action. In fact, as detailed below, none of the statutes cited or referenced in the Complaint waives sovereign immunity. Consequently, the Court lacks jurisdiction to entertain this action against the United States, it agencies, and agents, and should dismiss for lack of jurisdiction. *See* Fed. R. Civ. P. 12(h)(3).

1. Neither 42 U.S.C § 1983 nor 28 U.S.C. § 1331 Waive the Sovereign Immunity of the United States, Its Agencies, and Agents Acting under Color of Federal Law

Plaintiff suggests that the Court has "federal-question jurisdiction over this lawsuit pursuant to Section 1983 of Title 42." Complaint, ¶ 7. Section 1983 imposes liability for the deprivation of constitutional rights on a "person" acting under color of state law. *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1987) ("Section 1983 provides a remedy only for deprivation of constitutional rights by a person acting under color of law of any state or territory or the District of Columbia."). Not only are the United States Government and its agencies not a "person" subject to liability under Section 1983, but the statute contains no express waiver of sovereign immunity permitting Plaintiff's claims against the United States. *See Jachetta v. United States*, 653 F.3d 898, 908 (9th Cir. 2011) (holding that Section 1983 did not waive Government's sovereign immunity because there was "no evidence" in statute "that Congress intended to subject federal agencies to § 1983 and § 1985 liability. To the contrary, §§ 1983 and 1985 impose liability upon a 'person,' and a federal agency is not a 'person' within the meaning of these provisions."); *see also Morse v. North Coast Opportunities, Inc.*, 118 F.3d 1338, 1343 (9th Cir. 1997) ("by its very terms, § 1983 precludes liability in federal government actors"). Consequently, because there is no cognizable claim against the United States Government, including its agencies, under Section 1983, Section 1983 does not provide a basis for jurisdiction.

Any claim based on Section 1983 against Secretaries James Mattis and Richard Spencer similarly fails. There is no allegation in the Complaint that either Secretary Mattis or Secretary Spencer acted under color of state law. On the contrary, Plaintiff is suing both individuals in their official capacities as federal Government agents, specifically as Secretary of Defense and Secretary of the Navy, respectively. Complaint, ¶ 3.

Section 1983 "provides no cause of action against federal agents acting under the color of federal law." *Billings v. United States*, 57 F.3d 797, 801 (9th Cir. 1995). Consequently, Plaintiff cannot state a claim for relief under Section 1983 against Secretary Mattis and Secretary Spencer. *Id.* (affirming trial court's sua sponte dismissal of Section 1983 claims against Secret Service Agents because they were acting under color of federal law, not state law); *Flamingo Indus. v. United States Postal Serv.*, 302 F.3d 985, 997 (9th Cir. 2002) (dismissing with prejudice § 1983 claim because the "Postal Service acts under federal law, and § 1983 does not allow for a suit based upon actions taken under color of federal law"), *rev'd on other grounds*, 540 U.S. 736 (2004).

Lastly, to the extent the reference to "federal-question jurisdiction" in the Complaint is a reference to 28 U.S.C. § 1331, Plaintiff still has not identified a waiver of sovereign immunity. Even assuming the Complaint raises a federal question under 28 U.S.C. § 1331, "Section 1331 does not waive the government's sovereign immunity from suit." *Holloman*, 708 F.2d at 1401.

In short, neither of the statutes identified in the Complaint as an alleged basis for jurisdiction waives the United States' sovereign immunity. Nor does Section 1983 provide a claim for relief against Secretaries Mattis and Spencer.

2. Public Law 88-82 Similarly Provides No Private Cause of Action Against the United States

The Complaint also fails to identify or reference any federal statute demonstrating that the United States waived its sovereign immunity for a cause of action to enforce Public Law 88-82. "A plaintiff may only bring a cause of action to enforce a federal law if the law provides a private right of action." *Nisqually Indian Tribe v. Gregoire*, 623 F.3d 923, 929 (9th Cir. 2010). In this case, unlike actions involving only private parties, Congress must *expressly* provide for a cause of action against the United States to enforce Public Law 88-82 before the Court may entertain this suit against the Government. *See Hassay v. Dep't of the Army*, 2017 U.S. Dist. LEXIS 136253, *8 (N.D. Cal. Aug. 24, 2017) ("no court has jurisdiction to award relief against the United States or a federal agency unless

the requested relief is expressly and unequivocally authorized by federal statute"); *Mitchell*, 445 U.S. at 538 ("In the absence of clear congressional consent, then, there is no jurisdiction . . . to entertain suits against the United States.").

Here, alleging that storage of SNF at SONGS is "illegal" and poses "a threat to the interests of the United States of America," Plaintiff asserts a single cause of action against the United States for "Violation of Public Law 88-82." Complaint, ¶¶ 9-15. However, nothing in the plain text of Public Law 88-82 expressly states that the United States is subject to suit for allegedly violating the authorization stated therein. *See generally* Public Law 88-82, attached as Ex. A to Complaint; *see also Lane v. Pena*, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text and will not be implied.") (internal citations omitted). Unless Plaintiff identifies statutory text that authorizes a cause of action against the United States to enforce Public Law 88-82, the Court lacks jurisdiction over Plaintiff's cause of action for "Violation of Public Law 88-82." *Mitchell*, 445 U.S. at 546 (holding that Indian General Allotment Act did not provide cause of action against the United States for alleged mismanagement of forests located on land allotted to Indians under the Act because the Act did not "unambiguously" provide that the United States had a fiduciary responsibility to respondents for management of allotted forest lands); *Hassay*, 2017 U.S. Dist. LEXIS 136253 at *8-9 (dismissing complaint that invoked several federal statutes, including the National Defense Authorization Act and the Health Insurance Portability and Accountability Act, because none provided a private cause of action against the United States and thus did not waive its sovereign immunity).

B. Plaintiff Lacks Article III Standing Because Plaintiff Does Not Allege an Injury in Fact That is Actual or Imminent

"Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Lance v. Coffman*, 549 U.S. 437, 439 (2007). The requirement that a plaintiff have standing is part of the case and controversy requirement of Article III. *Id.* At the "irreducible constitutional minimum," standing requires that Plaintiff demonstrate

the following: (1) an injury in fact (2) that is fairly traceable to the challenged action of the United States and (3) likely to be redressed by a favorable decision.[2] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also Edwards v. First Am. Corp.*, 610 F.3d 514, 515 (9th Cir. 2010) (to establish Article III standing, a plaintiff must show three elements: injury, causation, and redressability). Plaintiff must establish standing with respect to each form of relief sought. *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007).

Furthermore, any alleged injury in fact must be "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) ("The plaintiff must have suffered or be imminently threatened with a concrete and particularized 'injury in fact'. . . ."). As the Supreme Court has repeatedly stated, "[a]llegations of possible future injury do not satisfy the requirements of Art. III," and "[a] threatened injury must be 'certainly impending' to constitute injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

Plaintiff here alleges only that it, its members, and "the public generally are being harmed by Defendants' conduct." Complaint, ¶ 16. Nowhere in the Complaint does Plaintiff identify any specific or actual harm to any individual member caused by the storage of SNF at SONGS. Instead, "[b]y way of example," Plaintiff alleges only possible future injury based on hypothetical scenarios none of which are "certainly impending" or

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[2] The Complaint is unclear as to whether Plaintiff is suing on its own behalf, on behalf of its members, or both. In either case, Plaintiff must still satisfy the standing test set forth in *Lujan*, *i.e.*, injury in fact, causation, and redressability. *See La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (standing test set forth in *Lujan* "is used to determine whether an organizational plaintiff has standing in a particular case"); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000) ("association has standing to bring suit on behalf of its members when [1] its members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit").

"concrete and particularized." Complaint, ¶ 16. Specifically, Plaintiff hypothesizes that "tens of thousands of people within 50 miles of SONGS *could* be exposed" to radiation if, for example, a container with SNF "were to break open due to mishandling" or "corrosion caused by the proximity to salt-heavy ocean air and moisture." *Id.* (emphasis added). Thus, Plaintiff seeks prospective relief for an injury that *might* occur in the future *i.e.*, people "could be exposed."

An allegation that future injury is possible is not sufficient to establish standing. *See Clapper*, 568 U.S. at 409 ("allegations of possible future injury are not sufficient"). Nor is this possible future exposure "certainly impending." *Id.* (no standing where respondents could only speculate as to whether and how the Government might target communications to which respondents were a party). The possible exposure complained of here represents only a potential harm based on a hypothetical chain of events. In Plaintiff's mishandling example, the alleged future injury requires that some unspecified person or entity "mishandle" a storage container in some unspecified manner that will result in a release at some unspecified future time. Similarly, in Plaintiff's corrosion example, the alleged possible future exposure requires that the Court assume that certain weather patterns and/or conditions will exist at SONGS for some unknown period of time that will lead to corrosion of storage containers in some unspecified way that will result in a release at some unspecified future time. However, there is no evidence that SNF at SONGS is currently being "mishandled" such that a release is imminent. Nor is there any evidence that existing weather conditions are currently corroding SNF storage containers at SONGS to such a degree that a release is imminent. In fact, the "mishandling" and "corrosion" scenarios suggested by Plaintiff may never occur.

As the Supreme Court explained in *Lujan*, "although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Lujan*, 504 U.S. at 564, n.2 (emphasis in original); *see also Clapper*, 568 U.S. at 409. The concept is "stretched beyond the breaking point when . . . the plaintiff alleges

only an injury at some indefinite future time." *Lujan*, 504 U.S. at 564, n.2. That is the case here where Plaintiff not only alleges mere possible injury at some unknown future time, but also relies on a "highly attenuated chain of possibilities" to support the notion that a future release and exposure "could" occur. *See Clapper*, 568 U.S. at 410 ("theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending"). In short, the alleged exposure that Plaintiff believes "could" occur is purely speculative, not "certainly impending," and therefore does not qualify as an injury in fact sufficient to support standing in this case.

For the same reasons, an allegation that a "member" of Public Watchdogs lives "within the zone of exposure to a catastrophic release of radioactive material from SONGS" is insufficient to support standing. Complaint, ¶ 2. Again, there is no evidence or allegation that a release of any material has occurred or is about to occur at SONGS and thus is "certainly impending." Further, the Complaint fails to identify this "member" by name or specify what injury in fact this "member" has allegedly suffered or will suffer in the future, if any. *See Associated Gen. Contractors of Am., San Diego Chapter v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013) ("to prove the requisite injury to a member requires, first, specific allegations establishing that at least one *identified member* had suffered or would suffer harm") (emphasis in original).

Plaintiff's general grievance that the Government is not following the law, specifically Public Law 88-82, and its conduct is illegal and contrary to the interests of the United States also fails to establish standing. *See* Complaint, ¶ 15. The Supreme Court "has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Whitemore*, 495 U.S. at 160 (quoting *Allen v. Wright*, 468 U.S. 737, 754 (1984)); *see also Lance*, 549 U.S. at 439 (no Article III case or controversy exists when "a plaintiff raises only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that

no more directly and tangibly benefits him than it does the public at large"). Yet, it appears that, in fact, Public Watchdogs' sole purpose in pursuing this lawsuit is to enforce Public Law 88-82 and compel the United States to comply with the law. *See* Complaint, ¶ 2 (Plaintiff "serves as a public 'watchdog' to ensure that government agencies and special interests comply with applicable laws"). It is not enough for Plaintiff to complain that the United States is purportedly violating Public Law 88-82. *See Allen*, 468 U.S. at 755 (holding that respondents had "no standing to complain simply that their Government is violating the law").

In sum, Plaintiff's speculation about a possible future harm that may never come to pass and a general grievance that the United States is violating Public Law 88-82 fall far short of establishing an injury in fact. In the absence of any imminent future harm to Plaintiff or its members, Plaintiff improperly asks the Court to decide a case in which no injury might ever occur.

V. CONCLUSION

The United States did not waive its sovereign immunity with respect to the claims asserted by Plaintiff in the Complaint. Nor does Plaintiff have Article III standing to pursue a cause of action for "Violation of Public Law 88-82" because it has not identified any specific injury in fact that is actual or imminent. The United States therefore respectfully requests that the Court dismiss Plaintiff's Complaint for lack of jurisdiction and failure to state a claim.

DATED: January 19, 2018

Respectfully submitted,

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