APPENDIX

PETITION FOR A WRIT OF CERTIORARI

George Berka,
Petitioner,
v.
Andrew M. Cuomo,
Respondent.

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1. 2nd Circuit Court's Denial of Appeal:

N.D.N.Y.
20-cv-516
Suddaby, C.J.
Stewart, M.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of June, two thousand twenty-one.

Present:

Guido Calabresi,
Steven J. Menashi,
Circuit Judges,
Denise Cote,
*District Judge.**

* Judge Denise Cote, of the United States District Court for the Southern District of New York, sitting by designation.

George Berka,

Plaintiff-Appellant,

v.

21-908

Andrew M. Cuomo, both individually and in his official capacity,

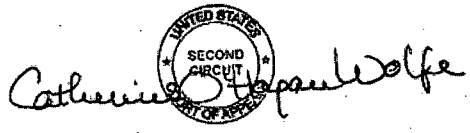
Defendant-Appellee.

Appellant, pro se, moves to add two parties to this appeal and for injunctive relief against those parties. Upon due consideration, it is hereby ORDERED that the motion is DENIED. *See Mullaney v. Anderson*, 342 U.S. 415, 417 (1952) (citing Fed. R. Civ. P. 21 for the proposition that parties may be added to litigation at any stage, but stating that this rule "will rarely come into play" on appeal); *Knaust v. City of Kingston*, 157 F.3d 86, 88 (2d Cir. 1998) (request for injunctive relief moot when it "seeks to enjoin the future occurrence of events that are already in the past").

Non-parties (which Appellant seeks to add and enjoin) move for leave to file a letter in opposition to Appellant's requests. This motion has been docketed as a motion for leave to file an amicus curiae brief. Upon due consideration, it is hereby ORDERED that the motion is GRANTED. *See* Fed. R. App. P. 29(a).

It is further ORDERED that the appeal is DISMISSED as moot, that the district court's judgment is VACATED, and the case is REMANDED with instructions to dismiss the action. *See United States v. Williams*, 475 F.3d 468, 479 (2d Cir. 2007) (The Court has an "independent obligation" to consider whether an appeal is moot.); *Bragger v. Trinity Capital Enter. Corp.*, 30 F.3d 14, 17 (2d Cir. 1994) ("When a civil case becomes moot while an appeal is pending, it is the general practice of an appellate court to vacate the unreviewed judgment granted in the court below and remand the case to that court with directions to dismiss it.").

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



CERTIFIED COPY ISSUED ON 06/02/2021

2. Opinion of the New York District Court at Albany:

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

GEORGE BERKA,
Plaintiff,
v. 1:20-cv-0516 (GTS/DJS)
ANDREW M. CUOMO (both individually and in his official capacity),
Defendant.

APPEARANCES:

GEORGE BERKA Plaintiff, *Pro Se*
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OF COUNSEL:

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Assistant Attorney General

GLENN T. SUDDABY, Chief United States District Judge

DECISION and ORDER

Currently before the Court, in this environmental action filed by George Berka ("Plaintiff") against Andrew M. Cuomo ("Defendant"), is Defendant's motion to dismiss Plaintiff's Complaint for lack of subject-matter jurisdiction and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and (6). (Dkt. No. 16.) For the reasons set forth below, Defendant's motion is granted.

I. RELEVANT BACKGROUND A. Plaintiff's Claims

Generally, liberally construed, Plaintiff's Complaint alleges that, between approximately January 8, 2017, and May 7, 2020, at the Indian Point Nuclear Plant ("Indian Point") in Buchanan, New York, Defendant wrongfully refused to grant Indian Point a permit to draw cooling water from the Hudson River, thus causing the premature and permanent shut down of Units 2 and 3 Indian Point, from which Plaintiff "likely" receives his power. (*See generally* Dkt. No. 1 [Plf.'s Compl.].) Based on these factual allegations, the Complaint asserts two claims: (1) a claim under the National Environmental Policy Act ("NEPA"), and (2) a claim under the Clean Air Act. (*See generally* Dkt. No.1 [Plf.'s Compl.].) Familiarity with these claims, and the factual allegations supporting them is assumed in this Decision and Order, which is intended primarily for review by the parties. (*Id.*)

B. Parties' Briefing on Defendant's Motion

Generally, in support of his motion to dismiss, Defendant asserts the following four arguments: (1) to the extent that the Complaint asserts claims for prospective injunctive relief against Defendant in his official capacity, those claims (even if supported by factual allegations plausibly suggesting a violation by Defendant of either NEPA or the Clean Air Act, which they are not) are barred by the Eleventh Amendment, because the "real, substantial party in interest" in those claims is New York State and thus the narrow exception provided by *Ex Parte Young* (for claims for prospective injunctive relief) does not apply; (2) to the extent that the Complaint asserts a claim under the Clean Air Act, its failure to allege facts plausibly suggesting compliance with the Clean Air Act's pre-suit notice requirement deprives the Court of subject- matter jurisdiction over that claim; (3) in any event, even if the Court were to have subject- matter jurisdiction over a claim asserted under NEPA, that claim should be dismissed for failure to state a claim because NEPA applies only to federal agencies and not to *state* agencies or officials; and (4) similarly, even if the Court were to have subject-matter jurisdiction over a claim asserted under the Clean Air Act, that claim should be dismissed for failure to state a claim because the Complaint identifies no violation of a concrete emission standard or limitation that is enforceable in a citizen suit under the Clean Air Act. (*See generally* Dkt. No. 16, Attach. 2 [Def.'s Memo. of Law].)

Generally, in response to Defendant's motion, Plaintiff asserts the following five arguments: (1) under *Ex Parte Young*, a claim for prospective injunctive relief against an official acting on behalf of a state is permitted where, as here, the State acts contrary to federal law (and there is a sufficient distinction alleged between the official's interest and the state's interest, which "there may be" here); (2) although it is true that the Complaint does not allege facts plausibly suggesting compliance with the Clean Air Act's pre-suit notice requirement, that requirement should be waived by the Court "[g]iven the seriousness of our climate crisis"; (3) even if Plaintiff's claim under NEPA were impermissible, his claim under the Clean Air Act should still suffice to warrant the relief he requests, or at the very least a claim would be permissible under New York State's equivalent to NEPA (New York State Environmental Quality Review Act or "SEQRA"); (4) Plaintiff's claim under the Clean Air Act is actionable because it does indeed identify a violation of a concrete emission standard or limitation under the Clean Air Act, specifically, the twelve-fold increase in carbon emissions that will be generated in the region by the closure of Indian Point (and the reliance instead on natural-gas-fired power plants); and (5) regardless of the foregoing, the Court should grant Plaintiff a default judgment against Defendant, because Plaintiff mailed his motion for default judgment to the Court on June 25, 2020, the day before Defendant filed his appearance (*See generally* Dkt. No. 18 [Plf.'s Opp'n Memo. of Law].)

Generally, in reply to Plaintiff's opposition, Defendant asserts the following four arguments: (1) Plaintiff makes no real attempt to dispute Defendant's Eleventh Amendment argument, and he fails to successfully refute Defendant's argument that the State is the real party in interest in Plaintiff's claims because the broad injunctive relief requested would interfere with public administration by preventing the State from administering its own laws and regulations); (2) Plaintiff concedes that he failed to comply with the Clean Air Act's pre-suit notice requirement, which is jurisdictional (and may not be waived); (3) to the extent that Plaintiff concedes that NEPA applies only to federal agencies and he now relies on SEQRA, he may not constructively amend his Complaint by asserting a new claim in an opposition memorandum of law and, even if he could do so, that new claim would not be actionable because it is subject a four-month limitations period (and here that period expired in May of 2017); and

(4) although Plaintiff cites his allegation of a twelve-fold increase in carbon emissions, he fails to identify any specific standard or limitation that Defendant allegedly violated. (*See generally* Dkt. No. 19 [Def.'s Reply Memo. of Law].)

II. RELEVANT LEGAL STANDARDS

A. Legal Standard Governing Motions to Dismiss for Lack of Subject-Matter Jurisdiction

A case is properly dismissed for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it. *Makarova v. U.S.*, 201 F.3d 110, 113 (2d Cir. 2000) (citing Fed. R. Civ. P. 12[b][1]). It is the burden of the plaintiff asserting subject-matter jurisdiction to prove, by a preponderance of the evidence, that it exists. *Id.* When a court evaluates a motion to dismiss for lack of subject-matter jurisdiction, "all ambiguities must be resolved and inferences drawn in favor of the plaintiff. *Aurecchione v. Schoolman Transp. Sys.*, Inc., 426 F.3d 635, 638 (2d Cir. 2005) (citing *Makarova*, 201 F.3d at 113).

B. Legal Standard Governing Motions to Dismiss for Failure to State a Claim

It has long been understood that a dismissal for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6), can be based on one or both of two grounds: (1) a challenge to the "sufficiency of the pleading" under Fed. R. Civ. P. 8(a)(2); or (2) a challenge to the legal cognizability of the claim. *Jackson v. Onondaga Cnty.*, 549 F. Supp.2d 204, 211, nn.15-16 (N.D.N.Y. 2008) (McAvoy, J., adopting Report-Recommendation on *de novo* review).

Because such dismissals are often based on the first ground, some elaboration regarding that ground is appropriate. Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a pleading contain "a *short and plain* statement of the claim *showing* that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) [emphasis added]. In the Court's view, this tension between permitting a "short and plain statement" and requiring that the statement "show[]" an entitlement to relief is often at the heart of misunderstandings that occur regarding the pleading standard established by Fed. R. Civ. P. 8(a)(2). On the one hand, the Supreme Court has long characterized the "short and plain" pleading standard under Fed. R. Civ. P. 8(a)(2) as "simplified" and "liberal." *Jackson*, 549 F. Supp.2d at 212, n.20 (citing Supreme Court case). On the other hand, the Supreme Court has held that, by requiring the above-described "showing," the pleading standard under Fed. R. Civ. P. 8(a)(2) requires that the pleading contain a statement that "give[s] the defendant *fair notice* of what the plaintiff's claim is and the grounds upon which it rests." *Jackson*, 549 F. Supp.2d at 212, n.17 (citing Supreme Court cases) (emphasis added).[1]

The Supreme Court has explained that such *fair notice* has the important purpose of "enabl[ing] the adverse party to answer and prepare for trial" and "facilitat[ing] a proper decision on the merits" by the court. *Jackson*, 549 F. Supp.2d at 212, n.18 (citing Supreme Court cases); *Rusyniak v. Gensini*, 629 F. Supp.2d 203, 213 & n.32 (N.D.N.Y. 2009) (Suddaby, J.) (citing Second Circuit cases). For this reason, as one commentator has correctly observed, the "liberal" notice pleading standard "has its limits." 2 *Moore's Federal Practice* § 12.34[1][b] at 12-61 (3d ed. 2003). For example, numerous Supreme Court and Second Circuit decisions exist holding that a pleading has failed to meet the "liberal" notice

pleading standard. *Rusyniak,* 629 F. Supp.2d at 213, n.22 (citing Supreme Court and Second Circuit cases); *see also Ashcroft v. Iqbal,*
129 S. Ct. 1937, 1949-52 (2009).

Most notably, in *Bell Atlantic Corp. v. Twombly*, the Supreme Court reversed an appellate decision holding that a complaint had stated an actionable antitrust claim under 15
U.S.C. § 1. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). In doing so, the Court "retire[d]" the famous statement by the Court in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Twombly*, 127 S. Ct. at 1968-69. Rather than turn on the *conceivability* of an actionable claim, the Court clarified, the "fair notice" standard turns on the *plausibility* of an actionable claim. *Id.* at 1965-74. The Court explained that, while this does not mean that a pleading need "set out in detail the facts upon which [the claim is based]," it does mean that the pleading must contain at least "some factual allegation[s]." *Id.* at 1965. More specifically, the "[f]actual allegations must be enough to raise a right to relief above the speculative level [to a plausible level]," assuming (of course) that all the allegations in the complaint are true. *Id.*
As for the nature of what is "plausible," the Supreme Court explained that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,*
129 S. Ct. 1937, 1949 (2009). "[D]etermining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . [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*, 129 S. Ct. at 1950 [internal quotation marks and citations omitted]. However, while the plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully," *id.*, it "does not impose a probability requirement." *Twombly*, 550 U.S. at 556.
Because of this requirement of factual allegations plausibly suggesting an entitlement to relief, "the tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by merely conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949.
Similarly, a pleading that only "tenders naked assertions devoid of further factual enhancement" will not suffice. *Iqbal*, 129 S. Ct. at 1949 (internal citations and alterations omitted). Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (citations omitted).
Finally, a few words are appropriate regarding what documents are considered when a dismissal for failure to state a claim is contemplated. Generally, when contemplating a dismissal pursuant to Fed. R. Civ. P. 12(b)(6) or Fed. R. Civ. P. 12(c), the following matters outside the four corners of the complaint may be considered without triggering the standard governing a motion for summary judgment: (1) documents attached as an exhibit to the complaint or answer, (2) documents incorporated by reference in the complaint (and provided by the parties), (3) documents that, although not incorporated by reference, are "integral" to the complaint, or (4)
any matter of which the court can take judicial notice for the factual background of the case.[2]

C. Legal Standards Governing Plaintiff's Claims

Because the parties to this action have demonstrated, in their memoranda of law, an accurate understanding of the relevant points of law contained in the legal standards governing Plaintiff's claims, the Court will not recite, in their entirety, those legal standards in this Decision and Order, which (again) is intended primarily for review by the parties.

(*See generally* Dkt. No. 16, Attach. 2 [Def.'s Memo. of Law]; Dkt. No. 18 [Plf.'s Opp'n Memo. of Law]; Dkt. No. 19 [Def.'s Opp'n Memo. of Law].)

III. ANALYSIS

A. Whether the Court Lacks Subject-Matter Jurisdiction Over Plaintiff's Claims

After carefully considering the matter, the Court answers this question in the affirmative for the reasons stated in Defendant's memoranda of law. (Dkt. No. 16, Attach. 2 [Def.'s Memo. of Law]; Dkt. No. 19 [Def.'s Reply Memo. of Law].) To those reasons, the Court adds only three points. First, Plaintiff is correct that *Ex Parte Young* permits an exception to the general bar of federal court jurisdiction over claims against a State or against a state official acting in his or her official capacity who is violating or plans to violate federal law. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326-27 (2015). However, this exception is narrow and applies only where the relief sought is prospective and not compensatory or otherwise retrospective. *Ex Parte Young*, 209 U.S. 123, 155-56 (1908) (explaining that officers of the state "may be enjoined by a Federal court of equity" when attempting to enforce against parties an "unconstitutional act"). Moreover, applied correctly, *Young* would not permit a federal-court action to proceed in every case where prospective declaratory relief is sought against an official acting in his or her official capacity. *See Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253-54 (2011) ("[A]bsent waiver or valid abrogation, federal court may not entertain a private person's suit against a State."). The Supreme Court explained that such an action would undermine the very principle which the Eleventh Amendment relies, which is to impose a "real limitation" on a federal court's jurisdiction. *Va. Office for Prot. & Advocacy*, 563 U.S. at 270 (Roberts, C.J., dissenting) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 270 [1997]). "The general rule is that relief sought nominally against [a State] officer is in fact against the sovereign if the decree would operate against the latter." *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963); *accord, Pennhurst State Sch. v. Halderman*, 465 U.S. 89, 101 (1984). In this case, although Plaintiff argues that "there may be" a sufficient distinction alleged between Defendant's interest and New York State's interest to avoid the application of the Eleventh Amendment, he has failed to allege facts plausibly suggesting that such a distinction exists here.

Second, even if the Eleventh Amendment were not to bar the Court from exercising jurisdiction here, Plaintiff's failure to provide adequate notice as required by the Clean Air Act would prevent the Court from entertaining that claim. The Clean Air Act's plain language clearly requires pre-suit notification by a plaintiff, which must occur sixty days prior to the commencement of any action under the statute. 42 U.S.C. § 7604(b)(1)-(2). The Clean Air Act is not unique in its mandatory pre-suit notification requirement for citizen-suits; nor is the mandate a flexible one. As the Supreme Court made clear in *Hallstrom v. Tillamook Cty.*, "Because this language is expressly incorporated by reference . . . it acts

as a specific limitation on a citizen's right to bring suit. Under a literal reading of the statute, compliance with the 60-day notice provision is a mandatory, not optional, condition precedent for suit." 493 U.S. 20, 26 (1989). "[A] district court may not disregard these requirements at its discretion." *Hallstrom*, 493 U.S. at 31. Although *Hallstrom* concerned the citizen-suit provision of the Resource Conservation and Recovery Act, the Clean Air Act expressly includes an identical 60-day notification requirement that the Supreme Court already declared to be a mandatory condition precedent that Plaintiff must fulfil before filing this action. *Hallstrom*, 493 U.S. at 26.

Despite Plaintiff's desire for the Court to make an exception to this requirement, there is no precedent to support his position that the Court can ignore federal law. *Id.* at 27. "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' to preserve their claims." *Id.* The rationale that militates against a Court-granted waiver of pre-suit notice is to serve the ultimate goals Congress had when it created the requirement, which is to strike a balance between "encouraging citizen suits and avoiding burdening the federal courts with excessive numbers of suits" and, most importantly, to allow government agencies to cure violations without the need for litigation. *Id.* The Court notes that it has been unable to find any cases waiving this requirement under the Clean Air Act.[3] Furthermore, even if waiver were permissible, the Court would not find it appropriate here.

In following *Hallstrom* and its progeny, the Court narrowly construes the notice provisions of environmental statutes as a jurisdictional prerequisite. *Roe v. Wert*, 706 F. Supp. 788, 792 (W.D. Okla. 1989). Even in extreme cases, such as those concerning pollution by hazardous substances, the mandate for requiring pre-suit notification does not falter. 42 U.S.C. § 6972(b)(1)(A) ("[S]uch action may be brought immediately after such notification"). Because the requirement is jurisdictional, a plaintiff must plead compliance with the requirement to state a claim. "[T]he giving of a 60–day notice is not simply a desideratum; it is a jurisdictional necessity." *Ctr. For Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d 794, 800 (9th Cir. 2009).

Here, because Plaintiff failed to plead facts plausibly suggesting that he has afforded Defendant the 60-day notice required by the plain language of the statute, he has failed to meet a mandatory condition precedent to maintain a citizen-suit in federal court, and the Court thus lacks subject-matter jurisdiction over Plaintiff's Clean Air Act claim. *Nat'l Parks & Conservation Ass'n, Inc. v. Tennessee Valley Auth.*, 502 F.3d 1316, 1329 (11th Cir. 2007); *Envtl. Integrity Project v. United States Envtl. Prot. Agency*, 160 F. Supp. 3d 50, 55 (D. D.C. 2015).

Third, even setting aside the two above-described jurisdictional pitfalls, the Court has trouble finding that Plaintiff has standing, given the speculative nature of his alleged injury. (*See, e.g.*, Dkt. No. 1, at 3 [Plf.'s Compl., alleging that he "likely receives power from the Plant"]; Dkt. No. 18, at 5 [Plf.'s Opp'n Memo. of Law, arguing that he is "very likely" a consumer].)

B. Whether, in the Alternative, Plaintiff's Claims Should Be Dismissed Because He Failed to State a Claim Upon Which Relief Can Be Granted

After carefully considering the matter, the Court answers this question in the affirmative for the reasons stated in Defendant's memoranda of law. (Dkt. No. 16, Attach. 2 [Def.'s Memo. of Law]; Dkt. No. 19 [Def.'s Reply Memo. of Law].) To those reasons, the Court adds only three points.

First, NEPA imposes environmental obligations on federal agencies, not on the several states or their executive officers. 42 U.S.C. § 4331(a). Although the statute provides that federal agencies should seek cooperation from the several states in maintaining environmental standards, such cooperation by the states is not required by law under NEPA: "[I]t is the continuing responsibility of the *Federal Government* . . . to improve and coordinate *Federal plans*. . . ." *Id.* at § 4331(b) (emphasis added). Here, were the Court to find that Plaintiff's Complaint sufficiently alleges a violation under NEPA (which the Court does not), such a claim could not be sustained against a state agency or official. Because Plaintiff's Complaint is directed against the Governor of New York (in both his individual and official capacity), Plaintiff fails to state an actionable claim under NEPA. Fed. R. Civ. P. 12(b)(6).

Second, despite the fact that Defendants have failed to appreciate the breath of the special solicitude afforded to *pro se* civil rights plaintiffs (which permits them to constructively amend their complaint, in certain circumstances, through an opposition to a motion to dismiss), Plaintiff has nevertheless failed to state a claim due to his failure to abide by the four-month statute of limitations. Where a plaintiff is proceeding *pro se*, factual assertions in the plaintiff's opposition to a motion to dismiss may be considered and treated as an amendment to the complaint, if those factual assertions are consistent with those of the complaint. *Holmes v. Fresh Direct*, 13-CV-4657, 2015 WL 4885216, at *3 (E.D.N.Y. Aug. 5, 2015) (citing *Rosales v. Kikendall*, 605 F. App'x 12, 15 [2d Cir. 2015]). Here, as a threshold matter, the Court has difficulty finding the new factual allegations even consistent with those of Plaintiff's detailed Complaint. In any event, Plaintiff has failed to explain, let alone even address, why the four-month statute of limitations period has been complied with or should be tolled, given the new factual allegations. For these reasons, the Court finds the defects in Plaintiff's NEPA claim (and proposed SEQRA claim) substantive and not merely formal such that better pleading would not cure them.

Third, Plaintiff's claim under the Clean Air Act does not cite a specific violation, emission standard or limitation set by the Clean Air Act. Granted, Plaintiff relies on his allegation of a twelve-fold increase in carbon emissions that would be generated in the region by the closure of Indian Point (and the reliance instead on natural-gas-fired power plants). (Dkt. No. 1, at 4.) However, even setting aside the attenuated causal link between this alleged increase and the closure of Indian Point, Plaintiff fails to allege any facts plausibly suggesting what particular emissions standard or limitation of the Clean Air would be violated by the alleged increase (and the Court has trouble identifying one).

Finally, the Court denies Plaintiff's request for a default judgment for two reasons: (1) that request is moot, given the Court's dismissal of his claims, and (2) in any event, that request was denied on July 13, 2020. (Dkt. No. 15.)

For all of these alternative reasons, the Court finds that Plaintiff's claims are dismissed.

ACCORDINGLY, it is

ORDERED that Defendant's motion to dismiss (Dkt. No. 16) is **GRANTED**; and it is further

ORDERED that Plaintiff's Complaint (Dkt. No. 1) is **DISMISSED**.

Dated: March 26, 2021
Syracuse, New York

1 *Accord, Flores v. Graphtex*, 189 F.R.D. 54, 54 (N.D.N.Y. 1999) (Munson, J.); *Hudson v. Artuz*, 95-CV-4768, 1998 WL 832708, at *1 (S.D.N.Y. Nov. 30, 1998); *Powell v. Marine Midland Bank*, 162 F.R.D. 15, 16 (N.D.N.Y.1995) (McAvoy, C.J.).

2 *See* Fed. R. Civ. P. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."); *L-7 Designs, Inc. v. Old Navy, LLC*, No. 10-573, 2011 WL 2135734, at *1 (2d Cir. June 1, 2011) (explaining that conversion from a motion to dismiss for failure to state a claim to a motion for summary judgment is not necessary under Fed. R. Civ. P. 12[d] if the "matters outside the pleadings" in consist of [1] documents attached to the complaint or answer, [2] documents incorporated by reference in the complaint (and provided by the parties), [3] documents that, although not incorporated by reference, are "integral" to the complaint, or [4] any matter of which the court can take judicial notice for the factual background of the case); *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) (explaining that a district court considering a dismissal pursuant to Fed. R. Civ. 12(b)(6) "may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint. . . . Where a document is not incorporated by reference, the court may neverless consider it where the complaint relies heavily upon its terms and effect, thereby rendering the document 'integral' to the complaint. . . . However, even if a document is 'integral' to the complaint, it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document. It must also be clear that there exist no material disputed issues of fact regarding the relevance of the document.") [internal quotation marks and citations omitted]; *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2009) ("The complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference.") (internal quotation marks and citations omitted); *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir.1995) (per curiam) ("[W]hen a plaintiff chooses not to attach to the complaint or incorporate by reference a [document] upon which it solely relies and which is integral to the complaint," the court may nevertheless take the document into consideration in deciding [a] defendant's motion to dismiss, without converting the proceeding to one for summary judgment."). (internal quotation marks and citations omitted).

3 Although there was a split of authority amongst U.S. Circuit Courts regarding the strictness in which Courts should construe the pre-suit notice requirements of various environmental statutes, this split was resolved by *Hallstrom*. Before *Hallstrom*, some circuits adopted the "pragmatic/functional doctrine" which found subject-matter jurisdiction despite the lack of pre-suit notice by one of three factors: (1) determining notice-in-fact; (2) staying proceedings until the notice time had run; or (3) finding notice was procedural rather than jurisdictional. *Proffitt v. Commissioners*, 754 F.2d 504, 506 (3rd Cir.1985) (Federal Water Pollution Control Act ("FWPCA"), and RCRA); *Hempstead County & Nev. County Project v. U.S.E.P.A.*, 700 F.2d 459, 463 & n. 5 (8th Cir.1983) (RCRA); *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 243 (3rd Cir.1980), *cert. denied*, 449 U.S. 1096 (1981) (National Environmental Policy Act); *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 83-84 (2nd Cir.1975) (FWPCA); *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 703 (D.C.Cir.1974) (Clean Air Act). However, the Supreme Court's holding in *Hallstrom* effectively nullified the pragmatic/functional doctrine, and instead endorsed the jurisdictional prerequisite doctrine, which is the approach taken by the Court here.

3. Plaintiff's Original Complaint:

George Berka
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(203) 681-7035 |
gberka57@comcast.net

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

George Berka, Plaintiff, vs. ANDREW M. CUOMO, (BOTH INDIVIDUALLY AND IN HIS OFICIAL CAPACITY), Defendant	Case No.: 20-cv-516 PLEADING TITLE

COMES NOW GEORGE BERKA, pro-se Plaintiff, and for cause of action states, alleges, and complains as follows:

I. PARTIES

1.1 George Berka, the Plaintiff, resides in Waterbury, New Haven County, Connecticut.

1.2 Governor Andrew M. Cuomo is currently the Governor of the State of New York, with his office located in Albany, New York.

II. JURISDICTION AND VENUE

2.1 Jurisdiction and venue are proper in the United States District Court for the Northern District of New York, because the property which is the subject of this action, the Indian Point Nuclear Power Plant, is located in New York State, because this action is between a private citizen and a government entity (the Governor of New York), and because the parties in this action reside in separate states (Connecticut and New York).

2.2 **Nuclear Matters and the Hobbs Act.** The Plaintiff is aware of the provision that certain nuclear matters are generally appealed directly to the Federal Appeals Court, per the Hobbs Act. However, the Plaintiff believes this rule to apply mainly to "more direct" nuclear matters, such as appeals from decisions of the Nuclear Regulatory Commission. This is a dispute between the Governor of the State of New York and a private citizen from Connecticut, about certain "obstructionist efforts" on the part of the Governor's Office, such as the denial of water permits from the Hudson River, that helped bring about the closure of the Plant. (The Nuclear Regulatory Commission is not a party to this action.) For this reason, the Plaintiff believes that this matter does not belong in the Federal Appeals Court, and that this Court is the proper jurisdiction and venue.

III. FACTUAL BACKGROUND

3.1 The Indian Point Nuclear Power Plant, (hereafter known as the "Plant" or as "Indian Point"), had been in operation since about 1976, and used to supply about 25% of the

electricity used by New York City and its surrounding area, all of it carbon-free. It is likely that some of this electricity is also used by homes and businesses in neighboring Connecticut. (See S.E.C. Docket 866, Volume 46, No. 11, which states that the "New England region, as a whole, is more closely connected electrically to New York than to any other adjoining state or Canadian province, and that it relies heavily on new York utilities [and power plants] to provide power directly to New England when it cannot be supplied by utilities within New England". Power is transferred through a 345 kilovolt interconnection between Pleasant Valley, New York, and New Milford, Connecticut, among others.)

3.2 One of the Plant's two reactors shut down at the end of April of 2020, with the other reactor scheduled to close within a year. After the Plant ceases operations, its output is expected to replaced primarily by natural gas fired generation, which will cause local and regional carbon emissions to increase.

3.3 Next, since the Plant is able to operate reliably in cold temperatures, and to maintain an extended fuel supply on site, the Plant helps to protect New York and New England home owners from extreme weather events, such as the polar vortex. During events of extreme cold such as this, natural gas is often prioritized for home heating, leading to a reduction in its availability for electrical generation. Not only does this cause the price of electricity to spike, but the negative impacts of this can be more than economic, and may even put New York and New England home owners at risk. During the 2016 polar vortex, for example, certain oil supplies had to be delivered by truck and barge to supply the oil-fired "peaker" power plants in New England. Frozen rivers made oil delivery by barge problematic in some cases, leaving trucks as the only viable option. In areas where roads where obscured by ice, snow, or accidents, a few plants actually came perilously close to running out of fuel, which could have resulted in power outages. During prolonged periods of such extreme cold, power outages may even be life-threatening, since many home heating systems also need electricity to operate. This is just one example of how having a power plant such as Indian Point on line helps guard against exactly these types of events; it's 2060 – megawatt, continuous electrical output helps ensure a steady supply of electricity, freeing up natural gas to be used primarily for home heating, without fear of creating power outages. Hence, it may be reasonably argued that the loss of Indian Point will make not only the local and regional electrical grid, but also the local and regional energy supply in general, less reliable, and less tolerant of extreme weather events.

3.4 **Standing.** The Plaintiff believes that he has standing in this matter because, as a New England home owner, he is a potential end user of Indian Point's power; i.e., some of the power from Indian Point flows to the Plaintiff's home through the shared electrical grid between New York and New England. Also, since it is not fueled by natural gas, Indian Point helps to protect the Plaintiff during extreme weather events, such as the Polar Vortex,

IV. AGRUMENT

4.1 **Nature of Relief Requested:** The Plaintiff hereby seeks to give Entergy, the current owner of Indian Point, or any future owner, a free and unobstructed opportunity to continue operating the Plant, as it has done in the past. The Plaintiff seeks to have Mr. Andrew Cuomo, the Governor of the State of New York, and his Office, along with any future governors, enjoined from interfering with the continued operation of Indian Point, for a period of twenty – five calendar years from the date of this Complaint. "Interference" in this context may be interpreted as, (but not limited to), any number of actions seeking to

thwart or halt the continued operation of the Plant, such as the denial of a permit to draw cooling water for the Plant from the Hudson River. In short, the Plaintiff seeks to have the Plant be solely under the jurisdiction and authority of the Nuclear Regulatory Commission, as it has been. If the N.R.C. approves the extension of the Plant's operating license, the Plant should be permitted to continue to operate, free from local interference and obstructionism.

4.2 **Applicable Law**: The Plaintiff brings his Claim in accordance with the National Environmental Policy Act, U.S. Code Title 42, Chapter 55, Paragraph 4321. In general, when a nuclear power reactor closes, it is typically replaced with natural gas fired electrical generation, which produces much higher air pollution and carbon dioxide emissions than the nuclear source that it replaced. This situation runs counter to the spirit and intent of Paragraph 4321, which aims to: *"declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man."* Given the fact that the carbon dioxide emissions of this new natural gas plant are about 60% of those of an equivalent coal plant, (up from the mere 5% or so that the nuclear plant used to generate), replacing shuttered nuclear plants with natural gas fired plants is definitely a step backwards from a climate standpoint. Also, in light of the now well – understood link between carbon emissions and global warming, the importance of Paragraph 4321 takes on a whole new meaning; lowering carbon dioxide levels in the atmosphere (not raising them) is a necessary step to *"prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man"*. Keeping the ultra – clean, and virtually carbon – free, nuclear generating stations on – line is one way to help accomplish this step. In addition to Paragraph 4321 above, the Plaintiff also cites the Clean Air Act, U.S. Code Title 42, Chapter 85, Subchapter I, Part A, Paragraph 7401. Sections (a)(2) and (c) of this paragraph also apply; *"the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation."* This does apply to the rising levels of carbon dioxide in the atmosphere, which are likely to endanger public health and welfare, injure agricultural crops and livestock, and damage property, through rising air temperatures, which will likely cause melting ice sheets, rising ocean levels and coastal flooding, along with more severe wild fires, hurricanes, and droughts. We have witnessed many of these events first hand in recent years. Next, Section (c) also applies; i.e., *"A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention."* Promoting the continued operation of nuclear generating stations would certainly constitute an action that would help prevent pollution.

4.3 **Likelihood of Success on the Merits:** There is now a well understood and generally accepted causal link between carbon emissions and global warming, which is projected to threaten the existence and well-being of man, through events such as more severe droughts, wild fires and hurricanes, as well as rising sea levels, fresh water shortages, habitat destruction, the extinction of endangered species, and reduced crop yields, among others. We have recently witnessed many of these events first hand, such as Hurricane

Sandy, which flooded parts of Manhattan and New Jersey. All of our existing assets should be utilized to combat the threat of climate change and global warming.

4.4 Due to their unique ability to consistently provide large quantities of carbon-free electricity, around the clock, for months and even years at a time, existing nuclear power plants are some of our most potent tools in our struggle against climate change. Keeping existing nuclear power plants in service, and perhaps even returning previously – shuttered plants into service, may be significantly more economical than building new nuclear plants, or attempting to replace the lost capacity with renewable sources, such as wind and solar. It may take less time to accomplish in certain cases as well.

4.5 Prematurely shutting down carbon-free electrical power sources, such as nuclear power plants, and replacing them with carbon-emitting electrical power sources, such as natural gas fired power plants may be considered "a step backwards" from a climate standpoint, and should be avoided. It also runs counter to the National Environmental Policy Act, U.S. Code Title 42, Chapter 55, Paragraph 4321, as mentioned above.

4.6 **Irreparable Harm**: If global temperatures continue to rise, they may place the Plaintiff and his fellow New Englanders in increased risk of losing his home to extreme weather events such as hurricanes. Next, for the reasons explained in Paragraph 3.3 above, the Plaintiff and his fellow New Yorkers and New Englanders may be endangered by an over-reliance on natural gas fired electrical generation in a region prone to prolonged periods of extreme cold, such as the Polar Vortex. Finally, it should also be mentioned that shutting down a reliable electrical generator in the middle of a national health emergency such as the corona virus epidemic is not wise, may needlessly endanger patients' lives, and should be avoided.

4.7 **Balancing of the Equities**: In cases such as these, the Court should exercise its discretion in favor of the party "most likely to be injured". The party "most likely to be injured" in this case is the Plaintiff, along with thousands of his fellow home owners across the New York City and New England region, who depend on the Plant's continued, reliable power. The Governor of the State of New York, however, is not likely to be injured at all by having his efforts to close the Plant over-ridden. Moreover, preservation of this Plant will result in the return of a valuable, income-generating asset which will benefit the Town of Buchanan and the local community.

V. CONCLUSION

In light of the above, the Plaintiff hereby respectfully requests this Court to over-ride any of Governor Cuomo's actions to close the Indian Point Nuclear Power Plant, and to permit this Plant to continue operating in an unobstructed manner for the next 25 calendar years.

Dated this 30th Day of April, 2020

George Berka

George Berka
Plaintiff, Pro-Se

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of July, two thousand twenty-one,

Present: Guido Calabresi,
Steven J. Menashi,
Circuit Judges,
Denise Cote,
District Judge.*

George Berka,

Plaintiff - Appellant,

v.

Andrew M. Cuomo, both individually and in his official capacity,

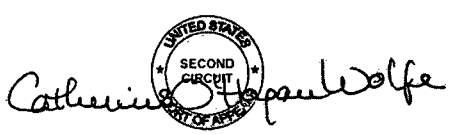
Defendant - Appellee.

ORDER
Docket No. 21-908

Appellant George Berka filed a motion for reconsideration and the panel that determined the motion has considered the request.

IT IS HEREBY ORDERED, that the motion is denied.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court



* Judge Denise Cote, of the United States District Court for the Southern District of New York, sitting by designation.