

Supplemental Appendix A

**Affidavit of Petitioner Simon V. Kinsella
in Support of Supplemental Brief**

(September 21, 2023)

I, Simon V. Kinsella, Petitioner *pro se*, being duly sworn, say under penalty of perjury:

- 1) I am a resident of Wainscott in the Town of East Hampton, State of New York.
- 2) On July 20, 2022, I filed a Freedom of Information Act (“FOIA”) Complaint against Defendants Bureau of Ocean Energy Management (“BOEM”), the U.S. Department of the Interior (“DOI”), and the U.S. Environmental Protection Agency (“EPA”) (collectively, “Federal Defendants”) (*see* D.D.C., 1:22-cv-02147, ECF #1).
- 3) The pleading to which no response has been made was served according to Rule 4 of the Federal Rules of Civil Procedure, as follows—
 - a. A Summons and Complaint were sent (return receipt acknowledged) by the U.S. Attorney General (Department of Justice Department), U.S. Attorney for the District of Columbia, U.S. Department of the Interior, U.S. Bureau of Ocean Energy Management, and U.S. Environmental Protection Agency (*see* E.D.N.Y., 2:23-cv-02915, ECF #77-3, PDF 1-19).
 - b. South Fork Wind LLC (“SFW”) was served notice of the Complaint as a potential joinder party (*id.*, PDF 25-26).

- 4) The U.S. District Court for the District of Columbia ordered Federal Defendants “to file its responsive pleading to the Complaint in this lawsuit ... *thirty days after ... the case is transferred and a new docket number and judge is assigned* ... Signed by Judge Jia M. Cobb on 9/13/2022” (emphasis added) (*id.*, PDF 50, Civil Docket MINUTE ORDER, 09/13/2022).
- 5) On November 2, 2022, Pl.-Petitioner filed an amended complaint as of right against Federal Defendants *only* (SFW was a named potential joinder party) (*see* D.D.C., 1:22-cv-02147, ECF 34-2).
- 6) On November 7, 2022, the U.S. District Court for the District of Columbia granted South Fork Wind’s Motion to Intervene and “ORDERED that Intervenor-Defendant South Fork Wind, LLC shall file its Answer or other responsive pleading on the same date as Federal Defendants[,]” thirty days after the case is transferred and a new docket number and judge is assigned (*see* ¶ 4). *See* Order (E.D.N.Y., 2:23-cv-02915, ECF #77-3, at PDF 2) (Supp App 3a-4a).
- 7) During a hearing on November 9, 2022, the district court for the District of Columbia accepted Pl.-Petitioner’s amended complaint— “I will grant ... Mr. Kinsella’s motion to amend the complaint, which he was free to do as a matter of course at this stage of the proceedings ... when we are referring ... to any allegations, we are all talking about the same operative complaint” (*see* D.C. Cir., No. 22-5317, Doc. 1994062-11, November 9 Hearing Tr., at 2:20-25 and 21:1-2).

Also, see E.D.N.Y., 2:23-cv-02915, ECF #77-3, at PDF 53, Minute Order, 11/10/2022).

- 8) On November 10, 2022, the district court for D.C. “**ORDERED** that this civil action is **TRANSFERRED** to the United States District Court for the Eastern District of New York” (*see* D.D.C., 22-cv-02147, ECF 48-49) (Cert. Petition, App 8a-19a).
- 9) On November 29, 2022, Pl.-Petitioner filed a Petition for a Writ of Mandamus challenging the district court’s transfer order (*see* D.C. Cir., No. 22-5317, Doc. 1975638) and an **amended petition** on December 7, 2022 (*id.*, Doc. 1976909).
- 10) On February 23, 2023, Circuit Judges Wilkins, Rao, and Walker ordered “that the United States and South Fork Wind, LLC to enter appearances and file responses to the mandamus petition ... within 30 days” (*see* D.C. Cir., No. 22-5317, Doc. 1987203) (Cert. Petition, App 7a), which they did (on March 27, 2023). Pl.-Petitioner filed a timely reply (*id.*, Doc. 1994449, corrected).
- 11) On April 19, 2023, in what appeared to be an attempt to evade appellate scrutiny, the district court for D.C. transferred the case to the E.D.N.Y. *before* the court of appeals ruled on the mandamus petition. “The case of **Kinsella v. Bureau of Ocean Energy Management et al.** has been transferred from the **U.S. District Court, District of Columbia**, to the Eastern District of New York. The new case number is **23-cv-2915-GRB-SIL**” (*see* E.D.N.Y., 23-cv-02915, ECF 77-3, at PDF 62). Pl.-Petitioner filed an

emergency motion to return the files to the district court for D.C. (*see* D.C. Cir., No. 22-5317, Doc. 1995489).

- 12) On April 24, 2023, a D.C. Circuit order confirmed that “the case was transferred prematurely and in error ... [and] [t]he case in the Eastern District of New York, No. 2:23-cv-02915, has been administratively closed” (*id.*, Doc. 1996148) (Cert. Petition, App 6a and 20a).
- 13) The next day (April 25, 2023), the district court for the E.D.N.Y., Chief Judge Margo K. Brodie, ordered that the “[c]ase [be] reassigned to Judge Frederic Block and Magistrate Judge Steven Tiscione (as related to 22-cv-1305) for all further proceedings” (*see* Cert Petition, App 20a-21a). Pl.-Petitioner had *not* been informed that his case had been reassigned.
- 14) On May 1, 2023, District Judge Frederic Block reopened the E.D.N.Y. case— “ELECTRONIC ORDER REOPENING CASE: Ordered by Judge Frederic Block on 5/1/2023” (*see* Cert Petition, App 21a). Pl.-Petitioner had *not* been informed that his case had been reopened in the E.D.N.Y.
- 15) On May 16, 2023 (at 9:02 p.m.), concerned about agency malfeasance by BOEM and continuing (unlawful) construction it had approved, Pl.-Petitioner filed a motion for a temporary restraining order and preliminary injunction enjoining SFW’s construction activities.
- 16) On May 17, 2023 (12:10 p.m.), only hours after the motion had been filed, a new panel, Circuit Judges Millet, Pillard, and Rao, decided the case

(initially assigned to Circuit Judges Wilkins, Rao, and Walker). The new panel immediately denied Pl.-Petitioner's mandamus petition, thus affecting transfer, and denied the injunctive relief filed only hours before (*see* Cert. Petition, App 4a-5a). Such a swift decision left little time for consideration on the merits.

- 17) According to D.C. Circuit Local Rule 41(3), “[n]o mandate will issue in connection with an order granting or denying a writ of mandamus ... but the order or judgment ... will become effective automatically 21 days after issuance ...” Therefore, the transfer order of May 17 (*see* ¶ 16), became effective on June 7, 2023 (21 days later).
- 18) Given that D.C. District Judge Cobb ordered Federal Defendants and Defendant-Intervenor SFW to file their responsive pleading to the amended complaint thirty days after the case was transferred (*see* ¶¶ 4 and 6), and the transfer order of May 17 (*see* ¶ 16), became effective 21 days later on June 7, 2023 (*see* ¶ 17), the deadline for filing responsive pleading was **July 7, 2023**.
- 19) On May 18, 2023, the day after the D.C. Circuit ordered Pl.-Petitioner's mandamus petition be denied, thus affecting transfer (*see* ¶ 16), the E.D.N.Y. court ordered that “[p]laintiffs motion [in D.D.C., No. 1:22-cv-02147, ECF] 35 for a preliminary injunction [be] DENIED. Ordered by Judge Frederic Block on 5/18/2023” (*see* Cert. Petition, App 21a and 28a-35a). The E.D.N.Y. court denied Petitioner's preliminary injunction twenty days *before* the transfer had become effective. The (unlawful) order denying Petitioner a

preliminary injunction was *not* without prejudice. Petitioner had *not* been notified and was unaware of the proceedings. There was no hearing. The E.D.N.Y. court ignored Petitioner's five fraud claims and the amended complaint as if it, the defendants, and the fraud claims do not exist. Judge Block's order was without power.

20) As of September 12, 2023, neither Federal Defendants nor SFW has filed answers to the amended complaint Pl.-Petitioner filed over ten months ago (on November 2, 2022) (*see* D.D.C., 22-cv-02147, ECF 34-2). Federal Defendants did not file answers to the (original) complaint Pl.-Petitioner filed over thirteen months ago (on July 20, 2022) (*id.*, ECF 1) and did not respond to the cross-motion for (partial) summary judgment and statement of material facts where there is no genuine dispute Pl.-Petitioner filed over eleven months ago (on September 26, 2022) (*id.*, ECF 21).

E.D.N.Y. District Court

21) On June 16, 2023, Defendant-Intervenor SFW filed a letter motion ("**SFW Letter Motion**") "request[ing] a pre-motion conference regarding SFW's intent to file a partial motion to dismiss all but the Freedom of Information Act ("FOIA") claim in Plaintiff Simon V. Kinsella's ("Plaintiff") First Amended Complaint ("Complaint") under Federal Rule of Civil Procedure 12(b)" (*see* E.D.N.Y., 23-cv-02915, ECF 66, at 1, 1st ¶).

22) The SFW Letter Motion provides the following reason for dismissing Petitioner's claims—

“First, Plaintiff lacks Article III standing. See, e.g., Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992) (standing requires: (1) injury-in-fact; (2) causal connection between the injury and the conduct complained of; and (3) likelihood that the alleged injury will be redressed by a favorable decision). Plaintiff’s allegations that onshore cable construction will exacerbate pre-existing per- and polyfluoroalkyl substance (“PFAS”) contamination, that wind farm construction will lead to increased cod prices, and that the Project will spur other wind energy projects in the Town are speculative and do not state concrete, particularized, actual, or certainly imminent injuries as a matter of law. Further, Plaintiff’s alleged injuries are not fairly traceable to Federal Defendants’ Project approvals, as onshore construction work was authorized by the NYSPSC and the Town, not Federal Defendants, and the economic claims associated with declining cod populations over the past decade are not attributable to any action by Federal Defendants in connection with this Project. Finally, a decision in Plaintiff’s favor on claims relating to onshore and nearshore work that are within the jurisdiction of state and local government and asserted economic harms, will not redress his alleged injuries because they are not fairly traceable to Federal Defendants’ Project approvals. Even if Federal Defendants’ approvals for the Project were set aside, that relief would not affect the nearshore work or the now-complete onshore cable over which Federal Defendants lack jurisdiction, see Mem. And

Order, Kinsella, ECF #56 at 7, nor the economic harms Plaintiff claims.”

“*Second*, Plaintiff’s claims regarding onshore Project siting and construction are now moot because the construction of the underground transmission cable is complete and the Court can no longer grant Plaintiff any effective relief for these claims. “[W]hen it becomes impossible for the courts, through the exercise of their remedial powers, to do anything to redress” the alleged injury, there is no Article III case or controversy to resolve, such that the action is moot and the Court lacks subject matter jurisdiction. *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993) (quotations omitted); *see also Powers v. Long Island Power Auth.*, 2022 WL 3147780, at *3 (2d Cir. Aug. 8, 2022) (dismissing claims as moot because construction at center of claims was completed). When a party seeks to enjoin a construction project—including in NEPA cases—the case becomes moot when the construction is completed. *See, e.g., Strykers Bay Neighborhood Council, Inc. v. City of New York*, 695 F. Supp. 1531, 1543-44 (S.D.N.Y. 1988). Because Plaintiff’s injury can no longer be redressed by the Court, there is no longer any “case” or “controversy” for purposes of Article III jurisdiction, and Plaintiff’s claims related to onshore Project construction and siting must be dismissed. *See Cook*, 992 F.2d at 19.”

“*Finally*, Plaintiff’s Complaint fails to plausibly state a claim for relief with respect to alleged fraud and violations of the CZMA, OCSLA,⁴ Executive Order 12898 (environmental justice),

and due process under the Fourteenth Amendment to the U.S. Constitution.”

Footnote 4 reads: “Plaintiff also failed to comply with OCSLA’s 60-day notice requirement, 43 U.S.C. § 1349(a)(1), (2), and/or his claims are not within the zone of interests OCSLA was designed to protect, 43 U.S.C. §§ 1331(a), 1301(a).”

See SFW Letter Motion (E.D.N.Y., 23-cv-02915, ECF 66, at 2-3).

- 23) Contrary to SFW’s false statement, Petitioner-Plaintiff Kinsella *did* comply with the “OCSLA’s 60-day notice requirement[.]” In fact, Mr. Kinsella sent two notices to BOEM and federal and state agencies 60 days *before* filing his lawsuit on July 20, 2022. See “60-day Notice of Intent to Sue” (D.D.C., 22-cv-02147, ECF 3-2). Also, see “URGENT: South Fork Wind Imminent Risk to Public Health” (D.D.C., 22-cv-02147, ECF 3-3).
- 24) On June 21, 2023, counsel for Defendant BOEM (and other Federal Defendants) filed a letter motion (“**BOEM Letter Motion**”) “request a pre-motion conference for leave to move to dismiss the complaint (except for the Twelfth Cause of Action which asserts a claim under the Freedom of Information Act [“FOIA”]) pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6) and 12(c) for lack of standing and failure to state a claim.” See BOEM Letter Motion (E.D.N.Y., 23-cv-02915, ECF 68, at 1, 1st ¶).

25) The BOEM Letter Motion provides the following reason for dismissing Petitioner's claims—

“Plaintiff's complaint (except for the twelfth claim made under FOIA), must be dismissed for lack of subject matter jurisdiction because plaintiff lacks standing. ‘To have Article III standing, (1) the plaintiff must have suffered an injury in fact, (2) there must be a causal connection between the injury and the conduct complained of, and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.’ Vengalattore v. Cornell U., 36 F.4th 87, 112–13 (2d Cir. 2022) (citing Lujan v. Defenders of Wildlife, 504 U.S. 505, 560–61 (1992)). An injury is redressable if it ‘is likely and not merely speculative that [it] will be remedied by the relief plaintiff seeks in bringing suit.’ Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 273–74 (2008) (internal quotation marks omitted). To show “a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’ Lujan, 504 U.S. at 560–61 (citation omitted).”

“Here, as noted by this court in Kinsella, 2023 WL 3571300, at *1, while plaintiff pleads 12 claims for relief, three alleged ‘harms underpin all of [his] numerous claims’ -- i.e., (1) PFAS contamination to the drinking supply caused by SFW's onshore trenching and construction activities; (2) increase in the price of Atlantic cod due to the harm that the offshore work will cause

to the cod population; and (3) economic harm because the Project will increase the cost of electricity. None of these alleged injuries confer standing on plaintiff to maintain this action.”

First, Kinsella alleges the same injury from the onshore work as alleged by the plaintiffs in Mahoney; i.e., that SFW’s onshore trenching activity will supposedly spread PFAS into the ground water. The onshore construction activity was authorized by, and within the exclusive jurisdiction of, the PSC and other State and local authorities. BOEM has no authority to regulate this activity because its jurisdiction is limited to the submerged lands starting three miles from state coastlines and extending seaward. 43 U.S.C. §§ 1331(a), 1301(a)(2). Thus, as the Federal Defendants and SFW show in their pending motions to dismiss Mahoney for lack of standing (ECF 67-82), plaintiff lacks standing because he cannot show that any alleged injury from SFW’s onshore work is either (1) caused by the actions of the Federal Defendants or (2) redressable by any relief against the Federal Defendants. See Kinsella, 2023 WL 3571300, at *3 (“New York State agencies issued the permits for the onshore portion of the Project, not BOEM, and enjoinder of its [BOEM’s] authorization of the Project would not halt the onshore portion of the Project[. Further,] the NYPSC has already found that the Project as proposed will not exacerbate existing PFAS, in part because of mitigation measures included in the Project’s plan) (citing Mahoney 2022 WL 1093199, at *2))”

“Second, plaintiff lacks standing to bring his claims relating to the offshore portion of the Project because he fails to plead or show that he has suffered an injury that is “concrete and particularized” as well as “actual or imminent, not conjectural or hypothetical.” Lujan, 504 U.S. at 560 (quotation marks and citations omitted). Specifically, plaintiff alleges that he will be injured by BOEM’s approval of SFW’s offshore activities because those activities will cause cod populations to decline, resulting in higher cod prices at his local market. As previously noted by this court, and as the Federal Defendants will show, these claims are entirely speculative and hypothetical. See Kinsella, at *3 (Kinsella’s unsubstantiated argument about the Project’s potential effect on the price of cod and the harm he may suffer as a result is exactly the sort of speculative argument that Borey [v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania, 934 F.2d 30, 34 (2d Cir. 1991)] forecloses”).”

Third, any alleged economic injury from an increase in Kinsella’s electricity rates are not caused by the Federal Defendants’ actions, nor are they redressable by any relief against the Federal Defendants. Instead, any such rate increases are the result of a Power Purchase Agreement between the Long Island Power Authority (“LIPA”) and SFW entered into on February 6, 2017, well before BOEM issued the FEIS and Record of Decision in 2021. Indeed, plaintiff sought to void the Power Purchase Agreement on many of the grounds asserted here, but was denied any relief by the New York State

Courts. See, Kinsella et al. v. Long Island Power Authority et al., No. 621109/2021 (N.Y. Sup. Ct. Suffolk Cty. filed Nov. 9, 2021).”

“Finally, even if Kinsella sustained a judicially recognizable injury and had standing to assert any of his claims, as will be shown in Federal Defendants’ motion, all such claims, except the FOIA claim, fail to state a cause of action and must be dismissed.”

See BOEM Letter Motion (E.D.N.Y., 23-cv-02915, ECF 68, at 2-3).

- 26) On June 30, 2023, the district court for EDNY issued an “ORDER granting 70 Motion to Adjourn Conference. The Initial Conference ... is adjourned sine die” (*see* E.D.N.Y., 23-cv-02915, Electronic Order, entered 06/30/2023).
- 27) On July 5, 2023, the court issued a “SCHEDULING ORDER: Movant South Fork Wind's letter application 66 dated 6/16/23 and the defendants letter application 68 dated 6/20/23 are GRANTED” (*id.*, Scheduling Order, entered 07/05/2023).
- 28) Neither the Electronic Order of Magistrate Judge Steven Tiscione (entered June 30, 2023) nor the Scheduling Order of District Judge Frederic Block (entered July 5, 2023) provided good cause or a reason for granting Federal Defendant’s and SFW’s letter motions.
- 29) Pl.-Petitioner’s First Amended Complaint is exhaustive at 141 pages (*see* D.D.C., 22-cv-02147, ECF 34-2).

30) On July 18, 2023, the E.D.N.Y. district court uploaded to the ECF system Pl.-Petitioner's letter of July 12 with the following docket text—

Letter dated 7/12/2023 from Simon V. Kinsella to Judge Frederic Block, informing the Court that the ECF System does not allow plttf to file his documents and is being denied access. Plttf further states that he will be overseas from September 1 through 26 and cannot attend the in-person pre-motion conference on September 13, 2023 (ECF [72]). Plttf respectfully request that the Court hold the conference in the final two weeks of August before he departs, so that the case may proceed while he is overseas. (SG)

31) Although Pl.-Petitioner requested that the in-person pre-motion conference be brought forward to “the final two weeks of August before I depart so that the case may proceed while I am overseas[.]” District Judge Frederic Block ordered that “[t]he in person pre-motion conference scheduled for September 13, 2023 [be] adjourned to October 5, 2023 at 4:00 P.M.” (See E.D.N.Y., 23-cv-02915, Electronic Order, entered 7/18/2023).

32) On July 18, 2023, an order of Judge Block confirmed that “[t]he Clerk's Office has given the pro se plaintiff access to file documents electronically.” *Id.*

I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge, information, and belief.

Dated: September 21, 2023


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Plaintiff *Pro Se*
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Sworn to before me this
21st day of September 2023


David Fink, Notary Public

State of New York No. 4526132
Qualified in New York County
Commission Expires February 28, 2024