



**U.S. Department of Justice**

*United States Attorney  
Eastern District of New York*

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*610 Federal Plaza  
Central Islip, New York 11722*

June 20, 2023

By ECF

Honorable Frederic Block  
United States District Judge  
Federal Courthouse, 225 Cadman Plaza  
Brooklyn, New York 11201

Re: Kinsella v. Bureau of Ocean Energy Management, et al  
Civil Action No. 23-2915 (Block, J.) (Tiscione, M.J.)

Dear Judge Block:

The undersigned Assistant U.S. Attorney represents defendants Bureau of Ocean Energy Management (“BOEM”), Deb Haaland, Secretary of the U.S. Department of the Interior and Michael S. Regan, Administrator of the U.S. Environmental Protection Agency (the “Federal Defendants”). Pursuant to Rule 2(a) of Your Honor’s Individual Practice Rules, the Federal Defendants respectfully 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. Subject to the space limitations of this request, the Federal Defendants will move to dismiss largely, but not solely, for the reasons below.

**A. Background**

This action involves a Project authorized by BOEM and the Army Corps of Engineers (the Army Corps is not a party) whereby defendant-intervenor South Fork Wind LLC (“SFW”) will develop a commercial-scale offshore wind energy facility on the Outer Continental Shelf that will generate and export power to the existing mainland electric grid in East Hampton, New York. The Project has an offshore component involving wind turbine generators which will be connected to the onshore portion by submarine cables extending, in part, through federal waters. The onshore component consists of an onshore, underground power cable that SFW installed in an electrical duct bank after it excavated trenches along an onshore route pursuant to authorizations issued by state and local authorities. SFW received permission for its onshore work from the State of New York Public Service Commission (the “NYPSC”) after extensive public proceedings.

Plaintiff, and similarly interested parties, made numerous challenges in the New York State courts to enjoin the Project in general and the onshore trenching in particular. After all such challenges failed, four of the individuals who participated in the State court proceedings commenced an action in this court on March 9, 2022 (Mahoney et. al. v. U.S. Department of the Interior et. al., cv-22-1305 (Block, J.)). Those plaintiffs repeatedly sought preliminary injunctive

relief, alleging that SFW's onshore trenching should be enjoined because the Federal Defendants supposedly failed to conduct an adequate review in the Final Environmental Impact Statement ["FEIS"] of potential contamination of their drinking water with poly-/perfluoroalkyl substances ("PFAS") along the onshore route. This Court rejected all such requests, holding that plaintiffs had failed to establish irreparable harm. Mahoney v. U.S. Dept. of the Int., 22-CV-01305-FB-ST, 2022 WL 1093199, at \*3 (E.D.N.Y. Apr. 12, 2022).

Plaintiff did not join in that action. Instead, after all New York State and Federal courts rejected all attempts to stop the Project, he filed the instant action in the District of Columbia ("DDC") on July 20, 2022. He alleged that the Federal Defendants in approving the Project violated various statutory and other provisions of law, including the National Environmental Policy Act ("NEPA"), the Administrative Procedure Act, and the Outer Continental Shelf Lands Act. Upon the Federal Defendants' motion, this case was transferred from the DDC to this court because, among other things, the Project is in this district, and the case is related to the pending Mahoney action. (ECF 49, 53, 45). On May 18, 2023, this court issued a memorandum and order (ECF 56), denying plaintiff's request (originally made in the DDC) for injunctive relief to stop the Project. Kinsella v. Bureau of Ocean Energy Mgt., 23-CV-02915-FB-ST, 2023 WL 3571300, at \*3 (E.D.N.Y. May 18, 2023)

#### **B. Basis of Proposed Motion**

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.

NB: BOEM merely parrots South Fork Wind's false statements regarding BOEM's limited jurisdiction that contradicts BOEM's own record of decision, BOEM's own guidelines, SFW's final Construction and Operations Plan, BOEM's lease assignment (OCS-A 0517) and the terms of the original lease (OCS-A 0486), and BOEM's establishing statute (43 U.S.C. § 1333(a)). (by Kinsella, Sep 2023)

Respectfully submitted,  
BREON PEACE  
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