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# LATHAM & WATKINS LLP

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June 16, 2023

### VIA ECF

The Honorable Frederic Block  
Senior United States District Judge  
United States District Court, Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, NY 11201

Re: *Kinsella v. Bureau of Ocean Energy Management, et al.*  
No. 2:23-cv-02915-FB-ST

Dear Judge Block:

On behalf of Defendant-Intervenor South Fork Wind, LLC (“SFW”), I write under the Court’s Individual Rules to request 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). Before the conference, SFW will confer with Plaintiff and Federal Defendants on a proposed briefing schedule.

## I. RELEVANT BACKGROUND

Plaintiff’s action challenges federal approvals for the South Fork Wind Farm and South Fork Export Cable (collectively, the “Project”), an offshore wind farm that will generate and export electricity to the existing mainland electric grid in the Town of East Hampton (the “Town”) through an onshore underground transmission cable. The offshore aspects of the Project on the Outer Continental Shelf are within the jurisdiction of the Bureau of Ocean Energy Management (“BOEM”). The onshore and nearshore aspects of the Project are within the jurisdiction of the New York State Public Service Commission (“NYSPSC”) and other state and local authorities.<sup>1</sup> SFW has completed all onshore construction activities that are the subject of Plaintiff’s Complaint.<sup>2</sup>

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<sup>1</sup> On May 10, 2023, the New York State appellate court rejected on the merits a challenge to the NYSPSC’s issuance of the Certificate of Environmental Compatibility and Public Need for SFW. *Citizens For The Pres. of Wainscott, Inc. v. N.Y. State Pub. Serv. Comm’n*, No. 2021-06582, Decision and Judgment (N.Y. App. Div., 2d Dep’t May 10, 2023). A separate case, *Kinsella v. PSC*, No. 2021-06572 (N.Y. App. Div., 2d Dep’t), remains pending.

<sup>2</sup> The only remaining onshore work relates to testing the interconnection facility, which is outside the scope of Plaintiff’s Complaint. See <https://southforkwind.com/resources-and-faqs/onshore-construction-updates> (select “Week of May 22nd” under “Weekly Updates 2023”); Complaint, ECF #34-2 (Nov. 2, 2022).

**NB: The interconnection facility is *not* outside the scope of the Complaint as it is part of the Project cost that BOEM fraudulently represented and subject to a procurement that was *neither* "technology neutral" *nor* "competitive."**  
*(by Si Kinsella, Sep 2023)*

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Plaintiff, a Town resident, filed this action (*pro se*) in the U.S. District Court for the District of Columbia.<sup>3</sup> Plaintiff asserts, among other things, that Federal Defendants, in approving the Project, violated the National Environmental Policy Act (“NEPA”), Coastal Zone Management Act (“CZMA”), Outer Continental Shelf Lands Act (“OCSLA”), FOIA, the Administrative Procedure Act, and the Fourteenth Amendment of the United States Constitution. *See* Complaint, ECF #34-2 at 2, 10, 94, 107, 110. Plaintiff also asserts claims related to presidential Executive Orders on environmental justice, and accuses Federal Defendants of fraud in approving the Project. *See id.* at 2, 10, 106.

The D.C. District Court granted Federal Defendants’ motion to transfer the action to this District, in part, because there is an earlier-filed pending action—*Mahoney v. U.S. Dep’t of Interior* (“*Mahoney*”), No. 22-cv-01305-FB-ST—also challenging the Project and raising many of the same arguments and claims that Plaintiff asserts. *See Kinsella*, ECF #48 at 5-6 (D.D.C. Nov. 10, 2022). The U.S. Court of Appeals for the D.C. Circuit denied Plaintiff’s petition for writ of mandamus challenging the D.C. District Court’s transfer order. *In re: Simon V. Kinsella*, No. 22-5317, Doc. 1999608 (D.C. Cir. May 17, 2023).

In the *Mahoney* case, Your Honor twice denied those plaintiffs’ motions for a temporary restraining order (“TRO”), and then denied their motion for a preliminary injunction (“PI”), finding that the plaintiffs had not established irreparable harm. Order, *Mahoney*, ECF #17 (E.D.N.Y. Mar. 14, 2022); Minute Order, *Mahoney* (Mar. 17, 2022); Mem. and Order, *Mahoney*, 2022 WL 1093199 (Apr. 12, 2022). The D.C. District Court similarly denied this Plaintiff’s request for a TRO to stop Project construction. Minute Order, *Kinsella* (D.D.C. Nov. 10, 2022). Plaintiff appealed that denial, and the D.C. Circuit granted SFW’s and Federal Defendants’ motions to dismiss Plaintiff’s appeal. *Kinsella*, Per Curiam Order, No. 22-5316, Doc. 1987197 (D.C. Cir. Feb. 23, 2023). Your Honor then denied Plaintiff’s pending PI motion. *See* Mem. and Order, *Kinsella*, ECF #56 (May 18, 2023) (noting that “the bulk of the harm claimed by *Kinsella* is largely the same as that claimed by the *Mahoney* plaintiffs” and the PI motion fails for same reasons, *e.g.*, lack of irreparable harm).

## II. PLAINTIFF’S FIRST AMENDED COMPLAINT SHOULD BE DISMISSED UNDER FED. R. CIV. P. 12(B)(1) AND 12(B)(6)

All claims, except the FOIA claim (twelfth), in Plaintiff’s Complaint should be dismissed on numerous grounds, including because the Court lacks jurisdiction over the claims and Plaintiff has failed to state a claim upon which relief may be granted.

*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

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<sup>3</sup> Plaintiff participated in the New York State regulatory processes for approving the Project, and filed multiple lawsuits against state agencies to try to stop the Project, raising many of the same arguments in his Complaint.

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NB: Plaintiff's injuries *are* directly traceable to Federal Defendants' Project approval as BOEM indisputably authorized SFW's Project, including onshore construction of the transmission cable. BOEM's record of decision (issued November 24, 2021) states that it authorized the Habitat Alternative Layout B (ROD, at 15) which BOEM described to include the "South Fork Export Cable (SFEC) ... and an [onshore] interconnection facility" connected "to the existing [onshore] mainland electric grid" (ROD, at 7) (*by Si Kinsella, Sep 2023*)

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<sup>4</sup>, Executive Order 12898 (environmental justice), and due process under the Fourteenth Amendment to the U.S. Constitution.

SFW looks forward to further discussing this matter with Your Honor.

Respectfully submitted,

/s/ Kegan A. Brown  
Kegan A. Brown  
of LATHAM & WATKINS LLP

cc: All Counsel of Record (via ECF)

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<sup>4</sup> 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).