

Supplemental Appendix J

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

(dated August 11, 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, Exhibit A).
 - b. South Fork Wind was served notice of the Complaint (*id.*, Exhibit B, at 1-6, PDF 2-7).

- 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.*, Exhibit C, at 50, Civil Docket MINUTE ORDER, 09/13/2022).
- 5) On November 2, 2022, Plaintiff filed (as of right) First Amended Complaint against Federal Defendants (*see* D.D.C., 1:22-cv-02147, ECF 34-2).
- 6) On November 7, 2022, the 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” (i.e., thirty days after the case is transferred and a new docket number and judge is assigned, *ref.* ¶ 4 above). *See* ORDER (Supp App 3a-4a) (E.D.N.Y., 2:23-cv-02915, ECF #77-3, Exhibit D, at 1, PDF 2).
- 7) On November 9, 2022, during a hearing, the district court for the District of Columbia accepted Plaintiff’s First 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* November 9 Hearing Tr. (D.C. Cir., No. 22-5317, Doc. 1994062-11, at 2:20-25 and 21:1-2). *Also, see*

E.D.N.Y., 2:23-cv-02915, ECF #77-3, Exhibit C (MINUTE ORDER, 11/10/2022, at PDF 53).

- 8) On May 17, 2023, the Court of Appeals for the D.C. Circuit (No. 22-5317, Doc. 1999608) transferred the case and “ORDERED that the petition for writ of mandamus be denied. The district court did not abuse its discretion in transferring petitioner’s case to the Eastern District of New York.” See Cert. Petition (App 4a-5a).
- 9) On April 19, 2023, “[t]he case of **Kinsella v. Bureau of Ocean Energy Management et al**, has been transferred from **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 Exhibit F (E.D.N.Y., 23-cv-02915, ECF 77-3, (at PDF 62).
- 10) On April 24, 2023, “District of Columbia Case number 1:22-cv-02147, *Kinsella v. Bureau Of Ocean Energy Management et al*, was transferred to The Eastern District of New York in error. E.D.N.Y. case number 23-cv-02915-GRB-SIL has been administratively closed. (AC)” (*id.*).
- 11) On April 25, 2023, according to an “ORDER REASSIGNING CASE[,] [the] Case [was] reassigned to Judge Frederic Block and Magistrate Judge Steven Tiscione (as related to 22-cv-1305) for all further proceedings.” (*id.*).
- 12) On May 1, 2023, the E.D.N.Y. Civil Docket Sheet reads— “ELECTRONIC ORDER REOPENING

CASE: Ordered by Judge Frederic Block on 5/1/2023. (MI) Modified on 5/18/2023” (*id.*).

- 13) As of August 11, 2023, Federal Defendants have *not* filed answers to Plaintiff’s Complaint filed over a year ago (on July 20, 2022)(*see* D.D.C., 1:22-cv-02147, ECF 1) and have *not* responded to Plaintiff’s cross-Motion for Partial Summary Judgment and Statement of (eighty-nine) Material Facts where there is no genuine dispute filed over ten months ago (on September 26, 2022)(*id.*, ECF 21). Neither Federal Defendants *nor* South Fork Wind filed answers to the First Amended Complaint that Plaintiff filed over nine months ago (on November 2, 2022)(*id.*, ECF 34-2).
- 14) According to Local Rule 41(3) for the Court of Appeals for the D.C. Circuit, “[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 became effective (21 days later) on June 7, 2023. Defendants and Defendant-Intervenor were ordered to file their responsive pleading to the complaint thirty days after the case was transferred, **July 7, 2023**.
- 15) New judges were assigned to the case (Senior District Judge Frederic Block and Magistrate Judge Steven Tiscione) on April 25, 2023.
- 16) 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).

- 17) 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).
- 18) Neither the electronic order of Magistrate Judge Steven Tiscione (entered June 30, 2023) nor District Judge Frederic Block's electronic order (entered July 5, 2023) provided *any* reason or for good cause shown.
- 19) On June 16, 2023, counsel for Defendant-Intervenor South Fork Wind LLC 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 SFW Letter Motion (E.D.N.Y., 23-cv-02915, ECF 66, at 1, 1st ¶).
- 20) 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, OCSLA⁴, 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).

- 21) 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).
- 22) 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 ¶).
- 23) 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.”

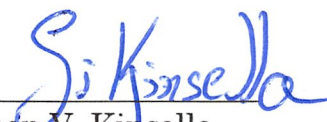
See BOEM Letter Motion (E.D.N.Y., 23-cv-02915, ECF 68, at 2-3).

24) Petitioner-Plaintiff Kinsella First Amended Complaint is exhaustive at 141 pages.

See First Amended Complaint (D.D.C., 22-cv-02147, ECF 34-2).

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

Dated: August 12, 2023

/s/ 
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Sworn to before me this
12th day of August 2023



Notary Public

