

**Court of Appeals Orders**

D.C. Circuit, *In re: Simon V. Kinsella* (No. 22-5317)

Appendix A – ORDERED Petitioner’s motion to stay the mandate (treated as a motion to stay effectiveness) of the court of appeals’ May 17, 2023 order, be denied (issued June 1, 2023) (22-5317, Doc. 2002892)..... 3a

Appendix C – ORDERED Petitioner’s motion for a temporary restraining order and preliminary injunction; and a petition for a writ of mandamus (affecting the transfer) be denied (issued May 17, 2023) (No. 22-5317, Doc. 1999608)..... 4a

Appendix D – ORDERED Petitioner’s Emergency Motion to Return Filed to the District of Columbia, be dismissed (as moot) (issued April 24, 2023) (No. 22-5317, Doc. 1996148)..... 6a

Appendix E – ORDERED the United States and South Fork Wind, LLC to enter appearances and file responses to the mandamus petition (issued February 23, 2023) (No. 22-5317, Doc. 1987203)..... 7a

**District Court Order & Opinion (D.D.C.)**

For the District of Columbia, *Simon V. Kinsella v. Bureau of Ocean Energy Management, et al.*  
No. 22-cv-02147 (JMC)

Appendix F – ORDERED that the case be transferred from D.C. to the E.D.N.Y. (issued November 10, 2022) (ECF No. 49)..... 8a

Appendix G – OPINION – Re: Order to Transfer (issued November 10, 2022) (ECF No. 48)..... 9a

**District Court Order & Opinion (E.D.N.Y.)**

For the Eastern District of New York

*Kinsella v. Bureau Of Ocean Energy Management et al.*

No: 2:23-cv-02915 (FB)

Appendix H – CIVIL DOCKET for 2:23-cv-02915 (FB)

(from April 19 through June 14, 2023) ..... 20a

Appendix I – MEMORANDUM AND ORDER:

Denying Plaintiff's motion for a preliminary injunction.

Ordered by Judge Frederic Block on 5/18/2023 ..... 28a

**Statutory and Regulatory Provisions Involved**

U.S. Constitution, Amendment V ..... 36a

28 U.S.C. § 1404 Change of venue ..... 36a

National Environmental Policy Act (NEPA)

42 U.S.C. § 4332 ..... 36a

Outer Continental Shelf Lands Act (OCSLA)

43 U.S.C. § 1332 ..... 38a

**Excerpts Affidavit of Petitioner Simon V. Kinsella**

in Support of an Emergency Motion for a Temporary

Restraining Order and Preliminary Injunction

(dated May 10, 2023)

**PFAS Contamination**

Submitted to BOEM (¶¶ 9-53) ..... 39a

BOEM's Fraud: PFAS (¶¶ 54-67) ..... 46a

Project Cost (\$2 bn) (¶¶ 68-91) ... 49a

South Fork RFP (¶¶ 92-106) ..... 56a

SFW Fraud: PFAS (¶¶ 146-157) ..... 63a

Cost (\$2 bn) (¶¶ 146-157) ..... 67a

**United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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No. 22-5317

September Term, 2022

1:22-cv-02147-JMC

Filed On: June 9, 2023

In re: Simon V. Kinsella,

Petitioner

**BEFORE:** Millett, Pillard, and Rao, Circuit Judges

**ORDER**

Upon consideration of the motion to stay the mandate, which the court construes as a motion to stay the effectiveness of the court's May 17, 2023 order, it is

**ORDERED** that the motion be denied. Petitioner has not shown that his application to the Supreme Court for emergency relief or for a writ of certiorari presents a substantial question and that there is good cause for a stay. See D.C. Cir. Rule 41(a)(3); cf. Fed. R. App. P. 41(d)(1).

**Per Curiam**

**FOR THE COURT:**

Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy

Deputy Clerk

**United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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No. 22-5317

September Term, 2022

1:22-cv-02147-JMC

Filed On: May 17, 2023

In re: Simon V. Kinsella,

Petitioner

**BEFORE:** Millett, Pillard, and Rao, Circuit Judges

**ORDER**

Upon consideration of the amended petition for writ of mandamus, the responses thereto, and the replies; and the emergency motion for a temporary restraining order and preliminary injunction, it is

**ORDERED** that the emergency motion for a temporary restraining order and preliminary injunction be denied. It is

**FURTHER 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 In re Tripathi, 836 F.2d 1406, 1407 (D.C. Cir. 1988) (per curiam). Petitioner does not dispute that venue is proper in the Eastern District of New York. See 28 U.S.C. § 1391(e)(1); 5 U.S.C. § 552(a)(4)(B). And upon review of the entire record, we conclude that the district court reasonably weighed the various factors for and against transfer and concluded that, on

balance, transfer was warranted. Petitioner is correct that the district court did not explicitly consider or allow argument on his independent claims of fraud, which were first raised in his amended complaint. Nonetheless, we are not convinced that consideration of these claims would have altered the outcome of the district court's analysis or that vacating the district court's otherwise proper exercise of its discretion is "essential to the interests of justice." See Starnes v. McGuire, 512 F.2d 918, 929 (D.C. Cir. 1974) (en banc).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

**FOR THE COURT:**  
Mark J. Langer, Clerk

BY: /s/  
Scott H. Atchue  
Deputy Clerk

**United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 22-5317 September Term, 2022  
1:22-cv-02147-JMC  
Filed On: April 24, 2023 [1996148]

In re: Simon V. Kinsella,  
Petitioner

**ORDER**

Upon consideration of petitioner's emergency motion to return files to the District of Columbia, it is

**ORDERED** that the motion be dismissed as moot. The docket in No. 1:22-cv-02147 reflects that the case was transferred prematurely and in error, and it has been reopened. The case in the Eastern District of New York, No. 2:23-cv-02915, has been administratively closed.

**FOR THE COURT:**  
Mark J. Langer, Clerk

BY: /s/  
Catherine J. Lavender  
Deputy Clerk

**United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 22-5317

September Term, 2022

1:22-cv-02147-JMC

Filed On: February 23, 2023

In re: Simon V. Kinsella,  
Petitioner

**BEFORE:** Wilkins, RAO, and Walker, Circuit Judges

**ORDER**

Upon consideration of amended petition for writ of mandamus, which contains a request for initial hearing en banc, it is

**ORDERED** that the request for initial hearing en banc be denied. See Fed. R. App. P. 35(a). It is

**FURTHER ORDERED**, on the court's own motion, that the United States and South Fork Wind, LLC enter appearances and file responses to the mandamus petition, not to exceed 7,800 words each, within 30 days of the date of this order. See Fed. R. App. P. 21(d); D.C. Cir. Rule 21(a). Petitioner may file a reply, not to exceed 3,900 words, within 14 days of the filing of the responses.

**Per Curiam**

**FOR THE COURT:**  
Mark J. Langer, Clerk

BY: /s/  
Scott H. Atchue  
Deputy Clerk

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SIMON V. KINSELLA,

Plaintiff,

v.

BUREAU OF OCEAN ENERGY  
MANAGEMENT, et al,

Defendants,

and

SOUTH FORK WIND, LLC,  
Defendant-Intervenor.

Civil Action  
No. 22-2147 (JMC)

**ORDER**

For the reasons stated in the accompanying  
Memorandum Opinion, it is hereby

**ORDERED** that this civil action is  
**TRANSFERRED** to the United States District  
Court for the Eastern District of New York.

**SO ORDERED.**

DATE: November 10, 2022

Sincerely,  
s/  
Jia M. Cobb  
U.S. District Court Judge



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SIMON V. KINSELLA,

Plaintiff,

v.

BUREAU OF OCEAN ENERGY  
MANAGEMENT, et al,

Defendants,

and

SOUTH FORK WIND, LLC,

Defendant-Intervenor.

Civil Action

No. 22-2147 (JMC)

**MEMORANDUM OPINION**

Plaintiff Simon Kinsella brought this action under the Administrative Procedure Act (APA), challenging the Bureau of Ocean Energy Management's approval of a wind farm off the coast of Long Island, New York.<sup>1</sup> Defendants moved to transfer the case to the District Court for the Eastern District of New York. ECF 11. The Court GRANTS that motion and transfers the case.

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<sup>1</sup> Unless otherwise indicated, the formatting of quoted materials has been modified throughout this opinion, for example, by omitting internal quotation marks and citations, and by incorporating emphases, changes to capitalization, and other bracketed alterations therein. All pincites to documents filed on the docket are to the automatically generated ECF Page ID number that appears at the top of each page.

## I. BACKGROUND

Plaintiff Simon Kinsella is a resident of Wainscott, in the Town of East Hampton, Suffolk County, New York. ECF 34-2 ¶ 5.<sup>2</sup> He challenges the Bureau of Ocean Energy Management's (BOEM) approval of the South Fork offshore wind energy project, which is to be constructed thirty-five miles east of Montauk Point, Long Island. *Id.* ¶¶ 11–12; ECF 11-3 at 7. The Project has two components: the South Fork Wind Farm and the South Fork Export Cable project. ECF 11-3 at 10. BOEM, a component of the Department of the Interior, held a competitive sale and awarded the lease to a company that is now called South Fork Wind, LLC. *Id.* at 6. On November 24, 2021, BOEM, together with the National Marine Fisheries Service (NMFS), issued a Record of Decision (ROD) approving the project with modifications. *Id.* at 4, 18.

The approval process included myriad opportunities for input from other agencies and stakeholders. The ROD itself was prepared with the cooperation of more than a half-dozen federal, state, and local agencies, including: the U.S. Army Corps of Engineers, the Bureau of Safety and Environmental Enforcement, the U.S. Coast Guard, the U.S. Environmental Protection Agency, the Massachusetts Office of Coastal Zone Management, the Rhode Island Coastal Resource Management Council, the Rhode Island Department of Environmental Management, the Town of East Hampton, and the Trustees of the Freeholders and

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<sup>2</sup> All citations to the Complaint are to the First Amended Complaint, ECF 34-2, which was submitted to the Court on November 2, 2022. The Court granted Kinsella's Motion to Amend as a matter of course on November 9, 2022.

Commonality of the Town of East Hampton. *Id.* at 4. Also, during the public comment period for the project's Environmental Impact Statement (EIS), BOEM held three virtual public hearings and received nearly 400 unique submittals from the public, agencies, and other interested groups. *Id.* at 6. In addition to BOEM's review, permits were issued for the onshore component of the project by the New York Public Service Commission (NYPSC)—which conducted its own, lengthy approval process. ECF 11-5 at 7–12. Kinsella was a formal party to that proceeding. *Id.* at 4; ECF 34-2 ¶ 111.

The South Fork project has been challenged in other courts. The NYPSC's approval was appealed and upheld in New York state court. *See Mahoney v. U.S. Dep't of the Interior*, No. 22-cv-01305, 2022 WL 1093199, at \*2 (E.D.N.Y. 2022). In another action, residents of the town of Wainscott petitioned a state court to invalidate an easement granted for the project—a petition that was denied. *Id.* In another action, Wainscott residents moved the District Court for the Eastern District of New York for a preliminary injunction to halt construction of the onshore export cable. *Id.* That motion for an injunction was denied in April 2022. *Id.* at \*3. Kinsella himself has sued (in state-court actions separate from this case) the NYPSC, the New York State Department of Public Service, and the Long Island Power Authority. ECF 34-2 ¶¶ 411, 412; see also ECF 40-1 at 17.

In this case, Kinsella claims that BOEM's approval of the South Fork project should be set aside (and construction on the project be enjoined) because of various deficiencies under the APA. ECF

34-2 ¶ 708. Amongst other things, Kinsella alleges that BOEM failed to consider adverse environmental impacts of the project, including the contamination of East Hampton's drinking water, *id.* ¶ 445, and the adverse population-level impacts on Atlantic cod, *id.* ¶ 605. Kinsella also alleges that the competitive bidding process was deficient, *id.* ¶ 563, that BOEM failed to sufficiently consider alternative plans, *id.* ¶¶ 523–24, and that BOEM failed to consider the economic downsides of the project, *id.* ¶ 639. In addition to his claims under the APA, Kinsella also alleges violations of the National Environmental Policy Act, *id.* at 2, the Outer Continental Shelf Lands Act, *id.*, the Coastal Zone Management Act, *id.* ¶ 499, Executive Order 12898 (relating to environmental justice), *id.* ¶ 574, and the Due Process Clause of the Fourteenth Amendment, *id.* ¶ 594.

Kinsella moved for a Temporary Restraining Order (TRO) on November 2, 2022, ECF 35, which was denied on November 9, 2022. Still pending before the Court is Kinsella's Motion for a Preliminary Injunction. ECF 35. This opinion addresses only Defendants' Motion to Transfer the case to the United States District Court for the Eastern District of New York. ECF 11. Plaintiff filed an opposition to the Motion, ECF 19, Defendants filed a Reply, ECF 25, and Plaintiff filed (with leave of the Court) a Surreply, ECF 27.

## II. LEGAL STANDARD

“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought . . . .” 28 U.S.C. § 1404(a).

Section 1404 provides the Court with a mechanism to transfer a case, even in cases where venue is proper in the transferor court, in order “to prevent the waste of time, energy and money[,] and to protect litigants, witnesses and the public against unnecessary inconvenience and expense.” *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964).

The Court employs a two-step analysis to determine whether a case should be transferred. First, the Court determines if the case could have been brought in the transferee district. *S. Utah Wilderness All. v. Lewis*, 845 F. Supp. 2d 231, 234 (D.D.C. 2012). If so, the Court turns to an analysis of the public and private interests supporting transfer. The public-interest factors include: (1) “the local interest in having local controversies decided at home,” (2) “the transferee’s familiarity with the governing laws” and the pendency of related litigation; (3) “the relative congestion of the calendars of the transferor and transferee courts.” *Pres. Soc’y of Charleston v. U.S. Army Corps of Eng’rs*, 893 F. Supp. 2d 49, 54 (D.D.C. 2012). The private-interest factors include: (1) “the plaintiff’s choice of forum;” (2) “the defendant’s choice of forum;” (3) “whether the claim arose elsewhere;” (4) “the convenience of the parties;” (5) “the convenience of the witnesses;” and (6) “the ease of access to sources of proof.” *Id.*

### III. ANALYSIS

Kinsella does not dispute that venue is proper in the transferee court. *See* ECF 19 at 8. The Court therefore moves to the second part of the analysis—weighing the public and private-interest factors for and against transferring the case. Based on its

analysis of those factors, the Court determines that the case should be transferred.

**A. The public-interest factors weigh strongly in favor of transferring the case.**

The “most important” of the public interest factors is “the local interest in having local controversies decided at home,” *Charleston*, 893 F. Supp. 2d at 57, so that concerned members of the public can engage with the proceedings. Pursuant to that principle, other courts in this jurisdiction have said that suits involving “water rights, environmental regulation, and local wildlife . . . should be resolved in the forum where the people whose rights and interests are in fact most vitally affected” are located. *Trout Unlimited v. U.S. Dep’t of Agric.*, 944 F. Supp. 13, 19–20 (D.D.C. 1996). The Court finds that the first public-interest factor weighs heavily in favor of transfer because the South Fork project directly affects the rights of residents of the transferee district, while having no impact at all on the residents of the District of Columbia. Moreover, the heavy involvement of the local public in the approval process preceding the project’s approval, see *id.* at 20, together with the pendency of multiple court cases challenging the project “demonstrates that other parties in [the transferee district] are interested” in the controversy, *Villa v. Salazar*, 933 F. Supp. 2d 50, 56 (D.D.C. 2013).

The second public-interest factor also weighs in favor of transfer. Although the transferee court has the same expertise as this Court regarding the laws governing this action, the transferee court is far more familiar with the facts and parties in this case. That is because there is at least one pending lawsuit

in the transferee jurisdiction involving a challenge to the same project on similar grounds. See *Mahoney*, 2022 WL 1093199; see also *Bartolucci v. 1-800 Contacts, Inc.*, 245 F. Supp. 3d 38, 50 (D.D.C. 2017) (“Courts in this district have consistently held that the interests of justice are better served when a case is transferred to the district where related actions are pending.”). The Court takes Kinsella’s point that there are differences between that case and the present action: the *Mahoney* defendants include the Army Corps of Engineers; this action involves claims under laws that are not at issue in that case; and the scientific process through which Kinsella claims the groundwater will be contaminated is different than the one highlighted by the plaintiffs in *Mahoney*. ECF 19 at 17–19. But those distinctions do not change the fact that the administrative record will be largely the same in each case, as are at least some of the alleged harms. For example, the transferee court has already heard testimony and considered a motion for a preliminary injunction made largely on the same harms as the pending motion in this case. *Mahoney*, 2022 WL 1093199, at \*1. The transferee court’s familiarity with the facts and background of this controversy weighs in favor of transfer.<sup>3</sup>

As for the third public-interest factor, Kinsella emphasizes and Defendants acknowledge that the transferee court’s docket is more congested than this Court’s. ECF 19 at 16–17; ECF 11-1 at 19. However,

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<sup>3</sup> Kinsella’s Opposition to the Motion to Transfer suggests that the transferee court will not be impartial due to its proximity to the NYPSC. ECF 19 at 13. The Court rejects the argument that the transferee court will not be able to fairly adjudicate Kinsella’s claims, and thus gives no weight to that argument.

that one factor does not outweigh the other two. *Cf. W. Watersheds Project v. Jewell*, 69 F. Supp. 3d 41, 44 (D.D.C. 2014). Moreover, the potential prejudice caused by the additional congestion (i.e., potential delay in the adjudication of the case) is offset by the fact that the transferee court is already familiar with the facts and record in this case. Accordingly, the Court finds that the public-interest factors, on balance, weigh strongly in favor of transfer.

**B. The private-interest factors weigh slightly against transferring the case, but they are outweighed by the public interest in transferring the case.**

Most of the private-interest factors are neutral with regard to this case. However, the Court does give weight to Kinsella's preference that the case be heard by this Court, and therefore the private-interest factors, taken together, weigh slightly against transfer. That does not change the Court's conclusion that transfer is appropriate, however, because the public interest factors far outweigh Kinsella's preference.

The first two private-interest factors, taken together, weigh against transfer. Kinsella prefers his claims be heard by this Court. Defendants prefer the transferee court. Defendants argue Kinsella's preference should be given little weight because the District of Columbia is not his "home forum," and because his choice of forum was made in part to avoid unfavorable precedent in the transferee court, ECF 11-1 at 20–21. Kinsella counters that his preference should be given priority because—regardless of his personal connection to the District—there is a "substantial connection" between his chosen forum



and “the subject matter of the action.” *Akiachak Native Cmty. v. Dep’t of Interior*, 502 F. Supp. 2d 64, 67 (D.D.C. 2007). The Court agrees with Kinsella. Because the final approval of the project occurred in the District, there is “a sufficiently substantial nexus” between the controversy and the forum. *Id.* The Court therefore grants more weight to Kinsella’s preference than Defendants’. *See id.*; *Gross v. Owen*, 221 F.2d 94, 95 (D.C. Cir. 1955).

The third factor weighs neither for nor against transfer. In considering where a claim arose, both the location of the decision-making process and the location of the impacts of the project are considered. *See Ctr. for Env’t. Sci., Accuracy & Reliability v. Nat’l Park Serv.*, 75 F. Supp. 3d 353, 357–58 (D.D.C. 2014). Defendants acknowledge that the final approval of the ROD took place in the District. ECF 11-1 at 22. On the other hand, Defendants point out that the bulk of the underlying work leading up to that approval happened outside of this jurisdiction, at BOEM’s offices in Sterling, Virginia. ECF 25 at 10; ECF 25-1 at ¶¶ 6, 9. *See also Seafreeze Shoreside Inc. v. U.S. Dep’t of the Interior*, Nos. 21-3276, 22-237, 2022 WL 3906934, at \*3, n.1 (“[A]nalysis that occurred in . . . Sterling, Virginia, would be a basis for venue in . . . the Eastern District of Virginia, not the District of Columbia.”). Moreover, there is nothing to suggest that BOEM’s approval of the project will have any impact whatsoever in the District of Columbia. *See Ctr. for Env’t. Sci., Accuracy, & Reliability*, 75 F. Supp. at 358 (transferring a case where the impacts of the project-in-controversy would be felt in the transferee district, even though agency decisionmakers were in

the District of Columbia). Accordingly, the Court finds that the third private-interest factor weighs neither for nor against transfer.

Kinsella focuses much of his argument on the remaining private-interest factors—“convenience of the parties;” “convenience of the witnesses;” “the ease of access to sources of proof.” *Trout Unlimited*, 944 F. Supp. at 16. He emphasizes that the nearest courthouse is sixty miles from the site of the controversy, and that there is no reason to think that the requested transfer would make it any more convenient for any of the parties to make the trip.<sup>4</sup> ECF 19 at 7. Kinsella also points out that the Defendant-agencies, as well as their lawyers, are located in the District of Columbia. *Id.* at 6. Finally, he asserts that this case may well involve extra-record evidence, which would be more easily gathered in the District. *Id.* at 10. The Court is not convinced by those arguments. As an initial matter, the location of the parties’ attorneys is not relevant to the transfer inquiry. *Charleston*, 893 F. Supp. 2d at 56. More importantly, this is an APA case that will likely be decided at summary judgment on the basis of the administrative record. There is no reason to expect that there will be a trial, or witnesses, or the need for significant extra-record evidence. See *Greater Yellowstone Coal. v. Kempthorne*, Nos. 07-2111, 07-2112, 2008 WL 1862298, at \*4 (D.D.C.

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<sup>4</sup> Defendants respond that they would seek to transfer the case to the E.D.N.Y. courthouse in Brooklyn. ECF 25 at 8 n.1. Although a courthouse in New York City would undoubtedly be more convenient for D.C.-based parties and their lawyers, that added convenience does not weigh heavily in the Court’s decision here.

2008). Accordingly, the Court concludes that these factors are neutral, and that the private-interest factors, taken as a whole, weigh slightly against transfer.

Although the Court gives due weight to Kinsella's preference that the case be heard by this Court, that consideration is ultimately outweighed by the public-interest factors, which weigh heavily in favor of transfer. In short, the Court concludes that (1) the local interest in having a local controversy adjudicated locally, and (2) the fact that the transferee court is more familiar with the issues in this case, make transferring the case the better course of action here.

#### **IV. CONCLUSION**

The Court GRANTS Defendants' Motion to Transfer the Case to the District Court for the Eastern District of New York. Accordingly, the Court declines to rule on Plaintiffs' Motion for a Preliminary Injunction. ECF 35.

**SO ORDERED.**

DATE: November 10, 2022

Sincerely,  
s/  
Jia M. Cobb  
U.S. District Court Judge

U.S. District Court  
 Eastern District of New York (Central Islip)  
 CIVIL DOCKET FOR CASE #: 2:23-cv-02915-FB-ST

Kinsella v. Bureau Of Ocean Energy Management et al Assigned to: Judge Frederic Block Referred to: Magistrate Judge Steven Tiscione Case in other court: District of Columbia, 1:22-cv- 02147	Date Filed: 04/19/2023 Jury Demand: None Nature of Suit: 895 Freedom of Information Act Jurisdiction: U.S. Government Defendant
Cause: 42:4321 Review of Agency Environment	

04/19/2023	Incomplete ACO Case Termination/Statistical/Non Reportable Closing. (DC) (Entered: 04/20/2023)
04/19/2023	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) (Entered: 04/24/2023)
04/25/2023	ORDER REASSIGNING CASE. Case reassigned to Judge

		<p>Frederic Block and Magistrate Judge Steven Tiscione (as related to 22-cv-1305) for all further proceedings. Judge Gary R. Brown, Magistrate Judge Steven I. Locke no longer assigned to case Please download and review the Individual Practices of the assigned Judges, located on our website. Attorneys are responsible for providing courtesy copies to judges where their Individual Practices require such. Ordered by Chief Judge Margo K. Brodie on 4/25/2023. (KD) (Entered: 04/25/2023)</p>
05/01/2023		<p>ELECTRONIC ORDER REOPENING CASE: Ordered by Judge Frederic Block on 5/1/2023. (MI) Modified on 5/18/2023 TO REFLECT THAT THERE ARE NO LONGER ANY PENDING APPEALS IN THE D.C. CIRCUIT. (MI). (Entered: 05/01/2023)</p>
05/18/2023	56	<p>MEMORANDUM AND ORDER: Plaintiffs motion 35 for a preliminary injunction is DENIED. Ordered by Judge Frederic Block on 5/18/2023. (MI) (Entered: 05/18/2023)</p>

05/18/2023	57	NOTICE of Appearance by Vincent Lipari on behalf of Bureau of Ocean Energy Management, Deb Haaland, Michael S. Regan (aty to be noticed) (Lipari, Vincent) (Entered: 05/18/2023)
06/12/2023	58	<p>SCHEDULING ORDER: An initial conference will be held at 10:30 a.m. on July 6, 2023 before the undersigned by phone. Counsel for all parties must participate and shall connect to the conference through dial-in number 888-557-8511 with access code 3152145. The attached Discovery Plan Worksheet is to be completed by counsel and electronically filed with the Court by July 3rd.</p> <p><b>THE PARTIES ARE REMINDED that audio or video recording of proceedings by any party other than the Court, is strictly prohibited by Local Civil Rule 1.8. Violation of this rule may result in sanctions, including removal of court issued media credentials, restricted entry to future hearings, denial of entry to future hearings, or</b></p>

		<p><b>any other sanctions deemed appropriate by the Court.</b>  So Ordered by Magistrate Judge Steven Tiscione on 6/12/2023.  (LV) (Entered: 06/12/2023)</p>
06/13/2023	59	<p>MOTION to Appear Pro Hac Vice Filing fee \$ 150, receipt number ANYEDC-16793536 by South Fork Wind, LLC.  (Attachments: # 1 Declaration of Janice M. Schneider in Support of Motion to Admit Counsel Pro Hac Vice, # 2 Exhibit A - Certificates of Good Standing, # 3 Proposed Order Granting Motion to Admit Counsel Pro Hac Vice) (Schneider, Janice)  (Entered: 06/13/2023)</p>
06/13/2023	60	<p>MOTION to Appear Pro Hac Vice Filing fee \$ 150, receipt number ANYEDC-16793569 by South Fork Wind, LLC.  (Attachments: # 1 Declaration of Stacey L. VanBelleghem in Support of Motion to Admit Counsel Pro Hac Vice, # 2 Exhibit A - Certificates of Good Standing, # 3 Proposed Order Granting Motion to Admit Counsel Pro Hac Vice)  (VanBelleghem, Stacey)  (Entered: 06/13/2023)</p>

06/13/2023	61	<p>MOTION to Appear Pro Hac Vice Filing fee \$ 150, receipt number ANYEDC-16793592 by South Fork Wind, LLC.  (Attachments: # 1 Declaration of Devin M. O'Connor in Support of Motion to Admit Counsel Pro Hac Vice, # 2 Exhibit A - Certificates of Good Standing, # 3 Proposed Order Granting Motion to Admit Counsel Pro Hac Vice) (O'Connor, Devin)  (Entered: 06/13/2023)</p>
06/14/2023		<p>ORDER granting 59 Motion for Leave to Appear Pro Hac Vice. Having reviewed the Pro Hac Vice application 59 submitted by Janice M. Schneider for Defendant-Intervenor South Forth Wind, LLC and found it to be in compliance with the local rules concerning attorney admissions, the application is approved. If not already done, the attorney shall register for ECF which is available online at the NYED's homepage. Once registered, the attorney shall file a notice of appearance and ensure that he/she receives electronic notifications of activity in this case. The attorney shall ensure that the</p>



	<p>\$150 admission fee is submitted or has been submitted to the Clerk's Office. So Ordered by Magistrate Judge Steven Tiscione on 6/14/2023. (LV) (Entered: 06/14/2023)</p>
06/14/2023	<p>ORDER granting 60 Motion for Leave to Appear Pro Hac Vice. Having reviewed the Pro Hac Vice application 60 submitted by Stacey L. VanBelleghem for Defendant-Intervenor South Fork Wind, LLC and found it to be in compliance with the local rules concerning attorney admissions, the application is approved. If not already done, the attorney shall register for ECF which is available online at the NYED's homepage. Once registered, the attorney shall file a notice of appearance and ensure that he/she receives electronic notifications of activity in this case. The attorney shall ensure that the \$150 admission fee is submitted or has been submitted to the Clerk's Office. So Ordered by Magistrate Judge Steven Tiscione on 6/14/2023. (LV) (Entered: 06/14/2023)</p>

06/14/2023	<p>ORDER granting 61 Motion for Leave to Appear Pro Hac Vice. Having reviewed the Pro Hac Vice application 61 submitted by Devin M. O'connor for Defendant-Intervenor South Forth Wind, LLC and found it to be in compliance with the local rules concerning attorney admissions, the application is approved. If not already done, the attorney shall register for ECF which is available online at the NYED's homepage. Once registered, the attorney shall file a notice of appearance and ensure that she receives electronic notifications of activity in this case. The attorney shall ensure that the \$150 admission fee is submitted or has been submitted to the Clerk's Office. So Ordered by Magistrate Judge Steven Tiscione on 6/14/2023. (LV) (Entered: 06/14/2023)</p>
06/16/2023	<p>NOTICE of Appearance by Kegan Andrew Brown on behalf of South Fork Wind, LLC (aty to be noticed) (Brown, Kegan) (Entered: 06/16/2023)</p>
06/16/2023	<p>NOTICE of Appearance by Janice Schneider on behalf of</p>

	South Fork Wind, LLC (notification declined or already on case) (Schneider, Janice) (Entered: 06/16/2023)
06/16/2023	NOTICE of Appearance by Stacey VanBellegem on behalf of South Fork Wind, LLC (notification declined or already on case) (VanBellegem, Stacey) (Entered: 06/16/2023)
06/16/2023	NOTICE of Appearance by Devin M. O'Connor on behalf of South Fork Wind, LLC (notification declined or already on case) (O'Connor, Devin) (Entered: 06/16/2023)
06/16/2023	Letter MOTION for pre motion conference by South Fork Wind, LLC. (Brown, Kegan) (Entered: 06/16/2023)
06/16/2023	CERTIFICATE OF SERVICE by South Fork Wind, LLC (O'Connor, Devin) (Entered: 06/16/2023)

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
SIMON V. KINSELLA,  
Plaintiff,

-against  
BUREAU OF OCEAN ENERGY  
MANAGEMENT; DEB HAALAND,  
Secretary of the Interior, U.S.  
Department of the Interior;  
MICHAEL S. REGAN, Administrator,  
U.S. Environmental Protection Agency,  
Defendants.

**MEMORANDUM**  
**AND ORDER**  
Case No. 23-CV-  
02915-FB-ST

-----X  
*Appearances:*

*For the Pro Se*

*Plaintiff:* SIMON V.  
KINSELLA  
P.O. Box 792  
Wainscott, N.Y. 11975

*For Defendants:*

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**BLOCK, Senior District Judge:**

Pro Se Plaintiff Simon Kinsella (“Kinsella”), a resident of the Wainscott hamlet of the Town of East Hampton, New York, is seeking a preliminary injunction to halt construction of the South Fork Wind Farm and South Fork Export Cable Project (the “Project”). Kinsella claims that as a result of the Project, which is currently under construction, irreparable harm will occur (i) to the drinking water near the onshore portion of the Project and (ii) to the Atlantic cod population near the offshore portion of the Project. For the reasons that follow, Kinsella’s motion is denied.

**I. FACTS AND PROCEDURAL HISTORY**

Kinsella’s action challenges the approval of the Project granted by the Bureau of Ocean Energy Management (“BOEM”), which is part of the United States Department of the Interior (“DOI”). Specifically, Kinsella argues that BOEM violated the Administrative Procedure Act (the “APA”) by failing to adequately consider the Project’s potential harm to the area’s drinking water and the offshore Atlantic cod population, as well as the Project’s negative economic impact. Kinsella also argues that the bidding process for the Project was deficient, that BOEM violated the National Environmental Policy Act (“NEPA”), the Outer Continental Shelf Lands Act (“OCSLA”), the Coastal Zone Management Act (“CZMA”), Executive Order 12898, and the Due Process Clause of the Fourteenth Amendment.

On November 2, 2022, Kinsella moved in the U.S. District Court for the District of Columbia (D.D.C.) for a temporary restraining order, which was denied one week later. Subsequently, the D.D.C.

granted Defendants' motion to transfer this case, along with Kinsella's pending motion for a preliminary injunction, to this Court since the Project is located in Suffolk County, New York and another case challenging the same Project is pending before the Court. See *Mahoney v. U.S. Dep't of the Interior*, No. 22-cv-01305, 2022 WL 1093199 (E.D.N.Y. 2022). Kinsella's challenge to the Project is largely the same as that brought by the *Mahoney* plaintiffs, though he adds to their argument by bringing claims under CZMA, the Fourteenth Amendment and an executive order, in addition to the APA, NEPA, and OCSLA. He also does not include the U.S. Army Corp of Engineers as defendants. However, the bulk of the harm claimed by Kinsella is largely the same as that claimed by the *Mahoney* plaintiffs, with the additions of the allegations of harm to the offshore cod population and the potential economic harm caused by the Project. Because these harms underpin all of Kinsella's numerous claims, the Court will address the harms claimed, rather than each individual cause of action, in explaining why Kinsella is not entitled to a preliminary injunction.

The Project—the same one challenged by the *Mahoney* plaintiffs—involves construction of a wind farm located 35 miles east of Montauk Point, Long Island, and the onshore cables that export the energy produced by the windmills to the onshore electric grid in East Hampton. The cables will be contained in underground trenches that will run through Wainscott, where portions of the groundwater are contaminated by perfluoroalkyl and polyfluoroalkyl substances ("PFAS"). The offshore portion of the

Project will involve seafloor construction in an area apparently known for Atlantic cod spawning.

As the D.D.C. pointed out in its November 10, 2022 memorandum and order transferring the venue of this action, the Project's "approval process included myriad opportunities for input from other agencies and stakeholders." Several federal, state, and local agencies participated in the process of preparing the Record of Decision, which approved the Project, and BOEM conducted a public comment period, which included three public hearings, and the review of nearly 400 submittals from the public, agencies, and other interested parties.

Ultimately, the permits to conduct the offshore portion of the Project were issued by Defendants. Permits for the onshore portion of the Project were issued by the New York Public Service Commission ("NYPSC") after years of administrative proceedings which considered the issue of PFAS pollution exacerbation, among other things. An appeal of this approval was denied in New York State court. Separately, residents of Wainscott brought an action in New York State court challenging an easement granted for the trenching in question, which was also denied. In March 2022, the *Mahoney* plaintiffs petitioned this Court for a preliminary injunction to block construction of the onshore portion of the Project, which they claimed would disrupt PFAS in the ground and irreparably harm their already contaminated groundwater quality. The Court denied their request the following month. Kinsella has also brought actions in state court related to the Project.

Now, Kinsella seeks the relief from this Court that he and his neighbors have repeatedly sought and failed to obtain—a bar to the Project’s construction. However, Kinsella, like his unsuccessful neighbors, has failed to demonstrate that irreparable harm will result in the absence of a preliminary injunction. Therefore, his motion for the extraordinary relief of a preliminary injunction is denied.

## II. PRELIMINARY INJUNCTION

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). If an injunction “disrupt[s] the status quo, a party seeking one must meet a heightened legal standard by showing ‘a clear or substantial likelihood of success on the merits.’” *N. Am. Soccer League, LLC v. U.S. Soccer Fed’n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018) (quoting *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012)).

“Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered.” *Bell & Howell: Mamiya Co. v. Masel Supply Co. Corp.*, 719 F.2d 42, 45 (2d Cir. 1983). To establish irreparable harm, a movant “must demonstrate an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by



an award of monetary damages.” *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995) (internal quotation omitted).

In addition, because Kinsella’s claims concern an administrative agency decision, the Court reviews his claims under the standard provided by the APA. Courts shall set aside agency action when it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). Agency decision-making is arbitrary and capricious when the agency bases its decision on “factors which Congress has not intended it to consider,” when the agency “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency,” or its reasoning “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Alzokari v. Pompeo*, 973 F.3d 65, 70 (2d Cir. 2020) (internal quotation marks and citation omitted).

### III. ANALYSIS

First, Kinsella argues that the digging for these trenches will disrupt the PFAS in the ground, exacerbating existing groundwater pollution in the area. Though the area and manner in which Kinsella argues that PFAS will be disrupted differs from that of the *Mahoney* plaintiffs, the harm claimed is the same. The same reasoning that the Court applied in denying the *Mahoney* plaintiffs’ request for a preliminary injunction applies here. Kinsella’s argument likewise fails on the first prong of the preliminary injunction analysis: irreparable harm.

Kinsella need not show that irreparable harm is a guaranteed outcome, but he must show that it is likely. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). “Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court’s] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Id.* Kinsella has not met his burden of demonstrating a likelihood of harm. Aside from the fact that New York State agencies issued the permits for the onshore portion of the Project, not BOEM, and enjoined its authorization of the Project would not halt the onshore portion of the Project, 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. And, even if the Project did ultimately exacerbate PFAS contamination, PFAS contamination can be remediated post-facto. See *Mahoney* 2022 WL 1093199, at \*2.

Next, Kinsella argues that the seafloor construction undertaken to build the offshore portion of the Project will cause irreparable harm to the cod population, which will in turn drive up the cost of cod. Not only is this argument speculative, far from meeting the standard of a likelihood of harm, but it points to a financial harm generally outside the purview of injunctive relief. It is well-settled that “[m]onetary loss alone will generally not amount to irreparable harm.” *Borey v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 934 F.2d 30, 34 (2d Cir. 1991). 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 forecloses. The same is true of Kinsella's final harm claimed: a potential increase in electricity prices in the area resulting from the Project's expense. Kinsella argues that the Project is based on "one-sided economic[s]" and will cause an increase in electricity prices in the area, which could be disproportionately borne by low-income residents. This argument likewise fails at the preliminary injunction stage for its failure to show a likelihood of irreparable harm and its singular basis on monetary harm that could be remedied with standard damages. *See id.*

Finally, as with *Mahoney*, Kinsella waited until several bites at the apple were taken in various judicial and administrative forums, with significant passage of time, before filing this action. This time lapse "undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *Tough Traveler, Ltd. v. Outbound Prod.*, 60 F.3d 964, 968 (2d Cir. 1995) (quoting *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 277 (2d Cir. 1985)).

#### CONCLUSION

Plaintiff's motion for a preliminary injunction is **DENIED**.

**SO ORDERED.**

/S/ Frederic Block  
FREDERIC BLOCK  
Senior United States  
District Judge

Brooklyn, New York  
May 18, 2023

The United States Constitution, Amendment V provides that:

“No person shall ... be deprived of life, liberty, or property, without due process of law ...”

28 U.S.C. § 1404 Change of venue provides that:

- (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.”

National Environmental Policy Act (NEPA)

42 U.S.C. § 4332 provides that:

The Congress authorizes and directs that, to the fullest extent possible:

- (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and
- (2) all agencies of the Federal Government shall-
  - ...
  - (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-
    - (i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

...

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

Outer Continental Shelf Lands Act (OCSLA)  
43 U.S.C. § 1332 provides:

It is hereby declared to be the policy of the United States that –

- (3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs;

### PFAS Contamination Submitted to BOEM

9. On February 22, 2021, Mr. Kinsella submitted comments letter to BOEM in response to its Draft Environmental Impact Statement (“DEIS”) (issued January 8, 2021), addressed to: Chief Michelle Morin, Environment Branch for Renewable Energy, BOEM Office of Renewable Energy Programs.  
See Exhibit 11, Kinsella Comments, Feb 2021
10. BOEM received the comments letter nine months before it approved the SFW Project (November 24, 2021). BOEM acknowledged receiving the documents and uploaded them to its website (see ¶ 11 below).
11. BOEM received the following documents on PFAS contamination—
  - a) NYS DEC Site Char. Rpt, East Hampton Airport (Nov 30, 2018)  
[https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment\\_8.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_8.pdf)
  - b) NYS DEC Site Char. Rpt, Wainscott Sand & Gravel (July 2020)  
[https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment\\_25.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_25.pdf)
  - c) PFAS Contamination Heat Map of Cable Route (p. 1)  
[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_74.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_74.pdf)
  - d) SCDHS PFAS Lab. Reports, 303 Wainscott Wells  
[https://downloads.regulations.gov/BOEM-2020-0066-0387/attachment\\_72.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0387/attachment_72.pdf)

- e) PFAS Zone - Onshore Route (decided *after* PFAS detected) (p. 1)  
[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_75.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_75.pdf)
- f) PFAS Contamination of Onshore Corridor (satellite map) (p. 2)  
[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_65.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_65.pdf)
- g) PFAS release within 500 feet of SFEC route (surface runoff) (p. 2)  
[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_71.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_71.pdf)
- h) NYS PSC, Kinsella Report No 3 - PFAS Contamination (p. 91)  
[https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment\\_9.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_9.pdf)
- i) NYS PSC, Kinsella Testimony 1-1, PFAS (Sep 9, 2020) (p. 37)  
[https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment\\_32.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_32.pdf)
- j) NYS PSC, Kinsella Testimony 1-2, PFAS (Oct 9, 2020) (p. 11)  
[https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment\\_36.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_36.pdf)
- k) NYS PSC, Kinsella Testimony, Rebuttal (Oct 30, 2020) (p. 13)  
[https://downloads.regulations.gov/BOEM-2020-0066-0387/attachment\\_63.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0387/attachment_63.pdf)
- l) NYS PSC, Kinsella, Brief; Initial (Jan 20, 2021) (p. 34)  
[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_9.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_9.pdf)



m) NYS PSC, Kinsella, Brief; Reply & Exhibits  
(Feb 3, 2021) (p. 29)

[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_16.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_16.pdf)

n) NYS PSC, Kinsella, Motion to Reopen  
Record (Jan 13, 2021)(p. 21)

[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_29.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_29.pdf)

12. On October 11, 2017, Suffolk County Department of Health Services (“SCDHS”) issued a Water Quality Advisory for Private-Well Owners in Area of Wainscott. The advisory was the first confirmed detection of PFAS contamination in Wainscott. It made the front page of all the local and regional newspapers. The Water Quality Advisory said it “has begun a private well survey in the vicinity of the [East Hampton] airport property. PFOS and PFOA have been detected in some of the private wells that have been tested so far. One private well had PFOS and PFOA detected above the USEPA lifetime health advisory level” (see link below) –

[https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment\\_13.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_13.pdf)

13. At the time, approximately ninety percent (90%) of residents used private wells for all their drinking water needs.

14. In 2016, the EPA released a “FACT SHEET” on “PFOA & PFOS Drinking Water Health Advisories.” It reads— “[E]xposure to PFOA and PFOS over certain levels may result in adverse health effects, including developmental effects to fetuses during pregnancy or to breastfed infants

(e.g., low birth weight, accelerated puberty, skeletal variations), cancer (e.g., testicular, kidney), liver effects (e.g., tissue damage), immune effects (e.g., antibody production and immunity), thyroid effects and other effects (e.g., cholesterol changes).” (see link below, at PDF 2, second paragraph)—

[https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment\\_33.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_33.pdf)

15. In June 2018, East Hampton Town Supervisor Van Scoyoc received an email from SCDHS stating that “PFC [PFAS] results have been received for 303” private wells, of which “[t]hirteen (13) wells are above the USEPA Health Advisory Level” and “[o]ne hundred and forty-four (144) wells had no detections of PFOS/PFOA.” Conversely, one hundred and fifty-nine (159) wells, or fifty-three percent (53%), had detectible levels of harmful PFOS/PFOA contamination” (see link below, at PDF 17)—

[https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment\\_13.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_13.pdf)

16. The highest recorded PFOS/PFOA contamination level was 791 ppt, more than seven times the EPA 2016 Health Advisory Level (*id.* at PDF 22, table, top row).
17. When SFW submitted its application to NYSPSC (September 14, 2020), it “determined that there were no hydraulically upgradient or adjacent properties along the study corridor that would represent a significant environmental risk to

subsurface conditions.”<sup>5</sup> SFW knew to avoid the source of contamination (at East Hampton Airport)— “The study corridor consists of the Long Island Railroad (LIRR) right-of-way that begins (from west-to-east) approximately 0.20 mile west of the Wainscott-Northwest Road crossover[.]”<sup>6</sup> and includes a “500-foot radius[.]”<sup>7</sup> SFW included within its “study corridor” only the railroad tracks and knew not to investigate the residential area of Wainscott south of East Hampton Airport, where it planned to build underground transmission infrastructure.

18. The PFAS contamination concentration levels quoted herein (see ¶¶ 39–59) are from the NYS DEC Site Characterization Reports for East Hampton Airport and Wainscott Sand & Gravel (see ¶ 7(a)-(b) above) —
19. East Hampton Airport Monitoring Wells (upgradient): EH-19A, EH-19A2, and EH-19B are within 1,000 feet from SFW’s construction corridor, and Well EH-1 is within 500 feet upgradient from SFW’s construction corridor.
20. Wainscott Sand and Gravel (“Wainscott S&G”) (NYSDEC site: 152254) is adjacent and

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<sup>5</sup> See Article VII application, Appendix F Part 2, Phase I Environmental Assessment prepared by VHB Engineering, Surveying, and Landscape Architecture P.C. - Hazardous Materials Desktop Analysis, dated March 30, 2018 (at PDF 142, first paragraph). See [dps.ny.gov—  
https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?  
DocRefId={D741B793-DFC1-4056-BCCC-6F46E06C4616}](https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={D741B793-DFC1-4056-BCCC-6F46E06C4616})

<sup>6</sup> *Id.* (at PDF 124, first paragraph).

<sup>7</sup> *Id.* (at PDF 125, first paragraph).

downgradient from SFW's construction corridor on the opposite side of the source of PFAS contamination at East Hampton Airport.

21. Wainscott S&G Monitoring Wells (downgradient): MW5, MW3, and MW4 (groundwater), and Wells: S1, S11, and S16 (soil), are within one hundred and fifty feet downgradient from SFW's construction site.
22. A similar profile of PFAS contamination at East Hampton Airport (the source of contamination) is evident in wells on the opposite downgradient side of the construction corridor at the Wainscott S&G site.
23. The combined concentration levels of PFOS/PFOA contamination in all four groundwater monitoring wells within one thousand feet upgradient from the construction corridor are more than double the 2016 USEPA Health Advisory Level ("HAL") of 70 ppt, regulatory standards designed to protect human health, as follows—
  24. Well: EH-19A – PFOS/PFOA = 145 ppt  
(exceeds 2016 HAL by 2.1x)
  25. Well: EH-19A2 – PFOS/PFOA = 174 ppt  
(exceeds 2016 HAL by 2.5x)
  26. Well: EH-19B – PFOS/PFOA = 166 ppt  
(exceeds 2016 HAL by 2.4x)
  27. Well: EH-1 – PFOS/PFOA = 162 ppt  
(exceeds 2016 HAL by 2.3x)
28. Soil contamination levels from PFOS, PFOA, and PFHxS chemical compounds detected on the

shallow surface at the Airport site upgradient within one thousand feet of the construction corridor are as follows –

- 29. Well: EH-19A (soil) – PFOS = 3,900 ppt
- 30. – PFOA = 180 ppt
- 31. – PFHxS = 170 ppt
- 32. Well: EH-19B (soil) – PFOS = 12,000 ppt
- 33. – PFOA = 3,800 ppt
- 34. – PFHxS = 3,800 ppt
- 35. Well: EH-1 (soil) – PFOS = 10,000 ppt
- 36. – PFOA = 180 ppt
- 37. – PFHxS = 170 ppt
- 38. Groundwater samples taken from monitoring wells on the opposite side of the corridor from the source of contamination (at the Airport), within one hundred and fifty feet downgradient from the construction corridor, all show exceedingly high levels of the same chemical compounds (PFOA, PFOS, and PFHxS) seen in soil samples taken at the Airport.
- 39. According to the NYSDEC Superfund Designation Site Environmental Assessment of the Wainscott S&G— “Overall, the highest total PFAS detections were in monitoring wells MW3, MW5, MW6 located on the Western (side-gradient) and Northern (upgradient) boundaries of the site, indicating a potential off-site source.” See link (below) (at 2) —  
  
[https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment\\_4.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_4.pdf)
- 40. Contamination levels in groundwater monitoring wells within one hundred and fifty feet

downgradient from the corridor (on the western side of the Wainscott S&G site) for groundwater (“GW”) Monitoring Wells MW5, MW3, and MW4 are as follows—

- 41. Well: MW5 (GW)      – PFOS = 877 ppt
- 42.                           – PFOA = 69 ppt
- 43.                           – PFHxS = 566 ppt
- 44.                           – PFOS/PFOA = 946 ppt  
                                  (exceeds 2016 HAL by 13.5 x)
  
- 45. Well: MW3 (GW)      – PFOS =1,010 ppt
- 46.                           – PFOA = 28 ppt
- 47.                           – PFHxS = 306 ppt
- 48.                           – PFOS/PFOA =1,038 ppt  
                                  (exceeds 2016 HAL by 14.8 x)
  
- 49. Well: MW4 (GW)      – PFOS = 232 ppt
- 50.                           – PFOA = 5.57 ppt
- 51.                           – PFHxS = 43.4 ppt
- 52.                           – PFOS/PFOA = 238 ppt  
                                  (exceeds 2016 HAL by 3.4 x)
  
- 53. Groundwater containing levels of PFAS contamination exceeding USEPA limits flows from the source of contamination at the Airport site across South Fork Wind’s construction corridor downgradient to the Wainscott S&G site, where the same chemical compounds are present in groundwater monitoring wells.

BOEM’s Fraud: PFAS

- 54. BOEM mentions “perfluorinated compounds” (aka PFAS) only once in its FEIS (of 1,317 pages) *somewhere else* “on a fourth site, NYSDEC #152250,” referring to East Hampton Airport. See Exhibit 15, FEIS, *excerpt* p. 655 *only* (at 1).

55. The FEIS (falsely) states that all “four NYSDEC Environmental Remediation Sites are mapped near the interconnection facility” (*id.*). However, the fourth site, East Hampton Airport, is approximately two miles from the interconnection facility (see Exhibit 15, Map, at 2).
56. The FEIS fails to identify a specific “perfluorinated compound” from the thousands of compounds in the broad class of PFAS chemical compounds.
57. In NYS, only two PFAS compounds are regulated, PFOA and PFOS.
58. The FEIS does *not* identify the precise location of the “perfluorinated compounds” relative to the construction site. The FEIS states the compounds are “on a fourth site, NYSDEC #152250” that could be *anywhere* on the 610-acre East Hampton Airport site.
59. The FEIS contains no analysis, test results, mitigation plans, or discussion on alternatives for the specific purpose of avoiding a contaminated area.
60. BOEM did *not* consider the Project’s impact on groundwater contamination that the EPA links to cancer and other adverse health effects. (see ¶ 14 above).
61. Federal Defendants fail to explain how BOEM arrived at the (false) conclusion that “existing groundwater quality in the analysis area appears to be good” (FEIS, at H-23, PDF 655, 2nd ¶), in opposition to the overwhelming evidence it

acknowledged receiving *nine months before* approving SFW's Project.

See Exhibit 15, FEIS, *excerpt* p. 655 *only* (at 1) and (¶¶ 9-53 above).

62. The groundwater in Wainscott contains levels of PFAS contamination exceeding federal and NYS regulatory standards.
63. To install underground concrete duct banks and vaults for over two miles through Wainscott, SFW had to excavate soil and groundwater containing PFAS contaminants.
64. SFW's construction impacted soil and groundwater containing PFAS contaminants.
65. SFW's underground concrete infrastructure will come in contact with groundwater PFAS contamination.
66. According to an exposé, 'Forever chemicals' found in Suffolk's private water wells since 2016, data shows, published in *Newsday* (on April 2, 2022), the Suffolk County Department of Health Services detected harmful levels of PFAS contamination (exceeding the NYS Maximum Contamination Level of 10 parts per trillion for PFOS and 10 parts per trillion for PFOA) in 202 wells in Suffolk County. PFAS chemicals are also known as 'forever chemicals.' Of the total number of contaminated wells in Suffolk County, thirty-two percent (32%) were in Wainscott downgradient from East Hampton Airport in the same area where South Fork Wind proposed installing underground concrete infrastructure for high-voltage transmission cables (see ¶¶ 11(c),



(e)-(f) above). The area with the next highest number of contaminated wells, Yaphank, had less than half the number of contaminated wells (32) than Wainscott (65).

See Exhibit 16, PFAS in Wainscott Wells (Newsday) (at 3-6).

67. As of May 2023, SFW has completed most of its onshore construction without regard to human health or the environment.

BOEM's Fraud: Project Cost (\$2 bn)

68. On November 19, 2018, Petitioner wrote to BOEM concerning SFW's "fail[ure] to comply with 30 CFR 585.627(a)(7) with specific regard to its potential negative impact upon employment" See Exhibit 10, Kinsella Comments, November 2018. The comments letter warns BOEM that SFW "will charge approximately 22 ¢/kWh" and that a "similar wind farm, Vineyard Wind" that is near SFW "will charge only 6.5 ¢/kWh" (*id.*, at 4). The letter also informed BOEM that the SFW would cost (in 2018) "\$1,624,738,893 (NYS Comptroller, 20-year term)" *Id.* See New York State Office of the State Comptroller, Open Book (link below) –

(<https://www2.osc.state.ny.us/transparency/contracts/contracttransactions.cfm?Contract=000000000000024767>)

69. In February 2021, BOEM received comprehensive information on SFW's Project cost submitted by Petitioner-Plaintiff Kinsella in response to BOEM's Draft Environmental Impact Statement ("DEIS") (issued January 8, 2021) for

SFW. The comments letter included an internal LIPA Encumbrance Request, signed by LIPA CFO Joseph Branco on January 30, 2017 (see link below)—

[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_36.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_36.pdf)

Also, see Exhibit 11, Kinsella Comments, February 2021

70. The Encumbrance Request shows the Project Cost, \$1,624,738,893, and Total Projected Energy, 7,432,080 MWh (371,604 MWh per year over 20 years). The price (cost/energy) is \$219 per MWh or 22 cents per kWh.
71. The Project cost and price of energy BOEM received in 2018 and 2021— \$1,624,738,893 and 22 cents per kilowatt-hour— reconcile.
72. On September 30, 2021, SFW and LIPA agreed to expand the offshore wind farm from 90 to 130 MW. The revised Project cost is \$2,013,198,056. NY Office of the State Comptroller, Open Book, Contract: C000883 at —  
<https://wwe2.osc.state.ny.us/transparency/contracts/contracttransactions.cfm?Contract=0000000000000000000085553> (last accessed April 16, 2023).
73. The energy price is 19 c/kWh (cents per kilowatt-hour). See Exhibit 17, COMPLAINT, Appendix 4, Price Tables (at 3).
74. Nine months *before* BOEM approved the Project (February 2021), it received comments regarding the Project cost (for a second time). The price was compared to Sunrise Wind, which is also owned



(indirectly) by the same joint and equal partners, Ørsted A/s and Eversource. The letter reads as follows (see Exhibit 11, Kinsella Comments Feb 2021)—

By comparison (on October 23, 2019), Ørsted A/S announced a power purchase agreement for Sunrise Wind with a price of only \$80.64/MWh. If the same amount of energy (i.e. 7,432,080 MWh) was purchased from Sunrise Wind instead of South Fork Wind, it would cost only \$599,322,931, which is \$1,025,415,958 less expensive [emphasis added]” (3-1, at 18, third paragraph).

75. The 2021 Comments included a table comparing South Fork Wind’s price and energy deliveries to Sunrise Wind. The table has been included here (overleaf). See the original table at the following link (at 15) —  
[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_32.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_32.pdf)

Please see the table (overleaf).

[blank]

		<u>South Fork Wind</u>		<u>Sunrise Wind</u>	
		(cost of delivered energy)		(equivalent cost of delivered energy)	
Energy Deliveries		SFW		Sunrise Price	Sunrise Discount
(MWh)				(\$/MWh)	(from SFW)
Contract Year	Price (\$/MWh)	Yearly Payments	Yearly Payments	Yearly Payments	Yearly Payments
0	37,040	\$160.33	\$5,938,623	\$80	\$2,963,200 50%
1	371,604	\$168.35	\$62,558,233	\$80	\$29,728,320 52%
2	371,604	\$176.76	\$65,686,144	\$80	\$29,728,320 55%
3	371,604	\$185.60	\$68,970,452	\$80	\$29,728,320 57%
4	371,604	\$194.88	\$72,418,974	\$80	\$29,728,320 59%
5	371,604	\$200.73	\$74,591,543	\$80	\$29,728,320 60%
6	371,604	\$206.75	\$76,829,290	\$80	\$29,728,320 61%
7	371,604	\$212.95	\$79,134,168	\$80	\$29,728,320 62%
8	371,604	\$219.34	\$81,508,194	\$80	\$29,728,320 64%
9	371,604	\$225.92	\$83,953,439	\$80	\$29,728,320 65%
10	371,604	\$228.18	\$84,792,974	\$80	\$29,728,320 65%
11	371,604	\$230.46	\$85,640,903	\$80	\$29,728,320 65%
12	371,604	\$232.77	\$86,497,312	\$80	\$29,728,320 66%
13	371,604	\$235.10	\$87,362,286	\$80	\$29,728,320 66%
14	371,604	\$237.45	\$88,235,908	\$80	\$29,728,320 66%
15	371,604	\$237.45	\$88,235,908	\$80	\$29,728,320 66%
16	371,604	\$237.45	\$88,235,908	\$80	\$29,728,320 66%
17	371,604	\$237.45	\$88,235,908	\$80	\$29,728,320 66%
18	371,604	\$237.45	\$88,235,908	\$80	\$29,728,320 66%
19	371,604	\$237.45	\$88,235,908	\$80	\$29,728,320 66%
20	334,564	\$237.45	\$79,440,906	\$80	\$26,765,120 66%
		 <b>\$1,624,738,893<sup>8</sup></b>		 <b>\$594,566,400 63.4%</b>	
		<u>South Fork Wind</u>		<u>Sunrise Wind</u>	

<sup>8</sup> New York Office of the State Comptroller, Open Book, Contract Number: C000883  
<https://wwe2.osc.state.ny.us/transparency/contracts/contractsearch.cfm>

**South Fork Wind is \$1 billion more expensive  
for the same renewable energy.**

76. In the knowledge of SFW's vastly overpriced (by \$1 billion) offshore wind farm, BOEM gave cost no thought *at all*, and approved it.
77. In BOEM's FEIS (issued August 16, 2021), under the heading "Demographics, Employment, and Economics" "Affected Environment" (FEIS, at 3-153, PDF 205, section 3.5.3.1), BOEM writes –

"In the COP, SFW does not indicate that any single state or county would be the primary recipient of the Project's economic impacts, adverse or beneficial ... Table 3.5.3-1. documents the ports, communities, counties, and states that could be directly or indirectly affected by the Project." (*id.*, last paragraph).

BOEM's ROD and FEIS and SFW's COP are available at boem.gov—  
<https://www.boem.gov/renewable-energy/state-activities/south-fork>

78. As the heading, "Ports, Communities, Counties, and States in the Analysis Area" for Table 3.5.3-1 indicates (*id.*; at 3-154, PDF 206), the table lists the geographic areas "that could be directly or indirectly affected by the Project." BOEM identifies *only* individual ports or towns *within* Suffolk County— the Town of East Hampton (East Hampton), Port of Montauk (Montauk), Shinnecock Fishing Dock (Hampton Bays), and Greenport Harbor (Greenport).

79. BOEM does *not* list Suffolk County, as a whole, in Table 3.5.3-1 (above), that could be affected by the Project. Ratepayers living in Suffolk County, LIPA's service area, will bear the economic burden of having to pay for the SFW Project, estimated to be over \$2 billion. BOEM does *not* include the area of Suffolk County in its analysis of impacts resulting from the SFW Project on demographics, employment, and economics.
80. BOEM's economic analysis area focuses on the "ocean economy" that does *not* include Suffolk County as a whole. BOEM describes the economic characteristics of its analysis area as follows—

"[The] focus of this analysis is the GDP for the "ocean economy," which includes economic activity dependent upon the ocean, such as commercial fishing and seafood processing, marine construction, commercial shipping and cargo handling facilities, ship and boat building, marine minerals, harbor and port authorities, passenger transportation, boat dealers, and ocean-related tourism and recreation (National Ocean Economics Program 2020)" (FEIS, at 3-157, PDF 209, last sentence).

81. BOEM devotes nearly two hundred pages to the "ocean economy" and the socio-economic impact on the fisheries industry (FEIS, at 3-86 to 3-183, PDF 138-235, 197 pages). By comparison, BOEM remains silent, not a word, on the Project

cost of \$2 billion and any potential *adverse* economic effects on Suffolk County, LIPA's service area.

82. In the ROD, BOEM summarizes impacts on demographics, economics, and employment from the SFW Project as follows—

“The FEIS also found that the Proposed Project could have, to some extent, beneficial impacts on ... demographics, employment, and economics” (ROD, at D-8, PDF 100, first paragraph).

83. BOEM's ROD identifies possible “beneficial impacts” but does not identify any potential adverse impacts on demographics, employment, or economics. For example, BOEM does not acknowledge any potential adverse effects resulting from the two-billion-dollar cost burden to over one million people in LIPA's service area.
84. BOEM's economic analysis considers beneficial economic impacts such as local spending on capital expenditures of \$184 to \$247 million (depending on the wind farm's capacity) (FEIS, at F-17, PDF 587, Table F-10).
85. BOEM considers beneficial impacts from operational spending of \$6.2 to \$12.3 million per year (*id.*, Table F-11), that is, \$123 to \$246 million over the 20-year contract term.
86. BOEM accounts for beneficial impacts from spending in the local economy by SFW on capital and operational expenses of \$307 to \$493 million

(the addition of capital expenditure and operational spending.

87. BOEM's analysis is one-sided. BOEM accounts for Project-related inflows into the local economy but ignores outflows. Project-related outflows (\$2 billion) outweigh inflows (\$307 to \$493 million) by 4 to 7 times. To put it another way, for every dollar South Fork Wind puts into the economy, it takes out four-to-seven times that amount.
88. The net outflow (i.e., inflows of \$307 to \$493 million less an outflow of \$2 billion) equals \$1.5 to \$1.7 billion, exiting Suffolk County's economy.
89. BOEM does not acknowledge, let alone consider, the adverse economic impacts of withdrawing \$2 billion from Suffolk County's economy. Moreover, the negative economic impact (\$2.013 billion) is fixed under the terms of the PPA. In contrast, the limited beneficial effects are estimates.
90. BOEM has used biased financial data to support its decision.
91. BOEM failed to consider both the Project's cost of \$2 billion and the people in Suffolk County who will have to pay that cost, including lower-income families.

#### BOEM's Fraud: South Fork RFP

92. On June 24, 2015, PSEG Long Island, on behalf of Long Island Lighting Company d/b/a LIPA, issued a Notice to Proposers soliciting bids in the South Fork RFP procurement. The RFP sought



“sufficient local resources to meet expected peak load requirements until at least 2022 in the South Fork of Long Island ... Such resources will be located on Long Island and provided to LIPA.” See Exhibit 4, RFP Notice to Proposers (2015).

93. The notice unambiguously invites bidders to submit proposals for “local resources ... located on Long Island” *and nowhere else*. PSEG Long Island repeats the specification twice, highlighting its significance. However, it is irrefutable that an offshore wind farm thirty-five miles off-coast from Montauk Point, such as SFW, is *not* a “local resource[]” that is “located on Long Island[,]” it is *on* the Outer Continental Shelf *in* the Atlantic Ocean.
94. Moreover, offshore wind technology is the least likely technology to provide power to meet “peak demand” for electricity. On eastern Long Island’s South Fork, “peak demand” for electricity occurs in response to air conditioning usage on hot (typically windless) summer days when, *not* coincidentally, power generation from offshore wind is minimal (due to less wind).
95. Please read the Complaint challenging the South Fork RFP (only 15 pages) –  
Exhibit 12, *Kinsella v LIPA* (621109-2021), Complaint) and compare the allegations to the South Fork RFP (see Exhibit 00, South Fork RFP).
96. Empirical evidence supports offshore wind’s inability to provide power efficiently during the summer. The Block Island Wind Farm (“BIWF”)

commenced operations in late 2016 and is in the same area as the proposed South Fork Wind Farm (“SFWF”). Its actual generating capacity in August (a six-year average from 2017 through 2022) was only 24% of its nameplate capacity, operating at an average capacity of 7.3 of 30 MW (its nameplate capacity). The wind farm’s average output in August was around half the average amount of electricity generated in December (52.7%) over the same period (2017 through 2022). Although the South Fork RFP specifically sought resources to meet “peak demand[,]” it awarded the PPA to an offshore wind farm that was more likely *not* to provide power to meet peak demand.

See Exhibit 6, Block Island Wind Farm Power Output Graph (2017–2022).

97. SFW does *not* meet the South Fork RFP’s minimum specifications and requirements. See Exhibit 12, *Simon V. Kinsella et al. v. Long Is. Power Auth., et al.*, (index 621109-2021, NY Sup. Ct. Suffolk County). Please compare the allegations to the South Fork RFP (Exhibit 14).
98. Although the Notice to Proposers precluded offshore wind proposals, the procurement made an exception for SFW. Despite *not* meeting the RFP’s minimum specifications and requirements, SFW was treated favorably and allowed as the *only bidder* to submit an offshore wind proposal. The South Fork RFP was manipulated to stifle competition.
99. The South Fork RFP **permitted favoritism** in another critical respect. On January 11, 2017,

then-Governor of New York State, Andrew M. Cuomo, in his 2017 State of the State address, directed the LIPA Board of Trustees to approve SFW's proposal.

100. Governor Cuomo's speech read as follows (*see* Exhibit 18, Governor Cuomo 2017 State of the State, *excerpts* (pages 1, 54–56)—

The first major step in the State's offshore wind development plan is a 90 megawatt [SFW's original size], 15-turbine project off the East End of Long Island. The Governor calls on the Long Island Power Authority to approve this critical project, which would be approximately 30 miles southeast of Montauk ... This innovative project is the least expensive proposal, including proposals for both renewable and conventional power generation, to meet the growing energy needs of the South Fork and to provide cleaner energy for all of Long Island [i.e., suggesting expansion][emphasis added].”

101. Fourteen days later (on January 25, 2021), the LIPA Board of Trustees approved SFW's Project. Governor Cuomo appointed the majority of the LIPA Board of Trustees. By “call[ing] on the Long Island Power Authority to approve this critical project[,]” Governor Cuomo interfered in an active procurement (the South Fork RFP) to advance the interests of a private developer to the detriment of the other bidders, the public, and Petitioner.

102. On November 24, 2021, BOEM issued its ROD approving the Project's FEIS. BOEM's ROD (falsely) asserts that SFW's "power purchase agreement executed in 2017 result[ed] from LIPA's technology-neutral competitive bidding process [emphasis added]" (ROD, at 7), referring to the South Fork RFP.<sup>9</sup>
103. SFW also makes the same (false) claim in its COP (*see* Exhibit 7, SFW COP, Executive Summary, *excerpt*).<sup>10</sup>
104. LIPA disagrees. A Memorandum from LIPA to the N.Y. Office of the State Comptroller (January 27, 2017) reads— "In some instances, proposals were advanced if they were the only proposal offering a particular technology." *See* LIPA Memo (at 12, first paragraph) (uploaded by BOEM link below) – [https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_49.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_49.pdf)  
LIPA continues— "Two other proposals (i.e., Deepwater Wind ... and Fuel Cell Energy ...) were designated as Semi-Finalists because ... they were the only proposals offering a particular technology ... Deepwater Wind was the only proposal offering offshore wind technology" (*id.*, at 13, first paragraph) (Deepwater Wind refers to SFW). The South

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<sup>9</sup> *See* ROD (at 7, PDF 9, ¶ 7). BOEM provides the same false information in its FEIS. *See* FEIS (at ii, PDF 6, penultimate paragraph). ROD and FEIS are available at the link below— <https://www.boem.gov/renewable-energy/state-activities/south-fork>

<sup>10</sup> *See* Exhibit 7, SFW COP May 2021, Executive Summary, *excerpt* (at ES-2, PDF 3).

Fork RFP procurement advanced proposals based on their technology (LIPA has *not* disclosed relative costing information comparing other bids). Thus, the bidding process was *not* “neutral” on technology. Where proposals can be advanced based solely on the technology (i.e., offshore wind technology), and there is only one bidder offering that technology, then the procurement process is *not* competitive. As SFW was the only bidder to submit a proposal for offshore wind resources (in a solicitation that precluded such resources), **SFW had no competition.** Thus, the South Fork RFP was *not* a “competitive bidding process[,]” as BOEM (SFW and the NYSPSC) claim.

105. On November 8, 2021, NYSPSC General Counsel Robert Rosenthal answered the Verified Petition in *Simon V. Kinsella v. NYSPSC* (index 2021-06572, N.Y. App. Div., 2d Dep’t),<sup>11</sup> admitting the following (see Exhibit 9, NYSPSC Verified Answer (index 2021-06572)—

a) [Verified Petition Paragraph 62] In January 2017, LIPA and PSEG Long Is., acting on behalf of LIPA, awarded SFW 25 a PPA for the supply of energy at an average price of 22 cents per kWh over the life of the contract (see Exhibit 2 – LIPA Contract Valuation for SFW).

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<sup>11</sup> In answer to Verified Petition in *Simon V. Kinsella v. NYSPSC* (index 2021-06572, N.Y. App. Div., 2d Dep’t). See Exhibit 8, Verified Petition, and Exhibit 9, Verified Answer

- b) [Verified Petition Paragraph 63] LIPA plans to purchase the same offshore wind renewable energy from another wind farm, Sunrise Wind, for 8 cents per kWh, nearly one-third the price of SFW (see Exhibit 3 – Ørsted's Sunrise Wind PPA (at p. 1)).
- c) [Verified Petition Paragraph 64] The two offshore wind farms – SFWF and Sunrise Wind Farm – are only two miles apart and are owned and controlled indirectly by the same joint and equal partners, Ørsted and Eversource.
106. According to LIPA, Total Projected Energy Deliveries for South Fork Wind over the 20-year contract term is 7,432,080 MWh, and the Total Annual Contract Payments over the same period are \$1,624,738,893. SFW's average renewable energy price is \$218.61/MWh or 21.9 cents/kWh. See Exhibit 2, LIPA Contract Valuation for SFW. Had LIPA purchased the same energy (7,432,080 MWh) but from Sunrise Wind at 8.064 cents per kWh (the published PPA price), it would have cost LIPA only \$599,322,931, representing a saving of \$1,025,415,962 (NB: the variance between the calculation and the price table is due to a rounding error in Sunrise Wind's price of energy) (see ¶¶ 75-76 above).

*SFW Fraud: PFA S*<sup>12</sup>

146. SFW argued in the district court that it is “on a very tight schedule ... there’s really no cushion for delay ... limited vessel availability [] could prevent the project from meeting its contractual power purchase agreement requirements, which could result in millions of dollars in liquidated damages [emphasis added]” (See Hearing Tr. 11/09/2022 (22-516, Doc. 1979239, at 6:7-15).
147. SFW obtained that power purchase agreement via a manipulated procurement process, the South Fork RFP.
148. SFW knowingly provided false information to BOEM in its final COP. It falsely represented groundwater quality (by concealing onsite groundwater PFAS contamination) and the Project’s socioeconomic impact (by omitting the Project cost of \$2 billion).
149. SFW (falsely) claimed that its COP “provides a description of water quality and water resource conditions in the ... SFEC<sup>[13]</sup> as defined by several parameters including: ... contaminants in water” (see COP May 2021, at 4-56, PDF 224, first paragraph). Under the heading, “Water Quality and Water Resources,” SFW asserts its COP “discusses relevant anthropogenic activities that have in the past or currently may

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<sup>12</sup> Per- and Polyfluoroalkyl Substance (“PFAS”) contamination

<sup>13</sup> South Fork Export Cable (SFEC), which includes onshore construction for high-voltage transmission cable through Waincott

impact water quality, including point and nonpoint source pollution discharges, ... and pollutants in the water” (*id.*). On the contrary, SFW does *not* describe “contaminants in water” (*id.*) or discuss “relevant anthropogenic activities” (*id.*), such as the use of firefight foam discharging “pollutants” (*id.*), such as harmful PFAS contamination into groundwater.

150. SFW ignored groundwater PFAS contamination in the area where it proposed installing underground concrete infrastructure (for two miles) encroaching into and impacting that groundwater (a sole-source aquifer used for drinking water). That area had more affected private drinking water wells by double the number of wells anywhere else in Suffolk County (*see* ¶ 67 above).
151. SFW tested its onshore construction corridor for PFOA/PFOS<sup>14</sup> contamination in January 2021. The test results showed groundwater PFOA contamination (of 50 ppt) that exceeds NYS’ drinking water standard by five times (Well MW-4A, sampled 01/14/2021) and groundwater PFOS contamination (of 14.7 ppt) that also exceeds NYS’ drinking water standard (Well SB/MW-15A, sampled 1/18/2021).<sup>15</sup> The testing pre-dates by four months the final COP SFW submitted to BOEM (in May 2021). *See* Exhibit

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<sup>14</sup> Perfluorooctanoic Acid (“PFOA”) and Perfluorooctane Sulfonate (“PFOS”) are chemical compounds classified as hazardous waste in NYS (contaminants) within a broad class of manmade chemicals known as PFAS.

<sup>15</sup> New York State Maximum Contamination Level (NYS MCL): PFOA, 10 ppt and PFOS, 10 ppt.



19, SFW PFAS Test Results, *excerpts*, Wells MW-4A (at 1) and SB/MW-15A (at 2). The complete Environmental Investigation Report by GZA GeoEnvironmental of New York (on behalf of Ørsted) contains test results performed in December 2020 and January 2021, four months *before* South Fork Wind submitted its final COP to BOEM in May 2021. GZA's report (revised April 1, 2021) reads as follows—

PFAS were detected in samples from 20 wells [within SFW's construction corridor]; levels of PFOA and PFOS exceeded NYSDEC's Ambient Water Quality Criteria Guidance Values in one well each (MW-4A and MW-15A, respectively)" (at 8, PDF 34, Groundwater Results).

Monitoring Well MW-4A is on Beach Lane, and MW-15A is on Wainscott NW Rd, in Wainscott, N.Y. The revised report was uploaded to the NYSPSC website (on April 21, 2021) (File No.: 282, Appendix H - Final HWPWP Part 3, Attachment E) (last accessed April 16, 2023). Available at [dps.ny.gov—  
https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={7F6C6BBF-6053-455D-AF06-E440FB46C63F}](https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={7F6C6BBF-6053-455D-AF06-E440FB46C63F}))

152. Despite including other chemical contaminants, such as “median groundwater nitrogen levels” (see ¶ 162 below), SFW did *not* include the PFAS contamination test results in the final COP submitted to BOEM. SFW concealed the test results showing groundwater PFAS

contamination from BOEM, consistent with an established pattern of denying and hiding the existence, nature, and extent of onshore PFAS contamination in Wainscott.

153. SFW identified other less harmful contaminants, such as “median groundwater nitrogen levels ... [that] have risen 40 percent to 3.58 mg/L” (COP May 2021, at 4-61, PDF 229, first sentence), but did *not* acknowledge the presence of chemicals “that can cause cancer and other severe health problems” (ECF No. 34-2, at 3, last sentence).
154. In February 2022, South Fork Wind’s tested the same Monitoring Wells: Well MW-4A showed onsite PFOA (82 ppt) contamination exceeding the EPA 2016 Health Advisory Levels (70 ppt) and the NYS MCL (10 ppt) by eight times, and Well MW-15A showed onsite PFOS (12 ppt) contamination exceeding the NYS MCL (10 ppt). Limited, summarized, unsigned, and unsubstantiated test results (without authorized laboratory results) were posted on East Hampton Town’s website by the Town (*not* South Fork Wind).  
See the East Hampton Town Website (last accessed April 16, 2022)—  
<https://ehamptonny.gov/DocumentCenter/View/11757/SFW-Monitoring-Well-summary-Feb-21-2022>.
155. In 2022, South Fork Wind did *not* publicly disclose the *actual* laboratory reports for PFAS contamination, breaking with prior practice. Previously (in April 2021), SFW had disclosed

its PFAS laboratory test results of groundwater and soil samples (taken in December 2020 and January 2021). **Note: Soil and groundwater samples were taken *after* the NYSPSC evidentiary record had closed, thereby avoiding examination and cross-examination of witnesses during the NYSPSC proceeding.**

156. SFW did *not* include *any* PFAS contamination results in its final COP.
157. SFW did *not* identify PFAS contamination in *any* of the six updates to its Construction and Operations Plan submitted to BOEM.

***SFW Fraud: Cost (\$2 bn)***

158. SFW submitted an Economic Development and Jobs Analysis (by Navigant Consulting Inc., February 5, 2019) to BOEM for review and approval. See Exhibit 24, SFW Economic Analysis. Under the heading “Summary Results,” SFW’s report (falsely) asserts that—

The Project will clearly have a positive economic impact and will add a significant number of jobs to the United States and to the state of New York [emphasis added] (*id.*, at 1, PDF 4, penultimate paragraph).

159. According to the analysis, the best-case scenario will have a total beneficial impact on NYS of \$458 million.<sup>16</sup> However, the Project cost of

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<sup>16</sup> Summary of Jobs and Investment Impacts for New York (at 3, PDF 6, Table 1-2). Total construction phase beneficial

\$2.013 billion (paid by ratepayers in Suffolk County) will offset beneficial in-state spending and result in a net adverse impact of \$1.555 billion.

160. A total *beneficial impact* (\$458 million) *may* have resulted in additional jobs (SFW claims 196 jobs), but the (\$2.013 billion) *adverse impact* resulting from the Project cost cancels out those jobs four times over. The Economic Analysis' conclusion that the Project will "add a significant number of jobs" is one-sided, omitting the more considerable *negative* economic impact of the Project cost. SFW neither disclosed, discussed, nor considered the Project cost (\$2.013 billion) in its final COP (May 2021) submitted to BOEM.

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economic impact is \$186.1 million (Earning \$74.1, Output \$81.9, and Value Add 57.1 million). Total operational phase beneficial economic impact is \$272 million (Earning \$2.8, Output \$6.8, and Value Add \$3.9: sum multiplied by 20 years).