Neither NEPA nor the OCSLA exempts BOEM or SFW from compliance, and neither BOEM nor SFW has asserted such a defense.

(4) Intent to deceive

One "may infer but [is] not required to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted" (*citing United States v. Mejia*, 597 F.3d 1329, 1341 (D.C. Cir. 2010)) *United States v. Williams*, 836 F.3d 1, 30 (D.C. Cir. 2016). SFW *and* BOEM establish a consistent pattern over a three-year period (from 2018 through 2021) of keeping the issue of *onsite* PFAS contamination out of the federal environmental review, out of consideration, and out of the public eye.[24] The consequence of their acts was that SFW gained project approval by concealing onshore PFAS contamination, enabling it to commence construction in February 2022.

NB: The following discussion on the NYSPSC proceeding is included to show that SFW's acts of deception were consistent in the federal and state review.

In October 2017, a year *before* SFW submitted its COP to BOEM for approval (and its application to the NYSPSC), PFAS contamination in the area where SFW planned construction was widely known (Kinsella Aff. I, ¶¶ 31, 34). In 2016, the adverse

[24] There are many other issues such as blantant procurements violations, numberous false purposes and needs, concealing of conflicts of interests, etc., but due to limitations, this motion is limited to the exclusion of the project cost and PFAS contamiantion from BOEM's review.

health effects of such contamination were also widely published (*id.*, ¶ 32) (Kinsella Aff. II, ¶¶ 60–63). In June 2018, SCDHS found groundwater south of East Hampton Airport (in Wainscott) so toxic that hundreds of people were forced to drink, cook, wash, and bathe with bottled water (Kinsella Aff. I, at ¶ 33). Still, in September 2018, when SFW submitted its Construction and Operations Plan to BOEM *and* its application to the NYSPSC, it did *not* include *any* information on PFAS contamination.

Evidence of PFAS contamination was only entered into the NYSPSC evidentiary record two years *after* it had started and *not* by SFW (or the Town of East Hampton) (*id.*, ¶ 88). When the contamination was entered into the record (in September and October 2020), rather than address the issue of existing PFAS contamination, SFW moved to strike the testimony from the record (*id.*, ¶¶ 89–92). The "probable consequence[]" (*United States v. Williams, supra*) of a motion to strike testimony is to remove it from the evidentiary record and consideration in the proceeding. Thus, SFW intended to deceive the public into believing there were no concerns with *onsite* PFAS contamination. Although the motion to strike was denied (in relevant part), it does not change its probable consequence; SFW's intention to keep PFAS contamination *out* of the NYSPSC case. SFW's intent to conceal PFAS contamination is reflected in BOEM's federal review, where SFW succeeded in keeping the issue entirely out of consideration.

(5) Action taken in reliance upon fraudulent representation

On October 19, 2018, BOEM published a Notice of Intent ("NOI"). It reads— "Consistent with the regulations implementing the National Environmental Policy Act ... (BOEM) is announcing its intent to prepare an Environmental Impact Statement (EIS)" (*see* Exhibit K, USCA 22-5316, Doc. 1980953, Exhibit 2, Federal Register, Vol. 83, No. 203, at 53104–53105). I (and the public) relied on BOEM's NOI to prepare a NEPA-compliant EIS based on a thorough environmental review by submitting comments (in response to the NOI) on November 19, 2018 (Kinsella Aff. I, ¶ 17-20). The NOI misleads the public and me into believing that BOEM would, pursuant to NEPA, "determine significant resources and issues, impact-producing factors, reasonable alternatives (e.g., ... restrictions on construction and siting of facilities and activities), and potential mitigation measures to be analyzed in the EIS" (Federal Register, *supra*).

On January 8, 2021, BOEM published a "Notice of availability of a Draft Environmental Impact Statement and public meetings" (*see* Exhibit L, USCA 22-5316, Doc. 1980953, Exhibit 3, Fed. Reg., Vol. 88, No. 5, at 1520–1521). BOEM's notice asserts that it acted "[i]n accordance with regulations issued under the National Environmental Policy Act" (*id.*, at 1520, first column). It continues— "The DEIS analyzes reasonably foreseeable effects from the project. The analysis ... assesses cumulative impacts that could result from the incremental impact of the proposed action and action alternatives ... when combined with past, present, or reasonably foreseeable activities, including other potential future offshore wind

activities" (*id.*, at 1520, second column, last paragraph).

On February 22, 2021, I sent Defendant-Appellee Michelle Morin of BOEM the 2021 Comments responding to SFW's DEIS, including 207 exhibits (*see* Exhibit M, USCA 22-5316, Doc. 1980953-4, Exhibit 4, at 15–24). See Addendum BOEM Exhibits (*id.*, at 26–36)(Kinsella Aff. I., at ¶¶ 21-25). The letter explains that "it is necessary to include these documents; otherwise substantial parts of the proposed Project will not be subject to any environmental review whatsoever" (*id.*, at 2, PDF 16, third paragraph). The comments letter continues— "I respectfully request that the documents herein listed be incorporated by reference and form part of my comments ... and that BOEM, as lead agency, conduct[s] a broad review of the whole Project[,] including in all respects the onshore and offshore components and 'use all practicable means and measures... to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans'" (citing NEPA Section 101(a); 42 U.S.C. § 4331(a)) (*id.*, fifth paragraph). I (and the public) relied on BOEM to perform that review.

On August 5, 2017, during a presentation to the Wainscott Citizens' Advisory Committee ("WCAC"), SFW made the following misleading representations– – that its project was the result of a "technology-neutral competitive solicitation" (*see* Exhibit N, USCA 22-5316, Doc. 1980953-5, Exhibit 5, WCAC SFW Slides, PDF 5); and that "[p]ermitting will involve ...

state and Federal Agencies" that included "New York State" and the "Bureau of Ocean Energy Management" with the implication that such permitting would be lawful (*id.,* PDF 13). The meeting minutes note that "[p]ermitting for the project will involve ... state and federal agencies, and is intentionally designed for transparency" (*see* Exhibit O, USCA 22-5316, Doc. 1980953-6, Exhibit 6, WCAC Minutes, at PDF 3, 1st ¶). The minutes continue, "[t]he formal proposal is expected in early 2018, which will include technical and environmental impact studies" (*id.*, at PDF 4, 2nd ¶). I was a member of the WCAC and Chairman of its Environmental Subcommittee tasked with assessing the SFW Project. I relied on SFW's representations that its project would be subject to proper environmental review.

I relied on BOEM's and SFW's representations that a lawful permitting process would include a 'hard look' environmental review. Still, after five years (since the WCAC meeting in 2017), endless work, and five lawsuits, neither BOEM nor SFW has delivered on their promise to conduct such a review as required by federal law.

4) Conclusion

According to D.C. Bar Association Rules of Professional Conduct, "a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) The representation will result in violation of the Rules of Professional Conduct or other law [emphasis added]" (*see* Rule 1.16(a)).

As discussed (above), the three partners of Latham & Watkins have wilfully and repeatedly violated the Rules of Professional Conduct as follows: Rule 1.2(e) (by assisting a client in conduct that the lawyer knows is fraudulent); Rule 3.3(a) (by making false statements of fact *and* law to a tribunal *and* failing to correct the false statements of material facts *and* law, and assisting a client in engaging in conduct that the lawyer knows is fraudulent); and Rule 8.4 (by engaging in conduct involving dishonesty, fraud, deceit, *and* misrepresentation).

The comments to Rule 1.2, state that "[w]hen the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent ... A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is ... fraudulent [emphasis added]. The lawyer must, therefore, withdraw from the representation of the client in the matter [emphasis added]. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like."

Accordingly, the three partners of Latham & Watkins must withdraw from representing South Fork Wind LLC while this matter is under investigation by the Office of Disciplinary Counsel for the District of Columbia Court of Appeals.

Should you have any questions, please do not hesitate to contact me via email (Si@oswSouthFork.Info) or my mobile (+1-631-903-9154).

Respectfully submitted this 21st day of February 2023,

Simon v. Kinsella, Plaintiff *Pro Se*
P.O. Box 792, Wainscott, NY 11975
Tel: (631) 903-9154 |
Si@oswSouthFork.Info

Attachments:

Exhibit A - USCA, No. 22-5316/7, Doc. 1978475, Entry of Appearances
Exhibit B - DDC Case 1:22-cv-02147, ECF No. 40-1
Exhibit C - DDC Case 1:22-cv-02147, ECF No. 44
Exhibit D - USCA, D.C. Cir., 22-5316, Doc. 1982288
Exhibit E - Statement of Issues (USCA, D.C. Cir., 22-5316, Doc. 1980953)
Exhibit F - Kinsella Affidavit I (USCA, D.C. Cir., 22-5316, Doc. 1979671)
Exhibit G - Kinsella Affidavit II (USCA, D.C. Cir., 22-5316, Doc. 1980954)
Exhibit H - Kinsella Affidavit III (USCA, D.C. Cir., 22-5316, Doc. 1981133, SEALED)
Exhibit I - Second Amended Complaint (USCA, D.C. Cir., 22-5316, Doc. 1980154-2, Exhibit A)
Exhibit J - Newsday Exposé on 'Forever Chemicals' in Suffolk County (USCA, D.C. Cir., 22-5316, Doc. 1983691-2, Exhibit 2)

Exhibit K- BOEM Notice of Intent (USCA, D.C. Cir., 22-5316, Doc. 1980953, Exhibit 2, Federal Register, Vol. 83, No. 203, at 53104–53105)

Exhibit L- BOEM Notice of availability of a Draft Environmental Impact Statement (USCA, D.C. Cir., 22-5316, Doc. 1980953, Exhibit 3, Fed. Reg., Vol. 88, No. 5, at 1520–1521).

Exhibit M-Kinsella Comments 2018 & 2021 (USCA, D.C. Cir., 22-5316, Doc. 1980953-4)
Exhibit N-WCAC, SFW Slides (USCA, D.C. Cir., 22-5316, Doc. 1980953-5)
Exhibit O-WCAC Meeting Minutes (USCA, D.C. Cir., 22-5316, Doc. 1980953-6)

References:

ROD: Record of Decision (issued November 24, 2021), *see* USCA No. 22-5316, Doc. 1980954, Exhibit 1. *Also, see* ROD and Appendices, available online at BOEM.gov, https://www.boem.gov/renewable-energy/state-activities/record-decision-south-fork

FEIS: Final Environmental Impact Statement (issued August 16, 2021), *see* USCA No. 22-5316, Doc. 1980954, Exhibit 2. *Also, see* BOEM.gov, https://www.boem.gov/renewable-energy/state-activities/sfwf-feis

Guidelines: BOEM Information Guidelines for a Renewable Energy Construction and Operations Plan ("COP"), Version 3 (dated April 7, 2016), available online at BOEM.gov,

https://www.boem.gov/sites/default/files/documents/about-boem/COP-Guidelines-Archived.pdf

COP: Construction and Operations Plan ("COP") for South Fork Wind (dated May 7, 2021), available online at BOEM.gov, https://www.boem.gov/sites/default/files/documents/renewable-energy/South-Fork-Construction-Operations-Plan.pdf

Supplemental Appendix D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIMON V. KINSELLA, *Plaintiff,* v. 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; SOUTH FORK WIND, LLC; *Defendants,* and LONG ISLAND POWER AUTHORITY; *Nominal Joinder Parties.*	**Civil Action No. 1:22-cv-02147 (JMC)**

Plaintiff's Response to Defendant Federal Agencies Memorandum in Opposition to Motion for Emergency TRO

Defendant Federal Agencies assert that Plaintiff cannot show an injury in fact. The Supreme Court, in rejecting the view that "the injury-in-fact

requirement had been satisfied by congressional conferral upon *all* persons" (*Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 (1992)), noted an exception – "a case where concrete injury has been suffered by many persons, as in ***mass fraud*** [emphasis added]" (*id.*). The instant matter represents precisely that, as Plaintiff has made clear in his particularized allegations of fraud against Defendants.

> Making a claim of fraud in equity ... does not require showing a particularized injury— as it "involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."
> *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 246 (1944).

In addition, Plaintiff can also establish standing— "[i]n environmental cases, plaintiffs can demonstrate their standing by showing they do or intend to use the relevant environment for, inter alia, fishing, camping, swimming, and bird watching; they may also show that property rights are less valuable as a consequence of the challenged actions" (*Friends of*

the Earth Inc. v. Laidlaw Environmental Services, 528 U.S. 167, 181–84, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).) Plaintiff swims, sails, jogs, etc., in the waters surrounding the onshore construction corridor that are directly linked via groundwater to the concrete duct banks and vaults that will become a secondary source of PFAS contamination from the contamination diffusing into the concrete. Even if the primary source is remediated, the concrete duct banks and vaults will remain and become a secondary source that will continue to release PFAS contamination. Furthermore, once the PFAS is embedded into the concrete, it cannot be removed. Even if the concrete were to be removed, further environmental damage would have been done (and placing the concrete elsewhere would simply contaminate that other location).

[D.D.C., No. 22-cv-02147, ECF 47, Filed 11/09/22, Pages 1-2 of 8]