No. 22A1097

In the Supreme Court of the United States

SIMON V. KINSELLA
Petitioner-Applicant,

v.

BUREAU OF OCEAN ENERGY MANAGEMENT, ET AL.,
Respondents,

and

SOUTH FORK WIND, LLC,
Intervenor-Respondent.

Emergency Application for a Writ of Injunction and
Stay To The United States Court of Appeals
For The District of Columbia Circuit

EMERGENCY APPLICATION FOR A WRIT OF INJUNCTION AND STAY

To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States and Circuit Justice for the District of Columbia Circuit

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PARTIES TO PROCEEDINGS

Applicant who was the plaintiff-petitioner is Simon V. Kinsella, *pro se*.

Respondents that were defendants-respondents are U.S. Bureau of Ocean Energy Management (BOEM); and in their official capacities working for BOEM: Director Elizabeth Klein; Chief Michelle Morin, Environment Branch for Renewable Energy; Program Manager James F. Bennett, Office of Renewable Energy Programs; Environmental Studies Chief Mary Boatman, Office of Renewable Energy Programs; Economist Emma Chaiken; Economist Mark Jensen; Biologist Brian Hooker; and Jennifer Draher; and Secretary of the Interior Deb Haaland, U.S. Department of the Interior (DOI); Principal Deputy Assistant Secretary Laura Daniels-Davis, Land and Mineral Management; and Administrator Michael S. Regan, U.S. Environ-mental Protection Agency (EPA).

Respondent that was intervenor-defendant-respondent is South Fork Wind LLC (SFW) (formerly Deepwater Wind South Fork LLC).

Note: BOEM Director was Amanda Lefton when filing the complaint on July 20, 2022, but Ms. Lefton resigned effective January 19, 2023.

RELATED CASES

In re: Simon V. Kinsella, No. 22-5317, U.S. Court of Appeals for the District of Columbia Circuit. Petition for a Writ of Mandamus seeking review of a district court ruling to transfer the case absent a hearing on substantive (civil) fraud claims or the contemplation of parties (potential witnesses) before transferring the case to an *in*convenient forum prejudicial to the claims that had been filed in a permissible venue.

On February 23, 2023, Circuit Judges Wilkins, Rao, and Walker (assigned to the case) ordered the United States and South Fork Wind, LLC enter appearances and file responses (*see* App 5a).

On May 16, 2023, a *different* panel, Circuit Judges Millet, Pillard, and Rao, denied an emergency motion for injunctive relief *and* the mandamus petition, affecting transfer to an *in*convenient forum prejudicial to the claims (*see* App 2-3a).

Simon V. Kinsella v. Bureau of Ocean Energy Management, et al., No. 22-5316, U.S. Court of Appeals for the District of Columbia Circuit. Judgment upon Appellees' Motion to Dismiss entered February 23, 2023 (*granted*).

Simon V. Kinsella v. Bureau of Ocean Energy Management, et al., No. 22-cv-02147, U.S. District Court for the District of Columbia. Judgment upon federal defendants' motion to transfer entered November 10, 2022 (*granted*). *See* Order (App 6a) and Opinion (App 7-17a).

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT:

EMERGENCY APPLICATION FOR A WRIT OF INJUNCTION

Pursuant to 28 U.S.C. § 1651 and Rules 22 and 23 of this Court, the Applicant, Simon V. Kinsella, respectfully applies for—

(1) An Emergency Order to Stay the court of appeals' ruling to transfer this case to the Eastern District of New York pending appeal, having been *denied* a motion to stay in the court of appeals (on June 9, 2023) (App 3a); and

(2) An Emergency Writ of Injunction, having been *denied* a motion for a temporary restraining order and preliminary injunction in the court of appeals (App 4a-5a).

(3) An Order that defendants file answers the first amended complaint (filed seven months ago on November 2, 2022).

Last Friday (on June 9, 2023), the U.S. Court of Appeals for the District of Columbia ordered the Applicant's motion to stay (filed June 1, No. 22-5317, Doc. 2001691) the court's order of May 17, 2023, be *denied* (*id.*, Doc. 2002892). Attached to the motion to stay (marked as Exhibit A) was a copy of an Emergency Application for a Writ of Injunction or Petition for a Writ of Certiorari (filed with this Court on June 1, 2023, but returned as to form) containing the same information here. Still, the court of appeals held that the Applicant had "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." (App 3a). Contrary to U.S. Supreme Court precedent, the appeals court provides no reasoning to support its conclusory statement. *See Kelley v. Everglades District*, 319 U.S. 415, 416 (1943) ("[T]here must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion [on the relevant issue] can rationally be predicated" and further, "it is not the function of this Court to analyze the evidence in order to supply findings ... sufficient to indicate the factual basis for its ultimate conclusion.").

On May 17, 2023, the court of appeals ordered—

(1) A petition for a writ of mandamus (filed November 29, 2022, *amended* December 7, No. 22-5317, Doc. 1976909) seeking review of the district court's order to transfer (App 8a, Opinion 9a-19a) be *denied* (App 4a-5a); and

(2) An emergency motion for a temporary restraining order and preliminary injunction filed under the All Writs Act be *denied.* The Applicant filed the motion on May ***16***, 2023 (at 9:02 p.m.). Within hours of receiving it, a *different* panel of judges (to the one assigned) *denied* the motion on May ***17*** (at 12:10 p.m.). Such a quick decision left little time for due consideration on the merits. Contrary to this Court precedent, the appeals court gave no reason for its denial. *See Kelley v. Everglades District, supra* ("We hold [] that there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion."). The order was *not* without prejudice.

INTRODUCTION

The change of venue statute, 28 U.S.C. § 1404, provides:

> **(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."

The court of appeals admitted that "the district court did not explicitly consider or allow argument on [Mr. Kinsella's] independent claims of fraud, which were first raised in his amended complaint" (App 5a). Mr. Kinsella's First Amended Complaint "state[s] with particularity the circumstances constituting fraud" (Fed. R. Civ. P. 9(b)) involving *nine Bureau of Ocean Energy Management (BOEM) officials*, named defendants (parties and witnesses) who participated in a fraudulent environmental review. In opposition to the plain language of the statute (above), the court of appeals, acknowledging that the district court did *not consider* "the convenience of the parties and witnesses" (as required under 28 U.S.C. § 1404), affirmed the district court's order transferring the case three hundred miles from three federal agency defendants' offices (and nine named defendants in fraud claims), other potential witnesses, and the seventeen causes of action to an *in*convenient forum prejudicial to the case that had been filed in a permissible venue *against* "the interest of justice" (*id.*).

The district court, and now the court of appeals' orders affecting transfer conflict with U.S. Supreme Court precedent. In *Van Dusen v. Barrack*, this Court held that

"the purpose of [] section [1404(a)] is to prevent the waste 'of time, energy and money' and 'to protect litigants, witnesses and the public against unnecessary inconvenience and expense . . . .' To this end it empowers a district court to transfer 'any civil action' to another district court if the transfer is warranted by the convenience of parties and witnesses and promotes the interest of justice." 376 U.S. 612, 616 (1964). "[T]he most convenient forum is frequently the place where the cause of action arose" (*id.*, at 628). "Section 1404(a) provides for transfer to a more convenient forum, not to a forum likely to prove equally convenient or inconvenient" (*id.*, at 646). However, in the instant matter, the court of appeals acknowledged that neither it nor the district court even considered substantive claims central to the case or the majority of parties (nine) and potential witnesses before transferring the case to a forum that would ***increase*** the waste of time, energy, and money and ***expose*** litigants, witnesses, and the public to unnecessary *in*convenience and further expense in aid of a federal agency evading judicial scrutiny ***against*** the interest of justice. In *Van Dusen v. Barrack*, this Court "concluded ... that the District Court ignored certain considerations which might well have been more clearly appraised and might have been considered controlling" (376 U.S. 612, 645-46 (1964). "It is appropriate, therefore, to reverse the judgment" (*id.*).

The evidence is disturbing. It conclusively shows that BOEM knowingly falsified its review of an offshore wind farm, concealing extensive environmental contamination harmful to human health (*see* No. 22-5317, Doc. 1999552-02, Kinsella

Affidavit ¶¶ 9-67), the adverse socioeconomic impact of the project cost ($2 billion) (*id.*, ¶¶ 68-91), procurement irregularities (*id.*, ¶¶ 92-106), and other material facts such as adverse population-level effects on the essential fish habitat for Atlantic Cod (Cox Ledge), the Sunrise Wind viable alternative, and information regarding the project's purpose and need. Seven instances where BOEM fraudulently represented material facts in its review are prominently up front in the First Amended Company (*see* No. 22-5317, Doc. 1999552-22, at 1-7). BOEM has *not* denied these allegations.

The First Amended Complaint was filed *seven months ago* (November 2, 2022), but BOEM has *not* filed answers (that include allegations of fraud). BOEM has *not* responded to a summary judgment motion filed *eight months ago* (September 26, 2022) that included eighty-nine material facts where there is no genuine dispute (*id.*, 1999552-21), and BOEM never answered the Complaint filed *ten months ago* (on July 20, 2022). Each time BOEM had to comply with lawful procedure, the district court deprived Mr. Kinsella of his rights to due process guaranteed by the Fifth Amendment of the U.S. Constitution.

"[A]s a matter of fundamental fairness the judge must accord an opportunity to be heard at least whenever there is a possibility that the hearing may develop facts bearing on the decision" *Fine v. McGuire*, 433 F.2d 499, 501 (D.C. Cir. 1970). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). See *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914)" *Mathews v. Eldridge*,

424 U.S. 319, 333 (1976). That meaningful time had come and gone on many occasions, but the district court deprived Mr. Kinsella of the opportunity to be heard each time. The Petition of Mandamus sought review of the district court's prejudicial practice of denying Mr. Kinsella his right to a fair hearing ***five times in two months***[1] as follows (*see* Reply to Federal Defendants' Opposition to Mandamus Petition, No. 22-5317, Doc. 1994449, *corrected*)—

(1) September 13, 2022— the district court granted defendants' Motion to Extend Time "for The Government to file its responsive pleading to the Complaint" filed *only the day before*, denying Mr. Kinsella the opportunity to respond (*see* DDC Docket, No. 22-5317, Doc. 1999552-03, at 4, MINUTE ORDER 09/13/2022).

Frustrated, Mr. Kinsella filed (on September 26, 2022) a dispositive Cross-Motion for Partial Summary Judgment and Statement of Material Facts with eighty-nine facts where there is no genuine dispute (*see* No. 22-5317, 1999552-21). In response, BOEM filed a motion to strike or stay the briefing on October 6 (*see* DDC Docket, *supra,* at 4, ECF 24).

(2) October 9 (Sunday)— the district court granted defendants' Motion to Strike or Stay the briefing on the motion for summary judgment (*stayed*) filed *three days earlier*, denying Mr. Kinsella the opportunity to respond (*id.*, at 5, MINUTE ORDER 10/09/2022).

[1] From September 13 through November 10, 2022

(3) November 9— A month after staying the briefing, the court ruled to *strike* the motion for summary judgment, "[i]t is premature given that the defendants haven't formally responded" (*see* Hearing Tr., November 9, 2022, No. 22-5317, Doc. 1994062-11, at 3:8-9), "just so that the docket is cleaned up and that defendants don't have this outstanding obligation" (*id.*, 3:21-22). Mr. Kinsella did not have the opportunity to respond before the court ruled to *strike* (*see* DDC Docket, *supra*, at 7, MINUTE ORDER 11/10/2022).

On November 2, 2022, Petitioned filed (as of right) First Amended Complaint concurrently with a Motion for a Temporary Restraining Order and Preliminary Injunction (*id.*, at 5-6, ECF 34 and 35). During the November 9 hearing, the district court accepted the amended complaint. As the appeals court acknowledged, the district court did *not* "consider or allow argument on [Mr. Kinsella's] [five] claims of fraud" (App 4a) or nine defendants (potential witnesses) named under the fraud claims. The district court ignored the seven instances of fraudulent representation prominently up front in the First Amended Complaint *and* in the Opening Statement of the Memorandum in Support of the Motion for an Emergency Temporary Restraining Order and Preliminary Injunction (*id.*, ECF 35-1, at 2-4). During the hearing, the court did not allow Mr. Kinsella the opportunity to address issues regarding ***BOEM's review or allegations of fraud.***

(4) November 9— The district court ruled to transfer the case absent a hearing on claims of fraud or contemplation of parties and potential witnesses. It was the court's fourth time denying Mr. Kinsella's right to respond at a fair hearing.

(5) November 9— "Finally, the [district] [c]ourt DENIES [Mr. Kinsella's] Motion for a Temporary Restraining Order 35 [ECF 36, *corrected*] for the reasons stated on the record at the hearing" (*id.*, at 7, MINUTE ORDER 11/10/2022). However, for the same reasons the hearing on the transfer order was deficient, the hearing on the TRO was also defective because it failed to address the critical arguments of fraud. Without considering the central elements of fraud by BEOM *and* SFW, there would be no reason SFW's economic injury would be invalid when weighing the equities in consideration of injunctive relief. It was the fifth time in two months the district court denied Mr. Kinsella his right to a fair hearing and his Constitutional right to due process.

Also, see Kinsella Affidavit (No. 22-5317, Doc. 1999552-02, at 28-36, ¶¶ 107-123).

On February 23, 2023, the assigned panel, Circuit Judges Wilkins, Rao, and Walker, ordered the United States and South Fork Wind LLC (SFW) enter appearances and file responses to the mandamus petition (App 7a), which they did (on March 27, 2023). Mr. Kinsella filed a timely reply (No. 22-5317, Doc. 1994449, *corrected*).

On April 19, 2023, in what appeared to be an attempt to evade appellate scrutiny, the district court acted without power, transferring the case to the Eastern District

of New York *before* the court of appeals had ruled on the mandamus petition. After an emergency motion had been filed *that day* (*id.*, Doc. 1995489), "[t]he case in the Eastern District of New York, No. 2:23-cv-02915, ha[d] been administratively closed." (App 6a) and the case reverted to the District of Columbia where it had been properly filed.

On May 16, 2023, concerned about flagrant agency malfeasance by BOEM and continuing (unlawful) construction it approved based on fraudulent representations, Mr. Kinsella filed a motion for a temporary restraining order and preliminary injunction enjoining construction activities of Respondent South Fork Wind LLC (SFW). In response to that motion, a *new* panel of judges, Circuit Judges Millet, Pillard, and Rao, decided the case (originally assigned to Circuit Judges Wilkins, Rao, and Walker), denying the mandamus petition and affecting transfer to an *in*convenient forum prejudicial to the case (App 4a-5a). It was the third time a court had ordered the case be transferred to a forum overtly prejudicial to the claims in aid of compromising proper judicial review of fraud claims.

The court of appeals' order denying the mandamus petition (App 4a-5a) relies on a case where a prisoner in Arizona sought to overturn a transfer order (in a class action suit) based on an alleged denial of access to legal materials, where the prisoner had filed *the same claims* in another U.S. District Court (in Arizona). "[T]he Arizona district court has found, on two previous occasions, that the law library at FCI-Tucson is constitutionally adequate. *See Tripati v. Henman,* No. 86-231 (D.Ariz. April 14,

1987); *Tripati v. Henman,* No. 85-170 (D.Ariz. May 13, 1987)." *Id.* In that case, the court concluded transfer was warranted "due to its familiarity with the related civil suits filed there [in Arizona in *federal court*] by Tripati[,]" citing "*Starnes v. McGuire,* 512 F.2d at 932" (*id.*), another case concerning a prisoner and a habeas petition.

This case is *not* a habeas action, and Mr. Kinsella is *not* a prisoner. Mr. Kinsella has commenced *only one* action in *any court* (federal or state), where he "state[s] with particularity the circumstances constituting fraud" (Fed. R. Civ. P. 9(b)) concerning *nine named BOEM officials* (defendants and potential witnesses) and a fraudulent environmental review by *a federal agency*. Mr. Kinsella has *not* filed *any* other cases alleging fraud anywhere ever before (or since) filing this action in Washington, D.C. Mr. Kinsella has no claims anywhere else against federal agency defendants in this case or claims of action under the same law against anyone anywhere. Since 2018, Mr. Kinsella has corresponded only with federal agency defendants *in Washington, D.C.,* regarding the *federal* review of SFW. This case is unique.

BOEM admitted that during its three-year environmental assessment of SFW (from 2018 through 2021), it spent less than four hours in the transferee forum compared to thousands of hours it acknowledged spending in the Washington, D.C. area (*see* Amended Mandamus Petition, 22-5317, Doc. 1976909, at 12, PDF 19). There is no dispute that the three federal agency defendants' offices are within commutable distance of the courthouse in Washington, D.C., where the seventeen causes of action

occurred with ready access to the nine individual defendants named in the fraud claims (witnesses) and other potential witnesses, including the current U.S. Deputy Secretary of the Interior, Mr. Tommy Beaudreau.

> "The three people overseeing the development of up to 45.3 million acres off the U.S. coastline all worked for a major law firm advising the offshore wind industry, Latham & Watkins LLP. The current U.S. Deputy Secretary of the Interior, Tommy Beaudreau, was a partner in the Washington, D.C. office of Latham & Watkins (2017–2021). The Nominee Report for Mr. Beaudreau lists 'DE Shaw Renewable Investments' as a source of compensation. DE Shaw Renewable Investments owned South Fork Wind LLC (formerly Deepwater Wind South Fork LLC) before selling it to Ørsted A/S, another offshore wind developer from which Mr. Beaudreau received compensation. Mr. Beaudreau's Nominee Report lists a Latham & Watkins income of $2.4 million. It identifies the following offshore wind companies— Ørsted A/S, Avangrid Renewables, Vineyard Wind LLC, Beacon Offshore Energy, TOTAL, innogy Renewables US, Dominion Resources, Inc., DE Shaw Renewable Investments, and Anbaric Development Partners. See Exhibit 9, OGE Nominee Report (2020) [No. 22-5317, Doc. 1994062-10]. The Principal Deputy Assistant Secretary for Land and Minerals Management (L&MM), Ms. Laura Daniel-Davis, who signed BOEM's Record of Decision for SFW, was a Senior Manager at Latham & Watkins (2001–2007). The Director of BOEM, Elizabeth (Liz) Klein, was an Associate at Latham & Watkins (2006–2010). Counsel representing SFW, Ms. Janice Schneider of Latham & Watkins, served as Assistant Secretary for L&MM (2014–2017)" (*see* Reply to Federal Defendant's Opposition to Mandamus Petition, *corrected,* No. 22-5317, Doc. 1994449, at 19-20).

The case is extraordinary. Clear and convincing evidence supports the conclusion that BOEM *and* SFW knowingly concealed contamination harmful to human health, the project cost ($2 billion), procurement violations, and other

material facts.[2] Knowing the review was materially false, BOEM approved the project.

BOEM has evaded answering the allegations of (civil) fraud for *seven months* (since November 2, 2022), aided by (unlawful) procedural abuse by the district court and now the court of appeals. The judgment of the court of appeals has so far departed from the accepted and usual course of judicial proceedings, sanctioned (unconstitutional) procedure by the district court in aid of violations amounting to (civil) fraud by a U.S. regulatory agency as to call for an exercise of this Court's supervisory power.

In the recent case of *Percoco v. United States*, this Court recognized that "an agent of the government has a fiduciary duty to the government and thus to the public it serves" (No. 21-1158, 598 U.S. ---, --- S. Ct. ---, 2023 WL 3356527 (May 11, 2023)). It naturally follows that if such *agent* has a fiduciary duty to the public, then *actual* public officials employed by the government have a fiduciary duty to the public they serve. In this case, the evidence supports beyond doubt that public officials working for BOEM violated that fiduciary duty by acting contrary to the public interest. It cannot be that flagrant violations of federal law rising to the level of (civil) fraud are acceptable.

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[2] For details on BOEM's fraudulent represenations regarding the project cost ($2 billion) and procurement violations, ***please read*** my Emergency Motion for a Temportary Restraing Order and Preliminary Injunction (No. 22-5317, 1999552, filed ***May 16, 2023***).

OPINIONS BELOW

The orders (no opinions) of the court of appeals (App. 3a, 4a-5a, 6a, 7a) are unreported. The order and opinion of the district court (App. 8a, 9a-19a) are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under the All Writs Act, 28 U.S.C. § 1651. The judgment of the court of appeals was entered on June 9, 2023. (App 3a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions are set out in the appendix to the petition (App 20a-22a).

STATEMENT

Bureau of Ocean Energy Management (BOEM)

Under Outer Continental Shelf Lands Act (OCSLA) regulations, BOEM has authority to "approve, disapprove, or approve with modifications" (30 C.F.R. § 585.628(f)) construction and operations plans for multi-billion-dollar offshore development in marine environments on the "[O]uter Continental Shelf [that] is a vital national resource reserve held by the Federal Government for the public" (43 U.S.C. § 1332(3)).

BOEM is the lead federal agency responsible for SFW's environmental review pursuant to the National Environmental Policy Act (NEPA) and the OCSLA. It developed the Final Environmental Impact Statement (FEIS) (August 16, 2021) for

SFW's Construction and Operations Plan (COP) (May 2021) and issued a Record of Decision (ROD) approving the FEIS (on November 24, 2021).

According to the ROD,

> [OCSLA] regulations at 30 C.F.R § 585.628 require BOEM to review the COP and all information provided therein pursuant to 30 C.F.R. §§ 585.626 and ***585.627***, to determine whether the COP contains all the information necessary to be considered complete and sufficient for BOEM to conduct technical and environmental reviews" (*see* 22-cv-02147, ECF No. 45.2, at D-5, PDF 97, 2nd ¶).[3]

The ROD confirms that—

> "Throughout the review process, BOEM evaluated the information [that] ... South Fork Wind submitted, and determined that the information provided was sufficient in accordance with the regulations." (*id.*, at D-6, PDF 98, 2nd ¶).
>
> "OREP has determined that the COP includes all the information required in 30 C.F.R. §§ 585.626 and ***585.627*** for the Proposed Project [emphasis added]" (*id.*, 3rd ¶).

On January 18, 2022, BOEM "approved the Construction and Operations Plan (COP) that South Fork Wind, LLC initially submitted on June 29, 2018, and last updated on May 7, 2021 ...."[4]

South Fork Wind Project

The Project BOEM approved is a relatively small offshore wind farm (130 megawatts) "approximately 19 miles southeast of Block Island, Rhode Island, and 35

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[3] BOEM Record of Decision (ROD), November 24, 2022—
www.boem.gov/renewable-energy/state-activities/south-fork

[4] BOEM SFW COP Approval Letter, January 18, 2022 (at 1)—
www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/SFWF-COP-Approval-Letter.pdf

miles east of Montauk Point, New York, in the Atlantic Ocean" (22-cv-02147, ECF No. 45.2, at 7, PDF 9, 1st ¶). The project includes high-voltage (138 kV) transmission and related infrastructure installed underneath local laneways and streets through a residential neighborhood in Wainscott, N.Y. (for approximately two-and-a-half miles).

Based on BOEM's (unlawful) approval of SFW's COP (on January 18, 2022), SFW commenced construction in February 2022.

PFAS*[5] *Contamination

In February 2021, BOEM received and uploaded to its website an EPA "FACT SHEET" (2016) on "PFOA & PFOS[6] 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)—

https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_33.pdf

The EPA fact sheet was one of many documents BOEM acknowledged receiving as part of Mr. Kinsella's comments letter he submitted to BOEM on February 22,

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5 **PFAS**: Per/– and Polyfluoroalkyl Substance contamination.
6 **PFOA**: Perfluorooctanoic Acid; and **PFOS:** Perfluorooctane Sulfonate.

2021, ***nine months before*** BOEM approved SFW (on November 24, 2021). The February 2021 letter asked BOEM "that the documents 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" (*see* No. 22-5317, Doc. 1999552-12, at 2, 5th ¶). BOEM uploaded the letter to its website. *See* link (below)—

https://downloads.regulations.gov/BOEM-2020-0066-0343/attachment_1.pdf

Nine months before approving the project, BOEM acknowledged receiving the following documents and uploaded them to its website (*also, see* Affidavit of Kinsella, 22-5317, Doc 1999552-02, ¶¶ 9-53)—

- **NYS Department of Environmental Conservation** Site characterization reports for two properties adjacent on either side of SFW's proposed construction corridor: East Hampton Airport (upgradient); and Wainscott Sand & Gravel (downgradient):

  East Hampton Airport (November 30, 2018) *See* link (below)—
  https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_8.pdf

  Wainscott Sand & Gravel (July 2020) *See* link (below)—
  https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_25.pdf

- **Laboratory test results** for 284 drinking water wells in Wainscott (416 pages) from Suffolk County Department of Health Services (SCDHS)—

  https://downloads.regulations.gov/BOEM-2020-0066-0387/attachment_72.pdf

- **SCDHS Email** to East Hampton Town Supervisor Van Scoyoc (June 2018) on the number of contaminated wells in Wainscott from Deputy Commissioner Capobianco (listing test results for 303 wells)—

  https://downloads.regulations.gov/BOEM-2020-0066-0387/attachment_70.pdf

- **SFW Interrogatories** (SK 03-10) (January 2020) containing documents showing extensive PFAS contamination in Wainscott (served on SFW)—

  https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_13.pdf

  NB: SCDHS' *Water Quality Advisory for Private-Well Owners in Area of Wainscott*, issued October 11, ***2017*** (at 9).

- **Maps**, as follows—

  PFAS Contamination Heat Map showing SFWs proposed Cable Route
  https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_74.pdf

  PFAS Zone - Onshore Route (decided *after* SCDHS had detected PFAS)
  https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_75.pdf

  Cable Corridor & PFAS (satellite map)
  https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_65.pdf

  PFAS within 500 feet of cable route (surface runoff)
  https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_71.pdf

- Testimony attesting to existing environmental PFAS contamination. NB: NYS Public Service Commission (PSC) was ***not a cooperating state agency*** in BOEM's federal review.[7] The PSC did *not* consider *actual* onsite PFAS

[7] *See* ROD (at 1, PDF 3, 2nd ¶)

contamination (i.e., test results).[8] The PSC denied a motion to reopen the record to include SFW's test results for PFAS contamination (*see* below)—

NYS PSC: Motion to Reopen Record (Jan 13, 2021) (*denied*)
https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_29.pdf

NYS PSC: Testimony 1-1, PFAS (Sep 9, 2020)
https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_32.pdf

NYS PSC: Testimony 1-2, PFAS (Oct 9, 2020)
https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_36.pdf

NYSPSC: Report No 3 - PFAS Contamination
https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_9.pdf

The documents BOEM received and uploaded to its website conclusively show that the groundwater where SFW proposed constructing underground concrete infrastructure, encroaching into groundwater and at the capillary fringe of a sole-source aquifer, contains levels of PFAS contamination exceeding EPA and NYS limits by many times.

In Suffolk County, thirty-two percent (32%) of all wells with PFOA or PFOS contamination exceeding regulatory limits are in the exact same area where South Fork Wind proposed installing its underground concrete infrastructure (*see* 'Forever chemicals' found in Suffolk's private water wells since 2016, No. 22-5317, Doc. 1999552-17, Table at 3-6).[9]

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[8] SFW first tested onsite soil and groundwater for PFAS contamination on December 28, 2020, *fifteen days after* the NYS PSC evidentiary record had closed (on December 8, 2020). *See* https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={7F6C6BBF-6053-455D-AF06-E440FB46C63F}) (at PDF 37, header record of last five columns).

[9] *See* www.newsday.com/long-island/environment/private-wells-testing-contaminants-drinking-water-pfas-v49xdvtl

Procedural Background

On July 20, 2022, Mr. Kinsella filed a Complaint in the U.S. District Court for the District of Columbia, a permissible venue easily commutable between the courthouse and three federal agency defendants' offices where the causes of action occurred giving rise to the claims under federal law— NEPA, the OCSLA, and the Freedom of Information Act (FOIA) (the District of Columbia is a forum with recognized expertise in FOIA-complaints).[10]

On November 2, 2022, Mr. Kinsella filed (as of right) a First Amended Complaint that "state[s] with particularity the circumstances constituting fraud" (Fed. R. Civ. P. 9(b)) regarding five additional claims alleging (civil) fraud. Nine BOEM officials are named defendants in those fraud claims. The officials were responsible for developing and reviewing the FEIS and issuing the ROD approving SFW's project.

This application-petition discusses only one example concerning groundwater PFAS contamination among seven similar instances of fraudulent representation by BOEM (*see* First Amended Complaint, FRAUD #1 through #7, No. 22-5317, Doc. 1994062-02, at 3-10). On its own, the fact that BOEM concealed environmental PFAS contamination of a sole-source aquifer harmful to human health warrants remand. If BOEM is willing to risk exposing residents to toxic contamination contrary to its statutorily mandated obligations, what else is BOEM willing to risk? The example of environmental contamination cited here provides a window into federal agency

[10] 5 U.S.C. § 552(a)(4)(B)

malfeasance. BOEM knowingly concealed contamination by (falsely) asserting "existing groundwater quality in the analysis area appears to be good" (FEIS, No. 22-5317, Doc. 1994449-02, 2nd ¶) (*also, see* Kinsella Affidavit, No. 22-5317, 1999552-04, ¶¶ 54-67).[11] BOEM falsely claimed that "no onshore construction activities under the Proposed Action [] would require ground disturbance at depths at or near groundwater resources, and ... [o]nshore subsurface ground-disturbing activities would not be placed at a depth that could encounter groundwater, and would therefore not result in impacts on water quality." [12]

BOEM's representations contradicted clear and convincing evidence that it acknowledged receiving in February 2021, at least *nine months before* approving the project (in November 2021). Still, BOEM approved the project, knowing it contained (its own) false statements of material facts.

REASONS FOR GRANTING THE PETITION

Legal Standard: Injunctive Relief

> "A temporary restraining order ("TRO") is an extraordinary form of relief. An application for a TRO is analyzed using factors applicable to preliminary injunctive relief. *See, e.g., Gordon v. Holder*, 632 F.3d 722, 723-24 (D.C. Cir. 2011) (applying preliminary injunction standard to a district court decision denying motion for TRO and preliminary injunction); *Sibley v. Obama*, 810 F. Supp. 2d 309, 310 (DDC 2011) (articulating TRO elements based on preliminary injunction case law)." *Figg Bridge Eng'rs, Inc. v. Fed. Highway Admin.*,

[11] *See* Final Environmental Impact Statement (FEIS), August 16, 2021 (at H-23, PDF 655). Avaiable at boem.gov (see link)— www.boem.gov/renewable-energy/state-activities/south-fork
[12] *Id.*, (at H-28, PDF 660).

> Civil Action No. 20-2188 (CKK), at *4-5 (DDC August 17, 2020).
>
> "To receive the 'extraordinary remedy' of a preliminary injunction, [there] must [be] a 'clear showing' that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); *see also Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291–92 (D.C. Cir. 2009)." *Pursuing Am.'s Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 505 (D.C. Cir. 2016).

Here, the Applicant makes a clear showing on all four factors.

1. Applicant will likely succeed on the merits

In February 2021, BOEM knew groundwater quality in Wainscott contained harmful chemical contaminants. BOEM acknowledged receiving conclusive evidence of PFAS contamination in soil and groundwater in the area where SFW proposed installing underground concrete infrastructure for high-voltage transmission cables (*see* pages 15-18). Still, BOEM's FEIS contains no discussion, analysis, test results, or mitigation plans to minimize the project's impact on PFAS contamination. It does not consider the adverse health effects of chemicals the EPA links to cancer. *See* Kinsella Affidavit (No. 322-5317, Doc. 1999552-02, ¶¶ 54-67). BOEM did *not* discuss alternatives *to avoid* a contaminated area (*see* Maps, page 17). "An EIS must discuss, among other things, 'alternatives to the proposed action,' NEPA § 102(2)(C)(iii), 42 U.S.C. § 4332(2)(C)(iii), and the discussion of alternatives forms 'the heart of the

environmental impact statement.' 40 C.F.R. § 1502.14" *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 194 (D.C. Cir. 1991).

BOEM is required to "consider every significant aspect of the environmental impact of [the] proposed action" *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983), and "to disclose the significant health ... and cumulative consequences of the environmental impact" *Id.*, (at 106-07). It was required to "take a 'hard look' at the environmental consequences before taking a major action" *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21 (1976)— **but BOEM did *none of these.***

Not only did BOEM neglect its duty to "inform the public that it has indeed considered environmental concerns in its decisionmaking process" (*id.*, at 97), it went one step further. It falsified the environmental review, asserting that "existing groundwater quality in the analysis area appears to be good" (No. 22-5317, Doc. 1999552-16, 2nd ¶), contradicting evidence it acknowledged receiving *nine months before* approving the project (*see* pages 11-15).

Here, BOEM's act satisfies the requisite elements of fraud. The Applicant can "show by clear and convincing evidence" (*Pyne v. Jamaica Nutrition Holdings Ltd.*, 497 A.2d 118, 131 (D.C. 1985)) that BOEM made a "false representation of material fact which is knowingly made" (*id.*) by stating groundwater quality was "good" contrary to the evidence it acknowledged receiving, intending to approve the FEIS based on *its own* false representations. One "may infer ... that a person intends the

natural and probable consequences of acts knowingly done or knowingly omitted" *United States v. Williams*, 836 F.3d 1, 30 (D.C. Cir. 2016). BOEM falsely stated groundwater quality in the FEIS, knowing the "probable consequences" of its act, that it would approve the FEIS *with* the false statement that groundwater quality is "good" absent accurate information on PFAS contamination. Such false representations would naturally deceive the reader into believing the water quality in Wainscott is good contrary to fact. On November 24, 2021, BOEM approved the FEIS, knowing it contained misleading information and deceived the public about groundwater quality in Wainscott.

The final element to prove fraud is an "action [that] is taken in reliance upon the misrepresentation." *Pyne v. Jamaica Nutrition Holdings Ltd.*, (*supra*).

On October 19, 2018, BOEM published a Notice of Intent to Prepare an Environmental Impact Statement for SFW [13] (83 Fed. Reg. 53,104). The opening sentence under the "Summary" starts with— "Consistent with the regulations implementing the National Environmental Policy Act (NEPA) ...." [14] In response to the notice, Mr. Kinsella submitted comments to BOEM (November 18, 2018) (*see* Kinsella 2018 Comments, 22-5317, 1999552-10).

On January 8, 2021, BOEM published a Notice of Availability of a Draft Environmental Impact Statement (86 Fed. Reg. 1520). The opening sentence under the "Summary" starts with— "In accordance with regulations issued under the

[13] In 2018, South Fork Wind LLC was Deepwater Wind South Fork LLC
[14] *See* https://www.federalregister.gov/d/2018-22880/p-3

National Environmental Policy Act ...." [15] In response to the notice, Mr. Kinsella submitted comments to BOEM for a second time (on February 22, 2021) (*see* Kinsella 2021 Comments, 22-5317, 1999552-11).

Mr. Kinsella relied on BEOM to perform a NEPA-compliant review on both occasions. In February 2021, he specifically requested "that BOEM, as lead agency, conduct a broad review of the whole Project including in all respects the onshore and offshore components and 'use all practicable means and measures' " (quoting NEPA 42 U.S.C. § 4331(a)) (*id.*, at 2, 5th ¶). The letter warns that "should BOEM likewise *not* require a thorough examination of the onshore part of the Project inasmuch as the offshore part, there will be *no* review, and *no* protections will be afforded the residents of Suffolk County, and specifically, the residents of the Town of East Hampton." *Id.* Mr. Kinsella relied on BOEM to perform the review it had promised the public. BOEM did *not* make good on its public assurances.

Here, Mr. Kinsella has made a clear showing that he is likely to succeed on the merits concerning BOEM's fraudulent representation of groundwater quality *and* by omitting PFAS contamination. (For further instances where BOEM fraudulently represented material facts in its review of SFW, *see* Petitioner-Applicant's Emergency Motion for a Temporary Restraining Order and Preliminary Injunction (*denied*) (No. 22-5317, Doc. 1999552-01).

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[15] *See* https://www.federalregister.gov/d/2021-00100/p-3

Mr. Kinsella can establish that the district court repeatedly deprived him of his Constitutional right under the Fifth Amendment to a fair hearing.

It has been six months, and BOEM *still* has *not* answered the allegations of fraud, responded to the summary judgment motion and statement of material facts, or answered the complaint filed *ten months ago* (on July 20, 2022).

2. Applicant will likely suffer irreparable harm

> "Were the Archdiocese to show a likelihood of success on the merits ... it would prevail on the final three factors because "the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury,' "*Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion)). *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 334 (D.C. Cir. 2018)

In *Chaplaincy of Full Gospel Churches v. England*, the D.C. Circuit observed—

> "*Elrod* [] require[s] movants to do more than merely allege a violation of freedom of expression in order to satisfy the irreparable injury prong of the preliminary injunction frame-work. Rather, moving parties must also establish they are or will be engaging in constitutionally protected behavior to demonstrate that the allegedly impermissible government action would chill allowable individual conduct ... [M]ovants must show that their 'First Amendment interests are either threatened or in fact being impaired at the time relief is sought,' *id.* at 1254-55 (quoting *Wagner v. Taylor*,836 F.2d 566, 577 n. 76 (D.C. Cir. 1987) (quoting *Elrod*,427 U.S. at 373, 96 S.Ct. 2673 (plurality opinion))) (brackets omitted)." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006)

Mr. Kinsella engaged in the federal regulatory review of SFW and commenced this lawsuit challenging BOEM's decision. As this application shows, these activities are ongoing. The district court and the court of appeals deprived him of his constitutional right to due process of law. By actively participating in the federal review and commencing this lawsuit, Mr. Kinsella was "engaging in constitutionally protected behavior to demonstrate that the allegedly impermissible government action would chill allowable conduct" (*id.*).

In the alternative, Mr. Kinsella had been *denied the opportunity* to engage in constitutionally protected behavior. Therefore, he may *not* establish that he *is* or *will be* engaging in that constitutionally protected behavior (because he had been prohibited from doing so) to *demonstrate* that the allegedly impermissible government action would "chill allowable individual conduct." *Id.* However, D.C. Circuit precedence has answered Mr. Kinsella's dilemma.

In *Chaplaincy of Full Gospel Churches,* the D.C. Circuit, when considering Establishment Clause violations (not First Amendment violations), recognized that–

> "[T]he pertinent liberty here is protection against government imposition of a state religion or religious preference. This protection ... requires no affirmative conduct on the part of the individual before its guarantees are implicated by government action. As a matter of semantics, an act chills the freedom of an individual to do something; it is incongruous to link the concept of 'chilling' with an individual's freedom not to have something done to him. Accordingly, while a particular government action may chill one's propensity to speak, associate, exercise one's faith, or otherwise engage in constitutionally protected individual conduct, where, as here, the claim

> asserts government imposition of a religious preference, the 'chilling effect' rationale is both inapposite and superfluous." *Id.* (at 302)

The same is true here. The "implicated government action" was the district court's *denial* of "the opportunity to be heard" (*Mathews v. Eldridge, supra*) on new fraud claims and the contemplation of witnesses and the court of appeals affirming and affecting transfer to a forum prejudicial to this case. It is the freedom *not* to have something done (i.e., *being denied*). On each occasion, the courts deprived Mr. Kinsella of constitutionally protected conduct. He would still feel more insecure knowing that such rights were withdrawn or denied to others with greater frequency independent of any 'chilling' of his own Due Process Clause rights.

The similarities between Establishment Clause violations in *Chaplaincy of Full Gospel Churches* and the denial of the Applicant's Due Process Clause rights extend to the government's message when it violates Constitutional rights.

In *Chaplaincy of Full Gospel Churches*, the D.C. Circuit held that—

> "[O]fficial preference of one religion over another, such governmental endorsement 'sends a message to nonadherents [of the favored denomination] that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.' *Lynch v. Donnelly,*465 U.S. 668, 688, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring)." (square brackets included in original text) (*supra*, at 302). "This harm ... occurs merely by virtue of the government's purportedly unconstitutional policy or practice" (*id.*) "[S]pecifically, **the harm that flows from the 'forbidden message'** [emphasis added]" (*supra*, at 299).

In *Chaplaincy of Full Gospel Churches*, the D.C. Circuit recognized "harm that flows from the 'forbidden message' " when a government act sends an adverse message endorsing one religion over another. In this case, BOEM's, the district court's, and the court of appeals' actions contrary to law ***send the wrong message.*** Harm flows from the message unlawful government acts send, whether they be violations of the Establishment Clause or Due Process Clause.

Statutory violations and fraud by federal agencies send the wrong message to the public and the industry it oversees. In this case, the agency is BOEM, and the offshore wind industry it regulates is planning an extensive construction program in undeveloped marine environments. By engaging in acts contrary to law constituting fraud, BOEM implicitly condones unlawful conduct in others, including developers operating offshore where few people can see what they are doing. BOEM's reckless neglect and fraudulent conduct send a clear message that developers need not comply with regulations and safety standards because BOEM, the regulator, does not. If a developer plans to build on a contaminated site, the message is that BOEM will help you cover it up and approve your project regardless; after all, it did it for SFW. The message is loud and clear: SFW does not have to comply with federal environmental law, so why should we? If federal regulators turn a blind eye to non-compliance and fraudulent representations, and if the courts turn to (unlawful) procedure to thwart proper judicial review, developers and the public will likewise act contrary to law.

Sending the wrong message regarding compliance to developers operating in unforgiving, sensitive, and critical ocean environments and onshore residential communities is harmful. One needs only look at the BP Deepwater Horizon Disaster. *See* Deep Water The Gulf Oil Disaster, Report to the President 2011 (No. 22-5317, Doc. 1994062-09).

Harm flows to the general public from the message of government acts that violate statutory, equity, and Constitutional law. The public will lose confidence in the regulatory and judicial process. It demoralizes hardworking staff and scientists at government agencies and judges and officials at courthouses. Such acts erode our Constitutional protections.

The harm is also irremediable. In *Chaplaincy of Full Gospel Churches*—

> "[T]he inchoate, one-way nature of Establishment Clause violations, which inflict an 'erosion of religious liberties [that] cannot be deterred by awarding damages to the victims of such erosion,' *City of St. Charles,*794 F.2d at 275, we are able to conclude that where a movant alleges a violation of the Establishment Clause, this is sufficient, without more, to satisfy the irreparable harm prong for purposes of the preliminary injunction determination." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006)

In this case, the harm resulting from the message of such violations would be felt throughout the U.S. in an "inchoate, one-way nature" that is untraceable to individuals. It includes the fishing industry, people living on the Gulf of Mexico concerned about future construction, and people inland worried about climate change. Such a disparate group cannot receive damages. An award of damages cannot remediate the harm.

For example, the FEIS states that other "[c]ooperating agencies may rely on this final EIS to support their decision-making." (FEIS, at ii, PDF 6, 3rd ¶). The U.S. Environmental Protection Agency is a listed cooperating federal agency (ROD, at 1, PDF 3, 2nd ¶). Should the EPA rely on BOEM's false representations that "[o]verall, existing groundwater quality in the analysis area appears to be good" (FEIS, at H-23, PDF 655, 2nd ¶), Wainscott might have problems securing federal assistance from the EPA regarding the remediation of harmful groundwater PFAS contamination. The harm that flows from unlawful government acts sends the wrong message that ripples through agencies by word of mouth, and Wainscott may not get the support it needs.

3. **The balance of equities favors Petitioner-Applicant**

> "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.' *Amoco Production Co.*,480 U.S., at 542, 107 S.Ct. 1396. 'In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.' *Romero–Barcelo*,456 U.S., at 312, 102 S.Ct. 1798; see also *Railroad Comm'n of Tex. v. Pullman Co.*,312 U.S. 496, 500, 61 S.Ct. 643, 85 L.Ed. 971 (1941)." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)

Here, the balance of equities weighs the harm to Applicant *without* injunctive relief against the harm to SFW *with* injunctive relief. Applicant considers the harms to Federal Defendants and the public interest together. *See Pursuing Am.' Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016) ("assessing the harm to

the opposing party and weighing the public interest 'merge when the Government is the opposing party' ").

Applicant *without* injunctive relief

BOEM, the district court, and the appeals court have denied the Applicant his Constitutional rights. For four years, federal agencies and the courts, people with a duty of care to serve the public interest, have violated federal law, engaged in fraud, and (unlawfully) manipulated procedure to protect private interests to the public detriment. Without immediate injunctive relief, Mr. Kinsella will lose confidence in U.S. government, including the judiciary, which would have failed him and the public. Simply put, fraud against the public by a federal agency with a duty of care to serve the public cannot be acceptable.

SFW *with* injunctive relief (denying the fruits of fraud)

SFW will argue (as it did in the district court) that it "has already mobilized and begun its prep work ... that includes bringing highly specialized equipment that was reserved in advance of construction to the site at great expense, approximately $40 million." (November 9, 2022, Hearing Tr., at 5:20-25). "[V]essel standby costs alone are $262,000 per day" (*id.*, at 6:17). Here, SFW is claiming that it will suffer potential economic injury should the district court grant Mr. Kinsella's injunction. Still, that hearing occurred in November 2022, nine months *after* SFW began construction (in February 2022). But SFW does *not* explain why it failed to consider PFAS

contamination when such contamination was widely published *four years before* it began construction.

In January 2020, the Applicant provided SFW with evidence showing extensive PFAS contamination in Interrogatories SK 03-10. The interrogatories were also provided to BOEM in February 2021 (*see* link below)—

https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_13.pdf

The Documents on PFAS contamination in Wainscott included a SCDHS' *Water Quality Advisory for Private-Well Owners in Area of Wainscot*, issued October 11, **2017**) (at 9) (*also* see page 17, 2nd bullet point). Public knowledge of PFAS contamination in Wainscott pre-dates by *eight months* SFW's initial submission of its Construction and Operations Plan to BOEM (June 29, 2018). [16]

Despite knowing the extent of contamination at least *two years* before (in January 2020), SFW still chose to continue its plans to build underground infrastructure through contaminated groundwater.

In December 2022 and January 2021, SFW tested its onshore construction corridor for PFAS contamination for the first time. The test results showed groundwater PFOA contamination (of 50 ppt), exceeding NYS' drinking water standard by five times (Well MW-4A, sampled 01/14/2021 on Beach Lane). *See* No. 22-5317, Doc. 1999552 (at 1, 5th column). Also, groundwater PFOS contamination (14.7 ppt) exceeds NYS' drinking water standard (Well SB/MW-15A, sampled

[16] BOEM SFW COP Approval Letter, January 18, 2022 (supra)

1/18/2021 on Wainscott NW Road). *Id.*, (at 2, 8th column) The ***testing pre-dates by four months the final COP SFW submitted to BOEM*** (in May 2021).

Although SFW's COP identifies other less harmful contaminants, such as "median groundwater nitrogen levels ... [that] have risen 40 percent to 3.58 mg/L",[17] SFW did *not* acknowledge *its own* test results showing PFAS contamination exceeding regulatory limits, chemicals the EPA links to cancer and other severe health problems (EPA FACT SHEET, on page 15).

Instead, SFW (falsely) claimed that its COP "provides a description of water quality and water resource conditions in the ... [onshore] SFEC [South Fork Export Cable] as defined by several parameters including: ... contaminants in water[.]" [18] However, SFW did *not* acknowledge *any* PFAS contamination in its COP despite a clear duty to "[d]escribe the existing water quality conditions and your project activities that could affect water quality" (30 CFR **585.627**(a)(2)). "Describe the general state of water quality in the area proposed for your project by reporting typical metrics for quality including the ... presence or absence of contaminants in water" (*id.*) and any "environmental hazards and/or accidental events causing accidental releases of... hazardous materials and wastes" (*id.*). *See* Kinsella Affidavit (No. 22-5317, Doc. 1999552-02, ¶¶ 146-157).

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[17] *See* COP May 2021 (at 4-61, PDF 229, 1st ¶). *See* SFW COP at boem.gov (under tab "Construction and Operations Plan")— www.boem.gov/renewable-energy/state-activities/south-fork

[18] *Id.*, (at 4-56, PDF 224, 1st ¶)

SFW's false representations of water quality satisfy the requisite elements of fraud. The Applicant can "show by clear and convincing evidence" (*Pyne v. Jamaica Nutrition Holdings Ltd., supra*) that SFW made a "false representation of material fact which is knowingly made" (*id.*) "The concealment of a fact that should have been disclosed is also a misrepresentation. *Feltman v. Sarbov,* 366 A.2d 137, 140-41 (D.C. 1976). Where a court finds that a party had the duty to disclose material information and failed to do so, there is an even greater likelihood that the nondisclosure will constitute fraud. *Pyne v. Jamaica Nutrition Holdings, Ltd.,*497 A.2d 118, 131 (D.C. 1985)" *Sage v. Broadcasting Publications, Inc.*, 997 F. Supp. 49, 52 (DDC 1998).

SFW had a duty to disclose. According to BOEM's ROD, SFW had an obligation as follows—

> Pursuant to 30 C.F.R. § ***585.627***, the Lessee ***must*** submit information and certifications necessary for BOEM to comply with the National Environmental Policy Act of 1969 (NEPA)[8] and other relevant laws [emphasis added]." (n.8 "42 U.S.C. § 4321 *et seq.*") (*see* App 1a).

Contrary to a clear mandate, SFW did *not* submit the required information to BOEM.

SFW's *own* test results showed onsite groundwater PFAS contamination, but SFW did *not* disclose that material information to BOEM (but disclosed other less harmful contaminants). Still, SFW made false representations by omission in the information it submitted to BOEM that it knew to be false, intending to secure approval based on those false representations. One "may infer ... that a person

intends the natural and probable consequences of acts knowingly done" *United States v. Williams* (*supra*). The "probable consequences" of SFW's "acts knowingly done" would result in BOEM approving the Project, which it did.

The final element of fraud is an "action [that] is taken in reliance upon the misrepresentation." *Pyne v. Jamaica Nutrition Holdings Ltd.*, (*supra*). Mr. Kinsella relied on the accuracy of SFW's COP and has read the COP several times out of concern that SFW would cause harm to him, his family, his community, and his environment. His concerns have proved to be well-founded. SFW's actions constitute (civil) fraud (and violate 18 U.S.C. § 1001).

In *Simon Schuster v. Crime Victims Bd.*, this Court "recognized the 'fundamental equitable principle,' ... that '[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity ...' " (502 U.S. 105, 119 (1991)). It is inconsistent with fundamental equitable principles for SFW "to profit by his own fraud" (*id.*), that is, the fraud when it knowingly omitted PFAS contamination from its COP that materially misrepresented groundwater quality and seeking "to take advantage of [its] own wrong" (*id.*) by using its construction (obtained by fraudulent representations) to defeat injunctive relief.

SFW wants to keep what it gained through fraud regardless of the ongoing risks to public health and the environment.

[left blank]

4. **Injunctive relief favors the public interest**

> "[A] preliminary injunction will not issue unless the moving party also shows, on the same facts ... that the public interest would be furthered by the injunction." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 304 (D.C. Cir. 2006).

This case cries out for this Court to defend the public interest in having agencies comply with their statutorily mandated obligations.

> "There is generally no public interest in the perpetuation of unlawful agency action. *PAG*, 831 F.3d at 511–12, 2016 WL 4087943, at *8; *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). To the contrary, there is a substantial public interest "in having governmental agencies abide by the federal laws that govern their existence and operations." *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994)." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

The case shows BOEM violated NEPA's and the OCSLA's statutory mandate, but the breach of public trust constituted a more serious public harm, fraud. The public interest is served by granting injunctive relief against the "perpetuation of unlawful agency action" (*id.*).

Furthermore, there is a strong public interest in courts observing constitutionally protected rights to a fair hearing. "The public interest favors the protection of constitutional rights, *see, e.g.*, *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)" *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 335 (D.C. Cir. 2018). Here, the public interest is also served by granting injunctive relief from the unconstitutional deprivation of Mr. Kinsella's rights to a fair hearing protected by the Fifth Amendment.

Federal Defendants may argue, contrary to fact, that "the Project *materially* furthers federal renewable energy goals [emphasis added]" as they did in the D.C. Circuit. However, SFW's wind farm (130 MW) represents *only one-third of one percent* of U.S. approved offshore wind generating capacity (39,021 MW);[19] thus, it is *not* material. On the contrary, granting a temporary restraining order at this early stage of offshore wind development would send the industry and regulators a strong message that the nation expects higher standards. This Court could send that message without *materially* affecting offshore wind resources' overall generating capacity.

CONCLUSION

The Applicant has no alternative remedy before the court transfers the case to an *in*convenient forum that will prove fatally prejudicial to his claims.

For the above reasons, I respectfully request that the U.S. Supreme Court grant this emergency application to (1) stay the court of appeals' ruling to transfer, pending appeal; (2) order that Intevenor-Respondent South Fork Wind LLC cease all construction and other activities permitted under the U.S. Bureau of Ocean Energy Management's (unlawful) action approving the Final Environmental Impact Statement and the Construction and Operations Plan for South Fork Wind LLC's

[19] Mayflower Wind's DEIS (February 2023), Volume II: Appendix D (D.C. Cir., No. 22-5317, Doc. 1994062-07, at 3). Table D2-1: OCS Total Generating Capacity (MW) is "39,021"

Project, and (3) order that defendants answer the first amended complaint within fourteen (14) days.

The public interest is to uphold our Constitution.

Respectfully submitted this 12th day of June 2023,

Simon V. Kinsella
Applicant *pro se*
P.O. Box 792,
Wainscott, NY 11975
Tel: (631) 903-915
Si@oswSouthFork.Info

Appendix A-D: Court of Appeals' Orders
D.C. Circuit, *In re: Simon V. Kinsella* (No. 22-5317)

Appendix A – ORDERED Mr. Kinsella'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 Mr. Kinsella'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-5a

Appendix D – ORDERED Mr. Kinsnella'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

Appendix F-G: District Court Order & Opinion
District Court for the District of Columbia, *Simon V. Kinsella* v. *Bureau of Ocean Energy Management, et al.* (No. 22-cv-02147)

Appendix F – ORDERED the case be transferred from the District of Columbia to the Eastern District of New York (issued November 10, 2022) (ECF No. 49)..... 8a

Appendix G – OPINION – Re: Order to Transfer (issued November 10, 2022) (ECF No. 48)..... 9a-19a

Appendix H: Statutory and Regulatory Provisions Involved

28 U.S.C. § 1404 Change of venue 20a

National Environmental Policy Act (NEPA)
42 U.S.C. § 4332 ..... 20a-21a

Outer Continental Shelf Lands Act (OCSLA)
43 U.S.C. § 1332 ..... 22a

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

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 Tripati, 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.[1] 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.

[1] 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.[2] 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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[2] 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.[3]

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,

[3] 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.[4] [4]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.

[4] 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

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

(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."

42 U.S.C. § 4332 provides:

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;

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;

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June 12, 2023

Clerk
Supreme Court of the United States
1 First Street, NE
Washington, D.C. 20002

RE: SIMON V. KINSELLA, APPLICANT V. U.S. BUREAU OF OCEAN ENERGY MANAGEMENT, ET AL., RESPONDENTS AND SOUTH FORK WIND, LLC, INTERVENOR-RESPONDENT.

Dear Sir or Madam:

I hereby certify that at the request of the Applicant, on June 12, 2023, I caused service to be made pursuant to Rule 29 on the following counsel for the Respondents:

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This service was effected by depositing three copies of an Emergency Application for a Writ of Injunction in an official "first class mail" receptacle of the United States Post Office as well as by transmitting digital copies via electronic mail.

Sincerely,

Jack Suber, Esq.
Principal

LISA KAY NICHOLSON
Notary Public
State of Maryland
Montgomery County
My commission exp. October 12, 2026

Sworn and subscribed before me this 12th day of June 2023.

Lisa K Nicholson