
IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 22-5317

IN RE:
SIMON V. KINSELLA
Petitioner *pro se*

**AFFIDAVIT OF
PETITIONER SIMON V. KINSELLA
IN SUPPORT OF AN EMERGENCY MOTION
FOR A TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

SIMON V. KINSELLA, Petitioner *pro se*
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I, Simon V. Kinsella, Plaintiff-Appellant appearing *pro se*, state as follows pursuant to 28 U.S.C. § 1746—

Procedure

1. On November 2, 2022, Petitioner-Plaintiff Kinsella filed an Emergency Motion for a Temporary Restraining Order and Preliminary Injunction (D.D.C. 22-cv-02147, ECF 35). During a hearing on November 9, 2022, the U.S. District Court for the District of Columbia denied the motion— “the Court DENIES Plaintiff’s Motion for a Temporary Restraining Order [ECF] 35 for the reasons stated on the record at the hearing. The Court does not rule on Plaintiff’s Motion for a Preliminary Injunction [ECF] 35.”
See Exhibit 01, Docket Sheet (at 7, 11/10/2022, MINUTE ORDER).

Submittals to BOEM by Kinsella

2. On November 19, 2018, Petitioner (Simon V. Kinsella) submitted a comments letter to BOEM (BOEM-2018-0010). It reads (in relevant part)—

The Applicant [SFW] has failed to comply with 30 CFR 585.627(a)(7) with specific regard to its potential negative impact upon employment.

The Applicant [SFW] will charge approximately 22 ¢/kWh for its wind-generated electricity (please see calculation [below ¶ 2]).

A similar wind farm, Vineyard Wind, which is just 20 miles from the Applicant’s proposed South Fork Wind Farm, will charge only 6.5 ¢/kWh.

At the time Vineyard Wind announced its price of 6.5 ¢/kWh, neither it nor the Applicant had commenced construction. Yet, despite both being on the starting line together, the price of the Applicant's electricity is more than three times the price of that from Vineyard Wind. The Applicant has refused to explain the staggering difference in price.

The Applicant will force ratepayers living on Long Island to pay exorbitantly high electricity prices. This money is money that will not be spent within the local economy.

See Exhibit 10, Kinsella Comments, November 2018 (at 4-5)

3. The 2018 comments letter included the following calculation—

Nameplate Capacity:	90 MW (megawatts)
Capacity Factor:	47%
Average Actual:	42.2 MW
Given:	1 MW of capacity produces 8,760 MWh per year
Average Actual:	370,000 MWh per year (34.2 MW x 8,760 hours)
Contract Valuation:	\$1,624,738,893 (NYS Comptroller, 20-year term)
Contract Valuation:	\$81,236,945 per year
Price per Output:	\$220 per MWh
Price per Output:	22 cents per kilowatt hour

See Exhibit 10 (at 4)

4. On February 22, 2021, Petitioner submitted a comments letter to BOEM in response to its Draft Environmental Impact Statement (“DEIS”) (issued January 8, 2021). It was addressed to: Chief Michelle Morin, Environment Branch for Renewable Energy, BOEM Office of Renewable Energy Programs.
5. *See Exhibit 11, Kinsella Comments, February 2021*

6. BOEM received the comments letter nine months before it approved the SFW Project (November 24, 2021). BOEM acknowledged receiving the documents and uploaded them to its website.
7. The comments letter included two hundred and seven exhibits containing verifiable records such as testimony, briefs, and government reports.
8. The comments letter reads (in relevant part)—

Since South Fork Wind began pursuing its Project in earnest in 2017, review largely has been left to the Town of East Hampton and the New York State Public Service Commission (“NYSPSC”). Over the last four years (see Legal Issues below), there has been little if any review of the Project’s environmental impact, economic impact, alternatives, public interest need and purpose.

For these reasons, I respectfully request that the documents herein listed (see Documents List below) be incorporated by reference and form part of my comments submitted to the Bureau of Ocean Energy Management (“BOEM”) and 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... 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.”¹ (n. 1 “National Environmental Policy Act (“NEPA”), Section 101(a); 42 U.S.C. § 4331(a)”)

In the absence of substantial review by the NYSPSC and the Town of East Hampton, and 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.

PFAS Contamination Submitted to BOEM

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

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

e) PFAS Zone - Onshore Route (decided *after* PFAS detected) (p. 1)

https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_75.pdf

f) PFAS Contamination of Onshore Corridor (satellite map) (p. 2)

https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_65.pdf

g) PFAS release within 500 feet of SFEC route (surface runoff) (p. 2)

https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_71.pdf

h) NYS PSC, Kinsella Report No 3 - PFAS Contamination (p. 91)

https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_9.pdf

i) NYS PSC, Kinsella Testimony 1-1, PFAS (Sep 9, 2020) (p. 37)

https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_32.pdf

j) NYS PSC, Kinsella Testimony 1-2, PFAS (Oct 9, 2020) (p. 11)

https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_36.pdf

k) NYS PSC, Kinsella Testimony, Rebuttal (Oct 30, 2020) (p. 13)

https://downloads.regulations.gov/BOEM-2020-0066-0387/attachment_63.pdf

l) NYS PSC, Kinsella, Brief; Initial (Jan 20, 2021) (p. 34)

https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_9.pdf

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

https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_16.pdf

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

https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_29.pdf

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

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

13. At the time, approximately ninety percent (90%) of residents used private wells for all their drinking water needs.
14. In 2016, the EPA released a “FACT SHEET” on “PFOA & PFOS Drinking Water Health Advisories.” It reads— “[E]xposure to PFOA and PFOS over certain levels may result in adverse health effects, including developmental effects to fetuses during pregnancy or to breastfed infants (e.g., low birth weight, accelerated puberty, skeletal variations), cancer (e.g., testicular, kidney), liver effects (e.g., tissue damage), immune effects (e.g., antibody production and immunity), thyroid effects and other effects (e.g., cholesterol

changes).” (see link below, at PDF 2, second paragraph)—

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

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

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

16. The highest recorded PFOS/PFOA contamination level was 791 ppt, more than seven times the EPA 2016 Health Advisory Level (*id.* at PDF 22, table, top row).
17. When SFW submitted its application to NYSPSC (September 14, 2020), it “determined that there were no hydraulically upgradient or adjacent properties along the study corridor that would represent a significant environmental risk to subsurface conditions.”¹ SFW knew to avoid the source of contamination

¹ See Article VII application, Appendix F Part 2, Phase I Environmental Assessment prepared by VHB Engineering, Surveying, and Landscape Architecture P.C. - Hazardous Materials Desktop Analysis, dated March 30, 2018 (at PDF 142, first paragraph). See [dps.ny.gov—https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={D741B793-DFC1-4056-BCCC-6F46E06C4616}](https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={D741B793-DFC1-4056-BCCC-6F46E06C4616})

(at East Hampton Airport)— “The study corridor consists of the Long Island Railroad (LIRR) right-of-way that begins (from west-to-east) approximately 0.20 mile west of the Wainscott-Northwest Road crossover[.]”² and includes a “500-foot radius[.]”³ SFW included within its “study corridor” only the railroad tracks and knew not to investigate the residential area of Wainscott south of East Hampton Airport, where it planned to build underground transmission infrastructure.

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

² *Id.* (at PDF 124, first paragraph).

³ *Id.* (at PDF 125, first paragraph).

21. Wainscott S&G Monitoring Wells (downgradient): MW5, MW3, and MW4 (groundwater), and Wells: S1, S11, and S16 (soil), are within one hundred and fifty feet downgradient from SFW's construction site.
22. A similar profile of PFAS contamination at East Hampton Airport (the source of contamination) is evident in wells on the opposite downgradient side of the construction corridor at the Wainscott S&G site.
23. The combined concentration levels of PFOS/PFOA contamination in all four groundwater monitoring wells within one thousand feet upgradient from the construction corridor are more than double the 2016 USEPA Health Advisory Level ("HAL") of 70 ppt, regulatory standards designed to protect human health, as follows—
24. Well: EH-19A – PFOS/PFOA = 145 ppt (exceeds 2016 HAL by 2.1x)
25. Well: EH-19A2 – PFOS/PFOA = 174 ppt (exceeds 2016 HAL by 2.5x)
26. Well: EH-19B – PFOS/PFOA = 166 ppt (exceeds 2016 HAL by 2.4x)
27. Well: EH-1 – PFOS/PFOA = 162 ppt (exceeds 2016 HAL by 2.3x)
28. Soil contamination levels from PFOS, PFOA, and PFHxS chemical compounds detected on the shallow surface at the Airport site upgradient within one thousand feet of the construction corridor are as follows –
29. Well: EH-19A (soil) – PFOS = 3,900 ppt
30. – PFOA = 180 ppt

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

Wainscott S&G site) for groundwater (“GW”) Monitoring Wells MW5, MW3, and MW4 are as follows—

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

BOEM's Fraud: PFAS

54. BOEM mentions “perfluorinated compounds” (aka PFAS) only once in its FEIS (of 1,317 pages) *somewhere else* “on a fourth site, NYSDEC #152250,” referring to East Hampton Airport. *See* Exhibit 15, FEIS, *excerpt* p. 655 *only* (at 1).
55. The FEIS (falsely) states that all “four NYSDEC Environmental Remediation Sites are mapped near the interconnection facility” (*id.*). However, the fourth site, East Hampton Airport, is approximately two miles from the interconnection facility (see Exhibit 15, Map, at 2).
56. The FEIS fails to identify a specific “perfluorinated compound” from the thousands of compounds in the broad class of PFAS chemical compounds.
57. In NYS, only two PFAS compounds are regulated, PFOA and PFOS.
58. The FEIS does *not* identify the precise location of the “perfluorinated compounds” relative to the construction site. The FEIS states the compounds are “on a fourth site, NYSDEC #152250” that could be *anywhere* on the 610-acre East Hampton Airport site.
59. The FEIS contains no analysis, test results, mitigation plans, or discussion on alternatives for the specific purpose of avoiding a contaminated area.
60. BOEM did *not* consider the Project’s impact on groundwater contamination that the EPA links to cancer and other adverse health effects. (*see* ¶ 14 above).

61. Federal Defendants fail to explain how BOEM arrived at the (false) conclusion that “existing groundwater quality in the analysis area appears to be good” (FEIS, at H-23, PDF 655, 2nd ¶), in opposition to the overwhelming evidence it acknowledged receiving *nine months before* approving SFW’s Project. See Exhibit 15, FEIS, *excerpt p. 655 only* (at 1) and (¶¶ 9-53 above).
62. The groundwater in Wainscott contains levels of PFAS contamination exceeding federal and NYS regulatory standards.
63. To install underground concrete duct banks and vaults for over two miles through Wainscott, SFW had to excavate soil and groundwater containing PFAS contaminants.
64. SFW’s construction impacted soil and groundwater containing PFAS contaminants.
65. SFW’s underground concrete infrastructure will come in contact with groundwater PFAS contamination.
66. According to an exposé, 'Forever chemicals' found in Suffolk's private water wells since 2016, data shows, published in Newsday (on April 2, 2022), the Suffolk County Department of Health Services detected harmful levels of PFAS contamination (exceeding the NYS Maximum Contamination Level of 10 parts per trillion for PFOS and 10 parts per trillion for PFOA) in 202 wells in Suffolk County. PFAS chemicals are also known as ‘forever chemicals.’ Of

the total number of contaminated wells in Suffolk County, thirty-two percent (32%) were in Wainscott downgradient from East Hampton Airport in the same area where South Fork Wind proposed installing underground concrete infrastructure for high-voltage transmission cables (see ¶¶ 11(c), (e)-(f) above). The area with the next highest number of contaminated wells, Yaphank, had less than half the number of contaminated wells (32) than Wainscott (65). *See* Exhibit 16, PFAS in Wainscott Wells (Newsday) (at 3-6).

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

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

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

(<https://wwe2.osc.state.ny.us/transparency/contracts/contracttransactions.cfm?Contract=000000000000000000024767>)

69. In February 2021, BOEM received comprehensive information on SFW's Project cost submitted by Petitioner-Plaintiff Kinsella in response to BOEM's Draft Environmental Impact Statement ("DEIS") (issued January 8, 2021) for SFW. The comments letter included an internal LIPA Encumbrance Request, signed by LIPA CFO Joseph Branco on January 30, 2017 (see link below)—
https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_36.pdf
Also, see Exhibit 11, Kinsella Comments, February 2021
70. The Encumbrance Request shows the Project Cost, \$1,624,738,893, and Total Projected Energy, 7,432,080 MWh (371,604 MWh per year over 20 years). The price (cost/energy) is \$219 per MWh or 22 cents per kWh.
71. The Project cost and price of energy BOEM received in 2018 and 2021— \$1,624,738,893 and 22 cents per kilowatt-hour— reconcile.
72. On September 30, 2021, SFW and LIPA agreed to expand the offshore wind farm from 90 to 130 MW. The revised Project cost is \$2,013,198,056.
NY Office of the State Comptroller, Open Book, Contract: C000883 at —
<https://wwe2.osc.state.ny.us/transparency/contracts/contracttransactions.cfm?Contract=000000000000000000085553> (last accessed April 16, 2023).
73. The energy price is 19 c/kWh (cents per kilowatt-hour). *See Exhibit 17,*

COMPLAINT, Appendix 4, Price Tables (at 3).

74. Nine months *before* BOEM approved the Project (February 2021), it received comments regarding the Project cost (for a second time). The price was compared to Sunrise Wind, which is also owned (indirectly) by the same joint and equal partners, Ørsted A/s and Eversource. The letter reads as follows (see Exhibit 11, Kinsella Comments Feb 2021)—

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

75. The 2021 Comments included a table comparing South Fork Wind’s price and energy deliveries to Sunrise Wind. The table has been included here (overleaf). *See* the original table at the following link (at 15) —

https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_32.pdf

Please see the table (overleaf).

[blank]

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

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

⁴ New York Office of the State Comptroller, Open Book, Contract Number: C000883
<https://wwe2.osc.state.ny.us/transparency/contracts/contractsearch.cfm>

76. In the knowledge of SFW's vastly overpriced (by \$1 billion) offshore wind farm, BOEM gave cost no thought *at all*, and approved it.

77. In BOEM's FEIS (issued August 16, 2021), under the heading "Demographics, Employment, and Economics" "Affected Environment" (FEIS, at 3-153, PDF 205, section 3.5.3.1), BOEM writes –

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

BOEM's ROD and FEIS and SFW's COP are available at boem.gov—

<https://www.boem.gov/renewable-energy/state-activities/south-fork>

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

79. BOEM does *not* list Suffolk County, as a whole, in Table 3.5.3-1 (above), that could be affected by the Project. Ratepayers living in Suffolk County, LIPA's service area, will bear the economic burden of having to pay for the

SFW Project, estimated to be over \$2 billion. BOEM does *not* include the area of Suffolk County in its analysis of impacts resulting from the SFW Project on demographics, employment, and economics.

80. BOEM’s economic analysis area focuses on the “ocean economy” that does *not* include Suffolk County as a whole. BOEM describes the economic characteristics of its analysis area as follows—

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

81. BOEM devotes nearly two hundred pages to the “ocean economy” and the socio-economic impact on the fisheries industry (FEIS, at 3-86 to 3-183, PDF 138-235, 197 pages). By comparison, BOEM remains silent, not a word, on the Project cost of \$2 billion and any potential *adverse* economic effects on Suffolk County, LIPA’s service area.

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

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

83. BOEM's ROD identifies possible "beneficial impacts" but does not identify any potential adverse impacts on demographics, employment, or economics. For example, BOEM does not acknowledge any potential adverse effects resulting from the two-billion-dollar cost burden to over one million people in LIPA's service area.
84. BOEM's economic analysis considers beneficial economic impacts such as local spending on capital expenditures of \$184 to \$247 million (depending on the wind farm's capacity) (FEIS, at F-17, PDF 587, Table F-10).
85. BOEM considers beneficial impacts from operational spending of \$6.2 to \$12.3 million per year (id., Table F-11), that is, \$123 to \$246 million over the 20-year contract term.
86. BOEM accounts for beneficial impacts from spending in the local economy by SFW on capital and operational expenses of \$307 to \$493 million (the addition of capital expenditure and operational spending).
87. BOEM's analysis is one-sided. BOEM accounts for Project-related inflows into the local economy but ignores outflows. Project-related outflows (\$2 billion) outweigh inflows (\$307 to \$493 million) by 4 to 7 times. To put it another way, for every dollar South Fork Wind puts into the economy, it takes out four-to-seven times that amount.

88. The net outflow (i.e., inflows of \$307 to \$493 million less an outflow of \$2 billion) equals \$1.5 to \$1.7 billion, exiting Suffolk County's economy.
89. BOEM does not acknowledge, let alone consider, the adverse economic impacts of withdrawing \$2 billion from Suffolk County's economy. Moreover, the negative economic impact (\$2.013 billion) is fixed under the terms of the PPA. In contrast, the limited beneficial effects are estimates.
90. BOEM has used biased financial data to support its decision.
91. BOEM failed to consider both the Project's cost of \$2 billion and the people in Suffolk County who will have to pay that cost, including lower-income families.

BOEM's Fraud: South Fork RFP

92. On June 24, 2015, PSEG Long Island, on behalf of Long Island Lighting Company d/b/a LIPA, issued a Notice to Proposers soliciting bids in the South Fork RFP procurement. The RFP sought "sufficient local resources to meet expected peak load requirements until at least 2022 in the South Fork of Long Island ... Such resources will be located on Long Island and provided to LIPA." *See* Exhibit 4, RFP Notice to Proposers (2015).
93. The notice unambiguously invites bidders to submit proposals for "local resources ... located on Long Island" *and nowhere else*. PSEG Long Island repeats the specification twice, highlighting its significance. However, it is

irrefutable that an offshore wind farm thirty-five miles off-coast from Montauk Point, such as SFW, is *not* a “local resource[.]” that is “located on Long Island[.]” it is on the Outer Continental Shelf in the Atlantic Ocean.

94. Moreover, offshore wind technology is the least likely technology to provide power to meet “peak demand” for electricity. On eastern Long Island’s South Fork, “peak demand” for electricity occurs in response to air conditioning usage on hot (typically windless) summer days when, *not* coincidentally, power generation from offshore wind is minimal (due to less wind).
95. Please read the Complaint challenging the South Fork RFP (only 15 pages) – Exhibit 12, *Kinsella v LIPA* (621109-2021), Complaint) and compare the allegations to the South Fork RFP (see Exhibit 00, South Fork RFP).
96. Empirical evidence supports offshore wind’s inability to provide power efficiently during the summer. The Block Island Wind Farm (“**BIWF**”) commenced operations in late 2016 and is in the same area as the proposed South Fork Wind Farm (“**SFWF**”). Its actual generating capacity in August (a six-year average from 2017 through 2022) was only 24% of its nameplate capacity, operating at an average capacity of 7.3 of 30 MW (its nameplate capacity). The wind farm’s average output in August was around half the average amount of electricity generated in December (52.7%) over the same period (2017 through 2022). Although the South Fork RFP specifically sought

resources to meet “peak demand[,]” it awarded the PPA to an offshore wind farm that was more likely *not* to provide power to meet peak demand.

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

97. SFW does *not* meet the South Fork RFP’s minimum specifications and requirements. *See* Exhibit 12, *Simon V. Kinsella et al. v. Long Is. Power Auth., et al.*, (index 621109-2021, NY Sup. Ct. Suffolk County). Please compare the allegations to the South Fork RFP (Exhibit 14).
98. Although the Notice to Proposers precluded offshore wind proposals, the procurement made an exception for SFW. Despite *not* meeting the RFP’s minimum specifications and requirements, SFW was treated favorably and allowed as the *only bidder* to submit an offshore wind proposal. The South Fork RFP was manipulated to stifle competition.
99. The South Fork RFP **permitted favoritism** in another critical respect. On January 11, 2017, then-Governor of New York State, Andrew M. Cuomo, in his 2017 State of the State address, directed the LIPA Board of Trustees to approve SFW’s proposal.
100. Governor Cuomo’s speech read as follows (*see* Exhibit 18, Governor Cuomo 2017 State of the State, *excerpts* (pages 1, 54–56)—

The first major step in the State’s offshore wind development plan is a 90 megawatt [SFW’s original size], 15-turbine project off the East End of Long Island. The Governor calls on the Long Island Power Authority to approve this critical project, which would be

approximately 30 miles southeast of Montauk ... This innovative project is the least expensive proposal, including proposals for both renewable and conventional power generation, to meet the growing energy needs of the South Fork and to provide cleaner energy for all of Long Island [i.e., suggesting expansion][emphasis added].”

101. Fourteen days later (on January 25, 2021), the LIPA Board of Trustees approved SFW’s Project. Governor Cuomo appointed the majority of the LIPA Board of Trustees. By “call[ing] on the Long Island Power Authority to approve this critical project[,]” Governor Cuomo interfered in an active procurement (the South Fork RFP) to advance the interests of a private developer to the detriment of the other bidders, the public, and Petitioner.
102. On November 24, 2021, BOEM issued its ROD approving the Project’s FEIS. BOEM’s ROD (falsely) asserts that SFW’s “power purchase agreement executed in 2017 result[ed] from LIPA’s technology-neutral competitive bidding process [emphasis added]” (ROD, at 7), referring to the South Fork RFP.⁵
103. SFW also makes the same (false) claim in its COP (*see* Exhibit 7, SFW COP, Executive Summary, *excerpt*).⁶

⁵ *See* ROD (at 7, PDF 9, ¶ 7). BOEM provides the same false information in its FEIS. *See* FEIS (at ii, PDF 6, penultimate paragraph). ROD and FEIS are available at the link below—<https://www.boem.gov/renewable-energy/state-activities/south-fork>

⁶ *See* Exhibit 7, SFW COP May 2021, Executive Summary, *excerpt* (at ES-2, PDF 3).

104. LIPA disagrees. A Memorandum from LIPA to the N.Y. Office of the State Comptroller (January 27, 2017) reads— “In some instances, proposals were advanced if they were the only proposal offering a particular technology.” See LIPA Memo (at 12, first paragraph) (uploaded by BOEM link below) – https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_49.pdf LIPA continues— “Two other proposals (i.e., Deepwater Wind ... and Fuel Cell Energy ...) were designated as Semi-Finalists because ... they were the only proposals offering a particular technology ... Deepwater Wind was the only proposal offering offshore wind technology” (*id.*, at 13, first paragraph) (Deepwater Wind refers to SFW). The South Fork RFP procurement advanced proposals *based on* their technology (LIPA has *not* disclosed relative costing information comparing other bids). Thus, the bidding process was *not* “*neutral*” on technology. Where proposals can be advanced based solely on the technology (i.e., offshore wind technology), and there is only one bidder offering that technology, then the procurement process is *not* competitive. As SFW was the only bidder to submit a proposal for offshore wind resources (in a solicitation that precluded such resources), **SFW had no competition**. Thus, the South Fork RFP was *not* a “competitive bidding process[,]” as BOEM (SFW and the NYSPSC) claim.

105. On November 8, 2021, NYSPSC General Counsel Robert Rosenthal answered the Verified Petition in *Simon V. Kinsella v. NYSPSC* (index 2021-06572, N.Y. App. Div., 2d Dep't),⁷ admitting the following (*see* Exhibit 9, NYSPSC Verified Answer (index 2021-06572))—

- a) [Verified Petition Paragraph 62] In January 2017, LIPA and PSEG Long Is., acting on behalf of LIPA, awarded SFW 25 a PPA for the supply of energy at an average price of 22 cents per kWh over the life of the contract (*see* Exhibit 2 – LIPA Contract Valuation for SFW).
- b) [Verified Petition Paragraph 63] LIPA plans to purchase the same offshore wind renewable energy from another wind farm, Sunrise Wind, for 8 cents per kWh, nearly one-third the price of SFW (*see* Exhibit 3 – Ørsted's Sunrise Wind PPA (at p. 1)).
- c) [Verified Petition Paragraph 64] The two offshore wind farms – SFWF and Sunrise Wind Farm – are only two miles apart and are owned and controlled indirectly by the same joint and equal partners, Ørsted and Eversource.

106. According to LIPA, Total Projected Energy Deliveries for South Fork Wind over the 20-year contract term is 7,432,080 MWh, and the Total Annual

⁷ In answer to Verified Petition in *Simon V. Kinsella v. NYSPSC* (index 2021-06572, N.Y. App. Div., 2d Dep't). *See* Exhibit 8, Verified Petition, and Exhibit 9, Verified Answer

Contract Payments over the same period are \$1,624,738,893. SFW's average renewable energy price is \$218.61/MWh or 21.9 cents/kWh. *See* Exhibit 2, LIPA Contract Valuation for SFW. Had LIPA purchased the same energy (7,432,080 MWh) but from Sunrise Wind at 8.064 cents per kWh (the published PPA price), it would have cost LIPA only \$599,322,931, representing a saving of \$1,025,415,962 (NB: the variance between the calculation and the price table is due to a rounding error in Sunrise Wind's price of energy) (*see* ¶¶ 75-76 above).

District Court: Mandamus Petition

107. Federal Defendants have not denied the allegations in ten months since Petitioner filed his Complaint (22-cv-02147, ECF No. 1, 07/20/2022).

108. Federal Defendants have not denied the facts where “there is no genuine dispute” (Fed. R. Civ. P. 56) in over seven months since Petitioner filed his Statement of Material Facts (of 90 pages) and cross-Motion for Partial Summary Judgment (*id.*, ECF No. 21, 09/26/2022).

109. Neither Federal Defendants nor SFW has denied the allegations in over six months since Petitioner filed his First Amended Complaint (*id.*, ECF No. 34, 11/02/2022).

(i) Denied Answers to Complaint

110. On September 13, 2022, the district court granted Federal Defendants' Motion for Extension of Time to Answer the Complaint that Federal Defendants had filed *the day before*. It has been ten months since Petitioner filed his Complaint (on July 20, 2022), and still, Federal Defendants have not answered the allegations (nor has SFW). The district court minute order reads –

“MINUTE ORDER granting [ECF] 14 Motion for Extension of Time to File Answer: The Government filed its Motion for Extension of Time to File Answer on September 12, 2022. Although the plaintiff has not yet informed the Court of their position on the matter, having considered the motion and for good cause shown, it is ORDERED that the motion is GRANTED. The time for The Government to file its responsive pleading to the Complaint in this lawsuit is extended to thirty days after: (1) the case is transferred and a new docket number and judge is assigned (should the Motion to Transfer 11 be granted); or (2) this Court issues an order denying the Motion to Transfer (should the Motion be denied).” *See* Exhibit 1, Docket Sheet (at 4, 09/13/2022, MINUTE ORDER).

(ii) Denied Response before Ruling to Stay/Strike Summary Judgement

111. On October 9, 2022, the district court granted Federal Defendants' Motion to Strike or Stay the Briefing on Petitioner's Motion for Partial Summary Judgement Motion (*stayed*) (“pending resolution of Defendants' Motion to Transfer [ECF No.] 11.” *See* Exhibit 1, Docket Sheet (at 5, 10/09/2022, MINUTE ORDER). The court waited just three days before ruling (on a Sunday) and offered no reason for its decision. It was the second time the court denied Petitioner the opportunity to respond. A month later (on

November 10, 2022), the district “[c]ourt STRIKES as premature Plaintiff’s Corrected Cross-Motion for Partial Summary Judgment [ECF No.] 21 ...” *See* Exhibit 00, Docket Sheet (at 7, 11/10/2022, MINUTE ORDER). “I am going to grant the defendant’s request to strike that motion at this stage. It is premature given that the defendants haven’t formally responded [to the motion for summary judgment].” *See* Hearing Tr. 11/09/2022 (22-516, Doc. 1979239 (at 3:7-9). As the court explained, it ruled to strike the Petitioner’s Motion for Partial Summary Judgment “just so that the docket is cleaned up and that defendants don’t have this outstanding obligation to respond to a motion for summary judgment before they’ve responded to the complaint [that the court ruled to postpone] or compiled a record ... [it] is necessary as a housekeeping matter [emphasis added].” *Id.* (at 3:21-25). Again, the district court granted Federal Defendants’ motion without allowing Petitioner the opportunity to respond since the court stayed the briefing on that motion (on October 9). It was the third time Petitioner was denied a right to respond.

112. During the November 9 hearing, the district court stated it is “going to grant the defendant’s request to strike that motion at this stage. It is premature given that the defendants haven’t formally responded [to the motion for summary judgment].” *See* Hearing Tr. 11/09/2022 (22-516, Doc. 1979239, at 3:7-9). The district court’s reasoning (i.e., that the summary judgment motion “is

premature”) is based on its earlier ruling to grant Federal Defendants’ Motion for an Extension of Time to Answer the Complaint until “the case is transferred and a new docket number and judge is assigned (should the Motion to Transfer 11 be granted)” (Exhibit 1, Docket Sheet, at 4, 09/13/2022, MINUTE ORDER), to which the district court also denied Petitioner-Plaintiff the opportunity to respond.

113. The court explained its ruling to strike the Petitioner-Plaintiff’s Motion for Partial Summary Judgment “just so that the docket is cleaned up and that defendants don't have this outstanding obligation to respond to a motion for summary judgment before they've responded to the complaint or compiled a record ... [it] is necessary as a housekeeping matter [emphasis added].” *See* Hearing Tr. 11/09/2022 (22-516, Doc. 1979239, at 3:21-25). It had been over nine months since Petitioner-Plaintiff filed his Complaint (on July 20, 2022), and Federal Defendants have yet to respond or compile the record.

114. Federal Defendants have *not* denied the allegations in Petitioner-Plaintiff’s Complaint (filed July 20, 2022).

115. Neither Federal Defendants nor South Fork Wind LLC has denied the allegations in Petitioner-Plaintiff’s First Amended Complaint that the district court accepted over six months ago (on November 10, 2022) (*id.*, at 7, 11/10/2022, MINUTE ORDER).

116. The district court opined that the case “will likely be decided at summary judgment [emphasis added] ... There is no reason to expect that there will be a trial, or witnesses ...” *See* OPINION, Motion to Transfer (DDC 22-cv-02147, 11/10/2022, ECF No. 48, at 8).

117. The court’s claim that the case will “be decided at summary judgment” contradicted its own ruling (the same day) to “STRIKE[] as premature Plaintiff’s ... Motion for Partial Summary Judgment” (*see* Exhibit 1, Docket Sheet, at 7, 11/10/2022, MINUTE ORDER).

118. The district court’s ruling to *STAY* then *STRIKE* Petitioner-Plaintiff’s summary judgment motion had the practical effect of denying him answers, either admitting or denying *any* of the eighty-nine alleged facts where there is no genuine dispute in the Statement of Material Facts (of 90 pages). *See* Exhibit 20, cross-Motion for Partial Summary Judgment Statement of Material Facts (*id.*, 09/26/2022, ECF No. 21).

(iii) Denied Proper Hearing in District Court before Denial of TRO

119. On November 9, 2022, “the Court DENIES Plaintiff’s Motion for a Temporary Restraining Order [ECF 35] (filed November 2) for the reasons stated on the record at the hearing” *See* Exhibit 1, Docket Sheet (at 7, 11/10/2022, MINUTE ORDER). The November 9 hearing was deficient in findings of fact and reasoning. The district court failed to acknowledge

recently introduced fraud claims in the First Amended Complaint (filed November 2, 2023) (D.D.C. 22-cv-02147, ECF 34) that the court accepted during the hearing— “The Court GRANTS Plaintiff’s Motion to Amend/Correct the Complaint 34, which Plaintiff may do as a matter of course at this stage in the proceedings. See Fed. R. Civ. P. 15(a)(1)(B).” See Exhibit 01, Docket Sheet (at 7, 11/10/2022, MINUTE ORDER). During the hearing, the district court did not consider or discuss *any* of the First Amended Complaint’s claims regarding the environmental review or address substantive arguments in Petitioner-Plaintiff Kinsella’s (corrected) Motion for Temporary Restraining Order and Preliminary Injunction [ECF 36]. The district court did not consider or discuss *any* of the First Amended Complaint’s claims regarding the environmental review or address the substantive arguments in Petitioner’s (corrected) Motion for Temporary Restraining Order and Preliminary Injunction [ECF 36]. The hearing excluded acknowledgment of fraud claims— that SFW used its investment in construction to defeat injunctive relief, the approval of which it secured via fraudulent means. See Kinsella Affidavit II (22-5316, Doc. 1980954). It was the fourth time the district court denied Petitioner right to respond and present new arguments at a hearing. The district court denied the motion because it could not find irreparable injury.

(iv) Denied a Hearing before District Court Ruling to Transfer

120. On November 10, 2022, the district court granted Federal Defendants' Motion to Transfer the case to the Eastern District of New York (EDNY) without a hearing on new claims of fraud introduced *after* Petitioner had filed his Surreply to Federal Defendants' Motion to Transfer (October 11) (ECF 27). Petitioner introduced seven new claims of fraud against eight individuals in his First Amended Complaint (ECF No. 34-2, filed November 2, 2022). It was the fifth time in two months that the district court had denied Petitioner his right to a hearing and his Constitutional right to due process.
121. On September 8, 2022, Federal Defendants filed a Motion to Transfer (*id.*, ECF No. 11), to which Petitioner-Plaintiff filed a timely Surreply on October 11 (*id.*, ECF No. 27). In the intervening three weeks from when Petitioner-Plaintiff filed his Surreply (October 11) to the hearing on the Transfer Motion (November 9), Petitioner-Plaintiff filed his First Amended Complaint (on November 2). Petitioner-Plaintiff's First Amended Complaint particularizes seven examples where BOEM and eight individuals working for BOEM knowingly falsified the ROD and FEIS (*see* Exhibit 21, First Amended Complaint, *excerpts*, FRAUD #1 through #7, at 3–10) and includes new claims of fraud (*id.*, Claims thirteen through seventeen, at 111–141).

122. During the November 9 hearing, the district court did not allow Petitioner to develop arguments, discuss new fraud claims, or address the need to call eight newly named individual defendants (witnesses).

123. On November 10, 2022, the district court granted Federal Defendants' Motion to Transfer the Case to the Eastern District of New York (EDNY) without a hearing on new claims of fraud introduced *after* Petitioner-Plaintiff had filed his Surreply to Federal Defendants' Motion to Transfer (on October 11) (*id.*, ECF No. 27). It was the fifth time in two months that the district court had denied Petitioner the opportunity to be heard.

NYSPSC: Deprivation of rights to examine evidence

124. The New York State Public Service Commission ("NYSPSC") denied Petitioner his Fourteenth Amendment right to due process of law.

125. NYSPSC denied Petitioner rights of examination and cross-examination of witnesses regarding the South Fork RFP and SFW Project cost. NYSPSC denied Petitioner the right to ask questions such as: Why is SFW *overpriced* by \$1 billion (in 2018)? Why does SFW plan to charge more than double the average price for its energy than four other offshore wind farms in the same area (in 2022)? Why NYSPSC excluded the Project cost from its Article VII review contrary to its statutorily mandated obligation?

126. The presiding ALJ ruled four times (*see* Exhibit 8, at 36, ¶ 81) that the RFP and PPA “are beyond the scope of this Article VII proceeding” (*id.*, (b)).
127. Evidence regarding Project cost, the South Fork RFP procurement process, and its subsequent award in 2017 of a PPA (to SFW) were off-limits.
128. On November 24, 2020, the ALJ granted SFW’s Motion to Strike Testimony regarding the RFP and PPA, asserting that the “need for the Project is sufficiently established through selection in a competitive process, here the 2015 RFP” and that “critiques of the 2015 RFP process and the resulting PPA ... are beyond the scope of this Article VII proceeding and ... testimony and exhibits related to these issues are irrelevant to the findings and determinations required by PSL §126 [emphasis added].” (*see* Exhibit 8, at 37, ¶ 81(d)). However, immediately before the ALJ closed the evidentiary record, he admitted the RFP and PPA into evidence (but still denied intervening parties their rights of examination or cross-examination).
129. Please read the (revealing) exchange between the presiding ALJ and LIPA’s Assistant General Counsel (*see* Exhibit 8, at 39–40, ¶¶ 83–84).

NYSPSC does *not* consider the cost of SFW

130. During the NYSPSC proceeding on SFW (case 18-T-0604),⁸ the New York State Department of Public Service (“NYSDPS”)⁹ Staff aver in sworn testimony that under Article VII, the “concept of ‘environmental compatibility and public need’ requires that the Commission ‘protect environmental values, and take into account the total cost to society of such facilities’ when deciding on whether it should grant an Article VII certificate ...” See Exhibit 8, *Simon V. Kinsella v. NYSPSC* (index no. 2021-06572, N.Y. App. Div., 2d Dep’t), Verified Petition (September 9, 2021) (at 32–33, ¶ 73).

131. NYSDPS staff explain in testimony that “[t]he concept of “environmental compatibility and public need” requires that the Commission ‘protect environmental values, and take into account **the total cost to society** of such facilities’ when making a decision on whether it should grant an Article VII certificate (Chapter 272 of the Laws of 1970, Section 1, Legislative Findings).” See [dps.ny.gov link below](#) (at 15 PDF 16:11-18).

10/09/2020, DPS Staff Panel Testimony, item no. 187 (direct link here—

⁸ New York State Public Service Commission (NYSPSC) Case (18-T-0604). See documents at (NB: “DMM” refers to the document matter management system)—<https://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=18-T-0604&submit=Search>

⁹ In New York State, the Department of Public Service (NYSDPS) is the administrative arm of the Public Service Commission (NYSPSC). NYSDPS perform tasks such as the administrative proceeding (case 18-T-0604). The Administrative Law Judge (ALJ) works for NYSDPS. NYSDPS submits recommendations for NYSPSC to decide.

<https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={C6BC8496-889B-492C-ACF1-D4B161536E01}> or Case 18-T-0604, DMM (all files), search for item no. 187 “DPS Staff Panel Testimony” (link here—
<https://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=18-T-0604&submit=Search>

132. Under cross-examination, NYSDPS admits that the total cost to society includes when “a rate payer [*sic*] pays his or her regular electricity bill” (*see* [dps.ny.gov link to testimony below](https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={C6BC8496-889B-492C-ACF1-D4B161536E01}), at 590 PDF 25:23-25 to 591, PDF 26:1-2) and that DPS Staff did *not* consider the cost burden to ratepayers of SFW’s facility (then \$1.625 billion)— “**There’s no testimony [...] that addresses cost to rate payers** [*sic*].” (*see* [dps.ny.gov link](https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={C6BC8496-889B-492C-ACF1-D4B161536E01}), at 595 PDF 30:14-21).

12/22/2020 DPS Staff Panel Testimony, item no. 227 (direct link here—
<https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={BBB282D4-7CB2-4B7C-AC81-6B85F97B734B}> or [dps.ny.gov](https://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=18-T-0604&submit=Search)—
Case 18-T-0604, DMM (all files), search for item no. 227 (link here—
<https://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=18-T-0604&submit=Search>

133. NYSDPS, in effect, admits the administrative proceeding was deficient by failing to consider the cost of the Project (\$1.6 billion expanded to \$2 billion).

134. Without considering the Project cost, the NYSPSC could not have considered less expensive alternatives.
135. The NYSPSC's failure to consider SFW's "total cost to society" mirrors BOEM's failure to assess the socioeconomic impact mandated by NEPA
136. On September 9, 2021, Petitioner commenced legal proceedings to challenge the NYSPSC's grant of Certification to SFW in the N.Y. Supreme Court, Appellate Division, Second Department. *See Simon V. Kinsella v. NYSPSC* (index 2021-06572, N.Y. App. Div., 2d Dep't). Respondent NYSPSC filed a timely response (on November 8, 2021), then waited a year before filing a Motion to Dismiss (September 15, 2022), to which Petitioner filed a timely Memo. of Law in Opp. (October 17, 2022). There has been no change in the case in over six months.

NY Supreme Court: Unreasonable Statute of Limitations

137. On November 9, 2021, Petitioner-Plaintiff commenced a state action alleging that "[c]ontrary to state procurement law, LIPA awarded a power purchase agreement [PPA] to a bidder whose proposal did not meet the minimum specifications or requirements as prescribed in the South Fork RFP and its Evaluation Guide ... LIPA should have disqualified Deepwater Wind's [South Fork Wind's] proposal at the outset." *See Exhibit 12, Simon V. Kinsella et al.*

v. Long Island Power Auth. et al., (index 621109/ 2021, N.Y. Sup. Ct. Suffolk Cnty.).

138. The declaratory judgment action seeks to have LIPA's PPA declared void for violating state procurement law subject to a six-year statute of limitations.¹⁰

139. To dismiss the action as time-barred after four months, the state court mischaracterized the equitable nature of the claims "where the acts complained of are without power, or where corruption, fraud or bad faith, amounting to fraud, is charged." *See Talcott v. Buffalo*, 125 N.Y. 280, 26 N.E. 263 (1891).

140. LIPA awarded SFW a PPA on January 25, 2017 (executed February 6, 2017).

141. Six months later (on August 5, 2017), SFW presented its Project to the Wainscott community for the first time at the Wainscott Citizens' Advisory Committee ("WCAC"). From the beginning (in 2017), SFW fraudulently represented its Project to the public. Before the WCAC, SFW claimed that its project resulted from "a technology-neutral competitive solicitation" (*see* Exhibit 22, WCWC SFW Slide 5). Petitioner was a member of the WCAC and Chairman of its Environmental Subcommittee at the time, tasked with looking into SFW and reporting back to the WCAC.

¹⁰ N.Y. C.P.L.R. § 213 (<https://codes.findlaw.com/ny/civil-practice-law-and-rules/cvp-sect-213.html>)

142. SFW divulged little information about its plans, and what it did disclose was only half the truth at best.

SFW and LIPA Mislead the Public

143. SFW and LIPA campaigned to mislead the public into believing the price of SFW's electricity was "16.3 cents" (still quoted in many government documents). For example, in May 2018, SFW's SFW VP Development, Clint Plumber, was quoted on News12 saying that the price is "about 16 cents per kWh" and the Project comes "with a \$740 million pricetag." The "pricetag" was \$1.6 billion at the time. (*see* Exhibit 23, SFW VP Development, Clint Plumber, News12, May 17, 2018). In October 2019, LIPA released a "South Fork Wind Farm Fact Sheet" stating that the "price for the [originally planned] 90-megawatt South Fork project starts at 16 cents per kWh" and on the graph below is reads: South Fork Wind Farm (90MW) 16.3c (NY)" *See* Exhibit 24, LIPA SFW 'Fact' Sheet, Oct 2019 (at 3, graph titled "A Developing Offshore Wind Industry"). The chart misleads the reader into believing the price and agreement occurred in 2015, but the PPA was executed on February 6, 2017 (*not* 2015). The horizontal scale (time in years) skews time to indicate the agreement occurred around the middle between the Block Island Wind Farm and *Skipjack* (a related company). However, the SFW PPA was signed in February 2017, approximately seven years *after* the

Block Island Wind Farm and only three months *before* Maryland awarded a contract to Skipjack (announced May 11, 2017, for “a levelized price of \$131.93 per megawatt-hour (MWh) for a term of 20 years[.]” (see Exhibit 25, “Maryland PSC Awards ORECS to Two Offshore Wind Developers”). Just three months earlier, LIPA awarded SFW a contract (also for 20 years) at a rate of \$218.61 (that it refused to disclose publicly). Although the contracts were signed only three months apart, SFW was 66% more expensive than Skipjack. ...

144. It was not until January 2021 that Petitioner first learned that LIPA valued the price of SFW’s renewable energy at 22 cents per kilowatt-hour, more than three times the price (6.5 cents) of Vineyard Wind.

145. Details of the Project were publicly available when SFW submitted its applications to BOEM and the NYSPSC (in September 2018), twenty months *after* SFW signed the PPA (February 6, 2017). Under such circumstances, it would have been impossible to commence an action challenging the South Fork Wind procurement process within four months (by May 2017). SFW and LIPA did not disclose any information about the Project until well after the four-month statute of limitations had expired.

Factor 3: The Balance of Equities Favors Petitioner

SFW Fraud: PFA S¹¹

146. SFW argued in the district court that it is “on a very tight schedule ... there’s really no cushion for delay ... limited vessel availability [] could prevent the project from meeting its contractual power purchase agreement requirements, which could result in millions of dollars in liquidated damages [emphasis added]” (See Hearing Tr. 11/09/2022 (22-516, Doc. 1979239, at 6:7-15).
147. SFW obtained that power purchase agreement via a manipulated procurement process, the South Fork RFP.
148. SFW knowingly provided false information to BOEM in its final COP. It falsely represented groundwater quality (by concealing onsite groundwater PFAS contamination) and the Project’s socioeconomic impact (by omitting the Project cost of \$2 billion).
149. SFW (falsely) claimed that its COP “provides a description of water quality and water resource conditions in the ... SFEC^[12] as defined by several parameters including: ... contaminants in water” (see COP May 2021, at 4-56, PDF 224, first paragraph). Under the heading, “Water Quality and Water Resources,” SFW asserts its COP “discusses relevant anthropogenic activities

¹¹ Per- and Polyfluoroalkyl Substance (“PFAS”) contamination

¹² South Fork Export Cable (SFEC), which includes onshore construction for high-voltage transmission cable through Wainscott

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

150. SFW ignored groundwater PFAS contamination in the area where it proposed installing underground concrete infrastructure (for two miles) encroaching into and impacting that groundwater (a sole-source aquifer used for drinking water). That area had more affected private drinking water wells by double the number of wells anywhere else in Suffolk County (*see* ¶ 67 above).
151. SFW tested its onshore construction corridor for PFOA/PFOS¹³ contamination in January 2021. The test results showed groundwater PFOA contamination (of 50 ppt) that exceeds NYS’ drinking water standard by five times (Well MW-4A, sampled 01/14/2021) and groundwater PFOS contamination (of 14.7 ppt) that also exceeds NYS’ drinking water standard (Well SB/MW-15A, sampled 1/18/2021).¹⁴ The testing pre-dates by four months the final COP

¹³ Perfluorooctanoic Acid (“PFOA”) and Perfluorooctane Sulfonate (“PFOS”) are chemical compounds classified as hazardous waste in NYS (contaminants) within a broad class of manmade chemicals known as PFAS.

¹⁴ New York State Maximum Contamination Level (NYS MCL): PFOA, 10 ppt and PFOS, 10 ppt.

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

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

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

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

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

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

groundwater and soil samples (taken in December 2020 and January 2021).

Note: Soil and groundwater samples were taken *after* the NYSPSC evidentiary record had closed, thereby avoiding examination and cross-examination of witnesses during the NYSPSC proceeding.

156. SFW did *not* include *any* PFAS contamination results in its final COP.

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

SFW Fraud: Cost (\$2 bn)

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

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

159. According to the analysis, the best-case scenario will have a total beneficial impact on NYS of \$458 million.¹⁵ However, the Project cost of \$2.013 billion

¹⁵ Summary of Jobs and Investment Impacts for New York (at 3, PDF 6, Table 1-2). Total construction phase beneficial economic impact is \$186.1 million (Earning \$74.1, Output \$81.9, and Value Add 57.1 million). Total operational phase beneficial economic impact is \$272 million (Earning \$2.8, Output \$6.8, and Value Add \$3.9: sum multiplied by 20 years).

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

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

Factor 4: Injunctive relief accords with the public interest

161. Federal Defendants may argue, contrary to fact, that "the Project materially furthers federal renewable energy goals [emphasis added]" as they did in this Circuit (22-5316, Doc. 1982686, at 23, PDF 28). However, the SFW wind farm is relatively small, only 130 MW, whereas the total offshore wind generating capacity approved to meet "federal renewable energy goals" (as of February 2023) is large, 39,021 MW.¹⁶ The SFW wind farm represents only 0.33% of U.S. approved generating capacity; thus, it is not material at only one-third of one percent.

¹⁶ According to Mayflower Wind's Draft Environmental Impact Statement ("DEIS"), dated February 2023, Volume II: Appendix D (22-5317, Doc. 1994062, at 3). Table D2-1: OCS Total Generating Capacity (MW) is "39,021"

162. On May 9, 2023, the Rhode Island Fisherman Advisory Board (“**FAB**”) and the individual fishers whom it represents sent (60-day) notice of intent to sue BOEM, Ørsted, and the Rhode Island Coastal Management Council. The letter reads— “It is clear from the FEIS that the impacts on the fishermen will be major ... [and that] the actions of Orsted call into question whether the BOEM is selectively enforcing the terms and conditions of the BOEM approval” (at 4, third and fourth paragraphs). Available here— <https://www.windaction.org/posts/54656> (last accessed May 10, 2023). Here, the message is that BOEM is protecting the interests of Ørsted, a private company majority owned by the state of Denmark, and *not* looking after U.S. fishermen. It is the message that the government does not represent its citizens equally. There is harm— “the impacts on the fishermen will be major.”

STATE OF NEW YORK
COUNTY OF SUFFOLK

I, Simon V. Kinsella, Petitioner *pro se*, being duly sworn, say under penalty of perjury:

I am a resident of Wainscott in the Town of East Hampton, N.Y. The contents of my affidavit supporting an emergency motion for a temporary restraining order and preliminary injunction dated May 10, 2023, are true to the best of my knowledge, information, and belief.

Sworn to before me this
10th day of May 2023



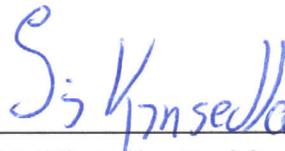
David Fink, Notary Public

State of New York

No. 4526132

Qualified in New York County

Commission Expires February 28, 2024



Simon V. Kinsella, Petitioner *pro se*

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