No. 22-1251

In the Supreme Court of the United States

SIMON V. KINSELLA

Petitioner,

v.

U.S. BUREAU OF OCEAN ENERGY MANAGEMENT, ET AL.,

and

SOUTH FORK WIND, LLC.

Respondents.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

Simon V. Kinsella
P.O. Box 792
Wainscott, NY 11975
Tel: (631) 903-9154
Si@oswSouthFork.Info

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTION, STATUTES, AND REGULATIONS

SUPPLEMENTAL BRIEF FOR PETITIONER

OPINIONS BELOW

The Order of the U.S. District Court for the Eastern District of New York (E.D.N.Y.) in *Mahoney et al. v. U.S. Department of the Interior et al.* (E.D.N.Y., No. 22-cv-01305, ECF 93) dismissing the case (Supp App. 18a) is unreported.

JURISDICTION

The judgment of the court of appeals ordered Petitioner's emergency motion for a temporary restraining order and preliminary injunction be *denied,* and the petition for a writ of mandamus seeking review of the district court order to transfer be *denied,* entered May 17, 2023. (App 4a-5a) The judgment of the court of appeals ordered Petitioner's motion to stay the mandate (treated as a motion to stay the effectiveness) be *denied*, entered June 9, 2023. (App 3a). The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provision, which is set out in the appendix to the supplemental brief (Supp App 2a), is 43 U.S.C. 1333(a)(1)(A).

STATEMENT

Pursuant to this Court's Rule 15.8, Petitioner calls the Court's attention to intervening actions of the transferee court, the District Court for the Eastern District of New York ("E.D.N.Y.") after petitioner's last filing in this Court on June 22, 2023.

The Petition for a Writ of Certiorari asks whether the Fifth Amendment requires that Federal Defendants, principally the Bureau of Ocean Energy Management ("BOEM"),[1] and Intervenor-Defendant South Fork Wind LLC ("SFW") answer the allegations against them in Petitioner's First Amended Complaint (filed November 2, 2022).[2]

Ten months have now passed since the filing of the amended complaint. Still, neither Federal Defendants nor SFW has answered the allegations despite District Judge Jia M. Cobb's order that they file responsive pleading by ***July 7, 2023*** (*see* Kinsella Affidavit ¶ 17) (Supp App 7a).[3]

Instead (on July 5), the transferee court granted Federal Defendants' and SFW's letter motions requesting a pre-motion conference regarding their

---

[1] Federal Defendants are U.S. Department of the Interior, U.S. Environmental Protection Agency, and the federal Bureau of Ocean Energy Management ("BOEM"), including BOEM officials named in the amended complaint's particularized fraud claims. *See* First Amended Complaint, Claims for Relief Thirteen through Seventeen (D.D.C., 22-cv-02417, ECF 34-2, at 111-141).

[2] *See* D.D.C., 22-cv-02417, ECF 34-2

[3] *Also*, the original complaint filed against only Federal Defendants over a year ago (on July 20, 2022) went unanswered.

intent to file Rule 12(b) motions to dismiss (*id.*, ¶¶ 19-25) (Supp App 7a-15a);[4] thus, avoiding having to answer the allegations past July 7, or perhaps at all (*id.*, ¶¶ 16-17) (Supp App 6a-7a).

The July 5 Scheduling Order of District Judge Frederic Block provides no reason for granting Federal Defendants' and SFW's letter motions. Looking to the underlying letter motions, therefore, we find that Federal Defendants and SFW intend to file Rule 12(b) motions to dismiss all claims (except for the FOIA[5] claim) for, allegedly, Pl.-Petitioner's lack of standing, failure to state a claim, and because the district court lacks jurisdiction.

Federal Defendants and SFW made similar overtures regarding standing and failure to state a claim in the District Court for D.C. During the only hearing in that court, District Judge Jia M. Cobb responded as follows—

> I just want to make clear … I have not … suggested that you [Petitioner] don't have standing to bring this motion. So I just want that to be clear.[6]

Judge Cobb's comment was in reference to motion papers filed by Pl.-Petitioner the day before. *Please read excerpt* (Supp App 68a-69a).

---

[4] On July 5, 2023, the District Court for E.D.N.Y. issued "SCHEDULING ORDER: Movant South Fork Wind's letter application 66 dated 6/16/23 and defendants' letter application 68 dated 6/20/23 are GRANTED" (id., ¶ 17) (Supp App 7a).

[5] Complaint's Twelfth Claim for Relief under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

[6] *See* November 9 Hearing Tr. 22:10-25 and 23:1-4 (D.C. Cir., No. 22-5317, 1994062-11, at 22-23, PDF 23-24)

Undermining the letter motions expressing a sudden desire to file motions to dismiss is the fact that neither Federal Defendant nor SFW filed a motion to dismiss in the transferor court, the District Court for D.C., soon after the filing of the complaint on July 20, 2022, or the amended complaint on November 2, 2022, or *at all*. In the District Court for D.C., Federal Defendants and SFW could have filed *actual* motions to dismiss rather than a laundry list of unsubstantiated grounds to dismiss in letter motions. We are left guessing why Federal Defendants and SFW waited ten months until the case was transferred to Judge Frederic Block in the transferee court before filing (conclusory) letter motions expressing an intent rather than an actual motion to dismiss in the transferor court, the District Court for D.C.

Federal Defendants and SFW did not merely seek an extension of a few weeks to file answers past the thirty-day statutory deadline (that expired nine months ago).[7] They filed (three-page) letter motions whereby they avoided having to answer substantive allegations of fraud against the public interest (*see* Kinsella Affidavit, ¶¶ 19-24) (Supp App 7a-11a), which the transferee court granted.

The letter motions are window-dressing. They do not address *any* of the sixteen claims they seek to dismiss. Instead, they only address alleged harm and

---

[7] Plaintiff filed his First Amended Complaint particularizing allegations of fraud pursuant to Federal Rule of Civil Procedure 9(b) on November 2, 2022. The statutory deadline for serving an answer or otherwise plead to any complaint under 5 U.S.C. § 552(a)(4)(C) is thirty days, which expired on December 2, 2022.

rely on post hoc rationalizations unrelated to the claims. The complaint's claims *all* concern ***BOEM's review*** (of SFW's project), *not* SFW's project itself (or its harms). The complaint asks why, *inter alia*, ***BOEM failed to disclose and discuss*** known PFOA and PFOS groundwater contamination,[8] population-level effects on Atlantic Cod habitat (Cox Ledge), the socioeconomic impact of the project's cost ($2 billion), and procurement irregularities; and why ***BOEM fraudulently represented material facts*** in its environmental review. The amended complaint does ***not*** ask whether SFW's construction would cause such harm as that question should have been asked and answered in BOEM's environmental review (but was not). If the original or amended complaints sought redress for damages directly caused by SFW's construction, then SFW would have been a named defendant, but it was *not; it* was named as a potential intervenor.

The letter motions also rely on false information Federal Defendants and SFW provided regarding BOEM's lack of jurisdiction onshore and nearshore within New York State's outer boundary. Federal Defendants falsely claimed that "onshore construction activity was authorized by, and within the ***exclusive*** jurisdiction of, the [NYS]PSC[9] and other State and local authorities [emphasis added]. BOEM has no authority to regulate this activity because its jurisdiction is limited to the submerged lands starting

---

[8] Groundwater, where SFW has installed underground concrete duct banks and large vaults that encroach into and are at the capillary fringe of a sole source aquifer, contains perfluoro-octanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS) contamination exceeding regulatory limits.

[9] New York State Public Service Commission

three miles from state coastlines and extending seaward [citing 43 U.S.C. §§ 1331(a)]."[10]

Similarly, SFW falsely claimed that "Plaintiff's alleged injuries are not fairly traceable to Federal Defendants' Project approvals, as onshore construction work was authorized by the NYSPSC and the Town, not Federal Defendants … [and] [e]ven if Federal Defendants' approvals for the Project were set aside, that relief would not affect the nearshore work or the [] onshore cable over which Federal Defendants lack jurisdiction …." [11]

The recent (false) claims in Federal Defendants' and SFW's letter motions regarding the limits of BOEM's jurisdiction contradict BOEM's *own* record of decision,[12] Renewable Energy Lease OCS-A 0486/0517, and U.S. Supreme Court precedent.

BOEM's Record of Decision

Contradicting Federal Defendants' and SFW's (false) assertions about BOEM's lack of jurisdiction onshore and that it did *not* authorize SFW's onshore construction is the fact that BOEM *did* exercise jurisdictional authority in approving onshore construction and confirmed as much in its *own* record of decision.

BOEM "approve[d], with modifications, the COP [Construction and Operations Plan] for South Fork Wind adopting Habitat Alternative" Layout B.[13]

---

[10] *Id.*, ECF #68 (at 2-3)

[11] *See* E.D.N.Y., 23-cv-02915, ECF #66 (at 3)

[12] *See* Record of Decision ("ROD"), issued November 24, 2021 at– www.boem.gov/renewable-energy/state-activities/record-decision-south-fork (last accessed September 9, 2023).

[13] *Id.*, (at 15, PDF 17, 1st ¶).

Under that alternative, BOEM reduced the number and adjusted the siting of offshore turbines (WTGs), but "[a]ll other Project components and construction and installation" would remain "identical to the Proposed Action[,]"[14] which BOEM described to include the "South Fork Export Cable (SFEC)" consisting of a "cable and an [onshore] interconnection facility" connected "to the existing [onshore] mainland electric grid in East Hampton, New York, for the delivery of power to the South Fork of Suffolk County, Long Island." [15]

Renewable Energy Lease OCS-A 0486/0517

The lease assignment (OCS-A 0517) agreed between the United States (acting through BOEM) and SFW is subject to the terms of the original lease (OCS-A 0486).[16] The lease assignment reads—

> This assignment, as approved, has the effect of segregating the assigned portion into a new lease, which now carries the new lease number OCS-A 0517 … The segregated lease is subject to all terms and conditions of

---

[14] *See* Final Environmental Impact Statement ("FEIS"), issued August 16, 2021 (at 2-12, PDF 38, 4th & 5th ¶¶) at boem.gov (www.boem.gov/renewable-energy/state-activities/sfwf-feis)

[15] *See* ROD (at 7, PDF 9, 2nd bullet point)

[16] BOEM initially awarded lease OCS-A 0486 to Deepwater Wind New England LLC as lessee (dated September 2013 with an effective date of October l, 2013). A portion of that lease was assigned to South Fork Wind LLC (SFW) (formerly Deepwater Wind South Fork LLC) and given lease number OCS-A 0517. BOEM approved the Assignment of Record Title Interest on March 23, 2020. *See* Lease OCS-A 0486 and 0517 at boem.gov (https://www.boem.gov/renewable-energy/lease-and-grant-information).

> the original lease [OCS-A 0486] … *(see* n.16 on page 7).

Section 1 of the original lease (OCS-A 0486) reads—

> This lease is issued pursuant to subsection 8(p) of the Outer Continental Shelf Lands Act [OCSLA] ("the Act"), 43 U.S.C. *§§* 1331 *et seq*. This lease is subject to the Act and regulations promulgated pursuant to the Act … This lease is also subject to … amendments to the Act … and regulations promulgated thereafter … It is expressly understood that amendments to existing statutes, including but not limited to the Act, and regulations may be made, and/or new statutes may be enacted or new regulations promulgated … and that the Lessee bears the risk that such amendments, regulations, and statutes may increase or decrease the Lessee's obligations under the lease. (*See* n.16 on page 7).

SFW's lease clearly stipulates that the lease is subject to subsequent amendments to existing statutes, including the OCSLA, and new statutes or new regulations, and that SFW, as lessee, bears the risks associated with such amendments, regulations, or statutes. Section is a standard clause that appears in BOEM's renewable energy leases.

On January 1, 2021, Congress amended the OCSLA, Section 4(a)(1),[17] which now reads—

---

[17] *See* National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283, tit. XCV, Sec. 9503 (2021).

> The Constitution and laws and civil and political jurisdiction of the United States are extended, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State, to- (i) the subsoil and seabed of the outer Continental Shelf … (iii) installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources, including non-mineral energy resources; or (iv) any such installation or other device … for the purpose of … transmitting such resources. 43 U.S.C. § 1333(a)(1)(A)

At the time BOEM issued its Record of Decision approving the Final Environmental Impact Statement for SFW (on November 24, 2021) and approved SFW's Construction and Operations Plan (on January 18, 2022), the lease (OCS-A 0486) and lease assignment (OCS-A 0486) recognized subsequent amendments to the OCSLA; and the OCSLA as amended January 1, 2021, expressly provided that the laws of the United States apply to installations and devices attached to the seabed of the Outer Continental Shelf for the purpose of exploring for, developing, producing and transmitting non-mineral energy resources, such as energy from offshore wind farms. Still, although BOEM and SFW were parties to the lease assignment and bound by the terms and conditions of the original lease, they asserted that BOEM did *not* have jurisdiction onshore or nearshore, contradicting those documents.

U.S. Supreme Court Precedent

This Court recently observed in *Siemens Gamesa Renewable Energy v. Gen. Elec. Co.*—

> It is a well-established principle of statutory construction that absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language." *United States v. Apfelbaum*, 445 U.S. 115, 121, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980). The language of the statute indicates that the "laws ... of the United States" apply to items affixed to the Outer Continental Shelf for energy generation. *43 U.S.C. § 1333(a)(1)(A).* [*Id.,* at 216]
>
> Through the OCSLA, Congress sought to extend federal power over the area to promote "leasing," "discovery[,] and development." [H.R. Rep. No. 83-413, at 2, 3 (1953)] [*Id.*]
>
> [I]t is undisputed that the Haliade-X wind turbines for energy generation will be affixed to the seabed within 200 miles from the United States coastline, and a wind turbine affixed within 200 nautical miles of the coast is 'within the United States' [*Id.*, 218].
>
> In short, "[t]here can be no question that the primary purpose for this legislation was to assert United States jurisdiction over the shelf, and to set up ***a system for the full development*** of its natural resources [emphasis added]." *Olsen v. Shell Oil Co.*,

> 561 F.2d 1178, 1188 (5th Cir. 1977). Its key purpose "was to expedite the exploration and development of the [O]uter [C]ontinental [S]helf while retaining adequate assurances that the marine ***and coastal environments*** would be protected [emphasis added]." *Watt, 565 F. Supp. at 1131.* [*Id.*] 605 F. Supp. 3d 198 (D. Mass. 2022)

The plain language of the OCSLA, as amended in 2021, mandates that the "laws ... of the United States are extended, to the same extent as if the outer Continental Shelf were an area of ***exclusive Federal jurisdiction located within a State***, to … any such installation or other device … for the purpose of … transmitting such resources [emphasis added]."[18] If a Haliade-X wind turbine for energy generation falls under United States jurisdiction, then it follows that a high-voltage export cable to be used for transmitting its energy resource also falls under federal jurisdiction and control. The transmission cable is a necessary integral part of "***a system for the full development*** of [the shelf's] natural resources" over which, pursuant to the OCSLA, the United States asserts jurisdiction as if it were an area of exclusive Federal jurisdiction located within a State.

Under subparagraph (iv), a transmission cable does *not* have to be attached to the OCS seabed[19] but must

---

[18] 43 U.S.C. § 1333(a)(1)(A)(iv)

[19] Although it could be argued that a transmission cable *is* attached (buried to four to six feet) to the seabed, it is not necessary for it to satisfy subparagraph (iv). Rather, the cable needs only to be for the purpose of transmitting such resources

be for the purpose of transmitting resources from an installation as defined under subparagraph (iii), such as an offshore wind turbine to fall within United States jurisdiction. The statutory definition of "any such installation or other device" under subparagraph (iv), such as a transmission cable, therefore, is not limited to a geographic boundary but instead defined by its purpose— "for the purpose of … transmitting such resources" (43 U.S.C. § 1333(a)(1)(A)), irrespective of the interconnection point where the cable delivers its electrical energy. In the case of SFW, the transmission cable connects the offshore wind farm on the OCS to the interconnection facility on eastern Long Island in the Town of East Hampton, NY. Therefore, the laws of the United States are extended to the offshore *and* onshore transmission cable "to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State" (43 U.S.C. § 1333(a)(1)). The question is *not* whether federal law applies, but ***whether state law applies to a federal enclave***.

BOEM and SFW made similar false statements about BOEM's jurisdiction in another case, *Mahoney et al. v. U.S. Department of the Interior et al.* (E.D.N.Y., No. 22-cv-01305) concerning, *inter alia*, BOEM's federal review of SFW that was also before District Judge Frederic Block. On July 17, 2023, Judge Block dismissed that case with prejudice for lack of standing, holding that BOEM "had no jurisdiction over onshore

---

as defined under subparagraph (iii), such as wind-generated electrical energy from an offshore wind turbine attached to the OCS seabed.

trenching. BOEM's jurisdiction extends only over the portion of the Project situated on the outer continental shelf, which extends seaward from New York state waters" (*see Mahoney, supra,* ECF 93, at 11) and that the "NYPSC [] had exclusive jurisdiction over onshore trenching" (*id.*, at 9). The ruling of Judge Block (Supp App 18a) contradicts this Court's precedent.

This Supplemental Brief is not the first time that Pl.-Petitioner has raised the issue of SFW's false statements concerning BOEM's jurisdiction. *See* Pl.-Petitioner's complaint to the DC Bar Association on February 21, 2023 (Supp App 31a).

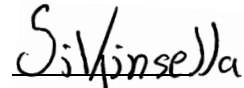
SFW (falsely) claims that Pl.-Petitioner "failed to comply with OCSLA's 60-day notice requirement" (*see* E.D.N.Y., 23-cv-02915, ECF #66, at 3, n.4). On the contrary, Pl.-Petitioner *did* file a 60-day notice of intent on December 18, 2021 (*see* D.D.C., 22-cv-02147, ECF 3-2) *and* a second notice "Re: URGENT: South Fork Wind Imminent Risk to Public Health" on March 11, 2022 (*id.*, ECF 3-3).

CONCLUSION

The practical effect of transferring the instant matter to District Judge Block in the E.D.N.Y., given Judge Block's erroneous order in *Mahoney* (dismissing that case on flawed jurisdictional grounds), will result in prolonging the litigation, wasting time, energy, and money, that is contrary to this Court's ruling in *Van Dusen v. Barrack*— 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" 376 U.S. 612, 616 (1964).

Respectfully submitted this 12th day of September 2023,



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

Statutory and Regulatory Provisions Involved

Statutory and Regulatory Provisions Involved

43 U.S.C. § 1333(a) provides that:

> **(1)** JURISDICTION OF THE UNITED STATES ON THE OUTER CONTINENTAL SHELF.-
>
> **(A)** IN GENERAL.-The Constitution and laws and civil and political jurisdiction of the United States are extended, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State, to-
>
> **(i)** the subsoil and seabed of the outer Continental Shelf;
>
> **(ii)** all artificial islands on the outer Continental Shelf;
>
> **(iii)** installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources, including non-mineral energy resources; or
>
> **(iv)** any such installation or other device (other than a ship or vessel) for the purpose of transporting or transmitting such resources.

Supplemental Appendix A

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

(September 13, 2023)

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

1) I am a resident of Wainscott in the Town of East Hampton, State of New York.

2) On July 20, 2022, I filed a Freedom of Information Act ("FOIA") Complaint against Defendants Bureau of Ocean Energy Management ("BOEM"), the U.S. Department of the Interior ("DOI"), and the U.S. Environmental Protection Agency ("EPA") (collectively, "Federal Defendants") (*see* D.D.C., 1:22-cv-02147, ECF #1).

3) The pleading to which no response has been made was served according to Rule 4 of the Federal Rules of Civil Procedure, as follows—

   a. A Summons and Complaint were sent (return receipt acknowledged) by the U.S. Attorney General (Department of Justice Department), U.S. Attorney for the District of Columbia, U.S. Department of the Interior, U.S. Bureau of Ocean Energy Management, and U.S. Environmental Protection Agency (*see* E.D.N.Y., 2:23-cv-02915, ECF #77-3, PDF 1-19).

   b. South Fork Wind LLC ("SFW") was served notice of the Complaint as a potential joinder party (*id.*, PDF 25-26).

4) The U.S. District Court for the District of Columbia ordered Federal Defendants "to file its responsive pleading to the Complaint in this lawsuit … ***thirty days after*** … ***the case is transferred and a new docket number and judge is assigned*** … Signed by Judge Jia M. Cobb on 9/13/2022" (emphasis added) (*id.*, PDF 50, Civil Docket MINUTE ORDER, 09/13/2022).

5) On November 2, 2022, Pl.-Petitioner filed an amended complaint as of right against Federal Defendants *only* (SFW was a named potential joinder party) (*see* D.D.C., 1:22-cv-02147, ECF 34-2).

6) On November 7, 2022, the U.S. District Court for the District of Columbia granted South Fork Wind's Motion to Intervene and "ORDERED that Intervenor-Defendant South Fork Wind, LLC shall file its Answer or other responsive pleading on the same date as Federal Defendants[,]" thirty days after the case is transferred and a new docket number and judge is assigned (*see* ¶ 4). *See* Order (E.D.N.Y., 2:23-cv-02915, ECF #77-3, at PDF 2) (Supp App 3a-4a).

7) During a hearing on November 9, 2022, the district court for the District of Columbia accepted Pl.-Petitioner's amended complaint— "I will grant ... Mr. Kinsella's motion to amend the complaint, which he was free to do as a matter of course at this stage of the proceedings ... when we are referring ... to any allegations, we are all talking about the same operative complaint" (*see* D.C. Cir., No. 22-5317, Doc. 1994062-11, November 9 Hearing Tr., at 2:20-25 and 21:l-2.

Also, see E.D.N.Y., 2:23-cv-02915, ECF #77-3, at PDF 53, Minute Order, 11/10/2022).

8) On November 10, 2022, the district court for D.C. "**ORDERED** that this civil action is **TRANSFERRED** to the United States District Court for the Eastern District of New York" (*see* D.D.C., 22-cv-02147, ECF 48-49) (Cert. Petition, App 8a-19a).

9) On November 29, 2022, Pl.-Petitioner filed a Petition for a Writ of Mandamus challenging the district court's transfer order (*see* D.C. Cir., No. 22-5317, Doc. 1975638) and an **amended petition** on December 7, 2022 (*id.*, Doc. 1976909).

10) On February 23, 2023, Circuit Judges Wilkins, Rao, and Walker ordered "that the United States and South Fork Wind, LLC to enter appearances and file responses to the mandamus petition … within 30 days" (*see* D.C. Cir., No. 22-5317, Doc. 1987203) (Cert. Petition, App 7a), which they did (on March 27, 2023). Pl.-Petitioner filed a timely reply (*id.*, Doc. 1994449, corrected).

11) On April 19, 2023, in what appeared to be an attempt to evade appellate scrutiny, the district court for D.C. transferred the case to the E.D.N.Y. *before* the court of appeals ruled on the mandamus petition. "The case of **Kinsella v. Bureau of Ocean Energy Management et al.** has been transferred from the **U.S. District Court, District of Columbia,** to the Eastern District of New York. The new case number is **23-cv-2915-GRB-SIL**" (s*ee* E.D.N.Y., 23-cv-02915, ECF 77-3, at PDF 62). Pl.-Petitioner filed an

emergency motion to return the files to the district court for D.C. (*see* D.C. Cir., No. 22-5317, Doc. 1995489).

12) On April 24, 2023, a D.C. Circuit order confirmed that "the case was transferred prematurely and in error … [and] [t]he case in the Eastern District of New York, No. 2:23-cv-02915, has been administratively closed" (*id.*, Doc. 1996148) (Cert. Petition, App 6a and 20a).

13) The next day (April 25, 2023), the district court for the E.D.N.Y., Chief Judge Margo K. Brodie, ordered that the "[c]ase [be] reassigned to Judge Frederic Block and Magistrate Judge Steven Tiscione (as related to 22-cv-1305) for all further proceedings" (*see* Cert Petition, App 20a-21a). Pl.-Petitioner had *not* been informed that his case had been reassigned.

14) On May 1, 2023, District Judge Frederic Block reopened the E.D.N.Y. case— "ELECTRONIC ORDER REOPENING CASE: Ordered by Judge Frederic Block on 5/1/2023" (*see* Cert Petition, App 21a). Pl.-Petitioner had *not* been informed that his case had been reopened in the E.D.N.Y.

15) On May 16, 2023 (at 9:02 p.m.), concerned about agency malfeasance by BOEM and continuing (unlawful) construction it had approved, Pl.-Petitioner filed a motion for a temporary restraining order and preliminary injunction enjoining SFW's construction activities.

16) On May 17, 2023 (12:10 p.m.), only hours after the motion had been filed, a new panel, Circuit Judges Millet, Pillard, and Rao, decided the case

(initially assigned to Circuit Judges Wilkins, Rao, and Walker). The new panel immediately denied Pl.-Petitioner's mandamus petition, thus affecting transfer, and denied the injunctive relief filed only hours before (*see* Cert. Petition, App 4a-5a). Such a swift decision left little time for consideration on the merits.

17) According to D.C. Circuit Local Rule 41(3), "[n]o mandate will issue in connection with an order granting or denying a writ of mandamus … but the order or judgment … will become effective automatically 21 days after issuance …." Therefore, the transfer order of May 17 (*see* ¶ 16), became effective on June 7, 2023 (21 days later).

18) Given that D.C. District Judge Cobb ordered Federal Defendants and Defendant-Intervenor SFW to file their responsive pleading to the amended complaint thirty days after the case was transferred (*see* ¶¶ 4 and 6), and the transfer order of May 17 (*see* ¶ 16), became effective 21 days later on June 7, 2023 (*see* ¶ 17), the deadline for filing responsive pleading was ***July 7, 2023***.

19) On May 18, 2023, the day after the D.C. Circuit ordered Pl.-Petitioner's mandamus petition be denied, thus affecting transfer (*see* ¶ 16), the E.D.N.Y. court ordered that "[p]laintiffs motion [in D.D.C., No. 1:22-cv-02147, ECF] 35 for a preliminary injunction [be] DENIED. Ordered by Judge Frederic Block on 5/18/2023" (*see* Cert. Petition, App 21a and 28a-35a). The E.D.N.Y. court denied Petitioner's preliminary injunction twenty days *before* the transfer had become effective. The (unlawful) order denying Petitioner a

preliminary injunction was *not* without prejudice. Petitioner had *not* been notified and was unaware of the proceedings. There was no hearing. The E.D.N.Y. court ignored Petitioner's five fraud claims and the amended complaint as if it, the defendants, and the fraud claims do not exist. Judge Block's order was without power.

20) As of September 12, 2023, neither Federal Defendants nor SFW has filed answers to the amended complaint Pl.-Petitioner filed over ten months ago (on November 2, 2022) (*see* D.D.C., 22-cv-02147, ECF 34-2). Federal Defendants did not file answers to the (original) complaint Pl.-Petitioner filed over thirteen months ago (on July 20, 2022) (*id.*, ECF 1) and did not respond to the cross-motion for (partial) summary judgment and statement of material facts where there is no genuine dispute Pl.-Petitioner filed over eleven months ago (on September 26, 2022) (*id.*, ECF 21).

E.D.N.Y. District Court

21) On June 16, 2023, Defendant-Intervenor SFW filed a letter motion ("**SFW Letter Motion**") "request[ing] a pre-motion conference regarding SFW's intent to file a partial motion to dismiss all but the Freedom of Information Act ("FOIA") claim in Plaintiff Simon V. Kinsella's ("Plaintiff") First Amended Complaint ("Complaint") under Federal Rule of Civil Procedure 12(b)" (*see* E.D.N.Y., 23-cv-02915, ECF 66, at 1, 1st ¶).

22) The SFW Letter Motion provides the following reason for dismissing Petitioner's claims—

"First, Plaintiff lacks Article III standing. *See, e.g., Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (standing requires: (1) injury-in-fact; (2) causal connection between the injury and the conduct complained of; and (3) likelihood that the alleged injury will be redressed by a favorable decision). Plaintiff's allegations that onshore cable construction will exacerbate pre-existing per- and polyfluoroalkyl substance ("PFAS") contamination, that wind farm construction will lead to increased cod prices, and that the Project will spur other wind energy projects in the Town are speculative and do not state concrete, particularized, actual, or certainly imminent injuries as a matter of law. Further, Plaintiff's alleged injuries are not fairly traceable to Federal Defendants' Project approvals, as onshore construction work was authorized by the NYSPSC and the Town, not Federal Defendants, and the economic claims associated with declining cod populations over the past decade are not attributable to any action by Federal Defendants in connection with this Project. Finally, a decision in Plaintiff's favor on claims relating to onshore and nearshore work that are within the jurisdiction of state and local government and asserted economic harms, will not redress his alleged injuries because they are not fairly traceable to Federal Defendants' Project approvals. Even if Federal Defendants' approvals for the Project were set aside, that relief would not affect the nearshore work or the now-complete onshore cable over which Federal Defendants lack jurisdiction, *see* Mem. And

Order, Kinsella, ECF #56 at 7, nor the economic harms Plaintiff claims."

"*Second*, Plaintiff's claims regarding onshore Project siting and construction are now moot because the construction of the underground transmission cable is complete and the Court can no longer grant Plaintiff any effective relief for these claims. "[W]hen it becomes impossible for the courts, through the exercise of their remedial powers, to do anything to redress" the alleged injury, there is no Article III case or controversy to resolve, such that the action is moot and the Court lacks subject matter jurisdiction. *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993) (quotations omitted); *see also Powers v. Long Island Power Auth.*, 2022 WL 3147780, at *3 (2d Cir. Aug. 8, 2022) (dismissing claims as moot because construction at center of claims was completed). When a party seeks to enjoin a construction project—including in NEPA cases—the case becomes moot when the construction is completed. *See, e.g.*, *Strykers Bay Neighborhood Council, Inc. v. City of New York*, 695 F. Supp. 1531, 1543-44 (S.D.N.Y. 1988). Because Plaintiff's injury can no longer be redressed by the Court, there is no longer any "case" or "controversy" for purposes of Article III jurisdiction, and Plaintiff's claims related to onshore Project construction and siting must be dismissed. *See Cook*, 992 F.2d at 19."

"*Finally*, Plaintiff's Complaint fails to plausibly state a claim for relief with respect to alleged fraud and violations of the CZMA, OCSLA,[4] Executive Order 12898 (environmental justice),

and due process under the Fourteenth Amendment to the U.S. Constitution."

Footnote 4 reads: "Plaintiff also failed to comply with OCSLA's 60-day notice requirement, 43 U.S.C. § 1349(a)(1), (2), and/or his claims are not within the zone of interests OCSLA was designed to protect, 43 U.S.C. §§ 1331(a), 1301(a)."

See SFW Letter Motion (E.D.N.Y., 23-cv-02915, ECF 66, at 2-3).

23) Contrary to SFW's false statement, Petitioner-Plaintiff Kinsella *did* comply with the "OCSLA's 60-day notice requirement[.]" In fact, Mr. Kinsella sent two notices to BOEM and federal and state agencies 60 days *before* filing his lawsuit on July 20, 2022. *See* "60-day Notice of Intent to Sue" (D.D.C., 22-cv-02147, ECF 3-2). *Also, see* "URGENT: South Fork Wind Imminent Risk to Public Health" (D.D.C., 22-cv-02147, ECF 3-3).

24) On June 21, 2023, counsel for Defendant BOEM (and other Federal Defendants) filed a letter motion ("**BOEM Letter Motion**") "request a pre-motion conference for leave to move to dismiss the complaint (except for the Twelfth Cause of Action which asserts a claim under the Freedom of Information Act ["FOIA"]) pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6) and 12(c) for lack of standing and failure to state a claim." *See* BOEM Letter Motion (E.D.N.Y., 23-cv-02915, ECF 68, at 1, 1st ¶).

25) The BOEM Letter Motion provides the following reason for dismissing Petitioner's claims—

"Plaintiff's complaint (except for the twelfth claim made under FOIA), must be dismissed for lack of subject matter jurisdiction because plaintiff lacks standing. 'To have Article III standing, (1) the plaintiff must have suffered an injury in fact, (2) there must be a causal connection between the injury and the conduct complained of, and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.' Vengalattore v. Cornell U., 36 F.4th 87, 112–13 (2d Cir. 2022) (citing Lujan v. Defenders of Wildlife, 504 U.S. 505, 560-61 (1992). An injury is redressable if it 'is likely and not merely speculative that [it] will be remedied by the relief plaintiff seeks in bringing suit.' Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 273–74 (2008) (internal quotation marks omitted). To show "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.' Lujan, 504 U.S. at 560–61 (citation omitted)."

"Here, as noted by this court in Kinsella, 2023 WL 3571300, at *1, while plaintiff pleads 12 claims for relief, three alleged 'harms underpin all of [his] numerous claims' -- i.e., (1) PFAS contamination to the drinking supply caused by SFW's onshore trenching and construction activities; (2) increase in the price of Atlantic cod due to the harm that the offshore work will cause

to the cod population; and (3) economic harm because the Project will increase the cost of electricity. None of these alleged injuries confer standing on plaintiff to maintain this action."

First, Kinsella alleges the same injury from the onshore work as alleged by the plaintiffs in Mahoney; i.e., that SFW's onshore trenching activity will supposedly spread PFAS into the ground water. The onshore construction activity was authorized by, and within the exclusive jurisdiction of, the PSC and other State and local authorities. BOEM has no authority to regulate this activity because its jurisdiction is limited to the submerged lands starting three miles from state coastlines and extending seaward. 43 U.S.C. §§ 1331(a), 1301(a)(2). Thus, as the Federal Defendants and SFW show in their pending motions to dismiss Mahoney for lack of standing (ECF 67-82), plaintiff lacks standing because he cannot show that any alleged injury from SFW's onshore work is either (1) caused by the actions of the Federal Defendants or (2) redressable by any relief against the Federal Defendants. See Kinsella, 2023 WL 3571300, at *3 ("New York State agencies issued the permits for the onshore portion of the Project, not BOEM, and enjoinment of its [BOEM's] authorization of the Project would not halt the onshore portion of the Project[. Further,] the NYPSC has already found that the Project as proposed will not exacerbate existing PFAS, in part because of mitigation measures included in the Project's plan) (citing Mahoney 2022 WL 1093199, at *2))"

"Second, plaintiff lacks standing to bring his claims relating to the offshore portion of the Project because he fails to plead or show that he has suffered an injury that is "concrete and particularized" as well as "actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560 (quotation marks and citations omitted). Specifically, plaintiff alleges that he will be injured by BOEM's approval of SFW's offshore activities because those activities will cause cod populations to decline, resulting in higher cod prices at his local market. As previously noted by this court, and as the Federal Defendants will show, these claims are entirely speculative and hypothetical. See Kinsella, at *3 (Kinsella's unsubstantiated argument about the Project's potential effect on the price of cod and the harm he may suffer as a result is exactly the sort of speculative argument that Borey [v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania, 934 F.2d 30, 34 (2d Cir. 1991)] forecloses")."

Third, any alleged economic injury from an increase in Kinsella's electricity rates are not caused by the Federal Defendants' actions, nor are they redressable by any relief against the Federal Defendants. Instead, any such rate increases are the result of a Power Purchase Agreement between the Long Island Power Authority ("LIPA") and SFW entered into on February 6, 2017, well before BOEM issued the FEIS and Record of Decision in 2021. Indeed, plaintiff sought to void the Power Purchase Agreement on many of the grounds asserted here, but was denied any relief by the New York State

Courts. See, Kinsella et al. v. Long Island Power Authority et al., No. 621109/2021 (N.Y. Sup. Ct. Suffolk Cty. filed Nov. 9, 2021)."

"Finally, even if Kinsella sustained a judicially recognizable injury and had standing to assert any of his claims, as will be shown in Federal Defendants' motion, all such claims, except the FOIA claim, fail to state a cause of action and must be dismissed."

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

26) On June 30, 2023, the district court for EDNY issued an "ORDER granting 70 Motion to Adjourn Conference. The Initial Conference … is adjourned sine die" (*see* E.D.N.Y., 23-cv-02915, Electronic Order, entered 06/30/2023).

27) On July 5, 2023, the court issued a "SCHEDULING ORDER: Movant South Fork Wind's letter application 66 dated 6/16/23 and the defendants letter application 68 dated 6/20/23 are GRANTED" (*id.*, Scheduling Order, entered 07/05/2023).

28) Neither the Electronic Order of Magistrate Judge Steven Tiscione (entered June 30, 2023) nor the Scheduling Order of District Judge Frederic Block (entered July 5, 2023) provided good cause or a reason for granting Federal Defendant's and SFW's letter motions.

29) Pl.-Petitioner's First Amended Complaint is exhaustive at 141 pages (*see* D.D.C., 22-cv-02147, ECF 34-2).

30) On July 18, 2023, the E.D.N.Y. district court uploaded to the ECF system Pl.-Petitioner's letter of July 12 with the following docket text—

> Letter dated 7/12/2023 from Simon V. Kinsella to Judge Frederic Block, informing the Court that the ECF System does not allow pltff to file his documents and is being denied access. Pltff further states that he will be overseas from September 1 through 26 and cannot attend the in-person pre-motion conference on September 13, 2023 (ECF [72]). Pltff respectfully request that the Court hold the conference in the final two weeks of August before he departs, so that the case may proceed while he is overseas. (SG)

31) Although Pl.-Petitioner requested that the in-person pre-motion conference be brought forward to "the final two weeks of August before I depart so that the case may proceed while I am overseas[,]" District Judge Frederic Block ordered that "[t]he in person pre-motion conference scheduled for September 13, 2023 [be] adjourned to October 5, 2023 at 4:00 P.M." (*See* E.D.N.Y., 23-cv-02915, Electronic Order, entered 7/18/2023).

32) On July 18, 2023, an order of Judge Block confirmed that "[t]he Clerk's Office has given the pro se plaintiff access to file documents electronically." *Id.*

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

Dated: September 13, 2023

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

Sworn to before me this
13th day of September 2023

David Fink, Notary Public

State of New York No. 4526132
Qualified in New York County
Commission Expires February 28, 2024

Supplemental Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PAMELA MAHONEY; MICHAEL MAHONEY; LISA SOLOMON; and MITCH SOLOMON,

Plaintiffs,

-against-

U.S. DEPARTMENT OF THE INTERIOR; BUREAU OF OCEAN ENERGY MANAGEMENT; U.S. DEPARTMENT OF THE ARMY; and U.S. ARMY CORPS OF ENGINEERS,

Defendants,

and

SOUTH FORK WIND, LLC

Defendant-Intervenor

MEMORANDUM AND ORDER

Case No. 22-CV-1305 (FB) (ST)

Appearances:
For the Plaintiffs:
ERIC GRANT
JOHN B. THOMAS
CRYSTAL V. VENNING
Hicks Thomas LLP
700 Louisiana Street
Suite 2300
Houston, TX 77002

For Defendants:
VINCENT LIPARI,
U.S. Attorney's Office, Eastern District of New York
610 Federal Plaza, 5th floor
Central Islip, NY 11722

For Defendant-Intervenor:
KEGAN A. BROWN
JANICE SCHNEIDER
STACEY VANBELLEGHAM
1271 Avenue of the Americas
New York, NY 10020
Lathan & Watkins LLP
555 Eleventh St., N.W., Ste. 1000
Washington, D.C. 20004

BLOCK, Senior District Judge:

Plaintiffs Pamela Mahoney, Michael Mahoney, Lisa Solomon, and Mitch Solomon ("Plaintiffs") live in the Wainscott hamlet of East Hampton, New York. They bring this action seeking to halt construction on the South Fork Wind Farm (the "Wind Farm") and South Fork Export Cable Project (the "Export Cable") (collectively, the "Project"), a wind farm being constructed 35 miles East of Montauk Point. Plaintiffs claim that onshore trenching for the South Fork Export Cable will worsen existing perfluoroalkyl and polyfluoroalkyl ("PFAS") contamination in their groundwater.

Defendants U.S. Department of the Interior, Bureau of Ocean Energy Management ("BOEM"), U.S. Department of the Army, and U.S. Army Corps of Engineers (the "Army Corps") (together, "Defendants") are federal agencies that issued permits for the South Fork Wind Farm, the offshore portion of the Project. They also issued a Final Environmental Impact Statement ("FEIS") required for those permits.[1] Defendant-Intervenor South Fork

[1] The FEIS is available at

Wind, LLC ("South Fork Wind") is the Project's developer.

Defendants move to dismiss each of Plaintiffs' claims for lack of standing under Federal Rule of Civil Procedure 12(b)(1), and alternatively to dismiss two of Plaintiffs' claims under Rule 12(b)(6). South Fork Wind moves for a judgment on the pleadings under Rule 12(c). For the following reasons, Defendants' Rule 12(b)(1) motion is granted and Plaintiffs' Complaint is dismissed with prejudice.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Project entails excavating onshore trenches to contain the Export Cable, which will transfer energy generated by the Wind Farm to an onshore electric grid in East Hampton. Part of the cable's onshore route will pass under Beach Lane in Wainscott, which is adjacent to Plaintiffs' properties. Plaintiffs' groundwater is contaminated by PFAS; accordingly, they do not use their water wells for drinking water—only for "other purposes such as irrigation." Compl. ¶ 18. Plaintiffs allege that trenching on Beach Lane will exacerbate this existing PFAS contamination. In addition to introducing new PFAS into their groundwater, they claim the trenching will intersect with existing contamination, becoming a "preferential pathway" for the migration of PFAS into uncontaminated areas. Compl. ¶ 27.

The onshore path of the Export Cable falls under the jurisdiction of the New York Public Service

---

https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/SFWF%20FEIS.pdf

Commission ("NYPSC"), including a 7.6-mile stretch running from the limit of New York's territorial waters to a substation in East Hampton. While Defendants issued permits to construct the offshore Wind Farm, permits for the onshore route of the Export Cable, including the trenching that Plaintiffs complain of, were issued by NYPSC.

On March 18, 2021, NYPSC issued a Certificate of Environmental Compatibility and Public Need under Article VII of the New York State Public Service Law, allowing the onshore portion of the Project to move forward. NYPSC's permit came after years of administrative proceedings which considered, among other things, the potential of the Project to exacerbate PFAS contamination. Plaintiffs participated in this process through public hearings and comment. NYPSC found that the Project would not exacerbate existing PFAS contamination, in part because of preventative measures to ensure that groundwater flow was not altered. NYPSC denied a rehearing of the issue, holding that the petitioners, which included Plaintiffs, had not demonstrated that the Project's PFAS provisions were inadequate. Plaintiffs then unsuccessfully challenged NYPSC's final decision in state court, along with East Hampton's easement agreement allowing South Fork Wind to trench on Beach Lane. *See Citizens for the Pres. of Wainscott, Inc. v. New York State Pub. Serv. Comm'n*, 216 A.D.3d 769 (2023) (denying request for rehearing of NYPSC's final decision); Lipari Decl., Dkt. No. 80, at Ex. F (Decision dismissing challenge to easement, captioned *Citizens for Preservation of Wainscott, Inc., et al. v. New York*

State Public Service Commission, et al., 2021-06582 (App. Div. 2d Dep't)).

On August 16, 2021, BOEM issued the FEIS, which the Army Corps adopted. BOEM approved South Fork Wind's construction and operations plan on January 18, 2022. The Army Corps granted a permit for the Project under § 404 of the Clean Water Act and § 10 of the Rivers and Harbors Act of 1899 on January 20, 2022.

On March 9, 2022, Plaintiffs brought the present action. They claim that the FEIS did not adequately consider the Project's potential effect on PFAS contamination in violation of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C), Clean Water Act, 33 U.S.C. § 1344(b)(1), Outer Continental Shelf Lands Act, 43 U.S.C. § 1337(p)(4)(B), and Administrative Procedure Act.

This Court previously denied Plaintiffs' motion for a preliminary injunction to halt onshore trenching for the Project. *See Mahoney v. U.S. Dep't of the Interior*, No. 22-CV-01305-FB-ST, 2022 WL 1093199 (E.D.N.Y. Apr. 12, 2022).

II. LEGAL STANDARD

Challenges to standing concern threshold questions of subject matter jurisdiction addressed under Rule 12(b)(1). *Merola v. Cuomo*, 427 F. Supp. 3d 286, 288 n.2 (N.D.N.Y. 2019). "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "A plaintiff bears the burden of proving by a preponderance of the evidence that subject

matter jurisdiction exists." *Razi Sch. v. Cissna*, 519 F. Supp. 3d 144, 148 (E.D.N.Y.) (citing *Makarova*, 201 F.3d at 110)).

"In evaluating constitutional standing, courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Dean v. Town of Hempstead*, 527 F. Supp. 3d 347, 394 (E.D.N.Y. 2021) (internal quotations omitted). However, "[j]urisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003) (internal quotation omitted).

"A Rule 12(b)(1) challenge to subject matter jurisdiction may be facial, that is, based solely on the pleadings, in which case the court must determine whether the pleadings 'allege facts that affirmatively and plausibly suggest that [the plaintiff] has standing to sue.'" *Razi Sch.*, 519 F. Supp. 3d at 148 (quoting *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011)). But challenges "may also be fact-based and rely on evidence beyond the pleadings, in which case a plaintiff must present controverting evidence unless the evidence is 'immaterial because it does not contradict plausible allegations that are themselves sufficient to show standing.'" Id. (quoting *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 57 (2d Cir. 2016)); see *Ali v. New York City Env't Control Bd.*, 670 F. App'x 26, 27 (2d Cir. 2016) ("When determining standing, a district court may consider evidence outside the pleadings.") (internal quotation omitted). Courts "may consider affidavits and other materials beyond the pleadings

to resolve the jurisdictional issue," but must disregard "conclusory or hearsay statements" contained in them. *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 110 (2d Cir. 2004). Defendants lodge a fact-based challenge here.

In regard to South Fork Wind's motion, Rule 12(c) provides that "[a]fter the pleadings have closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). Courts apply "[t]he same standard applicable to Fed. R. Civ. P. 12(b)(6) motions to dismiss." Bank of New York v. First Millennium, Inc., 607 F.3d 905, 922 (2d Cir. 2010).

III. DISCUSSION

Under Article III of the Constitution, federal courts can only hear disputes if the plaintiff has standing to sue. *Raines v. Byrd*, 521 U.S. 811, 818 (1997). "[T]o establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, ––– U.S. ––––, 141 S. Ct. 2190, 2203 (2021) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)) [***see*** **Supp App 67a**]. Once again, Plaintiffs have the burden of establishing standing. "[A]t the pleading stage, the plaintiff must clearly allege facts demonstrating each element." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (internal quotation omitted). Here, Defendants argue that Plaintiffs have failed to establish any of them.

Plaintiffs' claimed injury is that they live on land affected by potential PFAS contamination and that "their property is less valuable because of the [trenching]." Compl. ¶ 38. They claim that these injuries are caused by Defendant's conduct because South Fork Wind "would not be planning to trench a cable" near their property "but for Defendants requiring South Fork Wind to use the Beach Lane route for the onshore cable as a condition of their approvals and permits." Compl. ¶ 39. Finally, Plaintiffs claim that their injuries are redressable by judicial relief because vacating or altering the Army Corps' building permit would prevent further contamination. The issue of causation is dispositive.

To show a "causal connection between the injury and the conduct complained of," a plaintiff must demonstrate that their injury is fairly traceable to the defendant's actions, "not the result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560-61. [***see*** **Supp App 67a**]

Defendants argue that the location and manner of onshore trenching were dictated by local and state agencies like NYPSC, not Defendants. Defendants also maintain that they did not require trenching on Beach Lane as a condition of their permits, as alleged by Plaintiffs. In response, Plaintiffs stress that the permits granted by Defendants for offshore work were a necessary condition and a "but for" cause of construction on the Project as a whole, including onshore trenching for the Export Cable. They also insist that the Court must credit their allegations that Defendants required the selection of Beach Lane as the route for the Export Cable.

Plaintiffs maintain that trenching on Beach Lane would not occur without Defendants' approval of the offshore Wind Farm. But "but for" causation is not alone sufficient to tether an injury to a defendant's conduct for the purposes of standing. *See Pettus v. Morgenthau*, 554 F.3d 293, 299 (2d Cir. 2009) (noting that in the standing context, "the concept of 'fairly traceable' in its ordinary form . . . requires more than mere 'but for' causation."). Of course, construction on the Project, including trenching, could not commence without permits being granted for the Wind Farm—otherwise, there would be no power for the Export Cable to carry ashore. But this bare "but for" relationship does not mean that Defendants' offshore permits "likely caused" trenching on Beach Lane and the PFAS contamination Plaintiffs allege. *TransUnion LLC*, 141 S. Ct. at 2203. Instead, Plaintiffs' injuries are directly traceable to NYPSC, which had exclusive jurisdiction over onshore trenching—precisely an "independent action of some third party not before the court." *Lujan*, 504 U.S. at 560. [***see*** **Supp App 67a**]

Documents cited by both Defendants and Plaintiffs make clear that State and local entities approved Beach Lane as a path for the Export Cable, and that Defendants understood this choice to have already been made when issuing permits for the offshore Wind Farm. NYPSC in particular was responsible for "determining the location of the onshore cable and considering alternative locations," and had done so before Defendants issued the FEIS in August 2021. NYPSC Mem., Dkt. No. 34-1, 4-5 (explaining that NYPSC enjoys "exclusive

jurisdiction under state law to review the onshore portion of the [Export Cable]") (citing N.Y. Pub. Serv. Law §§ 120-130)).

The FEIS itself also reflects this decision timeline. In it, BOEM states that despite considering multiple potential landing sites for Export Cable, South Fork Wind had already been granted permits to trench on Beach Lane:

> Although [South Fork Wind] . . . proposes both these alternative landing sites, in the period since the draft EIS was published, [South Fork Wind] has secured approvals from the state and local agencies for the Beach Lane site and not the Hither Hills site. In part, because both routes are part of the envelope in the [construction and operations plan] and partly because the offshore cable routes are largely overlapping, this final EIS still considers the impacts associated with both routes.

FEIS at 2-5, n.4. East Hampton's easement agreement with South Fork Wind for onshore trenching on Beach Lane also was issued before Defendants' permits. Pl. Opp. Appendix, Dkt. No. 74-1, 6, 9, 25 (March 9, 2021 easement for trenching work "along Beach Lane to its intersection with Wainscott Main Street").

These facts directly contradict the Complaint's allegation that "Defendants requir[ed] South Fork Wind to use the Beach Lane route for the onshore cable as a condition of their approvals and permits." Compl. ¶ 39. Factual allegations are normally taken as true on a 12(b)(1) motion. *Dean*, 527 F. Supp. 3d

at 394. But this allegation's direct contradiction by material cited by both Defendants and Plaintiffs, which the Court finds to be true, means that Plaintiffs have failed to meet their burden of establishing subject matter jurisdiction. *Carter*, 822 F.3d at 57.

Defendants, meanwhile, had no jurisdiction over onshore trenching.

BOEM's jurisdiction extends only over the portion of the Project situated on the outer continental shelf, which extends seaward from New York state waters. *See* 43 U.S.C. § 1337(p)(1) (granting Secretary of the Interior power, delegated to BOEM, to "grant a lease, easement, or right-of-way on the outer Continental Shelf"); 43 U.S.C. §§ 1331(a), 1301(a)(2) (defining "outer Continental Shelf" as "all submerged lands lying seaward and outside of" "a line three geographical miles distant from the coast line of each . . . State").

Nor did the Army Corps have jurisdiction over onshore trenching. Section 404 of the Clean Water Act grants the Army Corps authority to permit the discharge of dredged or fill material into disposal sites situated in "navigable waters," which include "waters of the United States, including the territorial seas." 33 U.S.C. §§ 1344(a), (d); 33 U.S.C. § 1362(7). Plaintiffs do not claim that the groundwater under Beach Lane constitutes waters of the United States. Instead, they point to a directive by the Army Corps ordering that work conform to permit drawings indicating the cable's onshore arrival on Beach Lane. P's App'x, Dkt. No. 74-1, 76, 83. But the referenced December 3, 2021 permit drawing indicating a landing point on Beach Lane

was created after NYPSC had already chosen Beach Lane as the trenching location. P's App'x, Dkt. No. 74-1, 83.

Plaintiffs also cite the Army Corps' Record of Decision, which defines the relevant "permit area" as including "those areas comprising [waters of the United States] that will be directly affected by the proposed work or structures, as well as activities outside of waters of the U.S. because all three tests identified in 33 C.F.R. 325, Appendix C(g)(1) have been met." P's App'x, Dkt. No. 74-1, 70. But 33 C.F.R. 325 does not expand the Army Corps' § 404 jurisdiction to onshore land, and this passage is explicitly labeled as pertaining only to the Army Corps' "[d]etermination of [a] permit area for Section 106 of the National Historic Preservation Act." *Id*. Plaintiffs rightly do not contend that the National Historic Preservation Act grants the Army Corps authority over onshore trenching outside its usual § 404 jurisdiction over waters of the United States. *See* 36 C.F.R. § 800.16(d) (defining the "[a]rea of potential effects" under NHPA as "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties").

Thus, Defendants' conduct is too attenuated from the location and manner of onshore trenching to be fairly traceable to Plaintiffs' alleged injuries. Because Plaintiffs fail to show that Defendants' conduct is the likely cause of their injuries, they lack standing, and their Complaint must be dismissed. *TransUnion LLC*, 141 S. Ct. at 2203.

IV. CONCLUSION

For the reasons explained above, Defendants' motion to dismiss is granted and the Complaint is dismissed with prejudice.

SO ORDERED.

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

July 17, 2023

Supplemental Appendix C

SIMON V. KINSELLA

EMAIL:	P.O. BOX 792	
SI@FINK	WAINSCOTT, N. Y.	M (631)
KINSELLA.COM	11975	903-9154

February 21, 2023

Hamilton P. Fox, III Esq.
Office of Disciplinary Counsel
District of Columbia Court of Appeals
515 5th Street, N.W.,
Building A, Suite 117
Washington, DC 20001

Sent via email and online submission
Email: odcinfo@dcodc.org

Re: Violations by Latham & Watkins' Partners of District of Columbia Bar Rules of Professional Conduct

Dear Mr. Fox,

Words matter. They have consequences, more so when they carry the weight of professional authority. The instant matter concerns three partners of Latham & Watkins LLP,[1] who represent Defendant-Intervenor South Fork Wind LLC ("SFW"), opposing Plaintiff Simon Kinsella (me), a *pro se* litigant.

The partners of Latham & Watkins abused their position of authority by knowingly making false

[1] Latham & Watkins LLP, 555 11th Street N.W., Suite 1000, Washington, D.C. 20004

statements[2] and, relying on their professional standing, passing off their conclusory statements as facts. The partners take opportunistic advantage of a presumption that they comply with the District of Columbia Bar Rules of Professional Conduct. On the contrary, their legal submissions (as described below) violate those Rules and bring disrepute to the legal profession. Their vexatious statements have caused undue hardship and additional expense and serve no purpose other than to interfere with due process and frustrate a *pro se* litigant.[3] In addition, their false statements concern harmful PFAS contamination of a sole-source aquifer that thousands of people rely on daily for drinking water. Thus, the lawyers' words are not only false but reckless. Furthermore, the partners' actions aided in assisting SFW in fraud.[4]

The Rules Governing the District of Columbia Bar mandate that members comply with the Rules of Professional Conduct and "[a]cts or omissions by an attorney, … which violate the … rules … shall constitute misconduct and shall be grounds for discipline" (Rule XI, §§ 1–2).

According to the D.C. Bar Association Rules of Professional Conduct, Rule 8.4, "[i]t is professional misconduct for a lawyer to: (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly

---

[2] In violation of the Rules of Professional Conduct, Rule 3.3(a)(1)

[3] *See* Kinsella Affidavit III CONFIDENTIAL (sealed) (marked as Exhibit H).

[4] In violation of the Rules of Professional Conduct, Rules 1.2(e), 3.3(a)(2), 8.4, and 1.16(a).

assist or induce another to do so, or do so through the acts of another; [or] … (c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation[.]" Pursuant to those Rules, I respectfully request that the Board on Professional Responsibility discipline the following partners at Latham & Watkins LLP (collectively "L&W Partners")—

Janice M. Schneider (D.C. Bar No. 472037)
Stacey L. VanBelleghem (D.C. Bar No. 988144)
Devin M. O'Connor (D.C. Bar No. 1015632)

Ms. Schneider is Lead Counsel representing SFW in *Simon Kinsella v. Bureau of Ocean Energy Management et al.*[5] Ms. Van Belleghem and Ms. O'Connor are 2nd and 3rd Counsel, respectively.[6]

In the district court, the L&W Partners knowingly made false statements of material fact *and* law in their Memorandum in Opposition to Emergency Motion for a Temporary Restraining Order and Preliminary Injunction.[7] Their false statements were corrected at the time,[8] but the partners failed to reflect those corrections in their legal submissions. Instead, the partners repeated the untruthful information on appeal in their Response in Opposition to Emergency Motion for a

---

[5] *See* U.S. District Court for the District of Columbia (DDC), Case 1:22-cv-02147, filed July 20, 2022. *Also, see* U.S. Court of Appeals for the District of Columbia Circuit (D.C. Cir.), No. 22-5316/7, filed November 30, 2022.

[6] *See* USCA, No. 22-5316, Doc. 1978475, Entry of Appearances (marked as Exhibit A).

[7] *See* DDC Case 1:22-cv-02147, ECF No. 40-1 (marked as Exhibit B).

[8] *See* DDC Case 1:22-cv-02147, ECF No. 44 (marked as Exhibit C).

Temporary Restraining Order and Preliminary Injunction.[9] Simply put, the three partners of Latham & Watkins LLP lied to the U.S. Court of Appeals. Their lies assisted SFW in perpetrating fraud.

1) L&W Partners Lies Re: PFAS Contamination

In the U.S. District Court for the District of Columbia, the L&W Partners knowingly made the following false statements regarding the state review of SFW's project[10]—

> The PFAS allegations at the heart of Plaintiff's claims were also considered and rejected by the New York State Public Service Commission ("NYSPSC") twice after extensive evidentiary proceedings [Exhibit B, DDC Case 1:22-cv-02147, ECF No. 40-1, at 3, PDF 9].
>
> ---
>
> The NYSPSC Article VII conditions comprehensively cover the potential PFAS issues [*id.*, at 30, PDF 36].
>
> ---
>
> Environmental matters and the allegations of exacerbating existing PFAS contamination were discussed

[9] *See* USCA, D.C. Cir., No. 22-5316, Doc. 1982288 (marked as Exhibit D).

[10] Pursuant to Article VII of NY Public Service Law before the New York State Public Service Commission ("NYSPSC"), Case 18-T-0604.

> throughout the Article VII process [*id.*, at 8, PDF 14].

The heart of the PFAS-related claims concerns the lack of examination and the refusal to admit *any* PFAS soil or groundwater test results within SFW's proposed construction site during the federal or state review. Without submitting evidence of onsite PFAS contamination, issues such as the process of diffusion of PFAS contaminants into concrete could *not* have been considered.

The L&W Partners' statements were corrected as follows (in the district court)—

> Much like the selective environ-mental review …, the NYSPSC Article VII review was similarly manipulated. For example, the NYSPSC evidentiary record closed on December 8, 2020, and just fifteen days later (on December 23, 2020), [the] Developer [SFW] took the first sample to test groundwater for PFAS contamination.[2] Although Suffolk County issued a Water Quality Health Advisory concerning PFAS contamination in Wainscott in October 2017, South Fork Wind waited three years until the Public Service Commission evidentiary record closed (on December 8) before testing its planned construction corridor for contamination. By delaying, South Fork Wind avoided formal environmental review of any testing of soil or groundwater for PFAS

> contamination taken from *within* its proposed construction corridor. South Fork Wind avoided environmental review of onsite PFAS contamination in the NYSPSC Article VII review and BOEM's review.
>
> [Footnote2:] https://ehamptonny.gov/DocumentCenter/View/12142/Table-3---LIRR-PFAS-Samples [*id.*, Exhibit C, DDC Case 1:22-cv-02147, ECF No. 44, at 9].

The partners repeated similarly false statements regarding groundwater PFAS contamination but in reference to BOEM's federal review, specifically about the Final Environmental Impact Statement ("FEIS")[11] for SFW's project—

> The FEIS … also recognizes that sampling near the East Hampton Airport has detected PFAS in the "soil and groundwater within and around the site." *Id.*, at H-23." [*see* Exhibit C, DDC 1:22-cv-02147, ECF No. 40-1, at 30, PDF 36].

Contrary to the partners' false statements, the FEIS does *not* recognize PFAS in the soil and groundwater *within* or *around* the site (regardless of whether the "site" refers to East Hampton Aiport or SFW's proposed construction site). The FEIS reads—"Sampling at the fourth site, NYSDEC #152250 [the

---

[11] *See* USCA No. 22-5316, Doc. 1980954, Exhibit 2, FEIS. *Also, see* BOEM.gov, FEIS available online here—www.boem.gov/renewable-energy/state-activities/sfwf-feis.

610-acre East Hampton Airport site], has indicated the presence of perfluorinated compounds." [12] The FEIS does *not* state whether the contamination exists in "soil or groundwater" (or concrete infrastructure, building materials, or anything else). The FEIS only claims that "[*s*]*ite-related compounds* have been identified in soil and groundwater within and around the site [emphasis added]" (FEIS at H-23, PDF 655, 2nd ¶). BOEM explicitly uses the phrase *site-related compounds*, which could be *any* compound onsite, including naturally occurring safe compounds such as calcium or sodium. The FEIS does *not* recognize *any* sampling that "detected PFAS" in groundwater; it *only* acknowledges site-related compounds. The partners of Lathan & Watkins provided false information.

> [T]he FEIS appropriately incorporated the many testing, handling, and treatment requirements of the Article VII Order from the NYSPSC proceeding. *Id.*, at A-3. [*see* Exhibit C, DDC 1:22-cv-02147, ECF No. 40-1, at 30, PDF 36]
>
> [T]he BOEM FEIS … concluded that, with implementation of the conditions imposed by the NYSPSC and incorporated into the COP, the SFEC-Onshore does not present a risk of causing PFAS contamination in groundwater. [*id.*, at 31–32, PDF 37–38]

---

[12] Perfluorinated compounds is an outdated term for "PFAS" (per/- and polyfluoroalkyl substance) contamination.

BOEM's Record of Decision ("ROD") lists all "[c]ooperating state agencies" (*see* ROD, at 1, PDF 3).[13] No agency from New York State cooperated with BOEM "during the development and review" (*id.*) of the FEIS. The FEIS did *not* consider, analyze or incorporate by reference *any* information on PFAS contamination from NYSPSC's review. How could it? The NYSPSC did *not* consider onsite PFAS contamination during the state evidentiary hearing.

> [T]he BOEM FEIS *did* thoroughly discuss PFAS contamination
> [*id.*, at 31, PDF 37]
>
> The FEIS addresses PFAS issues and concludes that with application of state law requirements "all activities would meet permit and regulatory requirements to continue protecting groundwater." FEIS at H- 28; *see also id.* at H-23, H-27
> [*id.*, at 6, PDF 12]
>
> BOEM can and did rely on … its finding that "all activities would meet permit and regulatory requirements to continue protecting groundwater as drinking water resources." *Id.* at H-28.
> [*id.*, at 30, PDF 36].

---

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

None of the statements (above) by the L&W Partners is true. In response to these statements, the L&W Partners were corrected as follows (in the district court)—

> [The] Developer [SFW] (falsely) claims that BOEM's "FEIS … addresses PFAS issues, and concludes that with application of state law requirements 'all activities would meet permit and regulatory requirements to continue protecting groundwater [emphasis added].' FEIS at H-28; see also id. at H-23, H-27." The full quote in contaxt [*sic*] is as follows (FEIS at H-28)—
>
> > There are no onshore construction activities under the Proposed Action that would require ground disturbance at depths at or near groundwater resources, and all activities would meet permit and regulatory requirements to continue protecting groundwater as drinking water resources. The use of HDD [Horizontal Directional Drilling] at the landing sites would negate the need for trenching in areas where shallow groundwater would intersect the trench excavation. Onshore 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.

The problem here is that none of what BOEM writes is true. It is yet another example of BOEM fraudulently misrepresenting the facts… See the photo (overleaf), taken on April 18, 2022, of the transition vault at the southern end of Beach Lane with groundwater visible at the bottom (see ECF No. 1-2, at 6). [The] Developer [SFW] installed a treatment facility designed specifically to treat groundwater containing PFAS contamination extracted during onshore construction. The facility comprised four Frac Tanks with a combined capacity of 75,000 gallons (see photos of the frac tanks at ECF No. 1-2, at 1-4). Plaintiff illustrates the depth of groundwater where the trenching encroaches into groundwater in his letter of March 11, 2022, to BOEM titled "URGENT: Imminent Risk to Public Health" (see ECF No. 3-3, Fig 7 at 15 and Fig 8 at 16). [Insert of photo of groundwater in transition vault here.] Contrary to Developer's assertions that BOEM's "FEIS addresses PFAS issues," BOEM neither acknowledged nor discussed

onsite PFAS contamination and did *not* address *any* issues concerning PFAS contamination. BOEM fraudulently concluded that "[o]verall, existing groundwater quality in the analysis area appears to be good" (see FEIS at p. H-23, PDF p. 655 of 1,317). [*id.*, ECF No. 44, at 3–5]

Plaintiff provided Developer with numerous reports that it had also provided to BOEM, including Site Characterization Reports performed for New York State Department of Environmental Conservation (see BOEM Index Exhibit #066, BOEM Index Exhibit #075, BOEM Index Exhibit #078) and over three hundred laboratory test results from Suffolk County Department of Health Services (see BOEM Index Exhibit #166) showing extensive PFAS contamination exceeding regulatory limits along Developer's proposed onshore construction corridor. For example, on November 15, 2019, Plaintiff served on Developer Interrogatory SK1 (see ECF No. 44-3 NYSPSC IR SK1- PFAS and the figure overleaf). Developer responded by (falsely) stating that "the information asserted … is inaccurate and not based in fact [emphasis added]" (see ECF No. 44-4 NYSPSC SFW Resp IR SK1- PFAS). On the contrary, the

> information was from NYSDEC reports based on scientific facts. [*id.*, at 7–8]

Although the L&W Partners' false statements were corrected at the time in the district court, the partners repeated the untruthful information in the U.S. Appeals Court, as follows—

> The Final Environmental Impact Statement analyzed potential PFAS-related impacts to groundwater onshore and incorporated the testing, handling, and treatment requirements imposed by the State. Decl. of Janice Schneider, *Kinsella*, Dkt. 40-2 (D.D.C. Nov. 5, 2022) ("Schneider Decl.") Ex. 8 (Final Environmental Impact Statement excerpts) (Ex. D) at H-22, 23 (describing groundwater and uses); *id.* at H-23 (recognizing PFAS in soil and groundwater); *id.* at H-27 (acknowledging disturbance of soils near existing remediation sites); *id.* at A-3 (incorporated State testing, handling, and treatment requirements); *id.* at G-5 (again referencing State control measures). Based on all of these analyses and State requirements, the Bureau concluded that "all activities would meet permit and regulatory requirements to continue protecting groundwater as drinking water resources." *Id.* at H-28. Nothing more is required under either the National

> Environmental Policy Act or Outer Continental Shelf Lands Act. [USCA 22-5316, Doc. 1982288, at 17, PDF 22].

The three partners of Latham & Watkins lied to the U.S. Appeals Court. Contrary to their false statements, BOEM's environmental analysis of the largest PFAS contamination plume in Suffolk County (*see* Kinsella Aff. I, ¶ 110) consists of only one sentence that acknowledges "perfluorinated compounds" *somewhere else*.

In February 2022, without regard to public health, SFW commenced excavating soil and groundwater and pouring concrete for high-voltage transmission infrastructure in an area containing harmful PFAS chemical contaminates exceeding federal regulatory limits. BOEM failed to evaluate the impacts of underground concrete duct banks and vaults encroaching into *and* near groundwater.

2) L&W Partners Lies Re: BOEM's onshore jurisdiction

In the district court, L&W Partners knowingly make false statements concerning BOEM's onshore jurisdiction, as follows—

> With respect to PFAS, New York State has exclusive jurisdiction over the onshore construction at issue in this case.
> [*see* Exhibit C, DDC 1:22-cv-02147, ECF No. 40-1, at 26]

> [T]he NYSPSC—not Federal Defendants—has jurisdiction over

> whether there is a need for the project [*id.*, at 28, PDF 34].
>
> There is no "specific nexus" to Federal Defendant's conduct here: BOEM does not have jurisdiction over the SFEC-Onshore, the installation of concrete duct banks and vaults or HDD drilling and can neither authorize nor prohibit any of that conduct underlying the purported need for a TRO here. *See Robbins v. U.S. Dep't of Hous. & Urban Dev.*, 72 F. Supp. 3d 1, 6–7 (D.D.C. 2014). [*id.*, at 26, PDF 32]
>
> With respect to PFAS, injunctive relief against the Federal Defendants will have no effect on construction activities over which those Federal Defendants lack jurisdiction. None of the Federal Defendants' approvals or permits in this case authorize the installation of concrete duct banks and vaults or HDD drilling. *See* Gearon Decl. ¶¶ 7, 19, 23. Rather, the installation of concrete duct banks and vaults and HDD drilling is exclusively approved and permitted under other agency authority [*id.*, at 27, PDF 33].

BOEM's jurisdictional authority

In response to the false statements (above), the L&W Partners were corrected as follows (in the district court)—

> According to the Outer Continental Shelf Lands Act "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" (43 U.S. Code § 1332(3)). "The term 'development' means those activities … including geophysical activity, drilling, … and operation of all onshore support facilities" (43 U.S. Code § 1331(l)) …
>
> BOEM is *not* relieved of its statutorily mandated obligations pursuant to the National Environmental Policy Act [NEPA] or Outer Continental Shelf Lands Act [OCSLA] and their respective implementing regulations, irrespective of a non-cooperating state agency action that, as [the] Developer [SFW] acknowledges, is likewise the subject of many ongoing legal challenges. [*see* Exhibit D, DDC 1:22-cv-02147, ECF No. 44, at 11].

BOEM's Record of Decision ("ROD") states that "[t]he regulations at 30 C.F.R § 585.628 require BOEM to review the COP [Construction and Operations Plan for SFW] and all information provided therein [emphasis added]" (ROD, at 97, 2nd ¶). BOEM states "that a COP must … describe all planned facilities to be constructed and used for the project, including onshore support facilities

[emphasis added]" (*id.*, footnote 7). Subsection (a) of OCSLA regulation 30 C.F.R § 585.620 states that SFW "*must* describe *all* planned facilities … including *onshore* … facilities and all anticipated project easements [emphasis added]." Subsection (b) states that SFW "*must* describe *all* proposed activities including … *all* planned facilities, including *onshore* … facilities [emphasis added]." Subsection (c) states that SFW "*must* receive BOEM approval [emphasis added]" for its COP.

Moreover, BOEM's 2016 Information Guidelines for a Renewable Energy Construction and Operations Plan ("COP")("Guidelines")(DDC 1:22-cv-02147, ECF No. 34-10),[14] provides instructions on the information BOEM requires applicants to include in their COP. According to the BOEM's Guidelines, SFW "*must* submit with your COP *detailed information* that describes *resources*, *conditions*, and activities that *could* be affected by your proposed project [emphasis added]. The Guidelines (see tables in Attachment E) "describe the information requirements for 30 CFR 585.627(a). This information will be used by BOEM to comply with NEPA and, as appropriate, other environmental laws" (Guidelines, at 19, 2nd ¶).

Under the heading 30 CFR 585.627(a)(2) Water Quality, the Guidelines assert that SFW *must* submit detailed information on "the water quality in

[14] BOEM Information Guidelines for a Renewable Energy Construction and Operations Plan (COP), Version 3, dated April 7, 2016 (https://www.boem.gov/sites/default/files/documents/about-boem/COP-Guidelines-Archived.pdf).

the area proximal to your proposed activities and the incremental changes to the parameters that define water quality that may be caused by your proposed activities existing water quality conditions" (Guidelines, at 39, 2nd bullet point). SFW *must* submit detailed information on "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 or sediment" (*id.*, 3rd bullet point). SFW *must* submit detailed information on "[n]atural hazards—the environmental hazards and/or accidental events causing accidental releases of … hazardous materials and wastes" (*id.*, 5th bullet point). The Guidelines state that "[a]dditional information may be needed to support the evaluation of water quality impacts, including but not limited to: … any other pollution control plan prepared to avoid and minimize impacts to water quality" (*id.*, 7th bullet point). Further, "[i]f additional information requirements apply to the proposed project, [SFW *must*] provide any draft plans or quantitative assessments undertaken and/or describe any that are planned" (*id.*, 8th bullet point). Finally, SFW *must* submit detailed information on "any part of your project that is designed to minimize adverse effects on water quality" (*id.*, 10th bullet point).

Note: in New York State, PFAS contaminants, specifically PFOS and PFOA, are classified as hazardous waste.[15]

---

[15] In 2016, the New York State Department of Environmental Conservation ("NYSDEC") added PFOA and PFOS to New York State's list of hazardous substances (6 NYCRR, § 597.3) by

L&W Partners' false statements concerning New York State's "exclusive jurisdiction over the onshore construction" (*supra*) are contradicted by the OCSLA, its implementing regulations, and BOEM's own guidelines. SFW *and* Latham & Watkins would have known that their jurisdictional claims were *not* supported by fact *or* law because SFW provides the same references in its Construction and Operations Plan— "The COP was prepared in accordance with Title 30 of the Code of Federal Regulations (CFR) Part 585 (30 CFR § 585), BOEM's Guidelines for Information Requirements for a Renewable Energy Construction and Operations Plan (COP) (BOEM, 2016)" (*see* USCA 22-5316, Doc. 1980954, Exhibit 3-1, COP, at 1-1, PDF 49).[16] It continues— "The COP includes the following:

• A description of *all planned facilities*, *including onshore* and support *facilities*

• A description of *all proposed activities*, including construction activities, commercial operations, maintenance, and conceptual decommissioning plans

• The *basis for the analysis of the environmental and socioeconomic impacts* and operational integrity of the proposed construction,

---

emergency regulation, making them hazardous wastes as defined by ECL (Environmental Conservation Law), Article 27, Title 13.

[16] SFW COP, May 7, 2021, avaiable here (https://www.boem.gov/sites/default/files/documents/renewable-energy/South-Fork-Construction-Operations-Plan.pdf).

operation, maintenance, and decommissioning activities [emphasis added]" (*id.*).

However, the COP does *not* include *any* analysis or discussion of onshore groundwater PFAS contamination.

Although L&W Partners' false statements were corrected at the time in the district court, the partners repeated their false claims (about BOEM's jurisdiction) in the U.S. Appeals Court, as follows—

> [T]he State Commission— not Federal Defendants— has jurisdiction over whether there is a need for the project's power generation [USCA 22-5316, Doc. 1982288, at 18, PDF 23].

According to NEPA, BOEM is not relieved of its statutorily mandated obligations,[17] irrespective of a non-cooperating state agency review. In other words, the partners repeatedly lied to the U.S. Appeals Court.

3) L&W Partners Assisted SFW in Fraud

[17] According to Natonal Environmental Policy Act ("NEPA") regulation 40 C.F.R. § 1502.13, "[t]he [environmental impact] statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action [emphasis added]." NB: According to BOEM, its "NEPA review of the proposed [SFW] Project began prior to the September 14, 2020, effective date of the updated regulations, [thus] BOEM prepared the FEIS and this ROD under the previous version of the regulations (1978, as amended in 1986 and 2005)" (*see* USCA No. 22-5316, Doc. 1980954, ROD, at 1, PDF 3, footnote 1).

In support of this letter, *see* Statement of Issues (USCA 22-5316, Doc. 1980953, marked as Exhibit E), Kinsella Affidavit I (USCA 22-5316, Doc. 1979671, marked as Exhibit F), Kinsella Affidavit II (*id.*, Doc. 1980954, marked as Exhibit G), Kinsella Affidavit III (*id.*, Doc. 1981133, **SEALED**, marked as Exhibit H), and Second Amended Complaint (*id.*, Doc. 1980154-2, Exhibit A (marked as Exhibit I)

Contrary to the D.C. Bar Association Rules of Professional Conduct,[18] the three partners of Latham & Watkins knowingly made false statements (see above). The partners' false statements assisted South Fork Wind in engaging in conduct the partners knew was fraudulent.

"A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is … fraudulent" (Rules of Professional Conduct, Rule 1.2(e)).

The Second Amended Complaint (*see* Exhibit I)[19] concerns eight instances of fraud by BOEM (where BOEM knowingly made false statements of material facts in its ROD *and* FEIS, intending to approve SFW's project by deception). SFW, too, knowingly made fraudulent representations with the intent to gain approval for its project via deceit. Still, this letter addresses *only one* (of the eight) instances where the three partners of Latham & Watkins assisted BOEM in fraud— by making false

[18] Rules of Professional Conduct, Rule 3.3(a)

[19] *See* USCA 22-5316, doc. 1980154-2, Exhibit A- Second Amended Complaint (executed) (marked as Exhibit I).

statements concerning groundwater PFAS contamination.

"To prove fraud, a plaintiff must show by clear and convincing evidence that there is a false representation of material fact which is knowingly made with the intent to deceive and action is taken in reliance upon the misrepresentation. *Bennett v. Kiggins*, 377 A.2d 57, 59 (D.C.), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 768, 54 L.Ed.2d 782 (1978). Nondisclosure of material information may constitute fraud, *id.*, especially where there is a duty to disclose. *Rothenberg v. Aero Mayflower Transit Co.*, 495 F. Supp. 399, 406 (D.D.C. 1980)." *Pyne v. Jamaica Nutrition Holdings Ltd.*, 497 A.2d 118, 131 (D.C. 1985).

In the context of this case, "the requisite elements of fraud are (1) a false representation [by non-disclosure of groundwater PFAS contamination contrary to a statutory duty]; (2) made in reference to a material fact [where there is a duty to disclose under NEPA and the OCSLA]; (3) with knowledge of its falsity [BOEM and SFW had prior knowledge of environmental PFAS contamination]; (4) with the intent to deceive [the public, which largely succeeded]; and (5) an action that is taken in reliance upon the representation [Plaintiff and the public relied on BOEM's and SFW's representations that there would be a legally sufficient review according to NEPA and the OCSLA]." *Daskalea v. Wash. Humane Soc'y*, 480 F. Supp. 2d 16, 37 (D.D.C. 2007) (*citing Daisley v. Riggs Bank, N.A.*, 372 F. Supp. 2d 61, 78 (D.D.C. 2005)).

In the instant matter, all five elements of fraud are satisfied.

(1) False representation of groundwater PFAS contamination

Neither SFW nor BOEM acknowledged or considered onsite PFAS contamination along SFW's proposed construction corridor through the residential streets of Wainscott.

BOEM (falsely) concluded that "[o]verall, existing groundwater quality in the analysis area [Wainscott] appears to be good" (*see* Kinsella Aff. I, ¶ 93). BOEM claimed that SFW's "COP includes all the information required" in 30 CFR § 585.627 when its COP did *not* contain *any* of "the information required" concerning severe environmental PFAS contamination of a public health concern (*id.*, ¶ 108). BOEM's ROD reads— the "DOI [Department of Interior] weighed all concerns in making decisions regarding this Project … to avoid or minimize [the project's] environmental … impacts" (*id.*, ¶ 214). However, BOEM, acting under authority delegated to it by the DOI, had *not* "weighed all concerns" (*id.*). It did *not* consider harmful PFAS contamination of groundwater, acknowledging only "perfluorinated compounds" *somewhere else* on a 610-acre State Superfund Site (*id.*, ¶¶ 213–214).

SFW (falsely) claimed that its COP "provides a description of water quality and water resource conditions … as defined by several parameters including: … contaminants in water" (*id.*, ¶ 83). Under the heading, Water Quality and Water Resources, SFW (falsely) asserts its COP "discusses

relevant anthropogenic activities that have in the past or currently may impact water quality, including point and nonpoint source pollution discharges, … and pollutants in the water" (*id.*). SFW said that "the affected environment and assessment of potential impacts for water quality and water resources was evaluated by reviewing the revised Environmental Assessment completed as part of the BOEM NEPA review" (*id.*). SFW asserted that its "COP was prepared in accordance with … 30 CFR § 585 … [and] BOEM's Guidelines" (*supra*). SFW's statements are all contrary to fact.

BOEM and SFW falsely represented groundwater quality by omitting material facts about PFAS contamination and the project's environmental impact on a sole-source aquifer used for drinking water despite knowing that groundwater in Wainscott was highly contaminated.

(2) Knowledge of its falsity

SFW: In January 2020, SFW received detailed information on existing groundwater PFAS contamination where it planned to build underground concrete infrastructure that would encroach into the groundwater (a sole-source aquifer). The information took the form of eight interrogatories (of 144 pages) that included, *inter alia*, a Water Quality Advisory for Private-Well Owners in Area of Wainscott, issued by Suffolk County Department of Health Services ("SCDHS") in October **2017**;[20] a list of 303 test results of private drinking water wells in Wainscott (complied by

[20] USCA 22-5316, Doc. 1980954, Exhibit 4

SCDHS, dated June 15, **2018**) (*see* Kinsella Aff. I, ¶ 33); and two NYSDEC Site Characterization Reports for properties registered with the NY State Super Fund Program adjacent *on either side* of SFW's proposed construction corridor (*id.*, ¶¶ 85–86).

In December 2020 and January 2021, four months *before* SFW submitted its final COP to BOEM (in May 2021), it performed onsite soil and groundwater testing. The testing revealed PFAS contamination at levels exceeding regulatory standards (*id.*, ¶¶ 68–76). SFW's Environmental Investigation Report detected PFAS contamination in 20 wells *within* its onshore construction corridor. It noted that "levels of PFOA and PFOS exceeded NYSDEC's Ambient Water Quality Criteria Guidance Values in one well each (MW-4A and MW-15A, respectively)" (*id.*, ¶ 71). Monitoring Well MW-4A is on Beach Lane, and MW-15A is on Wainscott NW Rd, in Wainscott, N.Y. (*id.*, ¶ 72). The report (revised April 1, 2021) *pre-dates* BOEM's approval of the project (on November 24, 2021) by eight months (*id.*, ¶ 68).[21] Since receiving the information and despite updating its COP (in May 2021), SFW did *not* include the PFAS contamination test results of groundwater or soil prior to BOEM approving its project (on November 24, 2021).

---

[21] In December 2020 and January 2021, SFW tested areas and at depths to *avoid* detecting PFAS contamination (see USCA 22-5316, Doc. 1981133, letter to BOEM, dated March 11, 2022, Re: URGENT: South Fork Wind, Imminent Risk to Public Health). In February 2022, South Fork Wind re-tested the same Monitoring Wells: Well MW-4A showed onsite PFOA (82 ppt) contamination exceeding the EPA 2016 Health Advisory Level (of 70 ppt).

BOEM: In February 2021, nine months *before* BOEM approved SFW's Project, it received a comments letter that included 207 exhibits ("2021 Comments"). The letter contained verifiable records such as testimony, briefs, and government agency reports that BOEM uploaded to its website (*id.*, ¶¶ 21–25)(*also*, *see* DDC 1:22-cv-02147, ECF No. 3-1, at 15–24). See Addendum BOEM Exhibits (USCA 22-5316, doc. 1979671-9). Many exhibits, government agency reports, show extensive environmental PFAS contamination in the same area where SFW proposed building its underground high-voltage transmission infrastructure (Kinsella Aff. I, ¶¶ 24, 30–59). The exhibits also included the eight interrogatories served on SFW (referred to above) (*see* DDC 1:22-cv-02147, ECF No. 3-1, at 31, BOEM Exhibit #087).[22] Still, BOEM fraudulently concluded that "[o]verall, existing groundwater quality in the analysis area appears to be good" (*supra*)(Kinsella Aff. I, ¶ 89), contradicting overwhelming evidence of PFAS contamination exceeding federal regulatory standards that it acknowledged receiving nine months earlier.

(3) Statutory Duty to Disclose Material Facts

> "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,*

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

Ltd.,497 A.2d 118, 131 (D.C. 1985)" (*Sage v. Broadcasting Publications, Inc.*, 997 F. Supp. 49, 52 (D.D.C. 1998).

According to NEPA,[23] BOEM has a duty to disclose martial facts in an environmental review, such as the largest groundwater plume of harmful environmental PFAS contamination in Suffolk County (*see* Kinsella Aff. I, ¶ 110)(*also, see* Exhibit J, USCA 22-5316, Doc. 1983691-2, Exhibit 2, Exposé on Forever Chemicals).

According to BOEM, "[t]his ROD was prepared following the requirements of the National Environmental Policy Act (NEPA; 42 U.S.C. §§ 4321 *et seq.*) and 40 C.F.R. parts 1500-1508.1. BOEM prepared the FEIS with the assistance of a third-party contractor, SWCA, Inc." (ROD, at 1, PDF 3, first and second paragraphs). NEPA asserts that "Congress authorizes and directs that, to the fullest extent possible … all agencies of the Federal Government shall . . . include in every recommendation or report on … actions significantly affecting the quality of the human environment, a detailed statement . . . on (i) the environmental impact of the proposed action" (Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C)).

[23] "BOEM's NEPA review of the proposed Project began prior to the September 14, 2020, effective date of the updated regulations, BOEM prepared the FEIS and this ROD under the previous version of the regulations (1978, as amended in 1986 and 2005)" (USCA 22-5316, Doc. 1980954, Exhibit 1, ROD, at 1, PDF 3, footnote 1).

"This circuit has long held that courts must exercise heightened scrutiny of agencies' compliance with NEPA's procedures. *See, e.g., Scientists' Institute for Public Information, Inc. v. AEC,* 481 F.2d 1079, 1092 (D.C. Cir. 1973); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC,* 449 F.2d 1109, 1115 (D.C. Cir. 1971). In *Calvert Cliffs,* we stated that "the requirement of environmental consideration `to the fullest extent possible' sets a high standard for the agencies, a standard which must be rigorously enforced by a reviewing court." 449 F.2d at 1114." *Potomac Alliance v. U.S. Nuclear Reg. Com'n*, 682 F.2d 1030, 1035 n.21 (D.C. Cir. 1982).

"The statutory requirement that a federal agency contemplating a major action prepare such an environmental impact statement serves NEPA's "action-forcing" purpose in two important respects. See *Baltimore Gas Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983); *Weinberger* v. *Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 143 (1981). It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision. … NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast. See *ibid.; Kleppe, supra*, at 409 … Publication of an EIS, both in draft and final

form, also serves a larger informational role. It gives the public the assurance that the agency "has indeed considered environmental concerns in its decisionmaking process," *Baltimore Gas Electric Co., supra*, at 97, and, perhaps more significantly, provides a springboard for public comment, see L. Caldwell, Science and the National Environmental Policy Act 72 (1982)." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

NEPA mandates that BOEM evaluate and verify information provided to it—

> "The agency shall independently evaluate the information submitted [by South Fork Wind] and shall be responsible for its accuracy … It is the intent of this paragraph that acceptable work … be verified by the agency." (NEPA 1978, 40 CFR 1506.5(a)).
>
> "If the document is prepared by contract [SWCA, Inc.], the responsible Federal official shall … participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents" (*id.*, (c)).

In addition to BOEM's statutory duty to disclose material facts pursuant to NEPA, both BOEM *and* SFW have a similar duty under the OCSLA. For details of SFW's duty to disclose, *see* **BOEM's jurisdictional authority** (on pages 7–9).

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

(4) Intent to deceive

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

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

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

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

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

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

(5) Action taken in reliance upon fraudulent representation

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

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

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

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

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

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

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

4) Conclusion

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

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

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

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

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

Respectfully submitted this 21st day of February 2023,

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

Attachments:

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

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

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

Exhibit M-Kinsella Comments 2018 & 2021 (USCA, D.C. Cir., 22-5316, Doc. 1980953-4)

Exhibit N-WCAC, SFW Slides (USCA, D.C. Cir., 22-5316, Doc. 1980953-5)

Exhibit O-WCAC Meeting Minutes (USCA, D.C. Cir., 22-5316, Doc. 1980953-6)

References:

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

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

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

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

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

Supplemental Appendix D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIMON V. KINSELLA, *Plaintiff,* v. BUREAU OF OCEAN ENERGY MANAGEMENT; DEB HAALAND, Secretary of the Interior; U.S. DEPARTMENT OF THE INTERIOR; MICHAEL S. REGAN, Administrator, U.S. ENVIRONMENTAL PROTECTION AGENCY; SOUTH FORK WIND, LLC; *Defendants,* and LONG ISLAND POWER AUTHORITY; *Nominal Joinder Parties.*	**Civil Action No. 1:22-cv-02147 (JMC)**

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

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

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

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

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

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

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