

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SIMON V. KINSELLA

Plaintiff,

v.

BUREAU OF OCEAN ENERGY MANAGEMENT
DEB HAALAND, Secretary of the Interior,
U.S. Department of the Interior; and
SOUTH FORK WIND LLC

Defendants.

Case No. **2:23-cv-02915-FB-ST**

SECOND AMENDED COMPLAINT

I. INTRODUCTION

DEFENDANT SOUTH FORK WIND LLC (“SFW”)— The complaint alleges that SFW falsely represented material facts in its Construction and Operations Plan (May 2021) (“COP”) and omitted relevant information it had a duty to disclose. Knowing its COP materially misrepresented the Project and its impacts on the environment and economy, SFW submitted its COP to the Bureau of Ocean Energy Management, the lead federal agency responsible for reviewing and approving its Project.

For example, SFW claims that its SFEC was “sited, planned, and designed to avoid and minimize impacts.” (COP, ES-8, PDF 12) However, SFW *sited, planned, and designed* its SFEC to be encased in underground concrete infrastructure encroaching into and at the capillary fringe of a highly contaminated sole-source aquifer (the town’s *only* drinking water supply) for two-and-a-half miles. SFW tested its proposed construction site for contamination in January 2021. The laboratory results showed groundwater PFOA and PFOS contamination exceeding regulatory limits designed to protect human health. The results (dated January 22 and 27, 2021) predate SFW’s final COP (dated May 7, 2021) by over three months.

SFW had a duty of disclosure; it “*must* submit the results” of “surveys for the proposed site[,]” including any “[g]eotechnical survey ... (with soil sampling and testing) at each edge of the project area” (30 C.F.R. § 585.626(a)(4)). “[SFW] *must* submit with [its] COP detailed information to assist BOEM in complying with NEPA and other relevant laws.” 30 C.F.R. § 585.627(a). BOEM’s guidelines state that SFW must “[d]escribe the water quality in the area proximal to [its] proposed activities ... Describe the general state of water quality in the area proposed for [SFW’s] project by reporting typical metrics for quality including ... [the] presence or absence of contaminants in water” (citing 30 C.F.R. 585.627(a)(2) Water Quality).¹ Still, despite a clear duty to disclose environmental groundwater contamination, SFW did *not* include its *own* test results showing PFOA and PFOS contamination *onsite*. SFW did *not* disclose *offsite* PFAS contamination either. For example, SFW did *not* include in its COP test results from a Wainscott Well Survey (of 303 private wells) performed by Suffolk County Department of Health Services, where thirteen wells exceeded the EPA’s 2016 Health Advisory Level (70 ppt). The highest concentration of PFOA/PFOS (combined) was 791 ppt. Plaintiff provided SFW with the test results from the Wainscott Well Survey (along with other evidence of PFAS contamination) a year *before* (in January 2020) it submitted its final COP to BOEM for approval.² SFW’s non-disclosure of known groundwater contamination of a sole-source aquifer that the Environmental Protection Agency links to cancer, compromised immunity, and other adverse health effects satisfies the requisite elements of common-law fraud in New York State.

In addition, the complaint alleges that SFW falsified its Federal Consistency Certificate in

¹ See BOEM’s Guidelines for Information Requirements for a Renewable Energy Construction and Operations Plan (v.3, dated April 7, 2016) and (v.4, dated May 27, 2020) (at PDF 40). Available online at boem.gov (2020)—https://www.boem.gov/sites/default/files/documents/about-boem/COP%20Guidelines_Technical_Corrections.pdf

² See Interrogatory Si Kinsella #05, dated January 2, 2020 (ECF 93-25, at PDF 22). Available at regulations.gov—https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_13.pdf

violation of the Coastal Zone Management Act and falsely represented the nature of the South Fork RFP procurement process. SFW's actions here, too, satisfy the requisite elements of common-law fraud in New York State.

DEFENDANT BUREAU OF OCEAN ENERGY MANAGEMENT ("BOEM") has authority under the Outer Continental Shelf Lands Act ("OCSLA") and implementing regulations "to approve, approve with modification, or disapprove" SFW's COP "[u]pon completion of [its] technical and environmental reviews and other reviews required by Federal law (e.g., CZMA [Coastal Zone Management Act])" (30 C.F.R. § 585.628(f)).

In addition, "BOEM will prepare an appropriate NEPA [National Environmental Policy Act] analysis" (30 C.F.R. § 585.628(b)), which it did. BOEM issued its Final Environmental Impact Statement ("FEIS") on August 16, 2021. NEPA's "policies and goals ... are supplementary to those set forth in existing authorizations" (42 U.S.C. § 4335), such as those according to the OCSLA. According to NEPA, Congress "*directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth*" (42 U.S.C. § 4332). Thus, Congress *mandates* that BOEM interpret and administer the OCSLA according to NEPA. Still, in defiance of Congress, BOEM neither interpreted nor administered the OCSLA according to NEPA; and on November 24, 2021, issued a Record of Decision ("ROD") approving the FEIS, and on January 18, 2022, approved SFW's COP.

For example, NEPA required that BOEM perform a 'hard look' review "to the fullest extent possible" (*id.*) that should have included environmental PFOA and PFOS contamination that the NY State Department of Environmental Conservation ("NYDEC") designated "*a significant threat to public health*" in the area where SFW's proposed installing underground

infrastructure.³ SFW planed and has since installed concrete duct banks and vaults for high-voltage transmission cables encroaching into and at the capillary fringe of a sole-source aquifer used for drinking water. In February 2021, Plaintiff provided BOEM with conclusive evidence of PFOA and PFOS contamination *nine months before* it approved SFW's Project. The evidence included two NYDEC site characterization reports for adjacent properties on either side of SFW's proposed construction corridor. One of those sites, Wainscott Sand & Gravel, showed PFOS contamination (1,010 parts per trillion or ppt) exceeding the NY drinking-water standard (10 ppt) by one hundred times within 150 feet of SFW's proposed (underground) construction,⁴ where the source of the contamination was upgradient on the *opposite side* of SFW's corridor at East Hampton Airport.⁵ Still, contradicting at least four separate government reports and hundreds of groundwater test results from government laboratories, BOEM concluded that "existing ground-water quality in the analysis area appears to be good" (ECF 93-14, at 1, FEIS, at 655, *excerpt*).⁶ BOEM's procedural violations of NEPA concealing groundwater contamination mirror SFW's omissions from its COP of the same environmental contamination. BOEM's knowingly false statements concerning harmful contamination of a sole-source aquifer in violation of NEPA also satisfy the requisite elements of common-law fraud in New York.

³ See NYDEC Superfund Site Classification Notice for East Hampton Airport (ECF 93-13, 1st ¶). *Also, see* dec.ny.gov— www.dec.ny.gov/data/DecDocs/152250/ (last accessed Oct 29, 2023). Click on— "Fact Sheet.HW.152250.2019-06-19.East Hampton Airport Class 02 Listing.pdf" (at 1).

⁴ See NYDEC Site Characterization Report for Wainscott Sand & Gravel (Jul 2020), Well MW3 (Table 6, at 3, PDF 70, 9th column across, 4th row up from the bottom). BOEM uploaded the report to [regulations.gov](https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_25.pdf) (see link below)—https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_25.pdf

⁵ See NYDEC Site Characterization Report for East Hampton Airport (Nov 2018) (Fig. 6, PDF 25, bottom of page, soil samples for Wells EH-1 PFOS 10 ng/g and EH-19B1 PFOS 12 ng/g). BOEM uploaded the report to [regulations.gov](https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_8.pdf) (see link here)— https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_8.pdf

⁶ See FEIS (at H-23, PDF 655)

II. JURISDICTION AND VENUE

- 1) This Court has original subject matter jurisdiction under 28 U.S.C. § 1331 and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202. [¶ 2]
- 2) The civil action arises from claims under Federal Law— the National Environmental Policy Act (“NEPA”) (42 U.S.C. 4331 *et seq.*) (regulations of 1978, as amended in 1986 and 2005) and the Coastal Zone Management Act (“CZMA”) (16 U.S.C. 1451 *et seq.*), reviewable under the Administrative Procedure Act (“APA”) (5 U.S.C. §§ 701–706).
- 3) The civil action arises from claims brought under the Outer Continental Shelf Lands Act (“OCSLA”) (43 U.S.C. 1331 *et seq.*); this Court has jurisdiction under 43 U.S.C. § 1349.
- 4) This Court has the authority to grant the relief requested herein “other than money damages” under the APA (5 U.S.C. § 706) for violations by Federal Defendants of NEPA and the CZMA and relief for violations of the OCSLA (43 U.S.C. § 1349), including an award of litigation costs.
- 5) The venue is proper in this Court under 28 U.S.C. § 1391(e)(1). [¶ 3]

III. STANDING

- 6) The pleadings sufficiently alleged that Plaintiff was adversely affected or aggrieved.
- 7) Defendant SFW initially submitted its Construction and Operations Plan to Defendant BOEM on June 29, 2018, and last updated its COP on May 7, 2021.⁷ BOEM publicly disclosed SFW’s COP on its website at www.boem.gov/renewable-energy/state-activities/south-fork.
- 8) BOEM issued its FEIS on or around August 16, 2021.

⁷ See South Fork Wind COP Approval Letter (January 18, 2022) (at 1, 1st ¶). Available at boem.gov—www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/SFWF-COP-Approval-Letter.pdf

9) The U.S. Department of the Interior Secretary delegated to BOEM the authority to approve a COP under regulations promulgated by BOEM's predecessor agency, the Mineral Management Service ("MMS"), on April 29, 2009 (81 Fed. Reg. 19638). Accordingly, BOEM requires that SFW submit and receive approval of a COP before it may begin any development and production activities. The COP will undergo an appropriate NEPA review and must comply with relevant Federal statutes. The regulations describe the appropriate NEPA process as follows— "The NEPA process helps public officials make decisions based on an understanding of environmental consequences and take actions that protect, restore, and enhance the environment. It provides the tools to carry out these goals by mandating that every Federal agency prepare an in-depth study of the impacts of 'major federal actions significantly affecting the quality of the human environment' and alternatives to those actions, and by requiring that each agency make that information an integral part of its decisions."

10) SFW's COP does *not* state that BOEM's approval pursuant to NEPA or the CZMA pertains *only* to the geographical boundaries of the Outer Continental Shelf extending beyond a state's three-nautical-mile limit, and SFW makes no such claim.

11) Neither BOEM's FEIS nor ROD states that its approval pursuant to NEPA or the CZMA pertains *only* to the geographical boundaries of the Outer Continental Shelf extending beyond a state's three-nautical-mile limit, and BOEM makes no such claim.

12) On November 24, 2021, BOEM issued a ROD approving the FEIS for SFW's COP.

13) On January 18, 2022, BOEM approved SFW's COP.

14) BOEM's approval permitted SFW to commence construction.

15) In February 2022, SFW began building its onshore transmission infrastructure by pouring concrete into underground trenches for approximately two-and-a-half miles, encroaching into

and at the capillary fringe of a PFAS-contaminated sole-source aquifer used for drinking water.

16) According to SFW's evidence submitted during the NY State Public Service Commission proceeding (case 18-T-0604), the reaction between PFAS contaminants in groundwater and "concrete may enhance the long-term persistence of PFAS in groundwater" (ECF 93-04, at 6, last ¶).

17) SFW falsely represented groundwater quality in its final COP submitted to BOEM despite Plaintiff providing SFW conclusive evidence of extensive PFOA and PFOS groundwater contamination in the area where it planned construction *two years* earlier (in January 2020).

18) For its part, BOEM falsely represented groundwater quality in its FEIS despite Plaintiff providing BOEM with conclusive evidence of extensive PFOA and PFOS groundwater contamination in the area where SFW proposed construction *nine months before* BOEM approved the Project.

19) Still, during the federal environmental review, neither BOEM nor SFW acknowledged existing onsite PFOA or PFOS groundwater contamination (exceeding regulatory limits designed to protect human health) before BOEM approved the Project and SFW began pouring concrete.

20) Plaintiff lives near SFW's underground construction, drinks water from the sole-source aquifer, and swims, fishes, and sails in the surrounding waters hydrogeologically connected to groundwater adversely impacted by SFW's construction.

21) Given SFW's construction "may enhance the long-term persistence of PFAS in groundwater[.]" and that BOEM approved SFW's Project without the requisite environmental review of onsite PFOA and PFOS contamination pursuant to NEPA and their knowingly false representations concealing harmful groundwater contamination of a sole-source aquifer from which Plaintiff drinks, Plaintiff is uncertain of the degree to which SFW's construction will

adversely impact his health. Plaintiff is unsettled because he does not know the extent of environmental damage caused by SFW's construction or its impact on groundwater quality and the connected surface waters where swims, fishes, sails, etc. Consequently, Plaintiff avoids or minimizes recreation that he once used to enjoy.

22) SFW's underground onshore infrastructure adversely impacts Plaintiff's health and the immediate environment where he lives by prolonging and exacerbating harmful PFAS contamination of the sole-source aquifer. SFW has and will continue to expose Plaintiff to *excess* PFOA and PFOS chemical contaminants caused by its construction.

23) SFW *and* BOEM knowingly concealed PFOA and PFOS groundwater contamination. The injury to Plaintiff from SFW's construction is directly traceable to BOEM's fraudulent approval of the FEIS in violation of NEPA, and SFW's fraudulent representations in its COP in violation of the OCSLA and CZMA regulations.

24) Plaintiff is a ratepayer in the utility's service area where SFW plans to sell its electrical energy. He must pay higher power rates for SFW's electrical energy than the utility, the Long Island Power Authority ("LIPA"), estimates will be "between \$1.39 and \$1.57 per month." *See* LIPA South Fork Wind Farm Fact Sheet, Bill Impacts and Total Cost (ECF 93-31, at 3, 2nd ¶).

25) Plaintiff has standing to challenge BOEM's action approving SFW's construction in violations of NEPA.

26) Plaintiff has standing to challenge SFW's construction approval, which it received based on fraudulent misrepresentations it made in the COP submitted to BOEM in violation of the OCSLA and the CZMA and their respective implementing regulations.

27) The nature of the environmental injury to Plaintiff is within the zone of interest protected by NEPA and the CZMA and their respective implementing regulations.

28) Plaintiff has standing to bring this action –

- a. Had the BOEM conducted a thorough review, and SFW complied with OCSLA regulations, my daily routine and the pleasures I enjoy with my family would not have been put on hold for years. Since 2017, I have been fighting for clean water that BOEM threatens by its action to approve the SFW Project's onshore construction. It has taken its toll and adversely impacted my family and me. [¶ 7(a)]
- b. Having high-voltage electric cables within feet of where I used to jog and enjoy walking to the local farm stand and socializing with neighbors will forever be tainted with the adverse health effects of (I) concrete duct banks and vaults, prolonging and exacerbating existing PFAS contamination of soil, groundwater, and surface waters of Georgica Pond and Wainscott Pond; (II) electromagnetic radiation; and (III) thermal effects. [¶ 7(b)]
- c. I used to enjoy Georgica Pond when sailing at least three days a week (weather permitting), swimming, and eating fresh fish and crabs caught from the pond. Due to irreparable damage from construction that BOEM improperly allowed, I can no longer enjoy our local environment. [¶ 7(c)]
- d. One of my greatest pleasures used to be jogging to the beach along Beach Lane with my husband. I am no longer safe doing so with any regularity due to underground high-voltage transmission infrastructure and cables buried just a few feet below the surface. The standards used to assess the EMF effects date to 1978 and 1992. It is as if science stood still for 30 years. [¶ 7(d)]
- e. SFW's chosen landing site/cable route is nestled between two glacial ponds, Georgica Pond and Wainscott Pond, separated by only 2,300 feet. It is a magnificent environment teeming with marine life and birds, which is why I moved to Wainscott full-time in 2008.

BOEM ignored its mandate to protect such a beautiful and delicate environment. [¶ 7(e)]

- f. Since BOEM approved the project, South Fork Wind has taken from my family and me the simple pleasures we used to enjoy. We live in a toxic environment where we are rarely told the truth by those who are duty-bound to protect us and our environment but have failed to do so. [¶ 7(f)]

- g. Due to BOEM's statutory violations, SFW's regulatory violations, and its fraudulent representations, SFW's (unlawful) construction will continue to cause irreparable damage to our environment, and our property will be less valuable. [¶ 7(g)]

IV. PARTIES

29) **Simon V. Kinsella, Plaintiff pro se**, is a full-time Wainscott resident in the Town of East Hampton, Suffolk County, New York. He lives near SFW's construction corridor on Wainscott Main Street and Beach Lane, where SFW has installed underground transmission infrastructure for high-voltage submarine cables. He is a ratepayer in the Long Island Power Authority ("LIPA") service area and must pay higher rates for SFW's electrical energy.

30) In 2017, the Wainscott Citizens' Advisory Committee ("WCAC") asked Plaintiff to investigate a proposal for an offshore wind farm promoted by SFW following a request that he look into local water quality issues in Wainscott (in 2016).

31) Since 2016, Plaintiff has been concerned about groundwater contamination.

32) In 2017, Plaintiff insisted that Suffolk County test private drinking water wells in Wainscott south of East Hampton Airport. His letters resulted in the detection of the largest number of wells with PFOA and PFOS chemical contaminants in Suffolk County (double anywhere else), with a high of 791 parts per trillion (ppt) for combined PFOA/PFOS

contamination that exceeds the 2016 EPA health advisory level (70 ppt) by ten times.⁸ See Suffolk County Department of Health Services (“SCDHS”) Wainscott Well Survey PFOS & PFOA (of 303) Private Well Results to Date (June 14, 2018) (ECF 93-25, at 22) that *pre-dates by three months* SFW’s first publicly disclosed COP.⁹

33) Plaintiff has contributed substantially to BOEM’s record of review, including testimony, briefs, and over 150 exhibits.

34) Although Plaintiff diligently conducted research to the best of his ability, he has no authority or resources sufficient to perform onsite environmental testing within seal rights-of-way owned by the Town of East Hampton and New York State. Thus, Plaintiff had to rely on the accuracy of SFW’s testing in compliance with NEPA and CZMA regulations. Plaintiff also had to rely on “BOEM, as lead agency, [to] conduct a broad review of the whole Project ...” (citing NEPA, 42 U.S.C. § 4331). See Plaintiff 2021 Comments (ECF 93-10). [¶ 5] [¶ 6]

35) DEFENDANTS U.S. DEPARTMENT OF THE INTERIOR, and the Honorable Deb Haaland, in her official capacity as Secretary of the Interior (collectively “DOI”), is an “agency” within the meaning of the APA, 5 U.S.C. § 701(b)(1). Through its Secretary, DOI has the authority and duty to comply with NEPA, 42 U.S.C. § 4332(2)(C), and with OCSLA, 43 U.S.C. § 1337(p)(4)(B). Defendant, Secretary Haaland, is charged with overseeing the management of the nation’s Outer Continental Shelf lands and oceans, including those affected by offshore wind projects. Secretary Haaland oversees the Bureau of Ocean Energy Management and is ultimately responsible for the decisions taken by the BOEM. [¶ 8]

⁸ PFOA (perfluorooctanoic acid) and PFOS (perfluorooctane sulfonate) are two chemical compounds in a broad class (of thousands of similar chemicals) known collectively as PFAS (per- and polyfluoroalkyl substances).

⁹ The Wainscott Well Survey PFOS & PFOA (of 303) Private Well Results to Date (June 14, 2018) performed by Suffolk County Department of Health Services (“SCDHS”) *pre-dates by three months* South Fork Wind’s first publicly disclosed Construction and Operations Plan (COP) (revised September 2018) (ECF 44-5, at 2).

36) DEFENDANT BUREAU OF OCEAN ENERGY MANAGEMENT (“BOEM”) is a component of DOI and an “agency” within the meaning of the APA, 5 U.S.C. § 701(b)(1). Exercising authority delegated from the U.S. Department of the Interior, BOEM took the final agency actions challenged herein. Defendant BOEM was established in 2010 to oversee the development of the Outer Continental Shelf. BOEM’s mission “is to manage development of U.S. Outer Continental Shelf energy and mineral resources in an environmentally and economically responsible way.”¹⁰ BOEM evaluates the resources of the Outer Continental Shelf and leases portions of it. The Bureau also supervises and approves any oil, gas, or renewable energy projects within Outer Continental Shelf leases. [¶ 9]

37) DEFENDANT SOUTH FORK WIND LLC (formerly Deepwater Wind South Fork LLC) (“SFW”) is a merchant operator and developer of an offshore wind farm and transmission system with onshore support facilities (described below as the “Project”).

V. THE PROJECT

38) The South Fork Wind Project consists of the South Fork Wind Farm (“SFWF”) with a nameplate generating capacity of 132 megawatts (“132 MW”) and a South Fork Export Cable (“SFEC”), which includes a high-voltage (138 kV) transmission cable, and related (concrete) infrastructure, including an onshore interconnection facility (collectively the “Project”). [¶ 11]

39) The South Fork Wind Farm (“SFWF”) is approximately 35 miles east off Montauk Point on eastern Long Island in the Atlantic Ocean on the Outer Continental Shelf (“OCS”) in BOEM Renewable Energy Lease Number OCS-A 0517. [¶ 12]

¹⁰ U.S. Department of the Interior: Bureau of Ocean Energy Management, About Us (at <https://www.boem.gov/about-boem>, last accessed on October 21, 2022).

40) To connect the SFWF to the onshore interconnection facility, SFW has installed a high-voltage transmission cable of 66 miles, of which 62 miles are offshore and four miles are onshore. The SFEC lands (offshore) and is horizontally drilled at least thirty feet beneath the beach at the southern end of Beach Lane and rises at a (sea-to-shore) transition vault where SFW splices offshore and onshore cables together. The concrete transition vault (~ 48 ft long x 10 ft wide x 12 ft deep) is roughly *twice* the volume of a 40-foot shipping container and will permanently sit in groundwater. *See* Photograph of Transition Vault (April 18, 2022) (ECF 1-2, at 6). [¶ 13]

41) To accommodate the onshore transmission cables, SFW installed underground concrete duct banks and vaults (for four miles) through the seaside residential neighborhood of Wainscott. The onshore section of the SFEC route runs from the Atlantic Ocean northwest along Beach Lane to Wainscott Main Street, then along Wainscott Northwest Road via Sayre's Path and Wainscott Stone Road through the intersection at Montauk Highway (State Route 27) to the Long Island Railroad ("LIRR"), where it runs along the railway right-of-way to SFW's interconnection facility (a substation with transformers and other equipment). [¶ 14]

42) The onshore section of the transmission infrastructure includes nine large splicing vaults with concrete duct banks between each vault to protect the high-voltage cables. Each of the nine vaults (~ 26 ft long x 12 ft wide x 12 ft deep) is roughly one-and-a-half times the size of a 40-foot shipping container. [¶ 16] [¶ 17]

43) According to SFW's onshore construction plans, it will excavate 31,893 bulk tonnage of material from onshore construction, including (highly contaminated) soil and groundwater. *See* SFW Final Hazardous Waste and Petroleum Work Plan ("HWPWP"), Attachment B, Excavation Volumes (October 8, 2020). Available at dps.ny.gov (last accessed November 24, 2023)—

<https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={96B0E633-C308-45E5-A3A4-382D0C924AFF}> [¶ 15]

44) The proposed onshore construction corridor runs immediately above and, at some locations, encroaches into an aquifer system used for drinking water that the US Environmental Protection Agency (“**EPA**”) designated a Sole-Source Aquifer in 1978. [¶ 19]

45) The onshore section of the construction corridor runs through two Critical Environmental Areas (CEA) designed to protect the safety of the aquifer:

- (i) The Special Groundwater Protection Area (South Fork) (CEA Map #6) and
- (ii) The Water Recharge Overlay District (CEA Map #5).

See https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_2.pdf [¶ 24]

46) SFW’s construction corridor is adjacent to and downgradient from East Hampton Airport. The Town of East Hampton owns the Airport site (approximately 610 acres) and includes an industrial park (“**EH Town Airport**”). SFW’s construction corridor shares a common border with the EH Town Airport (for over 1,000 feet). [¶ 27] [¶ 29 – ¶ 32]

47) The New York Department of Environmental Conservation (“**NYDEC**”) registered the Airport with the State Superfund Program (site codes 152250 and 152156). *See* State Superfund Site Classification Notice (ECF 93-13). *Also, see* NYDEC Superfund Map, Interrogatories SK 03-10 (ECF 93-25, at PDF 62). [¶ 28]

48) SFW’s construction corridor is adjacent to and upgradient from a former sand-mining operation registered with NYDEC State Superfund Program, Wainscott Sand & Gravel (site code 152254). SFW’s construction corridor shares a common border with Wainscott Sand & Gravel (for approximately 3,000 feet). *See* NYDEC Superfund Map (ECF 93-25, at PDF 62). [¶ 33]

VI. WAINSCOTT

49) The aquifer system on eastern Long Island provides one hundred percent (100%) of the drinking water consumed on the South Fork. No alternative drinking water source could physically, legally, and economically supply all those dependent on it for drinking water and all other freshwater needs. [¶ 20]

50) Suffolk County Water Authority (“SCWA”) draws freshwater from the aquifer Upper Glacial and Magothy aquifers. SCWA has six public supply wells within one mile of East Hampton Airport. Two wells are within 750 feet of SFW’s underground concrete infrastructure (Stephen Hands Paths Wells Nos. 1 & 2). *See* Map of SCWA Public Supply Wells (ECF 46-1). The three wells draw fresh water from the Upper Glacial aquifer, which ranges in depth from 145 to 178 feet, and three draws from the Magothy aquifer, ranging from 294 to 435 feet. SCWA provides drinking water from its public supply wells to connected homes via water mains in the street (where available). SCWA’s public supply wells are typically only a few miles from residents’ homes. Plaintiff has *not* connected to SCWA’s water mains. [¶ 21] [¶ 22] [¶ 23]

51) Before 2018, around 90% of residents living in Wainscott used private wells for all their freshwater needs (including drinking water). Plaintiff still uses a private well on his property for drinking water. [¶ 25]

52) Farmers in Wainscott irrigate their crops using water pumped from private wells. [¶ 26]

53) Groundwater in Wainscott generally flows from East Hampton Airport (a primary source of PFAS contamination) southeast towards the Atlantic Ocean. [¶ 63]

54) “The Town of East Hampton is surrounded on three sides by water: the Atlantic Ocean to the south, Block Island Sound to the east and Gardiners Bay, Napeague Bay and Block Island Sound to the north ... There are 69 miles of outer coastline and 36 miles of protected harbor

shorelines.” *See* East Hampton LWRP (at XII-2, PDF 584, 1st ¶). SFW could have chosen any landing site to bring its high-voltage cables ashore from 105 miles of possibilities. Still, SFW designed and installed its underground concrete infrastructure encroaching into and at the capillary fringe of a sole-source aquifer for two and a half miles through an area with more contaminated drinking water wells than anywhere else in Suffolk County.

55) “Water resources, both groundwater and surface waters, have been a critical focus of the LWRP. As an island waterfront community, existing on a sole-source aquifer and bounded on three sides by marine environments crucial to its resort and commercial fishing economy, East Hampton Town has an overwhelming interest in preserving and protecting its water resources ... Ensuring a viable future of clean drinking and surface waters will be difficult. Groundwater must be carefully monitored, as pipelines carry water from one end of the Town to the other to alleviate shortages, maintain quality, and address salt water intrusion in low-lying areas ... Remediation of polluted groundwater and surface waters, restoring damaged wetlands and terrestrial and marine ecologies ... must be undertaken to avoid even more costly and complex solutions in the future.” *See* East Hampton LWRP (at XII-1, PDF 583) [¶ 362]

56) “The Town established a Harbor Protection Overlay District (HPOD) in 1995 to protect the surface waters of the Towns inner harbors [including Georgica and Wainscott Ponds] by regulating the most immediate contributing areas surrounding them ... (see Water Resources Maps XII-2A/-2B).” (*id.*, at XII-17, PDF 599). SFW designed and installed its underground infrastructure encroaching into groundwater and at its capillary fringe for one mile between the HPOD of Wainscott Pond and the HPOD of Georgica Pond. [¶ 363] [¶ 364]

57) SFW designed its cable corridor to run between the locally designated Significant Coastal Fish and Wildlife Habitat of Wainscott Pond (NYSDEC-classified Freshwater Wetland) and

Georgica Pond, which supports brackish wetlands and an abundance of wildlife of which some are endangered or threatened. Wainscott Pond is approximately 800 feet west of SFW's construction corridor, and Georgica Pond, at its closest point, is approximately 425 feet (to the southeast at Wainscott NW Road). [¶ 377][¶ 382-383]

58) The hydrogeology surrounding SFW's infrastructure includes Wainscott Pond and Georgica Pond, which "are linked to both the saltwater/tidal interface and to the underground aquifers, the sole source of drinking water for the Town." (*id.*, at XII-2, PDF 584, 5th ¶). [¶ 362]

59) "The future quality of potable water within the town will be dependant upon the town's ability to successfully manage this deep flow recharge area and limit the presence of sources of pollution, including residential and commercial development." *See* East Hampton Town Water Resources Management Plan 2004 (ECF 3-4, at 21, PDF 945, ¶ 3). [¶ 367]

60) "On the South Fork, only the upper two aquifers contain fresh-water and, in many areas of the town, only the Upper Glacial aquifer contains significant quantities of freshwater. The lower aquifer, the Lloyd, contains freshwater on western Long Island and salt water here ... The deepest groundwater recharge in East Hampton extends part way into the Magothy aquifer. Thus, drinking water supplies are limited to the Upper Glacial and portions of the Magothy aquifers. The deep flow recharge areas are located in the central portion of the South Fork. ***Movement within the aquifers is lateral and vertical.*** In the deep recharge areas, water moves predominantly downwards and to a lesser extent laterally. Since the quantity of water is great and the movement slow, this water, if contaminated, would remain so for decades. ***Closer to the coastal areas, elevation drops, the lens is thinner and movement is predominantly lateral.*** Freshwater moves toward shallow flow streams and discharges directly to the ocean and bays across the freshwater-saline interface."

See East Hampton LWRP (at XII-43, PDF 625, ¶¶ 3-4.)

[¶ 366][¶ 368]

61) The Significant Coastal Fish and Wildlife Habitat of Georgica Pond—

The opening and closing of the barrier beach allows Georgica Pond to function as a marine estuary which provides a spawning ground and nursery area for anadromous fish such as alewives, and maintains salinity for blue claw crab, the most important fishery in the pond. It provides an essential step in the food chain and is thus important to local fish populations. White perch as well as many bait fish, such as silversides, spawn in the pond. The coordination of beach opening with spawning times determines the effectiveness of this system. The pond also provides feeding areas for osprey (T), winter waterfowl, common terns (T), roseate terns (E, E-FED), least terns (E) and several species of herons and migrating shorebirds. The barrier beach supports a colony of least terns and several pairs of piping plovers (E, T-FED) ... Breeding birds also include blue-winged teal, common gallinule and black duck. Recreational uses associated with the wildlife resources at Georgica Pond include crabbing, hunting and birding. Commercial activities include the taking of perch, bait, crabs and eels. This is facilitated by the periodic opening of the barrier beach.” See East Hampton LWRP (ECF 3-4, at III-49, PDF 231, ¶¶ 3-4).

[¶ 378]

62) The Significant Coastal Fish and Wildlife Habitat of Wainscott Pond—

Wainscott Pond provides valuable wildlife habitat for waterfowl and aquatic species. Overwintering ducks include shovelers, blue-winged teal and green-winged teal. The pond is a stopover for migrating shorebirds and snow geese and a resting area for Canada geese. Its wetland fringes also support a variety of wildlife. Breeding birds include black ducks and occasionally ruddy ducks. The pond also supports populations of painted and snapping turtles.

Although use of the pond by the public is limited by the lack of public access, it is a popular duck hunting spot ... The following report was made to the NYS DEC by the Town's Assistant Environmental Protection Director in 1990:

Fish kills from low oxygen levels occur periodically. Anaerobic conditions exist in lower portions of the water column during the summer months. Wildlife populations that exist within the pond itself are high density and low diversity which are indicative of poor water conditions. The primary fish populations within the pond are stunted yellow perch, brown bullhead and American eel. There is a lack of predator species (i.e. warm water competitive species, e.g. largemouth bass, chain pickerel) which require higher oxygen levels.

Any activities that would further degrade water quality ... would have a significant impact on fish and wildlife species inhabiting Wainscott Pond. All species of fish and wildlife may be affected by pollution from chemical contamination (including food chain effects)” (*id.*, at III-50-51, PDF 232-233). [¶ 377] [¶ 380] [¶ 381]

VII. PFOA AND PFOS

What is PFOA and PFOS

63) **PFOA** (perfluorooctanoic acid) and **PFOS** (perfluorooctane sulfonate) are two of the most widely used and studied chemical compounds in broad class of chemical contaminants known as **PFAS** (per- and polyfluoroalkyl substances). The group of PFAS chemicals comprises thousands of man-made compounds that otherwise do *not* occur in nature. Some compounds, such as PFOA and PFOS are known to be harmful to human health and have been replaced in the United States. In 2022, the EPA proposed a National Primary Drinking Water Regulation to establish legally enforceable levels for PFOA and PFOS, called Maximum Contaminant Levels.

The proposed MCL for PFOA is 4 parts per trillion (ppt), and PFOS is also 4 ppt.¹¹

64) PFAS contamination released into soil leaches from the surface and spreads vertically and laterally (e.g., in surface run-off) into groundwater, carrying the contamination with it. [¶ 62]

Adverse Health Effects

65) In 2016, the U.S. Environmental Protection Agency (“EPA”) released a “FACT SHEET” on “PFOA & PFOS Drinking Water Health Advisories” that reads— “[E]xposure to PFOA and PFOS over certain levels may result in adverse health effects, including developmental effects to fetuses during pregnancy or to breastfed infants (e.g., low birth weight, accelerated puberty, skeletal variations), cancer (e.g., testicular, kidney), liver effects (e.g., tissue damage), immune effects (e.g., antibody production and immunity), thyroid effects and other effects (e.g., cholesterol changes).” *See* Interrogatory SK 03-10 (ECF 93-25, PDF 36, 2nd ¶). Available at— https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_13.pdf

66) According to the EPA, “certain PFAS can cause health risks even at very low levels. This is why anything we can do to reduce PFAS in water, soil, and air can have a meaningful impact on health.”¹²

67) On June 15, 2022, the White House announced the following— The “EPA is publishing four new drinking water lifetime health advisories for certain PFAS as part of the President’s plan to combat PFAS pollution and the Environmental Protection Agency’s (EPA) PFAS Roadmap. These health advisories reflect the Biden-Harris Administration’s commitment to follow the science and up-to-date public health information. Specifically:

- **EPS** is releasing interim updated drinking water lifetime health advisories for

¹¹ *See* EPA, Our Current Understanding of the Human Health and Environmental Risks of PFAS (accessed last on Oct 26, 2023)— www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas.

¹² *See* EPA, PFAS Explained (October 2023), www.epa.gov/system/files/documents/2023-10/final-virtual-pfas-explainer-508.pdf

perfluorooctanoic acid [“PFOA”] and perfluorooctane sulfonic acid [“PFOS”] that replace those issued by EPA in 2016. The updated advisory levels are based on new science that indicates that some negative health effects may occur with concentrations of PFOA or PFOS in water that are near zero ...”¹³

The White House announcement says that PFOA and PFOS are part of a class of chemicals called “per- and polyfluoroalkyl substances (PFAS) ... that can cause cancer and other severe health problems [and] ... are considered ‘forever chemicals’ because they are environmentally persistent, bioaccumulative, and remain in human bodies for a long time.”¹⁴ [¶ 456]

68) Surface water in the form of run-off over sealed surfaces can transport PFOA, PFOS and other PFAS compound contaminants. [¶ 64]

69) Exposure to PFAS contamination is not restricted to ingesting contaminated tap water at home but may include drinking tap water at restaurants, friends homes, swimming in water containing high concentrations of PFOA, PFOS, or other PFAS compound contaminants, or drinking water in public places. [¶ 71]

PFOA and PFOS in Wainscott

70) In 2017 and 2018, the Suffolk County Department of Health Services (“SCDHS”) tested 303 private drinking water wells in Wainscott downgradient from East Hampton Airport in the same area where SFW installed underground high-voltage transmission infrastructure. Of those wells, 159 (52%) showed detectable levels of PFOA and PFOS contamination.¹⁵ The highest

¹³ See FACT SHEET: Biden-Harris Administration Combatting PFAS Pollution to Safeguard Clean Drinking Water for All Americans. Available at— <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/15/fact-sheet-biden-harris-administration-combatting-pfas-pollution-to-safeguard-clean-drinking-water-for-all-americans/> (last accessed November 29, 2023).

¹⁴ *Id.*

¹⁵ Of the 303 wells tested, “[o]ne hundred and forty-four (144) wells had no detections of PFOS/PFOA.” Conversely, 159 wells had detectable levels of PFOS/PFOA contamination. See SCDHS Wainscott PFC Update (June 2018) (ECF 93-25, at PDF 17)

level of combined PFOS/PFOA contamination (up to June 2018) was 791 parts per trillion (ppt), *ten times* the 2016 EPA Health Advisory Level (70 ppt).¹⁶ Thirteen (13) wells exceeded that standard.¹⁷ Forty-five (45) drinking-water wells exceeded the New York drinking water standard (10 ppt).¹⁸ [¶ 35 – ¶ 39]

71) Suffolk County Department of Health Services (“SCDHS”) detected PFOA and PFOS contaminants exceeding the NY Maximum Contamination Level (“NYMCL”) (10 ppt) in more private drinking-water wells in Wainscott (south of East Hampton Airport) than anywhere else in Suffolk County. SCDHS detected PFOA/PFOS contamination exceeding the NYMCL (10 ppt) in 65 wells (32%) of the 202 wells in Suffolk County with PFOA/PFOS contamination exceeding the NYMCL. Yaphank had the second-highest number of PFOA/PFOS-contaminated wells (32) in Suffolk County, with less than half the number of wells in Wainscott (65). *See* Exposé “‘Forever chemicals’ found in Suffolk’s private water wells since 2016, data shows” in Newsday (ECF 3-9, at 3, Table of Private Well Surveys).¹⁹ [¶ 399]

72) The Airport site is the main source of groundwater PFAS contamination in Wainscott south of the Airport. *See* Sixty-day Notice of Intent to Sue, Map of PFAS Contamination in Wainscott (ECF 3-2, at 5, Fig 2). The two most significant sources of PFAS contamination in Wainscott are within 1,000 feet upgradient from SFW’s construction corridor. *See* Maps of Main Sources of PFAS Contamination at East Hampton Airport (ECF 3-2, at 7-8, Figs 3 and 4). PFAS contamination concentration levels at the Airport exceed federal and state standards designed to protect human health. [¶ 27] [¶ 29 – ¶ 32]

¹⁶ *Id.*, (PDF 22)

¹⁷ *Id.*, (PDF 17)

¹⁸ *Id.*, (PDF 30)

¹⁹ www.newsday.com/long-island/environment/private-wells-testing-contaminants-drinking-water-pfas-v49xdvtl (last accessed December 1, 2023)

73) PFAS contamination in groundwater south of East Hampton Airport is prevalent. [¶ 34]

74) *In addition* to East Hampton Airport (the main source of PFOA and PFOS contamination in Wainscott), SFW’s Final Hazardous Waste and Petroleum Work Plan (April 2021), notes eight separate instances of “[p]robable fires within the Project Corridor[.]”²⁰ However, SFW could find only one of the locations where firefighters extinguished a “[f]ire at a house on Wainscott-Northwest Road in Wainscott. 75 Wainscott-Northwest Road in Wainscott, close to Montauk Highway firefighters[.]”²¹ Although SFW could not locate the house number for “Mr. and Mrs. John C. Tysen’s summer home on Beach Lane, Wainscott [that] was destroyed by fire[.]” upon information and belief, the “summer home” was at 32 Beach Lane. [¶ 65] [¶ 68]

75) Photographs show construction workers standing shoulder-deep in the soil near the house at 75 Wainscott NW Road. South Fork Wind showed no regard for their safety. [¶ 66]

76) SFW showed no regard for the environmental impacts of installing underground concrete infrastructure and excavation activities in an area containing PFAS contamination. *See* Complaint, Appendix 2, Construction near house Fires, at 1 and 2). [¶ 67] [¶ 70]

77) In 2022, South Fork Wind detected PFOA contamination in groundwater beneath Beach Lane in Monitoring Well 4A at a concentration level of 82 ppt, which exceeds the 2016 EPA Health Advisory Level (70 ppt). [¶ 101]

78) Photographs show construction workers standing shoulder-deep in the soil near the monitoring well (MW-4A) on Beach Lane, where PFAS contamination exceeds the 2016 EPA Health Advisory Level. [¶ 69]

²⁰ *See* SFW Final Hazardous Waste and Petroleum Work Plan (April 2021), Environmental Sampling Scope of Work (January 2021), (Table 1, at 2.4, PDF 33). Available at [dps.ny.gov](https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={B9C9F7B5-3033-404C-B081-96AC996BB7D3}) (last accessed November 29, 2023)—<https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={B9C9F7B5-3033-404C-B081-96AC996BB7D3}>

²¹ *Id.*

79) In 2020, the same well (MW-4A) contained PFOA contamination in groundwater at a concentration level of 50 ppt that exceeds the NYS MCL (10 ppt) and the 2022 EPA Interim Health Advisory Levels (with total PFAS contamination of 190 ppt). [¶ 103]

80) In 2022, South Fork Wind detected PFOA contamination (15 ppt) and PFOS contamination (13 ppt) in groundwater beneath Beach Lane in Monitoring Well 4B that exceeds the NYS MCL (10 ppt) and the 2022 EPA Interim Health Advisory Levels. [¶ 104]

81) In 2022, South Fork Wind detected PFOS contamination in groundwater beneath Wainscott NW Road in Monitoring Well 15A at a concentration level of 12 ppt that exceeds the NYS MCL (10 ppt) and the 2022 EPA Interim Health Advisory Levels. [¶ 105]

82) In 2020, the same well (MW-15A) contained PFOS contamination in groundwater at a concentration level of 15 ppt that exceeds the NYS MCL (10 ppt) and the 2022 EPA Interim Health Advisory Levels (with total PFAS contamination of 41 ppt). [¶ 106]

83) On September 10, 2020, Plaintiff submitted during NYPSC Case 18-T-0604 Testimony (Part 1-1) on PFAS Contamination containing information from two NY State Department of Environmental Conservation (“NYSDEC”) Site Characterization Reports on PFOA and PFOS groundwater contamination in the vicinity of SFW’s proposed (underground) construction.

BOEM received and uploaded Plaintiff’s Testimony (Part 1-1) on PFAS contamination in

Wainscott in February 2021 (see link below) (last accessed on December 2, 2023)—

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

Plaintiff’s testimony also included the two NYDEC Site Characterization Reports – [¶ 72]

a. East Hampton Airport (sites: 152250/152156) (last accessed December 2, 2023)—

https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_8.pdf [¶ 72(a)]

b. Wainscott Sand & Gravel (site 152254) (last accessed December 2, 2023)—

https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_25.pdf [¶ 72(b)]

84) NYSDEC reports concerning the State Superfund-designated East Hampton Airport, the main source of PFAS contamination in the area where SFW proposed construction, are publicly available at dec.ny.gov (see link below). The following documents (listed below) are

incorporated by reference (*see* <https://extapps.dec.ny.gov/data/DecDocs/152250/>) [¶ 73].

- a. Fact Sheet.HW.152250.2018-01-05.Airport_Well Sampling Press Release SCDHS.pdf
- b. Fact Sheet.HW.152250.2019-06-19.East Hampton Airport Class 02 Listing.pdf
- c. Report.HW.152250.2018-11-12.Alpha Geoscience Hydrogeology Rpt Wainscott S&G.pdf
- d. Report.HW.152250.2018-11-30.Airport Site Characterization Report Final.pdf
- e. Work Plan.HW.152250.2021-06-30.East Hampton Airport Site RIFS WP-FINAL.pdf
- f. Report.HW.152254.2020-07-28.Final SC Report.pdf

85) BOEM and SFW had online access to the public records of the NY State Department of Environmental Conservation (“NYSDEC”), including access to the NYSDEC State Superfund Program under site record at East Hampton Airport (code 152250) and Wainscott Sand & Gravel (code 152254), available at dec.ny.gov (here)— <https://www.dec.ny.gov/data/DecDocs/152250/> and (here)— <https://www.dec.ny.gov/data/DecDocs/152254/>, respectively. [¶ 73.01]

86) The PFAS contamination levels quoted below are from the NYDEC Site Characterization Reports for East Hampton Airport and Wainscott S&G (see ¶¶ 79-81 above). Also, Plaintiff summarized the same results (below) in his Initial Brief (January 20, 2021) that pre-dated SFW’s final COP by over three months. See Initial Brief of Simon V. Kinsella in NYPSC (case 18-T-0604) (at 19-24). Available at— https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_9.pdf (last accessed on December 2, 2023). [¶ 74]

87) Wells at the Airport site (upgradient): EH-19A, EH-19A2, and EH-19B are within 1,000 feet from the proposed construction corridor, and Well EH-1 is within 500 feet from the South Fork Wind’s construction corridor. [¶ 75]

88) Wainscott Sand & Gravel (“**Wainscott S&G**”) (NYDEC site: 152254) is adjacent to (downgradient) and on the opposite side of SFW’s proposed construction corridor. [¶ 76]

89) Wells at the Wainscott S&G site (downgradient): MW5, MW3, and MW4 (groundwater), and Wells: S1, S11, and S16 (soil), are within one hundred and fifty feet downgradient from the South Fork Wind’s construction site. [¶ 77]

90) A similar profile of PFAS contamination at East Hampton Airport can be seen in wells on the opposite downgradient side of the construction corridor at the Wainscott S&G site. [¶ 78]

91) Combined concentration levels of PFOS and PFOA contamination in all four groundwater monitoring wells within one thousand feet upgradient from the construction corridor are more than double the 2016 USEPA Health Advisory Level (“**HAL**”) of 70 ppt, regulatory standards that are designed to protect human health, as follows— [¶ 79]

92) Well: EH-19A – PFOS/PFOA = 145 ppt (exceeds 2016 HAL by 2.1x) [¶ 80]

93) Well: EH-19A2 – PFOS/PFOA = 174 ppt (exceeds 2016 HAL by 2.5x) [¶ 81]

94) Well: EH-19B – PFOS/PFOA = 166 ppt (exceeds 2016 HAL by 2.4x) [¶ 82]

95) Well: EH-1 – PFOS/PFOA = 162 ppt (exceeds 2016 HAL by 2.3x) [¶ 83]

96) The same levels of PFOS and PFOA contamination but measured against the updated 2022 USEPA (interim) HAL (0.02 ppt for PFOS and 0.004 ppt PFOA) are— [¶ 84]

97) Well: EH-19A – PFOS = 5 ppt (exceeds 2022 HAL by 250 x)
– PFOA = 140 ppt (exceeds 2022 HAL by 35,000 x) [¶ 85]

98) Well: EH-19A2 – PFOS = 140 ppt (exceeds 2022 HAL by 7,000 x)
– PFOA = 34 ppt (exceeds 2022 HAL by 8,500 x) [¶ 86]

99) Well: EH-19B – PFOS = 77 ppt (exceeds 2022 HAL by 3,850 x)
– PFOA = 89 ppt (exceeds 2022 HAL by 22,250 x) [¶ 87]

100) Well: EH-1 – PFOS = 1.8 ppt (exceeds 2022 HAL by 90 x)
 – PFOA = 160 ppt (exceeds 2022 HAL by 40,000 x) [¶ 88]

101) Soil contamination levels from PFOS, PFOA, and PFHxS chemical compounds detected on the shallow surface at the Airport site upgradient within one thousand feet of the construction corridor are as follows [¶ 89] –

102) Well: EH-19A (soil) – PFOS = 3,900 ppt
 – PFOA = 180 ppt
 – PFHxS = 170 ppt [¶ 90]

103) Well: EH-19B (soil) – PFOS = 12,000 ppt
 – PFOA = 3,800 ppt
 – PFHxS = 3,800 ppt [¶ 91]

104) Well: EH-1 (soil) – PFOS = 10,000 ppt
 – PFOA = 180 ppt
 – PFHxS = 170 ppt [¶ 92]

105) Groundwater samples taken from monitoring wells on the opposite side of the corridor from the source of contamination (at the Airport), within one hundred and fifty feet downgradient from the construction corridor, all show exceedingly high levels of the same chemical compounds (PFOA, PFOS, and PFHxS) seen in soil samples taken at the Airport. [¶ 93]

106) According to the NYSDEC Superfund Designation Site Environmental Assessment of the Wainscott S&G— “Overall, the highest total PFAS detections were in monitoring wells MW3, MW5, MW6 located on the Western (side-gradient) and Northern (upgradient) boundaries of the site, indicating a potential off-site source.” See BOEM Index Exhibit #085 (at p. 2, Site Environmental Assessment, last sentence). [¶ 94]

107) Contamination levels in groundwater monitoring wells within one hundred and fifty feet downgradient from the corridor (on the western side of the Wainscott S&G site) for groundwater (“GW”) Monitoring Wells MW5, MW3, and MW4 are as follows— [¶ 94]

108) Well: MW5 (GW) – PFOS = 877 ppt (exceeds 2022 HAL by 43,850 x)
 – PFOA = 69 ppt (exceeds 2022 HAL by 17,250 x)
 – PFHxS = 566 ppt
 – PFOS/PFOA = 946 ppt (exceeds 2016 HAL by 13.5 x) [¶ 96]

109) Well: MW3 (GW) – PFOS = 1,010 ppt (exceeds 2022 HAL by 50,500 x)
 – PFOA = 28 ppt (exceeds 2022 HAL by 7,000 x)
 – PFHxS = 306 ppt
 – PFOS/PFOA = 1,038 ppt (exceeds 2016 HAL by 14.8 x) [¶ 97]

110) Well: MW4 (GW) – PFOS = 232 ppt (exceeds 2022 HAL by 11,600 x)
 – PFOA = 5.57 ppt (exceeds 2022 HAL by 1,393 x)
 – PFHxS = 43.4 ppt
 – PFOS/PFOA = 238 ppt (exceeds 2016 HAL by 3.4 x) [¶ 98]

111) Groundwater containing levels of PFAS contamination exceeding USEPA limits flows from the source of contamination at the Airport site across South Fork Wind’s construction corridor downgradient to the Wainscott S&G site, where the same chemical compounds are present in groundwater monitoring wells. [¶ 99]

Diffusion of PFOA and PFOS

112) According to evidence SFW submitted as testimony in the NYPSC proceeding (case no. 18-T-0604), the concrete duct banks and vaults SFW installed underground, encroaching into and at the capillary fringe of a sole-source aquifer may prolong PFAS contamination in groundwater via a

process called *diffusion*. SFW’s evidence consists of a scientific paper, Environmental Fate and Transport for Per- and Polyfluoroalkyl Substances (March 2018) (“PFAS Fate and Transport (2018)”) by the Interstate Technology Regulatory Council (“ITRC”) (ECF 3-5).²² The “ITRC is a program of the Environmental Research Institute of the States (ERIS) ... managed by the Environmental Council of the States (ECOS). ECOS is the national, nonprofit, nonpartisan association representing the state and territorial environmental commissioners. Its mission is to serve as a champion for states; to provide a clearinghouse of information for state environmental commissioners; to promote coordination in environmental management; and to articulate state positions on environmental issues to Congress, federal agencies, and the public.” (<https://pfas-1.itrcweb.org/about-itrc/>). [¶ 392]

113) PFAS Fate and Transport (2018) states that diffusion occurs when PFAS contaminant mass moves into lower permeability *materials such as “concrete may enhance the long-term persistence of PFAS in groundwater*. For instance, at one site PFAS penetrated 12 cm into a concrete pad at a fire training area, and diffusion was a contributing process (Badel, Paxman, and Mueller 2015).” See PFAS Fate and Transport 2018 (ECF 3-5, at 6, last ¶). [¶ 393]

114) A subsequent ITRC update concerning PFAS contaminants, Site Characterization (2020) reads— “Back-diffusion: PFAS dissolved in groundwater that accumulated in lower permeability silt/clay layers below the water table may diffuse into the higher permeability zones due to changing relative concentrations (Section 5.3.1 [below]).” See ITRC, Site Characterization (2020) (ECF 3-7, PDF 5, 2nd bullet point). [¶ 394]

115) A further ITRC update, Environmental Fate and Transport Processes (August 2021) reads

²² See NYPSC (case 18-T-0604), Filing No. 198, Filed 10/30/2020 (page 2 of 3), *SFW Exhibit (OWRP-3)* – <https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={2E939DCB-551D-4B83-9948-3F7C830E1742}> (last accessed November 2, 2023).

as follows—

5.3.1 Diffusion In and Out of Lower Permeability Materials

Diffusion is the movement of molecules in response to a concentration gradient ... contaminant mass in groundwater can diffuse into the pore space of lower permeability soils or bedrock [and site materials such as concrete (see below)]. Back-diffusion out of these low permeability materials may result in the longterm persistence of PFAS in groundwater even after source removal and remediation. Due to the lack of degradation of PFCAs [perfluoroalkyl carboxylic acids, includes PFOA] and PFSAAs [perfluorosulfonic acids, includes PFOS], back-diffusion of these PFAS is also likely to be a more significant process than for conventional contaminants ... Adamson et al. (2020) reported that approximately 82% of the total mass of PFAS measured at an AFFF [aqueous film-forming foam such as that used to fight fires] site was found within soils that were classified as lower permeability. This included 91% of the polyfluorinated precursor mass, most of which was encountered in the vicinity of the presumed source area. The mass distribution at this site confirmed that diffusion into lower permeability soils had occurred and demonstrated that this process can contribute to long-term retention of PFAS. The relative impact of PFAS accumulation at the air-water interface was not fully investigated in this study, as the water table was very shallow, and the unsaturated/saturated transition zone was likely disturbed during excavation. PFAS may also diffuse into site materials such as concrete. For example, Baduel, Paxman, and Mueller (2015) reported that PFAS had penetrated 12 cm into a concrete pad at a fire training area, and diffusion was identified as a contributing process.

See ITRC, Environmental Fate and Transport Processes, Section 5 (ECF 3-6, at 9).

116) SFW's concrete duct banks and vaults may react with PFAS contaminants in groundwater through a process of diffusion into concrete that, with a change in concentration gradient, may "back-diffusion out of these low permeability materials may result in the longterm persistence of PFAS in groundwater even after source removal and remediation" (*id.*, at PDF p. 9, ¶ 6).

[¶ 396]

117) The reaction between PFOA, PFOS, and other PFAS contaminants in groundwater and SFW's concrete duct banks and vaults that it installed underground encroaching into and at the capillary fringe of the contaminated groundwater "may enhance the long-term persistence of PFAS in groundwater."

Leaching & Air/Water Interface

118) A main source of PFAS, PFOS, and other PFAS contamination at East Hampton Airport is within 500 feet (upgradient) of SFW's construction corridor. According to ITRC, Environmental Fate and Transport Processes (August 2021), PFAS contamination in soil at East Hampton Airport leaches into groundwater as follows—

5.3.3 Leaching

PFAS present in unsaturated soils are subject to downward leaching during precipitation, flooding, or irrigation events that promote dissolution and migration of contaminant mass (Sepulvado et al. 2011; Ahrens and Bundshuh 2014). *This process can result in PFAS transport from surface soils to groundwater and surface water because PFAS releases often involve surface applications (for example, AFFF and biosolids) ... Leaching is also potentially relevant for plant uptake ...*

PFAS migration from shallow soils to groundwater is influenced by several interacting processes, which may enhance or limit PFAS leaching rates. The leaching potential will be enhanced in areas with high water infiltration rates, which may include natural water sources such as precipitation or human-made sources such as irrigation. The thickness of the unsaturated zone (depth to water table) will also affect leaching potential.

See ITRC, Environmental Fate and Transport Processes (August 2021) (ECF 3-6, at 11).

119) Groundwater movement is lateral *and* vertical (see ¶ 71). The closer the groundwater flow is to the coastal areas where elevation drops, the thinner the lens is, and movement is *predominantly lateral* (*id.*).

120) The Project's underground concrete duct banks and vaults will run for approximately two and a half miles through an area known for groundwater PFOA, PFOS, and other PFAS contamination exceeding regulatory limits designed to protect human health. [¶ 395]

121) SFW installed underground concrete duct banks and vaults that intersect with groundwater or are at the capillary fringe of a sole-source aquifer used for drinking water. [¶ 397]

122) According to the U.S. Geographic Survey's National Water Information System, groundwater levels vary seasonally (over the short term) and in the long term by up to eight feet. See Letter "URGENT: Imminent risk to Public Health" (ECF 3-3, at 10-11, Figs. 4 & 5). [¶ 398]

123) **5.2.4.1 Partitioning to Air/Water Interfaces**
 ... By design, many PFAS will lower the interfacial tension and preferentially form films at the air-water interface, with the hydrophobic carbon-fluorine (CF) tail oriented toward the air and the hydrophilic head group dissolved in the water (Krafft and Riess 2015) (Figure 4-1). This behavior ... suggests that *accumulation of PFAS at water surfaces will occur* (Prevedouros *et al.* 2006).

This *preference for the air-water interface* has important implications for PFAS transport in the vadose zone, where unsaturated conditions provide significant air-water interfacial area (Brusseau 2018; Brusseau *et al.* 2019). This includes the potential for enhanced retention in the vadose zone and the capillary fringe, which are the subject of significant ongoing research. For example, Brusseau (2018) showed that adsorption of PFOS and PFOA at the air-water interface can increase the retardation factor for aqueous-phase transport, accounting for approximately 50% of the total retention in a model system (well-sorted sand) with 20% air saturation.

See ITRC, Environmental Fate and Transport Processes (August 2021) (ECF 3-6, at 8). In other words, PFOA and PFOS are designed to accumulate at the air/water interface, or in this case, at the interface between the groundwater table and the unsaturated soil at its capillary fringe, precisely where SFW proposed (and BOEM approved) installing underground concrete infrastructure for high-

voltage transmission lines. As the groundwater levels rise and fall seasonally and over the years (by as much as eight (8) feet in Wainscott), the degree to which the underground concrete infrastructure is in direct contact with PFAS-contaminated groundwater will vary. [¶ 403]

124) “Surface water bodies in the town include the streams, ponds, tidal creeks, tidal embayments and wetlands. Ponds and streams that exist near the coastal areas such as Georgica Pond [and Wainscott Pond] ... are hydraulically connected to the groundwater and owe their existence to the fact that the land surface elevation is below that of the water table.” *See* East Hampton Town Water Resources Management Plan (2004) (ECF 3-4, at iii, PDF 916). [¶ 402]

125) The Project’s adverse environmental impact on PFOA, PFOS, and other PFAS contaminants in groundwater will affect sensitive habitats such as Georgica Pond and Wainscott Pond near the Project’s construction corridor through groundwater flow. [¶ 404]

PFOA & PFOS are Hazardous Waste

126) By emergency regulation in 2016, the NY Department of Environmental Conservation designed PFOA and PFOS as hazardous wastes as defined by New York State Environmental Conservation Law, Article 27, Title 13.

127) SFW had to transport excavated material from onshore construction (31,893 bulk tonnage) containing PFOA and PFOS contamination to another location. SFW has *not* disclosed the hazardous waste disposal site or treatment facility that received excavated material from onshore construction. SFW has *not* disclosed any test results for PFOA or PFOS contamination of excavated material. [¶ 400]

128) SFW operated a hazardous waste treatment facility capable of treating 75,000 gallons of PFOA/PFOS-contaminated excavated material (using four frac tanks) at its interconnection facility within 1,000 feet (upgradient) of a residential neighborhood. *See* Complaint Appendix A

(ECF 1-2, PDF 1 – 4).

129) SFW operated a second hazardous waste treatment facility on Beach Lane within its construction corridor capable of treating PFOA/PFOS-contaminated excavated material in at least three frac tanks (*id.*, at PDF 5).

130) SFW has not disclosed *any* test results for PFOA or PFOS contamination of excavated material (including groundwater) before *or* after treatment. The public is unaware of the degree to which SFW removed PFOA and PFOS contamination from excavated material, if any.

131) In 2021, SFW disclosed its laboratory test results for PFAS contamination and supporting documentation (for testing undertaken in December 2020 and January 2021). The disclosures showed that South Fork Wind took most soil samples from the shallow surface where PFAS contamination was less likely to be detected. *See* Plaintiff’s 2022 Letter (ECF 3-3). [¶ 107]

132) In 2022, SFW did *not* disclose laboratory test reports or supporting documentation for PFAS contamination testing conducted around January 2022. [¶ 108]

133) No agency of New York State cooperated with BOEM in developing the FEIS. [¶ 108.01]

VIII. BOEM: NOTICE OF CONTAMINATION

134) In November 2018, BOEM received comments from Plaintiff (“2018 Comments”) in response to BOEM’s Notice of Intent to prepare a Draft Environmental Impact Statement for SFW’s September 2018 COP. (ECF 3-1, at 1 through 14). BOEM posted the 2018 Comments online at regulation.gov— www.regulations.gov/comment/BOEM-2018-0010-0074. [¶ 40]

135) In February 2021, Plaintiff gave oral testimony during BOEM’s Public Hearing #3 (“Oral Testimony”). BOEM posted the transcript online at regulations.gov— https://downloads.regulations.gov/BOEM-2020-0066-0380/attachment_1.pdf

(transcript time-stamp beginning at 1:18:08). [¶ 41]

136) In February 2021, BOEM received further comments from Plaintiff (“2021 Comments”) in response to BOEM’s Notice of Availability of SFW’s Draft Environmental Impact Statement (“DEIS”) (ECF 3-1, at 1 through 14). BOEM posted the 2021 Comments online at regulation.gov (see link below)— [¶ 42]

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

137) Plaintiff’s 2021 Comments provide clear, substantial evidence, including testimony, briefs, and over 150 exhibits, showing the many assertions upon which BOEM relied were not based in fact. See Complaint, Exhibit C (ECF 3-1, PDF 26 – 36).

138) Plaintiff provided the Court with all the documents listed in his Complaint, Exhibit C (ECF 3-1, PDF 26 – 36) that the Court accepted into the record. See Notice of Filing (ECF 3).

139) Complaint Exhibit C documents are available at regulations.gov (maintained by BOEM), as follows—

<https://www.regulations.gov/comment/BOEM-2020-0066-0343>
<https://www.regulations.gov/comment/BOEM-2020-0066-0384>
<https://www.regulations.gov/comment/BOEM-2020-0066-0385> [¶ 43]

140) BOEM made little, if any, attempt to substantively address the material deficiencies raised in Plaintiff’s 2021 Comments or issues identified in the attached exhibits. [¶ 44]

141) In December 2021, BOEM (along with other Federal, State, and local agencies and SFW) received a Sixty-days’ Notice of Intent to Sue (ECF 3-2) [¶ 45]

142) In March 2022, BOEM (along with other Federal, State, and local agencies and SFW) received further comments concerning SFW’s flawed testing of soil and groundwater for PFAS contamination (ECF 3-3) [¶ 46]

143) At no time did BOEM contact Plaintiff in response to any of his comments. [¶ 47]

144) In February 2021, BOEM received over 150 exhibits providing substantive evidence of PFAS contamination surrounding SFW’s proposed onshore construction corridor through

Wainscott. The main exhibits concerning PFAS contamination are as follows— [¶ 48]

PFAS Contamination Heat Map of Onshore Cable Route (1 page) Exhibit #005
https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_74.pdf

PFAS Zone - onshore cable route decided *after* PFAS detection (1 page) Exhibit #006
https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_75.pdf

PFAS Contamination of Onshore Corridor (satellite map) (2 pages) Exhibit #004
https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_65.pdf

PFAS release within 500 feet of SFEC route (surface runoff) (2 pages) Exhibit #007
https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_71.pdf

Testimony 1-1, PFAS Contamination, Kinsella (Sep 9, 2020)(37 pages) Exhibit #061
https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_32.pdf

Testimony 1-1, Exhibit C - Report No 3 - PFAS Contamination (91 pages) Exhibit #065
https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_9.pdf

Testimony 1-2 - PFAS Contamination, Kinsella (Oct 9, 2020)(11 pages) Exhibit #094
https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_36.pdf

Testimony, Rebuttal (Oct 30, 2020)(13 pages) Exhibit #162
https://downloads.regulations.gov/BOEM-2020-0066-0387/attachment_63.pdf

Initial Brief by Simon V. Kinsella (Jan 20, 2021)(34 pages) Exhibit #009
https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_9.pdf

Reply Brief & Exhibits by Simon V. Kinsella (Feb 3, 2021)(29 pages) Exhibit #011
https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_16.pdf

Motion to Reopen Record by Simon V. Kinsella (Jan 13, 2021)(21 pages) Exhibit #022
https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_29.pdf

IX. SFW FRAUD: WATER QUALITY

145) On or around May 7, 2021, Defendant South Fork Wind LLC (“SFW”) submitted a final Construction and Operations Plan (“COP”) for an offshore wind farm (South Fork Wind Farm)

(“SFWF”), with high-voltage sea-to-shore transmission (South Fork Wind Export Cable) (“SFEC”) (collectively, the “Project”) to Defendant Bureau of Ocean Energy Management (“BOEM”) for review and approval.

146) Under “Water Quality and Water Resources,” SFW falsely states that—

This section provides a description of water quality and water resource conditions in the SFWF and SFEC as defined by several parameters including ... contaminants in water ... This section also briefly discusses relevant anthropogenic activities that have in the past or currently may impact water quality, including point and nonpoint source pollution discharges, deposition and spills, and pollutants in the water or sediment. The description of the affected environment and assessment of potential impacts for water quality and water resources was evaluated by reviewing ... current public data sources related to water quality and water resources in Suffolk County and on Long Island, including local, regional, state, and federal agency-published papers and reports and published journal articles ...”

(COP, at 4-56, PDF 224, ¶¶ 1-2). On the contrary, SFW *neither* provides “a description of water quality and water resource conditions” in the onshore SFEC route as defined by parameters that include PFOA, PFOS, or other PFAS “contaminants in water” *nor* “discusses relevant anthropogenic activities” that had impacted water quality, including “source pollution discharges” of PFOA, PFOS, or other PFAS contaminants from firefighting activities at East Hampton Airport within 500 feet *upgradient* from SFW’s proposed construction, or such “pollutants in the water” that included PFOS contamination of 1,010 ppt exceeding the NY drinking-water standard by one hundred times within 150 feet *downgradient* from SFW’s proposed construction.²³ *Id.* Moreover, if SFW had evaluated the environment and assessed “potential impacts for water quality and water resources” by “reviewing” publicly available data sources, including state “agency-published papers and reports” as

²³ See NYDEC Site Characterization Report for Wainscott Sand & Gravel (Jul 2020), Well MW3 (Table 6, at 3, PDF 70, 9th column across, 4th row up from the bottom). BOEM uploaded the report to regulations.gov (see link below)—https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_25.pdf

SFW claimed, it would have known, for example, of the NYDEC Site Characterization Reports for East Hampton Airport (November 2018) and Wainscott Sand & Gravel (July 2020). The NYDEC state agency-published reports pre-date SFW's COP (May 2021) by over two years (for East Hampton Airport) and over nine months (for Wainscott S&G). These reports were publicly available at— <https://extapps.dec.ny.gov/data/DecDocs/152250/> (for East Hampton Airport) and <https://www.dec.ny.gov/data/DecDocs/152254/> (for Wainscott S&G). These reports show severe PFOA, PFOS, and other PFAS contaminants in groundwater and soil within 500 feet *upgradient* and 150 feet *downgradient* (on both sides) of SFW's proposed construction corridor. So, either SFW did *not* review the NYDEC reports as it had claimed, or SFW *did* review them and decided to conceal from BOEM and the public information on environmental contamination that is a risk to public health *and* the environment.

147) Under the heading of “Affected Environment,” SFW's COP reads as follows—

[T]he SFEC - Onshore will occur near surface water ... and groundwater resources. This section describes the water resources in the ... SFEC and the metrics used to describe their condition *according to available data* [emphasis added].

(COP, at 4-56, PDF 224, 3rd ¶). The facts contradict SFW's statement. COP Section 4.2.2.1 “Affected Environment” (at 4-56–4-26, PDF 224–229) does *not* describe “water resources” in SFW's onshore SFEC construction corridor “according to available data” (*id.*). Available data includes, for example, groundwater test results from private drinking water wells in Wainscott performed by Suffolk County Department of Health Services (“SCDHS”) reported in June 2018. In January 2020, SFW received SCDHS's laboratory test results (for 303 private drinking-water wells) during the NYPSC proceeding in Interrogatory Si Kinsella #05 titled “PFAS Contamination” (ECF 93-25, at PDF 22-27). According to that data, “[t]hirteen (13) wells are above the USEPA Health Advisory Level (HAL) of 70 parts per trillion” and “eighteen (18) ... wells have detections of

combined PFOS/PFOA [contamination]... ranging from 22 ppt to 59.3 ppt.” (ECF 93-25, at PDF 17, 1st and 2nd buttel points). However, nowhere in SFW’s COP (of 630 pages) does it mention PFOA, PFOS, or *any* PFAS contaminants in groundwater *whatsoever*. You can try it yourself.

Open SFW’s final COP (May 2021), available at [boem.gov](https://www.boem.gov) (see link below)—

<https://www.boem.gov/Volume-I-Construction-and-Operations-Plan/> — and enter either “PFAS”

or “PFOA” or “PFOS” into the search field in Adobe Acrobat (ctrl + f), and the following

message will appear: “Adobe has finished searching the document. No matches were found.”

148) Under Section 4.2.2.1 “Affected Environment” under “Groundwaters,” it reads—

Most of the private groundwater wells and the wells that provide water to farms, golf courses, and industry tap the Upper Glacial Aquifer. Because the population is less dense and the threat of contamination in the aquifer is reduced, public supply wells in eastern Suffolk County also take water from the Upper Glacial Aquifer (LICAP, 2016).

(COP, at 4-60, PDF 228, 5th ¶). SFW phrases the sentences in such a way that the reader believes that “the threat of contamination” in the aquifer “is reduced” because of “population” density.

However, the quote is from a section of the report describing the aquifer system on Long Island in general terms. It is titled – “Where Does Our Water Come From?” Further in the body of the report, it reads— PFAS ²⁴ has “exceeded EPA health advisory levels in some areas of Long Island ... These contaminants underscore the need for continuing vigilance, in terms of monitoring for emerging contaminants and managing historic and ongoing potential sources of pollution.” *See* Long Island Commission for Aquifer Protection (“LICAP”), State of the Aquifer 2016 (at 32, PDF 36).²⁵ SFW misrepresents the report by failing to include the more relevant quote referring to the same contamination in Wainscott. Moreover, SFW refers to an *old* 2016 report, when four later reports are

²⁴ The Long Island Commission for Aquifer Protection (“LICAP”) State of the Aquifer 2016 Report uses the acronym “PFCs” (perfluorinated compounds), which is an outdated term for PFAS compounds.

²⁵ Available at— https://licaponline.com/wp-content/uploads/2020/08/LICAP_State_of_the_Aquifer_2016.pdf

available for 2017, 2018, 2019, and 2020. Those reports pre-date SFW’s final COP (May 2021) and are publicly accessible (last accessed December 2, 2023) at — <https://licaponline.com/reports/>. Had SFW evaluated a later report, for example, the 2020 State of the Aquifer LICAP report, it would have known that—

Per- and polyfluoroalkyl substances (PFAS) ... continue[s] to threaten public and private water supply wells in Suffolk County ... Since 2016, the SCDHS [Suffolk County Department of Health Services] has conducted 32 private well surveys and collected more than 1,000 private well samples for these chemicals, and about 180 private wells exceeded current New York State drinking water standards for PFOA and or PFOS ... As a result, public water has been extended to hundreds of homes in the areas of ... East Hampton”

See LICAP 2020, State of the Aquifer (published March 2021) (at 32, PDF 36).²⁶ Of the “180 private wells” that “exceeded” the NY “drinking water standards for PFOA and or PFOS,” more than half of those wells (65) were in Wainscott in the exact location where SFW proposed construction encroaching into and at the capillary fringe of the (contaminated) aquifer. SFW misleads the reader of its COP into believing there is no significant “threat of contamination” to the aquifer. On the contrary, the area near SFW’s proposed construction (upgradient within 500 feet) contains contaminants leaching into groundwater that NYDEC designed as “*a significant threat to public health*” See NYDEC Superfund Site Classification Notice for East Hampton Airport (ECF 93-13, 1st ¶).²⁷ Also, see Maps of PFAS Contamination Relative to SFW’s SFEC (ECF XXX), also provided to BOEM at the following links—

- https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_71.pdf
- https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_65.pdf

149) Groundwater throughout most of eastern Suffolk County is of

²⁶ See <https://licaponline.com/wp-content/uploads/2021/03/SOTA-2020-FINAL.pdf>

²⁷ Also, available at dec.ny.gov— www.dec.ny.gov/data/DecDocs/152250/ (last accessed Oct 29, 2023). Click on— “Fact Sheet.HW.152250.2019-06-19.East Hampton Airport Class 02 Listing.pdf” (at 1).

generally high quality (NYSDOH, 2003).

(COP, 4-60, PDF 228, last ¶). SFW uses outdated information from 2003. In 2003, government agencies were generally unaware of the dangers to public health and the environment posed by PFOA, PFOS, and other PFAS chemical contaminants. That awareness only began to develop a decade later.

150) All freshwater groundwater in New York State is Class GA, a source for potable water supply (NYSDOS, 2018b) With rare exceptions, potable water supplied by community water systems in Suffolk County meet[s] all drinking water quality standards.

(COP, 4-60, PDF 228, last ¶). SFW offers *no* substantiating reference. The reference provided “(NYSDOS, 2018b)” is a (broken) link to Westlaw 6 CRR-NY 701.15, which merely defines “Class GA fresh groundwaters” absent *any* geographic parameters. The reference is simply a legal definition. It reads— “The best usage of Class GA waters is as a source of potable water supply. Class GA waters are fresh groundwaters.”²⁸ That’s it. It does *not* state that “[a]ll freshwater groundwater” in NYS is “Class GA” and does *not* state that with “rare exceptions,” potable water “in Suffolk County meet[s] all drinking water quality standards.” The information provided by SFW is false and misleading. It is *not* a “rare exception” but significantly probable that potable water in the area where SFW proposed construction would *not* meet *all* drinking water quality standards. For example, of the (303) wells sampled in SCDHS’s Wainscott Well Survey, 30.4% exceed the EPA’s (proposed) National Primary Drinking Water Regulation for PFOA (4 ppt) or PFOS (4 ppt). A one-third likelihood (30.4%) that a private drinking water well in Wainscott exceeds the EPA’s (proposed) 2022 Primary Drinking Water Regulation is *not* a “rare exception” but a significant probability.

151) The onshore transition vault will be located outside wetlands and

²⁸ See <https://govt.westlaw.com/nycrr/Document/I4ed840d1cd1711dda432a117e6e0f345?>

other waterbodies.

(COP, at 4-67, PDF 235, 7th ¶). SFW’s statement is contradicted by the photograph in Complaint Appendix 1 (ECF 1-2, at 6), showing the transition vault sitting in the sole-source aquifer (towards the southern end of Beach Lane). The sole-source aquifer is a critical and essential waterbody because it is the *only* source of fresh water on the South Fork. The transition vault is *not* “located outside” but in that waterbody.

152) This COP includes *site* characterization and assessment of *potential impacts* for the Project ... The assessment is based upon the requirements set forth in **30 CFR § 585.627** and is also informed by input from ... *state agencies* and *other public and private stakeholders* in the region [emphasis added].

(COP, at ES-7, PDF 11). Contrary to the (above) statement, SFW does *not* include *any on-site* “potential impacts” from the reaction of its underground concrete infrastructure with known PFOA, PFOS, and other PFAS chemical contaminants in groundwater that, according to SFW’s *own* evidence, “may enhance the long-term persistence of PFAS in groundwater.” SFW’s “assessment” is *not* based upon the requirements set forth in **30 CFR § 585.627**’ Furthermore, had SFW intended for its COP to be “informed by input” from NY “state agencies” such as NYDEC and “other public and private stakeholders” such as SCDHS or Plaintiff himself, SFW could have included any number of publicly available reports with laboratory results all showing PFOA and PFOS contamination exceeding regulatory limits design to protect human health, but SFW did *not*. SFW’s statement is false.

153) The ... SFEC w[as] sited, planned, and designed to avoid and minimize impacts.

(COP, at ES-8, PDF 12 *and* 4-416, PDF 580). The SFEC was sited, planned, and designed a year *before* SFW submitted its initial COP to BOEM in September 2018. VHB Engineering, Surveying & Landscape Architecture, PC, provided SNC Lavalin with topographical land survey data on

August 25, 2017. SNC Lavalin’s survey drawings (using VHB Engineering’s topographical land survey data) all have a “PREPARED” date of October 18, 2017, indicating that SNC Lavalin surveyed the Beach Lane SFEC route sometime between August 25 and October 18, 2017.²⁹ SFW states that the “[r]outes associated with the Beach Lane landing site have the shortest distance to the existing East Hampton Substation; therefore, impacts of linear route construction are minimized” (COP, at 2-15, PDF 109, 9th ¶). In 2017, SFW determined that the shortest (and the least expensive) route to the East Hampton Substation was via Beach Lane; thus, it decided to land the cable at that beach and surveyed *only* that route. SFW did *not* have the other alternative routes professionally surveyed by SNC Lavalin. SNC Lavalin would have completed its survey of the Beach Lane SFEC route in early October 2017, around the same time SCDHS issued its Water Quality Advisory (on October 11, 2017). SCDHS had substantially completed the Wainscott Well Survey (of 303 private wells) by June 2018, and NYDEC released its Site Characterization Report for East Hampton Airport in November 2018. Therefore, NYDEC and SCDHS roughly knew the (lateral) extent of PFOA and PFOS contamination in Wainscott in 2018 *before* SFW submitted its initial COP to BOEM (in September 2018). Still, SFW did *not* change plans “designed” to use the Beach Lane SFEC route that ran through the middle of an area with severe environmental contamination “to avoid or minimize impacts” from its project. SFW could have altered its site plans at any time in the three years from when the extent of PFOA and PFOS contamination was generally known (in 2018) until it began construction (February 2022), but it did *not*. SFW claimed the Beach Lane SFEC route was “sited, planned, and designed to avoid and minimize impacts” but it was *not*. SFW designed its Beach Lane SFEC route without regard to its Project’s impact on known contamination.

²⁹ See South Fork Wind (SFW), formerly Deepwater Wind South Fork (DWSF), NYPSC Article VII Application, SFEC Onshore Survey by SNC Lavalin, Exhibit 5, Fig. 5.2-2 (at 1). Available at [dps.ny.gov](https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={A5CF4604-5074-4CE1-A030-CCFBB7160800}) (see link below)—<https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={A5CF4604-5074-4CE1-A030-CCFBB7160800}> (last accessed December 4, 2023).

Duty of Disclosure by SFW

154) SFW admits that “[t]he construction and operation of the Project will require a COP that is compliant with BOEM regulations (30 CFR § 585) and approved by BOEM prior to the start of construction.” (COP, at 1-29, PDF 76, 6th ¶). SFW claims that its “COP was prepared in accordance with ... BOEM’s Guidelines for Information Requirements for a Renewable Energy Construction and Operations Plan” (“BOEM’s 2016 Guidelines”) (COP, at 1-1, PDF 49, 2nd ¶). Still, SFW submitted to BOEM a COP that did *not* comply with BOEM regulations *or* BOEM’s 2016 Guidelines (as described below).

155) Under OCSLA regulations 30 C.F.R. § 585, SFW’s “COP **must** describe **all** planned facilities that you will construct and use for your project, **including onshore** ... [the] COP **must** describe **all** proposed activities ... for **all** planned facilities, **including onshore** ... [and SFW] **must** receive BOEM approval of [its] COP before [it] can begin **any** of the approved activities” (emphasis added) (30 C.F.R. § 585.620).

156) SFW admits that pursuant to OCSLA Regulation “30 CFR § 585.627(a) – [it] **must** submit with [its] COP detailed information to assist BOEM in complying with NEPA and other relevant laws [emphasis added]. [SFW’s] COP **must** describe those resources, conditions, and activities listed in the following table that could be affected by your proposed activities, or that could affect the activities proposed in your COP” (emphasis added) (COP, at 1-12, PDF 60, Table 1.0-1, 6th row). The “table” includes under the resource heading “(2) Water quality | Turbidity and total suspended solids from construction” (*id.*, 1-3, PDF 61, 1st row). However, BOEM’s 2016 Guidelines³⁰ provide more detailed instructions on the information BOEM requires applicants to

³⁰ BOEM’s 2016 Guidelines for Information Requirements for a Renewable Energy Construction and Operations Plan published by the Office of Renewable Energy Programs (OREP) (version 3.0, dated April 7, 2016) (“BOEM’s 2016 Guidelines”)

include in their COP. *See* BOEM’s 2016 Guidelines (ECF 34-10).³¹

157) According to BOEM’s 2016 Guidelines, “[t]he tables provided 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 such as ... the Coastal Zone Management Act (CZMA)” (ECF 34-10, at 19, 2nd ¶). Under “Attachment E: Information Requirements for NEPA and Other Relevant Laws” the guidelines state that “the level of detail will ultimately depend on the geographic extent of your activities, the duration or intensity of the impacting factors, and the sensitivity of resources in your project area. There should be enough detail to support the environmental analyses required by NEPA and other relevant environmental laws” (*id.*, at 36), such as the CZMA.

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³¹ For the purposes of this complaint, BOEM’s 2016 and 2020 Guidelines are substantively the same.

158) BOEM's 2016 Guidelines, Attachment E, read as follows—

[¶ 655]

	CONSTRUCTION AND OPERATIONS PLAN (COP) 30 CFR 585.627(a)(2) Water Quality		
	Construction Phase	Operation Phase	Conceptual Decommissioning Phase
Focus	<ul style="list-style-type: none"> Describe the existing water quality conditions and your project activities that could affect water quality. 		
Scope	<ul style="list-style-type: none"> Describe the water quality in 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. 		
Information Needs for COP Submittal	<ul style="list-style-type: none"> Describe the general state of water quality in the area proposed for your project by reporting typical metrics for quality including the following: dissolved oxygen; chlorophyll; nutrient content; seasonal variations in algae or bacterial content; upwelling conditions; presence or absence of contaminants in water or sediment; turbidity or water visibility states and variation. 		
Impacting Factors	<ul style="list-style-type: none"> Activities that disturb the sea bottom—the nature, intensity, and duration of disturbances to the sea bottom that may increase turbidity or affect other water quality conditions. Natural hazards—the environmental hazards and/or accidental events causing accidental releases of non-hazardous or hazardous materials and wastes. Accidental events—routine and accident releases from construction equipment, vessels, and installed facilities. 		
Other Potential Needs for COP Approval	<ul style="list-style-type: none"> Additional information may be needed to support the evaluation of water quality impacts, including but not limited to: <ul style="list-style-type: none"> Modeling of turbidity during foundation installation, cable jetting/burial, and cable landfall; Oil or other fluid spill probability and spill trajectory modeling; and Any Operation, Service and Maintenance Plan, Oil Spill Response Plan, Storm water Pollution Prevention Plan, and any other pollution control plan prepared to avoid and minimize impacts to water quality. If additional information requirements apply to the proposed project, provide any draft plans or quantitative assessments undertaken and/or describe any that are planned. 		
Monitoring (That You Propose)	<ul style="list-style-type: none"> Describe any monitoring activities you propose to undertake for construction and/or operations, as part of your COP proposal. 		

Environmental Protection Measures (That You Propose)	<ul style="list-style-type: none"> Describe any part of your project that is designed to minimize adverse effects on water quality. If an NPDES permit is required by the EPA or if Water Quality Certification is required by the state(s) or ACOE, include a summary of the anticipated reporting and monitoring requirements.
Presentation of Results	<ul style="list-style-type: none"> Provide succinct narratives by topic, at a level of detail appropriate to the scale of the impacts that each category of proposed activities may cause. Provide report(s) that present the methods used, results of, and conclusions reached by any numerical modeling performed. Include data/information in tables where appropriate. Include maps or tables where appropriate.

159) Notably, under Information *Needs* for COP Submittal, BOEM’s guidelines specifically request 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” (*see* above table, 3rd row).

160) BOEM’s 2016 Guidelines identify “contaminants in water” and refer explicitly to releases of “hazardous materials and wastes.” BOEM considers such environmental impacts as material facts in an environmental review; otherwise, BOEM would not have singled them out by including them as examples in its 2016 Guidelines.

161) Environmental PFAS, PFOS, and other PFAS compound contaminants in groundwater fit neatly into BOEM’s description under “Water quality.” They qualify as “contaminants in water” *and* as a release of “hazardous waste” (NY state classifies PFOS and PFOA chemical contaminants as hazardous wastes).

SFW knew of PFOA and PFOS groundwater contamination in Wainscott

162) In November 2019, over a year *before* SFW submitted its final COP to BOEM (in May 2021), Plaintiff served SFW (formerly Deepwater Wind South Fork LLC or DWSF) with Interrogatory Si Kinsella #1 (ECF 44-3). It reads—

In October of 2017, Suffolk County Department of Health Services (SCDHS) issued a *Water Quality Advisory for Private-Well Owners in Area of Wainscott*. The advisory notified residents and local authorities that contamination exceeding the US Environmental Protection Agency (EPA) lifetime health advisory level of 70 parts per trillion (ppt) for combined ... PFOS/PFOA had been detected in private drinking-water wells.

In June of 2018, SCDHS informed the Town of East Hampton that, within the Wainscott Private Well Survey Area ... “thirteen (13) wells are above the USEPA Health Advisory Level (HAL) ... The highest recorded ... level of 791 ppt ... is eleven-times the EPA standard and seventy four-times the NYS standard. The average level of contamination (166 ppt) is more than double the EPA standard of 70 ppt. The average level of contamination (58 ppt) above the NYS standard of 10 ppt is more than five-times that standard ... The majority of wells (54%) within the Wainscott Private Well Survey Area had detectible levels of PFOA or PFOS contamination ...

The [NY] Department of Environmental Conservation (NYS DEC) ... declared East Hampton Airport a “State Superfund” hazardous waste disposal site (codes: 152250 and 152156) and registered an adjacent former sand mine ... (code: 152254) as a “Potential” hazardous waste disposal site ... [a] *Site Characterization Report on PFAS Contamination at East Hampton Airport* ... (published November 30, 2018) [shows] levels of up to 299 ppt for combined PFOA/PFOS were recorded at East Hampton Airport which borders the proposed Beach Lane Route A cable corridor to the north. Contamination of 299 ppt is four-times the EPA standard and twenty nine-times the NYS standard.

Instead of verifying the authenticity of the NYDEC Site Characterization Reports or the SCDHS Wainscott Well Survey and addressing issues concerning contamination harmful to human health, SFW responded— “Deepwater Wind South Fork, LLC (“DWSF”) objects to the information asserted ... on the grounds that the information is inaccurate and not based in fact [emphasis added].” (ECF 44-4, at 1).

163) In January 2020, Plaintiff served SFW with Interrogatories Si Kinsella #3 through #10 and the following documents (as opposed to providing only references as he did in November 2019)—

- 2017 SCDHS Water Quality Advisory for Private-Well Owners in Area of Wainscott
- 2018 SCDHS Wainscott Well Survey (results of 303 private drinking water wells)
- 2016 EPA Fact Sheet: PFOA and PFOS Drinking Water Health Advisory (70 ppt)
- 2019 NY Proposes MCL for PFOS & PFOA (10 ppt) by R. Reagan, Philips Lytle
- 2020 NYDEC Site Remediation – East Hampton Airport 152250 (2 pages)
- 2020 NYDEC Site Remediation - East Hampton Airport 152156 (2 pages)
- 2019 NYDEC Map (DECinfo Locator) - Wainscott Remediation Sites (7 pages)
- 2018 NYDEC Site Characterization Report: East Hampton Airport (pp. 1-35)
- 2018 East Hampton Town Report on PFC Contamination (pp. 1-13) by Plaintiff
- 2018 SCDHS Laboratory Reports: Heat Map (main area) compiled by Plaintiff
- 2018 SCDHS Laboratory Reports: Heat Map (northern area) compiled by Plaintiff
- 2018 SCDHS Laboratory Reports: Wainscott Well Survey (416 pages) (*see link below*)—
<https://www.dropbox.com/s/bgew1xit1szsysa/SCDHS%20PFAS%20Lab%20Results%20in%20Response%20to%20FOIL%20by%20Si%20Kinsella%20%28416%20pages%29.pdf?dl=0>

See Interrogatories Si Kinsella #3 through #10 (ECF 93-25).

164) SFW responded to Interrogatories Si Kinsella #1 and #3 through #10 as required under NYS Public Service Law. Thus, SFW acknowledged receiving detailed information on existing PFAS groundwater contamination where it planned to build underground concrete infrastructure encroaching into and at the capillary fringe of an aquifer used for drinking water.

165) Despite updating its COP in July 2020 and again in May 2021, SFW did *not* include *any* of the information it received concerning PFAS groundwater contamination included in Plaintiff's Interrogatories Si Kinsella #1 (ECF 44-3) and Si Kinsella #3 through #10 (ECF 93-25).

166) During the NYPSC proceeding in September 2020, eight months *before* SFW submitted its final COP to BOEM (in May 2021), SFW received via the dps.ny.gov Document Matter Management ("DMM") system, Plaintiff's Testimony on PFAS Contamination that contained verifiable information on known PFOA and PFOS groundwater contamination in the vicinity of its proposed construction from the same two NYSDEC Site Characterization Reports. Plaintiff's

Testimony on PFAS Contamination is at [dps.ny.gov](https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={4206AC68-A6B5-4B9E-80FE-94D4B0388E4B}) (see link below)—

[https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={4206AC68-A6B5-](https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={4206AC68-A6B5-4B9E-80FE-94D4B0388E4B})

[4B9E-80FE-94D4B0388E4B}](https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={4206AC68-A6B5-4B9E-80FE-94D4B0388E4B}) (last accessed December 2, 2023). Plaintiff’s testimony included

the following two NYDEC Site Characterization Reports— [¶ 72]

c. East Hampton Airport (sites: 152250/152156) (see link below)—

[https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={AE1FE7CE-](https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={AE1FE7CE-FEB8-4FE2-96C2-8DA3A6F8288F})

[FEB8-4FE2-96C2-8DA3A6F8288F}](https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={AE1FE7CE-FEB8-4FE2-96C2-8DA3A6F8288F}) (last accessed December 2, 2023). [¶ 72(a)]

d. Wainscott Sand & Gravel (site 152254) (see link below)—

[https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={4C916857-](https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={4C916857-973E-411E-A56F-C897B4E8BE05})

[973E-411E-A56F-C897B4E8BE05}](https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={4C916857-973E-411E-A56F-C897B4E8BE05}) (last accessed December 2, 2023). [¶ 72(b)]

167) *The first time* SFW tested its onshore construction corridor for PFOA and PFOS contamination was in December 2020 and January 2021. Although, **that** SFW only *selectively* tested soil and groundwater within its construction corridor. SFW avoided taking samples where PFOA or PFOS contamination would likely exceed regulatory limits. See Plaintiff’s Letter “URGENT: Imminent Risk to Public Health” (March 11, 2022) (ECF 3-3, at 15-16, Figs. 7 & 8). Still, SFW’s *own* Environmental Investigation Report detected PFAS contamination in 20 wells within its 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). The report contains laboratory results for tests performed by GZA GeoEnvironmental (on behalf of Ørsted).

168) On April 21, 2021, SFW uploaded the report (revised April 1, 2021) to the NYSPSC DMM system (File No.: 282, Appendix H - Final HWPWP Part 3, Attachment E, at 8, PDF 34). The complete report is available at [dps.ny.gov](https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={7F6C6BBF-6053-) (see link below)—

<https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={7F6C6BBF-6053->

455D-AF06-E440FB46C63F} (at 23–137) (last accessed October 29, 2023).

169) PFOA contamination in groundwater detected at Beach Lane in Well MW-4A (50 ppt) exceeded the NY drinking water standard *by five times*.³² Groundwater PFOS contamination at the southern end of Wainscott NW Road in Well SB/MW-15A (14.7 ppt) exceeded the NY standard.³³ See SFW PFAS Test Results, *excerpts* (ECF 93-3, at 1–2).

170) The Eurofins laboratory report for Well MW-4A is dated January 22, 2021 (sampled January 14, 2021), and the report for Well SB/MW-15A is dated January 27, 2021 (sampled January 18, 2021). The test results pre-date by three months SFW’s final COP it submitted to BOEM in May 2021.

171) Although SFW included relatively harmless groundwater contaminants, such as “median groundwater nitrogen levels ... [that] have risen 40 percent to 3.58 mg/L” (COP, at 4-61, PDF 229, 1st sentence), it did *not* include its *own* test results showing *on-site* PFOA and PFOS groundwater contamination exceeding regulatory limits (designed to protect human health) in its final COP. SFW chose to conceal chemicals that “can cause cancer and other severe health problems.”

SFW’s Intent to Defraud

172) SFW admits that “[t]he purpose of this COP is to provide information about the Project to the Bureau of Ocean Energy Management (BOEM)” (COP, at 1-1, PDF 49, 2nd ¶).

173) SFW claims that its COP was prepared in accordance with 30 CFR § 585 and BOEM’s Guidelines for Information Requirements for a Renewable Energy COP (*id.*), the same BOEM 2016 Guidelines in the aforementioned table.

174) SFW admits that it “must submit with [its] COP detailed information to assist BOEM in

³² New York State Maximum Contamination Level (MCL): PFOA, 10 ppt and PFOS, 10 ppt.

³³ *Id.*

complying with NEPA and other relevant laws. [Its] COP must describe those resources, conditions, and activities listed in the following table that could be affected by your proposed activities, or that could affect the activities proposed in your COP” (COP, at 1-12, PDF 60, Table 1.0-1, 6th row), including “Water quality” (*id.*, at 1-13, PDF 61, 1st row). BOEM’s 2016 Guidelines unambiguously require that SFW “Describe the general state of water quality in the area proposed for your project by reporting typical metrics for quality including the ... presence or absence of contaminants in water.” OCSLA regulations 30 C.F.R. § 585 mandate that SFW’s “COP *must* describe all planned facilities that you will construct and use for your project, *including onshore*” (emphasis added) (30 C.F.R. § 585.620(a)) and that SFW “*must* receive BOEM approval of [its] COP before [it] can begin *any* of the approved activities” (emphasis added) (30 C.F.R. § 585.620(c)). Still, despite SFW’s legal obligations to impart information on the “presence or absence of contaminants in water” such as PFOA and PFOS contamination that poses “*a significant threat to public health*”³⁴ in the area where it proposes construction, SFW instead chose to conceal the information rather than disclose it to BOEM and the public.

175) SFW’s willful non-disclosure of PFOA and PFOS contamination that the EPA links to cancer, compromised immunity, and other adverse health effects to secure federal project approval mirrors similar acts by SFW during the NYPSC proceeding. SFW’s attempt to conceal PFOA and PFOS contamination is consistent across both federal and state environmental reviews.

176) SCDHS issued “Water Quality Advisory for Private-Well Owners in Area of Wainscott” in October 2017, which local and regional newspapers included on their front pages. Still, in September 2018, SFW filed its applications with BOEM *and* the NYPSC, proposing to install

³⁴ See NYDEC Airport Designation (ECF 93-13, 1st ¶)

underground transmission infrastructure through the middle of a highly contaminated area.

See PFAS Zone Map (link below). At boem.gov (last accessed December 2, 2023)—

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

177) In September 2020, Plaintiff submitted testimony on PFOA and PFOS contamination during the NYPSC proceeding in the hope that SFW would address issues concerning public health. Instead of taking environmental contamination seriously, SFW filed a Motion to Strike the testimony and evidence of contamination from the record (on November 5, 2020).³⁵ SFW’s Motion to Strike intended to remove evidence of PFAS contamination from the record and from consideration by the NYPSC contrary to Article VII of New York Public Service Law pursuant to which the Public Service “[C]ommission may *not* grant a certificate ... unless it shall find and determine ... the nature of the probable environmental impact ... [and] that the facility represents the minimum adverse environmental impact” (N.Y. Pub. Serv. Law § 126(b) and (c)). Federal *and* state environmental reviews require that SFW consider the “environmental impact” of its project, and in both cases, SFW sought to remove evidence of PFOA and PFOS environmental contamination from the record. SFW’s motion reads—

South Fork Wind, LLC (“SFW”) respectfully moves to exclude the following testimony ... the entirety of Mr. Simon Kinsella’s ... pre-filed direct testimony filed on October 9, 2020 pertaining to “economic impact” (“Part 2”) ... testimony filed on September 9, 2020 and October 9, 2020 regarding poly-/perfluoroalkyl substances (“PFAS”) contamination ... (“Rebuttal Testimony”) filed on October 30, 2020 regarding both economic impact and PFAS contamination. As explained herein, Mr. Kinsella’s testimony ... regarding PFAS is offered by an unqualified witness and therefore irrelevant to this proceeding.

See SFW Motion to Strike Testimony (at 1). Available at (last accessed December 2, 2023)—

³⁵ https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_56.pdf

https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_56.pdf. On November 24, 2020, the NYPSC denied (in part) SFW's Motion to Strike Plaintiff's testimony and admitted the evidence into the record (ECF 93-2) but closed the evidentiary hearing 14 days later (on December 8, 2020). Thus, the NYPSC allowed *only 14 days* to consider evidence of PFOA and PFOS contamination and *only off-site* contamination; it *never* considered *on-site* contamination.

178) On December 23, 2020 – *just fifteen days after* the NYPSC evidentiary record had closed (December 8, 2020), SFW tested groundwater for PFOA, PFOS, and other PFAS compounds *within* its proposed construction corridor *for the first time*. Although PFAS contamination was widely reported as early as *October 2017*, SFW waited over *two years* (from when it filed its application on September 14, 2018, until the NYPSC proceeding concluded on December 8, 2020) before testing its proposed construction site (on December 23, 2020). By delaying *on-site* testing for PFOA and PFOS contamination and other specific PFAS chemical compounds, SFW avoided examination and cross-examination of witnesses concerning test results, avoided environmental oversight by the NYPSC, and avoided public scrutiny. SFW's testing showed PFOA and PFOS contamination exceeding regulatory limits.

179) On January 13, 2021, Plaintiff filed a Motion to Reopen the Record to consider SFW's *on-site* environmental testing.³⁶ See NYPSC Motion to Reopen Record (January 13, 2021) at—<https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={2B61533B-F107-4EC7-BD4E-E57A85DB6204}> (last accessed December 4, 2023).

180) On January 21, 2021, SFW filed (in the NYSPSC Article VII 18-T-604 proceeding) the following response to a Motion to Reopen the Record that sought to include PFAS contamination test results of samples taken from within the SFEC construction corridor [¶ 432] —

³⁶ Also, see (at BOEM) Motion to Reopen Record by Simon Kinsella (Jan 13, 2021) (last accessed Dec 4, 2023) at — https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_25.pdf

“... *SFW is unlikely to encounter any PFAS contamination* during construction of the SFEC due to the fact that *it is not performing any excavation in areas where PFAS has been released*, such as the East Hampton Airport, and also because most of the *excavation will take place above the water table* [emphasis added].”

See NYPSC (case 18-T-0604), SFW’s Response to the Motion of Simon V. Kinsella to Reopen the Record (January 21, 2021) (at 17). Available at [dps.ny.gov](https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7bB6F06217-06FF-435E-9933-1715888577E9%7d) (see link below)—

<https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7bB6F06217-06FF-435E-9933-1715888577E9%7d> (last accessed December 5, 2023) and incorporated by reference.

181) In April 2022, SFW excavated and removed soil and groundwater to install a transition vault at the southern end of Beach Lane, Wainscott. A photograph taken at the time shows groundwater in the transition vault. See Complaint Appendix 1 (ECF 1-2, at 6) [¶¶ 433 – 434]

182) Contrary to SFW’s false statements during the NYPSC proceeding (above), SFW subsequently treated (in May 2022) PFAS-contaminated groundwater using four frac tanks with a combined capacity of 75,000 gallons and a Granular Activated Carbon filter at a treatment facility in the Town of East Hampton and planned to use another four frac tanks and a separate tank *on* Beach Lane. *Id.* (at 5). [¶ 435]

183) It was *not* unlikely that SFW would encounter PFAS contamination during the construction of SFW’s onshore SFEC.

184) In November 2019, Plaintiff informed SFW and provided references to verifiable objective substantiating evidence conclusively showing that PFOA and PFOS contamination existed along SFW’s Beach Lane SFEC route. Plaintiff concluded as follows—

[T]he Applicant’s Beach Lane Route A cable corridor passes through the middle of a highly contaminated area where soil and groundwater show high detectable levels of PFAS contamination. Contamination is known to exist on all sides of the Beach Lane Route A cable corridor, and it is, therefore, implausible that the

Beach Lane Route A cable corridor would not have been impacted with contamination that has been seeping into the aquifer from the East Hampton Town Airport (and other sites) and flowing southward towards the Atlantic Ocean since the 1950's.

See Interrogatory Si Kinsella #1, Assessment of PFAS Contamination (ECF 44-3, at 3, 6th ¶).

Also, see Heat Map of SCDHS Wainscott Survey Results (*id.*, at 2). In response, SFW (then Deepwater Wind South Fork, LLC) objected “to the information asserted ... on the grounds that the information is inaccurate ***and not based in fact***” (emphasis added). (ECF 44-4, at 1, 1st ¶).

185) On January 29, 2021, Plaintiff filed a Supplemental Motion to Reopen the Record to consider information on the South Fork RFP.³⁷ *See* NYPSC Motion to Reopen the Record, Supplemental Information (January 29, 2021) (last accessed December 4, 2023) at—
<https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={108A1910-8C5F-4503-8A9A-16FF769599DF}>.

186) On February 10, 2021, the NYPSC denied the Motions to Reopen the Record. *See* NYPSC Ruling on Motions (February 10, 2021) (last accessed December 4, 2023) at—
<https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={B65F11B6-7EC1-4962-B38A-389E602A4235}>

187) SFW successfully managed to keep its ***on-site*** test results showing PFOA and PFOS contamination exceeding regulatory limits out of the NYPSC (state) environmental review and kept ***all*** PFOA and PFOS test results (both off-site *and* on-site) out of BOEM's (federal) review. SFW's acts are consistent across two separate environmental reviews—the federal review under BOEM (according to NEPA and the CZMA) and the state NY Public Service Commission review (NY Public Service Law, Article VII). Across the two environmental examinations, from the start

³⁷ *Also, see* (at BOEM) Motion to Reopen Record, Supplemental Information by Simon Kinsella (Jan 13, 2021) (last accessed Dec 4, 2023) at— https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_32.pdf

(2018) to the finish (2021), SFW consistently acted to keep issues concerning environmental PFOA and PFOS contamination out of consideration.

188) If the environmental impact on groundwater PFOA and PFOS contamination from SFW's Project did *not* pose a potential risk to public health or the environment, then SFW would have no reason to keep evidence of such contamination out of consideration in the Project's federal and state environmental reviews. SFW's continuing attempts to conceal such evidence betray its guilty knowledge of PFOA, PFOS, and other PFAS contaminants in soil and groundwater and the need for SFW to hide them.

189) SFW intended to deceive regulators, the Public, and Plaintiff. Upon reading SFW's COP, one would reasonably believe Wainscott has no environmental contamination. After all, SFW *must* disclose potential environmental impacts in its COP. So, there must be none if there is no record of any. On the contrary, significant PFOA or PFOS groundwater contamination in Wainscott poses a potential risk to public health and the environment in the area where SFW installed its underground infrastructure. That threat is continuing.

190) Even after removing the primary source of PFOA and PFOS contamination (at East Hampton Airport), SFW's underground infrastructure will likely act as a *secondary source* of PFOA and PFOS contamination that will continue releasing chemical contaminants into groundwater (a sole-source aquifer) and connected the waters of Georgia and Wainscott Ponds.

191) SFW's claim that its "COP includes *site characterization and assessment of potential impacts*" that is "informed by input" from "*state agencies*" (COP, at ES-7, PDF 11) is contradicted by BOEM's Record of Decision that does *not* include *any* New York state agency as a cooperating agency in the development of the FEIS for SFW's COP (*see* ROD, at 1, PDF 3, 2nd ¶). SFW's claim is also contradicted by numerous site characterization reports prepared for NYDEC (a state

agency) showing extensive PFOA and PFOS environmental contamination. Plaintiff “informed” SFW by providing it with the site characterization reports from NYSDEC (a “state agency”), but SFW did *not* “input” its findings. Like so many other statements by SFW, its assertion that its COP’s “*site characterization and assessment* ... is also *informed by input* from ... *state agencies*” (COP, at ES-7, PDF 11) is false.

192) SFW deceives the reader of its COP into believing there is no environmental PFOA or PFOS groundwater contamination in Wainscott, contradicting overwhelming and conclusive evidence of such contamination the NYDEC designated as “a significant threat to public health” (ECF 93-13, at 1, 1st ¶)³⁸ in the area where it installed underground infrastructure encroaching into and at the capillary fringe of a sole-source aquifer.

Reasonable Reliance by Plaintiff

193) During a presentation by SFW to the Wainscott Citizens’ Advisory Committee (“WCAC”) in 2017, SFW claimed that it would—

- “Account for site specific conditions” (slide 19);
- “Leave area in better condition than we found it” (slide 18); and that
- “Permitting will involve many Municipal, State, and Federal Agencies”— including “New York State” and the “Bureau of Ocean Energy Management” (slide 13) (with the implication that such permitting would be lawful).

See WCAC Slide Presentation by SFW (August 5, 2017) marked Exhibit 000 (ECF 102-3).

The WCAC meeting minutes note that the permitting process would be “intentionally designed for transparency” and “include technical and environmental impact studies.” See WCAC Meeting Minutes (August 5, 2017) marked Exhibit 000 (ECF 102-3).

194) At the time, Plaintiff was a member of the WCAC and Chairman of its Environmental

³⁸ See DEC State Superfund Site Classification Notice for East Hampton Airport (2019) (ECF 93-13, at 1, 1st ¶).

Subcommittee tasked with assessing water quality *and* SFW's Project.

195) Since 2017, Plaintiff has tried to get SFW to "[a]ccount for site specific conditions" such as its project's impact on PFOA, PFOS, and other PFAS contaminants in soil and groundwater.

196) SFW has neither delivered the (legally sufficient) "technical and environmental impact studies" it promised in 2017, been transparent, nor left the area in a better condition. Instead, SFW compromised the federal *and* state environmental reviews by concealing material information on its Project's impacts on known PFOA, PFOS, and other PFAS contaminants in soil and groundwater, and has left two-and-a-half miles of concrete underground that will likely exacerbate and prolong such contamination.

197) Plaintiff has had to rely on SFW to perform environmental testing of soil and groundwater because he has neither the authority nor resources to test soil and groundwater within sealed roads owned by the Town of East Hampton and New York State.

Damage to Plaintiff

198) Since February 2022, SFW has poured concrete into trenches and installed concrete vaults encroaching into and at the capillary fringe of a sole-source aquifer for approximately two-and-a-half miles through Plaintiff's neighborhood. According to SFW's *own* evidence, materials such as "concrete may enhance the long-term persistence of PFAS in groundwater." SFW did *not* consider the reaction of its concrete infrastructure on known PFOA, PFOS, and other PFAS chemical compounds in groundwater. SFW admits that it is plausible that such a reaction with "concrete may enhance the long-term persistence of PFAS in groundwater." The hydrogeology surrounding SFW's infrastructure includes Wainscott Pond and Georgica Pond, which are linked "to the underground aquifers, the sole source of drinking water for the Town." Plaintiff is uncertain as to the extent to which SFW's underground concrete infrastructure will adversely

impact groundwater, a sole-source aquifer, and the connected surface waters of Wainscott and Georgica Ponds because SFW did *not* consider the impacts of its construction on PFOA, PFOS, and other PFAS chemical compounds in groundwater. Even after the primary source of contamination is removed (at East Hampton Airport), SFW's underground infrastructure will likely continue to act as a secondary source of contamination, prolonging the adverse environmental effects of PFOA, PFOS, and other PFAS chemical compounds in Wainscott's groundwater.

199) Consequently, Plaintiff avoids swimming in Georgica Pond and sailing on windy days when he may capsize. Plaintiff installed filters in his home at significant expense and has his water checked regularly, at a substantial cost. Despite these measures and because of SFW's misrepresentations, Plaintiff will likely be exposed to further contamination, for example, via locally grown crops irrigated with groundwater or through third parties' groundwater use.

200) Plaintiff relied on SFW's representations during the WCAC meeting in 2017 and has spent years laboring under the belief that SFW would "[a]ccount for site specific conditions" as it promised to do. However, SFW has *not* made good on that promise. Instead, SFW has obfuscated, frustrated, bullied, and harassed Plaintiff even to the extent of filing a (false) police report making a thinly veiled threat of "possible criminal charges" founded on demonstrably untrue statements. *See* Town of East Hampton Police Department Event Report (EHT-EV-2746-22) and letter from Plaintiff in response (ECF 19-3). SFW subsequently withdrew its spurious claims.

X. COASTAL ZONE MANAGEMENT

201) The Office of Ocean and Coastal Resources Management ("OCRM") approved the Town of East Hampton Local Waterfront Revitalization Program ("East Hampton LWRP"). In 2008,

the OCRM incorporated East Hampton LWRP into the NY Coastal Zone Management Program (CZMP) according to the Coastal Zone Management Act (“CZMA”) (16 U.S.C. 1451 *et seq.*).

See East Hampton LWRP (ECF 3-4, at PDF 39 – 40). [¶ 360]

202) Under 15 C.F.R. § 930.57, SFW “shall provide in the application to the federal licensing or permitting agency [BOEM] a certification that the *proposed activity complies* with and will be conducted in a manner consistent with the management program” (the East Hampton LWRP).

203) Accordingly, SFW provided BOEM with a Federal Consistency Statement for New York marked Appendix A to its COP (ECF 34-11). *Also*, available at boem.gov (last accessed November 30, 2023)— www.boem.gov/sites/default/files/renewable-energy-program/State-Activities/NY/App-A_SF WF_CZM-Rvw-2019-01-09.pdf

204) SFW’s Federal Consistency Statement reads as follows—

DWSF [SFW]^[39] has prepared a consistency statement that reviews the Project for consistency with the enforceable policies ... [in] the Town of East Hampton Local Waterfront Revitalization Program (LWRP), see Appendix A-1. With respect to required federal licenses or permits under 15 CFR § 930.57(b), *the proposed activity complies with the enforceable policies of the New York State approved management program* and will be conducted in a manner consistent with such program [emphasis added]. Additionally, *with respect to the COP*, under 15 CFR § 930.76(c), *the proposed activities described in detail in this plan comply with the New York approved management program* and will be conducted in a manner consistent with such program [emphasis added].

See SFW Consistency Statement (ECF #34-11, at A-1 to A-2, PDF 2 – 3).

205) Under the CZMA, Federal Consistency applies to the Enforceable Policies in the East Hampton LWRP. The Local Waterfront Revitalization Program (LWRP) describes the area

³⁹ South Fork Wind LLC (SFW), formerly Deepwater Wind South Fork LLC (DWSF)

where SFW installed underground infrastructure for high-voltage cables, including concrete duct banks and vaults that encroach into and are at the capillary fringe of a sole-source aquifer used for drinking water, crop irrigation, etc. It is the *only* source of freshwater on the South Fork. *See* East Hampton LWRP (ECF 3-4, at PDF 30 – 909). [¶ 361]

206) SFW does not identify Wainscott Pond at all in its COP, and it does not discuss its local designation as a Significant Coastal Fish and Wildlife Habitat and DEC-classified Freshwater Wetland. [¶ 388]

207) According to SFW’s Federal Consistency Statement for New York— “The summary tables present descriptions of how the ... South Fork Export Cable (SFEC) will be consistent with each applicable policy” *See* SFW Federal Consistency Statement (2019) (ECF #34-11, at A1, PDF 2, 3rd ¶).

208) The following East Hampton LWRP Enforceable Policies (38, 38A, and 44) all concern the quality of Wainscott’s groundwater and surface waters, specifically Wainscott Pond and Georgica Pond.

209) **POLICY 38** THE QUALITY AND QUANTITY OF SURFACE WATER AND GROUNDWATER SUPPLIES WILL BE CONSERVED AND PROTECTED, PARTICULARLY WHERE SUCH WATERS CONSTITUTE THE PRIMARY OR SOLE SOURCE OF WATER SUPPLY

See East Hampton LWRP (ECF 3-4, at XII-72, PDF 654) [¶ 369]

210) **POLICY 38A** MAINTAIN WATER RESOURCES AS NEAR TO THEIR NATURAL CONDITION OF PURITY AS REASONABLY POSSIBLE TO SAFEGUARD PUBLIC HEALTH

See East Hampton LWRP (ECF 3-4, at XII-72, PDF 654) [¶ 370]

211) The East Hampton LWRP provides the following explanation for Policies 38 and 38a—

Groundwater is the principle [*sic*] source of drinking water in the Town and therefore must be protected. Since Long Island's groundwater supply has been designated a 'sole source aquifer,' *all actions must be reviewed relative to their impacts* on the Long Island *aquifer* [emphasis added] [*id.*]. [¶ 371]

- 212) **POLICY 44** PRESERVE AND PROTECT TIDAL AND FRESHWATER WETLANDS AND PRESERVE THE BENEFITS DERIVED FROM THESE AREAS [¶ 390]

See East Hampton LWRP (ECF 3-4, at XII-76, PDF 658)

- 213) **Explanation of policy:**

The benefits derived from the preservation of tidal and freshwater wetlands include but are not limited to:

- (1) Providing habitat for wildlife and fish, including rare and endangered species and a substantial portion of the State's commercial finfish and shellfish resources;
- (2) Providing the foundation of and vital contributions to aquatic and terrestrial food chains;
- (3) Controlling erosion and storm flooding through absorption of flood waters and dampening of wave action;
- (4) Limiting pollution through absorption and filtering of contaminants;
- (5) Groundwater protection;
- (6) Recreational opportunities;
- (7) Educational and scientific opportunities; and
- (8) Esthetically pleasing open space in otherwise densely developed areas.

See East Hampton LWRP (ECF 3-4, at XII-76, PDF 658).

- 214) The East Hampton LWRP provides the following explanation for Policy 44—

All structures and uses ... shall be located on upland sites and in a location so that *no wetland will be* diminished in size, *polluted, degraded* or lost, *or placed in peril* in order to establish the structure or use” (*id.*, at XII-78, PDF 660, ¶ (1)). [¶ 390]

XI. SUNRISE ALTERNATIVE IGNORED

215) BOEM received comments with supporting documentation showing that transmitting power from farther western mid-Long Island (to the Town of East Hampton) was technically feasible and part of LIPA’s existing plan. [¶ 252]

216) In October 2019, LIPA issued a press release stating that— “LIPA will also buy an estimated 90 MW of offshore wind from the recently announced 1,700 MW of New York State projects.” *See* SFW Fact Sheet (ECF 93-31, at p. 3, ¶ 3). Available at boem.gov—
https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_50.pdf [¶ 253]

217) The “recently announced 1,700 MW of New York State projects” refers to Empire Wind (816 MW) and Sunrise Wind (880 MW). [¶ 254]

218) LIPA can purchase power from Sunrise Wind. Thus, according to the LIPA Fact Sheet, LIPA plans to buy 90 MW of power from Sunrise Wind [¶ 255]

219) LIPA’s plan to buy energy from an offshore wind farm (Sunrise Wind) via an alternative onshore landing site mid-Long Island is technically feasible. [¶ 257]

220) The Fact Sheet states that “LIPA will responsibly buy offshore wind,” under which it reads: “Share of Recent NYSERDA Awards: Estimated @ 90 MW” and “Future Offshore Wind Projects: Estimated @ 800+MW” *See* SFW Fact Sheet (ECF 93-31, at p. 3, top right graphic).
 At— https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_50.pdf [¶ 258]

221) BOEM received comments on an alternative to South Fork Wind that would combine it with Sunrise Wind (the “Sunrise Alternative”). [¶ 260]

222) The Sunrise Alternative would be technically, environmentally, and economically superior to the South Fork Wind Farm. [¶ 261]

223) SFW and Sunrise Wind each use the same alternating current interconnection cable array

that could used to connect the two offshore wind farms. [¶ 262]

224) The SFWF is only a few miles from the Sunrise Wind Farm on the OCS. [¶ 263]

225) SFW and Sunrise Wind are owned (indirectly) by the same joint and equal partners, Ørsted and Eversource. [¶ 264]

226) The (interconnected) Sunrise Alternative would avoid onshore PFAS contamination (that SFW would have to remediate).

227) By eliminating sixty-six (66) miles of trenching, the Sunrise Alternative would reduce transmission cable requirements and the ongoing impact on the onshore hydrogeology and the offshore marine environment. [¶ 265]

228) BOEM (falsely) asserts that— “No other cable landing site alternatives were identified during Project development or scoping ... (see New York Article VII submitted by SFW)” (FEIS, p. 2-19, PDF p. 45, final ¶). [¶ 266]

229) Contrary to BOEM’s (false) claim, the Sunrise Alternative *was* identified and discussed during the project’s development and scoping *and* the New York State Public Service Commission proceeding to which BOEM refers. [¶ 267]

230) The NYPSC's final ruling identifies the Sunrise Alternative *eight times*. [¶ 268]

231) The Commission's final ruling discussed the proposition “that the Sunrise Wind project and the South Fork Wind project should be combined, concluding that two nearby, but separate, projects make little economic sense.” *See* NYSPSC (18-T-0604), Order Adopting Joint Proposal issued March 18, 2021, at 88, ¶ 3). [¶ 269]

232) BOEM (falsely) asserts that “the final EIS evaluates and discloses the impacts of ... the Beach Lane ... site” (FEIS p. 2-20, PDF p. 46, ¶ 1) as grounds for *not* carrying forward alternatives that would have eliminated the site, such as the Sunrise Alternative. However,

BOEM neither “evaluates” nor “discloses” critical environmental impacts concerning known PFAS soil and groundwater contamination along Beach Lane. [¶¶ 270 – 270]

233) BOEM neither acknowledged nor considered the alternative to South Fork Wind that would combine it with Sunrise Wind. [¶ 272]

234) On November 8, 2021, NYSPSC General Counsel Robert Rosenthal filed Answers to the Petition of *Simon V. Kinsella v. NYSPSC* (index 2021-06572, N.Y. App. Div., 2d Dep’t).⁴⁰ See Verified Petition (ECF 93-22) and Verified Answer (ECF 93-23).

235) General Counsel Robert Rosenthal admitted the following —

a) Petition Paragraph 62—

In January 2017, LIPA and PSEG Long Is., acting on behalf of LIPA, awarded SFW^[41] a PPA for the supply of energy at an average price of **22 cents** per kWh over the life of the contract (see Exhibit 2 [ECF 93-15]).^[42]

b) Petition Paragraph 63—

LIPA plans to purchase the same offshore wind renewable energy from another wind farm, Sunrise Wind, for **8 cents per kWh**, nearly one-third the price of SFW (see Exhibit 3 [ECF 93-24] – Ørsted’s Sunrise Wind PPA (at p. 1)).

c) Petition Paragraph 64—

The two offshore wind farms – SFWF and Sunrise Wind Farm – are only two miles apart and are owned and controlled indirectly by the same joint and equal partners, Ørsted and Eversource.

⁴⁰ In answer to Verified Petition in *Simon V. Kinsella v. NYSPSC* (index 2021-06572, N.Y. App. Div., 2d Dep’t). See Exhibit 22, Verified Petition, and Exhibit 23, Verified Answer

⁴¹ At the time, South Fork Wind LLC was known as Deepwater Wind South Fork LLC.

⁴² Exhibit 2 [ECF 93-15]– LIPA Est. Contract Value (at p. 1) - New York Office of the State Comptroller, Estimated Contract Value of Power Purchase Agreement between LIPA and Deepwater Wind South Fork LLC. Total Projected Energy Deliveries (MWh) over the 20-year contract term is 7,432,080 MWh (371,604 MWh per year for 20 years). Total Annual Contract Payments over the 20-year contract term is \$1,624,738,893. Average contract price over the term is \$218.61 per MWh (\$1,624,738,893 divided by 7,432,080 MWh) or **21.9 cents per kWh**.

236) According to LIPA, Total Projected Energy Deliveries for SFW over the 20-year contract term is 7,432,080 MWh, and Total Annual Contract Payments over the same period are \$1,624,738,893. SFW's average renewable energy price is \$218.61/MWh or 21.9 cents/kWh. See LIPA Contract Valuation for SFW (ECF 93-15).

237) Had LIPA purchased the same energy (i.e., 7,432,080 MWh) but from Sunrise Wind at the published PPA price of \$80.64/MWh (instead of SFW \$218.61/MWh), LIPA would have to pay only \$599,322,931 (instead of SFW \$1,624,738,893).

238) In other words, the *same renewable energy* from Sunrise Wind (*not* SFW) would save Suffolk County ratepayers \$1,025,404,078.

FIRST CLAIM FOR RELIEF

DEFENDANT SFW knowingly made false and misleading material statements regarding water quality in its COP in violation of OCSLA Reg. 30 CFR Part 585, constituting common-law fraud.

239) Plaintiff incorporates by reference and realleges paragraphs 1 through 238 as if set forth in full herein.

240) Pursuant to OCSLA regulations 30 C.F.R. Part 585, Defendant South Fork Wind LLC ("SFW") submitted its final Construction and Operations Plan (May 2021) ("COP") to Defendant Bureau of Ocean Energy Management ("BOEM") for environmental and socioeconomic review and approval on or around May 7, 2023.

241) SFW made material misrepresentations *and* omitted material facts from its COP in the knowledge that its representations were false and its omissions misrepresented the environment and its Project's impact thereon, intending to seek approval of the Final Environmental Impact Statement ("FEIS") (for its COP) *and* its COP based on its misrepresentations and omissions,

which it did on November 24, 2021, and January 18, 2022, respectively.

242) SFW had a legal duty to disclose PFOA, PFOS, and other PFAS contaminants in its COP that posed a potential risk to public health and the environment but did not.

243) SFW admitted that it “**must** submit with its COP detailed information to assist BOEM in complying with NEPA and other relevant laws” and “**must** describe those resources, conditions, and activities” under 30 CFR § 585.627 “that **could be** affected by” its proposed activities or affect its activities (emphasis added) (COP, at 1-12, PDF 60, Table 1.0-1, 6th row). Under 30 C.F.R. § 585, SFW “**must** describe” all planned facilities and activities, including those *onshore*, and that SFW “**must** receive” BOEM’s approval of its COP “before it can begin **any** of the approved activities” (emphasis added) (30 C.F.R. § 585.620). Accordingly, SFW had a duty to describe groundwater resources, their condition, and activities that could affect or be affected by its proposed Project.

244) Plaintiff and the public justifiably relied on SFW to submit a legally sufficient COP.

245) Plaintiff justifiably relied on SFW’s representations made during the Wainscott Citizens’ Advisory Committee (“WCAC”) meeting on or around August 5, 2017, that it would account for site-specific conditions, leave the area in a better condition, and (legally) obtain permits from state and federal agencies.

246) Plaintiff had no choice but to rely on SFW’s site-specific environmental analysis and its compliance with state and federal permitting requirements, as they are outside his control.

247) Still, Plaintiff diligently tried for years to get SFW to honor the promises it made in 2017.

248) Plaintiff had neither the authority nor resources to perform environmental testing in sealed right-of-way in Wainscott, owned by the Town of East Hampton and New York State.

249) As a direct and proximate consequence of SFW’s fraudulent misrepresentations during

the WCAC meeting (August 2017) and in its COP (May 2021), SFW has harmed Plaintiff and his environment by pouring concrete into trenches and installing concrete vaults encroaching into and at the capillary fringe of a sole-source aquifer for approximately two-and-a-half miles through Plaintiff's neighborhood knowing that it is likely materials such as concrete may enhance the long-term persistence of PFOA, PFOS, and other harmful PFAS chemical compounds in groundwater, among other injuries.

250) SFW's underground infrastructure will adversely impact the hydrogeology in Wainscott, where Plaintiff lives, including the aquifer that is his sole source of drinking water.

251) Groundwater in Wainscott is a sole-source aquifer, meaning that it is the *only* source of freshwater used for drinking, cooking, bathing, and crop irrigation, among other uses. Suffolk County Water Authority pumps groundwater from the aquifer in Wainscott to areas on the South Fork outside Wainscott. It is a critical waterbody that residents depend upon daily for living. Information concerning aquifer contamination from PFOA, PFOS, and other PFAS chemical compounds the EPA links to cancer, compromised immunity, and other adverse health effects is material to the health and well-being of residents living in Wainscott *and* outside Wainscott.

252) SFW misrepresented groundwater quality in its COP by omitting material information concerning PFOA, PFOS, and other PFAS contaminants that are a potential risk to public health *and* the environment.

253) SFW had prior knowledge of the nature and extent of PFOA, PFOS, and other PFAS contaminants in soil and groundwater in the area where it planned to construct underground concrete infrastructure encroaching into and at the capillary fringe of a sole-source aquifer.

254) Without regard to potential risks that its project may exacerbate and prolong PFOA, PFOS, and other PFAS contaminants in a sole-source aquifer, SFW omitted such information

from its COP, intending to secure project approval based on its material misrepresentations of water quality by omission contrary to a clear duty of disclosure.

255) SFW submitted its COP to BOEM on or around May 7, 2021, and based on that COP, BOEM issued a FEIS in August 2021. BOEM then issued a Record of Decision approving the FEIS for SFW's COP (on November 24, 2021) and approved the COP (on January 18, 2022) based on SFW's material misrepresentations of groundwater quality. The following month (February 2022), SFW commenced construction based on permits obtained fraudulently.

256) As a direct and proximate consequence of Defendant SFW's fraudulent misrepresentations on or around August 5, 2017, Plaintiff suffered injury from relying on SFW's representations that, among other false representations, it would account for site-specific conditions and (legally) obtain appropriate regulatory permits.

257) Plaintiff is uncertain as to the extent to which SFW's underground concrete infrastructure will adversely impact groundwater, a sole-source aquifer, and the connected surface waters of Wainscott and Georgia Ponds because it did *not* consider the impacts of its construction on PFOA, PFOS, and other PFAS chemical compounds in groundwater.

258) Even after the primary source of contamination is removed (at East Hampton Airport), SFW's underground infrastructure will likely continue to act as a secondary source of contamination, prolonging the adverse environmental effects of PFOA, PFOS, and other PFAS chemical compounds in Wainscott's groundwater. Consequently, Plaintiff's home is less valuable.

259) Due to SFW's fraudulent acts, Plaintiff avoids swimming in Georgica Pond and sailing on windy days when he may capsize. Plaintiff installed filters in his home at significant expense and has his water checked regularly, at a substantial cost. Despite these measures and because of SFW's misrepresentations, Plaintiff will likely be exposed to further contamination, for example, via locally

grown crops irrigated with groundwater or through third parties' groundwater use.

260) Plaintiff relied on SFW's representations during the WCAC meeting in 2017, but SFW has *not* made good on those promises. Instead, SFW has obfuscated, frustrated, bullied, and harassed Plaintiff to the extent of filing a false police report against Plaintiff, making a thinly veiled threat of "possible criminal charges" founded on demonstrably untrue statements. *See* Town of East Hampton Police Department Event Report (EHT-EV-2746-22) and subsequent letter from Plaintiff in response (ECF 19-3). SFW has since withdrawn its spurious claims.

261) SFW has harmed Plaintiff and damaged his immediate environment.

262) On or around May 7, 2021, SFW knowingly misrepresented groundwater quality in Wainscott by omitting material information from its COP concerning PFOA, PFOS, and other PFAS contaminants that posed a potential risk to public health and the environment that it had a legal duty to disclose, intending to deceive Plaintiff and the public into believing that such contamination if it existed posed no threat to public health or the environment to secure approval of its Project without objection from Plaintiff or the public. Plaintiff justifiably relied on SFW's fraudulent misrepresentations because he had neither the authority nor means to conduct testing on property owned by the Town of East Hampton and New York State. As a direct and proximate consequence of SFW's fraudulent misrepresentations, SFW has substantially increased the risk that Plaintiff and the public will suffer adverse effects to his health from excess exposure to PFOA, PFOS, and other PFAS contaminants in groundwater and the environment to which he would not otherwise have been exposed. SFW's actions satisfy the requisite elements of common-law fraud in New York State.

263) During the Wainscott Citizens' Advisory Committee ("WCAC") meeting on or around August 5, 2017, SFW (formerly Deepwater Wind South Fork LLC) represented to Plaintiff, other

WCAC members, and the public that it would account for site-specific conditions, leave the area in better condition, and (legally) obtain permits from state and federal agencies.

264) Since August 2017 (ongoing), SFW has not refused to account for site-specific conditions concerning PFOA, PFOS, and other PFAS contaminants that posed a potential risk to public health and the environment, has not left the area in better condition by leaving concrete infrastructure underground for approximately two-and-half miles through Plaintiff's neighborhood that it admits may prolong PFAS contamination in groundwater, and obtained permits from state and federal agencies based on fraudulent misrepresentations that could be invalidated. Plaintiff justifiably relied on SFW's fraudulent misrepresentations during the WCAC meeting because he had no power to do more than he is now pursuing a legal remedy. As a direct and proximate consequence of SFW's fraudulent misrepresentations in August 2017, SFW has caused anxiety, stress, loss of money (lots of it), emotional pain, suffering, inconvenience, frustration, mental anguish, loss of reputation, loss of quality and enjoyment of life, and an increased the risk of adverse effects to his health from excess exposure to PFOA, PFOS, and other PFAS contaminants in groundwater and the environment to which he would not otherwise have been exposed. SFW's actions satisfy the requisite elements of common-law fraud in New York State.

Relief Sought

265) Plaintiff and the public are entitled to, and Plaintiff seeks a judgment declaring that Defendant SFW engaged in conduct constituting common law fraud.

266) Plaintiff and the public are entitled to, and Plaintiff seeks a judgment declaring that Defendant SFW submitted false information to a federal agency material to its Project review and approval.

267) Plaintiff and the public are entitled to a judgment setting aside approvals based on Defendant SFW's fraudulent misrepresentations.

268) Plaintiff has been injured as a direct and proximate consequence of Defendant SFW's fraudulent misrepresentations since 2017 that continue as alleged herein, causing Plaintiff to suffer monetary damages to be assessed at trial against Defendant SFW sufficient to vindicate the public interest, including but not limited to making Plaintiff whole by compensating him for expenses, time, opportunity lost, emotional pain, suffering, inconvenience, anxiety, frustration, mental anguish, loss of reputation, loss of quality and enjoyment of life, and other damages with pre-judgment and post-judgment interest as applicable in addition to litigation costs.

269) Plaintiff and the public are entitled to an order compelling Defendant SFW to dismantle, remove, and remediate any damage and return the SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and any other infrastructure and equipment related to the Project.

270) Awards such additional relief as the interests of justice may require.

SECOND CLAIM FOR RELIEF

DEFENDANT SFW failed to provide a complete Federal Consistency Certificate for New York with its COP in violation of 15 C.F.R. § 930.76(a)(3) constituting common-law fraud.

271) Plaintiff incorporates by reference and realleges paragraphs 1 through 238 as if set forth in full herein.

272) Defendant South Fork Wind LLC ("SFW") "shall submit ... (3) The necessary data and information required pursuant to § 930.58" (15 C.F.R. § 930.76(a)), which requires that SFW "shall include ... (3) An evaluation that includes *a set of findings relating the coastal effects* of the proposal and its associated facilities *to the relevant enforceable policies* of the management

program. *Applicants shall demonstrate that the activity will be consistent with the enforceable policies* of the management program. *Applicants shall demonstrate adequate consideration of policies* which are in the nature of recommendations.” (15 C.F.R. § 930.58)

273) The Town of East Hampton Local Waterfront Revitalization Program (“East Hampton LWRP”) (ECF 3-4, at PDF 30 – 909) is the approved Coastal Zone Management Program for Federal Consistency Certification purposes.

274) **POLICY 38A** MAINTAIN WATER RESOURCES AS NEAR TO THEIR NATURAL CONDITION OF PURITY AS REASONABLY POSSIBLE TO SAFEGUARD PUBLIC HEALTH

See East Hampton LWRP (ECF 3-4, at XII-72, PDF 654) [¶ 370]

Explanation of policy:

Groundwater is the principle [*sic*] source of drinking water in the Town and therefore must be protected. Since Long Island's groundwater supply has been designated a "sole source aquifer", *all actions must be reviewed relative to their impacts* on the Long Island aquifer ... Given the vulnerability of the Town's ground water supplies and its value as a sole source of drinking water, all available practical methods of preventing and controlling water pollution shall be utilized ... the following guidelines should apply throughout the Town's waterfront area ... (8) *Discourage the siting of commercial or industrial facilities with the potential for ground or surface water pollution.*”

Id. (at XII-73, PDF 655) SFW’s Federal Consistency Certificate does *not* list, and SFW does not address East Hampton LWRP Enforcible Policy 38A. [¶ 374]

275) The East Hampton LWRP includes Enforcable Policy 38A with a noted qualification—“For Policy 38A, only the eight guidelines identified in the LWRP are applicable.” See East Hampton LWRP (ECF 3-4, PDF 39, last ¶).

276) Specifically, SFW ignores Policies 38A, guideline eight (8) that “[d]iscourage[s] the siting of commercial or industrial facilities with the *potential* for ground or surface water pollution [emphasis added]” (ECF 3-4, XII-73, PDF 655). [¶ 375]

277) SFW's high-voltage (138 kV) transmission cable is a "Major utility transmission facility" (N.Y. Pub. Serv. Law § 120) designed to deliver electrical energy to tens of thousands of homes in Suffolk County. Therefore, it satisfies the definition of a commercial facility under guideline eight (8).

278) SFW has installed concrete duct banks and vaults encroaching into and at the capillary fringe of the sole-source aquifer for approximately two-and-a-half miles through Wainscott.

279) Materials such as concrete may enhance the long-term persistence of PFOA, PFOS, and other harmful PFAS chemical compounds in groundwater.

280) According to SFW's *own* evidence, materials such as "concrete may enhance the long-term persistence of PFAS in groundwater." (see ¶ 109) Therefore, SFW's concrete infrastructure has the "potential" to prolong or "enhance the long-term persistence" of chemical pollution, such as PFOA, PFOS, and other PFAS chemical compounds in groundwater or surface waters contrary to guideline eight (8) of Enforcible Policy 38A.

281) Title 15 C.F.R. § 930.76(a) requires that SFW include "a set of findings relating the coastal effects [of its Project] to the relevant enforceable policies," demonstrate that the activity will be "consistent with the enforceable policies" and that SFW has adequately considered the policies. SFW failed to satisfy those requirements in violation of 15 C.F.R. § 930.76(a).

282) SFW's Project is ***inconsistent*** with Enforcible Policy 38A, guideline eight (8).

283) SFW's underground infrastructure will adversely impact groundwater and affect the surrounding hydrogeology in Wainscott, including the sole-source aquifer and the surface water bodies of Wainscott Pond and Georgica Pond.

284) SFW's installed underground infrastructure, in violation of 15 C.F.R. § 930.76(a) and Enforcible Policy 38A, will adversely impact groundwater, a sole-source aquifer upon which

Plaintiff and the public rely as their sole source of fresh water. Also, it will degrade the surface water bodies connected hydrogeologically to the impacted groundwater surrounding SFW's concrete underground infrastructure. The surface water bodies include Wainscott Pond and Georgica Pond, where Plaintiff and the public sail, swim, and fish, potentially exposing him and the public to chemical pollutants to which Plaintiff and the public would not otherwise be exposed.

285) SFW's actions violating 15 C.F.R. § 930.76(a) are traceable to Plaintiff's injuries.

286) SFW's Federal Consistency Statement reads—

DWSF [SFW]^[43] has prepared a consistency statement that reviews the Project for consistency with the enforceable policies ... With respect to required federal licenses or permits under 15 CFR § 930.57(b), *the proposed activity complies with the enforceable policies of the New York State approved management program* and will be conducted in a manner consistent with such program ... *with respect to the COP*, under 15 CFR § 930.76(c), *the proposed activities described in detail in this plan comply with the New York approved management program* and will be conducted in a manner consistent with such program [emphasis added].

See SFW Consistency Statement (ECF #34-11, at A-1 to A-2, PDF 2 – 3).

287) SFW did *not* prepare a consistency statement that reviews the Project for consistency with the enforceable policy 38A.

288) SFW's Project does *not* comply with enforceable policy 38A of the New York State-approved management program.

289) With respect to the COP, under 15 CFR § 930.76(c), the proposed activities described in detail in this plan ***do not*** comply with the New York-approved management program and have ***not been*** conducted in a manner consistent with such program.

⁴³ South Fork Wind LLC (SFW), formerly Deepwater Wind South Fork LLC (DWSF)

290) “No Federal official or agency shall grant such person any license or permit for any activity described in detail in such plan until such state or its designated agency receives a copy of such certification and plan, together with any other necessary data and information” 16 U.S.C. § 1456(c)(3)(B) SFW has *not* provided the requisite certification together with the necessary data and information (i.e., a certificate of consistency with Enforcible Policy 38A) to the designated state agency.

291) Defendant BOEM’s grant of approval of SFW’s final COP on or around January 18, 2022 was improper.

292) Plaintiff and the public are entitled to a judgment setting aside SFW’s approval absent a Federal Consistency Certificate that complies with 15 C.F.R. § 930.76(a).

293) SFW’s actions violating 15 C.F.R. § 930.76(a) are traceable to Plaintiff’s injuries.

294) SFW’s Federal Consistency Statement reads—

DWSF [SFW]^[44] has prepared a consistency statement that reviews the Project for consistency with the enforceable policies ... With respect to required federal licenses or permits under 15 CFR § 930.57(b), *the proposed activity complies with the enforceable policies of the New York State approved management program* and will be conducted in a manner consistent with such program ... *with respect to the COP*, under 15 CFR § 930.76(c), *the proposed activities described in detail in this plan comply with the New York approved management program* and will be conducted in a manner consistent with such program [emphasis added].

See SFW Consistency Statement (ECF #34-11, at A-1 to A-2, PDF 2 – 3).

295) SFW’s Project does *not* comply with enforceable **policy 38** of the New York State-approved management program.

296) With respect to the COP, under 15 CFR § 930.76(c), the proposed activities described in

⁴⁴ South Fork Wind LLC (SFW), formerly Deepwater Wind South Fork LLC (DWSF)

detail in this plan *do not* comply with the New York-approved management program and have *not been* conducted in a manner consistent with such program.

297) SFW falsely stated or misrepresented its Project's consistency with enforceable policy 38A of the New York State-approved management program concerning groundwater quality by omitting a federal consistency statement and material information concerning PFOA, PFOS, and other PFAS contaminants that are a potential risk to public health *and* the environment.

298) SFW had prior knowledge of the nature and extent of PFOA, PFOS, and other PFAS contaminants in soil and groundwater in the area where it planned to construct underground concrete infrastructure encroaching into and at the capillary fringe of a sole-source aquifer.

299) Without regard to potential risks that its project may exacerbate and prolong PFOA, PFOS, and other PFAS contaminants in a sole-source aquifer, SFW omitted such information from its COP, intending to secure project approval based on its material misrepresentations of water quality by omission contrary to a clear duty of disclosure.

300) SFW submitted its COP to BOEM on or around May 7, 2021, together with its Federal Consistency Statement (dated January 2019), and based on those documents, BOEM issued a FEIS in August 2021. BOEM then issued a Record of Decision approving the FEIS for SFW's COP (on November 24, 2021) and approved the COP (on January 18, 2022) based on SFW's material misrepresentations of its Project's impacts on groundwater quality. The following month (February 2022), SFW commenced construction based on permits obtained fraudulently.

301) Plaintiff justifiably relied on SFW's representations made during the Wainscott Citizens' Advisory Committee ("WCAC") meeting on or around August 5, 2017, that it would account for site-specific conditions, leave the area in a better condition, and (legally) obtain permits from state and federal agencies, including but not limited to federal consistency certification pursuant

to the Coastal Zone Management Act (CZMA).

302) As a direct and proximate consequence of Defendant SFW's fraudulent misrepresentations on or around August 5, 2017, Plaintiff suffered injury from relying on SFW's representations that, among other false representations, it would account for site-specific conditions and (legally) obtain appropriate regulatory permits.

303) Plaintiff justifiably relied on SFW's representations when it submitted its COP on or around May 7, 2021, together with its Federal Consistency Statement (dated January 2019), that its proposed activities comply with the enforceable policies of the New York State approved management program and will be conducted in a manner consistent with such program and that the proposed activities in its COP described in detail complies with the New York approved management program and will be conducted in a manner consistent with such program.

304) Plaintiff neither has the authority nor the resources to conduct environmental testing within sealed rights-of-way owned by the Town of East Hampton and New York State.

305) Plaintiff is uncertain as to the extent to which SFW's underground concrete infrastructure will adversely impact groundwater, a sole-source aquifer, and the connected surface waters of Wainscott and Georgia Ponds because it did *not* consider the impacts of its construction on PFOA, PFOS, and other PFAS chemical compounds in groundwater in violation of the CZMA.

306) Even after the primary source of contamination is removed, SFW's underground infrastructure will likely continue to act as a secondary source of contamination, prolonging the adverse environmental effects of PFOA, PFOS, and other PFAS chemical compounds in Wainscott's groundwater. Consequently, Plaintiff's home is less valuable.

307) Plaintiff installed filters in his home at significant expense and has his water checked regularly, at a substantial cost. Despite these measures and because of SFW's misrepresentations,

Plaintiff will likely be exposed to further contamination, for example, via locally grown crops irrigated with groundwater or through third parties' groundwater use.

308) On or around May 7, 2021, SFW knowingly misrepresented groundwater quality in Wainscott by omitting material information from its Federal Consistency Statement (dated January 2019) concerning PFOA, PFOS, and other PFAS contaminants that posed a potential risk to public health and the environment that it had a legal duty to disclose, intending to deceive Plaintiff and the public into believing that such contamination if it existed posed no threat to public health or the environment to secure approval of its Project without objection from Plaintiff or the public. Plaintiff justifiably relied on SFW's fraudulent misrepresentations because he had neither the authority nor means to conduct testing on property owned by the Town of East Hampton and New York State. As a direct and proximate consequence of SFW's fraudulent misrepresentations, SFW has substantially increased the risk that Plaintiff and the public will suffer adverse effects to his health from excess exposure to PFOA, PFOS, and other PFAS contaminants in groundwater and the environment to which he would not otherwise have been exposed. SFW's actions satisfy the requisite elements of common-law fraud in New York State.

309) During the Wainscott Citizens' Advisory Committee ("WCAC") meeting on or around August 5, 2017, SFW (formerly Deepwater Wind South Fork LLC) represented to Plaintiff, other WCAC members, and the public that it would account for site-specific conditions, leave the area in better condition, and (legally) obtain permits from state and federal agencies.

310) Since August 2017 (ongoing), SFW has not refused to account for site-specific conditions concerning PFOA, PFOS, and other PFAS contaminants that posed a potential risk to public health and the environment, has not left the area in better condition by leaving concrete infrastructure underground for approximately two-and-half miles through Plaintiff's

neighborhood that it admits may prolong PFAS contamination in groundwater, and obtained permits from state and federal agencies based on fraudulent misrepresentations that could be invalidated. Plaintiff justifiably relied on SFW's fraudulent misrepresentations during the WCAC meeting because he had no power to do more than he is now pursuing a legal remedy. As a direct and proximate consequence of SFW's fraudulent misrepresentations in August 2017, SFW has caused anxiety, stress, loss of money (lots of it), emotional pain, suffering, inconvenience, frustration, mental anguish, loss of reputation, loss of quality and enjoyment of life, and an increased the risk of adverse effects to his health from excess exposure to PFOA, PFOS, and other PFAS contaminants in groundwater and the environment to which he would not otherwise have been exposed. SFW's actions satisfy the requisite elements of common-law fraud in New York State.

311) "No Federal official or agency shall grant such person any license or permit for any activity described in detail in such plan until such state or its designated agency receives a copy of such certification and plan, together with any other necessary data and information" 16 U.S.C. § 1456(c)(3)(B). SFW has *not* provided the designated state agency with an accurate certificate with the necessary data and information (i.e., a proper certificate of consistency with Enforceable Policy 38A).

312) Defendant BOEM's grant of approval of the FEIS for SFW's final COP on or around November 24, 2021, was improper.

313) Defendant BOEM's grant of approval of SFW's final COP on or around January 18, 2022, was improper.

314) Plaintiff and the public are entitled to a judgment setting aside SFW's approvals absent a proper Federal Consistency Certificate that complies with 15 C.F.R. § 930.76(a).

315) Plaintiff and the public are entitled to, and Plaintiff seeks a judgment declaring that Defendant SFW engaged in conduct constituting common law fraud.

316) Plaintiff and the public are entitled to, and Plaintiff seeks a judgment declaring that Defendant SFW submitted false information to a federal agency material to its Project review and approval.

317) Plaintiff and the public are entitled to a judgment setting aside approvals based on Defendant SFW's fraudulent misrepresentations.

318) Plaintiff has been injured as a direct and proximate consequence of Defendant SFW's fraudulent misrepresentations since 2017 that continue as alleged herein, causing Plaintiff to suffer monetary damages to be assessed at trial against Defendant SFW sufficient to vindicate the public interest, including but not limited to making Plaintiff whole by compensating him for expenses, time, opportunity lost, emotional pain, suffering, inconvenience, anxiety, frustration, mental anguish, loss of reputation, loss of quality and enjoyment of life, and other damages with pre-judgment and post-judgment interest as applicable in addition to litigation costs.

319) Plaintiff and the public are entitled to an order compelling Defendant SFW to dismantle, remove, and remediate any damage and return the SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and any other infrastructure and equipment related to the Project.

320) Awards such additional relief as the interests of justice may require.

THIRD CLAIM FOR RELIEF

DEFENDANT SFW knowingly made false and misleading material statements concerning its Federal Consistency Certificate for New York in violation of 15 C.F.R. § 930.76(a)(3) constituting common-law fraud.

321) Plaintiff incorporates by reference and realleges paragraphs 1 through 238 as if set forth

in full herein.

322) Defendant South Fork Wind LLC (“SFW”) “shall submit ... (3) The necessary data and information required pursuant to § 930.58” (15 C.F.R. § 930.76(a)), which requires that SFW “shall include ... (3) An evaluation that includes *a set of findings relating the coastal effects* of the proposal and its associated facilities *to the relevant enforceable policies* of the management program. *Applicants shall demonstrate that the activity will be consistent with the enforceable policies* of the management program. *Applicants shall demonstrate adequate consideration of policies* which are in the nature of recommendations.” (15 C.F.R. § 930.58)

323) The Town of East Hampton Local Waterfront Revitalization Program (“East Hampton LWRP”) (ECF 3-4, at PDF 30 – 909) is the approved Coastal Zone Management Program for Federal Consistency Certification purposes.

324) The East Hampton LWRP includes Enforceable Policy 38 as follows—

325) **POLICY 38** THE QUALITY AND QUANTITY OF SURFACE WATER AND GROUNDWATER SUPPLIES WILL BE CONSERVED AND PROTECTED, PARTICULARLY WHERE SUCH WATERS CONSTITUTE THE PRIMARY OR SOLE SOURCE OF WATER SUPPLY

[¶ 369]

Explanation of policy:

Groundwater is the principle [*sic*] source of drinking water in the Town and therefore must be protected. Since Long Island's groundwater supply has been designated a "sole source aquifer", *all actions must be reviewed relative to their impacts* on the Long Island aquifer ... Given the vulnerability of the Town's ground water supplies and its value as a sole source of drinking water, all available practical methods of preventing and controlling water pollution shall be utilized.

Id. (at XII-73, PDF 655)

326) **POLICY 44** PRESERVE AND PROTECT TIDAL AND FRESHWATER

WETLANDS AND PRESERVE THE BENEFITS DERIVED
FROM THESE AREAS

[¶ 390]

See East Hampton LWRP (ECF 3-4, at XII-76, PDF 658)

Explanation of policy:

All structures and uses ... shall be located on upland sites and in a location so that ***no wetland will be*** diminished in size, ***polluted, degraded*** or lost, ***or placed in peril*** in order to establish the structure or use (*id.*, at XII-78, PDF 660, ¶ (1)). [¶ 390]

Id. (at XII-73, PDF 655)

327) On or around May 7, 2021, SFW submitted to Defendant BOEM a Federal Consistency Statement that, under Enforceable Policy 38, falsely asserts that “[d]uring operations, there will be ***no impact to the groundwater quality*** or quantity, as the SFEC does not involve the use of groundwater resources and ***no groundwater resources are anticipated to be impacted.***” *See* SFW Consistency Statement (ECF #34-11, at A-1-7, PDF 11, Policy #38, 4th Column). [¶ 373]

328) In its Federal Consistency Certificate, SFW misled Plaintiff and the public into (falsely) believing that its Project would not impact groundwater resources and that SFW did not “***anticipate***” it would impact groundwater.

329) SFW’s COP contradicts that claim using basic mathematics. SFW admits that “[a]ccording to data from the USGS, depth to groundwater around the landing sites typically ranges from approximately 4 to 5 feet” (COP, 4-82, PDF 250, 1st ¶), and its transition vault at the Beach Lane landing site is ~12 feet deep” (*see* Onshore Conceptual Drawings, May 2019, at 9).⁴⁵ A transition vault buried 12 feet deep at the Beach Lane landing site would hit groundwater (at 4 – 5 feet) and permanently sit in groundwater from 7 – 8 feet deep (i.e., 12 less 4 – 5 feet). It does not take an engineer to subtract 4 – 5 feet from 12 feet to determine the transition vault will

⁴⁵ Available at boem.gov— https://www.boem.gov/sites/default/files/renewable-energy-program/State-Activities/NY/App-G5_SF WF_Onshore-Conceptual-Set_2019-05-13.pdf (last accessed December 4, 2023).

be sitting in 7 – 8 feet of groundwater. A cursory reading of the COP undermines SFW’s claim that it did not “anticipate” impacting groundwater.

330) SFW’s statement is also contradicted by the photograph in Complaint Appendix 1 (ECF 1-2, at 6), showing the transition vault sitting in the sole-source aquifer (towards the southern end of Beach Lane).

331) SFW repeats its false statement concerning groundwater when it writes on or around May 7, 2021— “The onshore transition vault will be located outside ... waterbodies.” (COP, at 4-67, PDF 235, 7th ¶), ignoring the facts that the sole-source aquifer is a critical and essential waterbody and the transition vault is *not* “outside” but in that waterbody.

332) Enforceable Policy 38 explains that “all actions ***must*** be reviewed relative to their impacts” (East Hampton LWRP, ECF 3-4, at XII-72, PDF 654). However, SFW neither reviews nor certifies its actions concerning the excavation of material from its onshore construction corridor containing PFOA and PFOS contaminants that NY defines as hazardous waste or that regarding the installation of concrete infrastructure and its impact on PFOA and PFOS contaminants in groundwater.

333) SFW has installed concrete duct banks and vaults encroaching into and at the capillary fringe of the sole-source aquifer for approximately two-and-a-half miles through Wainscott.

334) According to SFW’s *own* evidence, materials such as “concrete may enhance the long-term persistence of PFAS in groundwater.”

335) SFW admits that it is plausible its concrete infrastructure “may enhance the long-term persistence PFAS in groundwater[,]” such as PFOA, PFOS, and other PFAS chemical compounds in groundwater.

336) Title 15 C.F.R. § 930.76(a) requires that SFW include “a set of findings relating the

coastal effects [of its Project] to the relevant enforceable policies,” demonstrate that the activity will be “consistent with the enforceable policies” and that SFW has adequately considered those policies. SFW failed to satisfy the requirements in violation of 15 C.F.R. § 930.76(a).

337) SFW’s Project is *inconsistent* with Enforcible Policy 38.

338) SFW’s underground infrastructure will adversely impact groundwater and affect the surrounding hydrogeology in Wainscott, including the sole-source aquifer and the surface water bodies of Wainscott Pond and Georgica Pond.

339) SFW “prepared a consistency statement that reviews the Project for consistency with the enforceable policies that make up the ... East Hampton Local Waterfront Revitalization Program (LWRP)[] [in] Appendix A-1” (ECF #34-11, at A-1, PDF 2).

340) SFW’s Consistency Statement, under Enforceable Policy 44, claims its “SFEC is consistent with this policy ... *Construction* of the SFEC will not *directly* impact any tidal or freshwater wetlands ... In addition, the SFEC will obtain and *comply with all applicable federal, state, and local surface water quality requirements* and permits *in the coastal zone.*”

341) On the contrary, by “enhanc[ing] the long-term persistence of PFAS in groundwater[,]” SFW’s concrete duct banks and vaults *will* directly impact Wainscott Pond that *is* groundwater revealed (i.e., the groundwater and surface water of Wainscott Pond is the same water, literally) and which NYDEC defines as “Fresh Water Wetlands.” *See* East Hampton LWRP, Map XII - 1 (link below) (last accessed December 5, 2023) at—

https://docs.dos.ny.gov/opd-lwrp/LWRP/East%20Hampton_T/Original/Maps/Map%20XII-1%20Freshwater%20and%20Tidal%20Wetlands.pdf.

342) SFW’s underground concrete construction will further pollute, degrade, and risk placing Wainscott Pond’s and Georgica Pond’s sensitive habitats in peril because the groundwater

surrounding SFW's (underground) infrastructure hydrogeologically connects to the ponds.

Prolonging PFAS contamination around the duct banks and vaults also prolongs PFAS contamination in Wainscott Pond and Georgica Pond.

343) SFW's Project is ***inconsistent*** with Policy 44.

344) SFW's installed underground infrastructure, in violation of 15 C.F.R. § 930.76(a) and Enforceable Policy 44, will adversely impact groundwater, a sole-source aquifer upon which Plaintiff and the public rely as their sole source of fresh water. Also, it will degrade the surface water bodies connected hydrogeologically to the impacted groundwater surrounding SFW's concrete underground infrastructure. The surface water bodies include Wainscott Pond and Georgica Pond, where Plaintiff and the public sail, swim, and fish, potentially exposing him and the public to chemical pollutants to which Plaintiff and the public would not otherwise be exposed.

345) SFW's Project adversely impacts Plaintiff's health and the immediate environment where he lives by installing underground concrete infrastructure encroaching into and at the capillary fringe of highly PFAS-contaminated groundwater, prolonging and exacerbating the harmful contamination of the sole-source aquifer.

346) SFW's actions violating 15 C.F.R. § 930.76(a) are traceable to Plaintiff's injuries.

347) SFW's Federal Consistency Statement reads—

DWSF [SFW]^[46] has prepared a consistency statement that reviews the Project for consistency with the enforceable policies ... With respect to required federal licenses or permits under 15 CFR § 930.57(b), ***the proposed activity complies with the enforceable policies of the New York State approved management program*** and will be conducted in a manner consistent with such program ... ***with respect to the COP***, under 15 CFR § 930.76(c), ***the proposed***

⁴⁶ South Fork Wind LLC (SFW), formerly Deepwater Wind South Fork LLC (DWSF)

activities described in detail in this plan comply with the New York approved management program and will be conducted in a manner consistent with such program [emphasis added].

See SFW Consistency Statement (ECF #34-11, at A-1 to A-2, PDF 2 – 3).

348) SFW's Project does *not* comply with enforceable policy 38 of the New York State-approved management program.

349) SFW's Project does *not* comply with enforceable policy 44 of the New York State-approved management program.

350) With respect to the COP, under 15 CFR § 930.76(c), the proposed activities described in detail in this plan ***do not*** comply with the New York-approved management program and have ***not been*** conducted in a manner consistent with such program.

351) SFW falsely stated or misrepresented its Project's consistency with enforceable policy 38 of the New York State-approved management program concerning groundwater quality by omitting material information concerning PFOA, PFOS, and other PFAS contaminants that are a potential risk to public health *and* the environment.

352) SFW falsely stated or misrepresented its Project's consistency with enforceable policy 44 of the New York State-approved management program concerning groundwater quality by omitting material information concerning PFOA, PFOS, and other PFAS contaminants that are a potential risk to public health *and* the environment.

353) SFW had prior knowledge of the nature and extent of PFOA, PFOS, and other PFAS contaminants in soil and groundwater in the area where it planned to construct underground concrete infrastructure encroaching into and at the capillary fringe of a sole-source aquifer.

354) Without regard to potential risks that its project may exacerbate and prolong PFOA, PFOS, and other PFAS contaminants in a sole-source aquifer, SFW omitted such information

from its COP, intending to secure project approval based on its material misrepresentations of water quality by omission contrary to a clear duty of disclosure.

355) SFW submitted its COP to BOEM on or around May 7, 2021, together with its Federal Consistency Statement (dated January 2019), and based on those documents, BOEM issued a FEIS in August 2021. BOEM then issued a Record of Decision approving the FEIS for SFW's COP (on November 24, 2021) and approved the COP (on January 18, 2022) based on SFW's material misrepresentations of its Project's impacts on groundwater quality. The following month (February 2022), SFW commenced construction based on permits obtained fraudulently.

356) Plaintiff justifiably relied on SFW's representations made during the Wainscott Citizens' Advisory Committee ("WCAC") meeting on or around August 5, 2017, that it would account for site-specific conditions, leave the area in a better condition, and (legally) obtain permits from state and federal agencies, including but not limited to federal consistency certification pursuant to the Coastal Zone Management Act (CZMA).

357) As a direct and proximate consequence of Defendant SFW's fraudulent misrepresentations on or around August 5, 2017, Plaintiff suffered injury from relying on SFW's representations that, among other false representations, it would account for site-specific conditions and (legally) obtain appropriate regulatory permits.

358) Plaintiff justifiably relied on SFW's representations when it submitted its COP on or around May 7, 2021, together with its Federal Consistency Statement (dated January 2019), that its proposed activities comply with the enforceable policies of the New York State approved management program and will be conducted in a manner consistent with such program and that the proposed activities in its COP described in detail complies with the New York approved management program and will be conducted in a manner consistent with such program.

359) Plaintiff neither has the authority nor the resources to conduct environmental testing within sealed rights-of-way owned by the Town of East Hampton and New York State.

360) Plaintiff is uncertain as to the extent to which SFW's underground concrete infrastructure will adversely impact groundwater, a sole-source aquifer, and the connected surface waters of Wainscott and Georgia Ponds because it did *not* consider the impacts of its construction on PFOA, PFOS, and other PFAS chemical compounds in groundwater in violation of the CZMA.

361) Even after the primary source of contamination is removed, SFW's underground infrastructure will likely continue to act as a secondary source of contamination, prolonging the adverse environmental effects of PFOA, PFOS, and other PFAS chemical compounds in Wainscott's groundwater. Consequently, Plaintiff's home is less valuable.

362) Plaintiff installed filters in his home at significant expense and has his water checked regularly, at a substantial cost. Despite these measures and because of SFW's misrepresentations, Plaintiff will likely be exposed to further contamination, for example, via locally grown crops irrigated with groundwater or through third parties' groundwater use.

363) On or around May 7, 2021, SFW knowingly misrepresented groundwater quality in Wainscott by omitting material information from its Federal Consistency Statement (dated January 2019) concerning PFOA, PFOS, and other PFAS contaminants that posed a potential risk to public health and the environment that it had a legal duty to disclose, intending to deceive Plaintiff and the public into believing that such contamination if it existed posed no threat to public health or the environment to secure approval of its Project without objection from Plaintiff or the public. Plaintiff justifiably relied on SFW's fraudulent misrepresentations because he had neither the authority nor means to conduct testing on property owned by the Town of East Hampton and New York State. As a direct and proximate consequence of SFW's fraudulent

misrepresentations, SFW has substantially increased the risk that Plaintiff and the public will suffer adverse effects to his health from excess exposure to PFOA, PFOS, and other PFAS contaminants in groundwater and the environment to which he would not otherwise have been exposed. SFW's actions satisfy the requisite elements of common-law fraud in New York State.

364) During the Wainscott Citizens' Advisory Committee ("WCAC") meeting on or around August 5, 2017, SFW (formerly Deepwater Wind South Fork LLC) represented to Plaintiff, other WCAC members, and the public that it would account for site-specific conditions, leave the area in better condition, and (legally) obtain permits from state and federal agencies.

365) Since August 2017 (ongoing), SFW has **not** refused to account for site-specific conditions concerning PFOA, PFOS, and other PFAS contaminants that posed a potential risk to public health and the environment, has not left the area in better condition by leaving concrete infrastructure underground for approximately two-and-half miles through Plaintiff's neighborhood that it admits may prolong PFAS contamination in groundwater, and obtained permits from state and federal agencies based on fraudulent misrepresentations that could be invalidated. Plaintiff justifiably relied on SFW's fraudulent misrepresentations during the WCAC meeting because he had no power to do more than he is now pursuing a legal remedy. As a direct and proximate consequence of SFW's fraudulent misrepresentations in August 2017, SFW has caused anxiety, stress, loss of money (lots of it), emotional pain, suffering, inconvenience, frustration, mental anguish, loss of reputation, loss of quality and enjoyment of life, and an increased the risk of adverse effects to his health from excess exposure to PFOA, PFOS, and other PFAS contaminants in groundwater and the environment to which he would not otherwise have been exposed. SFW's actions satisfy the requisite elements of common-law fraud in New York State.

366) “No Federal official or agency shall grant such person any license or permit for any activity described in detail in such plan until such state or its designated agency receives a copy of such certification and plan, together with any other necessary data and information” 16 U.S.C. § 1456(c)(3)(B). SFW has *not* provided the designated state agency with an accurate certificate with the necessary data and information (i.e., a proper certificate of consistency with Enforcible Policy 38 or 44).

367) Defendant BOEM’s grant of approval of the FEIS for SFW’s final COP on or around November 24, 2021, was improper.

368) Defendant BOEM’s grant of approval of SFW’s final COP on or around January 18, 2022, was improper.

369) Plaintiff and the public are entitled to a judgment setting aside SFW’s approvals absent a proper Federal Consistency Certificate that complies with 15 C.F.R. § 930.76(a).

370) Plaintiff and the public are entitled to, and Plaintiff seeks a judgment declaring that Defendant SFW engaged in conduct constituting common law fraud.

371) Plaintiff and the public are entitled to, and Plaintiff seeks a judgment declaring that Defendant SFW submitted false information to a federal agency material to its Project review and approval.

372) Plaintiff and the public are entitled to a judgment setting aside approvals based on Defendant SFW’s fraudulent misrepresentations.

373) Plaintiff has been injured as a direct and proximate consequence of Defendant SFW’s fraudulent misrepresentations since 2017 that continue as alleged herein, causing Plaintiff to suffer monetary damages to be assessed at trial against Defendant SFW sufficient to vindicate the public interest, including but not limited to making Plaintiff whole by compensating him for

expenses, time, opportunity lost, emotional pain, suffering, inconvenience, anxiety, frustration, mental anguish, loss of reputation, loss of quality and enjoyment of life, and other damages with pre-judgment and post-judgment interest as applicable in addition to litigation costs.

374) Plaintiff and the public are entitled to an order compelling Defendant SFW to dismantle, remove, and remediate any damage and return the SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and any other infrastructure and equipment related to the Project.

375) Awards such additional relief as the interests of justice may require.

FOURTH CLAIM FOR RELIEF

DEFENDANT BOEM failed to include in its Environmental Impact Statement adverse environmental impacts of its action on PFOA or PFOS contamination in violation of NEPA, 42 U.S.C. § 4332

376) Plaintiff realleges paragraphs 1 through 238 as if set forth in full herein. [¶ 441]

377) According to NEPA, Congress “*directs* that, to the *fullest extent possible*” BOEM “shall” include a “*detailed* statement” on- “(i) reasonably foreseeable environmental effects” of its action approving SFW’s Project; [and] “(ii) any reasonably foreseeable adverse environmental effects which cannot be avoided” (emphasis added) (NEPA, 42 U.S.C. § 4332). “Effects includes ecological[,] [such as the effects on natural resources ... [and] economic, social, or health, whether direct, indirect, or cumulative” (40 C.F.R. § 1508.8). In an Environmental Impact Statement (EIS), it must be evident the agency took a “hard look” at the environmental consequences of its decision.

378) Nine months *before* BOEM issued its ROD approving SFW’s Project, it knew of the nature and extent of PFAS contamination in Wainscott, where SFW proposed construction and the degree to which it exceeded EPA and New York regulatory standards designed to protect

human health.

[¶ 49]

379) Without regard to the environmental or public health impact of SFW's Project on known PFAS contamination in the area where SFW proposed construction, BOEM falsely asserted in its FEIS that "[o]verall, existing groundwater quality in the analysis area appears to be good" (FEIS at H-23, PDF p. 655 of 1,317).

[¶ 50]

380) Defendant BOEM violated NEPA, 42 U.S.C. § 4332 by failing to take a "hard look" into PFOA and PFOS contamination in soil and groundwater, exceeding regulatory limits in the area where SFW proposed construction.

[¶ 51]

381) Defendant BOEM violated NEPA, 42 U.S.C. § 4332 by failing to acknowledge or include in its FEIS foreseeable environmental effects that approving SFW's onshore construction would have on PFOA and PFOS chemical compound contaminants in soil or groundwater *within* SFW's proposed onshore construction corridor.

382) Defendant BOEM violated NEPA, 42 U.S.C. § 4332 by failing to consider potential environmental or public health risks concerning PFOA and PFOS chemical compound contaminants in soil or groundwater when determining whether to approve SFW's onshore construction.

383) Defendant BOEM violated NEPA, 42 U.S.C. § 4332 by failing to state why SFW could not avoid an area containing PFOA and PFOS chemical compound contaminants in soil or groundwater exceeding regulatory standards.

384) Defendant BOEM violated NEPA, 42 U.S.C. § 4332 by failing to consider and assess the reaction between SFW's proposed underground concrete infrastructure and PFOA and PFOS chemical compound contaminants in soil or groundwater, that, according to SFW's *own* evidence, "may enhance the long-term persistence of PFAS in groundwater" (ECF 93-4, at 6).

385) DEFENDANT BOEM approved SFW's Project based on a legally deficient EIS in violation of NEPA, 42 U.S.C. § 4332 and its implementing regulations; therefore, the defendant engaged in an action that was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

386) The Court has the authority and duty to hold unlawful and set aside such agency action in whole or in relevant part pursuant to APA 5 U.S.C. § 706 and remand for reconsideration.

Plaintiff is entitled to a judgment, so holding and setting aside.

387) Plaintiff is entitled to injunctive relief against any further work permitted under such unlawful final agency action.

388) Plaintiff is entitled to an order compelling SFW to dismantle and remove the transmission cable and infrastructure onshore and offshore in whole or in part, including but not limited to removing the concrete duct banks, vaults, and equipment SFW installed onshore, to remediate all environmental damage and return the onshore and offshore SFEC corridor to its original condition.

389) Awards such additional relief as the interests of justice may require.

FIFTH CLAIM FOR RELIEF

DEFENDANT BOEM failed to describe the onshore area where SFW proposed installing underground infrastructure and high-voltage transmission cables in its Environmental Impact Statement in violation of NEPA Reg. 40 C.F.R. § 1502.15

390) Plaintiff realleges paragraphs 1 through 238 as if set forth in full herein. [¶ 441]

391) BOEM's final "environmental impact statement [FEIS] shall succinctly describe the environment of the area[] to be affected ... Data and analyses in a statement shall be commensurate with the importance of the impact" (40 C.F.R. § 1502.15).

392) DEFENDANT BOEM did *not* include in its Environmental Impact Statement a description of PFOA or PFOS contamination that it knew existed in soil or groundwater at levels exceeding regulatory limits designed to protect human health in the onshore area where SFW proposed installing its SFEC.

393) BOEM did not describe the potential environmental or public health risk from PFOA or PFOS contamination exposure.

394) BOEM did not describe the potential environmental or public health risk from the reaction between SFW's underground concrete duct banks and vaults encroaching into and at the capillary fringe of a sole-source aquifer and PFOA and PFOS in groundwater.

395) BOEM did *not* include in its FEIS *any* data or analysis commensurate with the greater importance of PFOA or PFOS contamination in soil and groundwater “that presents a significant threat to public health”⁴⁷ in the area where SFW proposed construction but gave greater importance to less harmful “temporary” adverse impacts on “groundwater quality from erosion, sedimentation, and inadvertent spills” (FEIS, at H-33, PDF 665, 4th ¶).

396) DEFENDANT BOEM violated NEPA regulation 40 C.F.R. § 1502.15.

397) DEFENDANT BOEM approved SFW's Project based on a legally deficient EIS in violation of NEPA, 42 U.S.C. § 4332 and its implementing regulations. The defendant engaged in an action that was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

398) The Court has the authority and duty to hold unlawful and set aside such agency action in whole or in relevant part pursuant to APA 5 U.S.C. § 706 and remand for reconsideration. Plaintiff is entitled to a judgment, so holding and setting aside.

⁴⁷ See DEC State Superfund Site Classification Notice for East Hampton Airport (2019) (ECF 93-13, at 1, 1st ¶).

399) Plaintiff is entitled to injunctive relief against any further work permitted under such unlawful final agency action.

400) Plaintiff is entitled to an order compelling SFW to dismantle and remove the transmission cable and infrastructure onshore and offshore in whole or in part, including but not limited to removing the concrete duct banks, vaults, and equipment SFW installed onshore, to remediate all environmental damage and return the onshore and offshore SFEC corridor to its original condition.

401) Awards such additional relief as the interests of justice may require.

SIXTH CLAIM FOR RELIEF

DEFENDANT BOEM failed to evaluate the information it received from Defendant SFW independently and failed to take responsibility for its accuracy in violation of 40 C.F.R. § 1506.5(a)

402) Plaintiff realleges paragraphs 1 through 238 as if set forth in full herein. [¶ 469]

403) “If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency ... shall independently evaluate the information submitted and shall be responsible for its accuracy” (40 C.F.R. § 1506.5(a)).

404) DEFENDANT BOEM falsely claimed in its FEIS that “[o]verall, existing groundwater quality in the analysis area appears to be good” (FEIS at H-23, PDF p. 655 of 1,317). BOEM did not independently evaluate the information and has not taken responsibility for the inaccuracy of the statement in violation of 40 C.F.R. § 1506.5(a)).

405) In the Record of Decision (ROD), BOEM summarizes impacts on demographics, economics, and employment from the SFW Project as follows—

The FEIS also found that the Proposed Project could have, to some

extent, beneficial impacts on ... demographics, employment, and economics

See ROD (at D-8, PDF 100, 1st ¶). BOEM identifies possible beneficial impacts, such as local spending on capital expenditures of \$184 to \$247 million (depending on the wind farm's capacity) (FEIS, at F-17, PDF 587, Table F-10). BOEM considers beneficial impacts from operational spending of \$6.2 to \$12.3 million per year (*id.*, Table F-11), which is approximately \$123 to \$246 million over the 20-year contract term. According to BOEM, **beneficial impacts** are roughly **\$307 to \$493 million** (the addition of capital expenditure and operational spending). However, BOEM ignores SFW's Project cost of \$2 billion (outflows from Suffolk County). SFW's cost of \$2 billion outweighs inflows (of \$307 to \$493 million) by four to seven times. For every dollar SFW puts into Suffolk County's economy, it takes out **four-to-seven times** that amount. The SFW Project could *not* have overall beneficial impacts on economics in Suffolk County. BOEM did not independently evaluate the information and has not taken responsible for the inaccuracy of the statement in violation of 40 C.F.R. § 1506.5(a)).

406) **DEFENDANT BOEM** approved SFW's FEIS without independently evaluating the information contained therein and has not taken responsibility for the inaccuracy of the FEIS in violation of 40 C.F.R. § 1506.5(a)).

407) The defendant engaged in an action that was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

408) The Court has the authority and duty to hold unlawful and set aside such agency action in whole or in relevant part pursuant to APA 5 U.S.C. § 706 and remand for reconsideration. Plaintiff is entitled to a judgment, so holding and setting aside.

409) Plaintiff is entitled to injunctive relief against any further work permitted under such unlawful final agency action.

410) Plaintiff is entitled to an order compelling SFW to dismantle and remove the transmission cable and infrastructure onshore and offshore in whole or in part, including but not limited to removing the concrete duct banks, vaults, and equipment SFW installed onshore, to remediate all environmental damage and return the onshore and offshore SFEC corridor to its original condition.

411) Awards such additional relief as the interests of justice may require.

SEVENTH CLAIM FOR RELIEF

DEFENDANT BOEM failed to explore and evaluate reasonable alternatives in violation of NEPA, 40 C.F.R. § 1502.14

412) Plaintiff realleges paragraphs 1 through 238 as if set forth in full herein. [¶ 441]

413) DEFENDANT BOEM neither acknowledged nor considered an alternative to SFW that would have combined it with Sunrise Wind. [¶ 521]

414) DEFENDANT BOEM claimed that— “No other cable landing site alternatives were identified during Project development or scoping ... (see New York Article VII submitted by SFW)” (FEIS at 2-19, PDF 45, final paragraph). On the contrary, the Sunrise Alternative was identified and discussed during the project’s development and scoping and during the “New York Article VII” hearing that identified the Sunrise/SFW alternative *eight times*. [¶ 523]

415) NYPSC General Counsel Robert Rosenthal acknowledged that if LIPA purchased the same *renewable* energy (i.e., 7,432,080 MWh) from Sunrise Wind at \$80.64/MWh (instead of SFW \$218.61/MWh), LIPA would save ratepayers **\$1,624,738,893**.

416) The SFW/Sunrise Alternative is technically feasible, environmentally superior, and half the price. However, DEFENDANT BOEM neither explored or evaluated reasonable alternatives nor devoted *any* treatment to the SFW/Sunrise Alternative in violation of 40 C.F.R. § 1502.14.

417) DEFENDANT BOEM approved SFW's FEIS in violation of 40 C.F.R. § 1502.14. [¶ 525]

418) DEFENDANT BOEM approved SFW's Project based on a legally deficient EIS in violation of NEPA, 42 U.S.C. § 4332 and its implementing regulations.

419) DEFENDANT BOEM engaged in an action that was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

420) The Court has the authority and duty to hold unlawful and set aside such agency action in whole or in relevant part pursuant to APA 5 U.S.C. § 706 and remand for reconsideration.

Plaintiff is entitled to a judgment, so holding and setting aside.

421) Plaintiff is entitled to injunctive relief against any further work permitted under such unlawful final agency action.

422) Plaintiff is entitled to an order compelling SFW to dismantle and remove the transmission cable and infrastructure onshore and offshore in whole or in part, including but not limited to removing the concrete duct banks, vaults, and equipment SFW installed onshore, to remediate all environmental damage and return the onshore and offshore SFEC corridor to its original condition.

423) Awards such additional relief as the interests of justice may require.

XII. NO PRIOR APPLICATIONS

707. No prior application for this or any similar relief has been made in this Court. [¶ 707]

XIII. PRAYER FOR RELIEF

708. Wherefore, Plaintiffs pray for relief as follows— [¶ 708]

a. A permanent injunction against further construction work related to South Fork

Wind's Project; [¶ 708(b)]

b. A declaratory judgment holding that Defendant BOEM's final agency action

- approving the Final Environmental Impact Statement for South Fork Wind's Construction and Operations Plan was unlawful and set aside in relevant part the final agency action challenged herein; [¶ 708(c)]
- c. A declaratory judgment holding that Defendant South Fork Wind LLC engaged in conduct constituting common law fraud.
 - d. A declaratory judgment holding that Defendant South Fork Wind LLC submitted false information to a federal agency material to its Project review and approval.
 - e. Restoration to the site's original condition, remediation of any damage, and dismantling of the facility under the oversight of Federal authorities; [¶ 708(d)]
 - f. Equitable relief [¶ 708(e)]
 - g. Damages for injuries since 2017 (ongoing) as a direct and proximate consequence of Defendant South Fork Wind LLC's fraudulent misrepresentations sufficient to vindicate the public interest as alleged herein to be assessed
 - h. Costs of suit herein to be assessed, and [¶ 708(f)]
 - i. Such other relief as the Court deems just and proper. [¶ 708(g)]