Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIMON V. KINSELLA,

Plaintiff,

v.

BUREAU OF OCEAN ENERGY MANAGEMENT; DEB HAALAND, Secretary of the Interior, U.S. DEPARTMENT OF THE INTERIOR; MICHAEL S. REGAN, Administrator, U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants,

and

SOUTH FORK WIND, LLC,

Proposed Defendant-Intervenor.

Case No.: 1:22-cv-02147-JMC

PROPOSED DEFENDANT-INTERVENOR SOUTH FORK WIND, LLC'S PROPOSED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S "EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER"

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I. INTRODUCTION

South Fork Wind, LLC ("South Fork Wind") is the developer of the South Fork Wind Farm and South Fork Export Cable (together, the "Project"), a renewable offshore wind energy project to provide clean, reliable power to homes and businesses in New York State. Plaintiff Simon V. Kinsella is a resident of Wainscott, in the Town of East Hampton, New York, who seeks a purported "emergency" temporary restraining order ("TRO") and preliminary injunction (the "TRO/PI Motion") to halt ongoing construction activity, including, in particular, construction necessary to build a critical onshore component of the Project in East Hampton, New York.

As an initial matter, Plaintiff's TRO should be denied because under LCvR 65.1(a), "[e]xcept in an emergency, the Court will not consider an ex parte application for a temporary restraining order." There is no "emergency" here. Plaintiff, a longtime opponent of the Project who has filed multiple lawsuits and administrative challenges over it, was fully aware of the ongoing construction and waited more than nine months to seek this relief. In particular, Plaintiff sent a notice of his intent to sue Federal Defendants over this Project in December 2021, has been closely following construction activities since he was notified of the commencement of construction in January 2022, and has been aware of the pending horizontal directional drilling ("HDD") phase for at least a month and a half. Yet Plaintiff delayed seeking relief until the midst of construction, attempting to create a false sense of urgency to advance an "emergency" TRO/PI Motion while this Court is considering Federal Defendants' pending motion to transfer the case to the Eastern District of New York, within whose territory the onshore portions of the Project is located (not to mention Plaintiff himself, who has formal legal training and has twice been a plaintiff there), and where a first filed case challenging many of the same issues is currently pending.

Similarly, with respect to Atlantic cod, the impetus for the TRO is that last month, Plaintiff

learned of an October 2021 letter from during the interagency review process. *See, e.g.*, Am. Compl. ¶ 410.05. Yet the timing of Plaintiff's purported discovery of this year-old "snapshot in time" letter is irrelevant to this action; the propriety of an agency approval is based solely on the sufficiency of the agency's review process. Absent from Plaintiff's Amended Complaint is any evidence that BOEM did not properly consider the National Oceanic and Atmospheric Administration ("NOAA")/National Marine Fisheries Service's ("NMFS") input in the course of the approval process and in designing final mitigation measures (as the letter in question recommends, *see* Am. Compl. ¶ 410.03). Indeed, the acoustic monitoring plan complained of by Plaintiff was reviewed by NMFS prior to agency approval, not to mention approximately nine months after the NMFS letter Plaintiff cites.

More importantly, Plaintiff's TRO/PI Motion should be denied because he does not even come close to the "clear showing" that is required for such extraordinary relief. **First**, the balancing of the equities weighs strongly against Plaintiff. Plaintiff has unreasonably delayed his request for a TRO and preliminary injunctive relief, knowingly allowing construction to proceed for more than 9 months. Plaintiff asserts his request for a TRO/PI now in an obvious effort to maximize disruption to the Project at a critical stage in its construction schedule. Plaintiff's request for a TRO/PI at this late stage would create severe harm to South Fork Wind that cannot be mitigated. South Fork Wind has invested over a billion dollars in the Project and faces substantial losses if the Project is delayed and does not meet its construction schedule. The magnitude of this potential harm to South Fork Wind weighs heavily against granting any relief. Also, a TRO is not in the public interest, as timely construction and operation of the Project will advance federal, state, and local renewable energy goals, reduce greenhouse gas emissions, and create jobs.

Second, Plaintiff has not proven any irreparable injury in the absence of a TRO or PI. Plaintiff primarily bases his claim of irreparable injury on two theories. The first theory is that

construction work in Town roads, including an HDD beginning on Beach Lane and extending out into the ocean, will exacerbate already existing per- and polyfluoroalkyl substance ("PFAS") contamination in the Town where he lives. But the U.S. District Court for the Eastern District of New York has already denied a preliminary injunction motion based on substantially similar allegations that the Project would exacerbate pre-existing PFAS contamination in the Town, holding that these allegations do not constitute irreparable injury because "it is possible to remediate PFAS contamination." The PFAS allegations at the heart of Plaintiff's claims were also considered and rejected by the New York State Public Service Commission ("NYSPSC") twice after extensive evidentiary proceedings in which Plaintiff actively participated; and the New York State Department of Environmental Conservation ("NYSDEC") has submitted filings with the NYSPSC stating that the Project will not exacerbate existing groundwater contamination. A New York State court reviewing the NYSPSC's decision has likewise rejected a request for preliminary injunctive relief on the basis of PFAS allegations.

Plaintiff's second theory is that Project activities on Cox Ledge on the Outer Continental Shelf ("OCS") through April 30, 2023 would harm the Atlantic cod, raising the price of fish he purchases. As an initial matter the Project will not be doing any pile driving work on Cox Ledge until May 1, 2023, so Plaintiff has no present or certainly impending injury. Declaration of Melanie Gearon ("Gearon Decl.") ¶ 32. Moreover, an alleged injury predicated on speculative increases in Atlantic cod prices is not irreparable because, even if the allegations were true, there is remedy at law for the alleged harm.

Third, Plaintiff's claims are unlikely to succeed on the merits. As a preliminary matter, the Court lacks jurisdiction to hear this case because Plaintiff does not have Article III standing. The potential future injuries Plaintiff alleges from exacerbation of PFAS contamination and construction on Cox Ledge are far too speculative and are not certainly impending to satisfy injury-

in-fact. Further, the alleged injuries associated with installation of concrete duct banks and vaults are not fairly traceable to the Federal Defendants' approvals that Plaintiff challenges. The installation of concrete duct banks and vaults in Town roads and the work in New York State waters has been approved by New York State and Town authorities, and is not within the jurisdiction of the named Federal Defendants in this suit. Indeed the work in Town roads is now almost complete. And those alleged harms are not redressable because the Federal Defendants have no jurisdiction over the onshore and nearshore activities, including the HDD.

Plaintiff's statutory arguments under the National Environmental Policy Act ("NEPA"), Outer Continental Shelf Lands Act ("OCSLA") and the Administrative Procedure Act also fail for the reasons explained herein.

For these and the other reasons detailed below, South Fork Wind respectfully requests the Court deny Plaintiff's TRO/PI Motion.

II. BACKGROUND

A. The Project

The South Fork Wind Farm will be located 35 miles east of Montauk Point, Long Island, in federal waters. South Fork Wind will construct, operate, and maintain the South Fork Export Cable ("SFEC") to deliver power from the South Fork Wind Farm to Long Island. Declaration of Kenneth Bowes ("Bowes Decl.") ¶ 5 (*Mahoney*, Dkt. 31 (March 25, 2022)); as Exhibit 4 to the Declaration of Janice Schneider ("Schneider Decl.").

The NYSPSC has jurisdiction over the 7.6-mile segment of the SFEC that runs from the seaward limit of the State's territorial waters to the State's mainland power grid in the Town. *Id.* ¶¶ 6-9. This segment, called the "SFEC-New York," has three parts: (1) the "SFEC-NYS" (approximately 3.5 miles of the SFEC running beneath the seabed in New York State waters and onshore under Wainscott Beach); (2) the "SFEC-Onshore" (approximately 4.1 miles of the SFEC

running underground from the onshore sea-to-shore transition vault[1] under Town roads and in the Long Island Rail Road right-of-way); and (3) the "SFEC-Interconnection Facility" (a new onshore facility in the Town where the SFEC will interconnect with the existing Long Island Power Authority ("LIPA") electric transmission and distribution system). *Id.* South Fork Wind has obtained all easements and state approvals required to complete the installation of concrete duct banks and vaults, including the easement obtained from the Town on March 9, 2021, and a Permit for Excavation of Highways obtained from the Town on January 20, 2022. *Id.* ¶ 8.

The federal Bureau of Ocean Energy Management ("BOEM") has jurisdiction on the OCS beyond the extent of New York State waters.[2] *See* 43 U.S.C. §§ 1301(a), 1331(a). Thus, the portion of the SFEC on the OCS (the "SFEC-Offshore") and the South Fork Wind Farm (including 12 wind turbine generators and associated OCS facilities) are the only components of the Project under BOEM jurisdiction.

B. Statutory and Regulatory Background

1. NEPA

NEPA requires that federal agencies prepare an environmental impact statement ("EIS") for any "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). On August 16, 2021, after a three-and-a-half-year period of environmental

[1] The sea-to-shore transition vault is the point where the offshore and onshore segments of the SFEC will be spliced together. The vault has already been installed underground, within the Town roadway, approximately 860 feet onshore from the coastline's mean high water line. The sea to shore transition is also called the transition joint bay ("TJB"). Installation of all cable vaults and splice vaults between the TJB and the existing substation is now nearly complete. Gearon Decl. ¶ 7. A TRO/PI would do nothing to prevent the harm alleged since the alleged "pathway" is already in place.

[2] The Environmental Protection Agency ("EPA") has jurisdiction to issue air permits on the OCS under the Clean Air Act. 42 U.S.C. § 7627; 40 C.F.R. § 55.5(a). No Clean Air Act claims are at issue in the Plaintiff's Motion for TRO/PI.

review, BOEM published the Final EIS ("FEIS")[3] for the Project. Gearon Decl. ¶ 16. The FEIS addresses PFAS issues, and concludes that with application of state law requirements "all activities would meet permit and regulatory requirements to continue protecting groundwater." FEIS at H-28; *see also id*. at H-23, H-27; Schneider Decl. Ex. 8.

As the culmination of a textbook interagency review process,[4] the FEIS also evaluated potential impacts to Atlantic cod and measures to mitigate potential impacts, including the current restriction on pile driving in Atlantic cod habitat from December 1 – April 30. *See* Record of Decision ("ROD") Schneider Decl. Ex. 9, Appendix D at 1.7.1, 1.3.3, 1.4.4, 1.4.5; Gearon Decl. ¶ 33; *see also* FEIS at 3-4, 3-8 to 3-10, 3-27, 3-36 to 3-39, 3-109 to 3-110, G-3 to G-4; FEIS at 3-28 ("timing restrictions would minimize adverse impacts on Atlantic cod spawning and likely avoid broader population-level effects. On balance, construction noise impacts on finfish would likely range from minor to moderate.").

2. OCSLA

The OCSLA authorizes the Secretary of the Interior, through BOEM, to issue leases, easements, and rights-of-way on the OCS for renewable energy development, including wind energy projects. 43 U.S.C. § 1337(p); 43 U.S.C. § 1333(a)(1). Consistent with BOEM's regulations, South Fork Wind prepared a detailed Construction and Operations Plan ("COP"), which it submitted to BOEM in June 2018 to obtain approval to develop its OCS lease. Gearon Decl. ¶ 15. Following extensive environmental review and consultation under multiple statutes,

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

[4] With respect to the October 2021 letter from NOAA, Plaintiff himself describes how NOAA raised this very issue with BOEM during the regular interagency review process, including a letter dated June 7, 2021. *See* Am. Compl. ¶¶ 410.10-11. Plaintiff further admits that BOEM responded to NOAA's letter as to these risks on October 3, 2021, and analyzed the risk of pile driving to Atlantic cod in the FEIS. *See id.* ¶ 410.12. The acoustic monitoring plan developed as a result of these interactions was also reviewed by NOAA before agency approval. Gearon Decl. Ex. C (email approving plan).

including NEPA, BOEM issued its ROD[5] for the Project on November 24, 2021. *Id.* ¶ 18. On January 18, 2022, BOEM approved the COP. *Id.*

3. NYSPSC

The NYSPSC has jurisdiction over the siting of transmission lines in New York State and has authority to issue Certificates of Environmental Compatibility and Public Need ("CECPNs") for certain defined projects, including this Project. N.Y. Comp. Codes R. & Regs. tit. 16, pts. 85-88. The installation of concrete duct banks and vaults and other work in New York state waters (including HDD) at issue here has been the subject of a multi-year proceeding before the NYSPSC under Article VII of the New York State Public Service Law. Bowes Decl. ¶ 10. The NYSPSC unanimously approved the CECPN for the SFEC-New York on March 18, 2021 after nearly three years of environmental review involving extensive discussions with state agencies and other stakeholders and interested parties—including NYSDEC and Plaintiff. *Id.* ¶¶ 10, 12, 16. The question of whether the installation of concrete duct banks and vaults would create a PFAS "preferential pathway" was extensively evaluated by the State, including at a multi-day evidentiary hearing. *Id.* ¶ 31.

This process resulted in approval by the NYSPSC of a Joint Proposal containing 195 separate conditions that, among other things, avoid and minimize, to the extent practicable, any significant adverse environmental impacts associated with constructing, operating, maintaining, and decommissioning the SFEC-New York. *Id.* ¶ 11.[6] The Joint Proposal contains conditions

[5] https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Record%20of%20Decision%20South%20Fork_0.pdf

[6] The Joint Proposal was supported and signed by: South Fork Wind, the New York State ("NYS") Department of Public Service ("NYSDPS"), NYSDEC, NYS Department of Transportation, NYS Department of State, NYS Office of Parks, Recreation and Historic Preservation, PSEG (acting on behalf of and as an agent of LIPA), The Trustees of the Freeholders and Commonalty of the Town of East Hampton, Win with Wind, Montauk United, the Concerned Citizens of Montauk, the Group for the East End, Inc., and a number of individuals. Bowes Decl. ¶ 12.

mitigating any potential impacts that may result from encountering PFAS-contaminated soil or water. *Id.* The NYSPSC adopted the Joint Proposal in its "Article VII Order" and found that the SFEC-New York as proposed meets the requirements for issuance of a CECPN; the SFEC-New York would have only "minimal adverse environmental impact"; and the record "fully support[ed] a finding of public need." *Id.* ¶ 13-14.

Environmental matters and the allegations of exacerbating existing PFAS contamination were discussed throughout the Article VII process. NYSDEC, as "a statutory party to all PSL [Public Service Law] Article VII proceedings," provided its "expertise in the area of environmental impact assessment, including whether a proposed project has appropriately avoided environmental impacts, and adequately minimized and mitigated unavoidable impacts." Bowes Decl. ¶ 31(a) (quoting NYSDEC Statement in Support of Joint Proposal). When Project opponents raised the theory of a preferential pathway for PFAS from the East Hampton Airport, South Fork Wind submitted a 268-page Site Characterization Report, *id.* ¶ 31(b), and further evidence that:

> [T]he Project will not create preferential pathways or cause groundwater to flow in directions it is not already flowing, irrespective of the Project. This is both because: (1) significant areas of excavation below the groundwater table are not anticipated, and thus will not affect groundwater flow in those areas; and (2) the Upper Glacial aquifer exists in highly permeable coarse sands and gravel sand, such that the trench design will not introduce a high-permeability zone that could serve as a preferential flow pathway that could divert groundwater flow into areas it will not naturally go within the sandy soil. Therefore, the Project will have no long-term negative impact on the nature or extent of PFAS impacts that may already be present in the area.

Id. ¶ 31(c) (emphasis added). Further explanation in expert testimony was given during the four days of evidentiary hearings on the application in December 2020, including how:

> The cable trenching that is being done is being installed inside of concrete casing so the trench system itself would actually be less permeable than the sands that surround it, the native material of the glacial aquifer. So the groundwater would continue to flow in those native sands of the upper glacial aquifer. They would not flow into or through a concrete chamber.

Id. ¶ 31(d) (emphasis added). Evidence was also given that a "couple feet" of trenching at the "top of a glacial aquifer with a wide variety in thickness up to 70 plus feet" "would not cause any

significant change in the overall groundwater flow where it meets the aquifer." *Id.* In other words, the trenching will not act like a "french drain" altering the direction of the groundwater as claimed by Plaintiff.

On January 20, 2021, NYSDEC submitted its Initial Brief in the Article VII proceeding. *Id.* ¶ 31(e). NYSDEC specifically addressed "potential contamination along the [Project's] proposed Beach Lane route" and concluded that "the Project's impact on potential existing contamination will be properly addressed through requirements included in the Joint Proposal." *Id.* Plaintiff was a formal party to the Article VII proceeding, individually and on behalf of an entity called Wainscott Pond Project, Inc.[7] Gearon Decl. ¶ 20. Plaintiff actively participated in the proceeding, including by submitting comments on South Fork Wind's application, signing a protective order so he could receive Protected Information, informing the NYSPSC of his other lawsuits against New York State agencies, moving to compel the Town of East Hampton to respond to interrogatories and document requests, submitting evidence relating to alleged effects of the SFEC-New York on existing PFAS contamination in East Hampton, and participating in the four-day evidentiary hearing including through cross-examination of South Fork Wind's witnesses. *Id.* The NYSPSC process, and Plaintiff's evidence and testimony submitted in that process, addressed the very same PFAS contamination issues Plaintiff raises here.

In its March 2021 Article VII Order adopting the Joint Proposal, the NYSPSC extensively discussed existing PFAS contamination, and concluded that Project opponents had not "established any reason that the potential presence of PFAS contaminated materials underlying portions of the Project corridor should preclude construction and that such arguments should be dismissed." Bowes Decl. ¶ 31(f) (emphasis added). Plaintiff petitioned for a rehearing and stay

[7] https://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?Mattercaseno=18-T-0604 (click "Party List (73)" tab and then type "Kinsella" in the search bar).

of the NYSPSC's Article VII Order. Gearon Decl. ¶ 21. NYSDEC opposed rehearing and reiterated that "the PSC correctly found that 'the Project, as proposed and conditioned will not exacerbate existing PFAS,' and that the Joint Proposal includes conditions that require testing and proper disposal of any contamination encountered to avoid or minimize any impacts related to potential contamination." Bowes Decl. ¶ 31(g). In its Order Denying Petitions for Rehearing, the NYSPSC reviewed all of the petitioners' PFAS-related claims and found them "to be without merit." *Id.* ¶ 17. Plaintiff then petitioned in the New York State Court Appellate Division and that petition remains pending. *Kinsella v. PSC*, No. 2021-06572 (N.Y. App. Div. 2d Dep't). Notably, whereas other Wainscott residents who petitioned for review of the NYSPSC's decision also filed a separate motion for a stay pending appeal from the New York State Court Appellate Division (albeit unsuccessfully), Plaintiff did not do so.

On January 31, 2022, the NYSPSC issued a Notice to Proceed with Construction of the Project.[8] Gearon Decl. ¶ 24. A Notice of Intent to Commence Construction was filed with the NYSPSC and noticed to parties to the proceeding (including Plaintiff), and posted on the South Fork website on January 14, 2022, over nine months ago; it stated that construction was anticipated to commence on or about January 28, 2022. Construction began on February 1, 2022. *Id.*

On March 11, 2022, Plaintiff wrote a letter asking the NYSPSC to order South Fork Wind to cease construction. Gearon Decl. ¶ 35. The NYSPSC did not do so. Construction of the cable trench and Installation of the duct bank and vaults between the TJB and the existing substation is now complete along the Long Island Rail Road and is largely complete along Town roads, with only 200 feet of duct tie in work remaining at three vault locations, and approximately 160 feet

[8] https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={69185974-2D32-4390-A510-886B11B20486} (Joint Proposal).

between the onshore HDD entry pit and the TJB. *Id.* ¶ 7.[9]

The NYSPSC's Article VII Order, including its environmental conditions, is not subject to approval by BOEM or any other federal agency. South Fork Wind has obtained all necessary federal permits for SFEC-Offshore construction, but the federal permits at issue in this case do not authorize construction of the SFEC-Onshore, installation of concrete duct banks and vaults, or HDD drilling in New York State waters. *See* Bowes Decl. ¶ 19. Rather, the NYSPSC's January 31, 2022 approval of South Fork Wind's Notice to Proceed with Construction authorized South Fork Wind to begin the SFEC-NYS construction and installation of concrete duct banks and vaults that Plaintiff seeks to halt. *See* Gearon Decl. ¶ 24.

C. Prior and Ongoing Litigation Against the Project's Approvals

Plaintiff and others have filed multiple challenges to the Project's approvals. Plaintiff himself has previously sued New York state regulators—the NYSPSC and the NYSDPS—as well as LIPA (over the power purchase agreement ("PPA") it entered into with South Fork Wind) in state court. *See Kinsella v. PSC*, No. 2021-06572 (N.Y. App. Div., 2d Dep't); *Kinsella v. Long Island Power Auth.*, No. 613/2021 (N.Y. Sup. Ct. Suffolk Cnty.) ("*Kinsella v. LIPA I*"); *Kinsella v. Long Island Power Auth.*, No. 621109/2021 (N.Y. Sup. Ct. Suffolk Cnty.) ("*Kinsella v. LIPA II*"). In each of these state court actions, Plaintiff raised contentions similar to those in the instant lawsuit. Plaintiff voluntarily discontinued one suit, and the court dismissed another. *See, Kinsella v. LIPA I*, Notice of Discontinuance (N.Y. Sup. Ct. Suffolk Cnty. Oct. 21, 2021); *Kinsella v. LIPA II*, Order Dismissing Case (N.Y. Sup. Ct. Suffolk Cnty. Mar. 23, 2022); Gearon Decl. ¶ 22. Plaintiff (and his co-plaintiffs, the Mahoneys) filed a notice of appeal in *Kinsella v. LIPA II* on

[9] *See also* construction status map available at, https://www.google.com/maps/d/u/0/viewer?mid=1J_kfl6SXsLWxwviVsLsy_Ivm2Gov-vNH&ll=40.95482430184058%2C-72.2298342982266&z=14.

April 21, 2022. *See* Gearon Decl. ¶ 22 As of the date of this filing, *Kinsella v. PSC* and the appeal of *Kinsella v. LIPA II* both remain pending.

Other residents of the Town of Wainscott claiming PFAS concerns have also sued in state court and failed to stop onshore construction of the Project. Several residents and a local group called Citizens for the Preservation of Wainscott challenged the easement granted by the Town of East Hampton and lost. *See Citizens for the Pres. of Wainscott, Inc. v. Town of E. Hampton, N.Y*, No. 601847/2021, Order Dismissing Case (N.Y. Sup. Ct. Suffolk Cnty. Feb. 24, 2022) (dismissing case challenging easement because, among other things, the Town sufficiently considered PFAS contamination concerns). Citizens for the Preservation of Wainscott also appealed the NYSPSC's March 2021 Order adopting the Joint Proposal and issuing the CECPN in an Article 78 proceeding in New York State court that included (unlike *Kinsella v. PSC*) a request for preliminary injunctive relief. That request was also denied. *See Citizens for the Pres. of Wainscott, Inc. v. N.Y. State Pub. Serv. Comm'n*, No. 2021-06582, Order Denying Motion to Stay Pending Appeal (N.Y. App. Div., 2d Dep't Jan. 26, 2022).

After this series of losses in state proceedings, two other sets of Wainscott property owners—one of which had joined Plaintiff in state court litigation—the Mahoneys and the Solomons, filed a case in the U.S. District Court for the Eastern District of New York, asserting substantially similar allegations relating to PFAS contamination in East Hampton that predates the Project. *See e.g.*, Complaint, *Mahoney*, Dkt. 1 (Mar. 9, 2022). The *Mahoney* plaintiffs filed their complaint in March 2022, immediately seeking a TRO to stop Project construction; the court denied their request. Order, *Mahoney*, Dkt. 17 (Mar. 14, 2022) (denying plaintiffs' motion for order to show cause for TRO); Schneider Decl. Ex. 2. The *Mahoney* plaintiffs subsequently both renewed their request for a TRO, which the court denied, and the *Mahoney* plaintiffs then sought a preliminary injunction, which the court also denied. Electronic Order, *Mahoney*, Dkt. 28A (Mar.

17, 2022) (denying plaintiffs' second motion for order to show cause for TRO), Schneider Decl. Ex. 3; Mem. and Order, *Mahoney*, Dkt. 42 (Apr. 12, 2022) (denying plaintiffs' motion for preliminary injunction), Schneider Decl. Ex. 7.

Given the NYSPSC's jurisdiction over the onshore component of the Project, the NYSPSC participated as an *amicus curiae* in *Mahoney* in opposition to the plaintiffs' motion for a preliminary injunction. *See* NYSPSC *Amicus Curiae Brief*, *Mahoney*, Dkt. 34-1 at 5 (March 25, 2022); Schneider Decl. Ex. 6. In that brief, the NYSPSC stated that "the Commission, as the New York State entity having exclusive jurisdiction under state law to review the onshore portion of the SFW Cable, has already thoroughly examined the potential environmental impacts from construction and operation of that portion of the cable[.]" *Id.* In its order denying the preliminary injunction, the court noted that "[t]he NYPSC found that the project would not exacerbate existing PFAS contamination, in part because as proposed, the project provided for preventative measures to ensure that groundwater flow was not materially altered." Mem. And Order, *Mahoney*, Dkt. 42 (Apr. 12, 2022); Schneider Decl. Ex. 7.

III. LEGAL STANDARD

A temporary restraining order and a preliminary injunction are "extraordinary" remedies that can only be granted upon a "clear showing" of entitlement to such relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008); *Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011). "An application for a TRO is analyzed using factors applicable to preliminary injunctive relief." *See Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 319 F. Supp. 3d 70, 81 (D.D.C. 2018), *rev'd on other grounds*, 944 F.3d 945 (D.C. Cir. 2019). A plaintiff seeking a TRO or preliminary injunction must show: (1) likelihood of success on the merits; (2) that there will be irreparable harm in the absence of preliminary relief; (3) that the balance of the equities tip in their favor; and (4) that an injunction is in the public interest. *Winter*, 555 U.S. at 20. The party

seeking the relief carries the burden of persuasion. *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). The rules of this Court provide that the court will not consider an ex parte application for a TRO "[e]xcept in an emergency[.]" LCvR 65.1(a).

IV. ARGUMENT

A. The Balance of the Equities and the Public Interest Strongly Favor Denial of the TRO/PI Motion

When "the competing claims of injury" and "effect[s] on each party of the granting or withholding of the requested relief" are analyzed, including economic harm, the balance of equities strongly weighs in favor of denying Plaintiff's TRO/PI motion. *Winter*, 555 U.S. at 24; *Sherley*, 644 F.3d at 398-99 (finding harm due to preliminary injunction was "certain and substantial" where injunction would disrupt researchers who had already begun projects in reliance upon agency funding such that "their investments in project planning would be a loss, their expenditures for equipment a waste, and their staffs out of a job").

Notwithstanding his strenuous, years-long opposition to the Project, including the filing of several lawsuits, Plaintiff—who has formal legal training[10]—delayed seeking relief until the midst of construction, attempting to create a false sense of urgency to advance a purported "emergency" TRO/PI Motion. While Plaintiff will not suffer any irreparable harm if the TRO/PI Motion is denied, *see infra* Section II.B, South Fork Wind will face "certain and substantial" harm if such relief is granted. South Fork Wind has entered into contracts for the manufacture, transport, and installation of Project components in order to commence and complete construction in 2023, and in connection with those contracts and other associated costs has now invested over $1 billion dollars in the Project. Gearon Decl. ¶¶ 40-41. The Article VII Order granted by the NYSPSC

[10] *See, e.g., Kinsella v. Inc. Vill. of E. Hampton*, Civ. No. 15-3948, Dkt. 134 at 14 (E.D.N.Y. Dec. 6, 2021) ("Where an attorney is proceeding *pro se*, however, his pleadings are not entitled to the special consideration which the courts customarily grant to *pro se* parties. Kinsella . . . received formal legal training in Australia . . . .") (internal quotation marks and citations omitted).

imposes numerous timing restrictions, including upcoming prohibitions on construction during the tourist season and to protect wildlife. Bowes Decl. ¶ 37; Ex. A, Attachment A, Appendix D at Certificate Conditions 72[b], 69, 71, and 72[a]. These State-mandated exclusion dates mean that any delay to the challenged onshore work would have cascading effects, would cause the Project to incur significant additional expenses, and would force South Fork Wind to extend the duration of construction.[11] Bowes Decl. ¶ 38. If HDD construction were enjoined as Plaintiff requests, South Fork Wind may not be able to finish the necessary HDD during this construction season and may not be able to drill again until a year from now in November 2023 due to restrictive work windows. Gearon Decl. ¶ 43. The Project's commercial operation date would then be delayed at least 6 to 8 months. *Id*. That sort of delay would equate to approximately $4.8 million in liquidated damages under the LIPA PPA and tens of millions of dollars in lost revenues during that six-month period. *Id*.

As another example of a substantial cost to South Fork Wind of granting Plaintiff's requested relief, South Fork Wind invested a significant amount of time and money to relocate the "Liftboat Jill"—a jack-up barge with 335 foot legs—to Long Island. *Id*. ¶ 22. The total cost for HDD, including the Jill, is $40 million. *Id*. ¶ 45. If HDD is enjoined or delayed, it will cost approximately $262,000 each day for the Jill and the other HDD equipment to sit idle; and the vessel may need to leave the site for other contractually scheduled commitments, causing further delay. *Id*.

If commercial operation of the Project is not achieved within 365 days after the target date established pursuant to the PPA, LIPA reserves the right to terminate the PPA. *Id*. ¶ 46. If the

[11] South Fork Wind has also entered into substantial engineering, procurement, and construction contracts to ensure it can complete construction as soon as possible, and has scheduled the use of unique equipment necessary to construct the SFEC-Offshore. Any delays to the Project schedule would result in significant harm to South Fork Wind. *See* Bowes Decl. ¶ 43; Gearon Decl. ¶¶ 40-46.

PPA were terminated, South Fork Wind could lose all of its investments in the Project (not to mention lost profits). *Id.* South Fork Wind has invested over a billion dollars to date to plan, permit and develop this Project. *Id*. ¶ 40. Against this backdrop and Plaintiff's both lesser and speculative injuries, the balance of the equities strongly favors denying Plaintiff's motion.

In evaluating the public interest, the Court may consider the public's interest in the local economy, job security, securing reliable energy, achieving clean energy goals, and reducing greenhouse gas emissions. *See Protect Our Cmtys. Found. v. U.S. Dep't of Agric.*, 845 F. Supp. 2d 1102, 1116–17 (S.D. Cal. 2012) (public interest in reliable energy), *aff'd*, 473 F. App'x 790 (9th Cir. 2012); *W. Watersheds Project v. Bureau of Land Mgmt.*, 774 F. Supp. 2d 1089, 1103–04 (D. Nev. 2011) (public interest in increasing energy independence, decreasing greenhouse gas emissions, and advancing clean energy policies), *aff'd*, 443 F. App'x 278 (9th Cir. 2011). Here, denying Plaintiff's requested relief is in the public interest. In approving the Project, the NYSPSC found that it "will serve the public interest, convenience, and necessity by, among other things, contributing to State energy policy goals . . . , diversifying the State's electric generation mix, lowering greenhouse gas emissions, and assisting LIPA in serving its customers." Bowes Decl. Ex. A at 79. Further, the NYSPSC already has explained that "[i]ts conditions governing construction and operation of the onshore cable are designed to minimize, if not entirely eliminate, adverse environmental impacts[.]" NYSPSC Amicus Br., *Mahoney* Dkt. 34-1; Schneider Decl. Ex. 6.

Additionally, as the NYSPSC found, timely operation of the Project will assist LIPA in meeting its renewable energy goals, and addressing the reliability needs identified in its 2015 Request for Proposals – South Fork Resources. Gearon Decl. ¶ 50; Bowes Decl. ¶ 41. If the Project cannot proceed on schedule, LIPA would likely need to pursue other more costly alternatives. Bowes Decl. ¶ 41. Second, Project delay—or termination—would result in increased

greenhouse gas emissions, directly undermining important long-term federal, state, and municipal policies to reduce emissions, deploy offshore wind energy generation, and increase clean energy growth. Gearon Decl. ¶ 50; Bowes Decl. ¶ 42. Third, as BOEM stated in the FEIS, the Project is anticipated to create between 1,226 and 1,611 full-time equivalent jobs during Project construction (through direct, indirect, and induced effects of the Project) and an estimated 47 to 96 full-time equivalent jobs annually for the Project's operations and maintenance work. Gearon Decl. ¶ 51. South Fork Wind expects that many of the offshore construction jobs on the Project will be union jobs. *Id.* Construction of the Project's onshore components is also being completed with local union labor, and several Long Island businesses supporting the Project's construction activities will prioritize local sourcing of construction materials. *Id*. The relief Plaintiff seeks would destroy those strong public interests in the Project.

B. Plaintiff Has Not Proven Irreparable Harm

Plaintiff has not proven irreparable harm absent a TRO or preliminary injunction for the most straightforward of reasons: Plaintiff does not have any legally cognizable injury-in-fact to begin with, which is why this Court should deny Plaintiff's motion on standing grounds. *See infra* Section IV.C.1. Yet, even if this Court found, despite the lack of evidence, that Plaintiff has established a legally cognizable injury-in-fact, that injury certainly is not irreparable.

A "possibility" of irreparable harm is insufficient; "plaintiffs seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in original). And a "procedural harm" consisting of a violation of a statute like NEPA "is insufficient . . . to constitute irreparable harm" to justify granting preliminary injunctive relief. *Nat'l Parks Conservation Ass'n v. U.S. Forest Serv.*, No. 15-cv-01582, 2016 WL 420470, at *11 (D.D.C. Jan. 22, 2016). Further, "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." *Ajilon*

Pro. Staffing, PLC v. Kubicki, 503 F. Supp. 2d 358, 361–62 (D.D.C. 2007) (quoting *Wis. Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985)).

As an initial matter, even putting aside Plaintiff's failure to provide any evidence that SFEC-Onshore installation of concrete duct banks and vaults or HDD work will exacerbate pre-existing PFAS contamination, such contamination is not irreparable, as the Eastern District of New York court found in rejecting a similar attempt to halt onshore construction on substantially similar grounds. Mem. and Order, *Mahoney*, Dkt. 42 (Apr. 12, 2022); Schneider Decl. Ex. 7. Critically, as that court held, PFAS contamination can be remediated and thus a PFAS injury is not irreparable. Indeed, extensive remediation efforts for drinking water in East Hampton—for pre-existing PFAS issues wholly unrelated to the Project—have already occurred.

- In 2018, NYSDEC undertook remedial measures to address the PFAS contamination in Wainscott's drinking water supply. Specifically, NYSDEC installed point-of-entry treatment systems ("POETs") and point-of-use treatment systems ("POUTs") at residential and commercial properties in Wainscott to remove PFAS from drinking water. Bowes Decl. ¶ 29(d).

- In addition to NYSDEC's remedial measures, in 2018, the Town finalized a plan to take affected Wainscott private drinking water wells offline by connecting those wells to the Town's public water supply. The Town also initiated a rebate program for Wainscott residents who did not require a POET installation by NYSDEC, but who wished to nevertheless install a POET at their household to treat any potential PFAS contamination in their drinking water. *Id.* ¶ 29(e).

- As of December 7, 2018, water main connections to the Town's water supply had been installed throughout all of Wainscott, with the exception of a few streets where "installation [was] pending." *Id.* ¶ 29(f).

- At present, the investigation and remediation of PFAS associated with the East Hampton Airport and Wainscott Sand & Gravel sites continues under NYSDEC's oversight. *Id.* ¶ 29(h).

Further, in approving the Project, the NYSPSC imposed a number of conditions on construction of the SFEC-Onshore that dictate how South Fork Wind must identify, handle, and dispose of any PFAS-contaminated soil or groundwater that is encountered during construction. Bowes Decl. ¶ 32. As such, not only are efforts ongoing to address PFAS contamination in the

Town, but in the unlikely event that SFEC-Onshore construction encounters PFAS contamination, South Fork Wind would be required to address it. Because PFAS contamination can be and is being remediated, any alleged harm related to speculative PFAS exacerbation cannot be deemed "irreparable." *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (to obtain preliminary injunctive relief, "the injury must be beyond remediation").

Plaintiff's only other claimed injury relates to speculative future increases in the price of cod as a result of construction of the SFWF, such that "Plaintiff will have to pay more for Atlantic cod." *See* TRO/PI Mot. at 26; Am. Compl. ¶ 7.h. Of course, preliminary injunctive relief is not warranted where monetary damages are alleged as there is an adequate remedy at law. *See Ajilon Pro. Staffing,* 503 F. Supp. 2d at 361–62. Equally important, Plaintiff claims that to avoid irreparably injury, he needs an order halting disruption of spawning Atlantic cod on Cox Ledge from November 2022 to April 30, 2023, TRO/PI Mot. at 22. But pile driving activities will not occur on Cox Ledge prior to May 1, 2023 and other, non-pile-driving activities occurring before then will be subject to BOEM-mandated mitigation measures to protect spawning cod, further undercutting Plaintiff's "emergency" basis for his TRO/PI Motion.[12] Gearon Decl. ¶ 32.

Finally, Plaintiff's delay in seeking injunctive relief cuts heavily against his claims of irreparable harm. BOEM issued the ROD approving Project construction in November 2021, and Plaintiff sent Federal Defendants and South Fork Wind a notice of intent to sue in December 2021. TRO/PI Mot. at 15, 17. Construction of the SFEC-Onshore—the first phase of Project construction—began in February 2022, and is currently ongoing. Bowes Decl. ¶ 18. Despite clear awareness of the federal approvals and construction activities which he now asserts present

[12] In fact, existing mitigation measures already prohibit such pile driving from December 1, 2022 to April 30, 2023. *See* ROD, Appendix D at 1.7.1; Schneider Decl. Ex. 9. Thus, Plaintiff's emergency request to halt pile driving from November 2022 through April 2023 (Am. Compl. ¶ 30) exceeds the existing restrictions only as to November 2022—during which time, again, South Fork Wind has no such pile driving scheduled. *See* Gearon Decl. ¶ 32.

immediate, irreparable harm, Plaintiff waited *nine months* after construction began to file the instant motion (having already foregone the opportunity to seek similar relief in *Kinsella v. PSC*). Such delay in seeking relief "implies a lack of urgency and irreparable harm." *Newdow v. Bush*, 355 F. Supp. 2d 265, 292 (D.D.C. 2005); *see also Mylan Pharms., Inc. v. Shalala,* 81 F. Supp. 2d 30, 44 (D.D.C. 2000) (two-month delay in seeking injunctive relief "militates against a finding of irreparable harm"). Plaintiff does not have any irreparable harm.

C. Plaintiff Is Not Likely to Succeed on the Merits

1. Plaintiff Lack Article III Standing

Plaintiff is unlikely to succeed on the merits because he cannot meet the threshold requirement of establishing Article III standing: (1) he has not suffered any concrete, particularized, actual, or certainly impending injuries, (2) his unproven alleged injuries are not fairly traceable to the alleged misconduct of the Federal Defendants, and (3) for that very reason, even granting Plaintiff the relief he seeks will not redress his supposed injuries.

To establish Article III standing, Plaintiff must satisfy the familiar 3-pronged test, showing: injury in fact; a "causal connection between the injury and the conduct complained of"; and a likelihood that the alleged injury "will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). When assessing standing at the preliminary injunction stage, the district court applies "the heightened standard for evaluating a motion for summary judgment[,]" meaning "the plaintiff cannot rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts that, if taken to be true, demonstrate a likelihood of standing." *Elec. Priv. Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 400 (D.C. Cir. 2017) (internal citations and quotations omitted); *see also Sierra Club v. E.P.A.*, 292 F.3d 895, 899 (D.C. Cir. 2002). Plaintiff has provided neither an affidavit nor any evidence from which the Court could find he has Article III standing. As

explained below, Plaintiff has not established standing.

a. Plaintiff Cannot Establish Injury in Fact

Plaintiff has not shown any injury in fact, as to either Atlantic cod or PFAS. To establish injury in fact, Plaintiff must prove "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan*, 504 U.S. at 560). A "concrete" injury "must actually exist." *Id*. at 340. For a future injury, Plaintiff must prove that the injury is "certainly impending"; "allegations of possible future injury," "fears of hypothetical future harm," or "subjective apprehension" are not sufficient. *Id.*; *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013); *City of Los Angeles v. Lyons*, 461 U.S. 95, 104 (1983). Nor can Plaintiff claim injuries for "generalized grievances" that affect the community at large. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 616 (1989).

Plaintiff cannot establish a concrete injury with regard to Atlantic cod. Plaintiff alleges only a future, speculative injury: that the project approval "will lead to further declines in Atlantic cod population levels and increases in price for Atlantic cod" such that "[Plaintiff], and the public, will have to pay higher prices. . . ." Am Compl. at 7.h. This alleged harm—a generalized grievance that, at best, affects the entire community of prospective cod consumers—is not "certainly impending." Plaintiff admits Atlantic cod stocks have already fallen by over 90% and "the price has steadily risen" for over a decade. *Id.*; *id.* at 410.10; *see also* TRO/PI Mot. at 26 ("The Atlantic cod population *is already compromised*."). There is no allegation that either trend—which was not caused by a project that had yet to be built—will halt, much less reverse, even if the Project were to be stopped.

Moreover, Plaintiff ignores the robust measures designed to mitigate potential impacts on Atlantic cod. As an initial matter, Plaintiff focuses on Cox Ledge (TRO/PI Mot. at 22), but the

Project area includes only a portion of what is considered the larger Cox Ledge geological feature on the continental shelf off the coast of Rhode Island. Gearon Decl. ¶ 32. And while Plaintiff seeks a TRO to halt activity on Cox Ledge prior to April 30, 2023 (TRO/PI Mot. at 22), pile driving on or in the vicinity of Cox Ledge will not even start until May 1, 2023, after the Atlantic cod spawning season. Gearon Decl. ¶ 32.

Furthermore, South Fork Wind was also required to and has developed an adaptive acoustic monitoring plan to provide additional protections for spawning Atlantic cod from November 1 through March 30. *Id.* ¶ 33. The objective of the Plan and of required cod aggregation monitoring is to detect Atlantic cod aggregations in the immediate footprint of site preparation work to avoid or minimize activities (including through adaptive management) in any area with aggregations of Atlantic cod indicative of spawning behavior, to the extent technically and economically feasible. *Id.* ¶ 33. NMFS and BOEM both reviewed the acoustic monitoring plan in the summer of 2022, and it was approved. *Id*. Any construction activities that South Fork Wind does carry out on or near Cox Ledge between now and May 1, 2023—which activities, again, will not include pile driving—will be subject to this plan, which Plaintiff completely fails to acknowledge.

As to PFAS, the lengthy Amended Complaint includes dozens of allegations about contamination in the Wainscott community, but omits a fundamental requirement: allegations of a concrete, particularized injury suffered *by Plaintiff himself*. For example, Plaintiff alleges that installation of concrete duct banks and vaults would create "a preferential pathway for the movement of PFAS . . . to locations that otherwise would not be impacted." Am. Compl. ¶ 400. As an initial matter, the U.S. District Court for the Eastern District of New York has rejected a TRO and PI motion based on that same "preferential pathway" theory. *See supra* at 12. But here, Plaintiff fails to even allege that *his property* could be impacted. Similarly, Plaintiff alleges "the majority of private water wells (159) in Wainscott (303) showed detectable levels of PFOS and

PFOA . . . .” Am. Compl. ¶ 661. Even if the allegation of existing contamination, unrelated to the Project, were relevant to any potential injury purportedly caused by the challenged action here (it is not), again, Plaintiff makes no allegation as to a private well *of his own*.[13] And for the discussion of the local “sole source aquifer,” Plaintiff’s Amended Complaint alleges the “Suffolk County Water Authority (“SCWA”) supplies public water to connected homes[,]” Am. Compl ¶¶ 19-21, but he fails to allege *his home* is connected or even mention from where he sources his own drinking water. In short, this case has a single Plaintiff, and he has not alleged any concrete, particularized injury from PFAS contamination, let alone any injury tied to the challenged actions.

Even if Plaintiff had made allegations in his Amended Complaint as to his own property or private well (he did not), although there is known, pre-existing PFAS contamination in Town groundwater, the installation of concrete duct banks and vaults will not—as multiple State agencies already have determined—create a preferential pathway that changes the direction of how that PFAS contamination flows in groundwater. Consequently, the installation of concrete duct banks and vaults will not cause more PFAS contamination to reach private wells than otherwise would have reached those wells absent the this work. Any such supposed “injuries” would be based on speculation of what could happen, not a scientifically reliable evidentiary showing of injuries that are concrete, particularized, actual, or certainly impending to Plaintiff. Similarly, even if there were allegations of an injury to Plaintiff from the installation of concrete duct banks and vaults (there are not), the NYSPSC already evaluated—and rejected—the claim that such work will create a preferential pathway for PFAS to move in groundwater. Bowes Decl. ¶ 32. Specifically, the NYSPSC concluded:

> If the Applicant encounters contaminated soil or groundwater[,] measures to ensure that the material is handled and disposed of

[13] Plaintiff’s lengthy allegations about the health risks of PFAS in drinking water contradict the fact, included in his own Amended Complaint, that in 2018 affected residents ceased using private wells for drinking water. Amended Compl. at 4.

> properly are required by the Proposed Certificate Conditions. Pre-construction testing and the development of specific plans for handling any contamination encountered are required and will avoid or minimize any impacts related to potential contamination. Similarly, nothing in the record supports the concern that the Project's design including duct banks, splicing or transition vaults will materially alter the flow of groundwater regardless of whether contamination is encountered.

Id. ¶ 32(b) (emphasis added). NYSDEC, the State environmental regulator and a party to the Article VII proceeding before the NYSPSC, also stated that "the PSC correctly found that 'the Project, as proposed and conditioned will not exacerbate existing PFAS,'" and "agree[d] that the Project's impact on potential existing contamination will be properly addressed through requirements included in the Joint Proposal." *Id.* ¶ 31(g), (e). And a New York state appellate court rejected Citizens for the Preservation of Wainscott's prior attempt to stay the onshore Project work on grounds similar to those Plaintiff relies on now.[14]

The NYSPSC made its decision after receiving specific evidence from South Fork Wind—evidence that was consistent with NYSDEC's position—that the installation of concrete duct banks and vaults will not create a preferential pathway for PFAS contamination in groundwater. Bowes Decl. ¶ 31. There is simply no credible evidence that the installation of concrete duct banks and vaults would create a preferential pathway:

- Most of the trenching will not even be deep enough to encounter groundwater. *Id.* ¶ 30(c). Where trenching does not intersect groundwater, that trenching will not, by definition, affect groundwater. *See id.*
- Even in the limited areas where trenching intersects groundwater, there is no PFAS contamination in those areas above applicable NYSDEC regulatory criteria. Declaration of Jeffrey Holden ("Holden Decl.") ¶ 3(b); Schneider Decl. Ex. 5.
- The aquifer underlying this area of East Hampton, which is approximately 70 feet deep, consists of sands and gravels, geologic material that is highly permeable. *Id.* ¶ 32. Adding concrete trenches in certain areas will not increase the permeability of the aquifer, nor

[14] *Citizens for the Pres. of Wainscott, Inc. v. N.Y. State Pub. Serv. Comm'n*, No. 2021-06582 (N.Y. App. Div., 2d Dep't, Jan. 26, 2022) (order denying motion for stay and preliminary injunction). This case is currently pending before the New York State court, as is a second case challenging the Article VII order, *Kinsella v. Pub. Serv. Comm'n*, No. 2021-06572 (N.Y. App. Div. 2d Dep't, Sept. 10, 2021).

affect the rate and direction of groundwater—changes that would have to occur for Plaintiff's preferential pathway theory to be correct. *Id.* ¶ 33(c). Simply put, the trenching—even if it encounters groundwater—will not cause groundwater to flow into new areas through which it was not already flowing.

- The NYSPSC's approval requires that South Fork Wind identify, handle, and dispose of any groundwater, including any PFAS-contaminated groundwater, that is encountered during onshore trenching construction. Bowes Decl. ¶ 32. As a result, even if PFAS groundwater contamination is actually encountered during the trenching, South Fork Wind will address it pursuant to the NYSPSC-approved conditions, resulting in an incremental net environmental benefit. *Id.* ¶ 32(i).

In sum, neither generalized grievances about PFAS contamination in groundwater in East Hampton nor unfounded speculation about the impact on private wells are evidence of an Article III injury in fact to this Plaintiff.[15] *Spokeo*, 578 U.S. at 339; *Clapper*, 568 U.S. at 416; *Lyons*, 461 U.S. at 105. Lacking a legally cognizable injury in fact, this Court need go no further: Plaintiff's TRO/PI Motion for should be denied.

b. Plaintiff Cannot Demonstrate Federal Defendants' Conduct Is the Cause of the Alleged Harm

Plaintiff also has failed to establish that his alleged injuries are fairly traceable to the actions of Federal Defendants, as opposed to the "independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (citation omitted); *see also NO Gas Pipeline v. F.E.R.C.*, 756 F.3d 764, 768 (D.C. Cir. 2014).

Again, the Amended Complaint documents a long, steady decline in local Atlantic cod stocks and increase in prices for over a decade. *See supra* at 21. Plaintiff does not identify the drivers of those longstanding trends, but those causes undisputedly predate, and are unconnected to, the Federal agency approvals for the Project that are before the Court. Therefore, even if the

[15] Plaintiff also asserts that onshore work in Town roads for the Project will allow future offshore wind farms to use the SFW-Onshore as a "transmission superhighway." This allegation is too speculative and hypothetical to establish injury in fact. There are no offshore wind projects proposing to use this area as a landing site. Moreover, Plaintiff ignores the fact that any future offshore wind farm that is built must first obtain BOEM and other federal approvals for the OCS and must also obtain NYSPSC approval onshore and in State waters. Future speculative harms are insufficient to establish injury in fact.

Project were to proceed and Atlantic cod stocks continued to fall or prices continued to rise (as would be expected given the ongoing challenge of inflation), Plaintiff cannot establish that this Project approval would be responsible for the continuation of those decadal trends—particularly given the mitigation measures identified in the FEIS. *See supra* at 6, 19, 21-22. Thus, Plaintiff cannot establish traceability with respect to Atlantic cod. Plaintiff's motion fails to argue otherwise or discuss this factor with respect to cod at all.

With respect to PFAS, New York State has exclusive jurisdiction over the onshore construction at issue in this case. *See also* NYSPSC *Amicus Curiae Brief*, *Mahoney*, Dkt. 34-1 at 5 (March 25, 2022); Schneider Decl. Ex. 6 ("Plaintiffs have neglected to inform the Court that the Commission, as the New York State entity having exclusive jurisdiction under state law to review the onshore portion of the SFW Cable, has already thoroughly examined the potential environmental impacts from construction and operation of that portion of the cable in accordance with its statutory responsibilities."). Indeed, all of Plaintiff's alleged PFAS harms relate to the installation of concrete duct banks and vaults or HDD drilling, which results from approvals granted by agencies not before the Court, and which could not be caused by Federal Defendants' actions. There is no "specific nexus" to Federal Defendant's conduct here: BOEM does not have jurisdiction over the SFEC-Onshore, the installation of concrete duct banks and vaults or HDD drilling and can neither authorize nor prohibit any of that conduct underlying the purported need for a TRO here. *See Robbins v. U.S. Dep't of Hous. & Urban Dev.*, 72 F. Supp. 3d 1, 6–7 (D.D.C. 2014). The appropriate venue for Plaintiff to assert claims related to the onshore construction activities and HDD drilling was before the NYSPSC, and he did so unsuccessfully. *See supra* Section II.C. The PFAS theories were specifically presented to the NYSPSC, and rejected. Bowes Decl. ¶ 31.

c. Plaintiff's Alleged Harm Is Not Redressable by This Court

Finally, Plaintiff's claims are not redressable by the Court. Redressability exists only where the requested relief would remedy a plaintiff's alleged injury directly. *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973); *Public Citizen v. Foreman*, 471 F. Supp. 586, 590 (D.D.C. 1979) ("[A] plaintiff must show 'an injury to himself that is likely to be redressed by a favorable decision.'" (citation omitted)). That is not the case here, as to either Atlantic cod or PFAS.

Against the backdrop of decadal trends in cod stocks and prices, the alleged harm of higher cod prices is not redressable by halting the Project. As Plaintiff himself has conceded, the alleged harm—increasing cod prices—existed prior to the Project, and will likely endure regardless of whether the Project proceeds. *See supra* at 21. Even if this alleged harm were traceable to the Project, the requested TRO/PI to block pile driving in spawning habitat before May 1, 2023 would have no impact on Plaintiff's alleged injuries because none is scheduled to occur in that timeframe. *See* Gearon Decl. ¶ 32.

With respect to PFAS, injunctive relief against the Federal Defendants will have no effect on construction activities over which those Federal Defendants lack jurisdiction. None of the Federal Defendants' approvals or permits in this case authorize the installation of concrete duct banks and vaults or HDD drilling. *See* Gearon Decl. ¶¶ 7, 19, 23. Rather, the installation of concrete duct banks and vaults and HDD drilling is exclusively approved and permitted under other agency authority—a reality that explains why multiple State proceedings have occurred (some of which remain ongoing) concerning this aspect of the Project. *Id.* Plaintiff simply cannot establish redressability for federal permits and approvals that lack jurisdiction over the conduct at issue.[16] *See, e.g.*, *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41-42 (1976).

[16] Plaintiff's motion for a TRO should also be denied to prevent interference in state-level judicial proceedings. As is the case here, abstention is appropriate where the "exercise of federal review . . . would be disruptive of state efforts to establish a coherent policy with respect to a matter of

2. Plaintiff's NEPA Claims Are Not Likely to Succeed

Plaintiff is not likely to succeed on his NEPA claims because Federal Defendants' NEPA review took a "hard look" at the environmental impacts of the Project in a robust FEIS based on extensive public input. The Administrative Procedure Act's deferential arbitrary and capricious standard of review applies to both BOEM's procedural compliance with NEPA and the adequacy of its EIS. *See Nevada v. DOE*, 457 F.3d 78, 87 (D.C. Cir. 2006). A court's role is "not to flyspeck an agency's environmental analysis" but rather is "simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.'" *Birckhead v. FERC*, 925 F.3d 510, 515 (D.C. Cir. 2019) (internal citations and quotations omitted). Courts only look to "whether the agency 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Id.* (quoting *Motor Vehicle Mfrs Ass'n, v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Economic Analysis. Plaintiff (at 36-40) appears to argue that BOEM was required to make its decision whether to approve the project based on NEPA analysis featuring the overall cost of the Project and the impact to ratepayers. However, the NYSPSC—not Federal Defendants—has jurisdiction over whether there is a need for the Project and LIPA has jurisdiction to enter into agreements "to purchase power from . . . any private entity, or any other available source at such price or prices as may be negotiated[.]" N.Y. Public Authorities Law § 1020-f(r). LIPA's decision to enter into a PPA with South Fork Wind was reviewed under applicable procurement requirements and approved by the New York Office of State Comptroller and New York Attorney General. Plaintiff did try—unsuccessfully, so far—to sue LIPA over the decision to enter into the

substantial public concern." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976).

PPA.

Plaintiff's citation to *Michigan v. EPA*, 135 S. Ct. 2699 (2015)—regarding the need to consider Project costs—is inapposite because that case involved a different federal agency (U.S. Environmental Protection Agency) making a decision under a completely different and unrelated statute and regulatory regime (Clean Air Act hazardous air pollutants). Plaintiff raised the ratepayer cost issue to BOEM in comments on the Project's Draft Environmental Impact Statement ("DEIS"); and BOEM considered and responded to those comments in the FEIS by reference to the energy generation analysis in the FEIS and that a "comprehensive forecast of impacts to energy supply and ratepayer costs under the proposed Project and alternatives depends on numerous variables beyond the scope of the EIS." FEIS at I-343, I-345 (responding to comment 343-5). Furthermore, BOEM considered socioeconomic impacts in the FEIS, *see* FEIS at 3-153 to 3-168, and appropriately based its final decision on the relevant considerations under the applicable statute—OCSLA, *see* ROD at 17; *id*., Appendix D at D-11 to D-14; Schneider Decl. Ex. 9. Nothing more is required under NEPA.

Evaluating and Verifying Information. Plaintiff at (42-46) appears to argue that BOEM's NEPA analysis was deficient because the agency allegedly failed to evaluate and verify certain information based on information Plaintiff perceives as undermining certain FEIS statements. But Plaintiff does not point to any information that renders BOEM's analysis in the FEIS arbitrary and capricious. To the extent Plaintiff simply disagrees with BOEM's conclusions that does not render them invalid. *See, e.g.*, *Twp. of Bordentown, N.J. v. FERC,* 903 F.3d 234, 248 (3d Cir. 2018) ("So long as the agency takes a 'hard look' at the environmental consequences the agency has satisfied its responsibilities and a reviewing court may not substitute its judgment for that of the agency as to the environmental consequences of its actions." ((internal citations and quotations omitted)).

PFAS Contamination. Plaintiff (at 46-49) alleges that BOEM failed to acknowledge PFAS

contamination in the groundwater, but the FEIS analyzes this issue in a manner consistent with NEPA requirements. The FEIS describes the groundwater onshore, and its uses, including for drinking water purposes. FEIS at H-22, 23; Schneider Decl. Ex. 8. It also recognizes that sampling near the East Hampton Airport has detected PFAS in the "soil and groundwater within and around the site." *Id.* at H-23. The FEIS further recognizes that "construction would require the disturbance of soils near existing remediation sites[]," *id.* at H-27, but BOEM found that "[o]verall, existing groundwater quality in the analysis area appears to be good and meets NYSDEC (2018) groundwater quality standards." *Id.* at H-23. In addition, the FEIS appropriately incorporated the many testing, handling, and treatment requirements of the Article VII Order from the NYSPSC proceeding. *Id*. at A-3. The NYSPSC Article VII conditions comprehensively cover the potential PFAS issues Plaintiff raises, and BOEM referenced as much by stating, among other things: "New York State Law requires that the SFEC-Onshore be constructed in compliance with a detailed plan that includes . . . control measures." *Id*. at G-5. BOEM can and did rely on those enforceable control measures as part of its independent analysis and its finding that "all activities would meet permit and regulatory requirements to continue protecting groundwater as drinking water resources." *Id*. at H-28. This approach is reasonable, and nothing more is required.

Environmental Safeguards. Plaintiff (at 49-50) vaguely alleges that BOEM failed to make the Project subject to "environmental safeguards" pursuant to OCSLA relating to existing PFAS contamination, construction workplace safety, and a local fire. With respect to PFAS contamination, BOEM addressed this issue in the FEIS. *See supra* at 6. And BOEM considered potential impacts of construction and installation of the Project onshore to water quality, *e.g.*, FEIS at H-27–H-28. In response to Plaintiff's comment on the draft EIS raising concerns regarding fires at the substation, BOEM identified public health and safety measures being considered. FEIS at I-102 (response to comment 343-7).

Atlantic Cod Stock. Plaintiff disagrees (at 51-53) with BOEM's findings in the FEIS regarding impacts on Atlantic cod stock. However, the FEIS extensively evaluated potential impacts to Atlantic cod and measures to mitigate potential impacts. FEIS at 3-4, 3-8 to 3-10, 3-27, 3-36 to 3-39, 3-109 to 3-110, G-3 to G-4; s*ee also* FEIS at 3-28 ("As stated, timing restrictions would minimize adverse impacts on Atlantic cod spawning and likely avoid broader population-level effects. On balance, construction noise impacts on finfish would likely range from minor to moderate.").

Environmental Justice. Plaintiff (at 53-54) alleges BOEM failed to consider how lower income families would be affected by electricity rates. As BOEM explained in its response to comments on the DEIS, "Ratepayer costs depend on numerous variables beyond the scope of the EIS and which BOEM has no authority to change" and "BOEM determined that it is reasonable to assume that if the proposed Project is not built, another project or projects would be constructed because of the need to meet mandates/demand." FEIS at I-86–I-87. BOEM thoroughly addressed environmental justice issues in FEIS Section 3.5.4 and in numerous responses to public comments. Plaintiff fails to show any way that BOEM's approach to analyzing environmental justice issues was arbitrary and capricious.

3. Plaintiff's OCSLA Claims Are Not Likely to Succeed

Plaintiff is not likely to succeed on his OCSLA claims. Plaintiff alleges that Federal Defendants violated OCSLA Section 8(p)(4), 43 U.S.C. § 1337(p)(4), by failing to analyze or address the presence of PFAS in the vicinity of the SFEC-Onshore. Am. Compl., ECF 34-2, ¶¶ 531-546. However, as explained above, the installation of concrete duct banks and vaults and contamination of which Plaintiff complains is solely within the jurisdiction of the NYSPSC, who thoroughly investigated the presence of PFAS in and around the SFEC-Onshore site and approved the Project subject to relevant conditions. *See supra* at 7-10. Moreover, Plaintiff ignores that the

BOEM FEIS *did* thoroughly discuss PFAS contamination in the vicinity of the SFEC-Onshore, and concluded that, with implementation of the conditions imposed by the NYSPSC and incorporated into the COP, the SFEC-Onshore does not present a risk of causing PFAS contamination in groundwater. *See supra* at 7-8. Plaintiff fails to identify any actionable deficiency in these analyses.

With respect to OCSLA Section 8(p)(4), this statutory provision requires only that BOEM "strike a rational balance" between OCSLA's enumerated goals, and in making this determination, "the Secretary retains wide discretion to weigh those goals as an application of her technical expertise and policy."[17] In approving the Project, BOEM thoroughly weighed the Project's relation to each of the enumerated goals, including those related to environmental protection and safety, and determined that approval of the COP "would strike a rational balance among the various goals enumerated in subsection 8(p)(4) of OCSLA." ROD at Appendix D, D-29; *see also id.* at D-10 to D-14; Schneider Decl. Ex. 9. Nothing more was required.[18]

V. CONCLUSION

For the foregoing reasons, South Fork Wind respectfully requests that the Court deny Plaintiff's TRO/PI Motion.

[17] M-Opinion 37067, U.S. Dept. of the Interior Office of the Solicitor 1-2 (Apr. 9, 2021) https://www.doi.gov/sites/doi.gov/files/m-37067.pdf.

[18] Plaintiff's eighth and ninth claims for relief invoke Congressional declarations of policy set forth in OCSLA at 43 U.S.C. § 1332(3), asserting that BOEM did not comply with such policy pronouncement in approving the Project. Am. Compl., ECF 34-2, ¶¶ 547-570; *see also* TRO/PI Mot. at 49-50. However Congress's declarations of policy in OCSLA are just that—policy—and do not afford Plaintiff a basis for relief. Moreover, Plaintiff's ninth claim for relief asserts that BOEM violated Congress's policy pronouncement that OCS resources be made available for development "in a manner which is consistent with the maintenance of competition." Am. Compl., ECF 34-2, ¶¶ 558-570. However, Plaintiff's claim relates solely to the state procurement process for the Project, a process that in no way relates to Federal Defendants' jurisdiction over the Project. As such, Plaintiff is not likely succeed on his eighth and ninth claims for relief.

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Respectfully submitted,

By */s/* Janice M. Schneider

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