Exhibit C

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,* SOUTH FORK WIND LLC; LONG ISLAND POWER AUTHORITY; *Nominal Joinder Parties*	:	Civil Action No.: **22-cv-02147 (JMC)**

Plaintiff's Response to *ex parte* Developer South Fork Wind LLC's [proposed] Memorandum in Opposition to Motion for Emergency Temporary Restraining Order

Opening Statement

Neither Defendants nor *ex parte* developer South Fork Wind has responded to Plaintiff's claims regarding Defendants' multiple instances of fraudulent misrepresentation of material facts upon which they then relied to (unlawfully) approve the South Fork Wind Project. Defendants' and Developer's failure to substantively respond to such claims in Plaintiff's Motion for Emergency TRO fits a pattern established by Defendants' failure to answer the pleadings and respond to Plaintiff's Motion for Partial Summary Judgment, thereby denying Plaintiff due process of law.

In addition to the standards under which an emergency TRO is granted, which Plaintiff

satisfies here, in the absence of a TRO, this court would risk rewarding the wrongdoer and worsening the injury to Plaintiff and the public.

Ex parte developer South Fork Wind fraudulently misrepresented material facts not uncoincidentally similar to those wrongly stated by Defendants upon which the project's approval is founded. Plaintiff provided the same facts to both Defendants and Developer that they ignored. In this matter, the wrong committed by both Defendants and Developer is fraudulent misrepresentation in addition to statutory violations. "It is a well settled rule that … whether it be construed as one of public policy or of common law, dictates that no one should be allowed to benefit from his own wrong" (*Napoleon v. Heard*, 455 A.2d 901, 902-03 (D.C. 1983), citing *Barnes v. Metropolitan Life Insurance Co.*, 97 Wn.D.L.Rptr. 969 (D.C. Super. Ct. June 9, 1969). Developer claims that it has invested large sums of money, but it did so knowing that it was acting in bad faith by submitting false information and withholding information. Now, it seeks to take advantage of its own wrongdoing. "[P]roof beyond a reasonable doubt is not required. What is required, however, is proof in a civil proceeding by a preponderance of the evidence" *Cheatle v. Cheatle*, 662 A.2d 1362, 1365 (D.C. 1995).

Developer will prejudice Plaintiff's case if it is permitted to proceed with construction based on Defendants' unlawful approval and their combined wrongdoing. An emergency TRO is necessary to stop Developer from prejudicing Plaintiff's case.

"The equitable powers of this court can never be exerted on behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abetter of iniquity." *Bein v. Heath*, 47 U.S. 228, 247 (1848). "[W]here a suit in equity concerns the public interest as well as the private interests of the litigants this [equitable] doctrine assumes even wider and more significant proportions. For

if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public." *Precision Co. v. Automotive Co.*, 324 U.S. 806, 815 (1945)

Introduction

Plaintiff's Motion for Emergency TRO seeks to prevent the "specific facts" that he identifies in his Complaint and (proposed) First Amended Complaint. According to Rule 65 of the Federal Rules of Civil Procedure, those facts "clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition …".

The adverse party in the Motion for Emergency TRO is the developer, South Fork Wind LLC ("Developer"). Defendants permitted Developer to take full advantage of their unlawful approval. As a result, Developer has proceeded with construction unimpeded. Developer's construction will immediately and irreparably cause the public and Plaintiff injury, loss, or damage "before the adverse party can be heard in opposition" (Fed. R. Civ. P. 65).

Defendants have *not* answered the Complaint (filed July 20, 2022) and have *not* responded to Plaintiff's Motion for Partial Summary Judgment (filed September 22, 2022). The statutory deadlines for answering the pleadings and responding to the motion had passed. Defendants have no fixed deadline for filing answers or responding to Plaintiff's Motion for Partial Summary Judgment. Plaintiff is denied due process of law where Defendants are *not* required to answer the pleadings or respond to Plaintiff's Motion for Partial Summary Judgment.

PFAS Contamination

Developer (falsely) claims that BOEM's "FEIS [Final Environmental Impact Statement]

addresses PFAS issues, and concludes that with application of state law requirements 'all activities would meet permit and regulatory requirements to continue protecting groundwater [emphasis added].' FEIS at H-28; see also id. at H-23, H-27." The full quote in contaxt is as follows (FEIS at H-28)—

> There are no onshore construction activities under the Proposed Action that would require ground disturbance at depths at or near groundwater resources, and all activities would meet permit and regulatory requirements to continue protecting groundwater as drinking water resources. The use of HDD at the landing sites would negate the need for trenching in areas where shallow groundwater would intersect the trench excavation. Onshore subsurface ground-disturbing activities would not be placed at a depth that could encounter groundwater, and would therefore not result in impacts on water quality.

The problem here is that none of what BOEM writes is true. It is yet another example of BOEM fraudulently misrepresenting the facts. Developer's own Dewatering Plan reads— "Based on current data, it is expected that dewatering will be required to facilitate the installation of the HDD/TJB Interface. A maximum of two frac tanks will be used to store dewatered fluids on-site. After characterization and notice of approval to proceed, the fluids will be transported by vacuum truck for offsite disposal at the selected POTW."[1] See the photo (overleaf), taken on April 18, 2022, of the transition vault at the southern end of Beach Lane with groundwater visible at the bottom (see ECF No. 1-2, at 6). Developer installed a treatment facility designed specifically to treat groundwater containing PFAS contamination extracted during onshore construction. The facility comprised four Frac Tanks with a combined capacity of 75,000 gallons (see photos of the frac tanks at ECF No. 1-2, at 1-4). Plaintiff illustrates the depth of groundwater where the

[1] See South Fork Wind Dewatering Plan by Stantec Consulting Servives, dated August 2021 (https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={747E9CB5-D53A-4478-8C47-D5D0D8942E86} (at 6, PDF 10)

trenching encroaches into groundwater in his letter of March 11, 2022, to BOEM titled "URGENT: Imminent Risk to Public Health" (see ECF No. 3-3, Fig 7 at 15 and Fig 8 at 16).

Contrary to Developer's assertions that BOEM's "FEIS addresses PFAS issues," BOEM neither acknowledged nor discussed onsite PFAS contamination and did *not* address *any* issues concerning PFAS contamination. BOEM fraudulently concluded that "[o]verall, existing groundwater quality in the analysis area appears to be good" (see FEIS at p. H-23, PDF p. 655 of 1,317). Moreover, in response to a FOIA request by Plaintiff seeking "[r]ecords generated by a certified scientific laboratory performing analysis to determine concentration levels of per- and polyfluoroalkyl substance ("PFAS") contaminants in soil or groundwater taken from within or near

the onshore South Fork Export Cable ("SFEC") route" (see ECF No. 44-2, FOIA DOI-BOEM-2022-004796 Resp), BOEM stated that "[a]fter a thorough search of our files, it has been determined that the BOEM has no records responsive to your request." In other words, BOEM claimed that, up to July 6, 2022 (although BOEM did not email the response to Plaintiff until July 21), it had neither received nor reviewed *any* PFAS contamination test results "in soil or groundwater taken from within or near the onshore South Fork Export Cable ("SFEC") route" (*id.*). BOEM's claim is demonstrably false. Plaintiff sent BOEM records of onsite PFAS contamination, as the evidence in this case clearly shows.

South Fork Wind: Fraudulent Misrepresentations

In addition to Defendants' multiple counts of fraudulent misrepresentation upon which it relied to (unlawfully) approve the Project, the Developer, South Fork Wind LLC, also fraudulently misrepresented its Project by knowingly submitting false information to BOEM or failing to submit the required information.

According to BOEM's Guidelines for Information Requirements for a Renewable Energy Construction and Operations Plan (COP) (April 7, 2016) ("BOEM 2016 Guide"), and 30 CFR 585.627(a)(2), Developer is required to "Describe the general state of water quality in the area proposed for your project by reporting typical metrics for quality including the … presence … of contaminants in water [emphasis added]." "[E]nvironmental hazards and/or accidental events causing accidental releases of … hazardous materials and wastes [emphasis added]." A "pollution control plan prepared to avoid and minimize impacts to water quality." (See ECF No. 34-10, at 39). Developer provided none.

Developer received all the same information on pervasive PFAS contamination of groundwater and soil that is a risk to human health and the environment that Plaintiff provided to

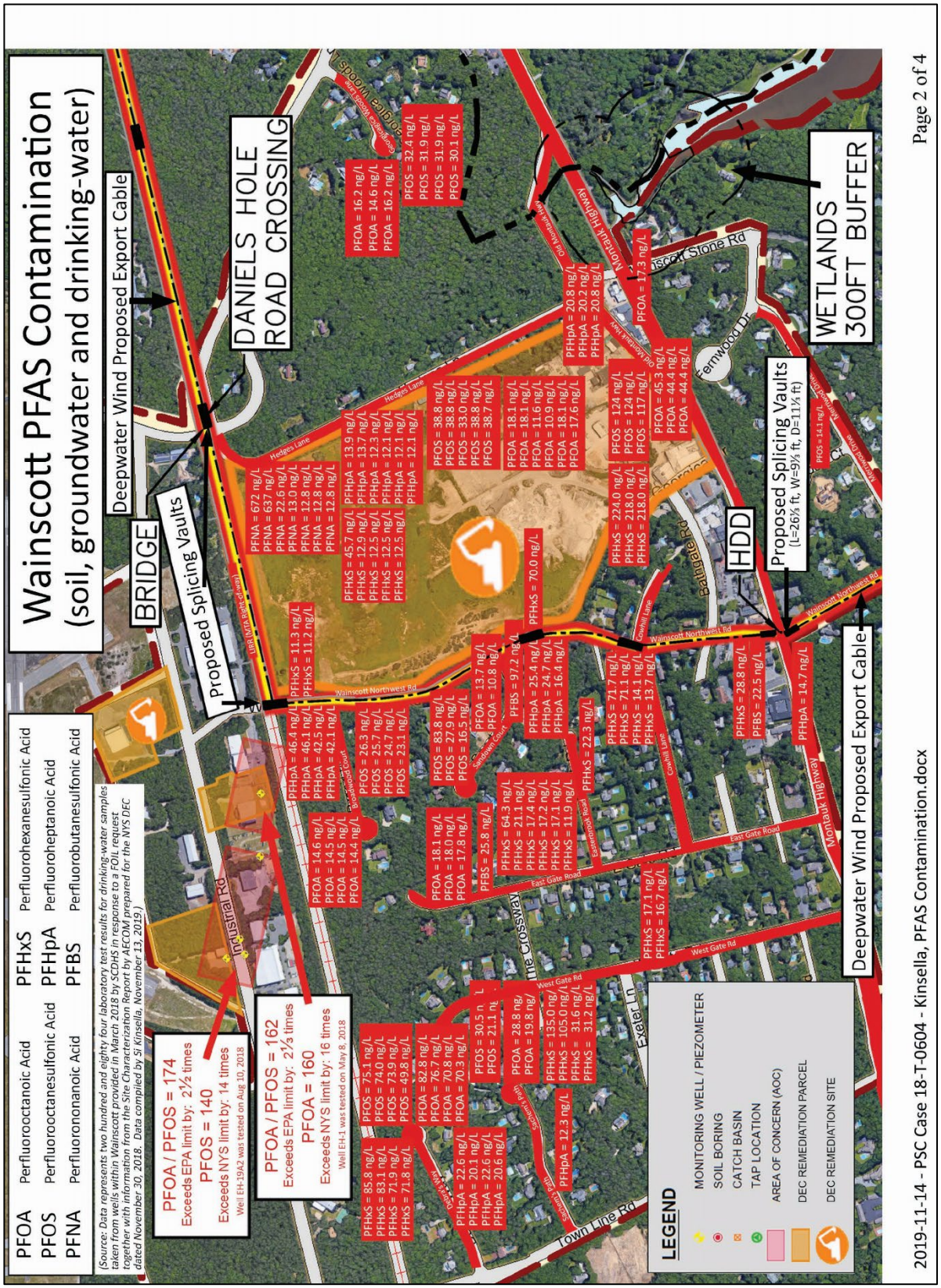
BOEM (see First Amended Complaint, ¶¶ 48 – 51). Still, despite knowing of harmful PFAS contamination *within* and surroundings its construction corridor, Developer fraudulently misrepresented the state of groundwater quality along its proposed onshore construction corridor.

Developer recognized that "Long Island is considered a sole source aquifer region, which means that groundwater is the single water supply source. Most of Long Island's drinking water is from groundwater" (COP, May 2021, at 4-60, PDF 228, fifth paragraph).

Still, in its Construction and Operations Plan ("COP"), dated May 7, 2021, Developer misrepresents the quality of groundwater, stating that "[g]roundwater throughout most of eastern Suffolk County is of generally high quality (NYSDOH, 2003). 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 all drinking water quality standards. (COP, May 2021, at 4-60, PDF 228, last two paragraphs).

In 2019 and 2020, during the New York State Public service Commission ("NYSPSC") proceeding (case 18-T-0604), Plaintiff provided Developer with numerous reports that it had also provided to BOEM, including Site Characterization Reports performed for New York State Department of Environmental Conservation (see BOEM Index Exhibit #066, BOEM Index Exhibit #075, BOEM Index Exhibit #078) and over three hundred laboratory test results from Suffolk County Department of Health Services (see BOEM Index Exhibit #166) showing extensive PFAS contamination exceeding regulatory limits along Developer's proposed onshore construction corridor. For example, on November 15, 2019, Plaintiff served on Developer Interrogatory SK1 (see ECF No. 44-3 NYSPSC IR SK1- PFAS, and the figure overleaf). Developer responded by (falsely) stating that "the information asserted … is inaccurate and not based in fact [emphasis added]" (see ECF No. 44-4 NYSPSC SFW Resp IR SK1- PFAS). On the contrary, the

information was from NYSDEC reports based on scientific facts.



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

The biased economic analysis was similarly manipulated in the BOEM and NYSPSC reviews. The NYS Department of Public Service admitted under cross-examination that the burden on ratepayers who will have to pay ($2 billion) for the offshore wind facility was *not* considered when the Public Service Commission made its decision to grant South Fork Wind certification— "There's no testimony in this, in our document, to the best of my recollection that addresses cost to rate payers."[3] The current director of BOEM, Defendant Amanda Lefton, oversaw BOEM's review and, before joining BOEM (in February 2021), oversaw the NYSPSC review under then-Governor Cuomo.

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[2] https://ehamptonny.gov/DocumentCenter/View/12142/Table-3---LIRR-PFAS-Samples
[3] Case 18-T-0604 – DPS Staff Panel, Cross-Examination by Kinsella, December 7, 2020 https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={BBB282D4-7CB2-4B7C-AC81-6B85F97B734B} (at p. 595, lines 19-21)

BOEM's Onshore Jurisdiction

Developer (falsely) assertions that "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" (see Memo in Opposition to TRO, at 26, PDF 32, last paragraph). Developer's claim is easily disproved. Developer cites *Robbins v. U.S. Dep't of Hous. & Urban Dev.*, 72 F. Supp. 3d 1, 6–7 (D.D.C. 2014) in support of its limited jurisdictional claim, but counsel is bluffing. That case states that "the Court dismisses the action for lack of standing [emphasis added]," not on jurisdictional grounds. The opinion reads, "the Court does not address lack of subject matter jurisdiction [emphasis added]" (*id.*). Developer's claim contradicts the Outer Continental Shelf Lands Act and its implementing regulations, and BOEM's Guidelines for Information Requirements for a Renewable Energy Construction and Operations Plan (COP) (Version 3.0: April 7, 2016) ("BOEM 2016 Guide") (see ECF No. 34-10). The opening statement of the BOEM 2016 Guide reads as follows –

> This document provides guidance on the information requirements for a Construction and Operations Plan (COP) for Outer Continental Shelf (OCS) renewable energy activities on a commercial lease, as required by 30 CFR Part 585. The Bureau of Ocean Energy Management (BOEM) is providing these guidelines to clarify and supplement information requirements for COP submittals. Specifically, the purpose of this document is to provide guidance on survey requirements, project-specific information, and information to meet the requirements of the Outer Continental Shelf Lands Act (OCSLA), National Environmental Policy Act (NEPA), and other applicable laws and regulations. …
>
> A COP contains information describing all planned facilities … along with all proposed activities including your proposed construction activities, commercial operations … for all planned facilities, including onshore and support facilities

[emphasis added]. (See ECF No. 34-10, at 2)

Under the heading of "Social and Economic Resources" (regulation 30 CFR 585.627(a)(7)), the BOEM 2016 Guide instructs the applicant/developer to "[d]escribe the onshore economic baseline of the coastal areas that may be affected by your project" (see ECF No. 34-10, at 51). Under the heading of "Archaeological resources survey," it includes "historic properties that are (1) located onshore with a view of the proposed project; (2) in onshore/terrestrial areas where cables may come ashore; (3) in onshore staging areas [emphasis added]" (*id.*, at 10, last paragraph). Under the heading of "Water Quality" (regulation 30 CFR 585.627(a)(2)), BOEM's guide directs the applicant/developer to include in its COP information "to support the evaluation of water quality impacts, including but not limited to … cable jetting/burial, and cable landfall [emphasis added]" (*id.*, at 39, "Other Potential Needs for COP Approval"). Regarding South Fork Wind, all the aforementioned onshore locations/activities are within New York State jurisdiction and federal jurisdiction.

According to the Outer Continental Shelf Lands Act "the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards" (43 U.S. Code § 1332(3)). "The term 'development' means those activities … including geophysical activity, drilling, … and operation of all onshore support facilities" (43 U.S. Code § 1331(l)).

The Developer's assertions that "the SFEC-Onshore, the installation of concrete duct banks and vaults or HDD drilling" (*id.*) falls outside BOEM's statutory mandate and that "New York State has exclusive jurisdiction over the onshore construction" (*id.*) is contrary to fact.

BOEM is *not* relieved of its statutorily mandated obligations pursuant to the National Environmental Policy Act or Outer Continental Shelf Lands Act and their respective

implementing regulations, irrespective of a non-cooperating state agency action that, as Developer acknowledges, is likewise the subject of many ongoing legal challenges. Defendants did *not* consider *any* documents from the New York State Public Service Commission. No agency from New York State is listed as a cooperating state agency decision.

Impending irreparable injury that is certain

Contrary to Developer's assertions, Plaintiff establishes "certainly impending" injuries in fact (*Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013); *City of Los Angeles v. Lyons*, 461 U.S. 95, 104 (1983) that are *not* "generalized grievances" (*ASARCO Inc. v. Kadish*, 490 U.S. 605, 616 (1989)). Developer refers to another case in the U.S. District Court for the Eastern District of New York that previously denied a preliminary injunction based *solely* on concerns with the spread of PFAS contamination via a specific transport method. However, in the instant matter, Plaintiff seeks an Emergency TRO to prevent imminent irreparable harm caused by Developer's concrete duct banks and vault prolonging and exacerbating PFAS contamination from a separate process called "diffusion." The Emergency TRO seeks to prevent the Developer from proceeding with existing plans for expanding the right-of-way, and to prevent the Developer from causing imminent damage to the Essential Fish Habit of Cox Ledge and adverse population-level impacts. In addition, the Emergency TRO seeks immediate (albeit temporary) equitable relief from Defendants and Developer profiting from their wrongful acts and causing further injury to Plaintiff and the public.

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1) PFAS Contamination

The other case to which Developer refers in the U.S. District Court for the Eastern District of New York denied a preliminary injunction based *solely* on concerns with the spread of

PFAS contamination via "preferential pathways" created by the project trenching. The EDNY court held that the issues of PFAS contamination creating preferential pathways do not constitute irreparable injury because "it is possible to remediate PFAS contamination." But the spread of PFAS contamination by preferential pathways is *not* a central issue in this matter. Here, Plaintiff's concern centers on a process called diffusion. According to evidence submitted by Developer during the NYSPSC hearing, "diffusion can strongly influence the migration of PFAS within and between media." Diffusion occurs where PFAS "contaminant mass moves "into lower permeability soils or site materials such as … concrete [that] 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 contributing process" (see ECF No. 3-5, ITRC, PFAS Fate & Transport, Mar 2018 (at p. 6, last paragraph). The only way to remediate the site is to remove the concrete duct banks and vaults *before* more PFAS contamination moves into the concrete, which becomes a secondary source of PFAS contamination and is difficult to destroy (because it is embedded into the concrete).

BEOM and Developer knew of the nature and extent of PFAS contamination but continued with construction regardless, taking full advantage of their wrongdoing and causing injury to Plaintiff and the public. The more this case continues, the greater the injury in time, money, and continued stress on the Plaintiff. "[H]ere involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 246 (1944)

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2) Planned Expansion of Onshore Gateway Project (24-inch conduit)

In 2018, Developer designed a "conduit … with a maximum diameter of 24 inches … through which the submarine cable will be installed."[4] The diameter of the submarine cable is only "8-12 inches."[5] More precisely, the submarine cable is approximately 8.5 inches. Thus, the conduit (with an area of 452 in^2) is eight times larger than the cable (with an area of 57 in^2). The conduit was designed to accommodate at least two (similar-sized) submarine cables or even slightly larger ones.

In 2018, the onshore duct banks and transition vaults were designed to accommodate the landing of two submarine cables at Beach Lane.[6] The utility, Long Island Power Authority (LIPA"), planned a new "Wainscott Substation" for "$413.7 million." LIPA's 2017 Budget noted, "[p]urchase land, establish new 138kV Wainscott substation and install new 138 kV UG [underground] cable from [Shinneckock] Canal" for access to the South Fork.[7] At the time, LIPA CEO Thomas Falcone admitted—

> We estimate those future needs will cause the existing infrastructure to be insufficient by approximately 170 megawatts of peak capacity by 2030. This will be an expensive investment for all of our customers and one we do not make lightly. Obviously, a 170-megawatt peak load problem cannot be solved by a 90-megawatt offshore wind farm [emphasis added] … A Wainscott substation is part of a planned underground transmission project and has an in-service date of 2026.[8]

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[4] ECF 44-5 to 44-8 - SFW Construction and Operations Plan (COP), 2018 (at 3-46, PDF 160)
[5] *Id.* (at 4-16, PDF 179, Table 4.1-4)
[6] See NYSPSC Case 18-T-064 - SFW Article VII Application, Exhibit 5, Fig 5, 2-1. (at PDF 7) Note - Onshore submarine cables are spliced onto two three-phase circuits (six terrestrial cables). (https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={32CEFBDC-7D22-4169-9D80-1BD87285D509}
[7] See LIPA 2017 Budget (at PDF 66, last row under "Major Projects" (https://www.lipower.org/wp-content/uploads/2016/09/LIPA-2017-BUDGET-1-6-2017.pdf)
[8] See ECF No. 44-9– LIPA Letter to E. Hampton Town, dated June 8, 2018 (at 1).

Developer's expansion plans were published in an inter-governmental report, Northeast Offshore Wind Market Characterization Report (October 2017). The report reads: "Deepwater Wind hopes to deliver up to 600 MW to the east end of Long Island … the first phase of which is the recently proposed 90 MW … South Fork project to be interconnected at East Hampton" (see ECF 44-10, at 22, PDF 39, last paragraph).

Three years ago (in 2018), South Fork Wind and LIPA planned for more than just a small 90-megawatt offshore wind farm, and the onshore infrastructure was specifically designed to allow for future expansion. The duct banks and vaults were built for two three-phase circuits (for two submarine cables), clearly showing that LIPA and the Developer had expansion in mind.

Since then (under public pressure), South Fork Wind and LIPA reduced the size of the duct banks. Now, the duct banks accommodate only one three-phase circuit (for one submarine cable).

On the other hand, the conduit that South Fork Wind initially designed for more than one submarine cable remains the same size (i.e., 24 inches). "The outer diameter of the … conduit will be approximately 26 to 28 in" (equal to an internal diameter of approximately 24 inches).[9] South Fork Wind's Horizontal Directional Drilling (HDD) Work Plan shows that the onshore infrastructure (the conduit) is still specifically designed to accommodate two submarine cables.

Moreover, the New York legislature amended Section 123 of the Public Service Law (in 2020) to mandate the Public Service Commission "establish an expedited process … for a major utility transmission facility … that (i) would be constructed within existing rights-of-way … or (iii) would necessitate expanding the existing rights-of-way" (NY Pub. Serv. Law § 123(3)(b)). An "[e]xpedited process" is one "completed in all respects, including a final decision by the

[9] See South Fork Wind, HDD Work Plan, August 2021 (at 2, second paragraph) (https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={0E3DFB6D-5C3B-46F9-9E9E-510F659142F2})

commission, within nine months [emphasis added]" (*id.*, § 123(3)(c)(i)). A "[r]ight-of-way" is "real property that is used or authorized to be used for electric utility purposes [emphasis added]" (*id.* (ii)).

If Developer is permitted to establish Beach Lane as an existing right-of-way, its plans show that it will use Beach Land to land another high-voltage cable. Developer's plans are *not* speculative; they are specified in South Fork Wind's HDD Work Plan – the "conduit will be approximately 26 to 28 in" that is to say, the conduit is still designed for two submarine cables.

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3) Cox Ledge: Atlantic Cod Habitat

Developer states that "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 [emphasis added]." (see Memo in Opposition to TRO, at 19, PDF 25, second paragraph). As explained below, pile-driving activities represent only part of the risk Developer poses to the Atlantic cod population on Cox Ledge. NOAA Fisheries has expressed concerns with BOEM's mitigation measures (as discussed below).

Pile Driving and Bottom-tending Construction Activities – Disturbance of Atlantic code during their spawning period is not limited to pile-driving activities but includes bottom-tending construction activities, including cable laying activities.

According to the National Oceanic and Atmospheric Administration National Marine Fisheries Service ("NOAA Fisheries"), "peak spawning times for cod on Cox Ledge and within the project area occur between November and January … Adult cod that spawn in southern New

England are primarily residential, with high rates of site fidelity … Spawning cod also congregate over specific substrate types, gravel during the day when resting and adjacent muddy areas at night … Atlantic cod spawning on Cox Ledge have recently been identified as genetically distinct from other spawning groups … These factors increase the vulnerability of this population to impacts resulting from reduced spawning success. Physical habitat disturbance occurring during spawning may interfere with mating behavior and egg production … Spawning cod form dense aggregations (known as "haystacks") prior to and during spawning that last for days to weeks. Cod spawning aggregations are easily disrupted and disturbances may result in the dispersion of spawning aggregations for extended periods."[10] NOAA Fisheries identifies disturbances from bottom-tending construction activities, including "cable installation … [that] requires multiple, consecutive bottom-tending disturbances within the same area. In addition to the cable installation equipment itself, multiple pre-lay installation operations and post-lay operations are required, including seafloor preparation, installation trials, and the installation of cable protection material in areas where cable burial target depth is not achievable. Seafloor preparation requires multiple steps, including a pre-lay grapple run and boulder relocation that may require multiple passes and/or deployment of specialized tools to the seafloor. It is also expected that approximately five to ten cable installation test trials will occur in different areas along the cable route. Further, geophysical surveys would occur throughout the installation, potentially including multibeam echosounder (MBES), side scan sonar, sub-bottom profiler or imager, cable tracking equipment, and/or visual surveys" (ECF No. 35-5, at 3-4).[11]

[10] NOAA Fisheries Letter to BOEM (Michelle Morin), dated June 7, 2021 (at 10, third paragraph) (https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/NMFS-SFWF-EFH-letter.pdf, last accessed November 6, 2022)

[11] See ECF No. 35-5 – NOAA Fisheries Letter to BOEM (James Bennett), dated October 25, 2021 (at 3-4).

BOEM's Mitigation Measures – According to NOAA Fisheries, BOEM is "not adopting all our recommendations regarding time of year restrictions to protect spawning cod on Cox Ledge. We understand that BOEM has replaced our static seasonal restriction to protect spawning cod with an untested adaptive approach requiring the applicant [the Developer] to prepare an acoustic monitoring plan and, based on that monitoring, to avoid activities that would disrupt spawning aggregations [emphasis added]." NOAA Fisheries expressed "concerns about the assumptions BOEM has made regarding both the biological and operational rationales for not fully adopting [its] recommendations." (ECF No. 35-5, at 1).[12] NOAA Fisheries' letter to BOEM continues – "We do not know how effective such a measure would be in avoiding or minimizing impacts to cod spawning. Effectiveness will rely on multiple factors, including the specifications of the monitoring design and methodology. This approach also assumes that cod will be acoustically detectable prior to the initiation of any avoidance behaviors pile driving or bottom disturbances in the lease area may elicit. To help ensure the monitoring plan is designed to detect cod in the area, we recommend that you require the monitoring plan be developed in coordination with NMFS rather than simply allowing for NMFS comment" (*id.*, at 5, second paragraph). NOAA Fisheries did *not* know much about BOEM's (so-called) "mitigation measures" or how effective it would be. BOEM had *not* discussed "the specifications of the monitoring design and methodology" with NOAA.

A month later (on November 24, 2021), BOEM approved South Fork Wind development without responding to the many concerns NOAA Fisheries raised in its letter of October 25 to BOEM's Chief of Office of Renewable Energy Programs, Mr. James Bennett.

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12 *Id.*, at 1

An Emergency Exists

Developer (wrongly) claims that "[t]here is no 'emergency' here" because Plaintiff "waited more than nine months to seek relief" from December 2021 (Memo in Opposition to TRO, ECF No. 40-1, at 1, PDF 7, second paragraph). Developer then contradicts its claim by providing a list of Plaintiff's efforts to seek relief dating back to July 2021 under the heading of "Prior and Ongoing Litigation Against the Project's Approvals" (*id.*, at 11, PDF 17). Thus, Developer establishes that Plaintiff did *not* wait nine months before seeking relief. Developer lists the following legal challenges filed by Plaintiff—

> 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*").

Missing from the list is the first time Plaintiff sought relief in a lawsuit filed in July 2019. In that case, Plaintiff successfully forced public disclosure of the contract price between Developer and Long Island Power Authority ("LIPA"), which they had refused to disclose publicly for over three years. That price, as it turned out, was significantly above market rates. According to Judge Richard Rivera, Plaintiff "substantially prevailed … The Court finds that the record requested was of significant interest to the general public as the records sought consisted of the contract prices which would affect the pricing of utilities supplied to the general public" (see ECF No. 44-11, at 2, third paragraph).

On July 15, 2021, Plaintiff sued Long Island Power Authority (LIPA) *et al.*, challenging its contract award to Developer (*Kinsella v. LIPA I*). However, Plaintiff filed a more focused complaint on November 9, 2021 (*Kinsella v. LIPA II*), replacing the earlier complaint that he

voluntarily withdrew. The latter complaint is on appeal.

On November 8, 2021, Plaintiff sued the New York State Public Service Commission, challenging its Article VII certification under New York Public Service Law (*Kinsella v. PSC*, No. 2021-06572 (N.Y. App. Div., 2d Dep't)). The case is ongoing.

Plaintiff first sought relief in July 2019. Since then, Plaintiff has commenced legal proceedings four more times (including this case), of which three are ongoing. Developer's claim that Plaintiff "waited more than nine months to seek relief" is untenable. Plaintiff has sought relief consistently since 2019.

During the nine-month period (from December 2021), Developer fails to consider the work required in the other cases (mentioned above). During that time, Plaintiff visited his family (in Australia) for the first time in many years.[13] In fact, on December 19, 2021, Plaintiff placed his Sixty-day Notice of Intent to Sue (sixteen copies) into a Federal Express drop box on his way to the airport. Plaintiff's parents are showing their age and declining more quickly than he had expected. Plaintiff tried to see his parents this summer (2022), but this case is preventing him from doing so. The loss of time with my parents is another injury and further reason for the Emergency TRO.

Plaintiff is not a lawyer

Developer misrepresents Plaintiff's qualifications. Plaintiff is a qualified accountant, *not* a lawyer, and has *no* training in the legal profession. Plaintiff has no office, no staff, and no clients. Plaintiff pays for everything himself (no one has paid him for anything). Plaintiff's *only* coursework was limited to Australian taxation and compan regulations as they related to the

[13] Plaintiff could not return to the U.S. until February 20, 2022. At the time, traveling to/from Australia was very difficult due to COVID-related restrictions. See ECF No. 44-12).

accounting profession (*not* the legal profession). Developer's claim is the equivalent of saying that a lawyer is qualified to perform open heart surgery because the lawyer studied medical malpractice law and, therefore, had medical training.

Developer provides only part of the quote. The full quote is— "Kinsella and Fink [the two plaintiffs in the case] received formal legal training in Australia and the United States, respectively, and Fink is a former member of the New York bar. See Def. 56.1 ¶¶ 127, 133." Developer then quotes out of context, "[w]here an attorney is proceeding *pro se* [emphasis added]," referring to Fink, who is a retired attorney (*not* Kinsella, who has *no* legal qualifications). In that case, Plaintiff states that he has *no* professional legal training. In that case, Plaintiff's Examination Before Trail (see ECF No. 44-13, at 10, lines 7-8) reads—

7 Q Can you practice law in Australia?
8 A No, I cannot.

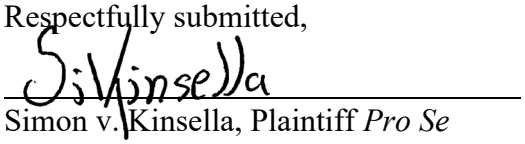
Plaintiff is *not* a lawyer, never has been a lawyer, and has *no* legal qualifications in the U.S., Australia, or anywhere else. One needs only look at how Plaintiff initially managed this case to realize that he is *not* qualified as a lawyer.

> "In order to guard the public against losses and injuries arising from the fraud or mistake or rashness or indiscretion of their agents, the rule requires of all persons dealing with public officers, the duty of inquiry as to their power and authority to bind the government; and persons so dealing must necessarily be held to a recognition of the fact that government agents are bound to fairness and good faith as between themselves and their principal. *Whiteside v. United States*, 93 U.S. 247, 257; United States v. Barlow, ante, 271."
> Hume v. United States, 132 U.S. 406, 414 (1889)

Plaintiff respectfully requests the court to grant his Motion for Emergency RTO to prevent *ex parte* Developer South Fork Wind from causing irreversible and irreparable damage to Plaintiff and the public as a direct result of Defendants' unlawful approval that permitted Developer to proceed with construction and take full advantage of Defendants' and Developer's wrongdoing. The irreparable harm concerns Developers rush to establish an existing right-of-way to execute its current plans to install a conduit designed for two (or more) submarine cables. The PFAS contamination cannot be remediated from concrete if allowed to continue. The population-level damage to Atlantic cod cannot be undone if Developer is allowed to clear the seafloor and perform other bottom-tending construction activities in November.

Date: November 6, 2022

Respectfully submitted,



Simon v. Kinsella, Plaintiff *Pro Se*
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STATE OF NEW YORK
COUNTY OF SUFFOLK

I, Simon V. Kinsella, Plaintiff *Pro Se,* being duly sworn, say under penalty of perjury:

I am a resident of Wainscott, Town of East Hampton, State of New York. The contents of my Response to *ex parte* South Fork Wind LLC's [proposed] Memorandum in Opposition to Motion for Emergency TRO, dated November 6, 2022, are true to the best of my knowledge, information, and belief.

Sworn to before me this
6th day of November 2022

David Fink, Notary Public

DAVID FINK
Notary Public, State of New York
No. 4526132
Qualified in New York County
Commission Expires Feburary 28 2023

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