

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

SIMON V. KINSELLA

*Plaintiff,*

- against -

BUREAU OF OCEAN ENERGY MANAGEMENT and in their official capacities, Director ELIZABETH KLEIN,<sup>1</sup> Environment Branch for Renewable Energy (“OREP”) Chief MICHELLE MORIN, OREP Program Manager JAMES F. BENNETT, OREP Environmental Studies Chief MARY BOATMAN, Economist EMMA CHAIKEN, Economist MARK JENSEN, Biologist BRIAN HOOKER, and JENNIFER DRAHER; and DEB HAALAND, Secretary of the Interior, U.S. Department of the Interior; LAURA DANIELS-DAVIS, in her official capacity as Principal Deputy Assistant Secretary, Land and Mineral Management; and MICHAEL S. REGAN, Administrator, U.S. Environmental Protection Agency;

*Defendants,*

and

SOUTH FORK WIND, LLC,

*Defendant-Intervenor.*

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

(Block, J.)

(Tiscione, M.J.)

**AFFIDAVIT OF PLAINTIFF  
SIMON V. KINSELLA IN SUPPORT  
OF HIS OPPOSITION TO FEDERAL  
DEFENDANTS’ AND DEFENDANT-  
INTERVENOR SOUTH FORK WIND  
LLC’S MOTIONS TO DISMISS**

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<sup>1</sup> U.S. Bureau of Ocean Energy Management (“BOEM”) Director was Amanda Lefton when filing the complaint on July 20, 2022, but Ms. Lefton resigned effective January 19, 2023.

**AFFIDAVIT OF PLAINTIFF SIMON V. KINSELLA IN  
SUPPORT OF HIS OPPOSITION TO FEDERAL  
DEFENDANTS’ AND DEFENDANT-INTERVENOR  
SOUTH FORK WIND LLC’S MOTIONS TO DISMISS**

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I, Simon V. Kinsella, Plaintiff *pro se* in the above-captioned matter, pursuant to 28

U.S.C. § 1746, state the following—

Summary Table of Plaintiff’s Claims

1. See Summary Table of First Amended Complaint (“FAC”) Claims (¶ 1, overleaf).

Summary Table of First Amended Complaint (“FAC”) Claims		
Claim	Violation	Short Description
1	NEPA	Federal Defendants Take a “hard look” into harmful PFOA/PFOS, socioeconomics, and cod population-level impacts.
2	NEPA	BOEM and EPA failed to cooperate and take responsibility for environmental PFOA/PFOS analyses (40 C.F.R. § 1501.6)
3	NEPA	BOEM failed to evaluate and verify project information, including PFAS, Cost, and population-level impacts (40 C.F.R. § 1506.5)
4	CZMA	BOEM failed to verify compliance and ensure NYS cooperation with Federal Consistency Certification (15 C.F.R. § 930.62)
5	NEPA	BOEM failed to verify compliance and approve an action consistent with the underlying purpose and needs (40 C.F.R. § 1502.13)
6	NEPA	BOEM failed to rigorously explore, evaluate, and devote substantial treatment to all reasonable alternatives (40 C.F.R. § 1502.14)
7	OCSLA	BOEM failed to ensure activities provided for the safety and protection of the environment (43 U.S.C. § 1337(p)(4))
8	OCSLA	BOEM failed to ensure that development and onshore transmission were subject to environmental safeguards (43 U.S.C § 1332(3))
9	OCSLA	BOEM failed to ensure that development was consistent with the maintenance of competition (43 U.S. Code § 1332(3))
10	Executive Order No. 12898	BOEM failed to analyze environmental effects on minority and low-income populations, including human health and economic effects.
11	U.S. Constitution	Comply with the Due Process Clause by approving South Fork Wind based on fraudulent representations of material facts.
12	FOIA	Failed to provide due notice of their determination on expedited processing within ten days (5 U.S.C. § 552(a)(6)(E)(ii)(I))
13	<b>FRAUD: Atlantic Cod</b>	BOEM falsely stated population-level effects on genetically distinct Atlantic cod contrary to NOAA Fisheries scientific experts.
14	<b>FRAUD: Socioeconomic Impact (\$2 bn)</b>	BOEM fraudulently represented the nature of South Fork Wind’s impact on social and economic resources by omitting from its socioeconomic analysis the project’s cost of \$2 billion.
15	<b>FRAUD: Groundwater Quality (PFAS)</b>	BOEM falsely stated that overall, existing groundwater quality in the analysis area appears to be good, contradicting conclusive evidence of groundwater PFAS contamination exceeding regulatory standards.
16	<b>FRAUD: Technology-Neutral RFP</b>	BOEM falsely stated that South Fork Wind’s power purchase agreement resulted from “LIPA’s technology-neutral competitive bidding process[,]” contradicting internal LIPA documents.
17	<b>FRAUD: Sunrise Wind Alternative</b>	BOEM falsely stated that it did not identify any alternative cable landing sites during Project development or scoping, omitting the Sunrise Wind viable alternative that had been discussed extensively.

## **Procedural History**

2. On July 20, 2022, Plaintiff filed a Complaint against the federal Bureau of Ocean Energy Management (“BOEM”), the U.S. Department of the Interior Secretary Deb Haaland, and the U.S. Environmental Protection Agency (“EPA”) Administrator Michael S. Regan (collectively “Federal Defendants”) (ECF 1).
3. On September 13, 2022, the district court granted Federal Defendants’ Motion to Extend Time (ECF 14) until “the case is transferred and a new docket number and judge is assigned” (*see* Minute Order, entered on September 13, 2022). That transfer became effective on June 7, 2023. The U.S. District Court for the District of Columbia effectively granted Federal Defendants a *nine-month extension* (from September 2022 to June 2023) to answer the Complaint.
4. Frustrated, Plaintiff filed (on September 26, 2022) a cross-motion for partial summary judgment and statement of material facts with *eighty-nine facts where there is no genuine dispute* (ECF 21). In response, Federal Defendants filed a Motion to Strike or Stay the Briefing (on October 6, 2022) (ECF 24) that the district court granted (*stayed*) three days later (on October 9), denying Plaintiff the opportunity to respond. *See* Minute Order (entered October 9, 2022).
5. On November 2, 2022, Petitioner filed his First Amended Complaint (as of right) (ECF 34-2), expanding the original Complaint to include seven instances of fraud (*id.*, at 3-10) and five particularized claims of fraud by officials working for BOEM. During a hearing on November 9, the district court accepted the amended complaint— “I will grant ... Mr. Kinsella's motion to amend the complaint, which he was free to do as a matter of course at

this stage of the proceedings ... when we are referring ... to any allegations, we are all talking about the same operative complaint.”<sup>2</sup>

6. On November 9, 2022, the court ruled to strike Plaintiff’s summary judgment motion, “[i]t is premature given that the defendants haven’t formally responded” (see November 9 Hearing Tr., No. 22-5317, Doc. 1994062-11, at 3:8-9), “just so that the docket is cleaned up and that defendants don’t have this outstanding obligation” (*id.*, 3:21-22). In the same way the district court granted Federal Defendant’s Motion to Strike or Stay Plaintiff’s summary judgment motion (*stayed*) without allowing Plaintiff an opportunity to respond, the court ruled to strike Plaintiff’s summary judgment motion again without permitting Plaintiff time to respond. *See* Minute Order (entered November 10, 2022).
7. On November 9, 2022, the U.S. District Court for the District of Columbia issued an order transferring the case to the Eastern District of New York.

### **PFAS contamination**

8. PFAS, per- and polyfluoroalkyl substances, is a broad class of chemical contaminants mentioned throughout this case. The class comprises thousands of man-made chemical compounds that do not naturally occur in nature. Some are known to be harmful to human health. For example, two of the most widely used and studied chemicals in the PFAS group, perfluorooctanoic acid (**PFOA**) and perfluorooctane sulfonate (**PFOS**), were replaced in the United States.<sup>3</sup> In 2022, the EPA proposed a National Primary Drinking Water Regulation to establish legally enforceable levels for PFOA and PFOS, called Maximum Contaminant Levels

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<sup>2</sup> *See* November 9, 2022, Hearing Tr. (at 2:20-25 and 21:1-2)(D.C. Cir., No. 22-5317, Doc. 1994062-11).

<sup>3</sup> *See* EPA website, Our Current Understanding of the Human Health and Environmental Risks of PFAS (accessed last on Oct 26, 2023) ([www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas](http://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas))

(MCLs). The proposed MCL for PFOA is 4 parts per trillion (ppt), and PFOS is also 4 ppt.<sup>4</sup>

9. **PFAS Health Impacts**: According to the EPA, “certain PFAS can cause health risks even at very low levels. This is why anything we can do to reduce PFAS in water, soil, and air can have a meaningful impact on health.”<sup>5</sup> Exposure to PFAS can lead to a variety of health effects, such as an increased risk of some cancers, including prostate, kidney, and testicular cancers, increased cholesterol levels and/or risk of obesity, reduced ability of the body’s immune system to fight infections, low birth weight, accelerated puberty, bone variations, or behavioral changes, and decreased fertility or increased high blood pressure in pregnant women.<sup>6</sup>

### **NYPSC’s failure to consider on-site PFAS contamination**

10. On September 14, 2018, South Fork Wind LLC (formerly Deepwater Wind South Fork LLC) (“**SFW**” or “**South Fork Wind**”) submitted its application to the New York Public Service Commission (“**NYPSC**”) for a Certificate of Environmental Compatibility and Public Need according to NY Public Service Law, Article VII.
11. In June 2019, nine months after South Fork Wind submitted its application (September 14, 2018), the NYPSC held its first public statement hearings on its Article VII application.
12. On September 24, 2019, South Fork Wind filed a Notice of Settlement Negotiations with the Commission, and on October 23, 2019, sent a Revised Notice of Impending Settlement Negotiations. Settlement Negotiations concluded in August/September 2020.

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<sup>4</sup> See EPA website, Proposed PFAS National Primary Drinking Water Regulation (accessed last on Oct 26, 2023), [www.epa.gov/sdwa/and-polyfluoroalkyl-substances-pfas](http://www.epa.gov/sdwa/and-polyfluoroalkyl-substances-pfas)

<sup>5</sup> See EPA, PFAS Explained (October 2023), [www.epa.gov/system/files/documents/2023-10/final-virtual-pfas-explainer-508.pdf](http://www.epa.gov/system/files/documents/2023-10/final-virtual-pfas-explainer-508.pdf)

<sup>6</sup> *Id.*

13. By October 8, 2020, a total of fifteen (15) party-intervenors who participated in the NYPSC proceeding had signed a Joint Proposal (including SFW) out of fifty-two (52) party-intervenors, or twenty-nine percent (29%) of participants. ***Seventy-one percent (71%) of party-intervenors rejected the Joint Proposal.*** See Exhibit 1.
14. On September 9, 2020, the NYPSC received testimony on the nature and extent of PFAS contamination in Wainscott for the first time (*see* ¶ 47(i)),<sup>7</sup> even though it had been widely published in newspapers as early as ***October 2017*** (*see* ¶ 48), a year *before* South Fork Wind submitted its application (September 2018).
15. Instead of addressing serious issues of a public health concern regarding groundwater contamination, South Fork Wind moved to strike the evidence of PFAS contamination from the record (on November 16, 2020) (*see* ¶ 47(o) and (p)). The records SFW sought to strike largely consist of objective information provided by the New York State Department of Environmental Conservation (“NYSDEC”), Suffolk County Department of Health Services (“SCDHS”), and other state and federal agencies. SFW’s Motion to Strike reads as follows—

South Fork Wind, LLC (“SFW”) respectfully moves to exclude the following testimony filed in the above-referenced proceeding: (i) the entirety of Mr. Simon Kinsella’s (“Mr. Kinsella”) pre-filed direct testimony filed on October 9, 2020 pertaining to “economic impact” (“Part 2”); (ii) the entirety of Mr. Kinsella’s pre-filed direct testimony filed on September 9, 2020 and October 9, 2020 regarding poly-/perfluoroalkyl substances (“PFAS”) contamination; 1 and (iii) the entirety of Mr. Kinsella’s rebuttal testimony (“Rebuttal Testimony”) filed on October 30, 2020 regarding both economic impact and PFAS contamination. As explained herein, Mr. Kinsella’s testimony regarding economic impact is squarely outside the scope of this proceeding, and his testimony regarding PFAS is offered by an unqualified witness and therefore irrelevant to this proceeding.

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<sup>7</sup> Available online at – [https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment\\_32.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_32.pdf)

See South Fork Wind Motion to Strike (NYPSC, 18-T-0604, at 1). Available at—  
[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_56.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_56.pdf)  
(last accessed on November 1, 2023). Also, see ¶ 47(o).

16. On November 16, 2020, Plaintiff responded to SFW’s Motion to Stike as follows –

During September and October 2020, I submitted to New York State Department of Public Service (“DPS”) testimony (of 113 pages) together with seventy-five (75) supporting exhibits containing eighty-six (86) source documents (of 4,743 pages) substantiating my testimony together with historic data of wind speeds and weather conditions provided by the US National Oceanic and Atmospheric Administration, NOAA (of 8,826 pages).

The Applicant does not dispute my testimony, its accuracy or the truthfulness of my testimony and has not found any errors of fact within it.

The Testimony submitted by me is herein listed (see below) –

Part 1-1 Re: PFAS Contamination ...	Sep 9, 2020	(37 pages)
Part 1-2 Re: PFAS Contamination ...	Oct 9, 2020	(11 pages)
Part 2 Re: Public Interest, Need & Price ...	Oct 9, 2020	(52 pages)
Part 3 Re: Rebuttal ...	Oct 30, 2020	(13 pages)
	Total	113 pages

In support of my testimony, I have submitted twenty three (23) source documents (of 9,023 pages) from United States federal agencies as follows: National Oceanic and Atmospheric Administration, Department of Energy, Environmental Protection Agency, Agency for Toxic Substances and Disease Registry and Energy Information Agency. Furthermore, I have submitted thirty two (32) supporting documents (of 2,432 pages) from state agencies and authorities (primarily located in New York State) as follows: NYS Department of Environmental Conservation, Long Island Power Authority (LIPA including PSEG Long Island), Suffolk County Dept. of Health Services, New York Energy Research & Development Authority, Maryland Public Service Commission, New Jersey Board of Public Utilities, Massachusetts Department of Environmental Protection, NYS Office of the State Comptroller, NYS Office of Attorney General, NYS Executive (Office of Governor Cuomo), NYS Department of State, NYS Department of Public Service. (For a full list of testimony and supporting documentation, please see pages 29-31.)



*See* Response of Simon V. Kinsella to South Fork Wind’s Motion of to Strike Testimony (NYPSC, 18-T-0604, at 3-4). Available at—  
[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_57.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_57.pdf)  
(last accessed on November 1, 2023)

17. On November 24, 2020, the Administrative Law Judge *granted* SFW’s motion to strike Plaintiff’s Testimony on Public Interest, Need & Price, and Rebuttal Testimony and *denied* SFW’s motion to strike Plaintiff’s testimony regarding PFAS contamination (*see* ¶ 47(p)).<sup>8</sup>
18. The NYPSC held evidentiary hearings and cross-examinations on December 3, 4, 7, and 8, 2020. The NYPSC evidentiary record closed on December 8, 2020.
19. The New York State agencies that signed SFW’s Joint Proposal included the New York State Department of Public Service (DPS), Department of State (DOS), Department of Environmental Conservation (DEC), Department of Transportation (DOT), and the Office of Parks, Recreation and Historic Preservation (OPRHP). *See* Order Adopting Joint Proposal, issued March 18, 2021 (at 2, PDF 8), *excerpt* marked Exhibit 1.
20. BOEM’s Record of Decision (ROD) lists the following cooperating state agencies that assisted BOEM with the preparation, development, and review of the Final Environmental Impact Statement (FEIS)— the Massachusetts Office of Coastal Zone Management (MA CZM), the Rhode Island Coastal Resource Management Council (RI CRMC), and the Rhode Island Department of Environmental Management. The ROD does *not* list any agency of New York State. *See* BOEM’s Record of Decision (ROD), issued November 24, 2021 (at 1, PDF 3, 2nd ¶). *Also, see* FEIS, Table A-1 (at A-2, PDF 280, last row).

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<sup>8</sup> Poly-/perfluoroalkyl substances (“PFAS”)

21. Although SFW submitted its application on September 14, 2018, the *actual time* that party-intervenors and the NYPSC had to consider evidence concerning *off-site* PFAS contamination of soil and groundwater was *only fourteen days* (from November 24, when the NYPSC denied SFW's Motion to Strike until December 8, 2020, when the NYPSC evidentiary record closed). *See* NYPSC Ruling on SFW's Motion to Strike, *excerpt* (at 1) marked Exhibit 2.
22. On December 23, 2020 – *fifteen days after* the NYPSC evidentiary record had closed (on December 8, 2020), South Fork Wind tested on-site soil and groundwater from within its proposed construction corridor for PFAS contamination *for the first time* (*see* ¶ 23).
23. Although PFAS contamination was widely reported as early as *October 2017* (*see* ¶ 48), South Fork Wind *delayed for over two years* (from when it filed its application on September 14, 2018, until the NYPSC proceeding concluded on December 8, 2020) before testing its proposed construction site for PFAS contamination (on December 23, 2020). *By delaying on-site testing for specific PFAS compounds, South Fork Wind avoided examination and cross-examination of actual PFAS contamination (including test results), avoided environmental oversight by the NYPSC, and avoided public scrutiny.*
24. In December 2020 and January 2021, SFW tested its onshore construction corridor for PFOA and PFOS<sup>9</sup> contamination for the first time. PFOA contamination in groundwater detected at Beach Lane in Well MW-4A (50 ppt) exceeds the NYS drinking water standard<sup>10</sup> *by five times*. Groundwater PFOS contamination at the southern end of Wainscott Northwest Road

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<sup>9</sup> Perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) are classified as hazardous waste in NYS. PFOA and PFOS are two compounds within a broad class known as poly-/perfluoroalkyl substances (PFAS).

<sup>10</sup> New York State Maximum Contamination Level (MCL): PFOA, 10 ppt and PFOS, 10 ppt.

in Well SB/MW-15A (14.7 ppt) exceeds the NYS drinking water standard.<sup>11</sup> See Exhibit 3, SFW PFAS Test Results, *excerpts*, Wells MW-4A (at 1) and SB/MW-15A (at 2).

25. SFW sampled groundwater from Well MW-4A on January 14, 2021, and groundwater from Well SB/MW-15A on January 18, 2021. The sampling pre-dates by four months SFW's final COP that it submitted to BOEM in May 2021. SFW did *not* include its own test results showing on-site PFOA and PFOS contamination of groundwater in the final COP it submitted to BOEM.
26. The complete Environmental Investigation Report by GZA GeoEnvironmental of New York (on behalf of Ørsted) contains test results performed in December 2020 and January 2021.

GZA's report (revised April 1, 2021) reads as follows—

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

On April 21, 2021, SFW uploaded the revised report to the NYSPSC website (File No.: 282, Appendix H - Final HWPWP Part 3, Attachment E, at 8, PDF 34). Available online at [dps.ny.gov](https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={7F6C6BBF-6053-455D-AF06-E440FB46C63F}) (click on the link below) (last accessed October 29, 2023)—

<https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={7F6C6BBF-6053-455D-AF06-E440FB46C63F}>

27. Despite including other chemical contaminants, such as “median groundwater nitrogen levels” (*see* ¶ 28), SFW did *not* include the PFAS contamination test results in the final COP submitted to BOEM in May 2021.

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<sup>11</sup> *Id.*

28. SFW identified other less harmful contaminants, such as “median groundwater nitrogen levels ... [that] have risen 40 percent to 3.58 mg/L” (COP May 2021, at 4-61, PDF 229, first sentence), but did *not* acknowledge the presence of chemicals that, according to the White House, “can cause cancer and other severe health problems” *See* FAC (ECF No. 34-2, at 3, last sentence).
29. In February 2022, South Fork Wind tested the same monitoring wells, again— Well MW-4A showed on-site PFOA contamination (82 ppt) exceeding the EPA 2016 Health Advisory Levels (70 ppt) and the NYS MCL (10 ppt) by eight times, and Well MW-15A showed on-site PFOS (12 ppt) contamination exceeding the NYS MCL (10 ppt). The Town of East Hampton (*not* South Fork Wind) posted on the Town's website summary test results that are unsigned and unsubstantiated (without authorized laboratory results).  
*See* the East Hampton Town Website (last accessed April 16, 2022)—  
<https://ehamptonny.gov/DocumentCenter/View/11757/SFW-Monitoring-Well-summary-Feb-21-2022>.
30. In 2022, South Fork Wind did *not* publicly disclose the *actual* laboratory reports for PFAS contamination, breaking with prior practice. Previously (in April 2021), SFW had disclosed its PFAS laboratory test results of groundwater and soil samples (taken in December 2020 and January 2021), although the tests were taken *after* the NYSPSC evidentiary record had closed (*see* ¶¶ 22-26).
31. SFW did *not* identify PFAS contamination in *any* of its updates to the Construction and Operations Plan (COP), including the final COP it submitted to BOEM in May 2021.

## **Diffusion of PFAS from groundwater into concrete**

32. According to testimony South Fork Wind submitted during the New York Public Service Commission (“NYPSC) proceeding (case no. 18-T-0604), the concrete duct banks and vaults SFW installed underground, encroaching into and at the capillary fringe of a sole-source aquifer may prolong PFAS contamination in groundwater via a process called *diffusion*. The testimony is in the form of a peer-reviewed scientific paper issued by the Interstate Technology Regulatory Council (ITRC) on Environmental Fate and Transport for Per- and Polyfluoroalkyl Substances (PFAS) (March 2018). It states that “diffusion of contaminant mass into lower permeability soils or site materials such as clays, bedrock, and *concrete may enhance the long-term persistence of PFAS in groundwater*. For instance, at one site PFAS penetrated 12 cm into a concrete pad at a fire training area, and diffusion was a contributing process (Baduel, Paxman, and Mueller 2015). See ITRC, PFAS Fate & Transport (March 2018) marked Exhibit 4 (ECF 3.5, at 6). SFW submitted the peer-reviewed paper in the NYPSC proceeding.<sup>12</sup>

33. A later ITRC update, Environmental Fate and Transport Processes (August 2021) reads as follows –

### **5.2.4.1 Partitioning to Air/Water Interfaces**

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

This *preference for the air-water interface* has important implications for PFAS transport in the vadose zone, where unsaturated conditions provide significant air-water interfacial area (Brusseau 2018; Brusseau *et al.*

<sup>12</sup> See NYPSC (case 18-T-0604), Filing No. 198, Filed 10/30/2020 (page 2 of 3), *SFW Exhibit (OWRP-3)* – <https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={2E939DCB-551D-4B83-9948-3F7C830E1742}> (last accessed November 2, 2023).

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

See ITRC, Environmental Fate and Transport Processes (August 2021) marked Exhibit 5 (ECF 3-6, at 8). In other words, PFOA and PFOS are designed to accumulate at the air/water interface, or in this case, at the interface between the groundwater table and the unsaturated soil at its capillary fringe, precisely where BOEM approved the installation of underground concrete infrastructure for high-voltage transmission lines. Groundwater levels rise and fall seasonally and over years by as much as eight feet in Wainscott (*see* ¶ 38-39), altering the degree to which the underground concrete infrastructure is in direct contact with PFAS-contaminated water.

### **5.3.1 Diffusion In and Out of Lower Permeability Materials**

Diffusion is the movement of molecules in response to a concentration gradient. *Diffusion in groundwater is often ignored because diffusion rates are slow relative to advection. However, contaminant mass in groundwater can diffuse into the pore space of lower permeability soils or bedrock. Back-diffusion out of these low permeability materials may result in the longterm persistence of PFAS in groundwater even after source removal and remediation.* Due to the lack of degradation of PFCAs and PFSAAs, back-diffusion of these PFAS is also likely to be a more significant process than for conventional contaminants such as chlorinated solvents. Adamson et al. (2020) reported that approximately 82% of the total mass of PFAS measured at an AFFF site was found within soils that were classified as lower permeability. This included 91% of the polyfluorinated precursor mass, most of which was encountered in the vicinity of the presumed source area. The mass distribution at this site confirmed that diffusion into lower permeability soils had occurred and demonstrated that this process can contribute to long-term retention of PFAS. The relative impact of *PFAS accumulation at the air-water interface was not fully investigated in this study, as the water table was very shallow, and the unsaturated/saturated transition zone was likely disturbed during excavation. PFAS may also diffuse into site materials*

*such as concrete.* For example, Baduel, Paxman, and Mueller (2015) reported that PFAS had penetrated 12 cm into a concrete pad at a fire training area, and diffusion was identified as a contributing process.

*Id.*, (at 9).

### **5.3.3 Leaching**

***PFAS present in unsaturated soils are subject to downward leaching during precipitation, flooding, or irrigation events that promote dissolution and migration of contaminant mass*** (Sepulvado et al. 2011; Ahrens and Bundshuh 2014). ***This process can result in PFAS transport from surface soils to groundwater and surface water because PFAS releases often involve surface applications (for example, AFFF and biosolids) or atmospheric deposition (Gellrich, Stahl, and Knepper 2012; Anderson, Adamson, and Stroo 2019; Galloway et al. 2020). Leaching is also potentially relevant for plant uptake as well as transport of PFAS*** ...

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

*Id.*, (at 11).

34. South Fork Wind has installed underground concrete duct banks and vaults for approximately two-and-a-half miles through an area containing more private drinking water wells with harmful PFOA and PFOS contamination exceeding regulatory limits than anywhere else in Suffolk County (*see* ¶ 35).
35. Suffolk County Department of Health Services detected PFOA and PFOS contamination exceeding New York State's Maximum Contamination Level in more private drinking water wells in Wainscott than anywhere else in Suffolk County, according to a *Newsday* report. The number of wells in Wainscott with excessive PFOA/PFOS contamination (65) represents thirty-two percent (32%) of the total number of contaminated wells in Suffolk County (202). The area

with the next highest number of wells containing PFOA/PFOS chemicals was Yaphank, with half the number of contaminated wells (32) than in Wainscott (65). *See* the Newsday article, *'Forever chemicals' found in Suffolk's private water wells since 2016, data shows, by Vera Chinese, published April 4, 2022, marked Exhibit 6 (table at 3)*. Available online at – [www.newsday.com/long-island/environment/private-wells-testing-contaminants-drinking-water-pfas-v49xdvtl](http://www.newsday.com/long-island/environment/private-wells-testing-contaminants-drinking-water-pfas-v49xdvtl) (last accessed November 1, 2023).

36. “Surface water bodies in the town include the streams, ponds, tidal creeks, tidal embayments and wetlands. Ponds and streams that exist near the coastal areas such as Georgica Pond [...] **are hydraulically connected to the groundwater** and owe their existence to the fact that the land surface elevation is below that of the water table.” (See East Hampton Town Water Resources Management Plan, dated March 2004, at p. iii, PDF p. 7, ¶ 3).
37. South Fork Wind installed its concrete duct banks and vaults underground, where they connect with groundwater, a sole-source aquifer, either directly or via capillary action. *See* Complaint, Appendix 1 (photos of groundwater in the transition vault on Beach Lane) (ECF 1-2, at 6) marked Exhibit 7. Further, Federal Defendants do not dispute that SFW set up multiple Fact Tanks and a Granular Activated Carbon filter designed to treat PFAS-contaminated groundwater (*id.*, at 1-4).
38. According to the U.S. Geographic Survey’s National Water Information System, groundwater levels vary seasonally (over the short term) and in the long term by up to eight feet (8 ft). *See* Plaintiff’s letter, *Re: URGENT: South Fork Wind, Imminent Risk to Public Health*, dated March 11, 2022, submitted to BOEM, marked Exhibit 8 (Figs 4 and 5, at 10-11).
39. Plaintiff warned BOEM and South Fork Wind of the risks associated with installing underground concrete infrastructure in and at the capillary fringe of a sole-source aquifer used



for drinking water, irrigating crops, and recreation in March 2022. *Id.* (Exhibit 8) BOEM did *not* substantively respond to Plaintiff's letter of March 11, 2022, his sixty-day notice of intent to sue (December 18, 2021), or his comments letters in November 2018 and February 2021.

### **BOEM: Plaintiff's Comments Letters**

40. On November 19, 2018, Plaintiff submitted to BOEM a comments letter (BOEM-2018-0010).

It reads (in relevant part)—

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

The Applicant [SFW] will charge approximately 22 ¢/kWh for its wind-generated electricity (please see calculation [at ¶ 41]).

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

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

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

*See* Kinsella Comments Letter, November 2018 (ECF 3-1, at 4-5) marked Exhibit 9.

Available online at— <https://www.regulations.gov/comment/BOEM-2018-0010-0074>

41. The 2018 comments letter included the following calculation—

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

Price per Output: 22 cents per kilowatt hour

(*id.*, at 4)

42. On February 22, 2021, Plaintiff submitted a comments letter to BOEM in response to its Draft Environmental Impact Statement (“DEIS”) (issued January 8, 2021), addressed to Defendant Chief Michelle Morin, Environment Branch for Renewable Energy, BOEM Office of Renewable Energy Programs. *See* Kinsella Comments Letter, February 2021 (ECF 3-1, at 15-24) marked Exhibit 10. Available online at—  
<https://www.regulations.gov/comment/BOEM-2020-0066-0343>

43. The February 2021 comments letter reads (in relevant part)—

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

For these reasons, I respectfully request that the documents herein listed (see Documents List below) be incorporated by reference and form part of my comments submitted to the Bureau of Ocean Energy Management (“BOEM”) and that BOEM, as lead agency, conduct a broad review of the whole Project including in all respects the onshore and offshore components and “use all practicable means and measures... to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.<sup>1</sup>” (n. 1 “National Environmental Policy Act (“NEPA”), Section 101(a); 42 U.S.C. § 4331(a)”)

In the absence of substantial review by the NYSPSC and the Town of East Hampton, and should BOEM likewise *not* require a thorough examination of the onshore part of the Project inasmuch as the offshore part, there will be *no* review, and *no* protections will be afforded the residents of Suffolk County, and specifically, the residents of the Town of East Hampton.

44. The comments letter included *two hundred and seven exhibits* containing verifiable records such as testimony, briefs, and government reports.

45. BOEM received the comments letter (in February 2021) nine months *before* it approved the SFW Project (November 24, 2021). BOEM acknowledged receiving the documents and uploaded them to regulations.gov. *See* BOEM Index of Exhibit (with links), Exhibit 11.

**BOEM knew of PFAS contamination in Wainscott.**

46. On February 22, 2021, the New York State Department of State (DOS) and the Department of Environmental Conservation (DEC) in consultation with the New York State Office of Parks, Recreation and Historic Preservation (OPRHP) and the Department of Transportation (DOT); jointly submitted a comments letter in response to BOEM’s Draft Environmental Impact Statement (DEIS), issued January 8, 2021, pursuant to NEPA. Paragraph 19 reads as follows –

Section 3.3.2.1.2 – Onshore Groundwater should include a discussion of DEC Environmental Remediation Site #152250 (the East Hampton Airport) and *the potential for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS) contamination in groundwater along the onshore SFEC route.*

*See* NYDEC Comments Letter to Chief James Bennett, Office of Renewable Energy Programs, BOEM of February 22, 2021 (at 11), marked Exhibit 12. Available online at – <https://www.regulations.gov/comment/BOEM-2020-0066-0338>.

On the contrary, neither BOEM nor SFW discussed or even mentioned PFOA or PFOS in the FEIS or COP. No potential *on-site* PFAS groundwater contamination was ever raised in BOEM’s environmental review.

47. On February 22, 2021, Plaintiff submitted a comments letter to BOEM (*see* Exhibit 10) in response to its Draft Environmental Impact Statement (“DEIS”), issued January 8, 2021. BOEM uploaded the comments letter and two hundred and seven exhibits to its website *nine months before* approving SFW’s Project (November 24, 2021). BOEM received with the

comments letter and uploaded the following documents on PFAS contamination to regulations.gov. See BOEM Index of Exhibits (ECF 3-1)(Exhibit 11)—

- a) NYS DEC Site Characterization Report, East Hampton Airport (Nov 30, 2018)  
[https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment\\_8.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_8.pdf)
- b) NYS DEC Site Characterization Report, Wainscott Sand & Gravel (July 2020)  
[https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment\\_25.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_25.pdf)
- c) PFAS Contamination Heat Map of Cable Route for South Fork Wind (p. 1)  
[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_74.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_74.pdf)
- d) SCDHS PFAS Laboratory Reports for 303 drinking water wells in Wainscott  
[https://downloads.regulations.gov/BOEM-2020-0066-0387/attachment\\_72.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0387/attachment_72.pdf)
- e) PFAS Zone - Onshore Route (decided *after* PFAS detected) (p. 1)  
[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_75.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_75.pdf)
- f) PFAS Contamination of Onshore Corridor (satellite map) (p. 2)  
[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_65.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_65.pdf)
- g) PFAS release within 500 feet of SFEC route (surface runoff) (p. 2)  
[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_71.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_71.pdf)
- h) NYS PSC, Kinsella Report No 3 - PFAS Contamination (p. 91)  
[https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment\\_9.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_9.pdf)
- i) NYS PSC, Kinsella Testimony 1-1, PFAS (Sep 9, 2020) (p. 37)  
[https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment\\_32.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_32.pdf)
- j) NYS PSC, Kinsella Testimony 1-2, PFAS (Oct 9, 2020) (p. 11)  
[https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment\\_36.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_36.pdf)
- k) NYS PSC, Kinsella Testimony, Rebuttal (Oct 30, 2020) (p. 13)

[https://downloads.regulations.gov/BOEM-2020-0066-0387/attachment\\_63.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0387/attachment_63.pdf)

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

[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_9.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_9.pdf)

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

[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_16.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_16.pdf)

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

[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_29.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_29.pdf)

o) NYPSC - Motion to Strike Testimony by South Fork Wind (Nov 5, 2020)

[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_56.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_56.pdf)

p) NYPSC – Response by Kinsella to Motion to Strike Testimony (Nov 16, 2020)

[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_57.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_57.pdf)

For a full list of documents submitted to BOEM by Plaintiff in February 2021 (with direct links to documents regulations.gov), see Exhibit 11.

48. On October 11, 2017, Suffolk County Department of Health Services (“SCDHS”) issued a Water Quality Advisory for Private-Well Owners in Area of Wainscott. The advisory was the first confirmed detection of PFAS contamination in Wainscott. It made the front page of all the local and regional newspapers (<https://oswSouthFork.info/early-pfas-reports>). The Water Quality Advisory said SCDHS “has begun a private well survey in the vicinity of the [East Hampton] airport property. PFOS and PFOA have been detected in some of the private wells that have been tested so far. One private well had PFOS and PFOA detected above the USEPA lifetime health advisory level ....” See NYPSC Case 18-T-0604, Interrogatory Si Kinsella #03 from Intervenor-Plaintiff Si Kinsella to SFW (formerly Deepwater Wind South Fork LLC), dated January 2, 2020 (“**NYPSC IR SK03-10**”) (at PDF

9 of 144) marked as Exhibit 25—

[https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment\\_13.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_13.pdf)

49. At the time (in 2017), approximately ninety percent (90%) of residents used private wells for all their drinking water needs.
50. In 2016, the EPA released a “FACT SHEET” on “PFOA & PFOS Drinking Water Health Advisories.” It reads— “[E]xposure to PFOA and PFOS over certain levels may result in adverse health effects, including developmental effects to fetuses during pregnancy or to breastfed infants (e.g., low birth weight, accelerated puberty, skeletal variations), cancer (e.g., testicular, kidney), liver effects (e.g., tissue damage), immune effects (e.g., antibody production and immunity), thyroid effects and other effects (e.g., cholesterol changes).” *See* NYPSC IR SK03-10 (at PDF 36) (Exhibit 25), at—
- [https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment\\_13.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_13.pdf)
51. In June 2018, East Hampton Town Supervisor Van Scoyoc received an email from SCDHS stating that “PFC [PFAS] results have been received for 303” private wells, of which “[t]hirteen (13) wells are above the USEPA Health Advisory Level” and “[o]ne hundred and forty-four (144) wells had no detections of PFOS/PFOA.” Conversely, one hundred and fifty-nine (159) wells, or fifty-three percent (53%), had detectible levels of harmful PFOS/PFOA contamination ....” *See* NYPSC IR SK03-10 (at PDF 17-28) (Exhibit 25)—
- [https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment\\_13.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_13.pdf)
52. The highest recorded PFOS/PFOA contamination level was 791 ppt, more than seven times the EPA 2016 Health Advisory Level (*id.*, at PDF 22, table, top row) (Exhibit 25).
53. When SFW submitted its application to NYSPSC (September 14, 2020), it “determined that there were no hydraulically upgradient or adjacent properties along the study corridor that

would represent a significant environmental risk to subsurface conditions.”<sup>13</sup> SFW knew to avoid the source of contamination (at East Hampton Airport)— “The study corridor consists of the Long Island Railroad (LIRR) right-of-way that begins (from west-to-east) approximately 0.20 mile west of the Wainscott-Northwest Road crossover[.]”<sup>14</sup> and includes a “500-foot radius[.]”<sup>15</sup> ***SFW’s “study corridor” covered only the LIRR railroad tracks. Apparently, SFW knew not to investigate the residential area of Wainscott south of East Hampton Airport (where it planned to build underground transmission infrastructure).***

54. The PFAS contamination concentration levels quoted herein (*see* ¶¶ 55–89) are from NYS DEC Site Characterization Reports for East Hampton Airport (*see* ¶ 47(a)) that is ***adjacent and upgradient*** from SFW construction corridor, and Site Characterization Reports for Wainscott Sand & Gravel (*see* ¶ 47(b)) that is ***adjacent and downgradient*** from SFW construction corridor.
55. Monitoring wells at East Hampton Airport: EH-19A, EH-19A2, and EH-19B are upgradient within 1,000 feet of SFW’s underground concrete infrastructure, and Well EH-1 is upgradient within 500 feet.
56. Wainscott Sand & Gravel (“Wainscott S&G”) (NYSDEC site: 152254) is on the opposite (downgradient) side of SFW’s construction corridor from the (upgradient) source of PFAS contamination at East Hampton Airport (NYSDEC site: 152250).

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<sup>13</sup> See Article VII application, Appendix F Part 2, Phase I Environmental Assessment prepared by VHB Engineering, Surveying, and Landscape Architecture P.C. - Hazardous Materials Desktop Analysis, dated March 30, 2018 (at PDF 142, first paragraph). See [dps.ny.gov—  
https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={D741B793-DFC1-4056-BCCC-6F46E06C4616}](https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={D741B793-DFC1-4056-BCCC-6F46E06C4616})

<sup>14</sup> *Id.* (at PDF 124, first paragraph).

<sup>15</sup> *Id.* (at PDF 125, first paragraph).

57. Monitoring wells at Wainscott Sand & Gravel: MW5, MW3, and MW4 (groundwater), and wells: S1, S11, and S16 (soil), are within one hundred and fifty feet downgradient from SFW’s construction site.

58. A similar profile of PFAS contamination at East Hampton Airport (the source of contamination) is evident in wells on the opposite downgradient side of the construction corridor at the Wainscott S&G site.

59. The combined concentration levels of PFOS/PFOA contamination in all four groundwater monitoring wells within one thousand feet upgradient from the construction corridor are more than double the 2016 USEPA Health Advisory Level (“HAL”) of 70 ppt, regulatory standards designed to protect human health, as follows—

60. Well: EH-19A – PFOS/PFOA = 145 ppt (exceeds 2016 HAL by 2.1x)

61. Well: EH-19A2 – PFOS/PFOA = 174 ppt (exceeds 2016 HAL by 2.5x)

62. Well: EH-19B – PFOS/PFOA = 166 ppt (exceeds 2016 HAL by 2.4x)

63. Well: EH-1 – PFOS/PFOA = 162 ppt (exceeds 2016 HAL by 2.3x)

64. Soil contamination levels from PFOS, PFOA, and PFHxS chemical compounds detected in the shallow surface at the Airport site upgradient (within 1,000 feet of SFW’s construction corridor are as follows –

65. Well: EH-19A (soil) – PFOS = 3,900 ppt (3.9 ppb or ng/g)

66. – PFOA = 180 ppt (0.18 ppb or ng/g)

67. – PFHxS = 170 ppt (0.17 ppb or ng/g)

68. Well: EH-19B (soil) – PFOS = 12,000 ppt (12 ppb or ng/g)

69. – PFOA = 3,800 ppt (3.8 ppb or ng/g)

70. – PFHxS = 3,800 ppt (3.8 ppb or ng/g)



71. Well: EH-1 (soil) – PFOS = 10,000 ppt (10 ppb or ng/g)
72. – PFOA = 180 ppt (0.18 ppb or ng/g)
73. – PFHxS = 170 ppt (0.17 ppb or ng/g)
74. Groundwater samples taken from monitoring wells within one hundred and fifty feet downgradient from the construction corridor on the opposite side from the source of contamination (at the Airport), all show exceedingly high levels of the same chemical compounds (PFOA, PFOS, and PFHxS) seen in soil samples taken at the Airport.
75. According to the NYSDEC Superfund Designation Site Environmental Assessment of the Wainscott S&G— “Overall, the highest total PFAS detections were in monitoring wells MW3, MW5, MW6 located on the Western (side-gradient) and Northern (upgradient) boundaries of the site, indicating a potential off-site source.” See link (below) (at 2) — [https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment\\_4.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_4.pdf)
76. Contamination levels in groundwater monitoring wells within one hundred and fifty feet downgradient from the corridor (on the western side of the Wainscott Sand & Gravel site) for groundwater (“GW”) Monitoring Wells MW5, MW3, and MW4 are as follows—
77. Well: MW5 (GW) – PFOS = 877 ppt (exceeds NYS MCL by **87.7 x**)
78. – PFOA = 69 ppt (exceeds NYS MCL by 6.9 x)
79. – PFHxS = 566 ppt
80. – PFOS/PFOA = 946 ppt (exceeds 2016 HAL by 13.5 x)
81. Well: MW3 (GW) – PFOS = 1,010 ppt (exceeds NYS MCL by **101 x**)
82. – PFOA = 28 ppt (exceeds NYS MCL by 2.8 x)
83. – PFHxS = 306 ppt
84. – PFOS/PFOA = 1,038 ppt (exceeds 2016 HAL by 14.8 x)

- 85. Well: MW4 (GW) – PFOS = 232 ppt (exceeds NYS MCL by 23.2 x)
- 86. – PFOA = 5.57 ppt
- 87. – PFHxS = 43.4 ppt
- 88. – PFOS/PFOA = 238 ppt (exceeds 2016 HAL by 3.4 x)
- 89. Groundwater containing levels of PFAS contamination (exceeding U.S. EPA limits) flows from the source of contamination at the Airport site across South Fork Wind’s construction corridor downgradient to the Wainscott Sand & Gravel site, where the same chemical compounds are present in groundwater monitoring wells.

**Superfund Designation: EH Airport**

- 90. In June 2019, the New York State Department of Environmental Conservation (NYSDEC) listed the adjacent upgradient property from South Fork Wind’s proposed construction corridor (through Wainscott, NY) with the Inactive Hazardous Waste Disposal Site Program (the NYS State Superfund Program). The State Superfund Site Classification Notice reads as follows—

The New York State Department of Environmental Conservation (DEC) maintains a list of these sites in the Registry of Inactive Hazardous Waste Disposal Sites (Registry). The site [East Hampton Airport] .... has been added to the Registry as a Class 2 site that presents *a significant threat to public health* and/or the environment for the following reason(s): Fire-fighting foam containing per- and polyfluoroalkyl substances (PFAS) was used and stored on the East Hampton Airport during crash response and training. PFAS’s including perfluorooctanesulfonic acid (PFOS) and perfluorooctanoic acid (PFOA), have been detected in on-site soil and groundwater and off-site private drinking water wells. The concentrations of PFOS/PFOA in the drinking water supply wells exceed the United States Environmental Protection Agency’s (USEPA’s) drinking health advisory for PFOS/PFOA, 70 parts per trillion. See NYSDEC State Superfund Site Classification Notice, June 2019

See NY State Superfund Site Classification Notice for East Hampton Airport. Available at [dec.ny.gov](http://dec.ny.gov)— [www.dec.ny.gov/data/DecDocs/152250/](http://www.dec.ny.gov/data/DecDocs/152250/) (last accessed Oct 29, 2023). Click on— “Fact Sheet.HW.152250.2019-06-19.East Hampton Airport Class 02 Listing.pdf” marked Exhibit 13 (at 1).

### **BOEM Fraud: PFAS**

91. BOEM mentions “perfluorinated compounds” (aka PFAS) only once in its FEIS (of 1,317 pages) *somewhere else* “on a fourth site, NYSDEC #152250,” referring to East Hampton Airport. See FEIS, *excerpt* (page 655) marked Exhibit 14 (at 1).
92. The FEIS (falsely) states that all “four NYSDEC Environmental Remediation Sites are mapped near the interconnection facility” (*id.*). However, the fourth site, East Hampton Airport, is approximately two miles from the interconnection facility. See Map, marked Exhibit 14 (at 2).
93. The FEIS fails to identify any *specific* “perfluorinated compound” from the thousands of compounds in the broad class of PFAS chemical compounds.
94. In NYS, only two PFAS compounds are regulated: PFOA and PFOS.
95. The FEIS does *not* identify the precise location of the “perfluorinated compounds” relative to the construction site. The FEIS states the compounds are “on a fourth site, NYSDEC #152250” that could be anywhere on the 610-acre East Hampton Airport site.
96. The FEIS contains no analysis, test results, mitigation plans, or discussion on alternatives for the specific purpose of avoiding a highly contaminated area.
97. BOEM did *not* consider the Project’s impact on groundwater contamination, the EPA links to cancer, and other adverse health effects. (see ¶ 9 and ¶ 50).

98. Federal Defendants fail to explain how BOEM arrived at the demonstrably false conclusion that “existing groundwater quality in the analysis area appears to be good” (*see* FEIS, at H-23, PDF 655, 2nd ¶, *excerpt* marked Exhibit 14, at 1), contradicting overwhelming evidence (*see* ¶ 47) it acknowledged receiving nine months *before* approving SFW’s Project. *See* FEIS, *excerpt* (page 655) marked Exhibit 14 (at 1). *Also, see* ¶¶ 46-89.
99. The groundwater in Wainscott contains levels of PFAS contamination exceeding federal and NYS regulatory standards. *See* ¶¶ 24-31, 46-90, and 103.
100. To install underground concrete duct banks and vaults for over two miles through Wainscott, SFW had to excavate soil and groundwater containing PFAS contaminants. *See* ¶¶ 37-39.
101. SFW’s construction impacted soil and groundwater containing PFAS contaminants.
102. SFW’s underground concrete infrastructure will come in contact with groundwater PFAS contamination.
103. According to an exposé, 'Forever chemicals' found in Suffolk's private water wells since 2016, data shows, published in Newsday (on April 2, 2022), the Suffolk County Department of Health Services detected harmful levels of PFAS contamination (exceeding the NYS Maximum Contamination Level of 10 parts per trillion for PFOS and 10 parts per trillion for PFOA) in 202 wells in Suffolk County. PFAS chemicals are also known as ‘forever chemicals.’ Of the total number of contaminated wells in Suffolk County, thirty-two percent (32%) were in Wainscott downgradient from East Hampton Airport in the same area where South Fork Wind proposed installing underground concrete infrastructure for high-voltage transmission cables (*see* ¶¶ 47(c), (e)-(g) above). The area with the next highest number of contaminated wells, Yaphank, had less than half the number of

contaminated wells (32) than Wainscott (65). *See* Newsday, *PFAS in Wainscott Wells* (at 3-6) marked Exhibit 6.

104. As of May 2023, SFW has completed most of its onshore construction without regard to human health and the environment (including the sole-source aquifer used for drinking water).

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

105. On November 19, **2018**, Plaintiff wrote to BOEM concerning SFW's "fail[ure] to comply with 30 CFR 585.627(a)(7) with specific regard to its potential negative impact upon employment" *See* Kinsella Comments (November 2018) marked Exhibit 9 (¶ 40). The comments letter warns BOEM that SFW "will charge approximately 22 ¢/kWh" and that a "similar wind farm, Vineyard Wind" that is near SFW "will charge only 6.5 ¢/kWh" (*id.*, at 4). The letter also informed BOEM that SFW would cost (in 2018) "\$1,624,738,893 (NYS Comptroller, 20-year term)" (*id.*) *See* New York State Office of the State Comptroller, Open Book at—  
<https://wwe2.osc.state.ny.us/transparency/contracts/contracttransactions.cfm?Contract=0000000000000000024767>
106. In February **2021**, BOEM received comprehensive information on SFW's Project cost submitted by Petitioner-Plaintiff Kinsella in response to BOEM's Draft Environmental Impact Statement ("DEIS") (issued January 8, 2021) for SFW. The comments letter included an internal LIPA Encumbrance Request, signed by LIPA CFO Joseph Branco on January 30, 2017 (see link below)—  
[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_36.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_36.pdf)  
*Also, see* Kinsella Comments (February 2021), marked Exhibit 15.
107. The Encumbrance Request shows the Project Cost, \$1,624,738,893, and Total Projected

Energy, 7,432,080 MWh (371,604 MWh per year over 20 years). The price (cost/energy) is \$219 per MWh or 22 cents per kWh.

**The estimated amount of energy generated** each year (371,604 MWh) is constant twenty years later. The expected generating capacity fails to account for twenty years of degradation from the turbines operating around the clock summer and winter out in the Atlantic Ocean at a height specifically designed for maximum constant winds velocity impacting the blades. The turbines are mechanical, requiring lubricants and oils to *reduce* (but not eliminate) wearing. The combination of the blades losing efficiency and the constant wearing of mechanical parts would decrease generating capacity over time. A generating capacity of 371,604 MWh per year represents a capacity factor of 47% (*see* Complaint, Appendix 4, Table 3. South Fork Wind Capacity and Price Calculation, ECF 1-5, at 3, rows 2 and 5 from top). The average operating capacity of the Block Island Wind Farm (near the proposed South Fork Wind Farm), over five years from 2017 through 2022 was 41.5% (*see* Block Island Wind Farm, Actual Generating Capacity (2017-2022), marked Exhibit 16). Although the expect generating capacity (47%) may be reasonable given SFW's newer and larger turbines, it is unrealistic to expect that the South Fork Wind Farm would still be generating at that high capacity twenty years later, especially given its constant use through years of harsh freezing winters.

108. The Project cost and price of energy Plaintiff estimated to be in 2018 (22 cents per kWh) was subsequently confirmed to be accurate 2021.

109. On September 30, 2021, SFW and LIPA agreed to expand the offshore wind farm from 90 to 130 MW. The revised Project cost is \$2,013,198,056.

NY Office of the State Comptroller, Open Book, Contract: C000883 at –

<https://wwe2.osc.state.ny.us/transparency/contracts/contracttransactions.cfm?Contract=0000000000000000085553> (last accessed April 16, 2023).

110. Since the project was expanded (from 90 MW to 130 MW), the price of energy is 19 cents per kilowatt-hour. *See* COMPLAINT, Appendix 4, Price Tables (ECF 1-5, at 3).
111. Nine months *before* BOEM approved the Project (in February 2021), it received comments regarding the Project cost (for a second time). This time, the price was compared to Sunrise Wind, which was also owned (indirectly) by the same joint and equal partners, Ørsted A/s and Eversource. The letter reads as follows—

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



*See* Kinsella Comments Feb 2021 (ECF 3-1, at 18, 3rd ¶) marked Exhibit 10.

112. The 2021 Comments included a table comparing South Fork Wind’s price and energy deliveries to Sunrise Wind. The table has been included here (overleaf).

*See* Original Table at the link (below) (at 15) (Exhibit 10) —

[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_32.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_32.pdf)

[blank]

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

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

<sup>16</sup> New York Office of the State Comptroller, Open Book, Contract Number: C000883  
<https://wwe2.osc.state.ny.us/transparency/contracts/contractsearch.cfm>



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

114. Under the heading “Demographics, Employment, and Economics” “Affected Environment” in the FEIS, BOEM writes –

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

*See* FEIS (at 3-153, PDF 205, last paragraph).

BOEM’s ROD and FEIS and SFW’s COP are available at boem.gov (link below)—

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

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

116. BOEM does *not* list Suffolk County, as a whole, in Table 3.5.3-1 (*see* ¶¶ 114-115), that could be affected by the Project. Ratepayers living in Suffolk County, LIPA’s service area, will bear the economic burden of having to pay for the SFW Project, estimated to be over \$2 billion. BOEM does *not* include the area of Suffolk County in its analysis of impacts resulting from SFW’s Project cost on demographics, employment, and economics.

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

follows—

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

See FEIS (at 3-157, PDF 209, last sentence).

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

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

The FEIS also found that the Proposed Project could have, to some extent, beneficial impacts on ... demographics, employment, and economics ....

See ROD (at D-8, PDF 100, first paragraph).

120. BOEM’s ROD identifies possible “beneficial impacts” but does not identify any potential adverse impacts on demographics, employment, or economics. BOEM does not acknowledge any potential adverse effects resulting from the two-billion-dollar cost burden to over one million people in LIPA’s service area.

121. BOEM’s economic analysis considers beneficial economic impacts such as local spending on capital expenditures of \$184 to \$247 million (depending on the wind farm’s capacity) (FEIS, at F-17, PDF 587, Table F-10).

122. BOEM considers beneficial impacts from operational spending of \$6.2 to \$12.3 million per year (*id.*, Table F-11), which is, \$123 to \$246 million over the 20-year contract term.
123. BOEM accounts for beneficial impacts from spending in the local economy by SFW on capital (*see* ¶ 121) *and* operational (*see* ¶ 122) expenses of \$307 to \$493 million (the addition of capital expenditure and operational spending).
124. BOEM's analysis is one-sided. BOEM accounts for Project-related inflows into the local economy but ignores outflows. Project-related outflows of \$2 billion (*see* ¶ 109) outweigh inflows of \$307 to \$493 million (*see* ¶ 123) by four-to-seven times. To put it another way, for every dollar South Fork Wind puts into the economy, it takes out four-to-seven times that amount.
125. The net outflow (i.e., inflows of \$307 to \$493 million less an outflow of \$2 billion) equals \$1.5 to \$1.7 billion, exiting Suffolk County's economy. Now that SFW is (indirectly) wholly-owned by Ørsted A/S, a Denmark-listed company that is majority owned by the State of Denmark, the capital outflow will end up in Denmark, *not* Suffolk County.
126. BOEM does not acknowledge, let alone consider, the adverse economic impacts of withdrawing \$2 billion from Suffolk County's economy. Moreover, the negative economic impact (\$2.013 billion) is fixed under the terms of the PPA. In contrast, the claimed beneficial impacts are SFW's own (unsubstantiated) *estimates*.
127. BOEM used biased financial data to support its decision.
128. BOEM failed to consider both the Project's cost of \$2 billion and the people in Suffolk County who will have to pay that cost, including lower-income families.

## **BOEM's Fraud: South Fork RFP**

129. On June 24, 2015, PSEG Long Island, on behalf of Long Island Lighting Company d/b/a LIPA, issued a Notice to Proposers soliciting bids in the South Fork RFP procurement. The RFP sought “sufficient local resources to meet expected peak load requirements until at least 2022 in the South Fork of Long Island ... Such resources will be located on Long Island and provided to LIPA.” *See* RFP 2015 Notice to Proposers, marked Exhibit 17.
130. The notice unambiguously invites bidders to submit proposals for “local resources ... located on Long Island” *and nowhere else*. PSEG Long Island repeats the specification twice, highlighting its significance. Still, it is irrefutable that an offshore wind farm thirty-five miles off-coast from Montauk Point, such as SFW, is *not* a “local resource[.]” that is “located on Long Island[.]” it is *on* the Outer Continental Shelf *in* the Atlantic Ocean.
131. Furthermore, offshore wind technology is the least likely technology to provide power to meet “peak demand” for electricity. On eastern Long Island’s South Fork, “peak demand” for electricity occurs in response to air conditioning usage on hot (typically windless) summer days when, *not* coincidentally, power generation from offshore wind is minimal (due to less wind).
132. Empirical evidence supports offshore wind’s inability to provide power efficiently during the summer. The Block Island Wind Farm (“**BIWF**”) commenced operations in late 2016 and is in the same area as the proposed South Fork Wind Farm (“**SFWF**”). Its actual generating capacity in August (a six-year average from 2017 through 2022) was only 24% of its nameplate capacity, operating at an average capacity of 7.3 of 30 MW (its nameplate capacity). The wind farm’s average output in August was around half the average amount of electricity generated in December (52.7%) over the same period (2017 through 2022).

Although the South Fork RFP specifically sought resources to meet “peak demand[,]” it awarded the PPA to an offshore wind farm that was more likely *not* to provide power to meet peak demand. *See* Block Island Wind Farm, Generating Capacity Graph (2017–2022), marked Exhibit 16.

133. SFW does *not* meet the South Fork RFP’s minimum specifications and requirements. *See* South Fork RFP, marked Exhibit 19 and Complaint in *Simon V. Kinsella et al. v. Long Is. Power Auth., et al.* (NY Sup. Ct. Suffolk County, index 621109-2021), marked Exhibit 18.
134. Please read the Complaint (¶ 133) (Exhibit 18) and compare the allegations to the South Fork RFP (Exhibit 19).
135. Although the Notice to Proposers (Exhibit 17) ***precluded proposals for offshore wind resources***, the procurement made an exception for SFW. Despite *not* meeting the RFP’s minimum specifications and requirements, SFW was treated favorably and allowed as the *only bidder* to submit an offshore wind proposal. The South Fork RFP was manipulated to stifle competition.
136. The South Fork RFP **permitted favoritism** in another critical respect. On January 11, 2017, then-Governor of New York State, Andrew M. Cuomo, in his 2017 State of the State address, directed the LIPA Board of Trustees to approve SFW’s proposal.
137. Governor Cuomo’s speech read as follows (*see* Governor Cuomo 2017 State of the State, *excerpts* (pages 1, 54–56), marked Exhibit 20—

The first major step in the State’s offshore wind development plan is a 90 megawatt [SFW’s original size], 15-turbine project off the East End of Long Island. The Governor calls on the Long Island Power Authority to approve this critical project, which would be approximately 30 miles southeast of Montauk ... This innovative project is the least expensive proposal, including proposals for both renewable and conventional power generation, to meet the growing energy needs of the South Fork and to

provide cleaner energy for all of Long Island [i.e., suggesting expansion][emphasis added].

138. Fourteen days later (on January 25, 2021), the LIPA Board of Trustees approved SFW’s Project. Governor Cuomo appointed the majority of the LIPA Board of Trustees. By “call[ing] on the Long Island Power Authority to approve this critical project[.]” Governor Cuomo interfered in an active procurement (the South Fork RFP) to advance the interests of a private developer to the detriment of the other bidders, the public, and Petitioner.
139. On November 24, 2021, BOEM issued its ROD approving the Project’s FEIS. BOEM’s ROD (falsely) asserts that SFW’s “power purchase agreement executed in 2017 result[ed] from LIPA’s technology-neutral competitive bidding process [emphasis added]” (ROD, at 7), referring to the South Fork RFP.<sup>17</sup>
140. SFW also makes the same (false) claim in its COP (*see* SFW COP, Executive Summary, *excerpt*), marked Exhibit 21.<sup>18</sup>
141. LIPA disagrees. A Memorandum from LIPA to the N.Y. Office of the State Comptroller (January 27, 2017) reads— “In some instances, proposals were advanced if they were the only proposal offering a particular technology.” *See* LIPA Memo (at 12, first paragraph) at— [https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_49.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_49.pdf) LIPA continues— “Two other proposals (i.e., Deepwater Wind ... and Fuel Cell Energy ...) were designated as Semi-Finalists because ... they were the only proposals offering a particular technology ... Deepwater Wind [SFW] was the only proposal offering offshore wind technology” (*id.*, at 13, first paragraph) (Deepwater Wind refers to SFW). The South

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<sup>17</sup> *See* ROD (at 7, PDF 9, ¶ 7). BOEM provides the same false information in its FEIS. *See* FEIS (at ii, PDF 6, penultimate paragraph). ROD and FEIS are available at the link below— <https://www.boem.gov/renewable-energy/state-activities/south-fork>

<sup>18</sup> *See* Exhibit 21, SFW COP May 2021, Executive Summary, *excerpt* (at ES-2, PDF 3).

Fork RFP procurement advanced proposals based on their technology (LIPA has *not* disclosed relative costing information comparing other bids). Thus, the bidding process was *not* “*neutral*” on technology. Where proposals can be advanced based solely on the technology (i.e., offshore wind technology), and only one bidder offering that technology was permitted to participate in a procurement that precluded such technologies, then the procurement process was *not* competitive. As SFW was the only bidder (allowed) to submit a proposal for offshore wind resources, **SFW had no competition**. Thus, the South Fork RFP was *not* a “competitive bidding process[,]” as BOEM (SFW and the NYSPSC) claim.

142. On November 8, 2021, NYSPSC General Counsel Robert Rosenthal answered the Verified Petition in *Simon V. Kinsella v. NYSPSC* (index 2021-06572, N.Y. App. Div., 2d Dep’t),<sup>19</sup> admitting the following (*see Kinsella v NYSPSC*, Verified Petition and Answer, marked Exhibits 22 and 23)—

- q) [Verified Petition Paragraph 62] In January 2017, LIPA and PSEG Long Is., acting on behalf of LIPA, awarded SFW 25 a PPA for the supply of energy at an average price of 22 cents per kWh over the life of the contract (*see* Exhibit [15] – LIPA Contract Valuation for SFW).
- r) [Verified Petition Paragraph 63] LIPA plans to purchase the same offshore wind renewable energy from another wind farm, Sunrise Wind, for 8 cents per kWh, nearly one-third the price of SFW (*see* Exhibit [24] – Ørsted’s Sunrise Wind PPA (at p. 1)).

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<sup>19</sup> In answer to Verified Petition in *Simon V. Kinsella v. NYSPSC* (index 2021-06572, N.Y. App. Div., 2d Dep’t). *See* Exhibit 22, Verified Petition, and Exhibit 23, Verified Answer

s) [Verified Petition Paragraph 64] The two offshore wind farms – SFWF and Sunrise Wind Farm – are only two miles apart and are owned and controlled indirectly by the same joint and equal partners, Ørsted and Eversource.

143. According to LIPA, Total Projected Energy Deliveries for South Fork Wind over the 20-year contract term is 7,432,080 MWh, and the Total Annual Contract Payments over the same period are \$1,624,738,893. SFW’s average renewable energy price is \$218.61/MWh or 21.9 cents/kWh. *See* Exhibit 15, LIPA Contract Valuation for SFW. Had LIPA purchased the same energy (7,432,080 MWh) but from Sunrise Wind at 8.064 cents per kWh (the published PPA price), it would have cost LIPA only \$599,322,931, representing a saving of \$1,025,415,962 (NB: the variance between the calculation and the price table is due to a rounding error in Sunrise Wind’s price of energy) (*see* ¶¶ 111-112 above).

### **NYSPSC: Deprivation of rights to examine evidence**

144. The New York State Public Service Commission (“NYSPSC”) denied Plaintiff his Fourteenth Amendment right to due process of law.
145. NYSPSC denied Plaintiff rights of examination and cross-examination of witnesses regarding the South Fork RFP and SFW Project cost. NYSPSC denied Plaintiff the right to ask questions such as: Why was SFW *overpriced* by \$1 billion (in 2018)? Why does SFW plan to charge more than double the average price for its energy than four other offshore wind farms in the same area (in 2022)? Why did the NYSPSC exclude the Project cost from its Article VII review contrary to its statutorily mandated obligation?
146. The presiding ALJ ruled *four times* that the RFP and PPA “are beyond the scope of this Article VII proceeding” (*See Simon V. Kinsella v. NYSPSC* (index no. 2021-06572, N.Y.



App. Div., 2d Dep't), Verified Petition (September 9, 2021) ("*Kinsella v. NYPSC*"), marked Exhibit 22, at 36, PDF 38, ¶ 81(b)).

147. Evidence regarding Project cost, the South Fork RFP procurement process, and its subsequent award in 2017 of a PPA (to SFW) were off-limits.
148. On November 24, 2020, the ALJ granted SFW's Motion to Strike Testimony regarding the RFP and PPA, asserting that the "need for the Project is sufficiently established through selection in a competitive process, here the 2015 RFP" and that "critiques of the 2015 RFP process and the resulting PPA ... are beyond the scope of this Article VII proceeding and ... testimony and exhibits related to these issues are irrelevant to the findings and determinations required by PSL §126 [emphasis added]." See *Kinsella v. NYPSC*, marked Exhibit 22 (at 37, PDF 39, ¶ 81(d)). However, immediately before the ALJ closed the evidentiary record, he admitted the RFP and PPA into evidence (but still denied intervening parties their rights of examination or cross-examination).
149. Please read the (revealing) exchange between the presiding ALJ and LIPA's Assistant General Counsel. See *Kinsella v. NYPSC*, marked Exhibit 22 (at 39–40, PDF 41-42, ¶¶ 83–84).

### **NYSPSC: does not consider the cost of SFW**

150. NY DPS staff were asked during cross-examination whether "the commission [NYPSC] is required to take into [] account the *total cost to society*[.] [I]s that correct? A. Yes that's what's stated in the testimony." See DPS Staff Panel Testimony (at 583:18-23, PDF 18), marked Exhibit 26.
151. The NY DPS admits that the total cost to society includes when "a rate payer [*sic*] pays his or her regular electricity bill" (from 590:23-25, PDF 25 to 591:1-2, PDF 26) and that DPS

Staff did *not* consider the cost burden to ratepayers of SFW’s facility (then \$1.625 billion)—  
— “*There’s no testimony [...] that addresses cost to rate payers [sic].*” See DPS Staff  
Panel Testimony (at 595:14-21, PDF 30), marked Exhibit 26. See link (below)—

152. <https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={BBB282D4-7CB2-4B7C-AC81-6B85F97B734B}>
153. NYSDPS effectively admits that the administrative proceeding was deficient by failing to consider the cost of the Project (\$1.6 billion, later expanded to 130 MW and \$2 billion).
154. Without considering the Project cost, the NYSPSC could not have considered alternatives based on cost, such as less expensive energy generation.
155. The NYSPSC’s failure to consider SFW’s “total cost to society” mirrors BOEM’s failure to consider the socioeconomic impact under NEPA.
156. On September 9, 2021, Plaintiff commenced legal proceedings to challenge the NYSPSC’s grant of Certification to SFW in the N.Y. Supreme Court, Appellate Division, Second Department. See *Simon V. Kinsella v. NYSPSC* (index 2021-06572, N.Y. App. Div., 2d Dep’t). Respondent NYSPSC filed a timely response (on November 8, 2021), then *waited a year* before filing a Motion to Dismiss (September 15, 2022), to which Plaintiff filed a timely Memo. of Law in Opp. (October 17). There has been no change in the case since.

### **NY Supreme Court: Unreasonable Statute of Limitations**

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

*Kinsella et al. v. Long Island Power Auth. et al.*, (index 621109/ 2021, N.Y. Sup. Ct. Suffolk Cnty.), marked Exhibit 27 (at 7).

158. The declaratory judgment action seeks to have LIPA's PPA declared void for violating state procurement law subject to a six-year statute of limitations.<sup>20</sup>
159. The action's claims relate to acts that "are without power, or where corruption, fraud or bad faith, amounting to fraud, is charged." See *Talcott v. Buffalo*, 125 N.Y. 280, 26 N.E. 263 (1891). Still, the state court mischaracterized the equitable nature of the claims to dismiss the action as time-barred after four months (*not* six years). "Because this action is brought so long after the expiration of the limitations period, both causes of action are hereby dismissed as time barred." See *Simon V. Kinsella et al. v. Long Island Power Auth. et al.*, (index 621109/ 2021, N.Y. Sup. Ct. Suffolk Cnty.), marked Exhibit 28 (at 4).
160. LIPA awarded SFW a PPA on January 25, 2017 (executed February 6, 2017).
161. **Six months later** (on August 5, 2017), SFW presented its Project to the Wainscott community at the Wainscott Citizens' Advisory Committee ("WCAC") **for the first time**. Since the WCAC meeting in 2017, SFW fraudulently represented its Project to the public, claiming that it resulted from "a technology-neutral competitive solicitation." See WCAC SFW Slide 5, marked Exhibit 29. Plaintiff was a member of the WCAC and Chairman of its Environmental Subcommittee at the time, tasked with looking into SFW's proposal and Wainscott water quality.
162. The Wainscott community only became aware of the SFW (formerly Deepwater Wind South Fork LLC) on August 5, 2017, six months *after* LIPA had awarded SFW a PPA on January 25, 2017 (executed February 6, 2017).

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<sup>20</sup> N.Y. C.P.L.R. § 213 (<https://codes.findlaw.com/ny/civil-practice-law-and-rules/cvp-sect-213.html>)

*SFW and LIPA Mislead the Public on price.*

163. SFW and LIPA campaigned to mislead the public into believing the price of SFW's electricity was "16.3 cents" (still quoted in many government documents). In May 2018, SFW's VP of Development, Mr. Clint Plumber, was quoted on News12 saying that the price is "about 16 cents per kWh" and the Project comes "with a \$740 million pricetag [sic]." At the time, the price tag was \$1.6 billion. *See* SFW VP Development, Clint Plumber, News12 (May 17, 2018), marked Exhibit 30.

In October 2019, LIPA released a "South Fork Wind Farm Fact Sheet" stating on a graph that the "South Fork Wind Farm (90MW) [is] 16.3c (NY)" *See* LIPA SFW 'Fact' Sheet (Oct 2019) (at 3, chart titled "A Developing Offshore Wind Industry"), marked Exhibit 31. The chart also misleads the reader into believing that LIPA and SFW agreed to the PPA and its price in 2015. However, the PPA was executed two years later in February 2017 (*not* 2015). The horizontal scale (time in years) skews time to indicate the agreement occurred halfway between when the prices were agreed for the Block Island Wind Farm and the Skipjack wind farm (a related company to SFW). Still, the SFW PPA was signed (in February 2017), around *seven years after* the Block Island Wind Farm and only *three months before* Maryland awarded a contract to Skipjack (announced May 11, 2017, for "a levelized price of **\$131.93 per megawatt-hour** for a term of 20 years[.]" *See* Maryland PSC Awards ORECS to Two Offshore Wind Developers, marked Exhibit 32. LIPA awarded SFW a contract (also for 20 years) at a rate of **\$218.61 per megawatt-hour**, a 66% premium just three months earlier.

164. LIPA and SFW refused to publicly disclose the price of SFW for years. *See Simon V. Kinsella v. Office of the New York State Controller* (Sup. Ct., Albany, index 904100-19,

decided in Petitioner Kinsella’s favor July 20, 2020), marked Exhibit 33. However, it was not until January 2021 that LIPA confirmed that LIPA’s internal valuation was 22 cents per kilowatt-hour, more than three times Vineyard Wind’s price (of 6.5 cents).

165. Details of SFW’s project were publicly available only after SFW had submitted its applications to BOEM and the NYSPSC in September 2018, twenty months *after* SFW had signed the PPA (in February 2017). Still, for years, SFW and LIPA engaged in a campaign designed to mislead the public regarding the nature of the South Fork RFP and the price of SFW’s renewable energy. Under such circumstances, it would have been impossible to commence an action challenging South Fork Wind’s procurement process within four months. SFW and LIPA did not disclose any meaningful information about the project until well after the four-month statute of limitations had expired.

### **SFW Fraud: PFAS** <sup>21</sup>

166. SFW argued in the district court that it is “on a very tight schedule ... there’s really no cushion for delay ... limited vessel availability [] could prevent the project from meeting its contractual power purchase agreement requirements, which could result in millions of dollars in liquidated damages [emphasis added]” (*See* Hearing Tr. 11/09/2022 (22-516, Doc. 1979239, at 6:7-15).
167. SFW obtained that power purchase agreement in a manipulated procurement process, the South Fork RFP, in violation of NYS procurement law (*see* ¶¶ 141-129).
168. SFW knowingly provided false information to BOEM in its final COP. It falsely represented groundwater quality by omitting *on-site* groundwater PFAS contamination test

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<sup>21</sup> Per- and Polyfluoroalkyl Substance (“PFAS”) contamination

results (*see* ¶¶ 22-28) and the project’s socioeconomic impact on Suffolk County by omitting its cost of \$2 billion (*see* ¶¶ 171-173).

169. SFW (falsely) claimed that its COP “provides a description of water quality and water resource conditions in the ... SFEC<sup>[22]</sup> as defined by several parameters including: ... contaminants in water” (*see* COP May 2021, at 4-56, PDF 224, first paragraph). Under the heading, “Water Quality and Water Resources,” SFW asserts its COP “discusses relevant anthropogenic activities that have in the past or currently may impact water quality, including point and nonpoint source pollution discharges, ... and pollutants in the water” (*id.*). On the contrary, SFW does *not* describe “contaminants in water” (*id.*) or discuss “relevant anthropogenic activities” (*id.*), such as the use of firefight foam discharging “pollutants” (*id.*), such as harmful PFAS contamination into groundwater.
170. SFW ignored groundwater PFAS contamination in the area where it proposed installing underground concrete infrastructure (for two miles) encroaching into and impacting that groundwater (a sole-source aquifer used for drinking water). That area had more affected private drinking water wells by double the number of wells anywhere else in Suffolk County (*see* ¶ 67 above).

### **SFW Fraud: Cost (\$2 billion)**

171. SFW submitted an Economic Development and Jobs Analysis (by Navigant Consulting Inc., February 5, 2019) to BOEM for review and approval. *See* Exhibit 34, SFW Economic Analysis. Under the heading “Summary Results,” SFW’s report (falsely) asserts that—

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<sup>22</sup> South Fork Export Cable (SFEC), which includes onshore construction for high-voltage transmission cable through Wainscott

*The Project will clearly have a positive economic impact and will add a significant number of jobs* to the United States and to the state of New York [emphasis added]”

(*id.*, at 1, PDF 4, penultimate paragraph).

172. According to the analysis, the best-case scenario will have a total beneficial impact on NYS of \$458 million.<sup>23</sup> However, the Project cost of \$2.013 billion (paid by ratepayers in Suffolk County) will offset beneficial in-state spending and result in a *net adverse impact of \$1.555 billion*.

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

### **The Project does not materially further federal renewable energy goals.**

174. Federal Defendants may argue, contrary to fact, that “the Project *materially* furthers federal renewable energy goals [emphasis added]” as they did in this Circuit (22-5316, Doc. 1982686, at 23, PDF 28). However, the SFW wind farm is relatively small, only 130 MW, whereas the total offshore wind generating capacity approved to meet “federal renewable energy goals” (as of February 2023) is large, 39,021 MW.<sup>24</sup> The SFW wind farm

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<sup>23</sup> Summary of Jobs and Investment Impacts for New York (at 3, PDF 6, Table 1-2). Total construction phase beneficial economic impact is \$186.1 million (Earning \$74.1, Output \$81.9, and Value Add 57.1 million). Total operational phase beneficial economic impact is \$272 million (Earning \$2.8, Output \$6.8, and Value Add \$3.9: sum multiplied by 20 years).

<sup>24</sup> According to Mayflower Wind’s Draft Environmental Impact Statement (“**DEIS**”), dated February 2023, Volume II: Appendix D (22-5317, Doc. 1994062, at 3). Table D2-1: OCS Total Generating Capacity (MW) is “39,021”

represents only 0.33% of U.S. approved generating capacity; thus, it is *not material* at only one-third of one percent.

**BOEM failed to verify the Project’s (false) purpose and needs statement.**

175. Complaint (¶ 178) — According to NEPA, “[i]f the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents” (NEPA 1978, 40 CFR § 1506.5(c)). BOEM failed to “independently evaluate” or verify Project information before approving it.

176. Complaint (¶ 185) — According to NEPA regulation 30 CFR 585.627(a)(7), SFW was required to describe those resources, conditions, and activities listed in the following table that could be affected by [its] proposed activities ... including ... Social and economic resources” such as “[e]mployment ... [and] minority and lower income groups .... Although Plaintiff had informed BOEM of South Fork Wind’s non-compliance in 2018 (*see* FAC ¶¶ 180-183), BOEM failed to verify or evaluate the accuracy of the project's socioeconomic impact on Suffolk County (as a whole), and specifically minority and lower income groups in violation of Executive Orders 12898 and 14008.

177. Executive Order 12898 requires that "each Federal agency shall make achieving environmental justice part of its mission ...” and comprehensive Presidential Documents No. 279 (February 11, 1994) identifies ways to consider environmental justice under NEPA, including— “Review of NEPA compliance [...] must ensure that the lead agency preparing NEPA analyses and documentation has appropriately analyzed environmental effects on minority populations, low-income populations, or Indian tribes, including human health, social, and economic effects.” *See* FAC (¶¶ 151-180 and 571-574).



178. Executive Order 14008 requires that “[w]e must strengthen our [...] water protections. [...]

We must deliver environmental justice in communities all across America.” However, BOEM failed to consider groundwater PFOA, PFOS, or *any* other specific on-site contaminant within the class of PFAS and environmental justice issues related to the Project’s *adverse* socioeconomic impact. See FAC (¶¶ 151-180 and 571-574).

179. BOEM failed to verify and then approved discriminatory project goals. BOEM approved

and adopted SFW’s project goals that *expressly* exclude minorities, women, and NYS Service-Disabled Veterans who own businesses “opportunity to participate in [...] contracting activity for the procurement of goods and services” as defined in the 2017 PPA, contrary to Executive Order 12898– Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations and the accompanying Memorandum to Heads of Departments and Agencies (FAC, ¶¶ 212-218).

180. Under the heading of Purpose and Need for the Proposed Action, BOEM’s ROD and FEIS


states “[t]he purpose of the Project is to develop a commercial-scale offshore wind energy facility ... and one transmission cable making landfall in Suffolk County ... [*i*]n *addition* [to] South Fork Wind’s goal [ ] to fulfill its contractual commitments to Long Island Power Authority (LIPA) pursuant to a power purchase agreement executed in 2017 resulting from LIPA’s technology-neutral competitive bidding process.” See ROD (at 7, PDF 9) and FEIS (at 8, PDF 6). The (alleged) “*technology-neutral* competitive bidding process” is the **South Fork RFP**. BOEM introduces South Fork Wind’s goals, as expressed in the 2017 PPA and South Fork RFP, into the NEPA process and adopts those goals *in addition* to the stated project’s stated purpose. Therefore, BOEM is statutorily mandated to verify, evaluate, and “shall be responsible” for the goals’ accuracy (NEPA 1978, 40 CFR 1506.5) in the 2017

PPA and South Fork RFP. Still, it does *not* identify or discuss those goals. BOEM does include as an appendix or incorporate by reference the 2017 PPA or South Fork RFP into its FEIS or ROD. BOEM cannot measure and assess reasonable alternatives against unspecified goals. In February 2021, Plaintiff provided BOEM with a copy of the 2017 PPA and South Fork RFP, and BOEM published them online at regulations.gov—  
*See* PPA at - [https://downloads.regulations.gov/BOEM-2020-0066-0387/attachment\\_13.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0387/attachment_13.pdf)  
*See* RFP at - [https://downloads.regulations.gov/BOEM-2020-0066-0387/attachment\\_6.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0387/attachment_6.pdf).


181. The South Fork RFP was *not* a ***technology-neutral competitive bidding process***, as BOEM claims (FAC, ¶¶ 284-358). In February 2021, BOEM received comments that included a Memorandum from LIPA to the New York Office of the State Comptroller “Re: LIPA’s 2015 Request for Proposals for South Fork Resources” dated January 27, 2017 (the “**LIPA Memo**”) and BOEM posted it online at regulations.gov at—  
[https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment\\_49.pdf](https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_49.pdf)  
The LIPA Memo reads: “In some instances, proposals were advanced if they were the only proposal offering a particular technology ...” (at 12). It continues: “Two other proposals (i.e., Deepwater Wind [One] [DWW100] and Fuel Cell Energy [FCE100]) were designated as Semi-Finalists because [...] they were the only proposals offering a particular technology” (square brackets included in original text) (“Deepwater Wind [One] [DWW100]” refers to the 90 MW South Fork Wind Project) (at 13). Further, the LIPA Memo states that: “[t]wo proposals (i.e., NextEra Energy [NEX100] and Halmar International [HAL100]) were designated because they were the only proposals offering a particular technology” (square brackets included in the original text) (*id.*).

Plaintiff explains the significance of the documents included as exhibits in his accompanying memorandum of law in support of his opposition to Federal Defendants' and Defendant-Intervenor South Fork Wind LLC's motions to dismiss.

I hereby declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information, and belief.

  
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Executed on November 7, 2023  
in New York, NY

Sworn to before me this  
7th day of November 2023

  
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