

Exhibit I

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5316

SIMON V. KINSELLA

Plaintiff-Appellant *pro se*

v.

BUREAU OF OCEAN ENERGY MANAGEMENT (“BOEM”); and
In their official capacity working for BOEM: AMANDA LEFTON, Director;
MICHELLE MORIN, Chief, Environment Branch for Renewable Energy
 (“OREP”); JAMES F. BENNETT, Program Manager, OREP (until July 2022);
MARY BOATMAN, Environmental Studies Chief, OREP; EMMA CHAIKEN,
Economist; MARK JENSEN, Economist; BRIAN HOOKER, Biologist; 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-Appellees

and

SOUTH FORK WIND LLC,
Defendant-Intervenor.

**Motion for Leave to File
Second Amended Complaint**

SIMON V. KINSELLA

Plaintiff-Appellant *pro se*

P.O. Box 792, Wainscott, NY 11975

Tel: (631) 903-9154

Si@oswSouthFork.Info

I, Simon V. Kinsella, Plaintiff-Appellant, appearing *pro se*, hereby moves for leave to file my Second Amended Complaint pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure – “a party may amend its pleading only with ... the court’s leave. The court should freely give leave when justice so requires.”

On July 20, 2022, I filed my Complaint, and on November 2, 2022, I filed my First Amended Complaint. Although, Federal Agency Defendants have *not* answered the pleadings. Federal Agency Defendants avoided responding to my motion for partial summary judgment that the district court judge stayed, then ruled to strike. It has been more than five months, and Federal Agency Defendants have avoided having to answer the allegations *at all*. (For further details, please see this case no. 22-5316, doc. 19796841 Underlying Decision from which Appeal Arises).

On November 10, 2022, the district court ruled to transfer the case (ECF Nos. 48–49). That ruling is subject to a Petition for Writ of Mandamus (in case no. 22-5317, doc. 1976909).

In support of my motion, I respectfully submit herewith the proposed Second Amended Complaint (executed version, attached as Exhibit A) and a version showing red-lined changes (attached as Exhibit B).

I intend to file a Motion for Temporary Restraining Order within days. The application for a TRO will allow me time to file a dispositive Motion for Partial

Summary Judgment that the district court had denied me. (For further details on the district court's denial, please see this case no. 22-5316, doc. 1979671, file marked Addendum TRO & PI Denied).

I. Standard of Review

I aver that granting me leave to file this Second Amended Complaint will serve the interests of justice for me and the public.

“It is common ground that Rule 15 embodies a generally favorable policy toward amendments.” *Davis v. Liberty Mut. Ins. Co.*, 871 F.2d 1134, 1136-37 (D.C. Cir. 1989) (citations omitted). The decision to grant leave to amend is within the discretion of the ... court (*Foman v. Davis*, 371 U.S. 178, 181-82, 83 S.Ct. 227, 229-30 (1962)), but “[t]he presumption runs in the plaintiff’s favor that he may amend his complaint” *Steinbuch v. Cutler*, 463 F. Supp. 2d 1, 3 (D.D.C. 2006). “If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.” *Foman v. Davis*, 371 U.S. 178, 182 (1962)

II. Discussion

Under the Federal Rules, “[t]he court should freely give leave [to amend pleading] when justice so requires.” Fed. R. Civ. P. 15(a)(2); see also *Browder v. Director, Ill. Dep't of Corrections*, 434 U.S. 257, 263 n. 7(1978)

(explaining that leave to amend a complaint under Rule 15(a) “shall be freely given when justice so requires.”). Justice so requires here.

Given my inexperience as a *pro se* litigant, I made too many mistakes in the First Amended Complaint. The Second Amended Complaint allowed me to correct errors where I found them. Consequently, my Second Amended Complaint has fewer errors and is more robust.

The First Amended Complaint provides details on Federal Agency Defendants’ multiple violations of NEPA and the OCSLA. In addition, Defendant Bureau of Ocean Energy Management (“BOEM”) falsely represented many material facts in its review to support approving South Fork Wind’s project.

For example, BOEM ignored the most significant environmental PFAS contamination of groundwater (a sole-source aquifer used for drinking water) in Suffolk County. South Fork Wind proposed building its underground infrastructure for high-voltage transmission cables through the same area. Its concrete duct banks and vaults encroach into contaminated groundwater, causing further environmental damage. Among other examples, BOEM also omitted the project’s cost (\$2.013 billion) from its socio-economic impact analysis. Its economic analysis is one-sided, accounting only for *beneficial* socio-economic impacts that leave out *adverse* impacts. The *adverse* impacts outweigh the beneficial impacts four times over.

On November 5, 2022, South Fork Wind, LLC (“SFW”) intervened in the district court case (as of right). Before SFW intervened in the case, I could not include it in my complaint. The Second Amended Complaint includes SFW as a defendant.

By including BOEM and SFW (as defendants), their respective representations during the review process can be compared. As one might have suspected, BOEM’s misrepresentations are consistent with South Fork Wind’s misrepresentations. A more precise picture emerges, supporting my complaint when comparing BOEM’s Final Environmental Impact Statement and Record of Decision with SFW’s Construction and Operations Plan. Thus, the Second Amended Complaint is stronger.

In addition, the Second Amended Complaint includes a Clayton Act claim against SFW regarding blatant procurement violations.

No reasonably foreseeable argument can be made that the proposed amendments are futile, offered in bad faith, or contrary to the interests of justice.

I can see no reason the Court should *not* grant me leave to file a Second Amended Complaint.

III. Conclusion

I respectfully request the Court grant my Motion for leave to file a Second Amended Complaint, and that the executed Second Amended Complaint

(submitted herewith as Exhibit A) be deemed filed as soon as practicable.

Respectfully submitted on this 4th day of January 2023,

A handwritten signature in black ink that reads "Simon v. Kinsella". The signature is written in a cursive style and is positioned above a horizontal line.

Simon v. Kinsella

Plaintiff-Appellant *pro se*

P.O. Box 792, Waincott, NY 11975

Tel: (631) 903-915 | Si@oswSouthFork.Info

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No. 22-5316

SIMON V. KINSELLA

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v.

BUREAU OF OCEAN ENERGY MANAGEMENT (“BOEM”); and
In their official capacity working for BOEM: AMANDA LEFTON, Director;
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Economist; MARK JENSEN, Economist; BRIAN HOOKER, Biologist; 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; and
South Fork Wind LLC
Defendants-Appellees

SECOND AMENDED COMPLAINT
(Clayton Act Action, triple damages)

SIMON V. KINSELLA

Plaintiff-Appellant *pro se*

P.O. Box 792, Wainscott, N.Y. 11975

Tel: (631) 903-9154 | Si@oswSouthFork.Info

I. INTRODUCTION

This case is about the U.S. Bureau of Ocean Energy Management (“BOEM”) basing its

record of decision (“ROD”) (issued November 24, 2021) approving the Final Environmental Impact Statement (“FEIS”) for the South Fork Wind (“SFW”) project on materially fraudulent statements intentionally designed to mislead Plaintiff and the public. This case concerns BOEM’s violations of the National Environmental Policy Act (“NEPA”) and the Outer Continental Shelf Lands Act (“OCSLA”), which are reviewable under the Administrative Procedure Act (“APA”). Plaintiff and the public relied on Defendant Federal Agencies’ to perform a legally sufficient review. Defendant Federal Agencies’ (unlawful) acts permitted South Fork Wind to begin construction in February 2022.

The case maintains that SFW, too, relied on materially fraudulent statements of material facts intentionally designed to deceive Plaintiff and the public consistent with BOEM; in addition to SFW’s violating antitrust law, Clayton Act (15 U.S.C. §§ 14–15). Note: Second Amended Complaint references to South Fork Wind (“SFW”) include Deepwater Wind South Fork LLC (former name) and its promoters' actions leading up to incorporation.

II. FRAUDULENT REPRESENTATIONS

Defendants make and rely on the following materially fraudulent statements in support of BOEM’s (unlawful) decision approving SFW’s project on false grounds to deceive Plaintiff and the public—

FRAUD #1 – PFAS Contamination

F1-1) The ROD constituted the final agency action that permitted South Fork Wind to excavate, according to its own estimates, over 30,000 tons of material for two miles in an area with a

significant PFAS contamination¹ plume in Suffolk County.

F1-2) Defendants were fully aware of environmental contamination that the New York State Department of Environmental Conservation (“NYSDEC”) classifies as “a significant threat to public health and ... the environment” (see ¶¶ 72-135).²

F1-3) Without regard to human health or the sole source aquifer that provides drinking water for thousands of residents, BOEM fraudulently concluded that— “Overall, existing groundwater quality in the analysis area appears to be good” (FEIS at H-23, PDF p. 655, second paragraph).

F1-4) In June 2022, the White House announced: new “drinking water lifetime health advisories ... based on new science that indicates that some negative health effects may occur with concentrations of PFOA or PFOS in water that are near zero [emphasis added][.]”

F1-5) The announcement said that PFOA and PFOS are part of a class of chemicals called “per- and polyfluoroalkyl substances (PFAS) ... that can cause cancer and other severe health problems, pose a serious threat ... [and] are considered ‘forever chemicals’ because they are environmentally persistent, bioaccumulative, and remain in human bodies for a long time.”³

F1-6) BOEM and SFW ignored hundreds of Suffolk County Department of Health Services (“SCDHS”) laboratory test results, multiple NYSDEC Site Characterization Reports, and reports from the Town of East Hampton (see Exhibit 18- SFW 2022 Monitoring Well Summary),⁴ all showing harmful contamination exceeding 2016 Environmental Protection Agency (“EPA”)

¹ PFAS (per- and polyfluoroalkyl substance) contamination.

² <https://www.dec.ny.gov/data/DecDocs/152250/Fact%20Sheet.HW.152250.2019-06-19.East%20Hampton%20Airport%20Class%2002%20Listing.pdf> (at 1, first paragraph).

³ <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/15/fact-sheet-biden-harris-administration-combatting-pfas-pollution-to-safeguard-clean-drinking-water-for-all-americans/> (last accessed October 29, 2022).

⁴ <https://ehamptonny.gov/DocumentCenter/View/11757/SFW-Monitoring-Well-summary-Feb-21-2022> (last accessed October 31, 2022).

Health Advisory Levels.

F1-7) A year *before* SFW submitted its Construction and Operations Plan (“COP”) to BOEM (in September 2018), SCDHS found groundwater in the analysis area so toxic that residents could no longer use their private wells for drinking water.⁵

F1-8) Contrary to BOEM’s fraudulent representations that— the “COP includes all the information required [emphasis added]” in 30 C.F.R. § 585.627 (ROD at D-6, PDF 98, third paragraph)— the plan does not contain *any* of “the information required” regarding PFAS contamination.

F1-9) According to BOEM’s Guidelines,⁶ the developer “must submit with your COP detailed information ... [on] existing water quality conditions ... in the area proximal to your proposed activities. Describe the general state of water quality in the area proposed for your Project by reporting typical metrics for quality including the ... presence ... of contaminants in water [emphasis added].” Under “Impacting Factors” the guide includes “environmental hazards and/or accidental events causing accidental releases of ... hazardous materials and wastes [emphasis added].” New York State classifies PFAS contamination as hazardous waste.

F1-10) BOEM did *not* require SFW to accurately describe groundwater quality according to OCSLA regulations and its own guidelines, and SFW did *not* comply with OCSLA regulations or BOEM’s guidelines.

F1-11) See FIFTEENTH CLAIM FOR RELIEF (¶¶ 648 – 668).

⁵ On October 11, 2017, Suffolk County of Health Services issued Water Quality Advisory for Private-Well Owners in Wainscott. A year later (September 4, 2018), then Deepwater Wind South Fork LLC (now South Fork Wind LLC) submitted its Constructions and Operations Plan to Defendant BOEM.

⁶ BOEM’s Guidelines for Information Requirements for a Renewable Energy Construction and Operations Plan published by the Office of Renewable Energy Programs (OREP), April 7, 2016

state represented by the Danish Ministry of Finance” (Ørsted annual report 2021, at PDF 167, note 16).¹⁴ North American ownership comprises “The Capital Group Companies, Inc. based out of Los Angeles, the US 5-10%” (*id.*) with a total North American ownership of 12% (*id.* at PDF 71).

F2-12) There is no indication of significant ownership interests of Ørsted in New York State/Suffolk County that would result in profits being returned to the local economy.

F2-13) Based on SFW’s Economic Analysis, the total *net adverse* socio-economic impact is expected to result in a capital outflow of \$1.555 billion leaving New York State/ Suffolk County.

F2-13) Ørsted A/S (indirectly) has a 50% ownership interest in South Fork Wind LLC. Denmark shareholders own the majority (63.1%) of shares in Ørsted A/S as follows— the Danish State (50.1%), Danish institutional investors (6%), Andel A.M.B.A, Denmark (5%), and Retail investors, Denmark (2%) (see Ørsted annual report 2021, *supra*).

F2-14) Approximately thirty-two percent (32%) of the *net adverse* impact (\$1.555 billion) will go overseas in expenses and profits to shareholders in Denmark.

F2-15) According to the SFW COP (May 2021), Suffolk County employed 747,600 people in 2017 (at 4-326, PDF 490, Table 4.6-6).

F2-16) Each wage earner in Suffolk County would have to contribute \$104 every month for 20 years to pay for South Fork Wind’s *net adverse* impact of \$1.555 billion.¹⁵

F2-17) According to the Economic Analysis, during the Project’s construction phase, total

¹⁴ Ørsted annual report 2021 (at PDF 167, note 16). Available online at the following link - <https://orstedcdn.azureedge.net/-/media/annual2021/annual-report-2021.ashx?rev=9d4904ddf4c44594adab627f7e4c62be&hash=69CE31C5D5935DD0DB46313E3BDEC952>

¹⁵ SFW’s net adverse impacts of \$1.555 billion divided by 20 years divided by 747,600 wage earners in Suffolk County.

job earnings will be \$47.1 million, representing 413 “job years” (No. 22-5316, Doc. 1979671, Exhibit E- SFW 2019 Economic Analysis, Table 1-2, at 3, PDF 6).¹⁶

F2-17) Assuming a construction phase of 2½ years,¹⁷ 413 “job years” is 165 full-time equivalent jobs.

F2-18) Total jobs of 31 include direct, indirect, and induced jobs (*id.*).

F2-19) According to SFW’s Economic Analysis, SFW claims that its project will add 196 jobs with total earnings of \$105 million over the life of the Project (with average yearly earnings of \$26,786).¹⁸

F2-20) SFW’s *net adverse* socio-economic impact of \$1.555 billion (see ¶ F2-10, above) represents approximately 2,903 jobs lost in Suffolk County.¹⁹

F2-21) SFW’s Economic Analysis conclusion that “[t]he Project will clearly ... add a significant number of jobs” is contrary to fact (see ¶ F2-8, above).

F2-22) BOEM limits its analysis to the “ocean economy” that includes only 3.9% of Suffolk County’s population, ignoring over one million Suffolk County ratepayers who will have to pay for the Project (¶¶ 186-218).

F2-23) BOEM fails to consider South Fork Wind’s exorbitant price of approximately 19 cents²⁰ compared to an average price of 8 cents²¹ for the same renewable energy from nearby

¹⁶ Available at boem.gov— <https://www.boem.gov/sites/default/files/renewable-energy-program/State-Activities/NY/Appendix-AA.pdf>

¹⁷ See Tentative Schedule (COP May 2021, at 1-44, PDF 91, Table 1.5-1).

¹⁸ Earnings, operational phase (\$2.9 m) by the contract (PPA) term (20 years), is \$58 m (unadjusted for inflation); in addition to the construction phase (\$47.1 m) is **\$105.1 million**.

¹⁹ SFW’s net adverse socio-economic impact of \$1.555 billion, dividd by 20 years, divided by \$26,786 (see ¶ F2-19).

²⁰ South Fork Wind price is 18.8 cents per kilowatt-hour (Appendix 4, Tables 2 and 3).

²¹ The average price of Vineyard Wind, Revolution Wind, Sunrise Wind, and Mayflower Wind is 7.9 cents per kilowatt-hour (Appendix 4, Tables 2).

offshore wind farms (¶¶ 167-173).

F2-24) BOEM violates Executive Order 12898 by failing to acknowledge the Project cost (of approximately \$2.013 billion) and its impact on low-income families.

F2-25) Executive Order 12898 requires each Federal agency to make achieving environmental justice part of its mission. “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.”

F2-26) See FOURTEENTH CLAIM FOR RELIEF (¶¶ 627 – 647).

FRAUD #3 – Risk to Atlantic Cod Population (Cox Ledge)

F3-1) BOEM falsely asserts that the Project’s construction and installation would have, at worst, only “moderate impacts” on benthic habitat, Essential Fish Habitat (“EFH”), and finfish (including Atlantic cod) (ROD at 11, PDF 13, Table 2, fourth row, last column).

F3-2) BOEM defines “moderate impacts” to be where “[i]mpacts to species are unavoidable but would not result in population-level effects [emphasis added]. Impacts to habitat may be short term, long term, ... but would not result in population-level effects to species that rely on them [emphasis added].” (FEIS at 3-12, PDF 64, Table 3.4.2-1.)

F3-3) On the contrary, the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (“NOAA Fisheries”) wrote to BOEM’s Chief of Office of Renewable Energy Programs, James Bennett, on October 25, 2021. [] It reads— “Based on our Northeast Fisheries Science Center’s fisheries science expertise and supporting peer-reviewed publications, this project has a high risk of population-level impacts on Southern New England Atlantic cod [emphasis added]” (see Exhibit 01 – NOAA Fisheries Letter, at 1, second paragraph).

F3-4) The Letter continues— “Given the emerging data on the significance of Cox Ledge for spawning Southern New England cod, it is important we maintain a consistent and common understanding of the potential effects of offshore wind development to this spawning population. This is a high priority given the cumulative and population level impacts this Project and additional proposed development on Cox Ledge could have on this important cod population [emphasis added].”

F3-5) The letter was not disclosed on BOEM’s website with other similar correspondence.

F3-6) Mr. Bennett ignored scientific experts and their peer-reviewed publications. BOEM has permitted the developer to begin preparing the seafloor construction site, beginning November 1, 2022, while Atlantic cod are spawning.

F3-7) The adverse population-level impacts on cod *are* avoidable by restricting the time of construction to exclude the period from November 1 through April 30.

F3-8) Instead, BOEM allows construction activities to proceed in the developer’s interests and risks the Atlantic cod population.

F3-8) See THIRTEENTH CLAIM FOR RELIEF (¶¶ 604 – 626).

FRAUD #4 – Sunrise/South Fork Alternative

F4-1) BOEM falsely claimed that— “No other cable landing site alternatives were identified during Project development or scoping ... (see New York Article VII submitted by SFW)” (FEIS at 2-19, PDF 45, final paragraph).

F4-2) On the contrary, the Sunrise Alternative *was* identified and discussed during the Project’s development, scoping.

F4-3) ¶ The Sunrise Alternative *was* identified and discussed during the “New York Article VII” hearing that mentions the Sunrise Wind in the context of alternatives *eight times*.

F4-4) BOEM fraudulently asserts that “[t]he final EIS evaluates and discloses the impacts of ... the Beach Lane ... site” as grounds for not carrying forward alternative landing sites and “[e]liminating [the] Beach Lane landing site” (FEIS at 2-20, PDF 46, first paragraph).

F4-5) However, BOEM did *not* acknowledge, evaluate or disclose the impacts of environmental PFAS contamination within the proposed Beach Lane construction corridor to and including the Interconnection Facility.

F4-6) Had BOEM disclosed existing environmental PFAS contamination *within* its proposed construction corridor (from the beach at Beach Lane to the Interconnection Facility, inclusive), BOEM may have had to assess alternative landing sites.

F4-7) BOEM did *not* acknowledge or consider an alternative that would have combined Sunrise Wind with South Fork.

F4-8) BOEM is not relieved of its statutory obligations, irrespective of a non-cooperating state agency action.

F4-9) The New York State Public Service Commission (“NYSPSC”) was a *non-cooperating* state agency that did *not* cooperate in the development and review of the FEIS.

F4-10) From the time when SFW filed its application with the NYSPSC (in September 2018) to when the NYSPSC evidentiary hearing (case 18-T-0604) concluded (on or about December 8, 2020), SFW did *not* test its planned onsite construction corridor for PFAS contamination.

F4-11) Plaintiff provided BOEM with evidence from government agencies showing PFAS contamination exceeding EPA 2016 Health Advisory Levels in the area where SFW proposed constructing underground concrete infrastructure for high-voltage transmission lines.

F4-12) Still, BOEM failed to “[r]igorously explore and objectively evaluate all reasonable alternatives” (40 C.F.R. § 1502.14(a)).

F4-13) BOEM failed to “[d]evote substantial treatment to each alternative considered” (40 C.F.R. § 1502.14(b)).

F4-14) BOEM did *not* consider an alternative specifically to avoid existing PFAS contamination in Wainscott.

F4-15) See SEVENTEENTH CLAIM FOR RELIEF (¶¶ 689 – 707).

FRAUD #5 –RFP was *not* technology-neutral or competitive

F5-1) BOEM claims that South Fork Wind’s “power purchase agreement executed in 2017 [“2017 PPA”] result[ed] from LIPA’s technology-neutral ... bidding process” (ROD at 7, PDF 9, seventh paragraph).

F5-2) BOEM’s claim (in ¶ F5-1) is false.

F5-3) BOEM claims that South Fork Wind’s 2017 PPA resulted from LIPA’s “competitive” (*id.*) bidding process.

F5-4) BOEM’s claim (in ¶ F5-3) is false.

F5-5) BOEM’s claim that SFW’s 2017 PPA resulted from LIPA’s “technology-neutral ... bidding process” (*id.*) is contradicted by internal LIPA documents provided to BOEM (in February 2021) showing that proposals were advanced in the procurement process after considering a proposal’s technology.

F5-6) The South Fork RFP was *not* “neutral” on technology (see ¶¶ 281-358).

F5-7) The South Fork RFP was *not* a “competitive” procurement process (see ¶¶ 281-358).

F5-8) Internal documents disclosed by LIPA (in January 2021) and provided to BOEM (in February 2021) show that SFW’s proposal for an offshore wind farm and transmission line did *not* satisfy all mandatory criteria of the South Fork RFP.

F5-9) Internal documents disclosed by LIPA (in January 2021) and provided to BOEM (in

February 2021) show that SFW's proposal for an offshore wind farm and transmission line did *not* satisfy all the minimum specifications and requirements of the South Fork RFP.

F5-10) SFW's proposed offshore wind farm and transmission line was the successful bid in a procurement "soliciting proposals ... to acquire sufficient local resources to meet expected peak load requirements until at least 2022 in the South Fork of Long Island [where] [s]uch resources will be located on Long Island [emphasis added]" (see ECF No. 3-12, Exhibit P- Notice to Proposers).

F5-11) The SFW's proposed offshore wind farm is *not* a "local resource" that is "located on Long Island" (*id.*).

F5-12) The SFW's proposed offshore wind farm is *not* designed "to meet expected peak load requirements ... in the South Fork of Long Island" (*id.*).

F5-13) The South Fork RFP procurement was rigged to preclude competition from other offshore wind developers.

F5-14) SFW's project was the *only* bid for offshore wind resources in the procurement process.

F5-15) On January 11, 2017, then-New York State Governor Andrew M. Cuomo directed the Long Island Power Authority's board of trustees to approve the South Fork Wind Farm proposal in his State of the State address.

F5-16) Fourteen days later, the Long Island Power Authority approved SFW's project (on January 25, 2021).

F5-17) Governor Cuomo influenced the South Fork RFP procurement process by interfering in an active procurement to advance the interests of a private developer to the detriment of the other bidders.

F5-18) The South Fork RFP permitted favoritism.

F1-19) BOEM knew at least as early as February 2021, nine months *before* issuing its ROD approving SFW's project, that it did *not* result from a technology-neutral or competitive bidding process.

F1-20) SFW knew that its own project did *not* result from a technology-neutral or competitive bidding process.

F1-21) See SIXTEENTH CLAIM FOR RELIEF (¶¶ 669 – 677).

FRAUD #6 – Project Design Pre-dates 2019 CLCPA (by 3½ years)

F6-1) BOEM claims that “the Project ... is designed to contribute to New York’s renewable energy requirements, particularly the state’s goal of generating 9,000 megawatts of offshore wind energy by 2030” (FEIS at i, PDF 5, last paragraph), referring to the New York State Climate Leadership and Community Protection Act (“2019 CLCPA”).

F6-2) BOEM’s claim (in ¶ F6-1, above) is false.

F6-3) [] New York State enacted the 2019 CLCPA approximately *three-and-a-half years after* [] SFW’s project design was submitted for consideration in the South Fork RFP procurement. F6-4) Even if, *arguendo*, the 2019 CLCPA was applicable (it is not), SFW’s project would have failed to meet the statute’s requirements (see ¶¶ 136-179).

F6-5) See SIXTEENTH CLAIM FOR RELIEF (¶¶ 669 – 673, 678).

FRAUD #7 – The Project is *not* economical and *not* commercial-scale

F7-1) SFW’s joint and equal owners (indirectly) are Ørsted A/S and Eversource.

F7-2) In response to Request for Information OSW-2018 Offshore Wind Renewable Energy Credits, Ørsted A/S and Eversource (under the name of Bay State Wind) agreed with

NYSERDA²² in its findings that projects less than 400 megawatts are “not likely to deliver cost savings. Due to diseconomies of scale, the costs per unit of energy for projects of 100 MW and 200 MW in size are significantly higher than those for 400 MW projects” (see ¶¶ 219-229) (also, see no. 22-5316, Doc. 1979671, at 10 of 11, BOEM Exhibit #169, at 4, fourth paragraph).

F7-3) The planned South Fork Wind Farm will have a capacity of 130 MW and requires an approximately 66-mile-long transmission system.

F7-4) SFW’s proposed project requires a transmission line that is four times longer per megawatt capacity than the average of three nearby wind farms (see Appendix 4, Table 1).

F7-6) In 2021, the price of SFW’s renewable energy was \$188 per megawatt-hour (“MWh”).

F7-7) In 2021, the average price from four nearby commercial-scale offshore wind farms was \$79 per MWh.

F7-8) In 2021, SFW’s price was more than double the average price of four nearby commercial-scale offshore wind farms for the same renewable energy.

F7-9) The SFW project is *not* commercial-scale.

F7-10) BOEM’s claim that “[t]he purpose of the Project is to develop a commercial-scale offshore wind energy facility [emphasis added]” (ROD at 7, PDF 9, seventh paragraph) is unsupported by the evidence.

F7-11) See SIXTEENTH CLAIM FOR RELIEF (¶¶ 669 – 673, 679).

FRAUD #8 – No construction near groundwater

F8-1) In its FEIS, BOEM asserts that “[g]roundwater ... is relatively shallower along the two onshore South Fork Export Cable (SFEC) routes, with the depth to groundwater being

²² New York State Energy Research and Development Authority (“NYSERDA”)

approximately 4 to 5 feet around the landing sites (Beach Lane and Hither Hills)” (FEIS at H-23, PDF 655, first paragraph).

F8-2) In November 2018, BOEM received comments in response to its Draft Environmental Impact Statement (“DEIS”). The comments letter states that “[t]he Applicant’s [SFW’s] Construction and Operations Plan contains specifications for twenty (20) vaults which are similar in size to a standard 40-foot shipping container” (ECF No. 3-1, at 6, third paragraph). The comments letter includes the vaults’ dimensions showing a depth of ten feet (10 ft) (*id.*, footnote 15). The vault depth is also predominantly marked in Appendices III through VI (*id.*, at 11–14). The comments letter includes the depth of the “Transition Vault (approx. 35’ long x 8’ wide x 10’ deep” (*id.*, Appendix V at 13).

F8-3) The depth of groundwater is also shown on BOEM’s own website (<https://www.boem.gov/renewable-energy/state-activities/volume-ii-appendices>, G5 Onshore—Conceptual Drawings (Updated May 2019), <https://www.boem.gov/Appendix-G5/>, at PDF 9).

F8-4) At least as early as 2019, BOEM knew that the depth of SFW’s proposed construction would be at least ten feet deep around the landing site at Beach Lane, where the depth to groundwater was only approximately 4 to 5 feet. BOEM knew that SFW’s transition vault would encroach into groundwater (see the photograph of groundwater in the transition vault taken April 18, 2022, Appendix 1, ECF No. 1-2, at 6).

F8-5) BOEM asserts in its Final Environmental Impact Statement (“FEIS”) that “[t]here are no onshore construction activities under the Proposed Action that would require ground disturbance at depths at or near groundwater resources, and ... [t]he use of HDD at the landing sites would negate the need for trenching in areas where shallow groundwater would intersect the trench excavation. Onshore subsurface ground-disturbing activities would not be placed at a

depth that could encounter groundwater, and would therefore not result in impacts on water quality” (FEIS, at H-28, PDF 660, penultimate paragraph).

F8-6) BOEM’s claim (in ¶ F8-5, above) is false, and BOEM knew it was false in 2019.

This action seeks a declaratory judgment and injunctive and equitable relief. It challenges the failures of Federal Agency Defendants to comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.* (regulations of 1978, as amended in 1986 and 2005, prior to the revised regulations issued by the CEQ on July 16, 2020) (“NEPA”); the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331, *et seq.* (“OCSLA”); and making fraudulent representations to support its decision to approve an offshore wind facility and necessary submarine and onshore transmission system filed by South Fork Wind LLC (formerly Deepwater Wind South Fork LLC, the “Applicant,” “South Fork Wind,” or “SFW”).

This action seeks a declaratory judgment and injunctive and equitable relief. It challenges South Fork Wind’s violations of the OCSLA’s implementing regulations, its non-compliance with BOEM’s guidelines, and its fraudulent representations regarding the environmental and socio-economic impacts of its offshore wind facility and transmission system.

III. JURISDICTION AND VENUE

1. This Court has original subject matter jurisdiction under 28 U.S.C. § 1331. This is a civil action pursuant to 42 U.S. Code § 6972(a)(1)(A). The civil action arises from claims under Federal Law, including the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 through 706; NEPA (regulations of 1978, as amended in 1986 and 2005), the OCSLA, 43 U.S.C. § 337(p)(4)(B).

- 1(a) This action is filed pursuant to Section 15 of the Clayton Act, as amended.
2. This Court has the authority to grant equitable relief for Defendants' fraudulent representations and the authority to grant the relief requested herein pursuant to the APA, 5 U.S.C. § 706 (2); and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202.
3. The venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(A), where Defendants are agencies of the United States that reside in this judicial district.
4. A reasonable connection to the forum exists, and the venue is proper, will promote objectivity, and lead to a just decision based on the merits.

IV. PARTIES

5. I, Simon V. Kinsella, plaintiff *pro se*, am a full-time resident of Wainscott, in the Town of East Hampton, Suffolk County, New York –
 - a. I live near the beach where the Applicant plans to bring a high-voltage submarine cable ashore and install underground transmission infrastructure through my neighborhood;
 - b. I am a taxpayer and a ratepayer in the service area who will have to pay higher rates for power because BOEM approved a project contrary to its statutorily mandated obligations;
 - c. In 2017, my community asked me to investigate a proposal for an offshore wind farm sponsored by the Applicant following a request (in 2016) that I look into water quality issues in Wainscott, including a group of emerging contaminants known collectively as per- and polyfluoroalkyl substances (“PFAS”).
 - d. I have contributed substantially to BOEM’s record of review, including testimony (of

299 pages), briefs (of 46 pages), and provided approximately one hundred and fifty (150) exhibits.

6. I relied on BOEM to conduct a vigorous and wholehearted review “to the fullest extent possible” (NEPA 1978, 42 USC § 4332, sect. 102), but BOEM recklessly ignored its obligations.

7. I have standing to bring this action –

- a. Had the defendants conducted a thorough review, my daily routine and the pleasures I enjoy with my family would not have been put on hold for years. Since 2016, I have been fighting for clean water that BOEM threatens by its action to approve the South Fork Wind Project’s onshore construction. It has taken its toll and adversely impacted my family and me.
- b. Having high-voltage electric cables within feet of where I used to jog and enjoy walking to the local farm stand and socializing with neighbors will forever be tainted with the adverse health effects of (I) concrete duct banks and vaults, prolonging and exacerbating existing PFAS contamination of soil, groundwater, and surface waters of Georgica Pond and Wainscott Pond; (II) electromagnetic radiation; and (III) thermal effects.
- c. I used to enjoy Georgica Pond when sailing at least three days a week (weather permitting), swimming, and eating fresh fish and crabs caught from the pond. Due to irreparable damage from construction that BOEM improperly allowed, I can no longer enjoy our local environment.
- d. One of my greatest pleasures used to be jogging to the beach along Beach Lane with my husband. I am no longer safe doing so with any regularity due to underground high-voltage transmission infrastructure and cables buried just a few feet below the

surface. The standards used to assess the EMF effects date to 1978 and 1992. It is as if science stood still for 30 years.

- e. South Fork Wind's chosen landing site/cable route is nestled between two glacial ponds, Georgica Pond and Wainscott Pond, separated by only 2,300 feet. It is a magnificent environment teeming with marine life and birds and a reason why I moved to Wainscott full-time in 2008. BOEM ignored its mandate to protect such a beautiful and delicate environment.
- f. Since BOEM approved the project, South Fork Wind has taken from my family and me simple pleasures we used to enjoy. We live in a toxic environment where we are rarely told the truth by those who are duty-bound to protect us and our environment but have failed to do so.
- g. Due to the defendants' statutory violations, South Fork Wind has and will continue to cause irreparable damage to our environment, our property will be less valuable, and our utility rates will be higher.
- h. Since 2007 when I moved to Wainscott, my family and I have enjoyed reasonably priced fresh fish that we buy at the local "Seafood Shop" in Wainscott. Almost daily, after collecting the mail from across the road (at the Wainscott Post Office), I visit the Seafood Shop, buying soft-shell crabs, lobster, fillets/whole fish— fluke, salmon, and Atlantic cod (among others). As the commercial catch for Atlantic cod off Montauk Point (eastern Long Island) has dwindled (to less than 10% of what it was ten years ago), the price has steadily risen.²³ By its (unlawful) grant of approval, Defendant

²³ According to NOAA Fisheries of the United States Report ("FUS Report"), the value of commercial landings in 2011 was \$30,091,030, whereas last year (2021), it was only \$2,787,289, just 9% of the value in 2011. See Exhibit 05 NOAA FUS Report.

BOEM has permitted the offshore wind farm developer to damage “Cox Ledge, an area with particularly complex and unique habitat conditions that support a wide range of marine resources” such as “spawning aggregations of Atlantic cod.”²⁴

According to NOAA Fisheries, the proposed wind farm development “may result in cascading long term to permanent effects to species that rely on this area for spawning and nursery grounds and the fisheries and communities that target such species.”²⁵ BOEM’s (unlawful) approval to allow massive offshore construction will lead to further declines in Atlantic cod population levels and increases in price for Atlantic cod and other fish affected by industrial-scale offshore construction, and my family and I, and the public, will have to pay higher prices as a direct result of BOEM’s unlawful actions (See Section XIII for further details.)

- i. In 2018, I notified BOEM that “[t]he Applicant has failed to comply with 30 CFR 585.627(a)(7) with specific regard to its potential negative impact upon the commercial fishing industry, largely based in Montauk, and the effect it will have on the local economy” (see Complaint Exhibit A, at 5, last paragraph). Four years later and BOEM has done little to ameliorate the adverse effects on the local fishing industry from offshore development it approved.
- j. I have standing to bring this action under the Clayton Act and other antitrust law as defined within the OCSLA. I will have to pay higher prices for electrical power than I would have otherwise if it were not for South Fork Wind’s participation in a

²⁴ See Exhibit 03— Letter from the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (“NOAA Fisheries”), Assistant Regional Administrator for Habitat Conservation, Louis Chiarella, to BOEM’s, Chief, Environmental Branch for Renewable Energy, Ms. Michelle Morin, dated June 7, 2021 (at 4, third paragraph).

²⁵ *Ibid.*

manipulated procurement process, the South Fork Request for Resources (“South Fork RFP”).

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

9. DEFENDANT, U.S. BUREAU OF OCEAN ENERGY MANAGEMENT (“BOEM”) is a component of DOI and an “agency” within the meaning of the APA, 5 U.S.C. § 701(b)(1). Exercising authority delegated from the U.S. Department of the Interior, BOEM took the final agency actions challenged herein. Defendant BOEM was established in 2010 to oversee the development of the Outer Continental Shelf. BOEM’s mission “is to manage development of U.S. Outer Continental Shelf energy and mineral resources in an environmentally and economically responsible way.”²⁶ BOEM evaluates the resources of the Outer Continental Shelf and leases portions of it. The Bureau also supervises and approves any oil, gas, or renewable energy projects within Outer Continental Shelf leases.

9.1 DEFENDANT, LAURA DANIELS- DAVIS, is sued in her official capacity as Principal Deputy Assistant Secretary, Land and Mineral Management. Ms. Daniels-Davis’ signed the U.S.

²⁶ U.S. Department of the Interior: Bureau of Ocean Energy Management, About Us (at <https://www.boem.gov/about-boem>, last accessed on October 21, 2022).

Department of the Interior, Bureau of Ocean Energy Management, Record of Decision for the South Fork Wind Project on November 24, 2021.

9.2 DEFENDANT, AMANDA LEFTON, is the Director of BOEM. Ms. Lefton issued the final agency decision challenged herein—the approval of the Final Environmental Impact Statement for the South Fork Wind Project and Construction and Operations Plan (“COP”). Director Lefton is sued in her official capacity as Director of the Bureau of Ocean Energy Management. Before becoming Director of BOEM (in February 2021), Ms. Lefton was First Assistant Secretary for Energy and the Environment under then-New York State Governor Cuomo M. Cuomo. According to Politico, Cuomo turned “the Public Service Commission [“PSC”], the state’s powerful utility regulator, into an organ of executive power in ways that critics find unprecedented and potentially troubling. ... ‘It’s an agency that carries out the governor’s orders regardless of the impact on the ratepayers,’ Earthjustice attorney Chris Amato said of the utility regulator. ‘The public process is a charade, it’s a play act.’”²⁷ Under Governor Cuomo, Ms. Lefton “managed a portfolio of twelve agencies and authorities”²⁸ that included LIPA and the NYS Department of Public Service (the administrative branch of the PSC).²⁹ After working with LIPA and the PSC under Cuomo, Ms. Lefton left the New York State Executive Chamber for Washington as the newly appointed Director of BOEM. As Director of BOEM,

²⁷ Politico, Critics see Cuomo power play at the PSC, by Marie french and David Giambusso, published June 5, 2017 (www.politico.com/states/new-york/albany/story/2017/06/05/critics-see-cuomo-power-play-at-the-psc-112491). Also, read Ronan Farrow’s exposé published in The New Yorker, Andrew Cuomo’s WarAgainst a Federal Prosecutor, August 10, 2021 (www.newyorker.com/news/news-desk/andrew-cuomos-war-against-a-federal-prosecutor?utm_medium=social&utm_social-type=owned&mbi%E2%80%A6).

²⁸ www.boem.gov/about-boem/boem-leadership/amanda-lefton (last accessed July 26, 2022).

²⁹ The New York State Secretary for Energy & Environment is part of the New York State Executive Chamber that oversees the following agencies: NYSDPS, LIPA, NYPA, NYSERDA, NYSDEC, NYSEFC, NYSOPRHP, APA, LGPC, HRPT, HRBRRD, and HRVG.

Ms. Lefton is ideally placed to ensure smooth sailing for South Fork Wind. As Director of BOEM, credentials in marine science, hydrogeology, economics, law, business administration, or any other qualification related to the management of offshore energy and mineral resources would be advantageous. Ms. Lefton holds a Bachelor of Arts from the University of Albany. Director Lefton's bio on BOEM's website is brief. It does not mention any professional memberships, awards, or notable achievements. Ms. Lefton replaced BOEM Acting Director Walter Cruickshank, Ph.D., who had worked in the Department of the Interior for more than 30 years and holds a Doctorate in Mineral Economics. In February 2021, Dr. Cruickshank, an eminently qualified and experienced candidate, was replaced with an inappropriately talented and inappropriately experienced (33-year-old) Arts graduate from the University of Albany.

9.3 DEFENDANT, JAMES F. BENNETT, is sued in his official capacity working for the Bureau of Ocean Energy Management. Mr. Bennett "was the Program Manager for the Office of Renewable Energy Programs (OREP) within the Department of the Interior's (DOI) Bureau of Ocean Energy Management (BOEM) from January 2015 until July 2022." As Program Manager, Mr. Bennett oversaw "approximately 70 staff and other personnel. My responsibilities included managing, among other things: ... environmental review of program activities, public meetings and other outreach efforts, consultations with Federal, State, ... and local agencies as required by law, and coordination with Intergovernmental Renewable Energy Task Forces. The OREP staff that I oversaw conducted renewable energy lease sales for areas offshore Massachusetts, Rhode Island, New Jersey, New York, and the Carolinas. I was actively involved in the work leading to the approval of the South Fork Wind COP" (see DECLARATION OF JAMES F. BENNETT, made October 3, 2022 (ECF No. 25-1, at ¶¶ 1-2)). According to Mr. Bennett's Declaration, "[o]n January 18, 2022, I signed the COP Approval Letter for the South Fork Wind COP ... that authorizes South Fork Wind to construct and operate its

project subject to the terms and conditions therein” (*Id.* at ¶ 5).

9.4 DEFENDANT, MARY BOATMAN, is sued in her official capacity as Environmental Studies Chief, Office of Renewable Energy Programs, Bureau of Ocean Energy Management. Ms. Boatman’s name appears in the List of Preparers and Reviewers for the South Fork Wind’s Final Environmental Impact Statement (“FEIS”) under Table B-1 as the “National Environmental Policy Act (NEPA) Coordinator” with ultimate responsibility for “NEPA compliance” (see FEIS, at B-1, PDF 297).

9.5 DEFENDANT, MICHELLE MORIN, is sued in her official capacity as Chief, Environment Branch for Renewable Energy, Bureau of Ocean Energy Management. Ms. Morin’s name appears in the List of Preparers and Reviewers for the South Fork Wind’s FEIS under Table B-1 as a contributor responsible for “NEPA compliance” (*Id.*).

9.6 DEFENDANT, EMMA CHAIKEN, is sued in her official capacity as an economist for the Bureau of Ocean Energy Management. Ms. Chaiken’s name appears in the List of Preparers and Reviewers for the South Fork Wind’s FEIS under Table B-1 as a contributor responsible for “[d]emographics, employment, and economics; recreation and tourism; land use and coastal infrastructure; commercial fisheries and for-hire recreational fishing” (*Id.*).

9.7 DEFENDANT, MARK JENSEN, is sued in his official capacity as an economist for the Bureau of Ocean Energy Management. Ms. Jensen’s name appears in the List of Preparers and Reviewers for the South Fork Wind’s FEIS under Table B-1 as a contributor responsible for “[d]emographics, employment, and economics; recreation and tourism; land use and coastal infrastructure; commercial fisheries and for-hire recreational fishing” (*Id.*).

9.8 DEFENDANT, JENNIFER DRAHER, is sued in her official capacity working for the Bureau of Ocean Energy Management. Ms. Draher’s name appears in the List of Preparers and

Reviewers for the South Fork Wind’s FEIS under Table B-1 as a contributor responsible for “[w]ater quality” (*Id.*).

9.9 DEFENDANT, BRIAN HOOKER, is sued in his official capacity as a biologist for the Bureau of Ocean Energy Management. Mr. Hooker’s name appears in the List of Preparers and Reviewers for the South Fork Wind’s FEIS under Table B-1 as a contributor responsible for “[b]enthic, finfish, invertebrates, and essential fish habitat; commercial fisheries and for-hire recreational fishing” (*Id.*).

10. DEFENDANTS, the U.S. ENVIRONMENTAL PROTECTION AGENCY and the Honorable Michael S. Regan, in his official capacity as Administrator of the U.S. Environmental Protection Agency (collectively “EPA”), is an “agency” within the meaning of the APA, 5 U.S.C. § 701(b)(1). Through its Secretary, EPA has the authority and duty to comply with NEPA (42 U.S.C. 4321 *et seq.*) and its implementing regulations.

10.1 DEFENDANT, SOUTH FORK WIND LLC (formerly known as Deepwater Wind South Fork LLC) (“SFW”) is a merchant operator and developer of an offshore wind farm and transmission system with onshore support facilities (described below as the “Project”). South Fork Wind LLC is the counterpart in a power purchase agreement (executed February 6, 2017, and amended September 30, 2021) with Long Island Power Authority.

V. THE PROJECT

11. The proposed South Fork Wind Project comprises an offshore wind farm with a nameplate capacity of 130 megawatts (“130 MW”), its transmission cable(s), and related infrastructure that includes an onshore interconnection facility (herein collectively referred to as the “Project”).

12. The offshore wind farm component of the Project will be located approximately thirty-five miles east of Montauk Point, New York, in the Atlantic Ocean on the Outer Continental Shelf in BOEM Renewable Energy Lease Number OCS-A 0517.

13. The total length of the proposed new transmission line is approximately sixty-six (66) miles, of which approximately sixty-two (62) miles will be offshore and approximately four (4) miles onshore.

14. Onshore, South Fork Wind plans to install underground transmission infrastructure for high-voltage cables through the seaside residential neighborhood of Wainscott and an interconnection facility” (i.e., a substation with transformers, *et cetera*).

15. South Fork Wind plans indicate that it will excavate over 30,000 tons of material (including soil and groundwater) from its onshore construction corridor and interconnection facility.

16. The onshore section of the proposed high-voltage transmission system includes the underground installation of ten large vaults with concrete duct banks between each.

17. Nine vaults are for splicing (~ 26 ft long by 12 ft wide by 12 ft deep each), and one transition joint vault (~ 48 ft long by 10 ft wide by 12 ft deep).

18. The plans allow for approximately two miles of duct banks (~ 4 ft wide by 5 ft deep for 2 miles, non-contiguous).

19. The proposed onshore construction corridor runs immediately above and, at some locations, encroaches into an aquifer system used for drinking water that the US Environmental Protection Agency designated a Sole-Source Aquifer in 1978.

20. The aquifer system provides one hundred percent (100%) of the drinking water consumed on the South Fork (excluding bottled water). No alternative drinking water source could physically, legally, and economically supply all those who depend on it for drinking water and

all other freshwater needs.

21. Suffolk County Water Authority (“SCWA”) supplies public water to connected homes.
22. SCWA draws freshwater from the aquifer system using public supply wells.
23. SCWA operates six public supply wells within one mile of the proposed onshore construction corridor.
24. The onshore section of the construction corridor for the proposed high-voltage transmission cables and underground infrastructure runs through two Critical Environmental Areas designed to protect the safety of the aquifer: (i) the Special Groundwater Protection Area (South Fork); and (ii) the Water Recharge Overlay District.
25. Before 2018, approximately ninety percent of residents living in Wainscott used private wells for all their freshwater needs, including drinking water. My family and I, among others, still use private wells.
26. Many farmers in Wainscott irrigate their crops using private well water.
27. The proposed (underground) construction corridor is downgradient and adjacent to the East Hampton Airport site that includes an industrial park (collectively “Airport”).
28. The New York State Department of Environmental Conservation (“NYSDEC”) registered the Airport with the State Superfund Program (site codes 152250 and 152156).
29. South Fork Wind’s construction corridor shares a common border with the Airport of more than one thousand feet long (1,000 ft).
30. South Fork Wind’s construction corridor is adjacent and downgradient from the Airport, a known source of PFAS contamination of soil and groundwater.
31. PFAS contamination concentration levels at the site exceed Federal and State standards.
32. Such contamination exists within five hundred feet of South Fork Wind’s (underground)

construction corridor.

33. South Fork Wind's construction corridor is adjacent (for approximately 3,000 feet) and upgradient from a former sand-mining operation registered with NYSDEC State Superfund Program (as Wainscott Sand and Gravel, code 152254).

34. PFAS contamination in groundwater south of the Airport (in Wainscott, NY) is pervasive.

35. In 2017 and 2018, the Suffolk County Department of Health Services ("SCDHS") tested over three hundred (300) private drinking water wells in Wainscott downgradient from the Airport in the same area where South Fork Wind is currently installing its underground high-voltage transmission infrastructure.

36. In June 2018, SCDHS reported receiving three hundred and three (303) test results for PFAS contamination of private wells in Wainscott. Of those wells, one hundred and fifty-nine wells (52%) showed detectible levels of perfluorooctane sulfonate ("PFOS") and perfluorooctanoic acid ("PFOA") contamination.

37. The average (combined) concentration level of PFOS/PFOA contamination detected in the private drinking water wells tested by SCDHS up to mid-June 2018 is twenty-three parts per trillion (23 ppt).

38. The maximum contamination level of PFOS/PFOA contamination detected in the private drinking water wells tested by SCDHS up to mid-June 2018 is seven hundred and ninety-one parts per trillion (791 ppt).

39. Thirteen (13) wells tested by SCDHS up to mid-June 2018 exceeded the 2016 EPA Health Advisory Level of seventy parts per trillion (70 ppt).

VI. NOTICE OF DEFICIENCIES

40. In November 2018, BOEM received comments from me (“2018 Comments”) in response to South Fork Wind’s Construction and Operations Plan (“COP”). See Exhibit A- 2018 Comments. BOEM posted the comments-letter online, which is incorporated by reference and available at – www.regulations.gov/comment/BOEM-2018-0010-0074.

41. On February 16, 2021, I gave oral testimony during BOEM’s Public Hearing #3 (“Oral Testimony”), which is incorporated by reference and available at – https://downloads.regulations.gov/BOEM-2020-0066-0380/attachment_1.pdf (transcript time-stamp beginning at 1:18:08).

42. In February 2021, BOEM received further comments from me (“2021 Comments”) in response to the Draft Environmental Impact Statement (“DEIS”). See Exhibit B- 2021 Comments.

43. My 2021 Comments provide clear substantial evidence, including testimony, briefs, and over one hundred and fifty exhibits showing the many assertions upon which BOEM relied were not based in fact. See Exhibit C – BOEM Index of Documents. All the documents listed in Exhibit C are herein incorporated by reference and are available at the following links maintained by BOEM—

<https://www.regulations.gov/comment/BOEM-2020-0066-0343>

<https://www.regulations.gov/comment/BOEM-2020-0066-0384>

<https://www.regulations.gov/comment/BOEM-2020-0066-0385>

44. BOEM made little attempt to address the substantive material deficiencies raised in my 2021 Comments.

45. In December 2021, BOEM (along with other Federal, State, and local agencies and South

Fork Wind) received sixty days' notice of intent to sue (Exhibit D- 60-day NOI to Sue).

46. In March 2022, BOEM (along with other Federal, State, and local agencies and South Fork Wind) received further testimony concerning South Fork Wind's flawed testing of soil and groundwater for PFAS contamination (Exhibit E- 2022 Comments).

47. BOEM did *not* contact me to discuss my 2018 Comments, 2021 Oral Testimony, or my 2021 Comments.

VII. PFAS CONTAMINATION

Notice of PFAS Received by BOEM

48. In February 2021, BOEM received comments, including over one hundred and fifty exhibits providing substantive evidence of PFAS contamination surrounding South Fork Wind's proposed onshore construction corridor through Wainscott. The main exhibits on PFAS contamination are listed below (NB: all Exhibit #000 are linked to the source documents that BOEM uploaded to its website) –

PFAS Contamination Heat Map of Onshore Cable Route (1 page).....	<u>Exhibit #005</u>
PFAS Zone - onshore cable route decided <i>after</i> PFAS detection (1 page).....	<u>Exhibit #006</u>
PFAS Contamination of Onshore Corridor (satellite map) (2 pages).....	<u>Exhibit #004</u>
PFAS release within 500 feet of SFEC route (surface runoff) (2 pages).....	<u>Exhibit #007</u>
Testimony 1-1, PFAS Contamination, Kinsella (Sep 9, 2020)(37 pages).....	<u>Exhibit #061</u>
• Exhibit C - Report No 3 - PFAS Contamination (91 pages)...	<u>Exhibit #065</u>
Testimony 1-2 - PFAS Contamination, Kinsella (Oct 9, 2020)(11 pages).....	<u>Exhibit #094</u>
Testimony, Rebuttal (Oct 30, 2020)(13 pages).....	<u>Exhibit #162</u>
Initial Brief by Simon V. Kinsella (Jan 20, 2021)(34 pages).....	<u>Exhibit #009</u>
Reply Brief & Exhibits by Simon V. Kinsella (Feb 3, 2021)(29 pages).....	<u>Exhibit #011</u>

Motion to Reopen Record by Simon V. Kinsella (Jan 13, 2021)(21 pages)... Exhibit #022

49. BOEM knew of the nature and extent of PFAS contamination and the degree to which such contamination exceeded EPA and applicable New York State regulatory standards at least nine months *before* it issued its ROD approving the Project.

50. BOEM asserted in its FEIS that “[o]verall, existing groundwater quality in the analysis area appears to be good” (see FEIS at p. H-23, PDF p. 655 of 1,317).

51. BOEM failed to take a “hard look” into PFAS contamination.

BOEM overlooks South Fork Wind errors

52. In September 2018, South Fork Wind submitted to BOEM a Construction and Operations Plan (“COP”) for its proposed Project. The COP reads— “Groundwater throughout most of eastern Suffolk County is of generally high quality (NYSDOH, 2003). All freshwater groundwater in New York State is Class GA, a source for potable water supply (NYSDOS, 2018b). With rare exceptions, potable water supplied by community water systems in Suffolk County meet all drinking water quality standards” (p. 4-56, PDF p. 219).

53. In May 2021, three months *after* BOEM had received detailed information on existing PFAS contamination (see above), South Fork Wind submitted to BOEM a revised COP.

54. South Fork Wind’s revised COP repeats the same misleading information concerning groundwater quality *verbatim* from its COP that it submitted to BOEM *two-and-half years* earlier (in September 2018) (see May 2021 COP, at p. 4-60, PDF p. 228).

55. Neither South Fork Wind’s COP of September 2018 nor its COP of May 2021 acknowledges *any* PFAS contamination.

56. According to NEPA, BOEM “shall independently evaluate the information submitted [by South Fork Wind] and shall be responsible for its accuracy. [...] It is the intent of this paragraph

that acceptable work not be redone, but that it be verified by the agency” (NEPA 1978, 40 CFR 1506.5(a)).

57. BOEM failed to evaluate or verify South Fork Wind’s misleading statements concerning the quality of groundwater supplies in Wainscott.

58. BOEM did *not* consider environmental PFAS contamination along the proposed onshore transmission cable route where South Fork Wind plans to excavate over 30,000 tons of material.

59. In August 2021, BOEM referred to “NYSDEC (2018) groundwater quality standards” that were outdated and inapplicable to drinking water standards for a sole-source aquifer used for drinking water.

60. The statement is over one thousand three hundred and seventeen (1,317) pages and contains only one reference to PFAS contamination. It reads – “Sampling at the fourth site [...] has indicated the presence of perfluorinated compounds. Site-related compounds have been identified in soil and groundwater within [...] the site” (at p. H-23, PDF 655, ¶ 2, last sentence).

61. BOEM inserts the two-sentence reference to PFAS contamination that poses a severe risk to human health and the environment deep within the FEIS (on page 655).

Nature of PFAS

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

63. The groundwater in Wainscott flows from a primary source of PFAS contamination at East Hampton Airport towards the Atlantic Ocean, generally flowing from the northwest to the southeast.

64. Surface water in the form of run-off over sealed surfaces can carry PFAS contamination with it.

65. Other than the primary source of contamination at East Hampton Airport, there are other sources of PFAS contamination. For example, according to South Fork Wind's Final Hazardous Waste and Petroleum Work Plan (April 2021), firefighters extinguished a house fire at 75 Wainscott Northwest Road (close to Montauk Highway) in August 2007.

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

67. South Fork Wind showed no regard for the environmental impacts from underground concrete infrastructure and excavation activities in an area containing PFAS contamination (see Appendix 2- Construction near house Fires, at p. 1).

68. Another example of firefighters extinguishing a house fire occurred on Beach Lane in 1965. According to South Fork Wind's Final Hazardous Waste and Petroleum Work Plan (April 2021), "Mr. and Mrs. John C. Tysen's summer home on Beach Lane, Wainscott was destroyed by fire."

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

70. South Fork Wind showed no regard for the environmental impacts from underground concrete infrastructure and excavation activities in an area containing PFAS contamination (see Appendix 2- Construction near house Fires, at p. 2).

71. Exposure to PFAS contamination is not restricted to ingesting contaminated tap water at home but may have included past exposure at restaurants, and other homes, swimming in contaminated water, or drinking water in public places.

Existing PFAS (Wainscott)

72. On September 9, 2020, South Fork Wind received notice of two Site Characterization

Reports prepared for the New York State Department of Environmental Conservation (NYSDEC”) showing extensive PFAS contamination concentrations in soil and groundwater in the vicinity of South Fork Wind’s proposed (underground) construction corridor—

- a. NYSDEC Site Characterization Report: East Hampton Airport (NYSDEC Site: 152250/152156). See Exhibit C, BOEM Index of Documents, Exhibits #066 through #074, available at – www.regulations.gov/comment/BOEM-2020-0066-0386.
- b. NYSDEC Site Characterization Report: Wainscott Sand and Gravel (NYSDEC Site Code 152254). See Exhibit C, BOEM Index of Documents, [Exhibit #075](#).

73. NYSDEC reports on PFAS contamination in the vicinity of South Fork Wind’s construction corridor (below with links to dec.ny.gov) are herein incorporated by reference –

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

73. 01 BOEM has online access to the public records of the New York State Department of Environmental Conservation (“NYSDEC”), including access to the NYSDEC State Superfund Program under site record at East Hampton Airport (code 152250), available –

<https://www.dec.ny.gov/data/DecDocs/152250/>; and for site record at Wainscott Sand and Gravel (code 152254) available at – <https://www.dec.ny.gov/data/DecDocs/152254/> (was at ¶ 303).

74. The PFAS contamination concentration levels quoted below are taken from the site characterization reports (above), which I also summarized in my Initial Brief of January 20, 2021 (BOEM Index Exhibit #009, pp. 19-24).

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

76. Wainscott Sand and Gravel ("**Wainscott S&G**") (NYSDEC site: 152254) is adjacent, downgradient, and on the opposite side of the South Fork Wind's proposed construction corridor.

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

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

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

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

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

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

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

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

85. Well: EH-19A – PFOS = 5 ppt (exceeds 2022 HAL by 250 x)

– PFOA = 140 ppt (exceeds 2022 HAL by 35,000 x)

86. Well: EH-19A2 – PFOS = 140 ppt (exceeds 2022 HAL by 7,000 x)

– PFOA = 34 ppt (exceeds 2022 HAL by 8,500 x)

87. Well: EH-19B – PFOS = 77 ppt (exceeds 2022 HAL by 3,850 x)

– PFOA = 89 ppt (exceeds 2022 HAL by 22,250 x)

88. Well: EH-1 – PFOS = 1.8 ppt (exceeds 2022 HAL by 90 x)

– PFOA = 160 ppt (exceeds 2022 HAL by 40,000 x)

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

90. Well: EH-19A (soil) – PFOS = 3,900 ppt

– PFOA = 180 ppt

– PFHxS = 170 ppt

91. Well: EH-19B (soil) – PFOS = 12,000 ppt

– PFOA = 3,800 ppt

– PFHxS = 3,800 ppt

92. Well: EH-1 (soil) – PFOS = 10,000 ppt

– PFOA = 180 ppt

– PFHxS = 170 ppt

93. Groundwater samples taken from monitoring wells on the opposite side of the corridor

from the source of contamination (at the Airport), within one hundred and fifty feet downgradient from the construction corridor, all show exceedingly high levels of the same chemical compounds (PFOA, PFOS, and PFHxS) seen in soil samples taken at the Airport.

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

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

96.	Well: MW5 (GW)	– PFOS	=	877 ppt	(exceeds 2022 HAL by 43,850 x)
		– PFOA	=	69 ppt	(exceeds 2022 HAL by 17,250 x)
		– PFHxS	=	566 ppt	
		– PFOS/PFOA	=	946 ppt	(exceeds 2016 HAL by 13.5 x)
97.	Well: MW3 (GW)	– PFOS	=	1,010 ppt	(exceeds 2022 HAL by 50,500 x)
		– PFOA	=	28 ppt	(exceeds 2022 HAL by 7,000 x)
		– PFHxS	=	306 ppt	
		– PFOS/PFOA	=	1,038 ppt	(exceeds 2016 HAL by 14.8 x)
98.	Well: MW4 (GW)	– PFOS	=	232 ppt	(exceeds 2022 HAL by 11,600 x)
		– PFOA	=	5.57 ppt	(exceeds 2022 HAL by 1,393 x)
		– PFHxS	=	43.4 ppt	
		– PFOS/PFOA	=	238 ppt	(exceeds 2016 HAL by 3.4 x)

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

100. BOEM received comments regarding PFAS contamination in February 2021, nine months *before* issuing its ROD (November 2021). Still, it did not consult with, obtain comments from, or otherwise use "to the maximum extent possible" the special expertise of the EPA (a cooperating agency) regarding environmental impacts concerning PFAS contamination (NEPA 1978, 40 C.F.R. § 1501.6 and §1508.5).

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

102. South Fork Wind proceeded with construction and excavation on Beach Lane near Well MW-4A, which was inconsistent with a manner that provides safety and protection of the environment according to the OCSLA (43 U.S.C. §§ 1331 *et seq*). See Appendix 2 (p. 2).

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

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

105. In 2022, South Fork Wind detected PFOS contamination in groundwater beneath Wainscott NW Road in Monitoring Well 15A at a concentration level of 12 ppt that exceeds the

NYS MCL (10 ppt) and the 2022 EPA Interim Health Advisory Levels.

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

107. In 2021, South Fork Wind disclosed its laboratory test results for PFAS contamination and supporting documentation (for testing undertaken in December 2020 and January 2021). The disclosures showed that South Fork Wind took most soil samples from the shallow surface where PFAS contamination was less likely to be detected (see Exhibit E- 2022 Comments).

108. In 2022, South Fork Wind has *not* disclosed laboratory test reports or supporting documentation for PFAS contamination testing conducted around January 2022.

108.01 No New York State agency or authority cooperated in developing the FEIS (was at ¶ 298).

108.02 BOEM is not relieved of its statutorily mandated obligation “to use all practicable means [...] to improve and coordinate Federal plans, functions, programs, and resources to [...] assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings [emphasis added]” (NEPA 42 U.S. Code § 4331(b)(2)) (originally at ¶ 299).

108.03 BOEM received testimony, briefs, and exhibits and is compelled to take a “hard look”

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and “use all practicable means”³¹ to ensure for all residents living in Wainscott “safe, healthful, productive, and esthetically [...] pleasing surroundings”³² (originally at ¶ 300).

³⁰ *E.g., Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (approving hard look style review of legislative rules).

³¹ NEPA 42 U.S. Code § 4331(b)(2)

³² *Ibid.*

108.04 BOEM had “practicable means” to access the electronic files it received in February 2021 because it posted them online (originally at ¶ 301).

108.05 BOEM had online access to the entire evidentiary record and procedural history in the New York State Public Service Commission hearing (docket 18-T-0604) on the South Fork Wind’s Project (originally at ¶ 302).³³

VIII. DUE PROCESS OF LAW

109. In January 2017, the LIPA Board of trustees approved the 2017 PPA with South Fork Wind.

110. A Memorandum, “Authorization to enter into a Power Purchase Agreement with Deepwater Wind South Fork, LLC for the South Fork Wind Farm Project,” to the Board of Trustees from LIPA’s CEO (January 2017) (“LIPA PPA Memo”), defers environmental reviews to be “conducted and [...] supervised by the Bureau of Ocean Energy Management pursuant to federal law [...] [and] a certificate of environmental compatibility and public need from the Public Service Commission pursuant to Article VII of the Public Service Law” (LIPA PPA Memo, at p. 5, footnote 6, BOEM Index Exhibit #122).

Contamination Ignored

111. South Fork Wind and parties to the New York State Public service Commission proceeding (“NYSPSC”) (case 18-T-0604) received evidence of existing PFAS contamination surrounding the proposed construction corridor in an interrogatory/document request titled “Si Kinsella #1” dated November 15, 2019.

112. South Fork Wind did *not* test soil or groundwater samples taken from within its proposed construction corridor until the NYSPSC evidentiary hearing concluded (on December 8, 2020).

³³ <https://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=18-T-0604&submit=Search>

113. On December 23, 2020, South Fork Wind tested soil or groundwater from its construction corridor for the first time, fifteen days *after* the NYSPSC hearing had concluded.

114. The NYSPSC did not require South Fork Wind to test soil or groundwater samples taken from within its proposed construction corridor during the two years from September 2018, when South Fork Wind submitted its Article VII application, until the evidentiary hearing concluded (December 8, 2020).

115. BOEM neither discusses onshore PFAS contamination, suggests *any* possible mitigation plans, nor considers alternatives specifically to avoid PFAS contamination.

116. In its FEIS (of 1,317 pages), BOEM refers only to a fourth site, NYSDEC #152250, without saying where that site is relative to the construction corridor.

117. BOEM states that sampling at the fourth site “has indicated the presence of perfluorinated compounds” without describing their impact on human health.

118. BOEM admits only to “[s]ite-related compounds” that have been “identified” in soil and groundwater within and around the site without identifying those compounds or stating that they pose a risk to public health and are a threat to the environment (see FEIS, Section 3.3.2.1.2 at H-23, PDF p. 655).

119. “Site-related compounds” include *any* compound related to the site, whether a harmful contaminant or safe naturally occurring compounds such as calcium or sodium.

120. BOEM has denied the public the opportunity to scrutinize South Fork Wind testing samples of groundwater and soil for PFAS contamination taken from within its construction corridor.

Ratepayers Ignored

121. The NYSPSC did *not* consider South Fork Wind’s high cost of power, the burden of

which will rest with ratepayers in the service area.

122. The New York State Department of Public Service (“NYSDPS”), the administrative arm of the NYS Public Service Commission, managed the NYS hearing under Article VII. During the hearing under cross-examination, the NYSDPS admitted that— “There’s no testimony in this, in our document, to the best of my recollection that addresses the cost to rate payers” (see BOEM Exhibit #009, Initial Brief, dated January 20, 2021, at 15, last paragraph).

123. The ALJ presiding over the NYSPSC hearing ruled on five occasions that the South Fork RFP and 2017 PPA are beyond the scope of this Article VII proceeding.

124. The NYSPSC denied party-intervenor rights to examine and cross-examine witnesses regarding the South Fork RFP and 2017 PPA. See BOEM Exhibit #021, Motion to Reopen the Record, dated January 13, 2021(at pp. 3 – 4).

125. In response to comments on South Fork Wind’s high cost of power relative to other offshore wind farms, BOEM states— “Ratepayer costs depend on numerous variables beyond the scope of the EIS and which BOEM has no authority to change” (FEIS, at p. I-87, PDF p. 855, ¶ 1).

126. Had BOEM chosen the “No Action” alternative, it would have changed Project-related ratepayer costs.

127. BOEM dismisses the notion of a “comprehensive forecast of impacts [...] to ratepayer costs” because it “depends on numerous variables beyond the scope of the EIS” (FEIS at p. I-345, PDF 1,113)

128. BOEM does not discuss using a variable such as a price per unit of output (dollars per megawatt-hour) from each offshore wind contract and using standard market forecasts to compare wind farm contracts with alternatives.

129. BOEM is obligated to review and consider the economic impacts of the Project.

130. A higher price of energy impacts lower-income families disproportionately.

131. BOEM does not request the participation of the U.S. Department of Energy (“DOE”) or the Renewable Energy Laboratory (“NREL”) according to 40 CFR § 1501.6.

132. The DOE and NREL already conduct such research and have expertise in this area.

133. BOEM turned a blind eye to bid rigging designed to stifle competition and increase the price of power to consumers.

134. BOEM’s exercise of power is arbitrary and capricious and not according to the law, and violates my rights to due process guaranteed by the U.S. Constitution.

135. BOEM’s action to approve the project constitutes arbitrary interference with life, liberty, and property.

IX. 2019 CLCPA

136. The Record of Decision (“**ROD**”) asserts that the “Project will contribute to New York’s renewable energy requirements, particularly the state’s goal of 9,000 MW of offshore wind energy generation by 2035[,]” referring to New York State’s Climate Leadership and Community Protection Act (“**2019 CLCPA**”) enacted in July 2019 (New York Environmental Conservation Law (“**NY ECL**”) § 75-0103(13)(e)).

137. The Final Environmental Impact Statement (“**FEIS**”) asserts that “South Fork Wind, LLC, is proposing the Project, which is designed to contribute to New York’s renewable energy requirements, particularly, the state’s goal of generating 9,000 megawatts of offshore wind energy by 2030 [emphasis added]” in reference (again) to New York State’s 2019 CLCPA.

138. BOEM provides no proof supporting its claims in ¶¶ 136 and 137 (above).

139. BOEM introduces the 2019 CLCPA into the NEPA process and is statutorily mandated to

evaluate and take responsibility for any claim upon which it relies arising out of the 2019 CLCPA, including but not limited to whether the South Fork Wind Project is consistent with “a manner that seeks [...] to minimize costs” (NY ECL § 75-0109(3)(a)).

SFW 2015 Design

140. South Fork Wind submitted the Project proposal for consideration in Request for Proposals South Fork Resources, issued in June 2015 (“**South Fork RFP**” or “**SFRFP**”).

141. BOEM received a copy of the South Fork RFP in February 2021 and posted it online – www.regulations.gov/comment/BOEM-2020-0066-0387 (see “Testimony Pt 2 - Exhibit 02 - South Fork RFP June 24, 2015” Exhibit #102).

142. The Project resulted from the South Fork RFP procurements process.

143. The Project proposal had to be submitted by the South Fork FRP submittal deadline in November 2015, later revised to December 2015.

144. According to the South Fork RFP and PSEG Long Island’s South Fork Resources RFP Evaluation Guide (December 2015) (“**RFP Evaluation Guide**”), the Project proposal “must contain” the following— “a description of each proposed resource” solution, “the location of any proposed facility” requiring construction and/or permitting, “a description of key features and functions” of the resource, and proposed pricing that “shall include all costs” — otherwise the proposal would be deemed non-responsive.

145. According to the South Fork RFP requirements and the RFP Evaluation Guide, the South Fork Wind Project would have had to have been substantively designed by the submittal deadline in December 2015.

146. The South Fork RFP submittal deadline (December 2015) predates the New York State 2019 CLCPA by three-and-a-half years.

147. It is implausible that the South Fork Wind Project was “designed to contribute” to specific provisions and regulations as defined in a law that did *not* exist at the time and would *not* exist for three-and-half years.

148. BOEM provides no details as to any further “renewable energy requirements” other than to cite “the state’s goal of 9,000 MW of offshore wind energy generation by 2035.”

149. BOEM provides neither discussion nor supporting documentation nor incorporates by reference the “state’s goal of 9,000 MW of offshore wind energy generation by 2035.”

150. BOEM does not list any agency or authority of New York State as a cooperating agency (or authority) in its FEIS or ROD.

Project Cost (\$2 bn) *not* considered

151. The New York State 2019 CLCPA mandates that in “promulgating these regulations, the department [N.Y.S. Department of Environmental Conservation] shall: a. Design and implement all regulations in a manner that seeks [...] to minimize costs [...] [emphasis added]” (NY ECL § 75-0109(3)(a)).

152. The 2019 CLCPA mandates that in “developing such plan the council shall [...] b. Evaluate, using the best available economic models, emission estimation techniques and other scientific methods, the total potential costs [...] of the plan [...] [emphasis added]. In conducting this evaluation, the council shall quantify [...] ii. The costs of implementing proposed emissions reduction measures [...] [emphasis added]” (NY ECL § 75-0103(14)(b)).

153. The 2019 CLCPA mandates the consideration of costs.

154. BOEM asserts that the “Project will contribute to [...] the state’s goal of 9,000 MW of offshore wind energy generation by 2035” without taking a “hard look” to ensure that the Project is consistent with the 2019 CLCPA in “a manner that seeks [...] to minimize costs” (NY ECL §

75-0109(3)(a)).

155. BOEM approved the Project because it will allegedly contribute to the 2019 CLCPA.

156. In 2018, BOEM received evidence related to the Project's high cost of power (now over \$2 billion) and did not consider that cost in its economic analysis of alternatives. Had BOEM performed a balanced economic analysis that included the Project's cost, ratepayers would not have to pay 19 cents for the same renewable energy that neighboring wind farms can provide for less than 8 cents (per kilowatt-hour).

19 cents vs. 8 cents

157. BOEM received evidence in February 2021 showing that the utility, the Long Island Power Authority ("LIPA"), around the time it executed a power purchase agreement with South Fork Wind (February 2017) ("**2017 PPA**"), valued the cost of energy at \$219 per megawatt-hour or 21.9 cents per kilowatt-hour.

158. On September 30, 2020, LIPA executed an amendment to the 2017 PPA. The amended 2017 PPA permitted South Fork Wind to expand the South Fork Wind Farm by adding forty megawatts (40 MW) of generating capacity (from 90 MW to 130 MW).

159. According to the Contract Encumbrance Request approved by LIPA VP Operations Oversight Rick Shansky on March 17, 2021, the total cost of energy from the Project per the amended 2017 PPA (130 MW) over the life of the contract is \$2,013,000,000.

160. According to the initial Contract Encumbrance Request approved by LIPA CFO Joseph Branco (on January 30, 2017), the total cost of energy from the Project per the 2017 PPA (90 MW) over the contract's life is \$1,624,738,893. Projected delivered energy is 371,604 megawatt-hours per year or 7,432,080 megawatt-hours over the twenty-year contract life.

161. According to the initial Contract Encumbrance Request, the cost of power from the South

Fork Wind Farm (90 MW) is \$219 per megawatt-hour (\$1,624,738,893 divided by 7,432,080 megawatt-hours) or 21.9 cents per kilowatt-hour.

162. According to both the initial and revised Contract Encumbrance Requests, the total cost of the increase in capacity (of 40 MW) is \$388,261,107 (\$2,013,000,000 less \$1,624,738,893).

163. According to an Offshore Wind Project Study Final Technical Report LIPA presented to the U.S. Department of Energy's Office of Energy Efficiency and Renewable Energy ("OSW Technical Report"), LIPA projects "additional annual delivered energy up to 165,157 MWh" from the South Fork Wind Farm's incremental increase of 40 MW (see Exhibit F- LIPA OSW Tech Report).

164. According to the OSW Technical Report, the projected delivered energy from the incremental increase of 40 MW in offshore wind capacity over the contract's life is 3,303,140 megawatt-hours (165,157 MWh multiplied by 20 years).

165. According to Contract Encumbrance Requests and OSW Technical Report, the cost of energy from the incremental increase in offshore wind capacity of 40 MW is \$118 per megawatt-hour (\$388,261,107 divided by 165,157 MWh) or 11.8 cents per kilowatt-hour.

166. According to the initial Contract Encumbrance Request and the OSW Technical Report, the projected delivered energy from the (130 MW) Project is 536,761 megawatt-hours per year (371,604 MWh in addition to 165,157 MWh), or 10,735,220 megawatt-hours over the twenty-year contract life (536,761 MWh multiplied by 20 years).

167. According to the Contract Encumbrance Requests and the OSW Technical Report, the cost of power from the (130 MW) South Fork Wind Farm is \$188 per megawatt-hour (\$2,013,000,000 divided by 10,735,220 MWh), or 18.8 cents per kilowatt-hour.

168. The price of energy from South Fork Wind is summarized as follows –

	Offshore Wind Farm Project	Contract Size (MW)	Year Signed	Duration (years)	Offtake State	Contract Type	Levelized Nom. Price (\$/MWh)
a.	South Fork Wind	90	Jan 2017	20	NY	PPA	\$219
b.	<u>South Fork Wind</u>	40	Sep 2020	20	NY	PPA	\$118
c.	South Fork Wind	130					\$188

169. In February 2021, BOEM received a report by the U.S. Department of Energy National Renewable Energy Laboratory (“NREL”), Comparing Offshore Wind Energy Procurement and Project Revenue Sources Across U.S. States (dated June 2020) (“**NREL OSW Report**”).

170. BOEM subsequently posted the NREL OSW Report online – www.regulations.gov/comment/BOEM-2020-0066-0387, see “Exhibit I - NREL Comparing Offshore Wind Energy June 2020” BOEM Index Exhibit #118).

171. According to the NREL OSW Report, Table A-2. U.S. Offshore Wind Offtake Agreements (at p. 41) the 2020 Levelized Price (\$/MWh) for other wind farms in the same Wind Energy Area as South Fork Wind are as follows (per signed contract) –

	Offshore Wind Project	Duration	Offtake State	Contract Type	Levelized Price (\$/MWh)
a.	Vineyard Wind 1	20	MA	PPA	\$74.00
b.	Vineyard Wind 1	20	MA	PPA	\$65.00
c.	Revolution Wind	20	RI	PPA	\$94.43
d.	Revolution Wind	20	CT	PPA	\$99.50
e.	Revolution Wind	20	CT	PPA	\$98.43
f.	Sunrise Wind	25	NY	NY OREC	\$83.36
g.	Mayflower Wind	20	MA	PPA	\$58.47
h.	<u>Mayflower Wind</u>	20	MA	PPA	<u>\$58.47</u>

i. Average 2020 Levelized Price (\$/MWh): **\$78.96**

172. BOEM approved a Project where the price of energy (\$188 /MWh) is nearly two and half times the average price (\$79 /MWh) of the other wind farms in the same Wind Energy Area—Vineyard Wind, Revolution Wind, Sunrise Wind, and Mayflower Wind. See Table 1 (above).

173. The Project BOEM approved provides the same renewable offshore wind energy as the other wind farms in the same Wind Energy Area but at more than double the average cost.

Cost: Inconsistent with CLCPA

174. Approving a Project where the cost of energy is more than double the average cost of the other wind farms is inconsistent with “a manner that seeks [...] to minimize costs” and contrary to the mandated provisions of the 2019 CLCPA.

175. The Project BOEM approved does not comply with the 2019 CLCPA.

176. The Project is inconsistent with the requirements of the 2019 CLCPA to reduce negative impacts on disadvantaged communities, including but not limited to those that “possess certain socioeconomic criteria, or comprise high-concentrations of low- and moderate- income households” (NY ECL § 75-0101(5)).

177. “BOEM prepared the FEIS with the assistance of a third-party contractor” (FEIS, p. 2).

178. According to NEPA— “If 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.

179. BOEM’s asserted purpose, that “South Fork Wind, LLC, is proposing the Project, which is designed to contribute to New York’s renewable energy requirements, particularly, the state’s

goal of generating 9,000 megawatts of offshore wind energy by 2030[,]” is conclusory and *not* based in fact.

X. Environmental Justice

180. In November 2018, three years before issuing its ROD (on November 24, 2021), BOEM received comments (see Exhibit A- 2018 Comments) in response to South Fork Wind’s Construction and Operations Plan (“COP”) regarding issues concerning potential negative impacts on social and economic resources (according to 30 CFR 585.627(a)(7)).

181. The 2018 Comments provide the calculation for the Project’s cost of power from its initial 90-megawatt facility, which is “approximately 22 ¢/kWh.”

182. The 2018 Comments draw BOEM’s attention to South Fork Wind’s noncompliance with 30 CFR 585.627(a)(7) and read as follows: “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. Instead of a family eating at a local restaurant or buying new shoes for their children, this money will go overseas into the pockets of Ørsted, a foreign company [...].”

183. The 2018 Comments draw BOEM’s attention to South Fork Wind’s noncompliance with 30 CFR 585.627(a)(7) and read as follows: “The Applicant has failed to comply with 30 CFR 585.627(a)(7) with specific regard to its potential negative impact upon lower income groups. **Any increase in electricity prices will fall disproportionately on those who can least afford it.**

A family on a low income will have to heat or cool their home in the same way a family on a higher income will have to do, so any increase in electricity prices will represent a larger proportion of a low-income family’s income than it will a higher-income family. This will cause families on lower incomes who are already hurting to suffer further more economic hardship

than families on higher incomes.”

184. BOEM failed to address the Project's adverse impact on low-income families according to 30 CFR 585.627(a)(7).

185. Specifically, South Fork Wind is 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” (30 CFR 585.627(a)(7)).

186. The FEIS limits its analysis of socioeconomic resources to the “ocean economy” (FEIS, at 3-157, PDF 209, last sentence).

187. BOEM defines the ocean economy to be “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)” (FEIS at 3-157, PDF 209, last paragraph).

188. “The FEIS found that the Proposed Project could have, to some extent, beneficial impacts on ... demographics, employment, and economics” (FEIS, at D-8, PDF 100, first paragraph), but BOEM remains silent on any *adverse* economic impacts such as the Project’s cost (of \$2 billion) that outweighs the economic benefits by many times.

189. BOEM’s economic analysis considers *beneficial* economic impacts such as spending in the local economy on capital expenditures (\$185 – 247 million)³⁴ and operational costs (\$6 – \$12 million per year).³⁵ The total *beneficial* economic impact is estimated to be from \$307 – 493

³⁴ Final Environmental Impact Statement (FEIS), at p. F-17, PDF p. 587, Table F-10

³⁵ *Ibid.*

million (over the twenty-year contract term).³⁶ The range depends on whether the offshore wind farm capacity is ninety megawatts (the low estimate) or one hundred and eighty megawatts (the high estimate).

190. LIPA initially valued the (90-megawatt) Project at \$1.6 billion³⁷ but, in September 2020, amended the contract (expanding the facility to 130 megawatts) that now exceeds \$2 billion.³⁸

191. BOEM does not consider the cost (of \$2 billion) in its economic analysis. Ratepayers living in Suffolk County will have to pay for the Project in their electricity bills. That represents money taken from Suffolk County's economy and given to the Project's (indirect) owners, Ørsted A/S and Eversource.

192. BOEM's biased economic analysis accounts for *beneficial* impacts but ignores *adverse* effects that exceed the benefits by four to six and a half times.

193. [deleted]

194. BOEM does *not* acknowledge that the *negative* economic effects are fixed under a power purchase agreement, whereas the *positive* economic impacts are merely *estimates* with little substantive support, given that the project's major components (i.e., the wind turbine generators, submarine cables, etc.) are manufactured overseas.

195. On November 19, 2018, three years *before* BOEM approved the Project, BOEM

³⁶ Local Operating Expenses (with taxes) ranging from \$6.16 to \$12.32 million per year, or from \$123.20 to \$246.40 million over twenty years. These Local Operating Expenses in addition to Local Capital Expenses (with taxes) of \$184.24 to \$246.81 million, is equal to total beneficial economic impacts of \$307.44 – 493.21 million (over 20 years).

³⁷ New York Office of the State Comptroller valuation of the South Fork PPA is \$1,624,738,893 (<https://wwe2.osc.state.ny.us/transparency/contracts/contracttransactions.cfm?Contract=000000000000000024767>),

³⁸ New York Office of the State Comptroller valuation of the South Fork PPA is \$2,013,198,056 (<https://wwe2.osc.state.ny.us/transparency/contracts/contracttransactions.cfm?Contract=000000000000000085553>)

received a letter from the Plaintiff that reads— “The Applicant has failed to comply with 30 CFR 585.627(a)(7) with specific regard to its potential negative impact upon employment.

The Applicant will charge approximately 22 ¢/kWh for its wind-generated electricity (please see calculation right). A similar wind farm, Vineyard Wind, just 20 miles from the Applicant’s proposed South Fork Wind Farm, will charge only 6.5 ¢/kWh.”³⁹

196. BOEM received a similar letter for the second time on February 22, 2021 ⁴⁰ (see ¶¶ 180-217). BOEM did *not* require the Applicant to comply with 30 CFR 585.627(a)(7) or its guidelines regarding the Project’s impact on the energy industry, energy prices, employment, demographics, or environmental justice considerations.

197. The scope of BOEM’s economic analysis is limited to the “ocean economy” around a few coastal ports such as New Bedford (MA), Providence (RI), New London (CT), and Montauk (NY), which includes only 3.9% of Suffolk County (based on population).

198. [deleted]

199. [deleted]

200. As explained in the 2018 Comments to BOEM (at pp. 4 - 5)— “There are well over one million ratepayers living on Long Island who will

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

be forced to absorb into their everyday household budgets vastly inflated prices for electricity ...

The ... wind farm will be a drag on economic growth that will lead to increased unemployment

³⁹ <https://www.regulations.gov/comment/BOEM-2018-0010-0074> (at pp. 4-5)

⁴⁰ <https://www.regulations.gov/comment/BOEM-2020-0066-0343> (at pp. 4-5)

... [and] put Long Island at a distinct disadvantage. ... This will drive economic development and employment away from Long Island toward other states. If a manufacturer is looking for a location to build a new plant, for example, it will likely look to Massachusetts where the price of electricity is less than a third the price that it is on Long Island.”

201. [deleted]

202. BOEM’s allegation that “the Proposed Project could have ... beneficial impacts on ... employment and economics”⁴¹ is undermined by the fact that for every dollar the developer injects into the economy (in the form of *estimated* capital and operational expenses), it withdraws from four to six and a half times that amount.

203. The FEIS’ prejudicial financial analysis fails to recognize the South Fork Wind Project’s *net adverse* economic impact estimated to be from \$1.5 to \$1.7 billion.

204. The FEIS neither identifies nor considers the adverse effects of its proposed activities, specifically the high cost of power, on social and economic resources such as employment and minorities and lower income groups according to NEPA regulations.

205. The FEIS limits its environmental justice analysis to “cities/towns, counties, and states where potentially affected ports or landing sites are located” (at p. 3-168, PDF p. 220).

206. The FEIS limits the area to “[f]ive-km zones [...] drawn around potentially affected ports or landing sites[,]” which further reduces the size of the analysis area (at p. 3-170, PDF p. 222).

207. The FEIS does *not* consider matters of Environmental Justice in any area of Suffolk County *other* than within 3.1 miles (five kilometers) of the Shinnecock Fishing Dock, Greenport Harbor, Montauk, Beach Lane, or Hither Hills.

208. According to the FEIS, the population used to assess Environmental Justice is equal to

⁴¹ ROD at p. D-8, PDF 100, ¶ 1

3.9% of the total population of Suffolk County (at pp. 3-168 to 3-173, PDF pp. 220-225, Tables 3.5.4-1, 3.5.4-2, and 3.5.4-3, Analysis Area “Population in 5-Km Zone” of 58,878 divided by Total Population in Suffolk County 1,497,595).

209. Executive Order 12898– Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations– provides that “each Federal agency shall make achieving environmental justice part of its mission [...].”

210. In the accompanying Memorandum from the President to Heads of Departments and Agencies, Comprehensive Presidential Documents No. 279 (February 11, 1994), the President 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.”

211. Defendants failed to comply with Executive Order 12898.

212. BOEM failed to meet its statutory obligation to make a determination “that economic or social and natural or physical environmental effects are interrelated” to inform the public as to whether the “environmental impact statement shall discuss and give appropriate consideration to these effects on the human environment [emphasis added]” (40 C.F.R. § 1502.16(b)).

213. According to NEPA, BOEM “shall independently evaluate the statement [FEIS] prior to its approval and take responsibility for its scope and contents” (NEPA 1978, 40 CFR 1506.5(c)).

214. The FEIS and ROD neither identify nor considers economic or social impacts resulting from South Fork Wind’s relatively high cost of power and its “effects on the human environment” (40 C.F.R. § 1502.16(b)).

215. South Fork Wind’s high cost of power is contrary to the Administration’s “Action to Spur

Domestic Clean Energy Manufacturing[,]” issued June 6, 2022, Authorizing Defense Production Act to Lower Energy Costs, Strengthen Power Grid, and Create Good-Paying Jobs. The White House Statement’s opening sentence reads (in relevant part): “Today’s clean energy technologies are a critical part of the arsenal we must harness to lower energy costs for families [...] [emphasis added]” (www.whitehouse.gov/briefing-room/statements-releases/2022/06/06/fact-sheet-president-biden-takes-bold-executive-action-to-spur-domestic-clean-energy-manufacturing/).

216. BOEM’s ROD asserts that the Project furthers “some of the goals stated in Executive Order 14008, Tackling the Climate Crisis at Home and Abroad” (ROD, at p. D-28, PDF p. 120, last ¶).

217. Executive Order 14008 reads: “We must strengthen our [...] water protections. [...] We must deliver environmental justice in communities all across America.” (see <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/> Part II).

218. BOEM failed to consider groundwater PFAS contamination and environmental justice issues related to the Project’s *adverse* economic impact.

Not “commercial-scale”

219. In February 2021, BOEM received a document titled “Initial Brief” (dated January 20, 2021) concerning, *inter alia*, the non-competitive nature of the South Fork RFP. BOEM posted the document online at – www.regulations.gov/comment/BOEM-2020-0066-0385 (see “Initial Brief - 1 by Kinsella Jan 20, 2021” BOEM Index Exhibit #009).

220. BOEM received information showing that the joint and equal (indirect) owners of South Fork Wind, Ørsted and Eversource, recommended in a regulatory submission to the New York

State Energy Research and Development Authority (“NYSERDA”) that it “establish a minimum capacity bid of 400 MW” because [citing NYSERDA’s OSW Policy Options Paper] “Small initial projects are not likely to deliver cost savings. Due to diseconomies of scale, the costs per unit of energy for projects of 100 MW and 200 MW in size are significantly higher than those for 400 MW projects. As a result, [...] program costs for such smaller projects would be comparable to those of a 400 MW project despite their smaller size and energy output.” See BOEM Index Exhibit #169, Comments of Bay State Wind that is a joint venture special purpose entity (indirectly) owned by equal partners, Ørsted and Eversource, that also (indirectly) own South Fork Wind (another special purpose entity) in Response to Request for Information OSW-2018.

221. The (indirect) owners of the South Fork Wind Project admit, albeit under the name of Bay State Wind, that small projects like the South Fork Wind Farm are *not* likely to deliver cost savings due to diseconomies of scale.

222. The NYSERDA OSW Policy Options Paper is part of New York’s Offshore Wind Masterplan that prescribes minimum capacity awards of 400 megawatts.

223. According to the NYSERDA OSW Policy Options Paper, the South Fork Wind Farm (of only 130 megawatts) does *not* have a commercial capacity large enough to achieve economic advantages of scale.

224. The South Fork Wind Farm Project does *not* meet the requirements of New York’s Offshore Wind Masterplan.

Uneconomic Design

225. The South Fork Wind Project has a maximum generating capacity of 2 MW per mile of transmission (130 MW divided by 66 miles).

226. The average maximum generating capacity for three offshore wind farms— Revolution

Wind, Sunrise Wind, and Vineyard Wind— in the same area as South Fork Wind is 7.5 MW per mile of transmission (see Appendix 4- SFW Project Tables, Table 1, at p. 1).

227. The South Fork Wind Project plans to install four times more transmission per megawatt capacity than the average of three offshore wind projects in the same area.

228. BOEM failed to take a “hard look” into the economics of the Project and did not compare it to alternatives.

229. BOEM approved a project that is *not* a “commercial-scale” and is *not* economic by design.

No “contractual commitments”

230. Under the heading of Purpose and Need, the FEIS and ROD assert that “South Fork Wind’s goal is to fulfill its contractual commitments to Long Island Power Authority (LIPA) pursuant to a power purchase agreement executed in 2017 [emphasis added].”

231. The “power purchase agreement executed in 2017” is the **2017 PPA**.

232. The alleged “technology-neutral competitive bidding process” is the **South Fork RFP**.

233. BOEM introduces the 2017 PPA and the South Fork RFP into the NEPA process and, therefore, is statutorily mandated to evaluate and take responsibility for any claim upon which it relies related to the 2017 PPA or the South Fork RFP.

234. BOEM does not identify or discuss any “contractual commitments” in the 2017 PPA.

235. [deleted]

236. BOEM adopts South Fork Wind’s goal to fulfill unspecified contractual commitments.

237. BOEM does not attach or incorporate the 2017 PPA by reference into its FEIS or ROD.

238. BOEM cannot measure and assess reasonable alternatives against unspecified contractual commitments.

239. BOEM received a copy of the 2017 PPA in February 2021 and posted it online at –

www.regulations.gov/comment/BOEM-2020-0066-0387 (see “Testimony Pt 2 - Exhibit 03 - Power Purchase Agreement Feb 2017” BOEM Index Exhibit #099).

240. “The agency shall independently evaluate the information submitted [by South Fork Wind] and shall be responsible for its accuracy” (NEPA 1978, 40 CFR 1506.5(a)).

241. BOEM adopts and incorporates South Fork Wind’s goal, as expressed in the 2017 PPA as *its* goal without verifying its contents.

Discrimination: Minorities, Women, Disabled Veterans

242. The 2017 PPA mandates that the “Seller [South Fork Wind] shall comply with the requirements of Appendix 16 with respect to the M/WBE/VET subcontracting goals” (at p. 50, ¶ 12.22). Under the heading of Contract Goals, Appendix 16 “establishes an overall goal of 0 % for Minority and Women-Owned [...], 0 % for Minority-Owned [...] and 0 % for Women-Owned Business Enterprises [...] participation [...].”

243. Appendix 16 reiterates these goals and, in addition, lists New York State Service-Disabled Veteran-Owned Business Participation as follows –

244. “M/WBE/VET Contract Goals

245. 0% Minority and Women’s Business Enterprise Participation

246. 0% Minority Business Enterprise Participation

247. 0% Women’s Business Enterprise Participation

248. 0% New York State Service-Disabled Veteran-Owned Business Participation.”

249. BOEM approved South Fork Wind’s “Contract 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” according to the Amended 2017 PPA.

250. BOEM's stated purpose relies on "contractual commitments" that exclude minorities, women, and NYS Service-Disabled Veterans business owners from participating in a contracting activity related to the Project.

251. The "Contract Goals" that exclude minorities, women, and NYS Service-Disabled Veterans is 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.

XI. HALF-PRICE ALT. IGNORED

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

253. In October 2019, LIPA issued a press release: "LIPA will also buy an estimated 90 MW of offshore wind from the recently announced 1,700 MW of New York State projects." See South Fork Wind Fact Sheet, BOEM Index Exhibit #048 (at p. 3, ¶ 3).

254. The "recently announced 1,700 MW of New York State projects" refers to Empire Wind (816 MW) and Sunrise Wind (880 MW).

255. LIPA can purchase power from only Sunrise Wind due to technical constraints of the Long Island transmission system. Thus, according to the LIPA Fact Sheet, LIPA plans to buy 90 MW of power from Sunrise Wind.

256. [deleted]

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

258. The Fact Sheet states that “LIPA will responsibly buy offshore wind,” under which it reads: “Share of Recent NYSERDA Awards: Estimated @ 90 MW” and “Future Offshore Wind Projects: Estimated @ 800+MW” (see South Fork Wind Fact Sheet, BOEM Index Exhibit #048 (at p. 3, top right graphic).

259. LIPA plans to buy an additional 800 MW of offshore wind generating capacity.

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

261. The connected project would be technically, environmentally, and economically superior.

262. South Fork Wind and Sunrise Wind use the same alternating current interconnection cable array that can be interconnected.

263. The South Fork Wind Farm is only a few miles from the Sunrise Wind Farm.

264. South Fork Wind and Sunrise Wind are owned (indirectly) by the same joint and equal partners, Ørsted and Eversource.

265. The interconnected Sunrise Alternative would avoid disturbing onshore PFAS contamination, reduce the offshore impact on the marine environment by eliminating sixty-six miles of trenching and reducing transmission cable requirements, and reduce the impact on the onshore community.

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

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

268. The Commission's final ruling identifies the Sunrise/South Fork alternative *eight times*.

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

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

271. BOEM neither “evaluates” nor “discloses” critical environmental impacts concerning known PFAS contamination of soil and groundwater along Beach Lane.

272. BOEM neither acknowledged nor considered the alternative to South Fork Wind that would combine it with Sunrise Wind.

273 – 280 [deleted]

XII. 2015 SOUTH FORK RFP

281. BOEM refers to and relies upon the (false) claim that South Fork Wind’s “power purchase agreement executed in 2017 result[ed] from LIPA’s technology-neutral competitive bidding process [emphasis added]” (ROD, at 7, PDF 9, seventh paragraph).

282. BOEM copied the language from South Fork Wind’s Construction and Operations Plan dated May 2021 (see p. I-29).

283.00 “LIPA’s technology-neutral competitive bidding process” refers to the South Fork RFP.

RFP not “technology-neutral.”

284. 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 posted it online – www.regulations.gov/comment/BOEM-2020-0066-0385 (see “Motion to Reopen Supp - Exhibit A - LIPA Memo Re South Fork RFP” BOEM Index Exhibit #030).

285. The LIPA Memo reads: “In some instances, proposals were advanced if they were the only proposal offering a particular technology [...].”

286. The LIPA Memo 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.” (NB: The square brackets are as written in the original document, and “Deepwater Wind [One] [DWW100]” refers to the 90 MW South Fork Wind Project.)

287. The LIPA Memo continues: “Two proposals (i.e., NextEra Energy [NEX100] and Halmar International [HAL100]) were designated because they were the only proposals offering a particular technology.” (NB: The square brackets are written in the original document.)

288. BOEM received a copy of a memorandum from LIPA showing that the South Fork RFP considered technology when advancing proposals.

289. BOEM received objective evidence (written by LIPA) showing that the South Fork RFP was *not* “neutral” concerning technology.

290. BOEM asserts that the 2017 PPA resulted from a “technology-neutral competitive bidding process” when it received substantive evidence to the contrary.

291. The “power purchase agreement executed in 2017” did *not* result “from LIPA’s technology-neutral competitive bidding process.”

292. No such “power purchase agreement executed in 2017 resulting from LIPA’s technology-neutral competitive bidding process” exists.

RFP not “competitive.”

292.01 The South Fork Wind Farm proposal was the *only* offshore wind proposal entered for consideration in the South Fork RFP procurement.

292.02 The South Fork RFP was a manipulated procurement process designed to shut out competitive bidding from other offshore wind developers that permitted unfair advantage and favoritism to the benefit of the South Fork Wind Farm proposal.

292.03 On January 11, 2017, in his State of the State address, then-Governor Andrew M. Cuomo interfered with the procurement process to advance the interests of a proposal for offshore wind resources to the detriment of twenty other bids submitted for consideration in the South Fork RFP. “The Governor calls on the Long Island Power Authority to approve this critical project,” referring to the “offshore wind development ... off the East End of Long Island” (see Exhibit 02 – Cuomo 2017 State of the State Address at 55, PDF 57, last paragraph).

Governor Cuomo appointed five of the nine trustees.

292.04 Fourteen days later, during the LIPA Board of Trustees meeting (on January 25, 2021), the “Board of Trustees authorizes the Chief Executive Officer [...] to execute a PPA [...] to implement the Authority’s purchase of energy [...] South Fork Wind Farm project” (see Exhibit 29 at p. 8).

292.05 On January 25, 2017, the Board of Trustees of LIPA agreed to pay more than double the estimated cost of building the South Fork Wind Farm. According to South Fork Wind (formerly Deepwater Wind South Fork), the South Fork Wind Farm (including the transmission

system) would cost \$740 million.⁴² The power purchase agreement between LIPA and South Fork Wind commits ratepayers to a contract LIPA values at \$1.624 billion.⁴³ Deepwater Wind's gross profit (excluding operations and maintenance) is \$885 million, representing 120% of the estimated cost (\$740 million).

292.06 The South Fork RFP was not a solicitation for offshore wind resources. The RFP is ninety-four pages long and does *not* mention “offshore wind” once. By contrast, the RFP mentions “energy storage” twenty times, “fuel” (for fossil-fuel generators) thirty-six times, “photovoltaic”/“solar” generation three times, and even “geothermal” once. Offshore wind is conspicuously missing (see BOEM Index Exhibit #102).

292.07 Six months after releasing the South Fork RFP (on June 24, 2015), a “Renewables RFP” was issued (on December 22, 2015). The Renewables RFP explicitly includes offshore wind, whereas the South Fork RFP does *not* (Exhibit 15 – Renewables RFP (Dec 2015)).

292.08 The Renewables RFP allows for “off-island projects” (such as offshore wind). The South Fork RFP calls *only* for “local resources” that are “located on Long Island[,]” thereby precluding offshore wind resources.⁴⁴

⁴² According to the Wall Street Journal, the New York Times, Newsday, and the Express News Group. See Exhibit 10 (click here) - Wind farm project approved by LIPA trustees by Mark Harrington published in Newsday on January 25, 2017. Exhibit 11 (click here) - New York State's First Offshore Wind Farm Gets Green Light Construction on the \$740 million project on Long Island will start in 2020 by Joseph De Avila published in the Wall Street Journal on January 25, 2017. Exhibit 12 (click here) - UPDATE: LIPA Approves \$740 Million Wind Farm To Power The South Fork published by the Express News Group. Exhibit 33 (click here) - Nation's Largest Offshore Wind Farm Will Be Built Off Long Island by Diane Cardwell published in the New York Times on January 25, 2017.

⁴³ BOEM Index Exhibit #040 (click here) – On January 30, LIPA's Chief Financial Officer, Joseph Branco, signed a Contract Encumbrance Request valuing the proposed project at one billion, six hundred and twenty four million, seven hundred and thirty eight thousand and eight hundred and ninety three dollars (\$1,624,738,893).

⁴⁴ Exhibit 15 (click here) - Renewables RFP, Dec 2015 (at p. 7, ¶ 2.1.11) - Request for Proposals for New Renewable Capacity and Energy (available online at PSEG Long Island, click here).

292.09 The Renewables RFP allows for resources to “be connected by a new transmission line dedicated to the delivery of power to Zone K” (referring to Long Island). The South Fork RFP is designed to defer new transmission lines and seeks proposals as “an alternative” to new transmission lines [emphasis added].⁴⁵

292.10 The Renewables RFP allows for a staggered installation that permits a commercial operation date (“COD”) to be as late as May 1, 2024.⁴⁶ The South Fork RFP’s latest COD is May 1, 2019. The South Fork Wind Farm proposal will miss that target by at least four years.⁴⁷

292.11 The submittal deadline for the Renewables RFP remained open for six months *after* the submittal deadline had closed for the South Fork RFP.⁴⁸ Still, the South Fork Wind proposal for offshore wind power generation was awarded from within the South Fork RFP that was neither designed nor a solicitation for offshore wind. By inserting the South Fork Wind bid into an incongruous procurement, the South Fork Wind proposal was guaranteed a clear field free of

Also, see Exhibit P – Notice to Proposers (click here) - Notice to Proposers South Fork RFP Cover Letter signed by Paul Napoli, Vice President of Power Markets, PSEG Long Island, addressed “To All Interested Proposers” dated June 24, 2015 (available online at PSEG Long Island, click here), and PSC DMM 007 p.1 Exhibit H).

⁴⁵ Exhibit 15 (click here) - Renewables RFP, Dec 2015 (at p. 7, ¶ 2.1.9 and 2.1.11) - Request for Proposals for New Renewable Capacity and Energy (available online at PSEG Long Island, click here). Also, see BOEM Index Exhibit #102 - South Fork RFP, Jun 2015 (version date of November 10, 2015) (at p. 2, penultimate paragraph) (available online at PSEG Long Island, click here, and PSC DMM 189 p. 1 Exhibit 02).

⁴⁶ Exhibit 15 (click here) - Renewables RFP, Dec 2015 (at p. 11, footnote 3) that reads: “Staggered startup will be allowed to occur in blocks no smaller than 25% of Project size with a minimum of 1 month between block startup with total Project capacity installed within two years [emphasis added]. Power delivery from the first block [which] shall be no later than May 1, 2022 [emphasis added]” (available online at PSEG Long Island, click here).

⁴⁷ BOEM Index Exhibit #102 - South Fork RFP, Jun 2015 (at p. 8). Although the commercial operation date is May 1, 2019, the RFP requests an “alternative pricing for the delay of project COD by one year” (see 2.2.1. Delayed COD). Available online at PSEG Long Island, click here, and PSC DMM 189 p. 1 Exhibit 02.

⁴⁸ The submittal deadline for the Renewable RFP is June 2016 (see Exhibit 15 (click here) - Renewables RFP, Dec 2015, at p. 11). The submittal deadline for the South Fork RFP is December 2, 2015 (see BOEM Index Exhibit #102, at p. 7).

competition from other offshore wind farms.

292.12 Despite being written to accommodate such resources, *no* offshore wind contract was awarded under the Renewables RFP (see [Exhibit 16](#)).⁴⁹

292.13 In November 2018, the New York State Energy Research and Development Authority (hereinafter “NYSERDA”) issued an RFP for Offshore Wind Renewable Energy Certificates (“NYSERDA OSW RFP”). The RFP mentions “offshore wind” one hundred and thirty-two (132) times.⁵⁰ By comparison, the South Fork RFP does *not* mention “offshore wind” at all.

292.14 The NYSEDA OSW RFP was a competitive procurement where four offshore wind farm developers competed against each other. The procurement resulted in a contract award to, *inter alia*, Sunrise Wind, where the average price of electrical energy is 8 cents (per kilowatt-hour over the life of the contract). After the procurement awards had been announced, the identities of all four bidders were publicly disclosed.⁵¹ By comparison, the South Fork RFP was a non-competitive procurement where *only one bidder*, Deepwater Wind, submitted a proposal for an offshore wind farm. The South Fork RFP resulted in a contract award to Deepwater Wind at an average price of 22 cents per kilowatt-hour (see [BOEM Index Exhibit #040](#)). Neither LIPA nor PSEG Long Island disclosed the identities of the other bidders until four years later.

⁴⁹ [Exhibit 16 \(click here\)](#) - Awards- Renewable RFP (last accessed July 11, 2021) - Pursuant to the Renewable RFP, LIPA and PSEG Long Island awarded a power purchase agreement only to LI Solar Generation LLC for Solar Photovoltaic (22.9 MW). Available online at PSEG Long Island, [click here](#).

⁵⁰ [Exhibit 17 \(click here\)](#) - NYSEDA OSW RFP (2018) - NYS Energy Research and Development Authority (“NYSEDA”) Purchase of Offshore Wind Renewable Energy Certificates Request for Proposals ORECRFP18-1, Released November 8, 2018 (available online at NYSEDA, [click here](#), and PSC [DMM 205 p. 1 Exhibit 3-6](#).)

⁵¹ Atlantic Shores Offshore Wind LLC, Empire Wind Project (Equinor US Holdings, Inc.), Liberty Wind (Vineyard Wind LLC), and Sunrise Wind (Bay State Wind LLC). See NYSEDA 2018 Solicitation, Four Major Developers Proposed, ([nyserda.ny.gov, click here](#)).

RFP Irregularities

293. During Public Hearing #3 on February 16, 2021, BOEM heard the following oral testimony— “The company that administered the procurement process, PSEG Long Island, awarded South Fork Wind [a] power purchase agreement to its business partner in a noncompetitive recruitment [procurement] process [emphasis added].”

294. In February 2021, BOEM received comments concerning the award of a “PPA pursuant to a non-competitive opaque procurement process [...] [emphasis added].” BOEM posted the letter online at www.regulations.gov/comment/BOEM-2020-0066-0343 (see “South Fork Wind, DEIS Comments by Kinsella (Feb 22, 2021)” BOEM Index Exhibit #001).

295. In February 2021, BOEM received a document titled Initial Brief (dated January 20, 2021) concerning the non-competitive nature of the South Fork RFP. BOEM posted the record online – www.regulations.gov/comment/BOEM-2020-0066-0385 (see “Initial Brief - 1 by Kinsella Jan 20, 2021” BOEM Index Exhibit #009).

296. The Initial Brief reads as follows –

“[S]ubstantial evidence exists sufficient to sustain the burden of proof required to rebut the presumption of validity attached to the PPA inasmuch as the PPA was awarded to the Applicant subject to a competitive bidding process. Substantial evidence rebutting the presumption of validity includes written testimony (of 52 pages) by me signed before a notary together with thirty (30) exhibits mostly from New York State and US federal agencies (of 640 pages), and sixteen (16) exhibits containing offshore wind speed data from the US National Oceanic and Atmospheric Administration (NOAA) (of 8,828 pages). I submitted testimony and exhibits [...] under the title: Testimony Part 2 – Public Interest, Need & Price.”

297. In February 2021, BOEM received all the documents (referred to in the preceding paragraph) and posted them online –

www.regulations.gov/comment/BOEM-2020-0066-0343,

www.regulations.gov/comment/BOEM-2020-0066-0384,

www.regulations.gov/comment/BOEM-2020-0066-0385,

www.regulations.gov/comment/BOEM-2020-0066-0386,

www.regulations.gov/comment/BOEM-2020-0066-0387.

298. – 303 (moved to ¶¶ 73.01 and 108.01 - 108.05)

304. In June 2015, PSEG Long Island LLC, acting for and on behalf of LIPA, sent notice “To All Interested Proposers[.]” soliciting proposals in the South Fork RFP “to acquire sufficient local resources to meet expected peak load requirements until at least 2022 in the South Fork of Long Island, and 2030 for certain areas east of Buell. Such resources will be located on Long Island” (see Exhibit P- Notice to Proposers).

305. The LIPA Memo states, “Deepwater Wind [South Fork Wind] was the only proposal offering offshore wind technology.”

306. During the South Fork RFP procurement process, South Fork Wind did *not* compete with other proposals offering offshore wind technology.

307. If the South Fork RFP were a competitive bidding process, all bidders would have had to compete equally according to the same objectives and minimum specifications and requirements according to the RFP.

Mandatory Criteria

308. According to the South Fork RFP and the RFP Evaluation Guide, LIPA should have disqualified South Fork Wind’s offshore wind farm proposal at the outset.

309. According to the SFRFP Evaluation Guide, “Mandatory Criteria” is used to measure “Proposals’ compliance to the RFP and [...] to determine whether the Proposal can be accepted. If this information is not provided at the Proposal Submittal Deadline, the Proposal will be eliminated from consideration.”

310. According to the LIPA Memo, LIPA overlooked four instances where the South Fork Wind Project did not meet mandatory criteria while disqualifying two of the 21 bids for not meeting mandatory criteria.

311. The RFP Evaluation Guide lists a mandatory criterion, a May 1, 2019, commercial operating date that is a requirement of the RFP.

312. South Fork Wind proposed December 31, 2022, as the commercial operating date, three and a half years later than the required date, which should have led to the immediate disqualification in the first phase of the procurement process.

313. The South Fork RFP required proposals to have a pricing mechanism for a delay.

314. That mechanism, however, only allowed for a one-year delay, May 1, 2020, which makes Deepwater Wind’s proposed commercial operating date two and half years later than any delay that could still meet the RFP’s requirements.

315. Mandatory criteria included the RFP requirement that any “[p]roposal must contain the location of any proposed facility requiring construction and/or permitting” by the submittal deadline (of December 2, 2015).

316. Upon information and belief, South Fork Wind did not have locations for proposed facilities until one and a half years *after* the submittal deadline.

317. According to the South Fork RFP, a proposal, as a stand-alone solution, could not be conditioned on some other act or omission under LIPA’s mandatory criteria.

318. According to the LIPA Memo, LIPA joined Deepwater Wind's offshore wind project to separate battery storage proposals to make it appear workable.

319. In other words, LIPA acted to salvage South Fork Wind's fatally flawed proposal by adding two conditional acts – agreements for installing two battery storage projects.

Minimum Specifications

320. The South Fork RFP requested proposals for “local resources” “located on Long Island” to meet “peak load” or peak electrical demand as an alternative to adding new transmission lines.

321. The RFP mandated that power production resources comply with “Operating Modes” consistent with dispatchable resources that can be turned on or ramped up remotely in response to a “trigger signal.”

322. The RFP required a commercial operating date no later than May 1, 2019, with an alternative date and pricing option for a one-year delay, no later than May 1, 2020.

323. The RFP required that each proposal “stand alone” in satisfying the RFP's requirements.

324. Irrespective of the rules governing the South Fork RFP, LIPA selected the South Fork Wind Project despite its many deficiencies (as follows)—

325. **Deficiency #1:** The project cannot reliably supply power to satisfy the peak demand for electricity in response to air conditioner usage on the South Fork in the hotter months from June to September.

326. **Deficiency #2:** The project is not a “local resource” that is “located on Long Island” but a power generation resource located on the Outer Continental Shelf in the Atlantic Ocean.

327. **Deficiency #3:** The project is not an alternative to adding new transmission lines but *is* a new 60-mile-long transmission line.

328. **Deficiency #4:** The Project does not defer the need for new transmission lines but instead

requires substantial transmission upgrades;

329. **Deficiency #5**: The Project cannot be a source of power until at least 2023, with a proposed commercial operating date of December 31, 2022.

330. **Deficiency #6**: The Project is not a dispatchable resource capable of functioning in Operating Modes that require power to be turned on in response to a “trigger signal” (because turbines that depend on the wind cannot be turned on as demand requires).

331. **Deficiency #7**: The Project is not a resource designed to meet “performance calculations” that are “no less severe than [...] [a] maximum steady wind velocity [of] 130 mph” (offshore wind turbines cease generating power at a wind speed closer to 55 mph).

332 – 335 [deleted]

336. The South Fork Wind Project did *not* comply with all mandatory criteria according to the South Fork RFP and the SFRFP Evaluation Guide.

337. The South Fork Wind Project did *not* comply with the South Fork RFP’s main objectives.

338. The South Fork Wind Project did *not* comply with applicable specifications and/or requirements according to the South Fork RFP.

339. The South Fork Wind Project was the only proposal (not to be disqualified) that failed to satisfy the main objectives of the South Fork RFP.

340. The South Fork RFP had been fixed to shut out competitive bidding from other offshore wind farm developers.

341. LIPA awarded a power purchase agreement to South Fork Wind for a proposal that failed to meet the minimum specifications and requirements of the South Fork RFP.

342. During the South Fork RFP procurement process, bidders were not treated equally.

343. The South Fork RFP procurement was not a level playing field where bidders’ proposals

competed on the merits by the same rules.

344. The South Fork RFP process permitted unfair advantage and favoritism.

345. The South Fork RFP was not a “competitive” bidding process.

346. According to NEPA, Defendants “shall independently evaluate the information submitted [by South Fork Wind] and shall be responsible for its accuracy.” Further, “[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 [FEIS] prior to its approval and take responsibility for its scope and contents” (NEPA 1978, 40 CFR § 1506.5).

347. Despite receiving clear substantive evidence rebutting the presumption of regularity attached to the South Fork RFP, Defendants DOI and BOEM approved the Project without independently evaluating and verifying the South Fork RFP to ensure it was a “technology-neutral competitive bidding process.”

Peak Demand

348. According to the LIPA Memo, the Project’s purpose as expressed in the South Fork RFP is as follows— “[T]he basic objective of the RFP was to acquire sufficient local resources to meet expected peak load requirements until at least 2022 in the South Fork, and 2030 in the east of Buell area [internal quotes removed][emphasis added].”

349. BOEM did not identify, discuss, consider, or “specify the underlying purpose and need” identified by LIPA in the South Fork RFP.

350. BOEM received objective evidence in internal LIPA documents showing that the South Fork Wind Project cannot reliably provide power to meet peak demand. BOEM uploaded the available documents— www.regulations.gov/comment/BOEM-2020-0066-0385 (see “Motion to Reopen Record Supp by Kinsella Jan 29 2021” BOEM Index Exhibit #029 and related exhibits).

351. BOEM received a copy of an internal LIPA report stating that “wind alone has a very small effective capacity due to the distinct statistical possibility that it may have very low available power output at the time of a peak-period contingency” (See WESC Report “Calculation of Effective Forced Outage Rate of Offshore Wind” BOEM Index Exhibit #035, at p. 2, last ¶).

352. BOEM received a copy of an internal LIPA report stating that its “[i]nitial analysis of temperature/wind correlation in the Block Island data provided by DWW [South Fork Wind] indicates that such a correlation may exist[,]” referring to a “correlation between high load and persistent low-wind conditions” (see WESC Report, SF RFP Portfolio Load Cycle Analysis” BOEM Index Exhibit #034, at p. 3, last paragraph).

353. BOEM received a copy of an internal LIPA report stating that, based on data provided by South Fork Wind, the “offshore wind project at P90 probability level would have a May through September Peak Period unavailability [...] of 29.9% without the assistance of LI Energy Storage battery [emphasis added].” The report continues: “Without the [33 MW] battery, shortfalls occur on 77 of the 152 Peak Period days, or about 50% of the days [emphasis added].” Moreover, there “are periods of up to 4 consecutive days where Wind+Battery [33 MW] shortfalls are occurring in August and September [emphasis added].” (See report, South Fork RFP Deepwater Offshore Wind Proposal EFOR Analysis” BOEM Index Exhibit #036, at pp. 2-3).

354. According to data provided by the U.S. Energy Information Administration (“USEIA”), the actual average generating capacity of the Block Island Wind Farm (over five years from 2017 to 2021) was 23.6% for August, which is less than half the average output (of 50.6%) for the cooler months of the year (November through to January)(see Exhibit G- BIWF Capacity (2017-2021).

355. BOEM received that information in an Excel spreadsheet but summarized output data for four years from 2017 to 2020. The actual average generating capacity of the Block Island Wind

Farm (2017-2020) was 27.8% for August, which is around half the average output (of 51.8%) for the cooler months of the year (November through to January). BOEM uploaded the spreadsheet that is available online at— www.regulations.gov/comment/BOEM-2020-0066-0384 (see “Block Island Wind Farm BIWF Capacity (2017-2020)” BOEM Index Exhibit #182).

356. BOEM received Testimony based on wind speed data provided by the U.S. National Oceanic and Atmospheric Administration (“NOAA”) on the correlation between onshore summer-time temperatures and the degree to which a facility that relies on offshore wind for power generation cannot reliably provide power to meet peak demand in response to air conditioner usage, and periods when such a facility may not provide any power at all. BOEM uploaded the testimony together with supporting documents that are available at— www.regulations.gov/comment/BOEM-2020-0066-0387 (see “18-T-0604 - Testimony Part 2 - Public Interest Price Oct 9, 2020” BOEM Index Exhibit #099).

357. BOEM received clear substantive evidence that the South Fork Wind Project could not reliably provide power to meet “peak load requirements [...] in the South Fork [...].”

358. Defendants DOI and BOEM ignored evidence showing that the Project’s “basic objective” was to acquire resources “to meet expected peak load requirements” in the South Fork.”

XIII. COASTAL ZONE MANAGEMENT

359. The U.S. Office of Ocean and Coastal Resources Management is part of the U.S. National Oceanic and Atmospheric Administration (“NOAA”), an agency of the U.S. Department of Commerce.

360. The U.S. Office of Ocean and Coastal Resources Management approved the Town of East Hampton Local Waterfront Revitalization Program (“LWRP”) (in August 2008) pursuant to

the Coastal Zone Management Act (“CZMA”) and implementing regulations 15 C.F.R. part 923 (see Exhibit H- CZMA LWRP).

361. The Town of East Hampton LWRP contains the enforceable policies of the State of New York’s Coastal Zone Management Program applicable to the project’s consistency review.

362. “East Hampton Town has an overwhelming interest in preserving and protecting its water resources [...] Groundwater must be carefully monitored, as pipelines carry water from one end of the Town [...] Remediation of polluted groundwater and surface waters, restoring damaged wetlands and terrestrial and marine ecologies [...] must be undertaken to avoid even more costly and complex solutions in the future. [...] *Fresh Ponds* [...] [and] *Coastal Ponds* [...] are linked to both the saltwater/tidal interface and to the underground aquifers, the sole source of drinking water for the Town.” (see Exhibit H- CZMA LWRP, at XII-1, PDF 554, ¶ 2.)

363. In 1995, the Town established a Harbor Protection Overlay District (“HPOD”) to protect the surface water bodies in the Town, including Georgica Pond and Wainscott Pond, “by regulating the most immediate contributing areas surrounding them” (*id.* at XII-17, PDF 570, ¶ 5).

364. The Project’s construction corridor is upgradient and adjacent for over one thousand feet (1,000 ft) to the HPOD that, is designed to protect the sensitive environment of Georgica Pond.

Groundwater Contamination

365. The U.S. Office of Ocean and Coastal Resources Management approved the East Hampton Town LWRP in 2008. The program states that “hazardous materials pose direct risks to ground and surface waters and wetlands. These include [...] chemicals and solvents, both households and commercial, used for [...] all manner of natural and synthetic materials” (*id.* at XII-19, PDF 572, ¶ 7). The broad definition of “hazardous materials” includes PFAS chemicals.

366. “On the South Fork, only the upper two aquifers contain fresh-water and, in many areas of

the town, only the Upper Glacial aquifer contains significant quantities of freshwater. [...] In East Hampton, “drinking water supplies are limited to the Upper Glacial and [upper] portions of the Magothy aquifers. The deep flow recharge areas are located in the central portion of the South Fork. Movement within the aquifers is lateral and vertical.” (*id.* at XII-43, PDF 596, ¶¶ 3-4.)

367. “The future quality of potable water within the town will be dependant upon the town's ability to successfully manage this deep flow recharge area and limit the presence of sources of pollution, including residential and commercial development” (see Exhibit I- Water Resources Mgt Plan, at 21, PDF 36, ¶ 3).

368. “Since the quantity of water is great and the movement slow, this water, if contaminated, would remain so for decades. Closer to the coastal areas, elevation drops, the lens is thinner and movement is predominantly lateral. Freshwater moves toward shallow flow streams and discharges directly to the ocean and bays across the freshwater-saline interface.” (See Exhibit H-CZMA LWRP, at XII-43, PDF 596, ¶ 4.)

369. CZMA Enforceable Policy 38 reads— “The quality and quantity of surface water and groundwater supplies, will be conserved and protected, particularly where such waters constitute the primary or sole-source of water supply.” (*id.* at XII-72, PDF 625, ¶ 6.)

370. CZMA Enforceable Policy 38a reads— “Maintain water resources as near to their natural condition of purity as reasonably possible to safeguard public health” (*id.*, ¶ 7).

371. The LWRP explanation of policies 38 and 38a reads— “Groundwater is the principle source of drinking water in the Town and therefore must be protected. Since Long Island's groundwater supply has been designated a ‘sole source aquifer’, all actions must be reviewed relative to their impacts on the Long Island aquifer” (*id.*, ¶ 8).

372. On May 27, 2021, BOEM approved the New York State Coastal Zone Management

Consistency Statement (“NYS CZM Statement”) for the South Fork Wind Project (Exhibit 08 – NYSDOS F-2018-1192).

373. Under Enforceable Policy 38, the NYS CZM Statement (falsely) asserts that “[t]he SFEC does not involve the use of groundwater resources and no groundwater resources are anticipated to be impacted” (Exhibit 07, at A-1-7, PDF 11, ¶ 38). On the contrary, the Project’s concrete duct banks and vaults will intersect with groundwater at some locations and impact groundwater.

374. The NY CZM Statement remains silent on Enforceable Policy 38a. It does *not* concur with the policy of “[m]aintain[ing] water resources as near to their natural condition of purity as reasonably possible to safeguard public health” (Exhibit H, at XII-72, PDF 625).

375. The Project ignores guideline number (8) for CZMA Enforceable Policies 38 and 38a, that “[d]iscourage[s] the siting of commercial or industrial facilities with the potential for ground or surface water pollution” (*id.*, p. XII-73, PDF 626).

376. As described (below), the Project will adversely impact human health and the environment by exacerbating, prolonging, enhancing, and spreading PFAS contamination in soil and groundwater.

376.01 The Project’s approved Coastal Zone Management Consistency Statements (“NY CZM Statement”) for New York alleges that the New York State “DOS [Department of State] ... concur[s] with South Fork’s certification that the activities described in detail in the COP [dated May 7, 2021] will be conducted in a manner that is fully consistent with the enforceable policies of the CMP” (see Exhibit 08, at 1, second paragraph). Although NYS DOS fraudulently asserted that the South Fork Wind Project complies with the federally approved CZMA Enforceable Policies, BOEM is *not* relieved of its statutory obligation to evaluate, verify, and take responsibility for any information it receives.

Significant Coastal Fish and Wildlife Habitats

377. BOEM approved the Project's cable corridor between the locally designated Significant Coastal Fish and Wildlife Habitats of Wainscott Pond (NYSDEC-classified Freshwater Wetland) and Georgica Pond, which supports brackish wetlands and an abundance of wildlife of which some are endangered or threatened.

378. The Significant Coastal Fish and Wildlife Habitat of Georgica Pond is described under CZMA Policy 7 (see Exhibit H- CZMA LWRP, at III-49, PDF 202, third paragraph).

379. The Significant Coastal Fish and Wildlife Habitat of Wainscott Pond is described within the East Hampton Town LWRP Policy 7 (*id.* at III-50, PDF 203, fourth paragraph).

380. In 1990, the Town of East Hampton's Assistant Environmental Protection Director issued a report on Wainscott Pond degraded water quality and poor ecology, including "[f]ish kills from low oxygen levels [that] occur periodically" (*id.*, at III-50-51, PDF 203-4).

381. East Hampton Town LWRP continues: "Any activities that would further degrade water quality [...] would have a significant impact on fish and wildlife species inhabiting Wainscott Pond. All species of fish and wildlife may be affected by pollution from chemical contamination. [...] Wetland areas surrounding the pond should be restored to improve both water quality and wildlife habitat" (*id.*, at III-50-51, PDF 203-4).

382. The freshwater habitat of Wainscott Pond is approximately eight hundred feet (800 ft) to the west of the SFEC construction corridor.

383. The habitat of Georgica Pond is approximately five hundred feet (500 ft) to the northwest of the corridor (at Wainscott NW Road).

384. The hydrogeology beneath the SFEC construction corridor route is connected via groundwater flow to the hydrogeology of Wainscott Pond and Georgica Pond.

385. South Fork Wind has begun and plans to continue excavation and horizontal directional drilling activities on Beach Lane and Wainscott North West Road (and at other locations) where it will encounter contaminated groundwater.

386. Groundwater beneath Beach Lane contains high levels of PFAS contamination, such as PFOA contamination detected in a groundwater monitoring well (MW-4A) at 82 parts per trillion, exceeding the 2016 EPA Health Advisory Levels.

387. Groundwater beneath Wainscott NW Road contains high concentration levels of PFAS contamination, such as PFOS contamination detected in a groundwater monitoring well (MW-15A) at a concentration level of 15 ppt that exceeds the NYS Maximum Contamination Limit.

388. “Wainscott Pond” is *not* mentioned in the FEIS or ROD.

389. BOEM did not consider the freshwater habitat of Wainscott Pond.

390. CZMA Enforceable Policy 44 reads— “Preserve and protect ... freshwater wetlands and preserve the benefits derived from these areas” (*id.*, at XII-76, PDF 629). It explains that “[a]ll structures and uses ... shall be ... in a location so that no wetland will be diminished in size, polluted, degraded or lost, or placed in peril in order to establish the structure or use” (*id.*, at XII-78, PDF 631, ¶ 1).

391. The Project’s concrete duct banks and vaults will pollute, degrade, and risk placing the Wainscott Pond and Georgivca Pond habitats in peril.

392. According to testimony submitted by South Fork Wind in the NYSPSC proceeding, its underground concrete duct banks and large vaults may prolong PFAS contamination in groundwater via diffusion.

393. In the instant matter, diffusion occurs where PFAS contaminant mass moves into lower permeability materials such as concrete, enhancing “the long-term persistence of PFAS in

groundwater. For instance, at one site PFAS penetrated 12 cm into a concrete pad at a fire training area, and diffusion was contributing process (Baduel, Paxman, and Mueller 2015).” See Exhibit J- ITRC, PFAS Fate & Transport, Mar 2018 (at p. 6, last ¶).

394. “Back-diffusion: PFAS dissolved in groundwater that accumulated in lower permeability silt/clay layers below the water table may diffuse into the higher permeability zones due to changing relative concentrations” (see Exhibit K- ITRC, PFAS Fate & Transport, Aug 2021 (at PDF p. 5, point 2).

395. The Project’s underground concrete duct banks and vaults will run for approximately two miles through an area known for PFAS contamination of soil and groundwater.

396. The concrete duct banks and vaults will act to retain PFAS contaminants in the concrete materials, and via a process of “back-diffusion out of these low permeability materials may result in the longterm persistence of PFAS in groundwater even after source removal and remediation” (*id.*, at PDF p. 9, ¶ 6).

397. At some locations, underground concrete duct banks and vaults have been installed or will be installed where they intersect with groundwater.

398. According to the U.S. Geographic Survey’s National Water Information System, groundwater levels vary seasonally (over the short term) and in the long term by up to eight feet (see Exhibit E- 2022 Comments, at pp 10-11, Figs 4-5).

399. Suffolk County Department of Health Services detected PFAS contamination exceeding New York State’s Maximum Contamination Level (10 ppt) 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 PFAS contamination (65) represents thirty-two percent (32%) of the total number of contaminated wells in Suffolk County (202). See Exhibit M- PFAS

Data, Suffolk County (Newsday, Apr 2022).

400. The concrete duct banks and vaults and the disturbed excavation will become a preferential pathway for the movement of PFAS and, as such, will transport PFAS contaminants to locations that otherwise would not be impacted.

401. “Subsurface features, including utility lines: Preferential pathways may result from subsurface features. For example, the flow may seep into or out of nonwatertight sewer lines based upon groundwater elevations relative to the utility. The bedding material of a subsurface line may also convey groundwater.” (See Exhibit L- ITRC, PFAS- Site Characterization, Aug 2021 (at p. 5, point 9).

402. “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).

403. The Project’s adverse environmental impact from installing concrete duct banks and vaults in an area where groundwater contains high levels of PFAS contamination will exacerbate, prolong, and enhance such contamination.

404. The Project’s adverse environmental impact will impact sensitive habitats in proximity to the west and east of the Project’s construction corridor through groundwater flow.

Siting of Energy Facilities

405. [deleted]

406. [deleted]

407. CZMA Enforceable Policy 27 continues– “Decisions on the siting and construction of

major energy facilities in the coastal area will be based on public energy needs, compatibility of such facilities with the environment, and the facility's need for shorefront location" (*id.*, p. XI-1, PDF p. 549), and explains that a "determination of public need for energy is the first step in the process for siting new facilities."

408. Policy 27 refers explicitly to transmission lines under Article VII of New York State's Public Service Law that "establishes the basis for determining the compatibility of these facilities with the environment and the necessity for a shorefront location" (*id.*, p. XI-1, PDF p. 549).

409. As explained in detail in the information provided to BOEM, South Fork Wind "failed to sustain its burden to show a need for its facility[,] that is defined within the South Fork RFP to serve as "an alternative to adding new transmission lines, [...] to acquire sufficient local resources to meet expected peak load requirements until at least 2022 in the South Fork" (see BOEM Exhibit #009, at pp. 10-15).

410. The project BOEM approved is contrary to CZMA Enforceable Policy 27.

XIV. ATLANTIC COD: POPULATION-LEVEL IMPACTS

Collapse of Atlantic Cod Stock

410.01 In 2011, the Commercial Landings for Atlantic cod (for Massachusetts, Main, New York, and Rhode Island) was \$30,091,030. Over the next ten years, Commercial Landings collapsed (by 91%) to only \$2,787,289 (in 2021).⁵²

410.02 For twelve years from 2000 through 2011, average Commercial Landings were \$24,837,408 each year. By comparison, for the past five years (from 2017 through 2021),

⁵² See Exhibit 05 – NOAA Fisheries of the United States Report ("FUS Report") (source: <https://www.fisheries.noaa.gov/foss/>)

average landings were just \$3,966,938 each year, representing just 16% of the average for the prior period.⁵³

NOAA Comments Concealed by BOEM

410.03 On October 25, 2021, the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (“NOAA Fisheries”) wrote to BOEM’s Chief of Office of Renewable Energy Programs, James Bennett (“NOAA Fisheries October Letter”). The letter reads as follows (Exhibit 01, at 1, second paragraph)—

The South Fork Project is proposed on Cox Ledge, a sensitive ecological area that provides valuable habitat for a number of federally managed fish species and other marine resources. Based on our Northeast Fisheries Science Center’s fisheries science expertise and supporting peer-reviewed publications, this project has a high risk of population-level impacts on Southern New England Atlantic cod [emphasis added]. ... BOEM is not planning to adopt or to only partially adopt a number of [our] recommendations. ... We ... have continuing concerns that we recommend BOEM address as either the ROD is finalized or these subsequent processes are implemented.

410.04 BOEM did *not* post the NOAA Fisheries Letter on its website and did *not* disclose the letter to the public. By concealing the letter, BOEM violated one of the two principle aims of NEPA—to ensure “that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process” (*Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983)).

410.05 The letter was brought to the Plaintiff’s attention only in October 2022, a year *after* NOAA Fisheries’ Assistant Regional Administrator for Habitat and Ecosystem Services, Mr. Louis A. Chiarella, had written to BOEM.

⁵³ *Ibid.*

410.06 It is not known how many other letters, reports, comments, etc., BOEM has failed to publicly disclose.

410.07 Plaintiff amended his Complaint to include the issues raised in the NOAA Fisheries October Letter.

410.08 Had Defendant BOEM *not* concealed the letter, Plaintiff would have included the in issues raised in the letter in his original Complaint (filed July 21, 2022).

410.09 The discovery of the critical document contradicts BOEM’s claim that “extra-record discovery ... is so unlikely that the Court need not even consider this factor in determining whether transfer would be appropriate” (ECF No. 25, at 14, PDF 19, second paragraph).

Cox Ledge– Atlantic Cod Habitat

410.10 On June 7, 2021, NOAA Fisheries expressed concerns it had with BOEM’s environmental review and its limited implementation of NOAA Fisheries’ Essential Fish Habitat (“EFH”) assessment. NOAA Fisheries’ Assistant Regional Administrator for Habitat Conservation, Louis A. Chiarella, wrote to BOEM’s Chief, Environmental Branch for Renewable Energy, Michelle Morin (“NOAA Fisheries June Letter”). The letter reads—

Of note is the absence of a meaningful evaluation of the potential project impacts for Atlantic cod. We have significant concerns that the project may result in substantial impacts to Atlantic cod EFH by adversely affecting benthic habitats and causing acoustic impacts that may interfere with cod spawning. These concerns were discussed at length in our December letter and in our follow-up coordination with your staff and the third-party contractor. However, your EFH assessment provides minimal analysis of such impacts and does not respond to our specific information requests or our discussions with you related to the level

of detail necessary for the assessment [Exhibit 03, at 2, first paragraph].⁵⁴

Mr. Chiarella informed BOEM that –

Cox Ledge

The proposed project is located on Cox Ledge, an area with particularly complex and unique habitat conditions that support a wide range of marine resources. ... Impacts to complex habitats, such as those found in the project area, are known to result in long recovery times and may take years to decades to recover from certain impacts. Such impacts may result in cascading long term to permanent effects to species that rely on this area for spawning and nursery grounds and the fisheries and communities that target such species. This area is also known to support spawning aggregations of Atlantic.

Atlantic cod

Atlantic cod are an iconic species in New England waters and a highly sought-after catch for recreational fishermen. In 2013, the recreational marine bait and tackle industry in New England was estimated to contribute \$200 million in total sales, \$78.9 million in income, and 1,256 jobs to the local economy (Hutt et al. 2015). Atlantic cod was reported to be the fifth greatest generator of sales. In the most recent Economies of the Fisheries (2016), commercial and recreational fisheries are estimated to contribute 97,000 jobs and generate \$8.7 billion in sales annually in the New England region with Atlantic cod remaining one of the key recreational species in the region (NOAA 2018) [*Id.* at 4, third paragraph].

...

The Atlantic cod stock most affected by the project area is the Georges Bank stock, which includes cod found in Southern New England waters and those around Cox Ledge. According to a preliminary 2019 operational assessment, the Georges Bank cod stock is overfished and near record low biomass observed in 2014. Despite recent emergency management actions and severe reductions in fishery resource allocations, cod stocks in the region remain at less than 10% of

⁵⁴ Letter from NOAA Fisheries (Louis A. Chiarella) to BOEM (Ms. Michelle Morin), dated June 7, 2021 (<https://www.boem.gov/renewable-energy/state-activities/nmfs-sfwf-efh-letter>)

the target sustainable spawning stock biomass, with the latest stock status report for Atlantic cod ... GB stocks estimate at ... 7 percent ... of the target for maximum sustainable yield. [*Id.* at 4-5]

...

Given the state of Atlantic cod stocks and the economic importance of the species to recreational and commercial fisheries, it is essential to minimize adverse impacts to habitats that can support and increase survivorship of critical life stages for cod in southern New England [*Id.* at 5, second paragraph].

...

Atlantic cod spawning on Cox Ledge have recently been identified as genetically distinct from other spawning groups (Clucas et al. 2019). These factors increase the vulnerability of this population to impacts resulting from reduced spawning success. Physical habitat disturbance occurring during spawning may interfere with mating behavior and egg production (Dean et al 2014, Siceloff and Howell 2013). [*Id.* at 11, first paragraph]

Impact Hammer Pile Driving

410.11 The NOAA Fisheries October Letter (2021) cites pile driving as a critical concern. The letter reads as follows—

BOEM had determined to restrict pile driving from January 1 to April 30 and potentially from December 1 to December 31, pile driving noise, particularly at the start of the spawning season (November and December), could prevent aggregations from forming, disrupt existing aggregations, and/or cause cod to leave or abandon the area altogether. Cod demonstrate site fidelity during spawning, so a single year abandonment of those locations may have significant implications for recruitment. We know that November and December are critical times for spawning activity in this region (Dean et al. 2021, in review) and restricting pile driving during the spawning season is necessary to avoid population effects (Hammar et al. 2014) [emphasis added].

(see Exhibit 01 at 2, last paragraph)⁵⁵

410.12 In its FEIS, BOEM admits that “[f]ish with a swim bladder or other gas chamber involved in hearing (e.g., ... fish in the cod family) are considered hearing specialists and are the most sensitive to underwater noise impacts.” Further, the FEIS quantifies the impacts as follows—

The Proposed Action includes the installation of 16 monopile foundations using an impact hammer. The installation ... assumes 15 ‘standard’ installations requiring approximately 4,500 pile strikes over 2 hours to achieve desired depth and one ‘difficult’ installation requiring 8,000 pile strikes and up to 4 hours due to underlying substrate conditions ... impact pile driving ... is the most intense source of noise resulting from the Project and would produce the most significant and extensive noise effects on fish. Pile driving would produce noise above the 150 dBPEAK behavioral effects threshold on over 200,000 cumulative acres (FEIS at 3-26, PDF 78).

A “standard” installation (4,500 strikes over 2 hours) is equal to three strikes every five seconds (at 150 dBPEAK each) for 2 hours, or 4 hours for a “difficult” installation.”

XV. RELATED LEGAL CHALLENGES

411. The New York State Public Service Commission’s grant of an Article VII certificate to South Fork Wind (docket 18-T-0604) is the subject of the following two separate legal challenges: (a) *Simon V. Kinsella et al. v. NYS Public Service Commission et al.*, N.Y. Supreme Court, Appellate Div. - 2nd Dept., filed September 9, 2021 ([index 006572/2021](#)); and (b) *Citizens for the Preservation of Wainscott, Inc. et al. v. NYS Public Service Commission et al.*, N.Y. Supreme Court, Appellate Div. - 2nd Dept., filed September 9, 2021 ([index: 006582/2021](#))

⁵⁵ See Exhibit 01 – Letter from NOAA Fisheries (Louis A. Chiarella) to BOEM (James Bennett), dated October 25, 2021 – *not publicly disclosed*

412. The 2017 PPA is the subject of the following legal challenge on appeal— *Simon V. Kinsella et al. v. Long Island Power Authority, et al.* N.Y. Suffolk County Supreme Court, filed November 9, 2021 ([index: 621109/2021](#), available here).

XVI. INJUNCTIVE RELIEF ALLEGATIONS

413. My family and I are suffering an injury that is actual or imminent due to BOEM's approval of construction that will continue to disturb, exacerbate, and prolong PFAS contamination of soil and groundwater in our neighborhood.

414. BOEM has permitted South Fork Wind to proceed with the Project's construction, exposing my family and me to increased levels of contamination to which we would not otherwise be exposed.

415. BOEM permitted South For Wind to proceed with construction irresponsibly without regard to environmental PFAS contamination.

416. BOEM approved the underground installation of concrete duct banks and vaults encroaching into PFAS-contaminated groundwater. According to information provided by South Fork Wind, its underground concrete infrastructure will "enhance the long-term persistence of PFAS in groundwater." See Exhibit J- ITRC, Environmental Fate and Transport for PFAS, March 2018 (at p. 6, last ¶).

417. The concrete duct banks and vaults form a barrier between the primary source of PFAS contamination at the Airport and Georgica Pond, where my family and I used to sail and swim.

418. South Fork Wind's underground concrete infrastructure will prolong and increase our exposure to PFAS contamination.

419. BOEM's approved Project will expose my family and me to increased levels of PFAS contamination from the underground concrete infrastructure and excavation, altering the course

of contaminant flow via preferential pathways, thereby spreading the contaminant plume to areas of the sole-source aquifer that would otherwise not be impacted by the PFAS contamination.

420. My family and I already incur costs of \$800 each time we have our water tested so that we may monitor any changes in the PFAS contamination plume.

421. BOEM approved the underground installation of concrete duct banks and vaults that will impact groundwater used for irrigating local crops by farmers from whom we buy fruit and vegetables daily at the corner farm stand.

422. Breaking from prior practice, South Fork Wind refuses to disclose PFAS contamination test results of soil and groundwater samples taken earlier this year.

423. Had BOEM complied with NEPA and undertaken a thorough environmental review, I would not be in a position where I am being denied information that reasonably poses an imminent threat to my physical safety and that of my family. I have a right to know the extent to which BOEM's approved Project threatens my health when substantive evidence gives cause to believe that contamination poses a significant risk to public health.

424. As a result of BOEM's action approving the Project, our property is less valuable.

425. The New York State Public Service Commission ("NYSPSC") did *not* require SFW, and SFW did not volunteer, to test soil or groundwater from *within* its construction corridor, despite a motion seeking to include such testing.

426. The NYS Article VII hearing (case 18-T-0604) denied intervenor-parties' rights to examine and cross-examine witnesses on such evidence.

427. The NYSPSC hearing lasted two years until the evidentiary record closed on December 8, 2020. On December 23, 2020 – just fifteen days *after* the NYSPSC hearing had concluded, SFW tested soil or groundwater from within its construction corridor for the first time.

428. By delaying testing for PFAS contamination, SFW avoided environmental review during the NYSPSC proceeding of *any* PFAS contamination test results of soil or groundwater from *within* its construction corridor.

429. Neither Federal nor State agencies thoroughly reviewed PFAS contamination to secure our health.

430. I have no option but to look into these matters *before* SFW causes further environmental damage.

431. Given that PFAS contamination poses a risk to human health, I have no other legal remedy other than to seek injunctive relief to allow time for South Fork Wind to disclose the laboratory results for PFAS contamination of soil or groundwater taken from within or near its onshore SFEC route, including but not limited to supporting documentation such as sampling plans, bore/well locations, maps, and borehole/well logs. Time is of the essence.

Treatment Facility for PFAS Contamination

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

“[...] SFW is unlikely to encounter any PFAS contamination during construction of the SFEC due to the fact that it is not performing any excavation in areas where PFAS has been released, [...] and also because most of the excavation will take place above the water table [emphasis added]” (NYSPSC DMM 254, available at dps.ny.gov, click here, at p. 17).

433. Three months later (in April 2022), SFW excavated and removed soil and groundwater

to install a transition vault at the southern end of Beach Lane, Wainscott.

434. The bottom of the excavation for the transition vault contained groundwater (see Appendix 1- PFAS Treatment, at p. 6, marked “F”) (also [available online, click here](#)).

435. Contrary to the characterization (in ¶ 432 above), in May 2022, South Fork Wind was treating PFAS-contaminated groundwater using four frac tanks with a combined capacity of 75,000 gallons and a Granular Activated Carbon filter at a treatment facility in the Town of East Hampton groundwater (see Appendix 1- PFAS Treatment, at pp. 1-4).

436. Defendants’ action has already caused substantial irreparable injury because of the concrete duct banks and vaults that South Fork Wind has installed. Leaving them where they are will permanently exacerbate and prolong the environmental harm. There is a substantial chance that upon the final resolution of the action, I cannot return to the position I previously occupied.

437. Both the balance of the equities and the public interest favor injunctive relief. Safeguarding a community’s water supply from contamination by dangerous chemicals, protecting the habitat of Cox Ledge and the Atlantic cod population, and ensuring that Defendants comply with the law serve Plaintiff’s interests and the public interest. They outweigh any harm that might result from an emergency temporary restraining order or preliminary injunction.

438. Defendants’ arbitrary exercise of power contrary to law permitted South Fork Wind to cause injury to me, my family, our property, and the public.

439. Constitutional, statutory, and regulatory limitations imposed by law upon BOEM’s action to approve the Project are essential to preserving my private rights of life, liberty, property, and due process of law.

440. I seek to enforce these limitations by judicial process as a means of protecting my rights

“against the power of numbers, and against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.”

See *Hurtado v. California*, 110 U.S. 516, 528, 532, 536 (1884).

XVII. FIRST CLAIM FOR RELIEF

Failure to include adverse environmental impacts

(Against all Defendants for violations of NEPA and the APA)

441. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

442. According to NEPA, 42 U.S.C. § 4332(2)(C), and its implementing regulations, an EIS must provide a full and fair discussion of significant “environmental impacts” and “any adverse environmental effects which cannot be avoided” to inform decisionmakers and the public of the reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment. In the EIS, it must be evident the agency took a “hard look” at the environmental consequences of its decision.

443. As described (above), Defendants buried deep within its FEIS an ambiguous reference to “perfluorinated compounds” (on page 655 of 1,317).

444. Defendants failed to identify the harmful contaminants, disclose their location relative to the Project, consider their impacts, or discuss PFAS contamination that they knew posed a threat to human health and the environment.

445. Defendants failed to address the imminent risks of the Project causing, exacerbating, prolonging, or otherwise furthering harmful PFAS contamination in the Town of East Hampton’s drinking water supply or impacting the nearby downgradient habitats and surface waters of Georgica Pond and Wainscott Pond.

446. Defendants failed to take a “hard look” into environmental contamination “to the fullest

extent possible” in accordance with Congress’ express direction that it does so pursuant to NEPA (42 U.S.C. 4321 *et seq.*) and its implementing regulations.

447. In approving a Project that relied on a deficient FEIS, Defendants failed to comply with NEPA and its implementing regulations and therefore engaged in final agency action that was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

448. According to the APA, 5 U.S.C. § 706(2)(A), the Court has the authority and duty to hold unlawful and set aside such agency action in the relevant part.

449. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

450. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

451. Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the South Fork Wind Farm (“SFWF”) and South Fork Export Cable (“SFEC”) corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and all and any other infrastructure and equipment related to the Project, and restoring the benthic environment on Cox Ledge.

XVIII. SECOND CLAIM FOR RELIEF

Failure to assume responsibility for environmental analyses

(Against all Defendant for violations of NEPA and the APA)

452. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

453. The “U.S. Environmental Protection Agency” (“EPA”) was a cooperating agency “during the development and review” of the FEIS (ROD at p. 1, PDF p. 3, ¶ 2).

454. According to NEPA (42 U.S.C. 4321 *et seq.*) implementing regulation 40 C.F.R. §

1501.6(b), cooperating agencies shall participate in the scoping process and “[a]ssume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.”

455. On October 18, 2021, EPA Administrator Michael S. Regan announced the agency’s PFAS Strategic Roadmap—laying out a whole-of-agency approach to addressing PFAS.

456. On June 15, 2022, the White House announced the following –

First, EPA is publishing four new drinking water lifetime health advisories for certain PFAS as part of the President’s plan to combat PFAS pollution and the Environmental Protection Agency’s (EPA) PFAS Roadmap. These health advisories reflect the Biden-Harris Administration’s commitment to follow the science and up-to-date public health information. Specifically:

- EPS is releasing *interim* updated drinking water lifetime health advisories for perfluorooctanoic acid [“PFOA”] and perfluorooctane sulfonic acid [“PFOS”] that replace those issued by EPA in 2016. The updated advisory levels are based on new science that indicates that some negative health effects may occur with concentrations of PFOA or PFOS in water that are near zero ...”.

The White House announcement says that PFOA and PFOS are part of a class of chemicals called “per- and polyfluoroalkyl substances (PFAS) ... that can cause cancer and other severe health problems, pose a serious threat across rural, suburban, and urban areas, and that disproportionately affect disadvantaged communities. PFAS are considered ‘forever chemicals’ because they are environmentally persistent, bioaccumulative, and remain in human bodies for a long time.” (<https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/15/fact->

sheet-biden-harris-administration-combatting-pfas-pollution-to-safeguard-clean-drinking-water-for-all-americans/, last accessed October 29, 2022).

457. The EPA has “special expertise” in the field of environmental contamination, including PFAS contamination.

458. Plaintiff had informed the EPA about the nature and extent of PFAS contamination in Wainscott, and South Fork Wind’s “proposed construction activities [that] would disturb approximately 10,000 tons short (US) of soil and undoubtedly impact the contamination site” (see Exhibit N- EPA Letter & Resp, PFAS & SFW).

459. Defendant BOEM and the named individual defendants working for BOEM “shall [...] use the environmental analysis and proposals of cooperating agencies with [...] special expertise, to the maximum extent possible consistent with its responsibility as lead agency” (40 C.F.R. § 1501.6(a)).

460. Contrary to substantive evidence of PFAS contamination that Plaintiff and others had provided BOEM, Defendant BOEM and the named individual defendants working for BOEM prepared, reviewed, and approved the FEIS, falsely concluding that—

“Overall, existing groundwater quality in the analysis area appears to be good”
(FEIS at H-23, PDF p. 655, second paragraph).

461. Defendant BOEM and the named individual defendants working for BOEM suppressed information on PFAS contamination provided by the EPA in violation of 40 C.F.R. § 1501.6(a)(2).

462. Defendant EPA failed to assume responsibility for developing and preparing environmental analyses concerning information already in its possession in violation of 40 C.F.R. § 1501.6(b).

463. Defendant BOEM as the lead agency, the named individual defendants working for BOEM, and the EPA as a cooperating agency developed a FEIS that ignored critical information

concerning environmental (PFAS) contamination that poses a risk to human health and the environment that Plaintiff and others had brought to their attention.

464. Defendants failed to comply with NEPA and its implementing regulations and are responsible for a final agency action that was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

465. According to the APA, 5 U.S.C. § 706(2)(A), the Court has the authority and duty to hold unlawful and set aside such agency action in the relevant part.

466. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

467. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

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

XIX. THIRD CLAIM FOR RELIEF

Failure to evaluate and verify information

(Against all Defendants for violations of NEPA and the APA, except Defendant EPA)

469. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

470. According to NEPA (42 U.S.C. 4321 et seq.), implementing regulation 40 C.F.R. § 1506.5(a), when “an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, [...] [t]he agency shall independently evaluate the information submitted and shall be responsible for its accuracy.”

The section continues— “If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§ 1502.17). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.” Regulation § 1506.5(c) reads: “If 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.”

471. “BOEM prepared the FEIS with the assistance of a third-party contractor, SWCA, Inc.” (ROD, at p. 1, PDF p. 3, ¶ 2).

472. Defendant BOEM and the named individual defendants working for BOEM on the Project’s review and approval failed to independently evaluate and verify information it received from the applicant, South Fork Wind, and are responsible for its contents.

473. If BOEM and the named individual defendants working for BOEM had independently verified its purpose and needs statement against the information it received nine months *before* issuing its ROD, or readily accessible public records, the purposes and needs would have been proven false. Instead, Defendant BOEM and the named defendants working for BOEM ignored comments it received and relied on fraudulent purposes and needs to support the Project.

474. BOEM’s purpose and needs statement alleges that “[t]he purpose of the Project is to develop a commercial-scale offshore wind facility” (FEIS, at ii, PDF 6, fifth paragraph).

475. According to the New York State Energy Research and Development Authority, the South Fork Wind Farm does *not* have a commercial capacity large enough to achieve economic advantages of scale, a fact admitted to by the ultimate owners of the Project, Ørsted and

Eversource.

476. BOEM's purpose and needs statement alleges that the Project "is designed to contribute to New York's renewable energy requirements, particularly, the state's goal of generating 9,000 megawatts of offshore wind energy by 2030" (FEIS at i, PDF 5, last paragraph), referring to the New York's 2019 CLCPA, even though South Fork Wind designed the Project three-and-half-years *before* the law's enactment; and, supposing *arguendo* the law did apply (it does not apply), would have failed to satisfy the law's requirements.

477. BOEM's purpose and needs statement (falsely) alleges that the underlying "power purchase agreement executed in 2017" between LIPA and South Fork Wind resulted from a "technology-neutral competitive bidding process" (FEIS at ii, PDF 6, fifth paragraph) in reference to the South Fork RFP (that is *sine qua non* to BOEM's review and approval challenged herein), contrary to conclusive evidence showing that the procurement was *not* a "technology-neutral competitive bidding process."

478. BOEM's purpose and needs statement alleges that its "action is needed to further the United States' policy to make OCS energy resources available for [...] development, subject to environmental safeguards[,] [in a manner which is consistent with the maintenance of competition] (43 U.S.C. § 1332 (3)), including consideration of natural resources" (FEIS, at ii, PDF 6, sixth paragraph), contrary to substantive evidence showing that the Project: (i) poses a risk to human health and ignores environment safeguards such as excavating over 30,000 tons of material from a highly contaminated area; and (ii) was born from a rigged procurement process specifically designed to thwart competition.

479. Defendants DOI, BOEM, and the named individual defendants working for BOEM violated NEPA (42 U.S.C. 4321 *et seq.*), implementing regulation 40 C.F.R. § 1506.5 by failing

to independently evaluate or verify critical information in the FEIS on the Project's purpose and need, and engaged in final agency action that was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

480. According to the APA, 5 U.S.C. § 706(2)(A), the Court has the authority and duty to hold unlawful and set aside such agency action in the relevant part.

481. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

482. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

483. Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the SFWF and SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and all and any other infrastructure and equipment related to the Project, and restoring the benthic environment on Cox Ledge.

XX. FOURTH CLAIM FOR RELIEF

**Failure to verify NYS concurrence with Federal Consistency Certification
(Against all Defendants for violations of CZMA, NEPA and the APA)**

484. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

485. I reallege paragraphs 470-472 (above) as if set forth in full herein.

486. The freshwater habitat of Wainscott Pond is approximately eight hundred feet (800 ft) to the west of the SFEC construction corridor, and the habitat of Georgica Pond is about five hundred feet (500 ft) to the northwest of the corridor (at Wainscott NW Road).

487. The hydrogeology beneath the SFEC construction corridor route is interconnected via

groundwater flow to the hydrogeology of Wainscott Pond and Georgica Pond.

488. South Fork Wind has begun and plans to continue excavation and horizontal directional drilling activities on Beach Lane and Wainscott North West Road (and at other locations) where it will encounter groundwater.

489. Groundwater beneath Beach Lane contains high levels of PFAS contamination, such as PFOA contamination detected in a groundwater monitoring well (MW-4A) at 82 ppt, exceeding the 2016 EPA Health Advisory Levels.

490. Groundwater beneath Wainscott NW Road contains high concentration levels of PFAS contamination, such as PFOS contamination detected in a groundwater monitoring well (MW-15A) at 15 ppt that exceeds the NYS Maximum Contamination Limit.

491. “Wainscott Pond” is *not* mentioned in the FEIS or ROD, *at all*.

492. BOEM did *not* consider the freshwater habitat of Wainscott Pond.

493. The Project’s environmental impact from underground concrete duct banks and vaults in an area where groundwater contains high levels of PFAS contamination will exacerbate, prolong, and enhance the contamination.

494. The Project’s environmental impact on PFAS contamination will adversely impact sensitive habitats in proximity to the west (Wainscott Pond) and east (Georgica Pond) of the Project’s construction corridor through groundwater flow.

495. Contrary to CZMA Enforceable Policy 44, Defendants permitted South Fork Wind to install concrete duct banks and vaults and undertake excavation and horizontal directional drilling activities that will pollute, degrade, and place the habits of Wainscott Pond and Georgivca Pond in peril.

496. Contrary to CZMA Enforceable Policy 27, Defendants permitted South Fork Wind to site

its renewable energy project in the Town of East Hampton's Coastal Management Zone.

497. The Project is *not* designed to serve residents' needs for power during peak demand during the summer but will provide more energy during the winter when the Town does *not* need it. The Project will serve residents of other localities to the west.

498. Contrary to CZMA Enforceable Policy 38 and 38a, which require the protection of surface water and groundwater supplies, "particularly where such waters constitute the primary or sole-source of water supply" and to maintain their "purity [...] to safeguard public health[.]" BOEM permitted South Fork Wind to begin onshore construction of a high-voltage transmission system and underground infrastructure through a square mile with more PFAS-contaminated drinking water wells than at any other location in Suffolk County.

499. According to the Coastal Zone Management Act ("CZMA"), the State of New York Department of State ("NYDOS") "shall also consult with the Federal agency responsible for approving the federal license or permit to ensure that proposed conditions satisfy federal as well as management program requirements" (15 C.F.R. § 930.62(d)).

500. Defendants failed to ensure that the Project satisfied federal and CZMA enforceable policies in violation of 15 C.F.R. § 930.62.

501. Defendants failed to independently evaluate and verify federal and CZMA policies according to NEPA (42 U.S.C. 4321 *et seq.*) implementing regulation 40 C.F.R. § 1506.5.

501.01 According to the APA, 5 U.S.C. § 706(2)(A), the Court has the authority and duty to hold unlawful and set aside such agency action in the relevant part.

501.02 Plaintiff and the public are entitled to a judgment, so holding and setting aside.

Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such

unlawful final agency action.

501.03 Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the SFWF and SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and all and any other infrastructure and equipment related to the Project.

XXI. FIFTH CLAIM FOR RELIEF

Failure to specify an underlying purpose or need

(Against all Defendants for violations of NEPA and the APA, except Defendant EPA)

502. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

503. According to NEPA (42 U.S.C. 4321 *et seq.*) and regulation 40 C.F.R. § 1502.13—

“The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action [emphasis added].”

504. Defendants DOI, BOEM, and the named individual defendants working for BOEM (falsely) state that the “proposed action” is included in the “underlying purpose and need to which the agency is responding, contrary to fact and in violation of 40 C.F.R. § 1502.13 as follows—

505. I reallege Paragraph 474-475 (above) as if set forth in full herein.

506. Defendants DOI, BOEM, and the named individual defendants working for BOEM allege that “[t]he purpose of the Project is to develop a commercial-scale offshore wind energy facility” (ROD, at 7, PDF 9, seventh paragraph), contrary to fact. The allegation is *not* based on fact and violates 40 C.F.R. § 1502.13 because the stated purpose does *not* include the proposed action.

507. I reallege Paragraph 476 (above) as if set forth in full herein.

508. Defendants DOI, BOEM, and the named individual defendants working for BOEM allege

“the Project ... is designed to contribute to New York’s renewable energy requirements, particularly, the state’s goal of generating 9,000 megawatts of offshore wind energy by 2030” (FEIS, at i, PDF 5, last paragraph), contrary to fact. The allegation is *not* based on fact and violates 40 C.F.R. § 1502.13 because the stated purpose does *not* include the proposed action.

509. Defendants DOI, BOEM, and the named individual defendants working for BOEM (falsely) allege that “SFW’s [South Fork Wind’s] goal is to fulfill ... contractual commitments” (FEIS, at ii, PDF 6, fifth paragraph) without specifying *any* contractual commitments in violation of 40 C.F.R. § 1502.13. It is impossible for Defendants DOI, BOEM, and the named individual defendants working for BOEM to measure and assess alternatives against such unspecified purposes and needs according to 40 C.F.R. § 1502.13.

510. I reallege Paragraph 477 (above) as if set forth in full herein.

511. Defendants DOI, BOEM, and the named individual defendants working for BOEM (falsely) allege, in violation of 40 C.F.R. § 1502.13, that the 2017 PPA resulted from a “technology-neutral competitive bidding process” (FEIS, at ii, PDF 6, fifth paragraph), contrary to clear substantial evidence provided by Plaintiff to BOEM *before* making its decision showing that the Project did *not* result from a “technology-neutral competitive bidding process.” The allegation is contrary to fact and violates 40 C.F.R. § 1502.13 because the stated purpose does *not* include the proposed action.

512. Defendants DOI, BOEM, and the named individual defendants working for BOEM assert that “[t]he purpose of BOEM’s action is to respond to and determine whether to approve, approve with modifications, or disapprove the COP” (FEIS, at ii, PDF 6, paragraph six). Under such criteria, any plausible set of facts conceived would support an alternative that would be approved, modified, or disapproved, thereby making it impossible to assess and respond to

alternatives where no matter what alternatives were proposed, they would *all* satisfy BOEM's purpose. Defendants DOI, BOEM, and the named individual defendants working for BOEM defined a purpose that denies the agency the opportunity to assess and respond in proposing alternatives in violation of 40 C.F.R. § 1502.13.

513. I reallege Paragraph 478 (above) as if set forth in full herein.

514. Defendants DOI, BOEM, and the named individual defendants working for BOEM (falsely) allege that its "action is [...] subject to environmental safeguards[,] [in a manner which is consistent with the maintenance of competition] (43 U.S.C. § 1332 (3)," (FEIS, at ii, PDF 6, sixth paragraph)), contrary to clear substantial evidence provided by Plaintiff to BOEM *before* making its decision showing that the Project ignores safeguards that protect human health and the environment from PFAS contamination and resulted from a non-competitive procurement process contrary to the maintenance of competition. The allegation is contrary to fact and violates 40 C.F.R. § 1502.13 because the stated purpose does *not* include the proposed action.

515. In approving the Project that relied on a deficient FEIS, Defendants DOI, BOEM, and the named individual defendants working for BOEM violated NEPA (42 U.S.C. 4321 *et seq.*) and implementing regulation 40 C.F.R. § 1502.13, and therefore engaged in final agency action that was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

516. According to the APA, 5 U.S.C. § 706(2)(A), the Court has the authority and duty to hold unlawful and set aside such agency action in the relevant part.

517. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

518. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

519. Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the SFWF and SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and all and any other infrastructure and equipment related to the Project, and restoring the benthic environment on Cox Ledge.

XXII. SIXTH CLAIM FOR RELIEF

Failure to consider alternatives

(Against all defendants for violations of NEPA and the APA)

520. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

521. Defendants neither acknowledged nor considered an alternative to South Fork Wind that would combine it with Sunrise Wind.

522. Defendants failed to “[r]igorously explore and objectively evaluate all reasonable alternatives” in violation of 40 C.F.R. § 1502.14(a) and failed to “[d]evote substantial treatment to each alternative considered” in violation of 40 C.F.R. § 1502.14(b).

523. Defendants (falsely) assert that—“No other cable landing site alternatives were identified during Project development or scoping ... (see New York Article VII submitted by SFW)” (FEIS at 2-19, PDF 45, final paragraph). Contrary to Defendants’ (false) claim, the Sunrise Alternative was identified and discussed during the project’s development, scoping, and the “New York Article VII” hearing that identifies the Sunrise/South Fork alternative *eight times*. Defendants did *not* acknowledge or consider the Sunrise/South Fork alternative and are *not* relieved of their statutory obligations irrespective of a non-cooperating state agency action that contradicts clear substantial evidence provided to Defendant BOEM by Plaintiff.

524. Defendants failed to “[i]nclude reasonable alternatives not within the jurisdiction of the

lead agency” in violation of 40 C.F.R. § 1502.14(c).

525. In approving the Project, Defendants violated 40 C.F.R. § 1502.14.

526. In approving the Project that relied on a deficient FEIS, Defendants failed to comply with NEPA (42 U.S.C. 4321 *et seq.*) and implementing regulations and therefore engaged in final agency action that was arbitrary, capricious, and an abuse of discretion, and otherwise not in accordance with the law.

527. According to the APA, 5 U.S.C. § 706(2)(A), the Court has the authority and duty to hold unlawful and set aside such agency action in the relevant part.

528. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

529. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

530. Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the SFWF and SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and all and any other infrastructure and equipment related to the Project, and restoring the benthic environment on Cox Ledge.

XXIII. SEVENTH CLAIM FOR RELIEF

The Project was not subject to safety and environmental safeguards
(Against all defendants for violations of OCSLA and the APA)

531. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

532. According to the OSCLA, the Defendant Secretary of the Interior “shall ensure that any activity under this subsection [granting of leases, easements, or rights-of-way for energy and

related purposes] is carried out in a manner that provides for [...] safety [...] [and] protection of the environment” (43 U.S.C. § 1337(p)(4)(A) and (B)).

533. Defendants did not ensure that the Project provided for the safety of human health or protection of the environment from adverse impacts related to PFAS contamination.

534. The FEIS merely refers to a “fourth site” where sampling has “indicated the presence of perfluorinated compounds” without admitting to the name of the compounds, their concentrations, the nature, extent, or relative proximity of such indicative compounds to the Project’s planned excavation and underground construction activity.

535. Only at the “fourth site” does the FEIS acknowledge the presence of compounds and only site-related compounds.

536. “Site-related compounds” can include *any* compound related to a site, whether a harmful contaminant or safe naturally occurring compounds such as calcium or sodium.

537. Defendants failed to acknowledge PFAS contamination *within* its construction corridor.

538. Defendants failed to proffer *any* discussion concerning the adverse human health and environmental impacts of excavating over 30,000 tons of material from an area containing PFAS contamination exceeding the 2016 EPA Health Advisory Level.

539. The area Defendant BOEM approved for the excavation of material, including soil and groundwater, is the same square mile, containing more contaminated drinking water wells than anywhere else in Suffolk County.

540. Defendants failed to address the potential for the Project it approved to adversely impact downgradient habitats by spreading, altering the course of, exacerbating, prolonging, or intensifying existing PFAS contamination.

541. By approving the Project, Defendants violated 43 U.S.C. § 1337(p)(4).

542. In granting approvals based on a deficient FEIS, Defendants failed to comply with the OCSLA and, therefore, engaged in final agency action that was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

543. According to the APA, 5 U.S.C. § 706(2)(A), the Court has the authority and duty to hold unlawful and set aside such agency action in the relevant part.

544. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

545. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

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

XXIV. EIGHTH CLAIM FOR RELIEF

The Project is not subject to environmental safeguards
(Against all defendants for violations of OCSLA and the APA)

547. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

548. Congress declared it “to be the policy of the United States that— [...] the outer Continental Shelf [...] should be made available for [...] development, subject to environmental safeguards [...] [emphasis added]” (43 U.S. Code § 1332(3)).

549. “The term development means those activities which take place [...], including geophysical activity, drilling, [...], and operation of all onshore support facilities, [...]. (43 U.S. Code § 1331(l)).

550. I reallege Paragraphs 533-540 (above) as if set forth in full herein.

551. Defendants did not meet their statutory obligations to ensure the Project's development would be subject to proper environmental safeguards that protect human health and the environment regarding PFAS contamination in violation of 43 U.S. Code § 1332(3).

552. Defendants did *not* ensure the Project's development was subject to proper environmental safeguards that exposed construction works and residents to PFAS contamination in violation of 43 U.S. Code § 1332(3).

553. In granting approvals based on a deficient FEIS, Defendants failed to comply with OCSLA and, therefore, engaged in final agency action that was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

554. According to the APA, 5 U.S.C. § 706(2)(A), the Court has the authority and duty to hold unlawful and set aside such agency action in the relevant part.

555. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

556. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

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

XXV. NINTH CLAIM FOR RELIEF

Inconsistent with the maintenance of competition

(Against all defendants for violations of OCSLA and the APA, except Defendant EPA)

558. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

559. Congress declared it “to be the policy of the United States that— [...] the outer Continental Shelf [...] should be made available for [...] development, [...] in a manner which is consistent with the maintenance of competition [...] [emphasis added]” (43 U.S. Code § 1332(3)).

560. Defendants DOI, BOEM, and the named individual defendants working for BOEM received clear substantive evidence contrary to their assertions that the 2017 PPA resulted from a “technology-neutral competitive bidding process.”

561. Defendants DOI, BOEM, and the named individual defendants working for BOEM failed to take a “hard look” into the non-competitive nature of the South Fork RFP, under which proposals were advanced based on their technology.

562. Defendants DOI, BOEM, and the named individual defendants working for BOEM merely parroted the Applicant, blindly relying on its information without ensuring the Project was consistent with the maintenance of competition.

563. The Project resulted from a non-competitive procurement process that advanced proposals based on their technology in violation of “a manner which is consistent with the maintenance of competition [...]” (43 U.S. Code § 1332(3)).

564. Defendants DOI, BOEM, and the named individual defendants working for BOEM approved the Project at inflated rates despite receiving clear substantive evidence that the Project resulted from a technology-dependent, non-competitive procurement outside the operations of a competitive market in violation of 43 U.S. Code § 1332(3).

565. In approving the Project, Defendants DOI, BOEM, and the named individual defendants

working for BOEM maintain a monopoly on the supply of energy where the set price of the contract resulted from a non-competitive procurement outside the scope of *any* Federal or State regulatory oversight in violation of 43 U.S. Code § 1332(3). Plaintiff wrote to Defendant BOEM in 2018, explaining that the price of energy from the (then-90-megawatt) South Fork Wind Farm was 21.9 cents,⁵⁶ which exceeded the price (of 6.5 cents) for the same renewable energy from a nearby offshore wind farm, Vineyard Wind, by more than three times. The cost of power from the expanded (130-megawatt) South Fork Wind Farm (19 cents) is nearly two and half times the average price (7.9 cents) of the other wind farms in the same area, according to the U.S.

Department of Energy's National Renewable Energy Laboratory ("NREL") (see ¶¶ 158-179).

566. In granting approvals reliant upon a deficient FEIS, Defendants DOI, BOEM, and the named individual defendants working for BOEM failed to comply with OCSLA and, therefore, engaged in final agency action that was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

567. According to the APA, 5 U.S.C. § 706(2)(A), the Court has the authority and duty to hold unlawful revoke or set aside such agency action in relevant part.

568. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

569. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

570. Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the SFWF and SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and

⁵⁶ According to the utility, Long Island Power Authority, that price was 21.9 cents per kilowatt-hour, or \$1,624,738,893 for 7,432,080 megawatt-hours over twenty years (371,604 megawatt-hours per year).

all and any other infrastructure and equipment related to the Project, and restoring the benthic environment on Cox Ledge.

XXVI. TENTH CLAIM FOR RELIEF

Contrary to the Executive Order on Environmental Justice

(Against all defendants for violations of Executive Order 12898, except Defendant EPA)

571. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

572. Executive Order 12898 requires that "each Federal agency shall make achieving environmental justice part of its mission [...]."

573. 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."

573.01 Defendants DOI, BOEM, and the named individual defendants working for BOEM rely on a biased economic analysis that ignores the Project cost of \$2 billion and its disproportionate impact on "minority populations, low-income populations, or Indian tribes, including human health, social, and economic effects." While the FEIS recognized *beneficial* economic impacts, it glosses over the two-billion-dollar *adverse* economic impact that exceeds the *estimated* benefits by over four times (§§ 180-218).

573.02 Defendants DOI, BOEM, and the named individual defendants working for BOEM limit the economic analysis to the "ocean economy" that includes only 3.9% of the population of Suffolk County and ignores over one million people in Suffolk County, including the Plaintiff,

who will have to pay for the two-billion-dollar Project in their electricity bills for the next twenty years (¶¶ 180-218).

574. The Project approved by Defendants DOI, BOEM, and the named individual defendants working for BOEM violates Executive Order 12898– Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.

575. According to the APA, 5 U.S.C. § 706(2)(A), the Court has the authority and duty to hold unlawful revoke or set aside such agency action in relevant part.

576. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

577. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

577.01 Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the SFWF and SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and all and any other infrastructure and equipment related to the Project, and restoring the benthic environment on Cox Ledge.

XXVII. ELEVENTH CLAIM FOR RELIEF

Contrary to U.S. Constitutional right to due process
(Against all defendants for violations of the U.S. Constitution)

578. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

579. Defendants failed to acknowledge existing PFAS contamination *within* the proposed construction corridor.

580. Defendants failed to consider and ensure that the Project avoided a square mile with more private drinking water wells containing detectible levels of harmful PFAS contaminants than anywhere else on Long Island.

581. Defendants (unlawfully) allowed the developer to begin and continue to excavate soil and groundwater containing PFAS contamination that poses a risk to human health and the environment.

582. The New York State Public Service Commission (“NYSPSC”) did *not* require SFW, and SFW did not volunteer, to test soil or groundwater from *within* the proposed construction corridor during the proceeding despite motions seeking to include such testing in the (narrowly-limited) review.

583. The NYSPSC deprived intervenor-parties’ including Plaintiff, of their rights to examine and cross-examine witnesses on evidence related to PFAS contamination *within* the construction corridor.

584. The NYSPSC deprived intervenor-parties’ including Plaintiff, of their rights to examine and cross-examine witnesses on the South Fork RFP and the 2017 PPA that it then relied on to support the basis of need for the Project.

585. The NYSPSC deprived intervenor-parties’ including, Plaintiff, of their rights to examine and cross-examine new evidence disclosed soon after the NYSPSC proceeding had concluded. Such evidence included South Fork Wind’s testing for PFAS contamination within the proposed corridor and information provided by LIPA showing that the South Fork RFP was *not* a “technology-neutral competitive bidding process” (ROD at p. 7, PDF p. 9, ¶ 7).

586. The NYSPSC admitted under cross-examination that it had *not* considered the two-billion-dollar cost of energy from the Project to be borne by ratepayers.

587. Defendants failed to consider the same information (¶¶ 582-586) that the NYSPSC failed to consider.

588. Defendants received clear substantive evidence showing that the project does *not* satisfy the purposes and needs in the ROD and FEIS but ignored such evidence.

589. No Federal or State government agency acted responsibly or transparently concerning my and my family's health, safety, and the environment we used to enjoy.

590. Federal and State administrative fiat has supplanted fact.

591. Federal and State administrative proceedings relied on demonstrably false presumptions despite receiving clear substantive evidence sufficient to sustain the burden of rebutting those presumptions.

592. Plaintiff has no option but to pursue justice for himself, his family, and the public before the Project Defendants (unlawfully) approved causes further injury to his health and the health of his family and community and causes irreparable environmental damage.

593. PFAS contamination poses a risk to human health. I have no other legal remedy.

594. Defendants denied me my right to due process of law guaranteed by the Fourteenth Amendment of the U.S. Constitution.

595. Defendants approved the Project involving my life, liberty, and property. Defendants acted arbitrarily and in violation of lawful procedure by denying me a fair opportunity to examine and cross-examine witnesses. Defendants made materially fraudulently misrepresentations and relied on their fraud to unlawfully approve the South Fork Wind Project. Defendants have *not* filed answers to my Complaint and have *not* responded to my Cross-Motion for Partial Summary Judgment, for which the statutory deadline has passed. Plaintiff has been raising issues about the Project's unlawful conduct for four years, but he has been denied due

process of law.

596. Plaintiff has been denied his Fourteenth Amendments Rights to due process of law guaranteed under the U.S. Constitution.

596.01 Plaintiff and the public are entitled to a judgment, so holding and setting aside.

596.02 Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

596.03 Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the SFWF and SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and all and any other infrastructure and equipment related to the Project, and restoring the benthic environment on Cox Ledge.

XXVIII. TWELFTH CLAIM FOR RELIEF

Failure to comply with NEPA & FOIA time limits

(Against Defendants DOI and BOEM for violations of NEPA and FOIA)

597. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

598. Defendants DOI and BOEM “must” ensure that a determination is made of whether to provide expedited processing of FOIA Request DOI-BOEM-2022-004796 (see Exhibit O- FOIA Request) pursuant to the Freedom of Information Act (“FOIA”) and give notice of such determination, “within 10 days after the date of the request” (5 U.S.C. § 552(a)(6)(E)(ii)(I)).

599. Defendants DOI and BOEM failed to provide notice of their determination of whether to provide expedited processing of the aforementioned request made on July 6, 2022, in violation of

5 U.S.C. § 552.

600. “Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection [5 U.S.C. § 552 (a)] shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.”

601. “[F]ailure by an agency to respond in a timely manner to such a request shall be subject to judicial review” (5 U.S.C. § 552 (a)(6)(E)(iii)).

602. According to NEPA, Defendants DOI and BOEM must disclose “to the public as provided by [FOIA] section 552 of title 5” information related to “comments and views” of a Federal agency that is “authorized to develop and enforce environmental standards” such as the EPA (NEPA, 42 U.S. Code § 4332(2)(C)).

603. Defendants DOI and BOEM violated NEPA, 42 U.S.C. § 4332(2), and FOIA, 5 U.S.C. § 552.

603-01 Expand FOIA Claims ...

XXIX. THIRTEENTH CLAIM FOR RELIEF

Fraudulent and misleading statements regarding
adverse population-level impacts on Atlantic cod
(Against defendants listed)

Fraud: Atlantic Cod

604. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

605. On November 24, 2021, DEFENDANT Bureau of Ocean Energy Management and the defendants herein listed (below) made fraudulent and misleading statements, were involved in events leading up to those statements, or failed to correct such statements concerning adverse population-level impacts on Atlantic cod. The defendants’ false representations were part of the

Record of Decision (ROD) approving the final environmental impact statement (FEIS) for the South Fork Wind Project’s construction and operations plan (COP). Defendants acted in their official capacity when making fraudulent and misleading statements, thereby giving those statements the additional weight of authority and creditability, further compounding the fraud against Plaintiff and the public by an institution set up to protect and safeguard the public. The defendants are as follows—

- a. In her official capacity, DEFENDANT DEB HAALAND, Secretary of the Interior, U.S. DEPARTMENT OF THE INTERIOR, who is ultimately responsible for the actions of the Department of the Interior;
- b. In her official capacity, DEFENDANT LAURA DANIELS-DAVIS, Principal Deputy Assistant Secretary, Land and Mineral Management who signed the record of decision on November 24, 2021, on behalf of the U.S. Department of the Interior;
- c. DEFENDANT AMANDA LEFTON, in her official capacity as Director, Bureau of Ocean Energy Management, who is responsible for overseeing and managing BOEM;
- d. DEFENDANT JAMES F. BENNETT, in his official capacity working for the Bureau of Ocean Energy Management, who, by his own admission, “was actively involved in the work leading to the approval of the South Fork Wind COP” (ECF No. 25-1, at 1, ¶ 2, last sentence). Mr. Bennett corresponded with the National Oceanic and Atmospheric Administration (NOAA) National Marine Fisheries Service (NMFS) regarding Atlantic cod on October 7 and 25, 2021;
- e. DEFENDANT MARY C. BOATMAN, in her official capacity as Environmental Studies Chief, Office of Renewable Energy Programs, Bureau of Ocean Energy Management who, according to the FEIS, was the “National Environmental Policy Act (NEPA)

Coordinator” for the Project’s review and approval and is a Contributor responsible for “NEPA Compliance” (FEIS, at B-1, PDF 297, Table B-1);

- f. DEFENDANT MICHELLE MORIN, in her official capacity as Chief, Environment Branch for Renewable Energy, Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor in the Project’s review and approval process and responsible for “NEPA Compliance” (FEIS, at B-1, PDF 297, Table B-1). Ms. Morin received correspondence from the NOAA NMFS regarding Atlantic cod on June 7 and October 25, 2021, and is listed as the “contact” in a letter from BOEM (James F. Bennett) to NOAA NMFS on October 7, 2021; and
- g. DEFENDANT BRIAN HOOKER, in his official capacity as Lead Biologist, Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the Project’s review and approval and responsible for “Benthic, finfish, invertebrates, and essential fish habitat; commercial fisheries and for-hire recreational fishing” (FEIS, at B-1, PDF 297, Table B-1). Mr. Hooker was copied on correspondence between BOEM and the NOAA NMFS regarding Atlantic cod on June 7 and October 25, 2021;

606. Upon information and belief, said defendants knowingly and intentionally made fraudulent and misleading statements, were involved in events leading up to those statements or failed to correct such statements concerning adverse population-level impacts on Atlantic cod to deceive the Plaintiff and the public.

607. In approval of the South Fork Wind Project, said defendants relied on their fraudulent and misleading statements.

Reliance on Misrepresentation

607(a) On October 19, 2018, BOEM published a Notice of Intent (“NOI”). It reads—

“Consistent with the regulations implementing the National Environmental Policy Act ...

(BOEM) is announcing its intent to prepare an Environmental Impact Statement (EIS) [emphasis added]” (Federal Register, Vol. 83, No. 203, at 53104–53105).

607(b) Plaintiff-Appellant Kinsella relied on BOEM’s expressions of “intent” to prepare a NEPA-compliant EIS based on a thorough environmental and socioeconomic review by submitting comments in response to the NOI on November 19, 2018 (*id.*, ¶ 17-20).

607(c) The NOI misleads Mr. Kinsella and the public into believing that BOEM would, pursuant to NEPA, “determine significant resources and issues, impact-producing factors, reasonable alternatives (e.g., ... restrictions on construction and siting of facilities and activities), and potential mitigation measures to be analyzed in the EIS” (Federal Register, *supra*).

607(d) On January 8, 2021, BOEM published a “Notice of availability of a Draft Environmental Impact Statement and public meetings” (Federal Register, Vol. 88, No. 5, at 1520–1521).

607(e) BOEM’s notice opens by asserting its act is “[i]n accordance with regulations issued under the National Environmental Policy Act” (*id.*, at 1520, first column, “SUMMARY”). The notice continues—“The DEIS analyzes reasonably foreseeable effects from the Project. The analysis ... assesses cumulative impacts that could result from the incremental impact of the proposed action and action alternatives ... when combined with past, present, or reasonably foreseeable activities, including other potential future offshore wind activities” (*id.*, at 1520, second column, last paragraph).

607(f) On February 22, 2021, Mr. Kinsella sent Defendant-Appellee Michelle Morin of BOEM comments in response to South Fork Wind’s DEIS (ECF No. 3-1, at 15–25) (*id.*, ¶¶ 21-25).

Included with the comments letter were two hundred and seven exhibits (see Addendum BOEM Exhibits, No. 22-5316, Doc. 1979671).

607(g) The letter explains that “it is necessary to include these documents; otherwise substantial parts of the proposed Project will not be subject to any environmental review whatsoever” (ECF No. 3-1, at 2, PDF 16, third paragraph).

607(h) The comments letter continues— “I respectfully request that the documents herein listed [see Addendum BOEM Exhibits] be incorporated by reference and form part of my comments ... and that BOEM, as lead agency, conduct[s] a broad review of the whole Project[,] including in all respects the onshore and offshore components and ‘use all practicable means and measures... to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans’” (citing NEPA Section 101(a); 42 U.S.C. § 4331(a)) (*id.*, fifth paragraph).

607(i) Mr. Kinsella relied on BOEM to perform such a review.

607(j) The public also relied on BOEM to conduct a thorough environmental and socio-economic review, according to NEPA and the OCSLA.

Atlantic Cod Population-Level Impacts: Fraudulent and misleading statements

608. BOEM asserts that the Project’s construction and installation would have “[n]egligible to moderate impacts” on benthic habitat, Essential Fish Habitat (“EFH”), and finfish (including Atlantic cod); and that “[o]verall cumulative impacts ... would be moderate” (ROD at 11, PDF 13, Table 2, fourth row, last column).

609. BOEM defines “negligible” as having “[n]o measurable impacts to species or habitat[,]” and “moderate” to be a situation where –

Impacts to species are unavoidable but would not result in population-level effects [emphasis added]. Impacts to habitat may be short term, long term, or permanent and may include impacts to sensitive habitats but would not result in population-level effects to species that rely on them [emphasis added].

(FEIS at 3-12, PDF 64, Table 3.4.2-1.)

610. BOEM’s ROD contradicts scientific evidence it received a month before approving the Project’s FEIS (on November 24, 2021). On October 25, 2021, the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (“NOAA Fisheries”) wrote to BOEM’s Chief of Office of Renewable Energy Programs, James Bennett (“NOAA Fisheries Letter”). That letter reads as follows—

Based on our Northeast Fisheries Science Center’s fisheries science expertise and supporting peer-reviewed publications, this project has a high risk of population-level impacts on Southern New England Atlantic cod [emphasis added] [Exhibit 01 – NOAA Fisheries Letter, at 1, second paragraph].

611. The NOAA Fisheries Letter continues –

Given the emerging data on the significance of Cox Ledge for spawning Southern New England cod, it is important we maintain a consistent and common understanding of the potential effects of offshore wind development to this spawning population. This is a high priority given the cumulative and population level impacts this project and additional proposed development on Cox Ledge could have on this important cod population [emphasis added].”

612. BOEM restricts pile driving only from January 1 through April 30 and permits pile driving during November when cod are spawning despite the “high risk of population-level impacts on Southern New England Atlantic cod” (Exhibit 01 – NOAA Fisheries Letter, at 1, second paragraph).

613. The developer must obtain prior authorization from BOEM (before September 1, 2022) before BOEM will permit pile driving during December. BOEM will only grant approval where “unanticipated delays due to weather or technical problems arise that necessitate extending pile driving through December” (ROD at A-23, PDF 47, ¶ 1.7.1).

614. The Plaintiff does *not* know whether BOEM has granted the developer authorization to perform piling driving in December (2022). If BOEM has granted such approval, it has *not* disclosed to the public the letter granting the developer permission to pile drive in December.

615. BOEM requires the developer to consider only “the risk of exposure of NARWs [North Atlantic Right Whales] to pile-driving noise” when it submits an “enhanced survey plan” with its letter seeking approval for pile driving during December.

616. BOEM does *not* consider Atlantic cod spawning aggregations when deciding whether to permit the developer to pile drive during December (2022).

617. BOEM could avoid disturbing the benthic habitat and harming EFH by prohibiting construction preparation and installation (such as scouring the seafloor, clearing boulders, pile driving, etc.) from November 1 to December 31 (in addition to keeping the agreed restrictions in place from January 1 through April 30). Instead, BOEM decided against such conditions. The potential absence of any construction preparation and installation prohibitions from November 1 through December 31 may adversely impact cod spawning and risk the Atlantic cod population.

Duty to Disclose

617-01 BOEM has a duty as lead federal agency responsible for reviewing and approving the South Fork Wind Project, under the NEPA. According to BOEM, “[t]his ROD [Record of Decision] was prepared following the requirements of the National Environmental Policy Act (NEPA; 42 U.S.C. §§ 4321 et seq.) and 40 C.F.R. parts 1500-1508.1. BOEM prepared the FEIS [Final Environmental Impact Statement] with the assistance of a third-party contractor, SWCA, Inc.” (ROD, at 1, PDF 3, first and second paragraphs).

617-02 NEPA mandates that BOEM shall independently evaluate the final environmental impact statement prior to its approval and take responsibility for its scope and contents.

617-03 NEPA mandates that BOEM shall independently evaluate the information submitted by South Fork Wind and shall be responsible for its accuracy.

617-04 Under NEPA, Congress authorizes and directs that, to the fullest extent possible BOEM shall include in every recommendation or report on actions significantly affecting the quality of the human environment, a detailed statement on the environmental impact of South Fork Wind's proposed project.

617-05 NEPA places upon BOEM the obligation to consider every significant aspect of the environmental impact of a proposed action.

617-06 NEPA is designed to ensure that BOEM will inform the public that it has indeed considered environmental concerns in its decision-making process.

617-07 BOEM has a duty under the OCSLA to ensure development is subject to environmental safeguards considering natural resources in a manner consistent with competition. SFW has a duty to disclose pursuant to OCSLA regulations that require SFW to submit detailed information, including Water quality and Social and economic resources, in its Construction and Operations Plan (COP).

617-08 BOEM asserts that its "action is needed to further the United States' policy to make OCS energy resources available for expeditious and orderly development subject to environmental safeguards [in a manner which is consistent with the maintenance of competition] (43 U.S.C. §1332(3)), including consideration of natural resources and existing ocean uses [emphasis added]" (ROD at p. 7, PDF p. 9, last paragraph).

617-09 The OCSLA defines "development" to mean "those activities which take place [...], including geophysical activity, drilling, platform construction, and operation of all onshore support facilities, [...]" (43 U.S. Code § 1331(1)), including onshore infrastructure for high-

voltage transmission lines for an offshore wind farm.

617-10 Defendant Secretary of the Interior “shall ensure that any activity under this subsection [granting of leases, easements, or rights-of-way for energy and related purposes] is carried out in a manner that provides for [...] safety [...] [and] protection of the environment” (43 U.S.C. § 1337(p)(4)(A) and (B)).

617-11 Neither NEPA nor the OCSLA exempts BOEM from compliance, and BOEM has not asserted such a defense

Knowledge of Falsity

618. According to NOAA Fisheries, BOEM’s assertion that adverse impacts on cod are “unavoidable” and will not result in “population-level effects” is contrary to fact.

619. On October 25, 2021, NOAA Fisheries Assistant Regional Administrator for Habitat and Ecosystem Services Louis A. Chiarella wrote to BOEM’s Chief of Office of Renewable Energy Programs, James Bennett (copied to BOEM’s Lead Biologist, Mr. Brian Hooker, and BOEM’s Lead Environmental Protection Specialist, Mr. Brian Krevor). Mr. Chiarella repeated NOAA Fisheries’ concerns regarding “the southern New England region cod population that relies on Cox Ledge for spawning[,] ... [and that] pile driving and cable laying activities were identified as the most impactful project activities, with pile driving identified as the most detrimental for population level effects” (at 2, second paragraph). However, BOEM ignored NOAA Fisheries’ warnings, and a month later (on November 24, 2021), BOEM issued its Record of Decision approving the Project based on the following fraudulent and misleading representations—

- a. The Project’s construction and installation would have “unavoidable” impacts on species, including Atlantic cod (see ¶¶ 605-606) when in fact, BOEM can avoid such adverse effects;

- b. The Project’s construction and installation would “not result in population-level effects” (see ¶¶ 605-606), contradicting NOAA Fisheries’ scientific experts who maintain the “project has a high risk of population-level impacts on Southern New England Atlantic cod” (see ¶ 607).
- c. The Project’s construction and installation “may include impacts to sensitive habitats but would not result in population-level effects to species that rely on them” (see ¶ 605-606), contradicting NOAA Fisheries’ scientists who maintain that “[g]iven ... the significance of Cox Ledge for spawning Southern New England cod, ... [t]his is a high priority given the cumulative and population level impacts this project and additional proposed development on Cox Ledge could have on this important cod population.”

Intent to Deceive

619-13 BOEM did *not* post the NOAA Fisheries Letter on its website and did *not* disclose the letter to the public.

619-14 By concealing the letter, BOEM violated one of the two principle aims of NEPA— to ensure “that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process” (*Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983)).

619-15 The letter was brought to the Plaintiff’s attention only in October 2022, a year *after* NOAA Fisheries’ Assistant Regional Administrator for Habitat and Ecosystem Services, Mr. Louis A. Chiarella, had written to BOEM.

619-15 By concealing the letter from the public, BOEM’s intention was clearly to conceal population-level damage to the cod breeding on Cox Ledge.

619-16 BOEM intended to deceive the public into believing that SFW's construction would *not* harm offshore fisheries.

Relief Sought

620. Plaintiff seeks equitable relief for himself and the public and the Court's intervention to correct the particular injustices resulting from the Defendants' fraudulent and misleading representations not limited to making Plaintiff and the public whole by providing fair compensation for all expenses, time, opportunity cost, and non-pecuniary damages including emotional pain, suffering, inconvenience, anxiety, frustration, mental anguish, loss of reputation and loss of quality and enjoyment of life, with pre-judgment and post-judgment interest as applicable.

621. Defendants risk the Southern New England Atlantic cod population on Cox Ledge by relying on fraudulent and misleading representations.

622. Plaintiff claims Defendants intentionally committed fraud against Plaintiff and the public.

623. Plaintiff and the public are entitled to equitable relief, and this Court has the authority to grant such relief as it sees fit.

624. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

625. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

626. Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the SFWF and SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and all and any other infrastructure and equipment related to the Project, replacing boulders, and restoring the benthic environment on Cox Ledge.

XXX. FOURTEENTH CLAIM FOR RELIEF

Fraudulent and misleading statements regarding
social and economic resources: a lop-sided economic analysis

(Against defendants listed)

BOEM: Economic Analysis

627. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

627(a) I reallege paragraphs 111 through 135 and 166 through 199 of Affidavit of Plaintiff-Appellant Simon V. Kinsella in Support of Response to Defendant-Intervenor-Appellee South Fork Wind LLC's Motion to Dismiss for Lack of Jurisdiction (USCA Case No. 22-5361, 1979671) as if set forth in full herein.

628. On November 24, 2021, DEFENDANT Bureau of Ocean Energy Management and the defendants herein listed (below) made fraudulent and misleading statements, were involved in events leading up to those statements, or failed to correct such statements concerning the Project's impact on social and economic resources. Instead, the defendants relied on a lop-sided economic analysis that fraudulently misrepresented the nature of the Project's impact on social and economic resources. The defendants' false representations were part of the Record of Decision (ROD) approving the final environmental impact statement (FEIS) for the South Fork Wind Project's construction and operations plan (COP). Defendants acted in their official capacity when making fraudulent and misleading statements, thereby giving those statements the additional weight of authority and creditability, further compounding the fraud against Plaintiff and the public by an institution set up to protect and safeguard the public. The defendants are as follows—

- a. In her official capacity, DEFENDANT DEB HAALAND, Secretary of the Interior, U.S.

DEPARTMENT OF THE INTERIOR, who is ultimately responsible for the actions of the Department of the Interior;

- b. In her official capacity, DEFENDANT LAURA DANIELS-DAVIS, Principal Deputy Assistant Secretary, Land and Mineral Management who signed the record of decision on November 24, 2021, on behalf of the U.S. Department of the Interior;
- c. DEFENDANT AMANDA LEFTON, in her official capacity as Director, Bureau of Ocean Energy Management, who is responsible for overseeing and managing BOEM;
- d. DEFENDANT JAMES F. BENNETT, in his official capacity working for the Bureau of Ocean Energy Management, who, by his own admission, “was actively involved in the work leading to the approval of the South Fork Wind COP” (ECF No. 25-1, at 1, ¶ 2, last sentence). Mr. Bennett corresponded with the National Oceanic and Atmospheric Administration (NOAA) National Marine Fisheries Service (NMFS) regarding Atlantic cod on October 7 and 25, 2021;
- e. DEFENDANT MARY C. BOATMAN, in her official capacity as Environmental Studies Chief, Office of Renewable Energy Programs, Bureau of Ocean Energy Management who, according to the FEIS, was the “National Environmental Policy Act (NEPA) Coordinator” for the Project’s review and approval and is a Contributor responsible for “NEPA Compliance” (FEIS, at B-1, PDF 297, Table B-1);
- f. DEFENDANT MICHELLE MORIN, in her official capacity as Chief, Environment Branch for Renewable Energy, Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor in the Project’s review and approval process and responsible for “NEPA Compliance” (FEIS, at B-1, PDF 297, Table B-1);
- g. DEFENDANT EMMA CHAIKEN, in her official capacity as an economist for the Bureau

of Ocean Energy Management, who, according to the FEIS, was a Contributor to the Project's review and approval and responsible for "[d]emographics, employment, and economics; recreation and tourism; land use and coastal infrastructure; commercial fisheries and for-hire recreational fishing" (FEIS, at B-1, PDF 297, Table B-1);

- h. DEFENDANT MARK JENSEN, in his official capacity as an economist for the Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the Project's review and approval and responsible for "[d]emographics, employment, and economics; recreation and tourism; land use and coastal infrastructure; commercial fisheries and for-hire recreational fishing" (FEIS, at B-1, PDF 297, Table B-1); and
- i. DEFENDANT JENNIFER DRAHER, in her official capacity working for the Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the Project's review and approval and responsible for "water quality" (FEIS, at B-1, PDF 297, Table B-1).

629. Upon information and belief, said defendants knowingly and intentionally made fraudulent and misleading statements, were involved in events leading up to those statements or failed to correct such statements concerning the Project's impact on social and economic resources to deceive Plaintiff and the public.

630. In approval of the South Fork Wind Project, said defendants relied on a lop-sided economic analysis that fraudulently misrepresented the nature of the Project's impact on social and economic resources.

Reliance on Misrepresentation

630(a) I reallege paragraphs 607(a) through 607(j) (above) as if set forth in full herein.

Lop-sided Economic Analysis

631. BOEM fraudulently asserts that its “OREP [Office of Renewable Energy Programs] has determined that the COP includes all the information required” in 30 C.F.R. § 585.627 for the Proposed Project [emphasis added] (ROD at D-6, PDF 98, third paragraph).

632. According to 30 C.F.R. § 585.627(a)(7) –

(a) You must submit with your COP detailed information to assist BOEM in complying with NEPA and other relevant laws [emphasis added]. Your COP must describe those resources, conditions, and activities listed in the following table that could be affected by your proposed activities, or that could affect the activities proposed in your COP [emphasis added], including:

Type of information:

Including:

(7) Social and economic resources

Employment, existing offshore and coastal infrastructure (including major sources of supplies, services, energy, and water), land use, subsistence resources and harvest practices, ... minority and lower income groups, coastal zone management programs, ... [emphasis added].”

633. BOEM’s Guidelines for Information Requirements for a Renewable Energy Construction and Operations Plan (version 3.0, dated April 7, 2016) reads as follows (in relevant part)—

	CONSTRUCTION AND OPERATIONS PLAN (COP) 30 CFR 585.627(a)(7) Social and Economic Resources		
	Construction Phase	Operation Phase	Conceptual Decommissioning Phase
Focus	<ul style="list-style-type: none"> Describe the onshore economic baseline of the coastal areas that <u>may</u> be affected by your project [emphasis added]. 		
Scope	<ul style="list-style-type: none"> Describe what socioeconomic activity and resources in the onshore and coastal environment are affected by your project phases. 		
Information Needs for	<ul style="list-style-type: none"> Identify the major coastal industries (onshore and offshore) of the affected area 		
	<ul style="list-style-type: none"> Describe any economic modeling (e.g., job creation) 		

COP Submittal	<ul style="list-style-type: none"> Describe ... <u>employment and demographic patterns</u> (particularly those related to <u>environmental justice</u> considerations) ... that would be affected by your construction and operations activities [emphasis added].
Presentation of Results	<ul style="list-style-type: none"> Narrative of each topic that includes data/information. Summarize in tables and maps where appropriate.

634. “There should be enough detail to support the environmental analyses required by NEPA and other relevant environmental laws.”⁵⁷

635. Contrary to BOEM's false assertion that “the COP includes all the information required [emphasis added,]” BOEM does *not* acknowledge, discuss, or consider the Project’s cost, initially valued at \$1.6 billion⁵⁸ but now exceeds \$2 billion.⁵⁹ The multi-billion-dollar price tag represents money that will take out of the Suffolk County economy monthly or every quarter in the form of additional charges on residents’ electricity bills for twenty years. BOEM ignores the Project’s cost, which is two to three times more expensive for the same renewable energy from the other offshore wind farms in the area (see ¶¶ 168 – 173).

636. BOEM’s economic analysis considers *beneficial* economic impacts such as spending in the local economy on capital expenditures (\$185 – 247 million)⁶⁰ and operational costs (\$6 – \$12 million per year).⁶¹ The total *beneficial* economic impact is estimated at \$307 – 493 million (over the twenty-year contract term).⁶²

⁵⁷ BOEM, Office of Renewable Energy Program, Guidelines for Information Requirements for a Renewable Energy Construction and Operations Plan, Version 3.0, April 7, 2016 (at 36)

⁵⁸ New York Office of the State Comptroller valuation of the South Fork PPA is \$1,624,738,893 (<https://wwe2.osc.state.ny.us/transparency/contracts/contracttransactions.cfm?Contract=00000000000000000024767>),

⁵⁹ New York Office of the State Comptroller valuation of the South Fork PPA is \$2,013,198,056 (<https://wwe2.osc.state.ny.us/transparency/contracts/contracttransactions.cfm?Contract=00000000000000000085553>)

⁶⁰ Final Environmental Impact Statement (FEIS), at p. F-17, PDF p. 587, Table F-10

⁶¹ *Ibid.*

⁶² Local Operating Expenses (with taxes) ranging from \$6.16 to \$12.32 million per year, or from \$123.20 to \$246.40 million over twenty years. These Local Operating Expenses in addition to

637. BOEM's biased economic analysis accounts for *beneficial* impacts but ignores *adverse* effects that exceed the benefits by four to six and a half times.

638. The prejudicial financial analysis fails to recognize the net adverse economic impact estimated to be from \$1.5 to \$1.7 billion.

639. Moreover, BOEM does *not* acknowledge that the *negative* economic effects are fixed under a power purchase agreement, whereas the *positive* economic impacts are merely *estimates* with little substantive support, given that the project's major components (i.e., the wind turbine generators, submarine cables, etc.) are manufactured overseas.

Duty to Disclose

639-01 I reallege paragraphs 617-01 through 617-06 (above) as if set forth in full herein.

639-02 NEPA does *not* exempts BOEM from compliance, and BOEM has not asserted such a defense

Knowledge of Falsity

640. In November 2018 – three years *before* BOEM issued its approval – BOEM received notice of the Project's high price of power (22 ¢/kWh) compared to Vineyard Wind (6.5 ¢/kWh). Furthermore, the letter notified BOEM of the developer's failure to comply with 30 CFR 585.627(a)(7) regarding adverse impacts on employment, the economy, and environmental justice.⁶³ BOEM ignored that letter and a subsequent reminder in February 2021.⁶⁴ BOEM did *not* require the Applicant to comply with 30 CFR 585.627(a)(7) or its guidelines regarding the Project's impact on the energy industry, energy prices, employment, demographics, or

Local Capital Expenses (with taxes) of \$184.24 to \$246.81 million, is equal to total beneficial economic impacts of \$307.44 – 493.21 million (over 20 years).

⁶³ <https://www.regulations.gov/comment/BOEM-2018-0010-0074> (at pp. 4-5)

⁶⁴ <https://www.regulations.gov/comment/BOEM-2020-0066-0343> (at pp. 4-5)

environmental justice considerations (see ¶¶ 180-218).

Intent to Deceive

640-01 BOEM's intention from the consequences of its acts is clear because BOEM kept repeating the same act of omitting the project cost (\$2.013 billion) from the review. It was *not* an accident. Despite receiving information on the high price of South Fork Wind's project as early as 2018, BOEM consistently omitted it from its socio-economic impact analysis over a three-year period (from 2018 through 2021). The consequence materially misrepresented the project's impact on Suffolk County and jobs. What BOEM claims to be a *beneficial* impact is actually a net *adverse* impact once the project cost of \$2.013 billion is accounted for in its economic analysis.

640-02 BOEM and SFW were consistent with each other in keeping the project cost out of their respective economic analyses.

640-03 The consequences of BOEM's repeated failures to consider the project cost was the same, to mislead the public into believing SFW's project was commercially viable, reasonably priced, and would create jobs, contrary to fact. BOEM intended to deceive.

Relief Sought

641. Plaintiff seeks equitable relief for himself and the public and the Court's intervention to correct the particular injustices resulting from the Defendants' fraudulent and misleading representations not limited to making Plaintiff and the public whole by providing fair compensation for all expenses, time, opportunity cost, and non-pecuniary damages including emotional pain, suffering, inconvenience, anxiety, frustration, mental anguish, loss of reputation and loss of quality and enjoyment of life, with pre-judgment and post-judgment interest as applicable.

642. Defendants fraudulently misrepresented the economic and socioeconomic impact of the

South Fork Wind Project by failing to consider the Project's cost of \$2 billion, thereby making it impossible to compare the actual economic impact to alternatives with any accuracy.

643. Plaintiff claims Defendants intentionally committed fraud against Plaintiff and the public.

644. Plaintiff and the public are entitled to equitable relief, and this Court has the authority to grant such relief as it sees fit.

645. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

646. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

647. Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the SFWF and SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and all and any other infrastructure and equipment related to the Project, replacing boulders, and restoring the benthic environment on Cox Ledge.

XXXI.FIFTEENTH CLAIM FOR RELIEF

Fraudulent and misleading
statements regarding water quality
(Against defendants listed below)

BOEM: Water Quality

648. I reallege paragraphs F1-1 through F8-6, and 1 through 440 (above) as if set forth in full herein.

648(a) I reallege paragraphs 93 through 110 of Affidavit of Plaintiff-Appellant Simon V.

Kinsella in Support of Response to Defendant-Intervenor-Appellee South Fortk Wind LLC's

Motion to Dismiss for Lack of Jurisdiction (USCA Case No. 22-5361, 1979671) as if set forth in

full herein.

649. On November 24, 2021, DEFENDANT Bureau of Ocean Energy Management and the defendants herein listed (below) made fraudulent and misleading statements, were involved in events leading up to those statements and failed to correct such statements concerning harmful contamination of the drinking water supply.

650. The defendants' false representations were part of the Record of Decision (ROD) approving the final environmental impact statement (FEIS) for the South Fork Wind Project's construction and operations plan (COP). Defendants acted in their official capacity when making fraudulent and misleading statements, thereby giving those statements the additional weight of authority and creditability, further compounding the fraud against Plaintiff and the public by an institution set up to protect and safeguard the public. The defendants are as follows—

- a. In her official capacity, DEFENDANT DEB HAALAND, Secretary of the Interior, U.S. DEPARTMENT OF THE INTERIOR, who is ultimately responsible for the actions of the Department of the Interior;
- b. In her official capacity, DEFENDANT LAURA DANIELS-DAVIS, Principal Deputy Assistant Secretary, Land and Mineral Management who signed the record of decision on November 24, 2021, on behalf of the U.S. Department of the Interior;
- c. DEFENDANT AMANDA LEFTON, in her official capacity as Director, Bureau of Ocean Energy Management, who is responsible for overseeing and managing BOEM;
- d. DEFENDANT JAMES F. BENNETT, in his official capacity working for the Bureau of Ocean Energy Management, who, by his own admission, “was actively involved in the work leading to the approval of the South Fork Wind COP” (ECF No. 25-1, at 1, ¶ 2, last sentence). Mr. Bennett corresponded with the National Oceanic and Atmospheric

Administration (NOAA) National Marine Fisheries Service (NMFS) regarding Atlantic cod on October 7 and 25, 2021;

- e. DEFENDANT MARY C. BOATMAN, in her official capacity as Environmental Studies Chief, Office of Renewable Energy Programs, Bureau of Ocean Energy Management who, according to the FEIS, was the “National Environmental Policy Act (NEPA) Coordinator” for the Project’s review and approval and is a Contributor responsible for “NEPA Compliance” (FEIS, at B-1, PDF 297, Table B-1);
- f. DEFENDANT MICHELLE MORIN, in her official capacity as Chief, Environment Branch for Renewable Energy, Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor in the Project’s review and approval process and responsible for “NEPA Compliance” (FEIS, at B-1, PDF 297, Table B-1);
- g. DEFENDANT EMMA CHAIKEN, in her official capacity as an economist for the Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the Project’s review and approval and responsible for “[d]emographics, employment, and economics; recreation and tourism; land use and coastal infrastructure; commercial fisheries and for-hire recreational fishing” (FEIS, at B-1, PDF 297, Table B-1);
- h. DEFENDANT MARK JENSEN, in his official capacity as an economist for the Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the Project’s review and approval and responsible for “[d]emographics, employment, and economics; recreation and tourism; land use and coastal infrastructure; commercial fisheries and for-hire recreational fishing” (FEIS, at B-1, PDF 297, Table B-1); and
- i. DEFENDANT JENNIFER DRAHER, in her official capacity working for the Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the

Project’s review and approval and responsible for “water quality” (FEIS, at B-1, PDF 297, Table B-1).

651. Upon information and belief, said defendants knowingly made fraudulent and misleading statements, were involved in events leading up to those statements and failed to correct such statements concerning harmful PFAS contamination of the drinking water supply to deceive Plaintiff and the public.

652. In approval of the South Fork Wind Project, said defendants relied on their fraudulent and misleading statements.

Reliance on Misrepresentation

652(a) I reallege paragraphs 607(a) through 607(j) (above) as if set forth in full herein.

False Representation

653. BOEM fraudulently asserts that its “OREP [Office of Renewable Energy Programs] has determined that the COP includes all the information required” in 30 C.F.R. § 585.627 for the Proposed Project [emphasis added] (ROD at D-6, PDF 98, third paragraph).

654. According to 30 C.F.R. § 585.627(a)(2) —

(a) You must submit with your COP detailed information to assist BOEM in complying with NEPA and other relevant laws [emphasis added]. Your COP must describe those resources, conditions, and activities listed in the following table that could be affected by your proposed activities, or that could affect the activities proposed in your COP, including [emphasis added]:

Type of information:

(2) Water quality

Including:

Turbidity and total suspended solids from construction.

655. BOEM’s Guidelines for Information Requirements for a Renewable Energy Construction and Operations Plan published by the Office of Renewable Energy Programs (OREP) (version 3.0, dated April 7, 2016) reads as follows –

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

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

656. Contrary to BOEM’s fraudulent representations that— the “COP includes all the information required” in 30 C.F.R. § 585.627 (ROD at D-6, PDF 98, third paragraph)— the plan does not contain *any* of “the information required” on PFAS contamination whatsoever.

657. Moreover, BOEM’s FEIS acknowledges only the *indicative presence* of perfluorinated compounds (an outdated term for PFAS contamination) “at the fourth site, NYSDEC #152250.” BOEM does *not* say where that “fourth site” is relative to the construction corridor (it is adjacent and upgraded from the construction corridor) and does not discuss the exceedingly high levels of contamination or the impacts of such contamination on the sole-source aquifer that supplies drinking water to over twenty thousand residents in the Town of East Hampton.

658. BOEM’s FEIS does *not* acknowledge *any* PFAS contamination *within* the construction, whereas such contamination *within* the construction site exceeds 2016 EPA regulatory standards.

659. In the FEIS, BOEM identifies “a gas storage facility ... upgradient of the onshore SFEC route from the Hither Hills landing site ... and ... a former gasoline refinery facility that predates the 1930s.” It concludes that the sites are “not a concern for the onshore SFEC route’ (FEIS, at H-23, PDF 655, second paragraph).

660. In stark contrast, BOEM ignores harmful contamination upgradient within 500 of the

SFEC route that the New York State Department of Environmental Conservation classifies “as a Class 2 site that presents a significant threat to public health and/or the environment”

(<https://www.dec.ny.gov/data/DecDocs/152250/Fact%20Sheet.HW.152250.2019-06-19.East%20Hampton%20Airport%20Class%2002%20Listing.pdf>, also see ¶¶ 72-135).

661. BOEM falsely states that— “Overall, existing groundwater quality in the analysis area appears to be good and meets NYSDEC (2018) groundwater quality[,]” contradicting substantive evidence to the contrary (see ¶¶ 72-108). For example, in June 2018, the majority of private drinking water wells (159) in Wainscott (303) showed detectible levels of PFOS and PFOA contamination (see ¶¶ 36-39). Wainscott had more contaminated drinking water well than anywhere else in Suffolk County (see ¶ 399). BOEM received indisputable evidence of existing PFAS contamination of groundwater (see ¶¶ 48-50) but turned a blind eye to extensive environmental contamination of a public health concern in the interests of the private developer.

Duty to Disclose

661-01 I reallege paragraphs 617-01 through 617-11 (above) as if set forth in full herein.

661-02 “It is also relevant, when assessing potential environmental and coastal zone harm, to consider the availability of regulatory measures to alleviate that harm. This does not mean that consideration of environmental damage may be postponed or foregone. But the potential for environmental harm cannot be adequately considered and weighed without a like examination of the potential to mitigate such harm.” *State of Cal. by and Through Brown v. Watt*, 668 F.2d 1290, 1317 (D.C. Cir. 1981). BOEM failed in “assessing potential environmental and coastal zone harm” from PFAS contamination and performed no “examination of the potential to mitigate such harm” (*ibid.*).

Knowledge of Falsity

661-03 Nine months before BOEM had approved SFW's Project, BOEM received comments dated February 22, 2021 ("2021 Comments"), in response to BOEM's Draft Environmental Impact Statement for SFW.

661-04 The 2021 Comments included two hundred and seven exhibits containing verifiable records such as testimony briefs, and government agency reports (Kinsella Aff., ¶¶ 21–25). The exhibits provided to BOEM that it uploaded to its website are incorporated by reference into the Complaint and First Amended Complaint (see Addendum BOEM Exhibits, No. 22-5316, Doc. 1979671) (also available at ECF No. 3-1, at 26–36).

661-05 The exhibits included government agency reports showing extensive environmental PFAS contamination of groundwater (and soil) in the area (Wainscott, NY) where SFW proposed building its underground high-voltage transmission infrastructure (Kinsella Aff., ¶¶ 24, 30–59).

661-06 For example, one exhibit contains eight interrogatories (144 pages) with notices, emails, and reports from Suffolk County Department of Health Services and NYS Department of Environmental Conservation on PFAS contamination (ECF No. 3-1, at 31, BOEM Exhibit #087) (https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_13.pdf).

661-07 The eight interrogatories (144 pages) included, inter alia, the first public acknowledgment of groundwater contamination in Wainscott, a Water Quality Advisory for Private-Well Owners in Area of Wainscott, issued by SCDHS on October 11, 2017; a list of 303 test results of private drinking water wells in Wainscott performed by SCDHS (dated June 15, 2018), and NYSDEC Site Characterization Reports for two properties registered with the NY State Super Fund Program adjacent and on either side of South Fork Wind's proposed

construction corridor (see Kinsella Aff., ¶¶ 85–86).

Intent to Deceive

661-08 BOEM’s intention from the consequences of its acts is clear because BOEM kept repeating the same act of omitting the nature and extent of environmental PFAS contamination from the review. It was *not* an accident. Despite receiving numerous government reports on PFAS contamination at least nine months *before* approving the project, BOEM did *not* discuss or consider the severe contamination in its environmental review. Based on the reports, BOEM knew that groundwater PFAS contamination exceeded EPA 2016 Health Advisory Levels throughout the area where SFW proposed underground construction but kept it out of consideration, out of the review, and out of the public eye. The consequence materially misrepresented groundwater quality. BOEM misrepresented groundwater quality by omitting PFAS contamination from consideration, in addition to falsely stating that groundwater quality was “good” when BOEM knew it was highly contaminated.

661-09 BOEM and SFW were consistent with each other in keeping onsite environmental PFAS contamination out of the review.

661-10 The consequences of BOEM’s repeated failures to consider environmental PFAS contamination from the review was the same, to mislead the public into believing that water quality was “good” when it was far from it. BOEM intended to deceive the public and largely succeeded.

Relief Sought

662. Plaintiff seeks equitable relief for himself and the public and the Court’s intervention to correct the particular injustices resulting from the Defendants’ fraudulent and misleading representations not limited to making Plaintiff and the public whole by providing fair compensation

for all expenses, time, opportunity cost, and non-pecuniary damages including emotional pain, suffering, inconvenience, anxiety, frustration, mental anguish, loss of reputation and loss of quality and enjoyment of life, with pre-judgment and post-judgment interest as applicable.

663. Defendants fraudulently misrepresented groundwater quality and intentionally concealed existing PFAS contamination within the proposed onshore construction corridor, making it impossible to compare the approved onshore cable corridor to alternatives accurately.

664. Plaintiff claims Defendants intentionally committed fraud against Plaintiff and the public.

665. Plaintiff and the public are entitled to equitable relief, and this Court has the authority to grant such relief as it sees fit.

666. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

667. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

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

XXXII. SIXTEENTH CLAIM FOR RELIEF

Fraudulent purpose and needs statements

(Against defendants listed)

Fraud: Purpose and Needs

669. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

670. On November 24, 2021, DEFENDANT Bureau of Ocean Energy Management and the

defendants herein listed (below) made fraudulent and misleading statements, were involved in events leading up to those statements and failed to correct such statements concerning the Project's purpose and needs.

671. The defendants' false representations were part of the Record of Decision (ROD) approving the final environmental impact statement (FEIS) for the South Fork Wind Project's construction and operations plan (COP). Defendants acted in their official capacity when making fraudulent and misleading statements, thereby giving those statements the additional weight of authority and credibility, further compounding the fraud against Plaintiff and the public by an institution set up to protect and safeguard the public. The defendants are as follows—

- a. In her official capacity, DEFENDANT DEB HAALAND, Secretary of the Interior, U.S. DEPARTMENT OF THE INTERIOR, who is ultimately responsible for the actions of the Department of the Interior;
- b. In her official capacity, DEFENDANT LAURA DANIELS-DAVIS, Principal Deputy Assistant Secretary, Land and Mineral Management who signed the record of decision on November 24, 2021, on behalf of the U.S. Department of the Interior;
- c. DEFENDANT AMANDA LEFTON, in her official capacity as Director, Bureau of Ocean Energy Management, who is responsible for overseeing and managing BOEM;
- d. DEFENDANT JAMES F. BENNETT, in his official capacity working for the Bureau of Ocean Energy Management, who, by his own admission, "was actively involved in the work leading to the approval of the South Fork Wind COP" (ECF No. 25-1, at 1, ¶ 2, last sentence);
- e. DEFENDANT MARY C. BOATMAN, in her official capacity as Environmental Studies

Chief, Office of Renewable Energy Programs, Bureau of Ocean Energy Management who, according to the FEIS, was the “National Environmental Policy Act (NEPA) Coordinator” for the Project’s review and approval and is a Contributor responsible for “NEPA Compliance” (FEIS, at B-1, PDF 297, Table B-1);

f. DEFENDANT MICHELLE MORIN, in her official capacity as Chief, Environment Branch for Renewable Energy, Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor in the Project’s review and approval process and responsible for “NEPA Compliance” (FEIS, at B-1, PDF 297, Table B-1);

g. DEFENDANT EMMA CHAIKEN, in her official capacity as an economist for the Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the Project’s review and approval and responsible for “[d]emographics, employment, and economics; recreation and tourism; land use and coastal infrastructure; commercial fisheries and for-hire recreational fishing” (FEIS, at B-1, PDF 297, Table B-1); and

h. DEFENDANT MARK JENSEN, in his official capacity as an economist for the Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the Project’s review and approval and responsible for “[d]emographics, employment, and economics; recreation and tourism; land use and coastal infrastructure; commercial fisheries and for-hire recreational fishing” (FEIS, at B-1, PDF 297, Table B-1);

672. Upon information and belief, said defendants knowingly made fraudulent and misleading statements, were involved in events leading up to those statements, and failed to correct such statements concerning the Project’s purpose and needs with intent to deceive Plaintiff and the public.

673. In approval of the South Fork Wind Project, said defendants relied on their fraudulent and misleading statements.

Reliance on Misrepresentation

673(a) I reallege paragraphs 607(a) through 607(j) (above) as if set forth in full herein.

False Representation

674. In approving the Project, BOEM relied on three demonstrably false claims in its Record of Decision as follows—

The procurement was *not* a “technology-neutral competitive bidding process.”

675. The ROD falsely claims that South Fork Wind’s “power purchase agreement executed in 2017 result[ed] from LIPA’s technology-neutral competitive bidding process [emphasis added],”⁶⁵ contradicting internal LIPA documents showing that proposals were advanced in the procurement process based on their technology. Thus, the South Fork RFP was *not* “neutral” on technology (see ¶¶ 281-358).

676. The South Fork Wind Project did *not* satisfy mandatory criteria or the minimum specifications and requirements of the South Fork RFP. The proposed South Fork Wind Farm was the successful bid in an RFP that precluded resources that were *not* “located on Long Island [emphasis added]” (see Exhibit P- Notice to Proposers). The South Fork Wind project was the *only* bid using offshore wind technology. The South Fork RFP was rigged to preclude competition from other offshore wind developers.

677. The New York State Governor, Andrew M. Cuomo, assured the success of the South Fork Wind proposal by interfering in an active procurement by advancing the interests of the bid to the detriment of the other bidders. On January 11, 2017, Governor Cuomo directed the utility’s board of trustees to approve the South Fork Wind Farm proposal in his State of the State address. Fourteen days later, the utility approved the Project (on January 25, 2021).

⁶⁵ ROD (at p. 7, PDF p. 9, ¶ 7)

The Project was *not* designed for and did *not* satisfy the 2019 CLCPA

678. “[T]he Project ... is designed to contribute to New York’s renewable energy ... goal of generating 9,000 megawatts of offshore wind energy by 2030”⁶⁶ in reference to the New York State’s Climate Leadership and Community Protection Act that was enacted *three-and-a-half years after* the Project was designed; and even if assuming *arguendo* the Act was applicable (it is not), the Project would have failed to satisfy the statute’s requirements (see ¶¶ 136-179).

According to the Project’s owners, the Project is *not* commercial-scale.

679. “The purpose of the Project is to develop a commercial-scale offshore wind energy facility [...][emphasis added]”⁶⁷ contradicting the joint and equal (indirect) owners of South Fork Wind, Ørsted and Eversource, that agree with NYSERDA⁶⁸ insofar as its Project would “not likely to deliver cost savings ... [d]ue to diseconomies of scale” (see ¶¶ 219-229). The relatively small scale of the wind farm (only 130 megawatts) compared to the length of the transmission (66 miles) requires four times the transmission per megawatt capacity than the average of the other three offshore wind farms in the same area (see Appendix 4, Table 1).

680. An agency’s decision-making should be “based on reasons and supported by facts.”⁶⁹ “Although we are dealing with the question whether agency action is arbitrary or capricious, ‘in their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same.’”⁷⁰

⁶⁶ FEIS (at p. I, PDF p. 5, last paragraph)

⁶⁷ ROD (at p. 7, PDF p. 9, ¶ 7)

⁶⁸ New York State Energy Research and Development Authority (“NYSERDA”)

⁶⁹ Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 234 (1974).

⁷⁰ *Butte County v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010), citing *Ass’n of Data, Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984); accord *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 243 (D.C. Cir. 2008)

Duty to Disclose

681-01 I reallege paragraphs 617-01 through 617-06 (above) as if set forth in full herein.

681-02 NEPA does *not* exempts BOEM from compliance, and BOEM has not asserted

Knowledge of Falsity

681-02 Nine months before BOEM had approved SFW's Project, BOEM received comments dated February 22, 2021 ("2021 Comments"), in response to BOEM's Draft Environmental Impact Statement for SFW.

681-03 The 2021 Comments included two hundred and seven exhibits containing verifiable records such as testimony briefs, and government agency reports (Kinsella Aff., ¶¶ 21–25). The exhibits provided to BOEM that it uploaded to its website are incorporated by reference into the Complaint and First Amended Complaint (see Addendum BOEM Exhibits, No. 22-5316, Doc. 1979671) (also available at ECF No. 3-1, at 26–36).

681-04 The 2021 Comments that BOEM received included a response to a request for information from the New York State Energy Research and Development Authority ("NYSERDA") from the project's joint and equal (indirect) owners, Ørsted and Eversource (under the name of Bay State Wind). The response from the (indirect) owners of South Fork Wind state that projects such as South Fork Wind (130 MW) are "not likely to deliver cost savings. Due to diseconomies of scale, the costs per unit of energy for projects of 100 MW and 200 MW in size are significantly higher than those for 400 MW projects" (ECF No. 3-1, at 35, Exhibit #169, at 2, fourth paragraph).

681-05 BOEM uploaded the NYSERDA response to its website, document 18-T-0604 - Testimony Pt 3 - Exhibit 3-6 - NYSERDA OSW RFI 2018 Orsted Eversource (near bottom of list) at— <https://www.regulations.gov/comment/BOEM-2020-0066-0387> (BOEM Exhibit #169).

681-06 BOEM knew that SFW's project was **\$1,030,172,493 dollars overpriced** because BOEM uploaded to its website the price table comparison of South Fork Wind to Sunrise Wind, document Motion to Reopen Record Supp by Kinsella Jan 29 2021 (at p. 15) (halfway down the list) at— <https://www.regulations.gov/comment/BOEM-2020-0066-0385> (BOEM Exhibit #029).

681-07 BOEM knew that South Fork Wind Farm was *not* a commercial-scale facility.

681-08 BOEM knew that the project was submitted for consideration in the South Fork RFP when it was “designed” in 2015 (No. 22-5316, Doc. 1979671, Addendum BOEM Exhibits, at 3 of 11, BOEM Exhibit #030, at 7, footnote 5), which pre-dates by three-and-a-half years New York State's enactment of the CLCPA (New York State's renewable energy goal).

681-09 BOEM also knew that the SFW project would *not* have qualified under the CLCPA due to its high cost that is inconsistent with “a manner that seeks [...] to minimize costs” (NY ECL § 75-0109(3)(a)).

681-10 BOEM also knew there were questions about whether the South Fork RFP was a fair procurement process. During BOEM's public hearing Public Hearing #3 (on February 16, 2021), BOEM heard the following testimony—

“The overall project cost of South Fork Wind is more than \$1 billion more expensive per unit of energy over 20 years, than Sunrise Wind. These costs have been concealed from ratepayers. Today, we still do not know the total amount of capacity that will be delivered by South Fork wind, nor do we know the final price that will be passed on to ratepayers for South Fork Wind. This information has been hidden from us. The company that administered the procurement process, PSEG Long Island, awarded South Fork Wind power purchase agreement to its business partner in a noncompetitive recruitment process.” (see Public Hearing Transcript, at PDF 47, from 442 01:18:46.650 to 445, 01:19:28.680) (Available on BOEM's website, here— https://downloads.regulations.gov/BOEM-2020-0066-0380/attachment_1.pdf).

681-10 BOEM knew that the South Fork RFP was *not* “technology-neutral” (ROD, at 7, PDF 9, penultimate paragraph) (SFW COP May 2021, at ES-2, PDF 6, first sentence). BOEM received internal LIPA documents showing that the South Fork RFP was *not* a “technology-neutral” bidding process. The LIPA Memorandum shows that proposals were advanced in the procurement process based on their technology— “In some instances, proposals were advanced if they were the only proposal offering a particular technology” (No. 22-5316, Doc. 1979671, Addendum BOEM Exhibits, at 3 of 11, BOEM Exhibit #030, at 12, middle of the first paragraph). The South Fork RFP was not “neutral” on a proposal’s technology.

Intent to Deceive

681. The defendants identified in this claim for relief relied on their fraudulent representations: to conceal the role technology played and the non-competitive nature of the procurement; to back-date by three and a half years a state-legislated “renewable energy” mandate (the 2019 CLCPA); and to gloss over an expensive and uneconomic design that required a dedicated sixty-six-miles-long transmission system for a small 130-megawatt wind farm.

640-01 BOEM’s intention from the consequences of its acts is to misrepresent the critical purpose and needs of SFW’s project, including the project’s commercial scale (or lack thereof), the price that is double the average cost of surrounding offshore wind farms, its economic viability, whether it meets New York State energy mandates,⁷¹ and whether the project was subject to a technology-neutral competitive bidding process.

640-02 BOEM’s acts of omission and false statements are consistent with SFW’s acts of

⁷¹ SFW does not satisfy the NYS 2016 Clean Energy Standard, it is excluded from the New York 2018 Offshore Wind Master Plan, and the New York State 2019 Climate Leadership and Community Protection Act

omission and false statements. It was *not* an accident.

640-03 Despite receiving internal LIPA documents, sworn testimony, analysis, etc., sufficient to rebut the false claims regarding SFW's purpose and needs at least nine months *before* approval, BOEM still approved the project.

640-04 The consequences of BOEM's repeated failures during its review all had the same end, to mislead the public into believing SFW was a commercially viable, economical, cost-efficient, and environmentally sound when it was *not*. BOEM intended to deceive the public.

Relief Sought

682. Plaintiff seeks equitable relief for himself and the public and the Court's intervention to correct the particular injustices resulting from the defendants' fraudulent and misleading representations not limited to making Plaintiff and the public whole by providing fair compensation for all expenses, time, opportunity cost, and non-pecuniary damages including emotional pain, suffering, inconvenience, anxiety, frustration, mental anguish, loss of reputation and loss of quality and enjoyment of life, with pre-judgment and post-judgment interest as applicable.

683. Defendants fraudulently claimed the Project satisfied the purposes and needs (mentioned above) contrary to clear substantive evidence provided by Plaintiff to Defendant BOAM rebutting the claims. By intentionally falsifying the Project's qualifications, Defendants fatally undermined the environmental and economic review by failing to compare the Project to alternatives accurately.

684. Plaintiff claims Defendants intentionally committed fraud against Plaintiff and the public.

685. Plaintiff and the public are entitled to equitable relief, and this Court has the authority to grant such relief as it sees fit.

686. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

687. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

688. Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the SFWF and SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and all and any other infrastructure and equipment related to the Project, replacing boulders, and restoring the benthic environment on Cox Ledge.

XXXIII. SEVENTEENTH CLAIM FOR RELIEF
Fraudulent statement regarding the Sunrise Alternative
(Against defendants listed below)

Sunrise/South Fork Alternative

689. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

690. On November 24, 2021, DEFENDANT Bureau of Ocean Energy Management and the defendants herein listed (below) made fraudulent and misleading statements, were involved in events leading up to those statements and failed to correct such statements concerning an economically, environmentally, and technically superior alternative to the Project as proposed.

691. The Defendants' false representations were part of the Final Environmental Impact Statement (FEIS) that BOEM approved on November 24, 2021. Defendants acted in their official capacity when making fraudulent and misleading statements, thereby giving those statements the additional weight of authority and credibility, further compounding the fraud against Plaintiff and the public by an institution set up to represent the public interest. The defendants are as follows—

- a. In her official capacity, DEFENDANT DEB HAALAND, Secretary of the Interior, U.S. DEPARTMENT OF THE INTERIOR, who is ultimately responsible for the actions of the Department of the Interior;
- b. In her official capacity, DEFENDANT LAURA DANIELS-DAVIS, Principal Deputy Assistant Secretary, Land and Mineral Management who signed the record of decision on November 24, 2021, on behalf of the U.S. Department of the Interior;
- c. DEFENDANT AMANDA LEFTON, in her official capacity as Director, Bureau of Ocean Energy Management, who is responsible for overseeing and managing BOEM;
- d. DEFENDANT JAMES F. BENNETT, in his official capacity working for the Bureau of Ocean Energy Management, who, by his own admission, “was actively involved in the work leading to the approval of the South Fork Wind COP” (ECF No. 25-1, at 1, ¶ 2, last sentence);
- e. DEFENDANT MARY C. BOATMAN, in her official capacity as Environmental Studies Chief, Office of Renewable Energy Programs, Bureau of Ocean Energy Management who, according to the FEIS, was the “National Environmental Policy Act (NEPA) Coordinator” for the Project’s review and approval and is a Contributor responsible for “NEPA Compliance” (FEIS, at B-1, PDF 297, Table B-1);
- f. DEFENDANT MICHELLE MORIN, in her official capacity as Chief, Environment Branch for Renewable Energy, Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor in the Project’s review and approval process and responsible for “NEPA Compliance” (FEIS, at B-1, PDF 297, Table B-1);
- g. DEFENDANT EMMA CHAIKEN, in her official capacity as an economist for the Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the

Project's review and approval and responsible for "[d]emographics, employment, and economics; recreation and tourism; land use and coastal infrastructure; commercial fisheries and for-hire recreational fishing" (FEIS, at B-1, PDF 297, Table B-1); and

- h. DEFENDANT MARK JENSEN, in his official capacity as an economist for the Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the Project's review and approval and responsible for "[d]emographics, employment, and economics; recreation and tourism; land use and coastal infrastructure; commercial fisheries and for-hire recreational fishing" (FEIS, at B-1, PDF 297, Table B-1);
- i. DEFENDANT BRIAN HOOKER, in his official capacity as Lead Biologist, Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the Project's review and approval and responsible for "Benthic, finfish, invertebrates, and essential fish habitat; commercial fisheries and for-hire recreational fishing" (FEIS, at B-1, PDF 297, Table B-1). Mr. Hooker was copied on correspondence between BOEM and the NOAA NMFS regarding Atlantic cod on June 7 and October 25, 2021;
- j. DEFENDANTS, U.S. Environmental Protection Agency, and the Hon. Michael S. Regan, in his official capacity as Administrator of the U.S. Environmental Protection Agency.

692. Upon information and belief, said defendants knowingly made fraudulent and misleading statements, were involved in events leading up to those statements, and failed to correct such statements concerning the Project's purpose and needs with intent to deceive Plaintiff and the public.

Reliance on Misrepresentation

692(a) I reallege paragraphs 607(a) through 607(j) (above) as if set forth in full herein.

False Representation

693. When approving the Project's FEIS on November 24, 2021, Defendants fraudulently represented that— “No other cable landing site alternatives were identified during Project development or scoping ... (see New York Article VII submitted by SFW)” (see FEIS at 2-19, PDF 45, final paragraph).

694. Federal Agency Defendants relied on their fraudulent misrepresentation to eliminate and thereby avoid considering an economically, environmentally, and technically superior alternative to the Project as proposed.

695. Contrary to BOEM's fraudulent claim, the Sunrise/South Fork alternative *was* identified and discussed during the project's development and scoping, including during the “New York Article VII,” referring to the New York State Public Service Commission hearing (18-T-0604).

696. The Commission's final ruling, Order Adopting Joint Proposal, issued March 18, 2021, discusses the Sunrise/South Fork alternative. The Order refers to “Sunrise Wind” *eight times* and discusses the proposition “that the Sunrise Wind project and the South Fork Wind project should be combined, concluding that two nearby, but separate, projects make little economic sense” (Case 18-T-0604, Order Adopting Joint Proposal issued March 18, 2021, at 88, ¶ 3).

697. Defendants fraudulently assert that “[t]he final EIS evaluates and discloses the impacts of ... the Beach Lane ... site” as grounds for not carrying forward alternative landing sites “[e]liminating [the] Beach Lane landing site” (FEIS at 2-20, PDF 46, first paragraph). On the contrary, Defendants neither evaluated nor disclosed the environmental PFAS contamination of soil and groundwater within the proposed Beach Lane landing site that Defendants concealed.

698. Defendants fraudulently maintained that assessing other land sites was unnecessary by concealing the PFAS contamination within the proposed Beach Lane construction corridor.

699. An agency’s decision-making should be “based on reasons and supported by facts.”⁷² “Although we are dealing with the question whether agency action is arbitrary or capricious, ‘in their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same.’”⁷³ (see ¶¶ 252-280).

Duty to Disclose

699-01 I reallege paragraphs 617-01 through 617-11 (above) as if set forth in full herein.

Knowledge of Falsity

699-02 The 2021 Comments letter BOEM received (on February 23, 2021) included information on an alternative whereby South Fork Wind and Sunrise would be combined.

Intent to Deceive

699-03 Defendant BOEM fraudulently represented that— “No other cable landing site alternatives were identified during Project development or scoping ... (see New York Article VII submitted by SFW)” (FEIS at 2-19, PDF 45, final paragraph).

699-04 The consequence of BOEM’s false assertion was to keep other alternatives out of consideration in its review, including the Sunrise/SFW alternative.

699-05 BOEM intended to deceive.

Relief Sought

700. Plaintiff seeks equitable relief for himself and the public and the Court’s intervention to correct the particular injustices resulting from the defendants’ fraudulent and misleading

⁷² Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 234 (1974).

⁷³ *Butte County v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010), citing *Ass'n of Data, Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984); accord *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 243 (D.C. Cir. 2008)

representations not limited to making Plaintiff and the public whole by providing fair compensation for all expenses, time, opportunity cost, and non-pecuniary damages including emotional pain, suffering, inconvenience, anxiety, frustration, mental anguish, loss of reputation and loss of quality and enjoyment of life, with pre-judgment and post-judgment interest as applicable.

701. Defendants fraudulently claimed to have evaluated and disclosed the environmental impacts regarding the proposed Beach Lane landing corridor, thereby concealing onsite PFAS contamination of soil and groundwater, contrary to clear substantive evidence provided by Plaintiff to Defendant BOAM rebutting the claims. Defendants fatally undermined the environmental review by intentionally falsifying the Project's qualifications and could not have possibly accurately compared the Project's landing corridor to alternatives.

702. Plaintiff claims Defendants intentionally committed fraud against Plaintiff and the public.

703. Plaintiff and the public are entitled to equitable relief, and this Court has the authority to grant such relief as it sees fit.

704. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

705. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

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

XXXIV. EIGHTEENTH CLAIM FOR RELIEF

Fraudulent representation of groundwater quality
by South Fork Wind LLC in its Construction and Operations Plan

(Against defendant South Fork Wind LLC)

SFW: Groundwater Quality

707. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

708. In addition, I reallege paragraphs 65 through 92 and 110 of Affidavit of Plaintiff-Appellant Simon V. Kinsella in Support of Response to Defendant-Intervenor-Appellee South Fork Wind LLC's Motion to Dismiss for Lack of Jurisdiction ("Kinsella Aff.") (USCA Case No. 22-5361, 1979671) as if set forth in full herein.

709. When Defendant South Fork Wind submitted its final COP (dated May 7, 2021) to BOEM for review and approval, SFW made fraudulent and misleading statements, was involved in events leading up to those statements, and failed to correct such statements concerning harmful PFAS contamination of groundwater in Wainscott, Suffolk County, NY.

SFW: Duty to Disclose

710. The OCSLA implementing regulations require that SFW submit "detailed information" with its COP to "assist [BOEM] in complying with NEPA and other relevant laws." 30 C.F.R. § 585.627(a). "Your COP must describe those resources, conditions, and activities listed in the following table that could be affected by your proposed activities, or that could affect the activities proposed in your COP" (*id.*). Such resources include the following— "(2) Water quality | Turbidity and total suspended solids from construction" (*id.*).

711. BOEM's Guidelines for Information Requirements for a Renewable Energy Construction and Operations Plan published by the Office of Renewable Energy Programs (OREP) (version 3.0, dated April 7, 2016) ("BOEM's 2016 Guidelines") provides instructions on the information BOEM requires applicants to include in their COP (see ECF No. 34-10).

712. According to BOEM's 2016 Guidelines, SFW "must submit with your COP detailed information that describes resources, conditions, and activities that could be affected by your proposed project [emphasis added]. ... refer to Attachment E ... The tables [in Attachment E] ... describe the information requirements for 30 CFR 585.627(a). This information will be used by BOEM to comply with NEPA" (*id.*, at 19, first paragraph).

713. According to Attachment E, SFW must provide detailed information on "existing water quality conditions ... in the area proximal to your proposed activities ... Describe the general state of water quality in the area proposed for your project ... including ... contaminants in water." (*id.*, at 39, first three bullet points). Under "Impacting Factors," the guide requires information on "environmental hazards ... accidental releases of ... hazardous materials and wastes ... and any other pollution control plan prepared to avoid and minimize impacts to water quality" (*id.*, fifth and seventh bullet point). New York State classifies PFOS and PFOA contaminants as hazardous waste.

714. BOEM's 2016 Guidelines identify "contaminants in water" and refer explicitly to releases of "hazardous materials and wastes." If such environmental impacts were not material facts in an environmental review, BOEM would not have included them as examples in BOEM's 2016 Guidelines. Conversely, such environmental impacts are material facts in an environmental review.

715. Environmental PFAS contamination of groundwater fits neatly into BOEM's description—it qualifies under "contaminants in water" and releases of "hazardous waste" (New York State defines PFOS and PFOA as hazardous waste). In its environmental review, BOEM includes PFAS contamination as a material fact.

716. South Fork Wind had a duty to disclose onsite environmental PFAS contamination within its proposed onshore construction corridor in its final COP.

SFW: False Representations

717. Defendant South Fork Wind LLC fraudulently claims that its COP “provides a description of water quality and water resource conditions in the ... SFEC [South Fork Wind Export Cable, including the onshore corridor] as defined by several parameters including: ... contaminants in water” (COP May 2021, at 4-56, PDF 224, first paragraph).

718. 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.*).

719. SFW said that “the affected environment and assessment of potential impacts for water quality and water resources was evaluated by reviewing the revised Environmental Assessment completed as part of the BOEM NEPA review” (*id.*).

720. SFW’s statements (in ¶¶ 717–719, above) are contrary to fact.

SFW: Knowledge of Falsity

721. On January 2, 2020, SFW received detailed information on existing PFAS contamination of groundwater where it planned to build underground concrete infrastructure encroaching into groundwater, a sole-source aquifer used for drinking water. The information took the form of eight interrogatories served on SFW during discovery in the NYS Public Service Commission proceeding (case 18-T-0604).

722. The eight interrogatories (144 pages) included, *inter alia*, the first public acknowledgment of groundwater contamination in Wainscott, a Water Quality Advisory for Private-Well Owners in Area of Wainscott, issued by SCDHS on October 11, 2017; a list of three hundred and three (303) test results of private drinking water wells in Wainscott (performed by SCDHS, dated June 15, 2018), and NYSDEC Site Characterization Reports for two properties registered with the NY State

Super Fund Program adjacent and on either side of South Fork Wind's proposed construction corridor (see Kinsella Aff., ¶¶ 85–86).

723. Despite updating its COP at least twice (in July 2020 and May 2021), SFW did *not* include *any* information on PFAS contamination of groundwater and soil before BOEM approved its project (November 24, 2021).

724. Four months *before* SFW submitted its final COP to BOEM (May 7, 2021), it performed onsite testing of soil and groundwater. The testing revealed PFAS contamination at levels exceeding the EPA 2016 HAL and NYS MCL (*id.*, ¶¶ 68–75).

725. SFW's Environmental Investigation Report detected PFAS contamination in 20 wells within its construction corridor and noted that “levels of PFOA and PFOS exceeded NYSDEC's Ambient Water Quality Criteria Guidance Values in one well each (MW-4A and MW-15A, respectively)” (*id.*, ¶ 71).

726. Monitoring Well MW-4A is on Beach Lane, and MW-15A is on Wainscott NW Rd, in Wainscott, N.Y. (*id.*, ¶ 72). The report (revised April 1, 2021) *pre-dates* BOEM's approval of the Project (November 24, 2021) by eight months (*id.*, ¶ 68).

727. SFW did *not* inform BOEM of the environmental PFAS contamination, contrary to its statutory duty to do so.

728. South Fork Wind neither disclosed nor considered onsite environmental PFAS contamination of groundwater within its proposed onshore construction corridor in its final COP (May 7, 2021).

SFW: Intent to Deceive

729. South Fork Wind's intent from the consequences of its acts is clear because SFW repeats the same act of knowingly omitting PFAS contamination from consideration in the review. SFW's

acts were consistent over three years (from 2018 through 2021).

730. SFW's acts were consistent across two separate reviews—the federal review under BOEM (according to NEPA and the OCSLA) and the New York State Public Service (“NYSPSC”) review (under NY Public Service Law, Article VII). Across the two environmental examinations, from start (2018) to finish (2021), SFW consistently acted to keep the issues of PFAS contamination out of the reviews, out of consideration, and out of the public eye.

731. South Fork Wind's intent was to deceive people into believing that groundwater quality was “good” and that there was *no* possible adverse environmental impact from constructing underground concrete infrastructure in Wainscott. On the contrary, SFW knew that groundwater was highly contaminated but concealed it from BOEM and the public so that it could proceed with construction without regard to the environmental impact or possible impacts on human health.

Reliance on Misrepresentation

732. On August 5, 2017, during a presentation to the Wainscott Citizens' Advisory Committee (“WCAC”), SFW made the following misleading representations— (1) that its project was the result of a “technology-neutral competitive solicitation” (slide 5); and that “[p]ermitting will involve ... state and Federal Agencies” that included “New York State” and the “Bureau of Ocean Energy Management[,]” the implication being the permitting would be lawful (slide 13).

733. The WCAC (August 5, 2017) meeting minutes note that “[p]ermitting for the project will involve ... state and federal agencies, and is intentionally designed for transparency” and that “[t]he formal proposal is expected in early 2018, which will include technical and environmental impact studies.”

734. Mr. Kinsella was a member of the WCAC and Chairman of its Environmental Subcommittee tasked with assessing the South Fork Wind Project.

735. Mr. Kinsella relied on South Fork Wind's representations that its project would be subject to proper environmental and socio-economic review.

736. After five years (since the WCAC meeting of August 5, 2017), mountains of paper, endless work, and five lawsuits later, SFW still has *not* delivered its promised review pursuant to federal law. Instead, SFW undermined the federal (and state) review by concealing information.

Relief Sought

737. Plaintiff claims Defendant South Fork Wind made false representations, including by omission of material facts concerning groundwater quality in Wainscott, knowing the representations were false with intent to deceive. Plaintiff and the public relied on South Fork Wind's misrepresentations.

738. Plaintiff and the public are entitled to equitable relief, and this Court has the authority to grant such relief as it sees fit.

739. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

740. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

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

742. Plaintiff seeks equitable relief for himself and the public and the Court's intervention to correct the particular injustices resulting from the defendants' fraudulent and misleading representations not limited to making Plaintiff and the public whole by providing fair compensation

for all expenses, time, opportunity cost, and non-pecuniary damages including emotional pain, suffering, inconvenience, anxiety, frustration, mental anguish, loss of reputation and loss of quality and enjoyment of life, with pre-judgment and post-judgment interest as applicable.

XXXV. NINETEENTH CLAIM FOR RELIEF

Fraudulent representation of the project's socio-economic impact by South Fork Wind LLC in its Construction and Operations Plan
(Against defendant South Fork Wind LLC)

SFW: Project Cost

743. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

744. In addition, I reallege paragraphs 111 through 165 of Affidavit of Plaintiff-Appellant Simon V. Kinsella in Support of Response to Defendant-Intervenor-Appellee South Fork Wind LLC's Motion to Dismiss for Lack of Jurisdiction ("Kinsella Aff.") (USCA Case No. 22-5361, 1979671) as if set forth in full herein.

745. When Defendant South Fork Wind submitted its final COP (dated May 7, 2021) to BOEM for review and approval, SFW made fraudulent and misleading statements, was involved in events leading up to those statements, and failed to correct such statements concerning harmful PFAS contamination of groundwater in Wainscott, Suffolk County, NY.

SFW: Duty to Disclose

746. The OCSLA implementing regulations require that SFW submit "detailed information" with its COP to "assist [BOEM] in complying with NEPA and other relevant laws." 30 C.F.R. § 585.627(a). "Your COP must describe those resources, conditions, and activities listed in the following table that could be affected by your proposed activities, or that could affect the activities proposed in your COP" (*id.*). Such resources include the following— "(7) Social and economic

resources | Employment, ... minority and lower income groups” (*id.*).

747. BOEM’s Guidelines for Information Requirements for a Renewable Energy Construction and Operations Plan published by the Office of Renewable Energy Programs (OREP) (version 3.0, dated April 7, 2016) (“BOEM’s 2016 Guidelines”) provides instructions on the information BOEM requires applicants to include in their COP (see ECF No. 34-10).

748. According to BOEM’s 2016 Guidelines, SFW “must submit with your COP detailed information that describes resources, conditions, and activities that could be affected by your proposed project [emphasis added]. ... refer to Attachment E ... The tables [in Attachment E] ... describe the information requirements for 30 CFR 585.627(a). This information will be used by BOEM to comply with NEPA” (*id.*, at 19, first paragraph).

749. Under the heading, Social and Economic Resources, BOEM’s 2016 Guidelines identify “economic modeling (e.g., job creation)” and “employment ... particularly those related to environmental justice considerations) [.]” The project cost of \$2.013 billion outweighs many times over any other financial consideration in BOEM’s or SFW’s economic modeling/analyses on job creation (see *Kinsella Aff.* ¶¶ 136–165, 166–199). The project cost affects environmental justice. Again, if such economic impacts were not material facts in a socio-economic review, BOEM would not have included them as examples in BOEM’s 2016 Guidelines. Conversely, such economic impacts are material facts in a socio-economic review. Given the project cost (\$2.013 billion), the dominating financial consideration in economic modeling/analyses, BOEM’s socio-economic review includes the project cost as a material fact.

750. South Fork Wind had a duty to disclose the project cost in its final COP.

SFW: False Representations

751. In 2019, South Fork Wind filed an Economic Development and Jobs Analysis (“Economic

Analysis”) by Navigant Consulting Inc. (February 5, 2019) (No. 22-5316, Doc. 1979671, Exhibit E, SFW 2019 Economic Analysis).

752. SFW’s Economic Analysis reads— “This advisory opinion was prepared ... at the request of Ørsted North America (“Ørsted”) to conduct an analysis that estimates ... jobs and economic outputs that will result from ... the ‘Project’” (No. 22-5316, Doc. 1979671, Exhibit E, at 1, PDF 4, first paragraph).

753. Under the heading Summary Results, SFW’s Economic Analysis reads—

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), contrary to fact.

754. SFW’s economic analysis’s claims total beneficial impacts on NYS will be \$458 million (Kinsella Aff., ¶ 156) but is offset by the project cost’s adverse impact (\$2.013 billion), resulting in a *net adverse* impact of \$1.555 billion, representing a *capital outflow* leaving NYS (*id.*, ¶¶ 157–158).

755. SFW’s project will result in over one thousand job losses, contradicting SFW’s claim that it will *add* (in New York State/Suffolk County) one hundred and ninety-six (196) jobs. SFW’s Economic Analysis’ conclusion that “[t]he Project will clearly ... add a significant number of jobs” is contrary to fact (*id.*, ¶¶ 145–155).

756. SFW’s Economic Analysis does *not* account for the Project cost of \$2.013.

757. SFW’s Economic Analysis relies on a one-sided analysis to support the conclusion that “[t]he Project will clearly have a positive economic impact,” contrary to fact.

758. South Fork Wind neither discloses nor considers the project cost of \$2.013 within its final COP (dated May 7, 2021).

SFW: Knowledge of Falsity

759. South Fork Wind would have known the cost of its own project.

SFW: Intent to Deceive

760. South Fork Wind's intent from the consequences of its acts is clear because SFW repeats the same act of knowingly omitting the project cost (\$2.013 billion) from the review. SFW's acts were consistent over three years (from 2018 through 2021).

761. SFW's acts were consistent across two separate reviews—the federal review under BOEM (according to NEPA and the OCSLA) and the New York State Public Service (“NYSPSC”) review (under NY Public Service Law, Article VII). Across the two socio-economic examinations, from start (2018) to finish (2021), SFW consistently acted to keep the project cost (\$2.013 billion) out of the reviews, out of consideration, and out of the public eye.

762. South Fork Wind's intent was to deceive people into believing that its project would have a *beneficial* socio-economic impact. On the contrary, SFW knew the cost of its project far outweighed any possible *beneficial* socio-economic impacts and that its project would have an *adverse* socio-economic impact.

763. SFW concealed its project cost and the *adverse* socio-economic impact of its project from BOEM and the public so that it could proceed with construction without regard to the socio-economic impact.

Reliance on Misrepresentation

764. I reallege paragraphs 732 through 736 (above) as if set forth in full herein.

Relief Sought

765. Plaintiff claims Defendant South Fork Wind made false representations by omitting material facts concerning the project cost, knowing that by its omission, SFW intended to

deceive by misrepresenting the project's socio-economic impact. Plaintiff and the public relied on South Fork Wind's misrepresentations.

766. I reallege paragraphs 738 through 742 (above) as if set forth in full herein.

XXXVI. TWENTIETH CLAIM FOR RELIEF

Violation of the OCSLA

(Against Federal Agency Defendants DOI and BOEM)

BOEM: OCSLA

767. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

768. South Fork Wind LLC, formerly known as Deepwater Wind South Fork LLC and including actions of its promoters prior to incorporation (collectively "SFW"), was the principal beneficiary of the South Fork RFP procurement process.

769. The South Fork RFP was *not* a "technology-neutral" bidding process.

770. The South Fork RFP was *not* a "competitive" bidding process.

771. The South Fork RFP procurement was manipulated to stifle competition.

772. SFW was the sole bidder for offshore wind resources.

773. SFW participated in and benefited from a rigged procurement process, the South Fork RFP, designed to lessen competition in the market for renewable sources of energy within the meaning of 15 U.S.C. §§ 14–15.

774. Plaintiff informed Defendant BOEM of the anti-trust violations on February 22, 2021. Regardless, on November 24, 2021, BOEM approved the South Fork Wind Project.

775. According to the Outer Continental Shelf Lands Act ("OCSLA"), "the outer Continental Shelf is ... held by the Federal Government for the public, which should be made available for

... development ... in a manner which is consistent with the maintenance of competition” (43 U.S.C. § 1332 (3)).

776. Prior to approving SFW’s project, BOEM received information on possible SFW procurement violations that resulted in a power supply agreement where the generating resource is within BOEM’s jurisdiction on the Outer Continental Shelf.

777. BOEM refers to and relies upon the (false) claim that South Fork Wind’s “power purchase agreement executed in 2017 [“2017 PPA”] result[ed] from LIPA’s technology-neutral competitive bidding process [emphasis added]” (ROD, at 7, PDF 9, seventh paragraph), referring to the South Fork RFP.

778. BOEM granted approval to SFW, a merchant operator, to construct an offshore wind generating facility in federal jurisdiction and to transmit that electrical energy across the border into the jurisdiction of the State of New York for sale to Long Island Power Authority.

779. The OCSLA defines “antitrust law” to mean “(1) the Sherman Act (15 U.S.C. 1 *et seq.*); (2) the Clayton Act (15 U.S.C. 12 *et seq.*); (3) the Federal Trade Commission Act (15 U.S.C. 41 *et seq.*); (4) the Wilson Tariff Act (15 U.S.C. 8 *et seq.*); or (5) the Act of June 19, 1936, chapter 592 (15 U.S.C. 13, 13a, 13b, and 21a)” (43 U.S.C. § 1331(n)).

780. Prior to approving SFW’s project, BOEM failed to assess whether the area leased to SFW would be developed “in a manner which is consistent with the maintenance of competition,” according to the OCSLA.

781. BOEM violated the Outer Continental Shelf Act, 43 U.S.C. § 1331 *et seq.*

Relief Sought

782. I reallege paragraphs 738 through 742 (above) as if set forth in full herein.

XXXVII. TWENTY-FIRST CLAIM FOR RELIEF

Clayton Act Violations (triple damages)

(against Defendant SFW)

Clayton Act

783. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

784. Pursuant to the Clayton Act, 15 U.S.C. § 15(a), which permits “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”

785. I have standing to bring this action under the Clayton Act and other antitrust law as defined within the OCSLA. I will have to pay higher prices for electrical power than I would have otherwise if it were *not* for South Fork Wind’s participation in a manipulated procurement process, the South Fork Request for Resources (“South Fork RFP”).

786. South Fork Wind LLC, formerly known as Deepwater Wind South Fork LLC and including actions of its promoters prior to incorporation (collectively “SFW”), was the principal beneficiary of the South Fork RFP procurement process.

787. The South Fork RFP was *not* a “technology-neutral” bidding process.

788. The South Fork RFP was *not* a “competitive” bidding process.

789. The South Fork RFP procurement was manipulated to stifle competition.

790. SFW was the sole bidder for offshore wind resources.

791. SFW participated in and benefited from a rigged procurement process, the South Fork RFP, designed to lessen competition in the market for renewable sources of energy within the meaning of 15 U.S.C. §§ 14–15.

792. SFW violated the Clayton Act.

793. South Fork Wind LLC is a Special Purpose Entity incorporated in the state of Delaware and controlled by its joint and equal (indirect) owners, Ørsted A/S (“Ørsted”) and Eversource.

794. Ørsted A/S (formerly DONG Energy) has its headquarters in Denmark. Ørsted lists its shares on Nasdaq Copenhagen, Denmark. Ørsted is majority owned by the state of Denmark.⁷⁴

795. Ørsted manages its United States operations through a wholly owned subsidiary, Orsted Wind Power North America LLC, a corporation registered in the state of Delaware with its headquarters at 1 International Place, 100 Oliver Street, Boston, Massachusetts.

796. Eversource transmits and delivers electricity and natural gas and supplies water to approximately four million customers in Connecticut, Massachusetts, and New Hampshire.

797. The joint and equal owners of South Fork Wind LLC, Ørsted and Eversource, are neither owned nor controlled from within New York State.

798. Plaintiff discovered critical information regarding the anti-trust violation upon disclosure by Long Island Power Authority (LIPA) pursuant to a Freedom of Information Law (FOIL) Request. The disclosure occurred on January 21, 2021. The critical information was LIPA’s internal valuation of SFW’s cost of power (i.e., 21.9 cents per kilowatt-hour), which was above market rates. Defendant SFW fraudulently concealed the price per unit of output to be passed onto ratepayers in LIPA’s service area.

Relief Sought

799. I reallege paragraphs 738 through 742 (above) as if set forth in full herein.

⁷⁴ According to Ørsted 2021 Annual Report, “Ørsted is a publicly listed company with the Danish State as majority shareholder with a 50.1 % ownership share. The Danish State exercises its ownership interest ... [via] a board of non-executive directors ... and executive directors ... [that] are responsible for the management of the company” (<https://orsted.com/en/investors/ir-material/annual-reporting-2021>, at 61, second column, first paragraph).

XXXVIII. NO PRIOR APPLICATIONS

800. No prior application for this or any similar relief has been made in this Court.

XXXIX. PRAYER FOR RELIEF

801. Wherefore, Plaintiffs pray for relief as follows:

- a. an emergency temporary restraining order and preliminary injunction against further construction work related to South Fork Wind's Project;
- b. a permanent injunction against further construction work related to South Fork Wind's Project;
- c. a declaratory judgment holding that BOEM's final agency action approving the Final Environmental Impact Statement for South Fork Wind's Construction and Operations Plan was unlawful and set aside in relevant part the final agency action challenged herein;
- d. a declaratory judgment holding the BOEM falsely represented material facts, including by omission, in its review, knowing of their falsity with intent to deceive;
- e. a declaratory judgment holding the SFW falsely represented material facts, including by omission, in its Construction and Operations Plan, knowing of their falsity with intent to deceive;
- f. restoration to the site's original condition, remediation of any damage, and dismantling of the facility under the oversight of Federal authorities;
- g. That the Court award treble damages to Plaintiff, the costs of this action, a reasonable attorneys' fee, and prejudgment interest pursuant to the Sherman and Clayton Act, including 15 U.S.C. § 15;

- h. equitable relief for himself and the public and the Court's intervention to correct the injustices resulting from Defendants' actions.
- i. costs of suit herein; and
- j. such other relief as the Court deems just and proper.

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STATE OF NEW YORK
COUNTY OF SUFFOLK

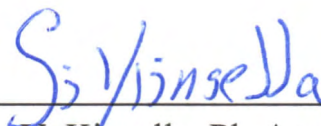
I, Simon V. Kinsella, Plaintiff-Appellant, appearing *pro se*, being duly sworn, say under penalty of perjury:

I am a resident of Wainscott, Town of East Hampton, State of New York. The contents of my Second Amended Complaint and Motion for leave to file Second Amended Complaint, dated January 4, 2023, are true to the best of my knowledge, information, and belief.

Sworn to before me this
4th day of January 2023



David Fink, Notary Public
State of New York
No. 4526132
Qualified in New York County
Commission Expires February 28, 2023



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

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5316

SIMON V. KINSELLA

Plaintiff-**Appellant** *pro se*

v.

BUREAU OF OCEAN ENERGY MANAGEMENT (“BOEM”); and
In their official capacity working for BOEM: AMANDA LEFTON, Director;
MICHELLE MORIN, Chief, Environment Branch for Renewable Energy
 (“OREP”); JAMES F. BENNETT, Program Manager, OREP (until July 2022);
MARY BOATMAN, Environmental Studies Chief, OREP; EMMA CHAIKEN,
Economist; MARK JENSEN, Economist; BRIAN HOOKER, Biologist; 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; and

South Fork Wind LLC

Defendants-**Appellees**

SECOND AMENDED COMPLAINT
(Clayton Act Action, triple damages)

SIMON V. KINSELLA

Plaintiff-Appellant *pro se*

P.O. Box 792, Wainscott, N.Y. 11975

Tel: (631) 903-9154 | Si@oswSouthFork.Info

I. INTRODUCTION

This case is about the U.S. Bureau of Ocean Energy Management (“BOEM”) basing its

record of decision (“ROD”) (issued November 24, 2021) approving the Final Environmental Impact Statement (“FEIS”) for the South Fork Wind (“SFW”) project on materially fraudulent statements intentionally designed to mislead Plaintiff and the public. This case concerns BOEM’s violations of the National Environmental Policy Act (“NEPA”) and the Outer Continental Shelf Lands Act (“OCSLA”), which are reviewable under the Administrative Procedure Act (“APA”). Plaintiff and the public relied on Defendant Federal Agencies’ to perform a legally sufficient review. Defendant Federal Agencies’ (unlawful) acts permitted South Fork Wind to begin construction in February 2022.

The case maintains that SFW, too, relied on materially fraudulent statements of material facts intentionally designed to deceive Plaintiff and the public consistent with BOEM; in addition to SFW’s violating antitrust law, Clayton Act (15 U.S.C. §§ 14–15). Note: Second Amended Complaint references to South Fork Wind (“SFW”) include Deepwater Wind South Fork LLC (former name) and its promoters' actions leading up to incorporation.

II. FRAUDULENT REPRESENTATIONS

Defendants make and rely on the following materially fraudulent statements in support of BOEM’s (unlawful) decision approving SFW’s project on false grounds to deceive Plaintiff and the public—

FRAUD #1 – PFAS Contamination

F1-1) The ROD constituted the final agency action that permitted South Fork Wind to excavate, according to its own estimates, over 30,000 tons of material for two miles in an area with a

significant PFAS contamination¹ plume in Suffolk County.

F1-2) Defendants were fully aware of environmental contamination that the New York State Department of Environmental Conservation (“NYSDEC”) classifies as “a significant threat to public health and ... the environment” (see ¶¶ 72-135).²

F1-3) Without regard to human health or the sole source aquifer that provides drinking water for thousands of residents, BOEM fraudulently concluded that— “Overall, existing groundwater quality in the analysis area appears to be good” (FEIS at H-23, PDF p. 655, second paragraph).

F1-4) In June 2022, the White House announced: new “drinking water lifetime health advisories ... based on new science that indicates that some negative health effects may occur with concentrations of PFOA or PFOS in water that are near zero [emphasis added][.]”

F1-5) The announcement said that PFOA and PFOS are part of a class of chemicals called “per- and polyfluoroalkyl substances (PFAS) ... that can cause cancer and other severe health problems, pose a serious threat ... [and] are considered ‘forever chemicals’ because they are environmentally persistent, bioaccumulative, and remain in human bodies for a long time.”³

F1-6) BOEM and SFW ignored hundreds of Suffolk County Department of Health Services (“SCDHS”) laboratory test results, multiple NYSDEC Site Characterization Reports, and reports from the Town of East Hampton (see Exhibit 18- SFW 2022 Monitoring Well Summary),⁴ all showing harmful contamination exceeding 2016 Environmental Protection Agency (“EPA”)

¹ PFAS (per- and polyfluoroalkyl substance) contamination.

² <https://www.dec.ny.gov/data/DecDocs/152250/Fact%20Sheet.HW.152250.2019-06-19.East%20Hampton%20Airport%20Class%2002%20Listing.pdf> (at 1, first paragraph).

³ <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/15/fact-sheet-biden-harris-administration-combatting-pfas-pollution-to-safeguard-clean-drinking-water-for-all-americans/> (last accessed October 29, 2022).

⁴ <https://ehamptonny.gov/DocumentCenter/View/11757/SFW-Monitoring-Well-summary-Feb-21-2022> (last accessed October 31, 2022).

Health Advisory Levels.

F1-7) A year *before* SFW submitted its Construction and Operations Plan (“COP”) to BOEM (in September 2018), SCDHS found groundwater in the analysis area so toxic that residents could no longer use their private wells for drinking water.⁵

F1-8) Contrary to BOEM’s fraudulent representations that— the “COP includes all the information required [emphasis added]” in 30 C.F.R. § 585.627 (ROD at D-6, PDF 98, third paragraph)— the plan does not contain *any* of “the information required” regarding PFAS contamination.

F1-9) According to BOEM’s Guidelines,⁶ the developer “must submit with your COP detailed information ... [on] existing water quality conditions ... in the area proximal to your proposed activities. Describe the general state of water quality in the area proposed for your Project by reporting typical metrics for quality including the ... presence ... of contaminants in water [emphasis added].” Under “Impacting Factors” the guide includes “environmental hazards and/or accidental events causing accidental releases of ... hazardous materials and wastes [emphasis added].” New York State classifies PFAS contamination as hazardous waste.

F1-10) BOEM did *not* require SFW to accurately describe groundwater quality according to OCSLA regulations and its own guidelines, and SFW did *not* comply with OCSLA regulations or BOEM’s guidelines.

F1-11) See FIFTEENTH CLAIM FOR RELIEF (¶¶ 648 – 668).

⁵ On October 11, 2017, Suffolk County of Health Services issued Water Quality Advisory for Private-Well Owners in Wainscott. A year later (September 4, 2018), then Deepwater Wind South Fork LLC (now South Fork Wind LLC) submitted its Constructions and Operations Plan to Defendant BOEM.

⁶ BOEM’s Guidelines for Information Requirements for a Renewable Energy Construction and Operations Plan published by the Office of Renewable Energy Programs (OREP), April 7, 2016

FRAUD #2 – One-side Economic Analysis (excludes \$2 billion cost)

F2-1) BOEM and SFW rely on biased economic data that does *not* account for the Project cost of **approximately \$2.013 billion**.⁷

F2-2) BOEM's prejudicial financial analysis considers *beneficial* spending in the local economy on capital expenditures (\$185 – 247 million)⁸ and operational costs (\$6 – \$12 million per year)⁹ but excludes *adverse* economic impacts that outweigh the *beneficial* impacts by at least four times.

F2-3) SFW's economic analysis relies only on *beneficial* spending in the economy. SFW omits *adverse* socio-economic impacts related to the project cost that outweigh *beneficial* impacts by at least four times.

F2-4) The U.S. Supreme Court's position is clear on the issue of cost— Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR joined, dissenting, agreed with Justice SCALIA and the majority— "I agree with the majority—let there be no doubt about this—that EPA's [...] regulation would be unreasonable if '[t]he Agency gave cost no thought *at all*'" (*Michigan v. EPA*, 135 S. Ct. 2699 (2015)).

F2-5) The multi-billion-dollar price tag represents money SFW plans to withdraw from Suffolk County's economy via (LIPA) ratepayers' utility bills for the next twenty years. It is money families will *not* spend in the local economy.

F2-6) BOEM misleads the public into believing "the Proposed Project could have ... beneficial impacts on ... demographics, employment, and economics" (ROD, at D-8, PDF 100,

⁷ New York Office of the State Comptroller valuation of the South Fork PPA is \$2,013,198,056 (<https://www2.osc.state.ny.us/transparency/contracts/contracttransactions.cfm?Contract=00000000000000000085553>)

⁸ Final Environmental Impact Statement ("FEIS"), at F-17, PDF 587, Table F-10

⁹ *Ibid.*

first paragraph).

F2-7) On the contrary, the SFW project will have a *net adverse* economic impact of \$1.5 to \$1.7 billion.¹⁰

F2-8) SFW’s Economic Analysis by Navigant (No. 22-5316, Doc. 1979671, Exhibit E-SFW 2019 Economic Analysis)¹¹ concluded that “[t]he Project will clearly have a positive economic impact and will add a significant number of jobs ... to the state of New York” (at 1, PDF 4, fifth paragraph), that does *not* consider *adverse* impacts related to the project cost.

F2-9) SFW’s economic analysis’ (alleged) *beneficial* impact to NYS is \$458 million¹² and does *not* consider the project cost’s *adverse* impact on ratepayers that LIPA estimates will be approximately \$2.013 billion.¹³

F2-10) The *net adverse* socio-economic impact is \$1.555 billion (\$2,013 less \$458 million).

F2-11) South Fork Wind is (indirectly) owned by joint and equal partners, Eversource and Ørsted. Eversource services Connecticut, Massachusetts, and New Hampshire, with headquarters in those states (*not* in New York State). Ørsted is majority owned by the “Danish

¹⁰ Local Operating Expenses (with taxes) ranging from \$6.16 to \$12.32 million per year, or from \$123.20 to \$246.40 million (over 20 years). These Local Operating Expenses in addition to Local Capital Expenses (with taxes) of \$184.24 to \$246.81 million, is equal to a total *beneficial* economic impacts of \$307.44 – 493.21 million (over 20 years). The total *beneficial* economic impact less the *adverse* economic impact of the project’s cost (\$2,013,198,056) represents a *net adverse* economic impact of \$1.5 to \$1.7 billion (over 20 years).

¹¹ Available at [boem.gov](https://www.boem.gov)— <https://www.boem.gov/sites/default/files/renewable-energy-program/State-Activities/NY/Appendix-AA.pdf>

¹² 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).

¹³ The N.Y. Office of the State Comptroller, the PPA valuation is \$2,013,198,056. See— (<https://wwe2.osc.state.ny.us/transparency/contracts/contracttransactions.cfm?Contract=0000000000000000085553>)

state represented by the Danish Ministry of Finance” (Ørsted annual report 2021, at PDF 167, note 16).¹⁴ North American ownership comprises “The Capital Group Companies, Inc. based out of Los Angeles, the US 5-10%” (*id.*) with a total North American ownership of 12% (*id.* at PDF 71).

F2-12) There is no indication of significant ownership interests of Ørsted in New York State/Suffolk County that would result in profits being returned to the local economy.

F2-13) Based on SFW’s Economic Analysis, the total *net adverse* socio-economic impact is expected to result in a capital outflow of \$1.555 billion leaving New York State/ Suffolk County.

F2-13) Ørsted A/S (indirectly) has a 50% ownership interest in South Fork Wind LLC. Denmark shareholders own the majority (63.1%) of shares in Ørsted A/S as follows— the Danish State (50.1%), Danish institutional investors (6%), Andel A.M.B.A, Denmark (5%), and Retail investors, Denmark (2%) (see Ørsted annual report 2021, *supra*).

F2-14) Approximately thirty-two percent (32%) of the *net adverse* impact (\$1.555 billion) will go overseas in expenses and profits to shareholders in Denmark.

F2-15) According to the SFW COP (May 2021), Suffolk County employed 747,600 people in 2017 (at 4-326, PDF 490, Table 4.6-6).

F2-16) Each wage earner in Suffolk County would have to contribute \$104 every month for 20 years to pay for South Fork Wind’s *net adverse* impact of \$1.555 billion.¹⁵

F2-17) According to the Economic Analysis, during the Project’s construction phase, total

¹⁴ Ørsted annual report 2021 (at PDF 167, note 16). Available online at the following link - <https://orstedcdn.azureedge.net/-/media/annual2021/annual-report-2021.ashx?rev=9d4904ddf4c44594adab627f7e4c62be&hash=69CE31C5D5935DD0DB46313E3BDEC952>

¹⁵ SFW’s net adverse impacts of \$1.555 billion divided by 20 years divided by 747,600 wage earners in Suffolk County.

job earnings will be \$47.1 million, representing 413 “job years” (No. 22-5316, Doc. 1979671, Exhibit E- SFW 2019 Economic Analysis, Table 1-2, at 3, PDF 6).¹⁶

F2-17) Assuming a construction phase of 2½ years,¹⁷ 413 “job years” is 165 full-time equivalent jobs.

F2-18) Total jobs of 31 include direct, indirect, and induced jobs (*id.*).

F2-19) According to SFW’s Economic Analysis, SFW claims that its project will add 196 jobs with total earnings of \$105 million over the life of the Project (with average yearly earnings of \$26,786).¹⁸

F2-20) SFW’s *net adverse* socio-economic impact of \$1.555 billion (see ¶ F2-10, above) represents approximately 2,903 jobs lost in Suffolk County.¹⁹

F2-21) SFW’s Economic Analysis conclusion that “[t]he Project will clearly ... add a significant number of jobs” is contrary to fact (see ¶ F2-8, above).

F2-22) BOEM limits its analysis to the “ocean economy” that includes only 3.9% of Suffolk County’s population, ignoring over one million Suffolk County ratepayers who will have to pay for the Project (¶¶ 186-218).

F2-23) BOEM fails to consider South Fork Wind’s exorbitant price of **approximately** 19 cents²⁰ compared to an average price of 8 cents²¹ for the same renewable energy from nearby

¹⁶ Available at [boem.gov](https://www.boem.gov/sites/default/files/renewable-energy-program/State-Activities/NY/Appendix-AA.pdf)— <https://www.boem.gov/sites/default/files/renewable-energy-program/State-Activities/NY/Appendix-AA.pdf>

¹⁷ See Tentative Schedule (COP May 2021, at 1-44, PDF 91, Table 1.5-1).

¹⁸ Earnings, operational phase (\$2.9 m) by the contract (PPA) term (20 years), is \$58 m (unadjusted for inflation); in addition to the construction phase (\$47.1 m) is **\$105.1 million**.

¹⁹ SFW’s *net adverse socio-economic impact of \$1.555 billion, dividd by 20 years, divided by \$26,786* (see ¶ F2-19).

²⁰ South Fork Wind price is 18.8 cents per kilowatt-hour (Appendix 4, Tables 2 and 3).

²¹ The average price of Vineyard Wind, Revolution Wind, Sunrise Wind, and Mayflower Wind is 7.9 cents per kilowatt-hour (Appendix 4, Tables 2).

offshore wind farms (¶¶ 167-173).

F2-24) BOEM violates Executive Order 12898 by failing to acknowledge the Project cost (of **approximately \$2.013 billion**) and its impact on low-income families.

F2-25) Executive Order 12898 requires each Federal agency to make achieving environmental justice part of its mission. “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.”

F2-26) See FOURTEENTH CLAIM FOR RELIEF (¶¶ 627 – 647).

FRAUD #3 – Risk to Atlantic Cod Population (Cox Ledge)

F3-1) BOEM falsely asserts that the Project’s construction and installation would have, at worst, only “moderate impacts” on benthic habitat, Essential Fish Habitat (“EFH”), and finfish (including Atlantic cod) (ROD at 11, PDF 13, Table 2, fourth row, last column).

F3-2) BOEM defines “moderate impacts” to be where “[i]mpacts to species are unavoidable but would not result in population-level effects [emphasis added]. Impacts to habitat may be short term, long term, ... but would not result in population-level effects to species that rely on them [emphasis added].” (FEIS at 3-12, PDF 64, Table 3.4.2-1.)

F3-3) On the contrary, the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (“NOAA Fisheries”) wrote to BOEM’s Chief of Office of Renewable Energy Programs, James Bennett, on October 25, 2021. □ It reads— “Based on our Northeast Fisheries Science Center’s fisheries science expertise and supporting peer-reviewed publications, this project has a high risk of population-level impacts on Southern New England Atlantic cod [emphasis added]” (see Exhibit 01 – NOAA Fisheries Letter, at 1, second paragraph).

F3-4) The Letter continues— “Given the emerging data on the significance of Cox Ledge for spawning Southern New England cod, it is important we maintain a consistent and common understanding of the potential effects of offshore wind development to this spawning population. This is a high priority given the cumulative and population level impacts this Project and additional proposed development on Cox Ledge could have on this important cod population [emphasis added].”

F3-5) The letter was not disclosed on BOEM’s website with other similar correspondence.

F3-6) Mr. Bennett ignored scientific experts and their peer-reviewed publications. BOEM has permitted the developer to begin preparing the seafloor construction site, beginning November 1, 2022, while Atlantic cod are spawning.

F3-7) The adverse population-level impacts on cod *are* avoidable by restricting the time of construction to exclude the period from November 1 through April 30.

F3-8) Instead, BOEM allows construction activities to proceed in the developer’s interests and risks the Atlantic cod population.

F3-8) See THIRTEENTH CLAIM FOR RELIEF (¶¶ 604 – 626).

FRAUD #4 – Sunrise/South Fork Alternative

F4-1) BOEM falsely claimed that— “No other cable landing site alternatives were identified during Project development or scoping ... (see New York Article VII submitted by SFW)” (FEIS at 2-19, PDF 45, final paragraph).

F4-2) On the contrary, the Sunrise Alternative *was* identified and discussed during the Project’s development, scoping.

F4-3) ¶ The Sunrise Alternative was identified and discussed during the “New York Article VII” hearing that mentions the Sunrise Wind in the context of alternatives *eight times*.

F4-4) BOEM fraudulently asserts that “[t]he final EIS evaluates and discloses the impacts of ... the Beach Lane ... site” as grounds for not carrying forward alternative landing sites and “[e]liminating [the] Beach Lane landing site” (FEIS at 2-20, PDF 46, first paragraph).

F4-5) However, BOEM did *not* acknowledge, evaluate or disclose the impacts of environmental PFAS contamination within the proposed Beach Lane **construction** corridor **to and including the Interconnection Facility**.

F4-6) Had BOEM disclosed existing environmental PFAS contamination *within its proposed construction corridor (from the beach at Beach Lane to the Interconnection Facility, inclusive)*, BOEM **may have had to assess** alternative landing sites.

F4-7) BOEM did *not* acknowledge or consider **an alternative that would have combined Sunrise Wind with South Fork**.

F4-8) **BOEM** is not relieved of its statutory obligations, irrespective of a non-cooperating state agency action.

F4-9) The New York State Public Service Commission (“NYSPSC”) was a *non-cooperating* state agency that did *not* cooperate in the development and review of the FEIS.

F4-10) From the time when SFW filed its application with the NYSPSC (in September 2018) to when the NYSPSC evidentiary hearing (case 18-T-0604) concluded (on or about December 8, 2020), SFW did *not* test its planned onsite construction corridor for PFAS contamination.

F4-11) Plaintiff provided BOEM with evidence **from government agencies showing PFAS contamination exceeding EPA 2016 Health Advisory Levels in the area where SFW proposed constructing underground concrete infrastructure for high-voltage transmission lines**.

F4-12) Still, BOEM **failed** to “[r]igorously explore and objectively evaluate all reasonable alternatives” (40 C.F.R. § 1502.14(a)).

F4-13) BOEM failed to “[d]evote substantial treatment to each alternative considered” (40 C.F.R. § 1502.14(b)).

F4-14) BOEM did *not* consider an alternative specifically to avoid existing PFAS contamination in Wainscott.

F4-15) See SEVENTEENTH CLAIM FOR RELIEF (¶¶ 689 – 707).

FRAUD #5 –RFP was *not* technology-neutral or competitive

F5-1) BOEM claims that South Fork Wind’s “power purchase agreement executed in 2017 [“2017 PPA”] result[ed] from LIPA’s technology-neutral ... bidding process” (ROD at 7, PDF 9, seventh paragraph).

F5-2) BOEM’s claim (in ¶ F5-1) is false.

F5-3) BOEM claims that South Fork Wind’s 2017 PPA resulted from LIPA’s “competitive” (*id.*) bidding process.

F5-4) BOEM’s claim (in ¶ F5-3) is false.

F5-5) BOEM’s claim that SFW’s 2017 PPA resulted from LIPA’s “technology-neutral ... bidding process” (*id.*) is contradicted by internal LIPA documents provided to BOEM (in February 2021) showing that proposals were advanced in the procurement process *after* considering a proposal’s technology.

F5-6) The South Fork RFP was *not* “neutral” on technology (see ¶¶ 281-358).

F5-7) The South Fork RFP was *not* a “competitive” procurement process (see ¶¶ 281-358).

F5-8) Internal documents disclosed by LIPA (in January 2021) and provided to BOEM (in February 2021) show that SFW’s proposal for an offshore wind farm and transmission line did *not* satisfy all mandatory criteria of the South Fork RFP.

F5-9) Internal documents disclosed by LIPA (in January 2021) and provided to BOEM (in

February 2021) show that SFW's proposal for an offshore wind farm and transmission line did *not* satisfy all the minimum specifications and requirements of the South Fork RFP.

F5-10) SFW's proposed offshore wind farm and transmission line was the successful bid in a procurement "soliciting proposals ... to acquire sufficient local resources to meet expected peak load requirements until at least 2022 in the South Fork of Long Island [where] [s]uch resources will be located on Long Island [emphasis added]" (see ECF No. 3-12, Exhibit P- Notice to Proposers).

F5-11) The SFW's proposed offshore wind farm is *not* a "local resource" that is "located on Long Island" (*id.*).

F5-12) The SFW's proposed offshore wind farm is *not* designed "to meet expected peak load requirements ... in the South Fork of Long Island" (*id.*).

F5-13) The South Fork RFP procurement was rigged to preclude competition from other offshore wind developers.

F5-14) SFW's project was the *only* bid for offshore wind resources **in the procurement process**.

F5-15) On January 11, 2017, then-New York State Governor Andrew M. Cuomo directed the **Long Island Power Authority's** board of trustees to approve the South Fork Wind Farm proposal in his State of the State address.

F5-16) Fourteen days later, the **Long Island Power Authority** approved SFW's project (on January 25, 2021).

F5-17) Governor Cuomo **influenced the South Fork RFP procurement process by** interfering in an active procurement to advance the interests of a private developer to the detriment of the other bidders.

F5-18) The South Fork RFP permitted favoritism.

F1-19) BOEM knew at least as early as February 2021, nine months *before* issuing its ROD approving SFW's project, that it did *not* result from a technology-neutral or competitive bidding process.

F1-20) SFW knew that its own project did *not* result from a technology-neutral or competitive bidding process.

F1-21) See SIXTEENTH CLAIM FOR RELIEF (¶¶ 669 – 677).

FRAUD #6 – Project Design Pre-dates 2019 CLCPA (by 3½ years)

F6-1) BOEM claims that “the Project ... is designed to contribute to New York’s renewable energy requirements, particularly the state’s goal of generating 9,000 megawatts of offshore wind energy by 2030” (FEIS at i, PDF 5, last paragraph), referring to the New York State Climate Leadership and Community Protection Act (“2019 CLCPA”).

F6-2) BOEM’s claim (in ¶ F6-1, above) is false.

F6-3) [] New York State enacted the 2019 CLCPA *approximately three-and-a-half years after* [] SFW’s project design *was submitted* for consideration in the South Fork RFP procurement. F6-4) Even if, *arguendo*, the 2019 CLCPA was applicable (it is not), SFW’s project would have failed to *meet* the statute’s requirements (see ¶¶ 136-179).

F6-5) See SIXTEENTH CLAIM FOR RELIEF (¶¶ 669 – 673, 678).

FRAUD #7 – The Project is *not* economical and *not* commercial-scale

F7-1) SFW’s joint and equal owners (indirectly) are Ørsted A/S and Eversource.

F7-2) In response to Request for Information OSW-2018 Offshore Wind Renewable Energy Credits, Ørsted A/S and Eversource (under the name of Bay State Wind) agreed with

NYSERDA²² in its findings that projects less than 400 megawatts are “not likely to deliver cost savings. Due to diseconomies of scale, the costs per unit of energy for projects of 100 MW and 200 MW in size are significantly higher than those for 400 MW projects” (see ¶¶ 219-229) (also, see no. 22-5316, Doc. 1979671, at 10 of 11, [BOEM Exhibit #169](#), at 4, fourth paragraph).

F7-3) The planned South Fork Wind Farm will have a capacity of 130 MW and requires an approximately 66-mile-long transmission system.

F7-4) SFW’s proposed project requires a transmission line that is four times longer per megawatt capacity than the average of three nearby wind farms (see Appendix 4, Table 1).

F7-6) In 2021, the price of SFW’s renewable energy was \$188 per megawatt-hour (“MWh”).

F7-7) In 2021, the average price from four nearby commercial-scale offshore wind farms was \$79 per MWh.

F7-8) In 2021, SFW’s price was more than double the average price of four nearby commercial-scale offshore wind farms for the same renewable energy.

F7-9) The SFW project is *not* commercial-scale.

F7-10) BOEM’s claim that “[t]he purpose of the Project is to develop a commercial-scale offshore wind energy facility [emphasis added]” (ROD at 7, PDF 9, seventh paragraph) is unsupported by the evidence.

F7-11) See SIXTEENTH CLAIM FOR RELIEF (¶¶ 669 – 673, 679).

FRAUD #8 – No construction near groundwater

F8-1) In its FEIS, BOEM asserts that “[g]roundwater ... is relatively shallower along the two onshore South Fork Export Cable (SFEC) routes, with the depth to groundwater being

²² New York State Energy Research and Development Authority (“NYSERDA”)

approximately 4 to 5 feet around the landing sites (Beach Lane and Hither Hills)” (FEIS at H-23, PDF 655, first paragraph).

F8-2) In November 2018, BOEM received comments in response to its Draft Environmental Impact Statement (“DEIS”). The comments letter states that “[t]he Applicant’s [SFW’s] Construction and Operations Plan contains specifications for twenty (20) vaults which are similar in size to a standard 40-foot shipping container” (ECF No. 3-1, at 6, third paragraph). The comments letter includes the vaults’ dimensions showing a depth of ten feet (10 ft) (*id.*, footnote 15). The vault depth is also predominantly marked in Appendices III through VI (*id.*, at 11–14). The comments letter includes the depth of the “Transition Vault (approx. 35’ long x 8’ wide x 10’ deep” (*id.*, Appendix V at 13).

F8-3) The depth of groundwater is also shown on BOEM’s own website (<https://www.boem.gov/renewable-energy/state-activities/volume-ii-appendices>, G5 Onshore—Conceptual Drawings (Updated May 2019), <https://www.boem.gov/Appendix-G5/>, at PDF 9).

F8-4) At least as early as 2019, BOEM knew that the depth of SFW’s proposed construction would be at least ten feet deep around the landing site at Beach Lane, where the depth to groundwater was only approximately 4 to 5 feet. BOEM knew that SFW’s transition vault would encroach into groundwater (see the photograph of groundwater in the transition vault taken April 18, 2022, Appendix 1, ECF No. 1-2, at 6).

F8-5) BOEM asserts in its Final Environmental Impact Statement (“FEIS”) that “[t]here are no onshore construction activities under the Proposed Action that would require ground disturbance at depths at or near groundwater resources, and ... [t]he use of HDD at the landing sites would negate the need for trenching in areas where shallow groundwater would intersect the trench excavation. Onshore subsurface ground-disturbing activities would not be placed at a

depth that could encounter groundwater, and would therefore not result in impacts on water quality” (FEIS, at H-28, PDF 660, penultimate paragraph).

F8-6) BOEM’s claim (in ¶ F8-5, above) is false, and BOEM knew it was false in 2019.

This action seeks a declaratory judgment and injunctive and equitable relief. It challenges the failures of Federal Agency Defendants to comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.* (regulations of 1978, as amended in 1986 and 2005, prior to the revised regulations issued by the CEQ on July 16, 2020) (“NEPA”); the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331, *et seq.* (“OCSLA”); and making fraudulent representations to support its decision to approve an offshore wind facility and necessary submarine and onshore transmission system filed by South Fork Wind LLC (formerly Deepwater Wind South Fork LLC, the “Applicant,” “South Fork Wind,” or “SFW”).

This action seeks a declaratory judgment and injunctive and equitable relief. It challenges South Fork Wind’s violations of the OCSLA’s implementing regulations, its non-compliance with BOEM’s guidelines, and its fraudulent representations regarding the environmental and socio-economic impacts of its offshore wind facility and transmission system.

III. JURISDICTION AND VENUE

1. This Court has original subject matter jurisdiction under 28 U.S.C. §§ 1331. This is a civil action pursuant to 42 U.S. Code § 6972(a)(1)(A). The civil action arises from claims under Federal Law, including the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 through 706; NEPA (regulations of 1978, as amended in 1986 and 2005), the OCSLA, 43 U.S.C. § 337(p)(4)(B).

- 1(a) This action is filed pursuant to Section 15 of the Clayton Act, as amended.
2. This Court has the authority to grant equitable relief for Defendants' fraudulent representations and the authority to grant the relief requested herein pursuant to the APA, 5 U.S.C. § 706 (2); and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202.
3. The venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(A), where Defendants are agencies of the United States that reside in this judicial district.
4. A reasonable connection to the forum exists, and the venue is proper, will promote objectivity, and lead to a just decision based on the merits.

IV. PARTIES

5. I, Simon V. Kinsella, plaintiff *pro se*, am a full-time resident of Wainscott, in the Town of East Hampton, Suffolk County, New York –
 - a. I live near the beach where the Applicant plans to bring a high-voltage submarine cable ashore and install underground transmission infrastructure through my neighborhood;
 - b. I am a taxpayer and a ratepayer in the service area who will have to pay higher rates for power because BOEM approved a project contrary to its statutorily mandated obligations;
 - c. In 2017, my community asked me to investigate a proposal for an offshore wind farm sponsored by the Applicant following a request (in 2016) that I look into water quality issues in Wainscott, including a group of emerging contaminants known collectively as per- and polyfluoroalkyl substances (“PFAS”).
 - d. I have contributed substantially to BOEM’s record of review, including testimony (of

299 pages), briefs (of 46 pages), and provided approximately one hundred and fifty (150) exhibits.

6. I relied on BOEM to conduct a vigorous and wholehearted review “to the fullest extent possible” (NEPA 1978, 42 USC § 4332, sect. 102), but BOEM recklessly ignored its obligations.

7. I have standing to bring this action –

- a. Had the defendants conducted a thorough review, my daily routine and the pleasures I enjoy with my family would not have been put on hold for years. Since 2016, I have been fighting for clean water that BOEM threatens by its action to approve the South Fork Wind Project’s onshore construction. It has taken its toll and adversely impacted my family and me.
- b. Having high-voltage electric cables within feet of where I used to jog and enjoy walking to the local farm stand and socializing with neighbors will forever be tainted with the adverse health effects of (I) concrete duct banks and vaults, prolonging and exacerbating existing PFAS contamination of soil, groundwater, and surface waters of Georgica Pond and Wainscott Pond; (II) electromagnetic radiation; and (III) thermal effects.
- c. I used to enjoy Georgica Pond when sailing at least three days a week (weather permitting), swimming, and eating fresh fish and crabs caught from the pond. Due to irreparable damage from construction that BOEM improperly allowed, I can no longer enjoy our local environment.
- d. One of my greatest pleasures used to be jogging to the beach along Beach Lane with my husband. I am no longer safe doing so with any regularity due to underground high-voltage transmission infrastructure and cables buried just a few feet below the

surface. The standards used to assess the EMF effects date to 1978 and 1992. It is as if science stood still for 30 years.

- e. South Fork Wind's chosen landing site/cable route is nestled between two glacial ponds, Georgica Pond and Wainscott Pond, separated by only 2,300 feet. It is a magnificent environment teeming with marine life and birds and a reason why I moved to Wainscott full-time in 2008. BOEM ignored its mandate to protect such a beautiful and delicate environment.
- f. Since BOEM approved the project, South Fork Wind has taken from my family and me simple pleasures we used to enjoy. We live in a toxic environment where we are rarely told the truth by those who are duty-bound to protect us and our environment but have failed to do so.
- g. Due to the defendants' statutory violations, South Fork Wind has and will continue to cause irreparable damage to our environment, our property will be less valuable, and our utility rates will be higher.
- h. Since 2007 when I moved to Wainscott, my family and I have enjoyed reasonably priced fresh fish that we buy at the local "Seafood Shop" in Wainscott. Almost daily, after collecting the mail from across the road (at the Wainscott Post Office), I visit the Seafood Shop, buying soft-shell crabs, lobster, fillets/whole fish— fluke, salmon, and Atlantic cod (among others). As the commercial catch for Atlantic cod off Montauk Point (eastern Long Island) has dwindled (to less than 10% of what it was ten years ago), the price has steadily risen.²³ By its (unlawful) grant of approval, Defendant

²³ According to NOAA Fisheries of the United States Report ("FUS Report"), the value of commercial landings in 2011 was \$30,091,030, whereas last year (2021), it was only \$2,787,289, just 9% of the value in 2011. See Exhibit 05 NOAA FUS Report.

BOEM has permitted the offshore wind farm developer to damage “Cox Ledge, an area with particularly complex and unique habitat conditions that support a wide range of marine resources” such as “spawning aggregations of Atlantic cod.”²⁴

According to NOAA Fisheries, the proposed wind farm development “may result in cascading long term to permanent effects to species that rely on this area for spawning and nursery grounds and the fisheries and communities that target such species.”²⁵ BOEM’s (unlawful) approval to allow massive offshore construction will lead to further declines in Atlantic cod population levels and increases in price for Atlantic cod and other fish affected by industrial-scale offshore construction, and my family and I, and the public, will have to pay higher prices as a direct result of BOEM’s unlawful actions (See Section XIII for further details.)

- i. In 2018, I notified BOEM that “[t]he Applicant has failed to comply with 30 CFR 585.627(a)(7) with specific regard to its potential negative impact upon the commercial fishing industry, largely based in Montauk, and the effect it will have on the local economy” (see Complaint Exhibit A, at 5, last paragraph). Four years later and BOEM has done little to ameliorate the adverse effects on the local fishing industry from offshore development it approved.
- j. I have standing to bring this action under the Clayton Act and other antitrust law as defined within the OCSLA. I will have to pay higher prices for electrical power than I would have otherwise if it were not for South Fork Wind’s participation in a

²⁴ See Exhibit 03— Letter from the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (“NOAA Fisheries”), Assistant Regional Administrator for Habitat Conservation, Louis Chiarella, to BOEM’s, Chief, Environmental Branch for Renewable Energy, Ms. Michelle Morin, dated June 7, 2021 (at 4, third paragraph).

²⁵ *Ibid.*

manipulated procurement process, the South Fork Request for Resources (“South Fork RFP”).

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

9. DEFENDANT, U.S. BUREAU OF OCEAN ENERGY MANAGEMENT (“BOEM”) is a component of DOI and an “agency” within the meaning of the APA, 5 U.S.C. § 701(b)(1). Exercising authority delegated from the U.S. Department of the Interior, BOEM took the final agency actions challenged herein. Defendant BOEM was established in 2010 to oversee the development of the Outer Continental Shelf. BOEM’s mission “is to manage development of U.S. Outer Continental Shelf energy and mineral resources in an environmentally and economically responsible way.”²⁶ BOEM evaluates the resources of the Outer Continental Shelf and leases portions of it. The Bureau also supervises and approves any oil, gas, or renewable energy projects within Outer Continental Shelf leases.

9.1 DEFENDANT, LAURA DANIELS- DAVIS, is sued in her official capacity as Principal Deputy Assistant Secretary, Land and Mineral Management. Ms. Daniels-Davis’ signed the U.S.

²⁶ U.S. Department of the Interior: Bureau of Ocean Energy Management, About Us (at <https://www.boem.gov/about-boem>, last accessed on October 21, 2022).

Department of the Interior, Bureau of Ocean Energy Management, Record of Decision for the South Fork Wind Project on November 24, 2021.

9.2 DEFENDANT, AMANDA LEFTON, is the Director of BOEM. Ms. Lefton issued the final agency decision challenged herein—the approval of the Final Environmental Impact Statement for the South Fork Wind Project and Construction and Operations Plan (“COP”). Director Lefton is sued in her official capacity as Director of the Bureau of Ocean Energy Management. Before becoming Director of BOEM (in February 2021), Ms. Lefton was First Assistant Secretary for Energy and the Environment under then-New York State Governor Cuomo M. Cuomo. According to Politico, Cuomo turned “the Public Service Commission [“PSC”], the state’s powerful utility regulator, into an organ of executive power in ways that critics find unprecedented and potentially troubling. ... ‘It’s an agency that carries out the governor’s orders regardless of the impact on the ratepayers,’ Earthjustice attorney Chris Amato said of the utility regulator. ‘The public process is a charade, it’s a play act.’”²⁷ Under Governor Cuomo, Ms. Lefton “managed a portfolio of twelve agencies and authorities”²⁸ that included LIPA and the NYS Department of Public Service (the administrative branch of the PSC).²⁹ After working with LIPA and the PSC under Cuomo, Ms. Lefton left the New York State Executive Chamber for Washington as the newly appointed Director of BOEM. As Director of BOEM,

²⁷ Politico, Critics see Cuomo power play at the PSC, by Marie french and David Giambusso, published June 5, 2017 (www.politico.com/states/new-york/albany/story/2017/06/05/critics-see-cuomo-power-play-at-the-psc-112491). Also, read Ronan Farrow’s exposé published in The New Yorker, Andrew Cuomo’s WarAgainst a Federal Prosecutor, August 10, 2021 (www.newyorker.com/news/news-desk/andrew-cuomos-war-against-a-federal-prosecutor?utm_medium=social&utm_social-type=owned&mbi%E2%80%A6).

²⁸ www.boem.gov/about-boem/boem-leadership/amanda-lefton (last accessed July 26, 2022).

²⁹ The New York State Secretary for Energy & Environment is part of the New York State Executive Chamber that oversees the following agencies: NYSDPS, LIPA, NYPA, NYSERDA, NYSDEC, NYSEFC, NYSOPRHP, APA, LGPC, HRPT, HRBRRD, and HRVG.

Ms. Lefton is ideally placed to ensure smooth sailing for South Fork Wind. As Director of BOEM, credentials in marine science, hydrogeology, economics, law, business administration, or any other qualification related to the management of offshore energy and mineral resources would be advantageous. Ms. Lefton holds a Bachelor of Arts from the University of Albany. Director Lefton's bio on BOEM's website is brief. It does not mention any professional memberships, awards, or notable achievements. Ms. Lefton replaced BOEM Acting Director Walter Cruickshank, Ph.D., who had worked in the Department of the Interior for more than 30 years and holds a Doctorate in Mineral Economics. In February 2021, Dr. Cruickshank, an eminently qualified and experienced candidate, was replaced with an inappropriately talented and inappropriately experienced (33-year-old) Arts graduate from the University of Albany.

9.3 DEFENDANT, JAMES F. BENNETT, is sued in his official capacity working for the Bureau of Ocean Energy Management. Mr. Bennett "was the Program Manager for the Office of Renewable Energy Programs (OREP) within the Department of the Interior's (DOI) Bureau of Ocean Energy Management (BOEM) from January 2015 until July 2022." As Program Manager, Mr. Bennett oversaw "approximately 70 staff and other personnel. My responsibilities included managing, among other things: ... environmental review of program activities, public meetings and other outreach efforts, consultations with Federal, State, ... and local agencies as required by law, and coordination with Intergovernmental Renewable Energy Task Forces. The OREP staff that I oversaw conducted renewable energy lease sales for areas offshore Massachusetts, Rhode Island, New Jersey, New York, and the Carolinas. I was actively involved in the work leading to the approval of the South Fork Wind COP" (see DECLARATION OF JAMES F. BENNETT, made October 3, 2022 (ECF No. 25-1, at ¶¶ 1-2)). According to Mr. Bennett's Declaration, "[o]n January 18, 2022, I signed the COP Approval Letter for the South Fork Wind COP ... that authorizes South Fork Wind to construct and operate its

project subject to the terms and conditions therein” (*Id.* at ¶ 5).

9.4 DEFENDANT, MARY BOATMAN, is sued in her official capacity as Environmental Studies Chief, Office of Renewable Energy Programs, Bureau of Ocean Energy Management. Ms. Boatman’s name appears in the List of Preparers and Reviewers for the South Fork Wind’s Final Environmental Impact Statement (“FEIS”) under Table B-1 as the “National Environmental Policy Act (NEPA) Coordinator” with ultimate responsibility for “NEPA compliance” (see FEIS, at B-1, PDF 297).

9.5 DEFENDANT, MICHELLE MORIN, is sued in her official capacity as Chief, Environment Branch for Renewable Energy, Bureau of Ocean Energy Management. Ms. Morin’s name appears in the List of Preparers and Reviewers for the South Fork Wind’s FEIS under Table B-1 as a contributor responsible for “NEPA compliance” (*Id.*).

9.6 DEFENDANT, EMMA CHAIKEN, is sued in her official capacity as an economist for the Bureau of Ocean Energy Management. Ms. Chaiken’s name appears in the List of Preparers and Reviewers for the South Fork Wind’s FEIS under Table B-1 as a contributor responsible for “[d]emographics, employment, and economics; recreation and tourism; land use and coastal infrastructure; commercial fisheries and for-hire recreational fishing” (*Id.*).

9.7 DEFENDANT, MARK JENSEN, is sued in his official capacity as an economist for the Bureau of Ocean Energy Management. Ms. Jensen’s name appears in the List of Preparers and Reviewers for the South Fork Wind’s FEIS under Table B-1 as a contributor responsible for “[d]emographics, employment, and economics; recreation and tourism; land use and coastal infrastructure; commercial fisheries and for-hire recreational fishing” (*Id.*).

9.8 DEFENDANT, JENNIFER DRAHER, is sued in her official capacity working for the Bureau of Ocean Energy Management. Ms. Draher’s name appears in the List of Preparers and

Reviewers for the South Fork Wind’s FEIS under Table B-1 as a contributor responsible for “[w]ater quality” (*Id.*).

9.9 DEFENDANT, BRIAN HOOKER, is sued in his official capacity as a biologist for the Bureau of Ocean Energy Management. Mr. Hooker’s name appears in the List of Preparers and Reviewers for the South Fork Wind’s FEIS under Table B-1 as a contributor responsible for “[b]enthic, finfish, invertebrates, and essential fish habitat; commercial fisheries and for-hire recreational fishing” (*Id.*).

10. DEFENDANTS, the U.S. ENVIRONMENTAL PROTECTION AGENCY and the Honorable Michael S. Regan, in his official capacity as Administrator of the U.S. Environmental Protection Agency (collectively “EPA”), is an “agency” within the meaning of the APA, 5 U.S.C. § 701(b)(1). Through its Secretary, EPA has the authority and duty to comply with NEPA (42 U.S.C. 4321 *et seq.*) and its implementing regulations.

10.1 DEFENDANT, SOUTH FORK WIND LLC (formerly known as Deepwater Wind South Fork LLC) (“SFW”) is a merchant operator and developer of an offshore wind farm and transmission system with onshore support facilities (described below as the “Project”). South Fork Wind LLC is the counterpart in a power purchase agreement (executed February 6, 2017, and amended September 30, 2021) with Long Island Power Authority.

V. THE PROJECT

11. The proposed South Fork Wind Project comprises an offshore wind farm with a nameplate capacity of 130 megawatts (“130 MW”), its transmission cable(s), and related infrastructure that includes an onshore interconnection facility (herein collectively referred to as the “Project”).

12. The offshore wind farm component of the Project will be located approximately thirty-five miles east of Montauk Point, New York, in the Atlantic Ocean on the Outer Continental Shelf in BOEM Renewable Energy Lease Number OCS-A 0517.

13. The total length of the proposed new transmission line is approximately sixty-six (66) miles, of which approximately sixty-two (62) miles will be offshore and approximately four (4) miles onshore.

14. Onshore, South Fork Wind plans to install underground transmission infrastructure for high-voltage cables through the seaside residential neighborhood of Wainscott and an interconnection facility” (i.e., a substation with transformers, *et cetera*).

15. South Fork Wind plans indicate that it will excavate over 30,000 tons of material (including soil and groundwater) from its onshore construction corridor and interconnection facility.

16. The onshore section of the proposed high-voltage transmission system includes the underground installation of ten large vaults with concrete duct banks between each.

17. Nine vaults are for splicing (~ 26 ft long by 12 ft wide by 12 ft deep each), and one transition joint vault (~ 48 ft long by 10 ft wide by 12 ft deep).

18. The plans allow for approximately two miles of duct banks (~ 4 ft wide by 5 ft deep for 2 miles, non-contiguous).

19. The proposed onshore construction corridor runs immediately above and, at some locations, encroaches into an aquifer system used for drinking water that the US Environmental Protection Agency designated a Sole-Source Aquifer in 1978.

20. The aquifer system provides one hundred percent (100%) of the drinking water consumed on the South Fork (excluding bottled water). No alternative drinking water source could physically, legally, and economically supply all those who depend on it for drinking water and

all other freshwater needs.

21. Suffolk County Water Authority (“SCWA”) supplies public water to connected homes.
22. SCWA draws freshwater from the aquifer system using public supply wells.
23. SCWA operates six public supply wells within one mile of the proposed onshore construction corridor.
24. The onshore section of the construction corridor for the proposed high-voltage transmission cables and underground infrastructure runs through two Critical Environmental Areas designed to protect the safety of the aquifer: (i) the Special Groundwater Protection Area (South Fork); and (ii) the Water Recharge Overlay District.
25. Before 2018, approximately ninety percent of residents living in Wainscott used private wells for all their freshwater needs, including drinking water. My family and I, among others, still use private wells.
26. Many farmers in Wainscott irrigate their crops using private well water.
27. The proposed (underground) construction corridor is downgradient and adjacent to the East Hampton Airport site that includes an industrial park (collectively “Airport”).
28. The New York State Department of Environmental Conservation (“NYSDEC”) registered the Airport with the State Superfund Program (site codes 152250 and 152156).
29. South Fork Wind’s construction corridor shares a common border with the Airport of more than one thousand feet long (1,000 ft).
30. South Fork Wind’s construction corridor is adjacent and downgradient from the Airport, a known source of PFAS contamination of soil and groundwater.
31. PFAS contamination concentration levels at the site exceed Federal and State standards.
32. Such contamination exists within five hundred feet of South Fork Wind’s (underground)

construction corridor.

33. South Fork Wind's construction corridor is adjacent (for approximately 3,000 feet) and upgradient from a former sand-mining operation registered with NYSDEC State Superfund Program (as Waincott Sand and Gravel, code 152254).

34. PFAS contamination in groundwater south of the Airport (in Waincott, NY) is pervasive.

35. In 2017 and 2018, the Suffolk County Department of Health Services ("SCDHS") tested over three hundred (300) private drinking water wells in Waincott downgradient from the Airport in the same area where South Fork Wind is currently installing its underground high-voltage transmission infrastructure.

36. In June 2018, SCDHS reported receiving three hundred and three (303) test results for PFAS contamination of private wells in Waincott. Of those wells, one hundred and fifty-nine wells (52%) showed detectable levels of perfluorooctane sulfonate ("PFOS") and perfluorooctanoic acid ("PFOA") contamination.

37. The average (combined) concentration level of PFOS/PFOA contamination detected in the private drinking water wells tested by SCDHS up to mid-June 2018 is twenty-three parts per trillion (23 ppt).

38. The maximum contamination level of PFOS/PFOA contamination detected in the private drinking water wells tested by SCDHS up to mid-June 2018 is seven hundred and ninety-one parts per trillion (791 ppt).

39. Thirteen (13) wells tested by SCDHS up to mid-June 2018 exceeded the 2016 EPA Health Advisory Level of seventy parts per trillion (70 ppt).

VI. NOTICE OF DEFICIENCIES

40. In November 2018, BOEM received comments from me (“2018 Comments”) in response to South Fork Wind’s Construction and Operations Plan (“COP”). See Exhibit A- 2018 Comments. BOEM posted the comments-letter online, which is incorporated by reference and available at – www.regulations.gov/comment/BOEM-2018-0010-0074.

41. On February 16, 2021, I gave oral testimony during BOEM’s Public Hearing #3 (“Oral Testimony”), which is incorporated by reference and available at – https://downloads.regulations.gov/BOEM-2020-0066-0380/attachment_1.pdf (transcript time-stamp beginning at 1:18:08).

42. In February 2021, BOEM received further comments from me (“2021 Comments”) in response to the Draft Environmental Impact Statement (“DEIS”). See Exhibit B- 2021 Comments.

43. My 2021 Comments provide clear substantial evidence, including testimony, briefs, and over one hundred and fifty exhibits showing the many assertions upon which BOEM relied were not based in fact. See Exhibit C – BOEM Index of Documents. All the documents listed in Exhibit C are herein incorporated by reference and are available at the following links maintained by BOEM—

<https://www.regulations.gov/comment/BOEM-2020-0066-0343>

<https://www.regulations.gov/comment/BOEM-2020-0066-0384>

<https://www.regulations.gov/comment/BOEM-2020-0066-0385>

44. BOEM made little attempt to address the substantive material deficiencies raised in my 2021 Comments.

45. In December 2021, BOEM (along with other Federal, State, and local agencies and South Fork Wind) received sixty days’ notice of intent to sue (Exhibit D- 60-day NOI to Sue).

46. In March 2022, BOEM (along with other Federal, State, and local agencies and South Fork Wind) received further testimony concerning South Fork Wind's flawed testing of soil and groundwater for PFAS contamination (Exhibit E- 2022 Comments).

47. BOEM did *not* contact me to discuss my 2018 Comments, 2021 Oral Testimony, or my 2021 Comments.

VII. PFAS CONTAMINATION

Notice of PFAS Received by BOEM

48. In February 2021, BOEM received comments, including over one hundred and fifty exhibits providing substantive evidence of PFAS contamination surrounding South Fork Wind's proposed onshore construction corridor through Wainscott. The main exhibits on PFAS contamination are listed below (NB: all Exhibit #000 are linked to the source documents that BOEM uploaded to its website) –

PFAS Contamination Heat Map of Onshore Cable Route (1 page).....	<u>Exhibit #005</u>
PFAS Zone - onshore cable route decided <i>after</i> PFAS detection (1 page).....	<u>Exhibit #006</u>
PFAS Contamination of Onshore Corridor (satellite map) (2 pages).....	<u>Exhibit #004</u>
PFAS release within 500 feet of SFEC route (surface runoff) (2 pages).....	<u>Exhibit #007</u>
Testimony 1-1, PFAS Contamination, Kinsella (Sep 9, 2020)(37 pages).....	<u>Exhibit #061</u>
• Exhibit C - Report No 3 - PFAS Contamination (91 pages).....	<u>Exhibit #065</u>
Testimony 1-2 - PFAS Contamination, Kinsella (Oct 9, 2020)(11 pages).....	<u>Exhibit #094</u>
Testimony, Rebuttal (Oct 30, 2020)(13 pages).....	<u>Exhibit #162</u>
Initial Brief by Simon V. Kinsella (Jan 20, 2021)(34 pages).....	<u>Exhibit #009</u>
Reply Brief & Exhibits by Simon V. Kinsella (Feb 3, 2021)(29 pages).....	<u>Exhibit #011</u>
Motion to Reopen Record by Simon V. Kinsella (Jan 13, 2021)(21 pages)....	<u>Exhibit #022</u>

49. BOEM knew of the nature and extent of PFAS contamination and the degree to which such contamination exceeded EPA and applicable New York State regulatory standards at least nine months *before* it issued its ROD approving the Project.

50. BOEM asserted in its FEIS that “[o]verall, existing groundwater quality in the analysis area appears to be good” (see FEIS at p. H-23, PDF p. 655 of 1,317).

51. BOEM failed to take a “hard look” into PFAS contamination.

BOEM overlooks South Fork Wind errors

52. In September 2018, South Fork Wind submitted to BOEM a Construction and Operations Plan (“COP”) for its proposed Project. The COP reads— “Groundwater throughout most of eastern Suffolk County is of generally high quality (NYSDOH, 2003). All freshwater groundwater in New York State is Class GA, a source for potable water supply (NYSDOS, 2018b). With rare exceptions, potable water supplied by community water systems in Suffolk County meet all drinking water quality standards” (p. 4-56, PDF p. 219).

53. In May 2021, three months *after* BOEM had received detailed information on existing PFAS contamination (see above), South Fork Wind submitted to BOEM a revised COP.

54. South Fork Wind’s revised COP repeats the same misleading information concerning groundwater quality *verbatim* from its COP that it submitted to BOEM *two-and-half years* earlier (in September 2018) (see May 2021 COP, at p. 4-60, PDF p. 228).

55. Neither South Fork Wind’s COP of September 2018 nor its COP of May 2021 acknowledges *any* PFAS contamination.

56. According to NEPA, BOEM “shall independently evaluate the information submitted [by South Fork Wind] and shall be responsible for its accuracy. [...] It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency” (NEPA 1978, 40 CFR

1506.5(a)).

57. BOEM failed to evaluate or verify South Fork Wind’s misleading statements concerning the quality of groundwater supplies in Wainscott.

58. BOEM did *not* consider environmental PFAS contamination along the proposed onshore transmission cable route where South Fork Wind plans to excavate over 30,000 tons of material.

59. In August 2021, BOEM referred to “NYSDEC (2018) groundwater quality standards” that were outdated and inapplicable to drinking water standards for a sole-source aquifer used for drinking water.

60. The statement is over one thousand three hundred and seventeen (1,317) pages and contains only one reference to PFAS contamination. It reads – “Sampling at the fourth site [...] has indicated the presence of perfluorinated compounds. Site-related compounds have been identified in soil and groundwater within [...] the site” (at p. H-23, PDF 655, ¶ 2, last sentence).

61. BOEM inserts the two-sentence reference to PFAS contamination that poses a severe risk to human health and the environment deep within the FEIS (on page 655).

Nature of PFAS

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

63. The groundwater in Wainscott flows from a primary source of PFAS contamination at East Hampton Airport towards the Atlantic Ocean, generally flowing from the northwest to the southeast.

64. Surface water in the form of run-off over sealed surfaces can carry PFAS contamination with it.

65. Other than the primary source of contamination at East Hampton Airport, there are other

sources of PFAS contamination. For example, according to South Fork Wind's Final Hazardous Waste and Petroleum Work Plan (April 2021), firefighters extinguished a house fire at 75 Wainscott Northwest Road (close to Montauk Highway) in August 2007.

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

67. South Fork Wind showed no regard for the environmental impacts from underground concrete infrastructure and excavation activities in an area containing PFAS contamination (see Appendix 2- Construction near house Fires, at p. 1).

68. Another example of firefighters extinguishing a house fire occurred on Beach Lane in 1965. According to South Fork Wind's Final Hazardous Waste and Petroleum Work Plan (April 2021), "Mr. and Mrs. John C. Tysen's summer home on Beach Lane, Wainscott was destroyed by fire."

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

70. South Fork Wind showed no regard for the environmental impacts from underground concrete infrastructure and excavation activities in an area containing PFAS contamination (see Appendix 2- Construction near house Fires, at p. 2).

71. Exposure to PFAS contamination is not restricted to ingesting contaminated tap water at home but may have included past exposure at restaurants, and other homes, swimming in contaminated water, or drinking water in public places.

Existing PFAS (Wainscott)

72. On September 9, 2020, South Fork Wind received notice of two Site Characterization Reports prepared for the New York State Department of Environmental Conservation

(NYSDEC”) showing extensive PFAS contamination concentrations in soil and groundwater in the vicinity of South Fork Wind’s proposed (underground) construction corridor—

- a. NYSDEC Site Characterization Report: East Hampton Airport (NYSDEC Site: 152250/152156). See Exhibit C, BOEM Index of Documents, Exhibits #066 through #074, available at – www.regulations.gov/comment/BOEM-2020-0066-0386.
 - b. NYSDEC Site Characterization Report: Wainscott Sand and Gravel (NYSDEC Site Code 152254). See Exhibit C, BOEM Index of Documents, [Exhibit #075](#).
73. NYSDEC reports on PFAS contamination in the vicinity of South Fork Wind’s construction corridor (below with links to dec.ny.gov) are herein incorporated by reference –
- c. [Fact Sheet.HW.152250.2018-01-05.Airport_Well Sampling Press Release SCDHS.pdf](#)
 - d. [Fact Sheet.HW.152250.2019-06-19.East Hampton Airport Class 02 Listing.pdf](#)
 - e. [Report.HW.152250.2018-11-12.Alpha Geoscience Hydrogeology Rpt Wainscott S&G.pdf](#)
 - f. [Report.HW.152250.2018-11-30.Airport Site Characterization Report Final.pdf](#)
 - g. [Work Plan.HW.152250.2021-06-30.East Hampton Airport Site RIFS WP-FINAL.pdf](#)
 - h. [Report.HW.152254.2020-07-28.Final SC Report.pdf](#)

73. 01 BOEM has online access to the public records of the New York State Department of Environmental Conservation (“NYSDEC”), including access to the NYSDEC State Superfund Program under site record at East Hampton Airport (code 152250), available – <https://www.dec.ny.gov/data/DecDocs/152250/>; and for site record at Wainscott Sand and Gravel

(code 152254) available at – <https://www.dec.ny.gov/data/DecDocs/152254/> (was at ¶ 303).

74. The PFAS contamination concentration levels quoted below are taken from the site characterization reports (above), which I also summarized in my Initial Brief of January 20, 2021 (BOEM Index Exhibit #009, pp. 19-24).

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

76. Wainscott Sand and Gravel (“**Wainscott S&G**”) (NYSDEC site: 152254) is adjacent, downgradient, and on the opposite side of the South Fork Wind's proposed construction corridor.

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

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

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

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

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

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

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

84. The same levels of PFOS and PFOA contamination but measured against the updated

2022 USEPA (interim) HAL (0.02 ppt for PFOS and 0.004 ppt PFOA) are—

85. Well: EH-19A – PFOS = 5 ppt (exceeds 2022 HAL by 250 x)
– PFOA = 140 ppt (exceeds 2022 HAL by 35,000 x)
86. Well: EH-19A2 – PFOS = 140 ppt (exceeds 2022 HAL by 7,000 x)
– PFOA = 34 ppt (exceeds 2022 HAL by 8,500 x)
87. Well: EH-19B – PFOS = 77 ppt (exceeds 2022 HAL by 3,850 x)
– PFOA = 89 ppt (exceeds 2022 HAL by 22,250 x)
88. Well: EH-1 – PFOS = 1.8 ppt (exceeds 2022 HAL by 90 x)
– PFOA = 160 ppt (exceeds 2022 HAL by 40,000 x)

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

90. Well: EH-19A (soil) – PFOS = 3,900 ppt
– PFOA = 180 ppt
– PFHxS = 170 ppt
91. Well: EH-19B (soil) – PFOS = 12,000 ppt
– PFOA = 3,800 ppt
– PFHxS = 3,800 ppt
92. Well: EH-1 (soil) – PFOS = 10,000 ppt
– PFOA = 180 ppt
– PFHxS = 170 ppt

93. Groundwater samples taken from monitoring wells on the opposite side of the corridor from the source of contamination (at the Airport), within one hundred and fifty feet

downgradient from the construction corridor, all show exceedingly high levels of the same chemical compounds (PFOA, PFOS, and PFHxS) seen in soil samples taken at the Airport.

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

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

96. Well: MW5 (GW) – PFOS = 877 ppt (exceeds 2022 HAL by 43,850 x)
– PFOA = 69 ppt (exceeds 2022 HAL by 17,250 x)
– PFHxS = 566 ppt
– PFOS/PFOA = 946 ppt (exceeds 2016 HAL by 13.5 x)
97. Well: MW3 (GW) – PFOS = 1,010 ppt (exceeds 2022 HAL by 50,500 x)
– PFOA = 28 ppt (exceeds 2022 HAL by 7,000 x)
– PFHxS = 306 ppt
– PFOS/PFOA = 1,038 ppt (exceeds 2016 HAL by 14.8 x)
98. Well: MW4 (GW) – PFOS = 232 ppt (exceeds 2022 HAL by 11,600 x)
– PFOA = 5.57 ppt (exceeds 2022 HAL by 1,393 x)
– PFHxS = 43.4 ppt
– PFOS/PFOA = 238 ppt (exceeds 2016 HAL by 3.4 x)
99. Groundwater containing levels of PFAS contamination exceeding USEPA limits flows

from the source of contamination at the Airport site across South Fork Wind's construction corridor downgradient to the Wainscott S&G site, where the same chemical compounds are present in groundwater monitoring wells.

100. BOEM received comments regarding PFAS contamination in February 2021, nine months *before* issuing its ROD (November 2021). Still, it did not consult with, obtain comments from, or otherwise use "to the maximum extent possible" the special expertise of the EPA (a cooperating agency) regarding environmental impacts concerning PFAS contamination (NEPA 1978, 40 C.F.R. § 1501.6 and §1508.5).

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

102. South Fork Wind proceeded with construction and excavation on Beach Lane near Well MW-4A, which was inconsistent with a manner that provides safety and protection of the environment according to the OCSLA (43 U.S.C. §§ 1331 *et seq*). See Appendix 2 (p. 2).

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

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

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

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

107. In 2021, South Fork Wind disclosed its laboratory test results for PFAS contamination and supporting documentation (for testing undertaken in December 2020 and January 2021). The disclosures showed that South Fork Wind took most soil samples from the shallow surface where PFAS contamination was less likely to be detected (see Exhibit E- 2022 Comments).

108. In 2022, South Fork Wind has *not* disclosed laboratory test reports or supporting documentation for PFAS contamination testing conducted around January 2022.

108.01 No New York State agency or authority cooperated in developing the FEIS (was at ¶ 298).

108.02 BOEM is not relieved of its statutorily mandated obligation “to use all practicable means [...] to improve and coordinate Federal plans, functions, programs, and resources to [...] assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings [emphasis added]” (NEPA 42 U.S. Code § 4331(b)(2)) (originally at ¶ 299).

108.03 BOEM received testimony, briefs, and exhibits and is compelled to take a “hard look”

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and “use all practicable means”³¹ to ensure for all residents living in Wainscott “safe, healthful, productive, and esthetically [...] pleasing surroundings”³² (originally at ¶ 300).

108.04 BOEM had “practicable means” to access the electronic files it received in February

³⁰ *E.g., Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (approving hard look style review of legislative rules).

³¹ NEPA 42 U.S. Code § 4331(b)(2)

³² *Ibid.*

2021 because it posted them online (originally at ¶ 301).

108.05 BOEM had online access to the entire evidentiary record and procedural history in the New York State Public Service Commission hearing (docket 18-T-0604) on the South Fork Wind's Project (originally at ¶ 302).³³

VIII. DUE PROCESS OF LAW

109. In January 2017, the LIPA Board of trustees approved the 2017 PPA with South Fork Wind.

110. A Memorandum, "Authorization to enter into a Power Purchase Agreement with Deepwater Wind South Fork, LLC for the South Fork Wind Farm Project," to the Board of Trustees from LIPA's CEO (January 2017) ("LIPA PPA Memo"), defers environmental reviews to be "conducted and [...] supervised by the Bureau of Ocean Energy Management pursuant to federal law [...] [and] a certificate of environmental compatibility and public need from the Public Service Commission pursuant to Article VII of the Public Service Law" (LIPA PPA Memo, at p. 5, footnote 6, BOEM Index Exhibit #122).

Contamination Ignored

111. South Fork Wind and parties to the New York State Public service Commission proceeding ("NYSPSC") (case 18-T-0604) received evidence of existing PFAS contamination surrounding the proposed construction corridor in an interrogatory/document request titled "Si Kinsella #1" dated November 15, 2019.

112. South Fork Wind did *not* test soil or groundwater samples taken from within its proposed construction corridor until the NYSPSC evidentiary hearing concluded (on December 8, 2020).

113. On December 23, 2020, South Fork Wind tested soil or groundwater from its

³³ <https://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=18-T-0604&submit=Search>

construction corridor for the first time, fifteen days *after* the NYSPSC hearing had concluded.

114. The NYSPSC did not require South Fork Wind to test soil or groundwater samples taken from within its proposed construction corridor during the two years from September 2018, when South Fork Wind submitted its Article VII application, until the evidentiary hearing concluded (December 8, 2020).

115. BOEM neither discusses onshore PFAS contamination, suggests *any* possible mitigation plans, nor considers alternatives specifically to avoid PFAS contamination.

116. In its FEIS (of 1,317 pages), BOEM refers only to a fourth site, NYSDEC #152250, without saying where that site is relative to the construction corridor.

117. BOEM states that sampling at the fourth site “has indicated the presence of perfluorinated compounds” without describing their impact on human health.

118. BOEM admits only to “[s]ite-related compounds” that have been “identified” in soil and groundwater within and around the site without identifying those compounds or stating that they pose a risk to public health and are a threat to the environment (see FEIS, Section 3.3.2.1.2 at H-23, PDF p. 655).

119. “Site-related compounds” include *any* compound related to the site, whether a harmful contaminant or safe naturally occurring compounds such as calcium or sodium.

120. BOEM has denied the public the opportunity to scrutinize South Fork Wind testing samples of groundwater and soil for PFAS contamination taken from within its construction corridor.

Ratepayers Ignored

121. The NYSPSC did *not* consider South Fork Wind’s high cost of power, the burden of which will rest with ratepayers in the service area.

122. The New York State Department of Public Service (“NYSDPS”), the administrative arm of the NYS Public Service Commission, managed the NYS hearing under Article VII. During the hearing under cross-examination, the NYSDPS admitted that— “There’s no testimony in this, in our document, to the best of my recollection that addresses the cost to rate payers” (see BOEM Exhibit #009, Initial Brief, dated January 20, 2021, at 15, last paragraph).

123. The ALJ presiding over the NYSPSC hearing ruled on five occasions that the South Fork RFP and 2017 PPA are beyond the scope of this Article VII proceeding.

124. The NYSPSC denied party-intervenor rights to examine and cross-examine witnesses regarding the South Fork RFP and 2017 PPA. See BOEM Exhibit #021, Motion to Reopen the Record, dated January 13, 2021(at pp. 3 – 4).

125. In response to comments on South Fork Wind’s high cost of power relative to other offshore wind farms, BOEM states— “Ratepayer costs depend on numerous variables beyond the scope of the EIS and which BOEM has no authority to change” (FEIS, at p. I-87, PDF p. 855, ¶ 1).

126. Had BOEM chosen the “No Action” alternative, it would have changed Project-related ratepayer costs.

127. BOEM dismisses the notion of a “comprehensive forecast of impacts [...] to ratepayer costs” because it “depends on numerous variables beyond the scope of the EIS” (FEIS at p. I-345, PDF 1,113)

128. BOEM does not discuss using a variable such as a price per unit of output (dollars per megawatt-hour) from each offshore wind contract and using standard market forecasts to compare wind farm contracts with alternatives.

129. BOEM is obligated to review and consider the economic impacts of the Project.

130. A higher price of energy impacts lower-income families disproportionately.

131. BOEM does not request the participation of the U.S. Department of Energy (“DOE”) or the Renewable Energy Laboratory (“NREL”) according to 40 CFR § 1501.6.

132. The DOE and NREL already conduct such research and have expertise in this area.

133. BOEM turned a blind eye to bid rigging designed to stifle competition and increase the price of power to consumers.

134. BOEM’s exercise of power is arbitrary and capricious and not according to the law, and violates my rights to due process guaranteed by the U.S. Constitution.

135. BOEM’s action to approve the project constitutes arbitrary interference with life, liberty, and property.

IX. 2019 CLCPA

136. The Record of Decision (“**ROD**”) asserts that the “Project will contribute to New York’s renewable energy requirements, particularly the state’s goal of 9,000 MW of offshore wind energy generation by 2035[,]” referring to New York State’s Climate Leadership and Community Protection Act (“**2019 CLCPA**”) enacted in July 2019 (New York Environmental Conservation Law (“**NY ECL**”) § 75-0103(13)(e)).

137. The Final Environmental Impact Statement (“**FEIS**”) asserts that “South Fork Wind, LLC, is proposing the Project, which is designed to contribute to New York’s renewable energy requirements, particularly, the state’s goal of generating 9,000 megawatts of offshore wind energy by 2030 [emphasis added]” in reference (again) to New York State’s 2019 CLCPA.

138. BOEM provides no proof supporting its claims in ¶¶ 136 and 137 (above).

139. BOEM introduces the 2019 CLCPA into the NEPA process and is statutorily mandated to evaluate and take responsibility for any claim upon which it relies arising out of the 2019

CLCPA, including but not limited to whether the South Fork Wind Project is consistent with “a manner that seeks [...] to minimize costs” (NY ECL § 75-0109(3)(a)).

SFW 2015 Design

140. South Fork Wind submitted the Project proposal for consideration in Request for Proposals South Fork Resources, issued in June 2015 (“**South Fork RFP**” or “**SFRFP**”).

141. BOEM received a copy of the South Fork RFP in February 2021 and posted it online – www.regulations.gov/comment/BOEM-2020-0066-0387 (see “Testimony Pt 2 - Exhibit 02 - South Fork RFP June 24, 2015” Exhibit #102).

142. The Project resulted from the South Fork RFP procurements process.

143. The Project proposal had to be submitted by the South Fork FRP submittal deadline in November 2015, later revised to December 2015.

144. According to the South Fork RFP and PSEG Long Island’s South Fork Resources RFP Evaluation Guide (December 2015) (“**RFP Evaluation Guide**”), the Project proposal “must contain” the following— “a description of each proposed resource” solution, “the location of any proposed facility” requiring construction and/or permitting, “a description of key features and functions” of the resource, and proposed pricing that “shall include all costs” — otherwise the proposal would be deemed non-responsive.

145. According to the South Fork RFP requirements and the RFP Evaluation Guide, the South Fork Wind Project would have had to have been substantively designed by the submittal deadline in December 2015.

146. The South Fork RFP submittal deadline (December 2015) predates the New York State 2019 CLCPA by three-and-a-half years.

147. It is implausible that the South Fork Wind Project was “designed to contribute” to

specific provisions and regulations as defined in a law that did *not* exist at the time and would *not* exist for three-and-half years.

148. BOEM provides no details as to any further “renewable energy requirements” other than to cite “the state’s goal of 9,000 MW of offshore wind energy generation by 2035.”

149. BOEM provides neither discussion nor supporting documentation nor incorporates by reference the “state’s goal of 9,000 MW of offshore wind energy generation by 2035.”

150. BOEM does not list any agency or authority of New York State as a cooperating agency (or authority) in its FEIS or ROD.

Project Cost (\$2 bn) *not* considered

151. The New York State 2019 CLCPA mandates that in “promulgating these regulations, the department [N.Y.S. Department of Environmental Conservation] shall: a. Design and implement all regulations in a manner that seeks [...] to minimize costs [...] [emphasis added]” (NY ECL § 75-0109(3)(a)).

152. The 2019 CLCPA mandates that in “developing such plan the council shall [...] b. Evaluate, using the best available economic models, emission estimation techniques and other scientific methods, the total potential costs [...] of the plan [...] [emphasis added]. In conducting this evaluation, the council shall quantify [...] ii. The costs of implementing proposed emissions reduction measures [...] [emphasis added]” (NY ECL § 75-0103(14)(b)).

153. The 2019 CLCPA mandates the consideration of costs.

154. BOEM asserts that the “Project will contribute to [...] the state’s goal of 9,000 MW of offshore wind energy generation by 2035” without taking a “hard look” to ensure that the Project is consistent with the 2019 CLCPA in “a manner that seeks [...] to minimize costs” (NY ECL § 75-0109(3)(a)).

155. BOEM approved the Project because it will allegedly contribute to the 2019 CLCPA.

156. In 2018, BOEM received evidence related to the Project's high cost of power (now over \$2 billion) and did not consider that cost in its economic analysis of alternatives. Had BOEM performed a balanced economic analysis that included the Project's cost, ratepayers would not have to pay 19 cents for the same renewable energy that neighboring wind farms can provide for less than 8 cents (per kilowatt-hour).

19 cents vs. 8 cents

157. BOEM received evidence in February 2021 showing that the utility, the Long Island Power Authority ("LIPA"), around the time it executed a power purchase agreement with South Fork Wind (February 2017) ("**2017 PPA**"), valued the cost of energy at \$219 per megawatt-hour or 21.9 cents per kilowatt-hour.

158. On September 30, 2020, LIPA executed an amendment to the 2017 PPA. The amended 2017 PPA permitted South Fork Wind to expand the South Fork Wind Farm by adding forty megawatts (40 MW) of generating capacity (from 90 MW to 130 MW).

159. According to the Contract Encumbrance Request approved by LIPA VP Operations Oversight Rick Shansky on March 17, 2021, the total cost of energy from the Project per the amended 2017 PPA (130 MW) over the life of the contract is \$2,013,000,000.

160. According to the initial Contract Encumbrance Request approved by LIPA CFO Joseph Branco (on January 30, 2017), the total cost of energy from the Project per the 2017 PPA (90 MW) over the contract's life is \$1,624,738,893. Projected delivered energy is 371,604 megawatt-hours per year or 7,432,080 megawatt-hours over the twenty-year contract life.

161. According to the initial Contract Encumbrance Request, the cost of power from the South Fork Wind Farm (90 MW) is \$219 per megawatt-hour (\$1,624,738,893 divided by 7,432,080

megawatt-hours) or 21.9 cents per kilowatt-hour.

162. According to both the initial and revised Contract Encumbrance Requests, the total cost of the increase in capacity (of 40 MW) is \$388,261,107 (\$2,013,000,000 less \$1,624,738,893).

163. According to an Offshore Wind Project Study Final Technical Report LIPA presented to the U.S. Department of Energy's Office of Energy Efficiency and Renewable Energy ("OSW Technical Report"), LIPA projects "additional annual delivered energy up to 165,157 MWh" from the South Fork Wind Farm's incremental increase of 40 MW (see Exhibit F- LIPA OSW Tech Report).

164. According to the OSW Technical Report, the projected delivered energy from the incremental increase of 40 MW in offshore wind capacity over the contract's life is 3,303,140 megawatt-hours (165,157 MWh multiplied by 20 years).

165. According to Contract Encumbrance Requests and OSW Technical Report, the cost of energy from the incremental increase in offshore wind capacity of 40 MW is \$118 per megawatt-hour (\$388,261,107 divided by 165,157 MWh) or 11.8 cents per kilowatt-hour.

166. According to the initial Contract Encumbrance Request and the OSW Technical Report, the projected delivered energy from the (130 MW) Project is 536,761 megawatt-hours per year (371,604 MWh in addition to 165,157 MWh), or 10,735,220 megawatt-hours over the twenty-year contract life (536,761 MWh multiplied by 20 years).

167. According to the Contract Encumbrance Requests and the OSW Technical Report, the cost of power from the (130 MW) South Fork Wind Farm is \$188 per megawatt-hour (\$2,013,000,000 divided by 10,735,220 MWh), or 18.8 cents per kilowatt-hour.

168. The price of energy from South Fork Wind is summarized as follows –

<u>Offshore Wind Farm Project</u>	<u>Contract Size (MW)</u>	<u>Year Signed</u>	<u>Duration (years)</u>	<u>Offtake State</u>	<u>Contract Type</u>	<u>Levelized Nom. Price (\$/MWh)</u>
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a.	South Fork Wind	90	Jan 2017	20	NY	PPA	\$219
b.	<u>South Fork Wind</u>	40	Sep 2020	20	NY	PPA	\$118
c.	South Fork Wind	130					\$188

169. In February 2021, BOEM received a report by the U.S. Department of Energy National Renewable Energy Laboratory (“NREL”), Comparing Offshore Wind Energy Procurement and Project Revenue Sources Across U.S. States (dated June 2020) (“**NREL OSW Report**”).

170. BOEM subsequently posted the NREL OSW Report online –

www.regulations.gov/comment/BOEM-2020-0066-0387, see “Exhibit I - NREL Comparing Offshore Wind Energy June 2020” BOEM Index Exhibit #118).

171. According to the NREL OSW Report, Table A-2. U.S. Offshore Wind Offtake Agreements (at p. 41) the 2020 Levelized Price (\$/MWh) for other wind farms in the same Wind Energy Area as South Fork Wind are as follows (per signed contract) –

	<u>Offshore Wind Project</u>	<u>Duration</u>	<u>Offtake State</u>	<u>Contract Type</u>	<u>Levelized Price (\$/MWh)</u>
a.	Vineyard Wind 1	20	MA	PPA	\$74.00
b.	Vineyard Wind 1	20	MA	PPA	\$65.00
c.	Revolution Wind	20	RI	PPA	\$94.43
d.	Revolution Wind	20	CT	PPA	\$99.50
e.	Revolution Wind	20	CT	PPA	\$98.43
f.	Sunrise Wind	25	NY	NY OREC	\$83.36
g.	Mayflower Wind	20	MA	PPA	\$58.47
h.	<u>Mayflower Wind</u>	20	MA	PPA	<u>\$58.47</u>
i.	Average 2020 Levelized Price (\$/MWh):				<u>\$78.96</u>

172. BOEM approved a Project where the price of energy (\$188 /MWh) is nearly two and half times the average price (\$79 /MWh) of the other wind farms in the same Wind Energy Area—Vineyard Wind, Revolution Wind, Sunrise Wind, and Mayflower Wind. See Table 1 (above).

173. The Project BOEM approved provides the same renewable offshore wind energy as the other wind farms in the same Wind Energy Area but at more than double the average cost.

Cost: Inconsistent with CLCPA

174. Approving a Project where the cost of energy is more than double the average cost of the other wind farms is inconsistent with “a manner that seeks [...] to minimize costs” and contrary to the mandated provisions of the 2019 CLCPA.

175. The Project BOEM approved does not comply with the 2019 CLCPA.

176. The Project is inconsistent with the requirements of the 2019 CLCPA to reduce negative impacts on disadvantaged communities, including but not limited to those that “possess certain socioeconomic criteria, or comprise high-concentrations of low- and moderate- income households” (NY ECL § 75-0101(5)).

177. “BOEM prepared the FEIS with the assistance of a third-party contractor” (FEIS, p. 2).

178. According to NEPA— “If 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.

179. BOEM’s asserted purpose, that “South Fork Wind, LLC, is proposing the Project, which is designed to contribute to New York’s renewable energy requirements, particularly, the state’s goal of generating 9,000 megawatts of offshore wind energy by 2030[,]” is conclusory and *not*

based in fact.

X. Environmental Justice

180. In November 2018, three years before issuing its ROD (on November 24, 2021), BOEM received comments (see Exhibit A- 2018 Comments) in response to South Fork Wind's Construction and Operations Plan ("COP") regarding issues concerning potential negative impacts on social and economic resources (according to 30 CFR 585.627(a)(7)).

181. The 2018 Comments provide the calculation for the Project's cost of power from its initial 90-megawatt facility, which is "approximately 22 ¢/kWh."

182. The 2018 Comments draw BOEM's attention to South Fork Wind's noncompliance with 30 CFR 585.627(a)(7) and read as follows: "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. Instead of a family eating at a local restaurant or buying new shoes for their children, this money will go overseas into the pockets of Ørsted, a foreign company [...]."

183. The 2018 Comments draw BOEM's attention to South Fork Wind's noncompliance with 30 CFR 585.627(a)(7) and read as follows: "The Applicant has failed to comply with 30 CFR 585.627(a)(7) with specific regard to its potential negative impact upon lower income groups. **Any increase in electricity prices will fall disproportionately on those who can least afford it.** A family on a low income will have to heat or cool their home in the same way a family on a higher income will have to do, so any increase in electricity prices will represent a larger proportion of a low-income family's income than it will a higher-income family. This will cause families on lower incomes who are already hurting to suffer further more economic hardship than families on higher incomes."

184. BOEM failed to address the Project's adverse impact on low-income families according to 30 CFR 585.627(a)(7).

185. Specifically, South Fork Wind is 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” (30 CFR 585.627(a)(7)).

186. The FEIS limits its analysis of socioeconomic resources to the “ocean economy” (FEIS, at 3-157, PDF 209, last sentence).

187. BOEM defines the ocean economy to be “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)” (FEIS at 3-157, PDF 209, last paragraph).

188. “The FEIS found that the Proposed Project could have, to some extent, beneficial impacts on ... demographics, employment, and economics” (FEIS, at D-8, PDF 100, first paragraph), but BOEM remains silent on any *adverse* economic impacts such as the Project’s cost (of \$2 billion) that outweighs the economic benefits by many times.

189. BOEM’s economic analysis considers *beneficial* economic impacts such as spending in the local economy on capital expenditures (\$185 – 247 million)³⁴ and operational costs (\$6 – \$12 million per year).³⁵ The total *beneficial* economic impact is estimated to be from \$307 – 493 million (over the twenty-year contract term).³⁶ The range depends on whether the offshore wind

³⁴ Final Environmental Impact Statement (FEIS), at p. F-17, PDF p. 587, Table F-10

³⁵ *Ibid.*

³⁶ Local Operating Expenses (with taxes) ranging from \$6.16 to \$12.32 million per year, or from

farm capacity is ninety megawatts (the low estimate) or one hundred and eighty megawatts (the high estimate).

190. LIPA initially valued the (90-megawatt) Project at \$1.6 billion³⁷ but, in September 2020, amended the contract (expanding the facility to 130 megawatts) that now exceeds \$2 billion.³⁸

191. BOEM does not consider the cost (of \$2 billion) in its economic analysis. Ratepayers living in Suffolk County will have to pay for the Project in their electricity bills. That represents money taken from Suffolk County's economy and given to the Project's (indirect) owners, Ørsted A/S and Eversource.

192. BOEM's biased economic analysis accounts for *beneficial* impacts but ignores *adverse* effects that exceed the benefits by four to six and a half times.

193. [deleted]

194. BOEM does *not* acknowledge that the *negative* economic effects are fixed under a power purchase agreement, whereas the *positive* economic impacts are merely *estimates* with little substantive support, given that the project's major components (i.e., the wind turbine generators, submarine cables, etc.) are manufactured overseas.

195. On November 19, 2018, three years *before* BOEM approved the Project, BOEM received a letter from the Plaintiff that reads— “The Applicant has failed to comply with 30 CFR 585.627(a)(7) with specific regard to its potential negative impact upon employment.

\$123.20 to \$246.40 million over twenty years. These Local Operating Expenses in addition to Local Capital Expenses (with taxes) of \$184.24 to \$246.81 million, is equal to total beneficial economic impacts of \$307.44 – 493.21 million (over 20 years).

³⁷ New York Office of the State Comptroller valuation of the South Fork PPA is \$1,624,738,893 (<https://wwe2.osc.state.ny.us/transparency/contracts/contracttransactions.cfm?Contract=0000000000000000024767>),

³⁸ New York Office of the State Comptroller valuation of the South Fork PPA is \$2,013,198,056 (<https://wwe2.osc.state.ny.us/transparency/contracts/contracttransactions.cfm?Contract=0000000000000000085553>)

The Applicant will charge approximately 22 ¢/kWh for its wind-generated electricity (please see calculation right). A similar wind farm, Vineyard Wind, just 20 miles from the Applicant’s proposed South Fork Wind Farm, will charge only 6.5 ¢/kWh.”³⁹

196. BOEM received a similar letter for the second time on February 22, 2021 ⁴⁰ (see ¶¶ 180-217). BOEM did *not* require the Applicant to comply with 30 CFR 585.627(a)(7) or its guidelines regarding the Project’s impact on the energy industry, energy prices, employment, demographics, or environmental justice considerations.

197. The scope of BOEM’s economic analysis is limited to the “ocean economy” around a few coastal ports such as New Bedford (MA), Providence (RI), New London (CT), and Montauk (NY), which includes only 3.9% of Suffolk County (based on population).

198. [deleted]

199. [deleted]

200. As explained in the 2018 Comments to BOEM (at pp. 4 - 5)— “There are well over one

million ratepayers living on

Long Island who will be

forced to absorb into their

everyday household budgets

vastly inflated prices for

electricity ... The ... wind

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

farm will be a drag on economic growth that will lead to increased unemployment ... [and] put

Long Island at a distinct disadvantage. ... This will drive economic development and

³⁹ <https://www.regulations.gov/comment/BOEM-2018-0010-0074> (at pp. 4-5)

⁴⁰ <https://www.regulations.gov/comment/BOEM-2020-0066-0343> (at pp. 4-5)

employment away from Long Island toward other states. If a manufacturer is looking for a location to build a new plant, for example, it will likely look to Massachusetts where the price of electricity is less than a third the price that it is on Long Island.”

201. [deleted]

202. BOEM’s allegation that “the Proposed Project could have ... beneficial impacts on ... employment and economics”⁴¹ is undermined by the fact that for every dollar the developer injects into the economy (in the form of *estimated* capital and operational expenses), it withdraws from four to six and a half times that amount.

203. The FEIS’ prejudicial financial analysis fails to recognize the South Fork Wind Project’s net adverse economic impact estimated to be from \$1.5 to \$1.7 billion.

204. The FEIS neither identifies nor considers the adverse effects of its proposed activities, specifically the high cost of power, on social and economic resources such as employment and minorities and lower income groups according to NEPA regulations.

205. The FEIS limits its environmental justice analysis to “cities/towns, counties, and states where potentially affected ports or landing sites are located” (at p. 3-168, PDF p. 220).

206. The FEIS limits the area to “[f]ive-km zones [...] drawn around potentially affected ports or landing sites[,]” which further reduces the size of the analysis area (at p. 3-170, PDF p. 222).

207. The FEIS does *not* consider matters of Environmental Justice in any area of Suffolk County *other* than within 3.1 miles (five kilometers) of the Shinnecock Fishing Dock, Greenport Harbor, Montauk, Beach Lane, or Hither Hills.

208. According to the FEIS, the population used to assess Environmental Justice is equal to 3.9% of the total population of Suffolk County (at pp. 3-168 to 3-173, PDF pp. 220-225, Tables

⁴¹ ROD at p. D-8, PDF 100, ¶ 1

3.5.4-1, 3.5.4-2, and 3.5.4-3, Analysis Area “Population in 5-Km Zone” of 58,878 divided by Total Population in Suffolk County 1,497,595).

209. Executive Order 12898– Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations– provides that “each Federal agency shall make achieving environmental justice part of its mission [...].”

210. In the accompanying Memorandum from the President to Heads of Departments and Agencies, Comprehensive Presidential Documents No. 279 (February 11, 1994), the President 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.”

211. Defendants failed to comply with Executive Order 12898.

212. BOEM failed to meet its statutory obligation to make a determination “that economic or social and natural or physical environmental effects are interrelated” to inform the public as to whether the “environmental impact statement shall discuss and give appropriate consideration to these effects on the human environment [emphasis added]” (40 C.F.R. § 1502.16(b)).

213. According to NEPA, BOEM “shall independently evaluate the statement [FEIS] prior to its approval and take responsibility for its scope and contents” (NEPA 1978, 40 CFR 1506.5(c)).

214. The FEIS and ROD neither identify nor considers economic or social impacts resulting from South Fork Wind’s relatively high cost of power and its “effects on the human environment” (40 C.F.R. § 1502.16(b)).

215. South Fork Wind’s high cost of power is contrary to the Administration’s “Action to Spur Domestic Clean Energy Manufacturing[,]” issued June 6, 2022, Authorizing Defense Production

Act to Lower Energy Costs, Strengthen Power Grid, and Create Good-Paying Jobs. The White House Statement’s opening sentence reads (in relevant part): “Today’s clean energy technologies are a critical part of the arsenal we must harness to lower energy costs for families [...] [emphasis added]” (www.whitehouse.gov/briefing-room/statements-releases/2022/06/06/fact-sheet-president-biden-takes-bold-executive-action-to-spur-domestic-clean-energy-manufacturing/).

216. BOEM’s ROD asserts that the Project furthers “some of the goals stated in Executive Order 14008, Tackling the Climate Crisis at Home and Abroad” (ROD, at p. D-28, PDF p. 120, last ¶).

217. Executive Order 14008 reads: “We must strengthen our [...] water protections. [...] We must deliver environmental justice in communities all across America.” (see <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/> Part II).

218. BOEM failed to consider groundwater PFAS contamination and environmental justice issues related to the Project’s *adverse* economic impact.

Not “commercial-scale”

219. In February 2021, BOEM received a document titled “Initial Brief” (dated January 20, 2021) concerning, *inter alia*, the non-competitive nature of the South Fork RFP. BOEM posted the document online at – www.regulations.gov/comment/BOEM-2020-0066-0385 (see “Initial Brief - 1 by Kinsella Jan 20, 2021” BOEM Index Exhibit #009).

220. BOEM received information showing that the joint and equal (indirect) owners of South Fork Wind, Ørsted and Eversource, recommended in a regulatory submission to the New York State Energy Research and Development Authority (“NYSERDA”) that it “establish a minimum

capacity bid of 400 MW” because [citing NYSERDA’s OSW Policy Options Paper] “Small initial projects are not likely to deliver cost savings. Due to diseconomies of scale, the costs per unit of energy for projects of 100 MW and 200 MW in size are significantly higher than those for 400 MW projects. As a result, [...] program costs for such smaller projects would be comparable to those of a 400 MW project despite their smaller size and energy output.” See BOEM Index Exhibit #169, Comments of Bay State Wind that is a joint venture special purpose entity (indirectly) owned by equal partners, Ørsted and Eversource, that also (indirectly) own South Fork Wind (another special purpose entity) in Response to Request for Information OSW-2018.

221. The (indirect) owners of the South Fork Wind Project admit, albeit under the name of Bay State Wind, that small projects like the South Fork Wind Farm are *not* likely to deliver cost savings due to diseconomies of scale.

222. The NYSERDA OSW Policy Options Paper is part of New York’s Offshore Wind Masterplan that prescribes minimum capacity awards of 400 megawatts.

223. According to the NYSERDA OSW Policy Options Paper, the South Fork Wind Farm (of only 130 megawatts) does *not* have a commercial capacity large enough to achieve economic advantages of scale.

224. The South Fork Wind Farm Project does *not* meet the requirements of New York’s Offshore Wind Masterplan.

Uneconomic Design

225. The South Fork Wind Project has a maximum generating capacity of 2 MW per mile of transmission (130 MW divided by 66 miles).

226. The average maximum generating capacity for three offshore wind farms— Revolution Wind, Sunrise Wind, and Vineyard Wind— in the same area as South Fork Wind is 7.5 MW per

mile of transmission (see Appendix 4- SFW Project Tables, Table 1, at p. 1).

227. The South Fork Wind Project plans to install four times more transmission per megawatt capacity than the average of three offshore wind projects in the same area.

228. BOEM failed to take a “hard look” into the economics of the Project and did not compare it to alternatives.

229. BOEM approved a project that is *not* a “commercial-scale” and is *not* economic by design.

No “contractual commitments”

230. Under the heading of Purpose and Need, the FEIS and ROD assert that “South Fork Wind’s goal is to fulfill its contractual commitments to Long Island Power Authority (LIPA) pursuant to a power purchase agreement executed in 2017 [emphasis added].”

231. The “power purchase agreement executed in 2017” is the **2017 PPA**.

232. The alleged “technology-neutral competitive bidding process” is the **South Fork RFP**.

233. BOEM introduces the 2017 PPA and the South Fork RFP into the NEPA process and, therefore, is statutorily mandated to evaluate and take responsibility for any claim upon which it relies related to the 2017 PPA or the South Fork RFP.

234. BOEM does not identify or discuss any “contractual commitments” in the 2017 PPA.

235. [deleted]

236. BOEM adopts South Fork Wind’s goal to fulfill unspecified contractual commitments.

237. BOEM does not attach or incorporate the 2017 PPA by reference into its FEIS or ROD.

238. BOEM cannot measure and assess reasonable alternatives against unspecified contractual commitments.

239. BOEM received a copy of the 2017 PPA in February 2021 and posted it online at –

www.regulations.gov/comment/BOEM-2020-0066-0387 (see “Testimony Pt 2 - Exhibit 03 -

Power Purchase Agreement Feb 2017” BOEM Index Exhibit #099).

240. “The agency shall independently evaluate the information submitted [by South Fork Wind] and shall be responsible for its accuracy” (NEPA 1978, 40 CFR 1506.5(a)).

241. BOEM adopts and incorporates South Fork Wind’s goal, as expressed in the 2017 PPA as *its* goal without verifying its contents.

Discrimination: Minorities, Women, Disabled Veterans

242. The 2017 PPA mandates that the “Seller [South Fork Wind] shall comply with the requirements of Appendix 16 with respect to the M/WBE/VET subcontracting goals” (at p. 50, ¶ 12.22). Under the heading of Contract Goals, Appendix 16 “establishes an overall goal of 0 % for Minority and Women-Owned [...], 0 % for Minority-Owned [...] and 0 % for Women-Owned Business Enterprises [...] participation [...].”

243. Appendix 16 reiterates these goals and, in addition, lists New York State Service-Disabled Veteran-Owned Business Participation as follows –

244. “M/WBE/VET Contract Goals

245. 0% Minority and Women’s Business Enterprise Participation

246. 0% Minority Business Enterprise Participation

247. 0% Women’s Business Enterprise Participation

248. 0% New York State Service-Disabled Veteran-Owned Business Participation.”

249. BOEM approved South Fork Wind’s “Contract 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” according to the Amended 2017 PPA.

250. BOEM’s stated purpose relies on “contractual commitments” that exclude minorities,

women, and NYS Service-Disabled Veterans business owners from participating in a contracting activity related to the Project.

251. The “Contract Goals” that exclude minorities, women, and NYS Service-Disabled Veterans is 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.

XI. HALF-PRICE ALT. IGNORED

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

253. In October 2019, LIPA issued a press release: “LIPA will also buy an estimated 90 MW of offshore wind from the recently announced 1,700 MW of New York State projects.” See South Fork Wind Fact Sheet, BOEM Index Exhibit #048 (at p. 3, ¶ 3).

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

255. LIPA can purchase power from only Sunrise Wind due to technical constraints of the Long Island transmission system. Thus, according to the LIPA Fact Sheet, LIPA plans to buy 90 MW of power from Sunrise Wind.

256. [deleted]

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

258. The Fact Sheet states that “LIPA will responsibly buy offshore wind,” under which it

reads: “Share of Recent NYSERDA Awards: Estimated @ 90 MW” and “Future Offshore Wind Projects: Estimated @ 800+MW” (see South Fork Wind Fact Sheet, BOEM Index Exhibit #048 (at p. 3, top right graphic).

259. LIPA plans to buy an additional 800 MW of offshore wind generating capacity.

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

261. The connected project would be technically, environmentally, and economically superior.

262. South Fork Wind and Sunrise Wind use the same alternating current interconnection cable array that can be interconnected.

263. The South Fork Wind Farm is only a few miles from the Sunrise Wind Farm.

264. South Fork Wind and Sunrise Wind are owned (indirectly) by the same joint and equal partners, Ørsted and Eversource.

265. The interconnected Sunrise Alternative would avoid disturbing onshore PFAS contamination, reduce the offshore impact on the marine environment by eliminating sixty-six miles of trenching and reducing transmission cable requirements, and reduce the impact on the onshore community.

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

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

268. The Commission's final ruling identifies the Sunrise/South Fork alternative *eight times*.

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

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

271. BOEM neither “evaluates” nor “discloses” critical environmental impacts concerning known PFAS contamination of soil and groundwater along Beach Lane.

272. BOEM neither acknowledged nor considered the alternative to South Fork Wind that would combine it with Sunrise Wind.

273 – 280 [deleted]

XII. 2015 SOUTH FORK RFP

281. BOEM refers to and relies upon the (false) claim that South Fork Wind’s “power purchase agreement executed in 2017 result[ed] from LIPA’s technology-neutral competitive bidding process [emphasis added]” (ROD, at 7, PDF 9, seventh paragraph).

282. BOEM copied the language from South Fork Wind’s Construction and Operations Plan dated May 2021 (see p. I-29).

283.00 “LIPA’s technology-neutral competitive bidding process” refers to the South Fork RFP.

RFP not “technology-neutral.”

284. 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 posted it online – www.regulations.gov/comment/BOEM-2020-0066-0385 (see “Motion to Reopen Supp - Exhibit A - LIPA Memo Re South Fork RFP” BOEM Index Exhibit #030).

285. The LIPA Memo reads: “In some instances, proposals were advanced if they were the only proposal offering a particular technology [...].”

286. The LIPA Memo 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.” (NB: The square brackets are as written in the original document, and “Deepwater Wind [One] [DWW100]” refers to the 90 MW South Fork Wind Project.)

287. The LIPA Memo continues: “Two proposals (i.e., NextEra Energy [NEX100] and Halmar International [HAL100]) were designated because they were the only proposals offering a particular technology.” (NB: The square brackets are written in the original document.)

288. BOEM received a copy of a memorandum from LIPA showing that the South Fork RFP considered technology when advancing proposals.

289. BOEM received objective evidence (written by LIPA) showing that the South Fork RFP was *not* “neutral” concerning technology.

290. BOEM asserts that the 2017 PPA resulted from a “technology-neutral competitive bidding process” when it received substantive evidence to the contrary.

291. The “power purchase agreement executed in 2017” did *not* result “from LIPA’s technology-neutral competitive bidding process.”

292. No such “power purchase agreement executed in 2017 resulting from LIPA’s technology-

neutral competitive bidding process” exists.

RFP not “competitive.”

292.01 The South Fork Wind Farm proposal was the *only* offshore wind proposal entered for consideration in the South Fork RFP procurement.

292.02 The South Fork RFP was a manipulated procurement process designed to shut out competitive bidding from other offshore wind developers that permitted unfair advantage and favoritism to the benefit of the South Fork Wind Farm proposal.

292.03 On January 11, 2017, in his State of the State address, then-Governor Andrew M. Cuomo interfered with the procurement process to advance the interests of a proposal for offshore wind resources to the detriment of twenty other bids submitted for consideration in the South Fork RFP. “The Governor calls on the Long Island Power Authority to approve this critical project,” referring to the “offshore wind development ... off the East End of Long Island” (see Exhibit 02 – Cuomo 2017 State of the State Address at 55, PDF 57, last paragraph).

Governor cuomo appointed five of the nine trustees.

292.04 Fourteen days later, during the LIPA Board of Trustees meeting (on January 25, 2021), the “Board of Trustees authorizes the Chief Executive Officer [...] to execute a PPA [...] to implement the Authority’s purchase of energy [...] South Fork Wind Farm project” (see Exhibit 29 at p. 8).

292.05 On January 25, 2017, the Board of Trustees of LIPA agreed to pay more than double the estimated cost of building the South Fork Wind Farm. According to South Fork Wind (formerly Deepwater Wind South Fork), the South Fork Wind Farm (including the transmission

system) would cost \$740 million.⁴² The power purchase agreement between LIPA and South Fork Wind commits ratepayers to a contract LIPA values at \$1.624 billion.⁴³ Deepwater Wind's gross profit (excluding operations and maintenance) is \$885 million, representing 120% of the estimated cost (\$740 million).

292.06 The South Fork RFP was not a solicitation for offshore wind resources. The RFP is ninety-four pages long and does *not* mention “offshore wind” once. By contrast, the RFP mentions “energy storage” twenty times, “fuel” (for fossil-fuel generators) thirty-six times, “photovoltaic”/“solar” generation three times, and even “geothermal” once. Offshore wind is conspicuously missing (see BOEM Index Exhibit #102).

292.07 Six months after releasing the South Fork RFP (on June 24, 2015), a “Renewables RFP” was issued (on December 22, 2015). The Renewables RFP explicitly includes offshore wind, whereas the South Fork RFP does *not* (Exhibit 15 – Renewables RFP (Dec 2015)).

292.08 The Renewables RFP allows for “off-island projects” (such as offshore wind). The South Fork RFP calls *only* for “local resources” that are “located on Long Island[,]” thereby precluding offshore wind resources.⁴⁴

⁴² According to the Wall Street Journal, the New York Times, Newsday, and the Express News Group. See Exhibit 10 (click here) - Wind farm project approved by LIPA trustees by Mark Harrington published in Newsday on January 25, 2017. Exhibit 11 (click here) - New York State's First Offshore Wind Farm Gets Green Light Construction on the \$740 million project on Long Island will start in 2020 by Joseph De Avila published in the Wall Street Journal on January 25, 2017. Exhibit 12 (click here) - UPDATE: LIPA Approves \$740 Million Wind Farm To Power The South Fork published by the Express News Group. Exhibit 33 (click here) - Nation's Largest Offshore Wind Farm Will Be Built Off Long Island by Diane Cardwell published in the New York Times on January 25, 2017.

⁴³ BOEM Index Exhibit #040 (click here) – On January 30, LIPA's Chief Financial Officer, Joseph Branco, signed a Contract Encumbrance Request valuing the proposed project at one billion, six hundred and twenty four million, seven hundred and thirty eight thousand and eight hundred and ninety three dollars (\$1,624,738,893).

⁴⁴ Exhibit 15 (click here) - Renewables RFP, Dec 2015 (at p. 7, ¶ 2.1.11) - Request for Proposals for New Renewable Capacity and Energy (available online at PSEG Long Island, click here).

292.09 The Renewables RFP allows for resources to “be connected by a new transmission line dedicated to the delivery of power to Zone K” (referring to Long Island). The South Fork RFP is designed to defer new transmission lines and seeks proposals as “an alternative” to new transmission lines [emphasis added].⁴⁵

292.10 The Renewables RFP allows for a staggered installation that permits a commercial operation date (“COD”) to be as late as May 1, 2024.⁴⁶ The South Fork RFP’s latest COD is May 1, 2019. The South Fork Wind Farm proposal will miss that target by at least four years.⁴⁷

292.11 The submittal deadline for the Renewables RFP remained open for six months *after* the submittal deadline had closed for the South Fork RFP.⁴⁸ Still, the South Fork Wind proposal for offshore wind power generation was awarded from within the South Fork RFP that was neither designed nor a solicitation for offshore wind. By inserting the South Fork Wind bid into an incongruous procurement, the South Fork Wind proposal was guaranteed a clear field free of

Also, see Exhibit P – Notice to Proposers (click here) - Notice to Proposers South Fork RFP Cover Letter signed by Paul Napoli, Vice President of Power Markets, PSEG Long Island, addressed “To All Interested Proposers” dated June 24, 2015 (available online at PSEG Long Island, click here), and PSC DMM 007 p.1 Exhibit H).

⁴⁵ Exhibit 15 (click here) - Renewables RFP, Dec 2015 (at p. 7, ¶ 2.1.9 and 2.1.11) - Request for Proposals for New Renewable Capacity and Energy (available online at PSEG Long Island, click here). Also, see BOEM Index Exhibit #102 - South Fork RFP, Jun 2015 (version date of November 10, 2015) (at p. 2, penultimate paragraph) (available online at PSEG Long Island, click here, and PSC DMM 189 p. 1 Exhibit 02).

⁴⁶ Exhibit 15 (click here) - Renewables RFP, Dec 2015 (at p. 11, footnote 3) that reads: “Staggered startup will be allowed to occur in blocks no smaller than 25% of Project size with a minimum of 1 month between block startup with total Project capacity installed within two years [emphasis added]. Power delivery from the first block [which] shall be no later than May 1, 2022 [emphasis added]” (available online at PSEG Long Island, click here).

⁴⁷ BOEM Index Exhibit #102 - South Fork RFP, Jun 2015 (at p. 8). Although the commercial operation date is May 1, 2019, the RFP requests an “alternative pricing for the delay of project COD by one year” (see 2.2.1. Delayed COD). Available online at PSEG Long Island, click here, and PSC DMM 189 p. 1 Exhibit 02.

⁴⁸ The submittal deadline for the Renewable RFP is June 2016 (see Exhibit 15 (click here) - Renewables RFP, Dec 2015, at p. 11). The submittal deadline for the South Fork RFP is December 2, 2015 (see BOEM Index Exhibit #102, at p. 7).

competition from other offshore wind farms.

292.12 Despite being written to accommodate such resources, *no* offshore wind contract was awarded under the Renewables RFP (see [Exhibit 16](#)).⁴⁹

292.13 In November 2018, the New York State Energy Research and Development Authority (hereinafter “NYSERDA”) issued an RFP for Offshore Wind Renewable Energy Certificates (“NYSERDA OSW RFP”). The RFP mentions “offshore wind” one hundred and thirty-two (132) times.⁵⁰ By comparison, the South Fork RFP does *not* mention “offshore wind” at all.

292.14 The NYSEDA OSW RFP was a competitive procurement where four offshore wind farm developers competed against each other. The procurement resulted in a contract award to, *inter alia*, Sunrise Wind, where the average price of electrical energy is 8 cents (per kilowatt-hour over the life of the contract). After the procurement awards had been announced, the identities of all four bidders were publicly disclosed.⁵¹ By comparison, the South Fork RFP was a non-competitive procurement where *only one bidder*, Deepwater Wind, submitted a proposal for an offshore wind farm. The South Fork RFP resulted in a contract award to Deepwater Wind at an average price of 22 cents per kilowatt-hour (see [BOEM Index Exhibit #040](#)). Neither LIPA nor PSEG Long Island disclosed the identities of the other bidders until four years later.

⁴⁹ [Exhibit 16 \(click here\)](#) - Awards- Renewable RFP (last accessed July 11, 2021) - Pursuant to the Renewable RFP, LIPA and PSEG Long Island awarded a power purchase agreement only to LI Solar Generation LLC for Solar Photovoltaic (22.9 MW). Available online at PSEG Long Island, [click here](#).

⁵⁰ [Exhibit 17 \(click here\)](#) - NYSEDA OSW RFP (2018) - NYS Energy Research and Development Authority (“NYSEDA”) Purchase of Offshore Wind Renewable Energy Certificates Request for Proposals ORECRFP18-1, Released November 8, 2018 (available online at NYSEDA, [click here](#), and PSC [DMM 205 p. 1 Exhibit 3-6](#).)

⁵¹ Atlantic Shores Offshore Wind LLC, Empire Wind Project (Equinor US Holdings, Inc.), Liberty Wind (Vineyard Wind LLC), and Sunrise Wind (Bay State Wind LLC). See NYSEDA 2018 Solicitation, Four Major Developers Proposed, ([nyserda.ny.gov](https://www.nyserda.ny.gov), [click here](#)).

RFP Irregularities

293. During Public Hearing #3 on February 16, 2021, BOEM heard the following oral testimony— “The company that administered the procurement process, PSEG Long Island, awarded South Fork Wind [a] power purchase agreement to its business partner in a noncompetitive recruitment [procurement] process [emphasis added].”

294. In February 2021, BOEM received comments concerning the award of a “PPA pursuant to a non-competitive opaque procurement process [...] [emphasis added].” BOEM posted the letter online at www.regulations.gov/comment/BOEM-2020-0066-0343 (see “South Fork Wind, DEIS Comments by Kinsella (Feb 22, 2021)” BOEM Index Exhibit #001).

295. In February 2021, BOEM received a document titled Initial Brief (dated January 20, 2021) concerning the non-competitive nature of the South Fork RFP. BOEM posted the record online – www.regulations.gov/comment/BOEM-2020-0066-0385 (see “Initial Brief - 1 by Kinsella Jan 20, 2021” BOEM Index Exhibit #009).

296. The Initial Brief reads as follows –

“[S]ubstantial evidence exists sufficient to sustain the burden of proof required to rebut the presumption of validity attached to the PPA inasmuch as the PPA was awarded to the Applicant subject to a competitive bidding process. Substantial evidence rebutting the presumption of validity includes written testimony (of 52 pages) by me signed before a notary together with thirty (30) exhibits mostly from New York State and US federal agencies (of 640 pages), and sixteen (16) exhibits containing offshore wind speed data from the US National Oceanic and Atmospheric Administration (NOAA) (of 8,828 pages). I submitted testimony and exhibits [...] under the title: Testimony Part 2 – Public Interest, Need & Price.”

297. In February 2021, BOEM received all the documents (referred to in the preceding paragraph) and posted them online –

www.regulations.gov/comment/BOEM-2020-0066-0343,

www.regulations.gov/comment/BOEM-2020-0066-0384,

www.regulations.gov/comment/BOEM-2020-0066-0385,

www.regulations.gov/comment/BOEM-2020-0066-0386,

www.regulations.gov/comment/BOEM-2020-0066-0387.

298. – 303 (moved to ¶¶ 73.01 and 108.01 - 108.05)

304. In June 2015, PSEG Long Island LLC, acting for and on behalf of LIPA, sent notice “To All Interested Proposers[,]” soliciting proposals in the South Fork RFP “to acquire sufficient local resources to meet expected peak load requirements until at least 2022 in the South Fork of Long Island, and 2030 for certain areas east of Buell. Such resources will be located on Long Island” (see Exhibit P- Notice to Proposers).

305. The LIPA Memo states, “Deepwater Wind [South Fork Wind] was the only proposal offering offshore wind technology.”

306. During the South Fork RFP procurement process, South Fork Wind did *not* compete with other proposals offering offshore wind technology.

307. If the South Fork RFP were a competitive bidding process, all bidders would have had to compete equally according to the same objectives and minimum specifications and requirements according to the RFP.

Mandatory Criteria

308. According to the South Fork RFP and the RFP Evaluation Guide, LIPA should have disqualified South Fork Wind’s offshore wind farm proposal at the outset.

309. According to the SFRFP Evaluation Guide, “Mandatory Criteria” is used to measure “Proposals’ compliance to the RFP and [...] to determine whether the Proposal can be accepted. If this information is not provided at the Proposal Submittal Deadline, the Proposal will be eliminated from consideration.”

310. According to the LIPA Memo, LIPA overlooked four instances where the South Fork Wind Project did not meet mandatory criteria while disqualifying two of the 21 bids for not meeting mandatory criteria.

311. The RFP Evaluation Guide lists a mandatory criterion, a May 1, 2019, commercial operating date that is a requirement of the RFP.

312. South Fork Wind proposed December 31, 2022, as the commercial operating date, three and a half years later than the required date, which should have led to the immediate disqualification in the first phase of the procurement process.

313. The South Fork RFP required proposals to have a pricing mechanism for a delay.

314. That mechanism, however, only allowed for a one-year delay, May 1, 2020, which makes Deepwater Wind’s proposed commercial operating date two and half years later than any delay that could still meet the RFP’s requirements.

315. Mandatory criteria included the RFP requirement that any “[p]roposal must contain the location of any proposed facility requiring construction and/or permitting” by the submittal deadline (of December 2, 2015).

316. Upon information and belief, South Fork Wind did not have locations for proposed facilities until one and a half years *after* the submittal deadline.

317. According to the South Fork RFP, a proposal, as a stand-alone solution, could not be conditioned on some other act or omission under LIPA’s mandatory criteria.

318. According to the LIPA Memo, LIPA joined Deepwater Wind's offshore wind project to separate battery storage proposals to make it appear workable.

319. In other words, LIPA acted to salvage South Fork Wind's fatally flawed proposal by adding two conditional acts – agreements for installing two battery storage projects.

Minimum Specifications

320. The South Fork RFP requested proposals for “local resources” “located on Long Island” to meet “peak load” or peak electrical demand as an alternative to adding new transmission lines.

321. The RFP mandated that power production resources comply with “Operating Modes” consistent with dispatchable resources that can be turned on or ramped up remotely in response to a “trigger signal.”

322. The RFP required a commercial operating date no later than May 1, 2019, with an alternative date and pricing option for a one-year delay, no later than May 1, 2020.

323. The RFP required that each proposal “stand alone” in satisfying the RFP's requirements.

324. Irrespective of the rules governing the South Fork RFP, LIPA selected the South Fork Wind Project despite its many deficiencies (as follows)—

325. **Deficiency #1**: The project cannot reliably supply power to satisfy the peak demand for electricity in response to air conditioner usage on the South Fork in the hotter months from June to September.

326. **Deficiency #2**: The project is not a “local resource” that is “located on Long Island” but a power generation resource located on the Outer Continental Shelf in the Atlantic Ocean.

327. **Deficiency #3**: The project is not an alternative to adding new transmission lines but *is* a new 60-mile-long transmission line.

328. **Deficiency #4**: The Project does not defer the need for new transmission lines but instead

requires substantial transmission upgrades;

329. **Deficiency #5**: The Project cannot be a source of power until at least 2023, with a proposed commercial operating date of December 31, 2022.

330. **Deficiency #6**: The Project is not a dispatchable resource capable of functioning in Operating Modes that require power to be turned on in response to a “trigger signal” (because turbines that depend on the wind cannot be turned on as demand requires).

331. **Deficiency #7**: The Project is not a resource designed to meet “performance calculations” that are “no less severe than [...] [a] maximum steady wind velocity [of] 130 mph” (offshore wind turbines cease generating power at a wind speed closer to 55 mph).

332 – 335 [deleted]

336. The South Fork Wind Project did *not* comply with all mandatory criteria according to the South Fork RFP and the SFRFP Evaluation Guide.

337. The South Fork Wind Project did *not* comply with the South Fork RFP’s main objectives.

338. The South Fork Wind Project did *not* comply with applicable specifications and/or requirements according to the South Fork RFP.

339. The South Fork Wind Project was the only proposal (not to be disqualified) that failed to satisfy the main objectives of the South Fork RFP.

340. The South Fork RFP had been fixed to shut out competitive bidding from other offshore wind farm developers.

341. LIPA awarded a power purchase agreement to South Fork Wind for a proposal that failed to meet the minimum specifications and requirements of the South Fork RFP.

342. During the South Fork RFP procurement process, bidders were not treated equally.

343. The South Fork RFP procurement was not a level playing field where bidders’ proposals

competed on the merits by the same rules.

344. The South Fork RFP process permitted unfair advantage and favoritism.

345. The South Fork RFP was not a “competitive” bidding process.

346. According to NEPA, Defendants “shall independently evaluate the information submitted [by South Fork Wind] and shall be responsible for its accuracy.” Further, “[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 [FEIS] prior to its approval and take responsibility for its scope and contents” (NEPA 1978, 40 CFR § 1506.5).

347. Despite receiving clear substantive evidence rebutting the presumption of regularity attached to the South Fork RFP, Defendants DOI and BOEM approved the Project without independently evaluating and verifying the South Fork RFP to ensure it was a “technology-neutral competitive bidding process.”

Peak Demand

348. According to the LIPA Memo, the Project’s purpose as expressed in the South Fork RFP is as follows— “[T]he basic objective of the RFP was to acquire sufficient local resources to meet expected peak load requirements until at least 2022 in the South Fork, and 2030 in the east of Buell area [internal quotes removed][emphasis added].”

349. BOEM did not identify, discuss, consider, or “specify the underlying purpose and need” identified by LIPA in the South Fork RFP.

350. BOEM received objective evidence in internal LIPA documents showing that the South Fork Wind Project cannot reliably provide power to meet peak demand. BOEM uploaded the available documents— www.regulations.gov/comment/BOEM-2020-0066-0385 (see “Motion to Reopen Record Supp by Kinsella Jan 29 2021” BOEM Index Exhibit #029 and related exhibits).

351. BOEM received a copy of an internal LIPA report stating that “wind alone has a very small effective capacity due to the distinct statistical possibility that it may have very low available power output at the time of a peak-period contingency” (See WESC Report “Calculation of Effective Forced Outage Rate of Offshore Wind” BOEM Index Exhibit #035, at p. 2, last ¶).

352. BOEM received a copy of an internal LIPA report stating that its “[i]nitial analysis of temperature/wind correlation in the Block Island data provided by DWW [South Fork Wind] indicates that such a correlation may exist[,]” referring to a “correlation between high load and persistent low-wind conditions” (see WESC Report, SF RFP Portfolio Load Cycle Analysis” BOEM Index Exhibit #034, at p. 3, last paragraph).

353. BOEM received a copy of an internal LIPA report stating that, based on data provided by South Fork Wind, the “offshore wind project at P90 probability level would have a May through September Peak Period unavailability [...] of 29.9% without the assistance of LI Energy Storage battery [emphasis added].” The report continues: “Without the [33 MW] battery, shortfalls occur on 77 of the 152 Peak Period days, or about 50% of the days [emphasis added].” Moreover, there “are periods of up to 4 consecutive days where Wind+Battery [33 MW] shortfalls are occurring in August and September [emphasis added].” (See report, South Fork RFP Deepwater Offshore Wind Proposal EFOR Analysis” BOEM Index Exhibit #036, at pp. 2-3).

354. According to data provided by the U.S. Energy Information Administration (“USEIA”), the actual average generating capacity of the Block Island Wind Farm (over five years from 2017 to 2021) was 23.6% for August, which is less than half the average output (of 50.6%) for the cooler months of the year (November through to January)(see Exhibit G- BIWF Capacity (2017-2021).

355. BOEM received that information in an Excel spreadsheet but summarized output data for four years from 2017 to 2020. The actual average generating capacity of the Block Island Wind

Farm (2017-2020) was 27.8% for August, which is around half the average output (of 51.8%) for the cooler months of the year (November through to January). BOEM uploaded the spreadsheet that is available online at— www.regulations.gov/comment/BOEM-2020-0066-0384 (see “Block Island Wind Farm BIWF Capacity (2017-2020)” BOEM Index Exhibit #182).

356. BOEM received Testimony based on wind speed data provided by the U.S. National Oceanic and Atmospheric Administration (“NOAA”) on the correlation between onshore summer-time temperatures and the degree to which a facility that relies on offshore wind for power generation cannot reliably provide power to meet peak demand in response to air conditioner usage, and periods when such a facility may not provide any power at all. BOEM uploaded the testimony together with supporting documents that are available at— www.regulations.gov/comment/BOEM-2020-0066-0387 (see “18-T-0604 - Testimony Part 2 - Public Interest Price Oct 9, 2020” BOEM Index Exhibit #099).

357. BOEM received clear substantive evidence that the South Fork Wind Project could not reliably provide power to meet “peak load requirements [...] in the South Fork [...].”

358. Defendants DOI and BOEM ignored evidence showing that the Project’s “basic objective” was to acquire resources “to meet expected peak load requirements” in the South Fork.”

XIII. COASTAL ZONE MANAGEMENT

359. The U.S. Office of Ocean and Coastal Resources Management is part of the U.S. National Oceanic and Atmospheric Administration (“NOAA”), an agency of the U.S. Department of Commerce.

360. The U.S. Office of Ocean and Coastal Resources Management approved the Town of East Hampton Local Waterfront Revitalization Program (“LWRP”) (in August 2008) pursuant to

the Coastal Zone Management Act (“CZMA”) and implementing regulations 15 C.F.R. part 923 (see Exhibit H- CZMA LWRP).

361. The Town of East Hampton LWRP contains the enforceable policies of the State of New York’s Coastal Zone Management Program applicable to the project’s consistency review.

362. “East Hampton Town has an overwhelming interest in preserving and protecting its water resources [...] Groundwater must be carefully monitored, as pipelines carry water from one end of the Town [...] Remediation of polluted groundwater and surface waters, restoring damaged wetlands and terrestrial and marine ecologies [...] must be undertaken to avoid even more costly and complex solutions in the future. [...] *Fresh Ponds* [...] [and] *Coastal Ponds* [...] are linked to both the saltwater/tidal interface and to the underground aquifers, the sole source of drinking water for the Town.” (see Exhibit H- CZMA LWRP, at XII-1, PDF 554, ¶ 2.)

363. In 1995, the Town established a Harbor Protection Overlay District (“HPOD”) to protect the surface water bodies in the Town, including Georgica Pond and Wainscott Pond, “by regulating the most immediate contributing areas surrounding them” (*id.* at XII-17, PDF 570, ¶ 5).

364. The Project’s construction corridor is upgradient and adjacent for over one thousand feet (1,000 ft) to the HPOD that, is designed to protect the sensitive environment of Georgica Pond.

Groundwater Contamination

365. The U.S. Office of Ocean and Coastal Resources Management approved the East Hampton Town LWRP in 2008. The program states that “hazardous materials pose direct risks to ground and surface waters and wetlands. These include [...] chemicals and solvents, both households and commercial, used for [...] all manner of natural and synthetic materials” (*id.* at XII-19, PDF 572, ¶ 7). The broad definition of “hazardous materials” includes PFAS chemicals.

366. “On the South Fork, only the upper two aquifers contain fresh-water and, in many areas of

the town, only the Upper Glacial aquifer contains significant quantities of freshwater. [...] In East Hampton, “drinking water supplies are limited to the Upper Glacial and [upper] portions of the Magothy aquifers. The deep flow recharge areas are located in the central portion of the South Fork. Movement within the aquifers is lateral and vertical.” (*id.* at XII-43, PDF 596, ¶¶ 3-4.)

367. “The future quality of potable water within the town will be dependant upon the town's ability to successfully manage this deep flow recharge area and limit the presence of sources of pollution, including residential and commercial development” (see Exhibit I- Water Resources Mgt Plan, at 21, PDF 36, ¶ 3).

368. “Since the quantity of water is great and the movement slow, this water, if contaminated, would remain so for decades. Closer to the coastal areas, elevation drops, the lens is thinner and movement is predominantly lateral. Freshwater moves toward shallow flow streams and discharges directly to the ocean and bays across the freshwater-saline interface.” (See Exhibit H-CZMA LWRP, at XII-43, PDF 596, ¶ 4.)

369. CZMA Enforceable Policy 38 reads— “The quality and quantity of surface water and groundwater supplies, will be conserved and protected, particularly where such waters constitute the primary or sole-source of water supply.” (*id.* at XII-72, PDF 625, ¶ 6.)

370. CZMA Enforceable Policy 38a reads— “Maintain water resources as near to their natural condition of purity as reasonably possible to safeguard public health” (*id.*, ¶ 7).

371. The LWRP explanation of policies 38 and 38a reads— “Groundwater is the principle source of drinking water in the Town and therefore must be protected. Since Long Island's groundwater supply has been designated a ‘sole source aquifer’, all actions must be reviewed relative to their impacts on the Long Island aquifer” (*id.*, ¶ 8).

372. On May 27, 2021, BOEM approved the New York State Coastal Zone Management

Consistency Statement (“NYS CZM Statement”) for the South Fork Wind Project (Exhibit 08 – NYSDOS F-2018-1192).

373. Under Enforceable Policy 38, the NYS CZM Statement (falsely) asserts that “[t]he SFEC does not involve the use of groundwater resources and no groundwater resources are anticipated to be impacted” (Exhibit 07, at A-1-7, PDF 11, ¶ 38). On the contrary, the Project’s concrete duct banks and vaults will intersect with groundwater at some locations and impact groundwater.

374. The NY CZM Statement remains silent on Enforceable Policy 38a. It does *not* concur with the policy of “[m]aintain[ing] water resources as near to their natural condition of purity as reasonably possible to safeguard public health” (Exhibit H, at XII-72, PDF 625).

375. The Project ignores guideline number (8) for CZMA Enforceable Policies 38 and 38a, that “[d]iscourage[s] the siting of commercial or industrial facilities with the potential for ground or surface water pollution” (*id.*, p. XII-73, PDF 626).

376. As described (below), the Project will adversely impact human health and the environment by exacerbating, prolonging, enhancing, and spreading PFAS contamination in soil and groundwater.

376.01 The Project’s approved Coastal Zone Management Consistency Statements (“NY CZM Statement”) for New York alleges that the New York State “DOS [Department of State] ... concur[s] with South Fork’s certification that the activities described in detail in the COP [dated May 7, 2021] will be conducted in a manner that is fully consistent with the enforceable policies of the CMP” (see Exhibit 08, at 1, second paragraph). Although NYS DOS fraudulently asserted that the South Fork Wind Project complies with the federally approved CZMA Enforceable Policies, BOEM is *not* relieved of its statutory obligation to evaluate, verify, and take responsibility for any information it receives.

Significant Coastal Fish and Wildlife Habitats

377. BOEM approved the Project's cable corridor between the locally designated Significant Coastal Fish and Wildlife Habitats of Wainscott Pond (NYSDEC-classified Freshwater Wetland) and Georgica Pond, which supports brackish wetlands and an abundance of wildlife of which some are endangered or threatened.

378. The Significant Coastal Fish and Wildlife Habitat of Georgica Pond is described under CZMA Policy 7 (see Exhibit H- CZMA LWRP, at III-49, PDF 202, third paragraph).

379. The Significant Coastal Fish and Wildlife Habitat of Wainscott Pond is described within the East Hampton Town LWRP Policy 7 (*id.* at III-50, PDF 203, fourth paragraph).

380. In 1990, the Town of East Hampton's Assistant Environmental Protection Director issued a report on Wainscott Pond degraded water quality and poor ecology, including "[f]ish kills from low oxygen levels [that] occur periodically" (*id.*, at III-50-51, PDF 203-4).

381. East Hampton Town LWRP continues: "Any activities that would further degrade water quality [...] would have a significant impact on fish and wildlife species inhabiting Wainscott Pond. All species of fish and wildlife may be affected by pollution from chemical contamination. [...] Wetland areas surrounding the pond should be restored to improve both water quality and wildlife habitat" (*id.*, at III-50-51, PDF 203-4).

382. The freshwater habitat of Wainscott Pond is approximately eight hundred feet (800 ft) to the west of the SFEC construction corridor.

383. The habitat of Georgica Pond is approximately five hundred feet (500 ft) to the northwest of the corridor (at Wainscott NW Road).

384. The hydrogeology beneath the SFEC construction corridor route is connected via groundwater flow to the hydrogeology of Wainscott Pond and Georgica Pond.

385. South Fork Wind has begun and plans to continue excavation and horizontal directional drilling activities on Beach Lane and Wainscott North West Road (and at other locations) where it will encounter contaminated groundwater.

386. Groundwater beneath Beach Lane contains high levels of PFAS contamination, such as PFOA contamination detected in a groundwater monitoring well (MW-4A) at 82 parts per trillion, exceeding the 2016 EPA Health Advisory Levels.

387. Groundwater beneath Wainscott NW Road contains high concentration levels of PFAS contamination, such as PFOS contamination detected in a groundwater monitoring well (MW-15A) at a concentration level of 15 ppt that exceeds the NYS Maximum Contamination Limit.

388. “Wainscott Pond” is *not* mentioned in the FEIS or ROD.

389. BOEM did not consider the freshwater habitat of Wainscott Pond.

390. CZMA Enforceable Policy 44 reads— “Preserve and protect ... freshwater wetlands and preserve the benefits derived from these areas” (*id.*, at XII-76, PDF 629). It explains that “[a]ll structures and uses ... shall be ... in a location so that no wetland will be diminished in size, polluted, degraded or lost, or placed in peril in order to establish the structure or use” (*id.*, at XII-78, PDF 631, ¶ 1).

391. The Project’s concrete duct banks and vaults will pollute, degrade, and risk placing the Wainscott Pond and Georgivca Pond habitats in peril.

392. According to testimony submitted by South Fork Wind in the NYSPSC proceeding, its underground concrete duct banks and large vaults may prolong PFAS contamination in groundwater via diffusion.

393. In the instant matter, diffusion occurs where PFAS contaminant mass moves into lower permeability materials such as concrete, enhancing “the long-term persistence of PFAS in

groundwater. For instance, at one site PFAS penetrated 12 cm into a concrete pad at a fire training area, and diffusion was contributing process (Baduel, Paxman, and Mueller 2015).” See Exhibit J- ITRC, PFAS Fate & Transport, Mar 2018 (at p. 6, last ¶).

394. “Back-diffusion: PFAS dissolved in groundwater that accumulated in lower permeability silt/clay layers below the water table may diffuse into the higher permeability zones due to changing relative concentrations” (see Exhibit K- ITRC, PFAS Fate & Transport, Aug 2021 (at PDF p. 5, point 2).

395. The Project’s underground concrete duct banks and vaults will run for approximately two miles through an area known for PFAS contamination of soil and groundwater.

396. The concrete duct banks and vaults will act to retain PFAS contaminants in the concrete materials, and via a process of “back-diffusion out of these low permeability materials may result in the longterm persistence of PFAS in groundwater even after source removal and remediation” (*id.*, at PDF p. 9, ¶ 6).

397. At some locations, underground concrete duct banks and vaults have been installed or will be installed where they intersect with groundwater.

398. According to the U.S. Geographic Survey’s National Water Information System, groundwater levels vary seasonally (over the short term) and in the long term by up to eight feet (see Exhibit E- 2022 Comments, at pp 10-11, Figs 4-5).

399. Suffolk County Department of Health Services detected PFAS contamination exceeding New York State’s Maximum Contamination Level (10 ppt) 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 PFAS contamination (65) represents thirty-two percent (32%) of the total number of contaminated wells in Suffolk County (202). See Exhibit M- PFAS

Data, Suffolk County (Newsday, Apr 2022).

400. The concrete duct banks and vaults and the disturbed excavation will become a preferential pathway for the movement of PFAS and, as such, will transport PFAS contaminants to locations that otherwise would not be impacted.

401. “Subsurface features, including utility lines: Preferential pathways may result from subsurface features. For example, the flow may seep into or out of nonwatertight sewer lines based upon groundwater elevations relative to the utility. The bedding material of a subsurface line may also convey groundwater.” (See Exhibit L- ITRC, PFAS- Site Characterization, Aug 2021 (at p. 5, point 9).

402. “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).

403. The Project’s adverse environmental impact from installing concrete duct banks and vaults in an area where groundwater contains high levels of PFAS contamination will exacerbate, prolong, and enhance such contamination.

404. The Project’s adverse environmental impact will impact sensitive habitats in proximity to the west and east of the Project’s construction corridor through groundwater flow.

Siting of Energy Facilities

405. [deleted]

406. [deleted]

407. CZMA Enforceable Policy 27 continues– “Decisions on the siting and construction of

major energy facilities in the coastal area will be based on public energy needs, compatibility of such facilities with the environment, and the facility's need for shorefront location" (*id.*, p. XI-1, PDF p. 549), and explains that a "determination of public need for energy is the first step in the process for siting new facilities."

408. Policy 27 refers explicitly to transmission lines under Article VII of New York State's Public Service Law that "establishes the basis for determining the compatibility of these facilities with the environment and the necessity for a shorefront location" (*id.*, p. XI-1, PDF p. 549).

409. As explained in detail in the information provided to BOEM, South Fork Wind "failed to sustain its burden to show a need for its facility[,]" that is defined within the South Fork RFP to serve as "an alternative to adding new transmission lines, [...] to acquire sufficient local resources to meet expected peak load requirements until at least 2022 in the South Fork" (see BOEM Exhibit #009, at pp. 10-15).

410. The project BOEM approved is contrary to CZMA Enforceable Policy 27.

XIV. ATLANTIC COD: POPULATION-LEVEL IMPACTS

Collapse of Atlantic Cod Stock

410.01 In 2011, the Commercial Landings for Atlantic cod (for Massachusetts, Main, New York, and Rhode Island) was \$30,091,030. Over the next ten years, Commercial Landings collapsed (by 91%) to only \$2,787,289 (in 2021).⁵²

410.02 For twelve years from 2000 through 2011, average Commercial Landings were \$24,837,408 each year. By comparison, for the past five years (from 2017 through 2021),

⁵² See Exhibit 05 – NOAA Fisheries of the United States Report ("FUS Report") (source: <https://www.fisheries.noaa.gov/foss/>)

average landings were just \$3,966,938 each year, representing just 16% of the average for the prior period.⁵³

NOAA Comments Concealed by BOEM

410.03 On October 25, 2021, the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (“NOAA Fisheries”) wrote to BOEM’s Chief of Office of Renewable Energy Programs, James Bennett (“NOAA Fisheries October Letter”). The letter reads as follows (Exhibit 01, at 1, second paragraph)—

The South Fork Project is proposed on Cox Ledge, a sensitive ecological area that provides valuable habitat for a number of federally managed fish species and other marine resources. Based on our Northeast Fisheries Science Center’s fisheries science expertise and supporting peer-reviewed publications, this project has a high risk of population-level impacts on Southern New England Atlantic cod [emphasis added]. ... BOEM is not planning to adopt or to only partially adopt a number of [our] recommendations. ... We ... have continuing concerns that we recommend BOEM address as either the ROD is finalized or these subsequent processes are implemented.

410.04 BOEM did *not* post the NOAA Fisheries Letter on its website and did *not* disclose the letter to the public. By concealing the letter, BOEM violated one of the two principle aims of NEPA—to ensure “that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process” (*Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983)).

410.05 The letter was brought to the Plaintiff’s attention only in October 2022, a year *after* NOAA Fisheries’ Assistant Regional Administrator for Habitat and Ecosystem Services, Mr. Louis A. Chiarella, had written to BOEM.

⁵³ *Ibid.*

410.06 It is not known how many other letters, reports, comments, etc., BOEM has failed to publicly disclose.

410.07 Plaintiff amended his Complaint to include the issues raised in the NOAA Fisheries October Letter.

410.08 Had Defendant BOEM *not* concealed the letter, Plaintiff would have included the in issues raised in the letter in his original Complaint (filed July 21, 2022).

410.09 The discovery of the critical document contradicts BOEM's claim that "extra-record discovery ... is so unlikely that the Court need not even consider this factor in determining whether transfer would be appropriate" (ECF No. 25, at 14, PDF 19, second paragraph).

Cox Ledge– Atlantic Cod Habitat

410.10 On June 7, 2021, NOAA Fisheries expressed concerns it had with BOEM's environmental review and its limited implementation of NOAA Fisheries' Essential Fish Habitat ("EFH") assessment. NOAA Fisheries' Assistant Regional Administrator for Habitat Conservation, Louis A. Chiarella, wrote to BOEM's Chief, Environmental Branch for Renewable Energy, Michelle Morin ("NOAA Fisheries June Letter"). The letter reads—

Of note is the absence of a meaningful evaluation of the potential project impacts for Atlantic cod. We have significant concerns that the project may result in substantial impacts to Atlantic cod EFH by adversely affecting benthic habitats and causing acoustic impacts that may interfere with cod spawning. These concerns were discussed at length in our December letter and in our follow-up coordination with your staff and the third-party contractor. However, your EFH assessment provides minimal analysis of such impacts and does not respond to our specific information requests or our discussions with you related to the level

of detail necessary for the assessment [Exhibit 03, at 2, first paragraph].⁵⁴

Mr. Chiarella informed BOEM that –

Cox Ledge

The proposed project is located on Cox Ledge, an area with particularly complex and unique habitat conditions that support a wide range of marine resources. ... Impacts to complex habitats, such as those found in the project area, are known to result in long recovery times and may take years to decades to recover from certain impacts. Such impacts may result in cascading long term to permanent effects to species that rely on this area for spawning and nursery grounds and the fisheries and communities that target such species. This area is also known to support spawning aggregations of Atlantic.

Atlantic cod

Atlantic cod are an iconic species in New England waters and a highly sought-after catch for recreational fishermen. In 2013, the recreational marine bait and tackle industry in New England was estimated to contribute \$200 million in total sales, \$78.9 million in income, and 1,256 jobs to the local economy (Hutt et al. 2015). Atlantic cod was reported to be the fifth greatest generator of sales. In the most recent Economies of the Fisheries (2016), commercial and recreational fisheries are estimated to contribute 97,000 jobs and generate \$8.7 billion in sales annually in the New England region with Atlantic cod remaining one of the key recreational species in the region (NOAA 2018) [*Id.* at 4, third paragraph].

...

The Atlantic cod stock most affected by the project area is the Georges Bank stock, which includes cod found in Southern New England waters and those around Cox Ledge. According to a preliminary 2019 operational assessment, the Georges Bank cod stock is overfished and near record low biomass observed in 2014. Despite recent emergency management actions and severe reductions in fishery resource allocations, cod stocks in the region remain at less than 10% of

⁵⁴ Letter from NOAA Fisheries (Louis A. Chiarella) to BOEM (Ms. Michelle Morin), dated June 7, 2021 (<https://www.boem.gov/renewable-energy/state-activities/nmfs-sfwf-efh-letter>)

the target sustainable spawning stock biomass, with the latest stock status report for Atlantic cod ... GB stocks estimate at ... 7 percent ... of the target for maximum sustainable yield. [*Id.* at 4-5]

...

Given the state of Atlantic cod stocks and the economic importance of the species to recreational and commercial fisheries, it is essential to minimize adverse impacts to habitats that can support and increase survivorship of critical life stages for cod in southern New England [*Id.* at 5, second paragraph].

...

Atlantic cod spawning on Cox Ledge have recently been identified as genetically distinct from other spawning groups (Clucas et al. 2019). These factors increase the vulnerability of this population to impacts resulting from reduced spawning success. Physical habitat disturbance occurring during spawning may interfere with mating behavior and egg production (Dean et al 2014, Siceloff and Howell 2013). [*Id.* at 11, first paragraph]

Impact Hammer Pile Driving

410.11 The NOAA Fisheries October Letter (2021) cites pile driving as a critical concern. The letter reads as follows—

BOEM had determined to restrict pile driving from January 1 to April 30 and potentially from December 1 to December 31, pile driving noise, particularly at the start of the spawning season (November and December), could prevent aggregations from forming, disrupt existing aggregations, and/or cause cod to leave or abandon the area altogether. Cod demonstrate site fidelity during spawning, so a single year abandonment of those locations may have significant implications for recruitment. We know that November and December are critical times for spawning activity in this region (Dean et al. 2021, in review) and restricting pile driving during the spawning season is necessary to avoid population effects (Hammar et al. 2014) [emphasis added].

(see Exhibit 01 at 2, last paragraph)⁵⁵

410.12 In its FEIS, BOEM admits that “[f]ish with a swim bladder or other gas chamber involved in hearing (e.g., ... fish in the cod family) are considered hearing specialists and are the most sensitive to underwater noise impacts.” Further, the FEIS quantifies the impacts as follows—

The Proposed Action includes the installation of 16 monopile foundations using an impact hammer. The installation ... assumes 15 ‘standard’ installations requiring approximately 4,500 pile strikes over 2 hours to achieve desired depth and one ‘difficult’ installation requiring 8,000 pile strikes and up to 4 hours due to underlying substrate conditions ... impact pile driving ... is the most intense source of noise resulting from the Project and would produce the most significant and extensive noise effects on fish. Pile driving would produce noise above the 150 dBPEAK behavioral effects threshold on over 200,000 cumulative acres (FEIS at 3-26, PDF 78).

A “standard” installation (4,500 strikes over 2 hours) is equal to three strikes every five seconds (at 150 dBPEAK each) for 2 hours, or 4 hours for a “difficult” installation.”

XV. RELATED LEGAL CHALLENGES

411. The New York State Public Service Commission’s grant of an Article VII certificate to South Fork Wind (docket 18-T-0604) is the subject of the following two separate legal challenges: (a) *Simon V. Kinsella et al. v. NYS Public Service Commission et al.*, N.Y. Supreme Court, Appellate Div. - 2nd Dept., filed September 9, 2021 ([index 006572/2021](#)); and (b) *Citizens for the Preservation of Wainscott, Inc. et al. v. NYS Public Service Commission et al.*, N.Y. Supreme Court, Appellate Div. - 2nd Dept., filed September 9, 2021 ([index: 006582/2021](#))

⁵⁵ See Exhibit 01 – Letter from NOAA Fisheries (Louis A. Chiarella) to BOEM (James Bennett), dated October 25, 2021 – *not publicly disclosed*

412. The 2017 PPA is the subject of the following legal challenge on appeal— *Simon V. Kinsella et al. v. Long Island Power Authority, et al.* N.Y. Suffolk County Supreme Court, filed November 9, 2021 ([index: 621109/2021](#), available here).

XVI. INJUNCTIVE RELIEF ALLEGATIONS

413. My family and I are suffering an injury that is actual or imminent due to BOEM's approval of construction that will continue to disturb, exacerbate, and prolong PFAS contamination of soil and groundwater in our neighborhood.

414. BOEM has permitted South Fork Wind to proceed with the Project's construction, exposing my family and me to increased levels of contamination to which we would not otherwise be exposed.

415. BOEM permitted South For Wind to proceed with construction irresponsibly without regard to environmental PFAS contamination.

416. BOEM approved the underground installation of concrete duct banks and vaults encroaching into PFAS-contaminated groundwater. According to information provided by South Fork Wind, its underground concrete infrastructure will "enhance the long-term persistence of PFAS in groundwater." See Exhibit J- ITRC, Environmental Fate and Transport for PFAS, March 2018 (at p. 6, last ¶).

417. The concrete duct banks and vaults form a barrier between the primary source of PFAS contamination at the Airport and Georgica Pond, where my family and I used to sail and swim.

418. South Fork Wind's underground concrete infrastructure will prolong and increase our exposure to PFAS contamination.

419. BOEM's approved Project will expose my family and me to increased levels of PFAS contamination from the underground concrete infrastructure and excavation, altering the course

of contaminant flow via preferential pathways, thereby spreading the contaminant plume to areas of the sole-source aquifer that would otherwise not be impacted by the PFAS contamination.

420. My family and I already incur costs of \$800 each time we have our water tested so that we may monitor any changes in the PFAS contamination plume.

421. BOEM approved the underground installation of concrete duct banks and vaults that will impact groundwater used for irrigating local crops by farmers from whom we buy fruit and vegetables daily at the corner farm stand.

422. Breaking from prior practice, South Fork Wind refuses to disclose PFAS contamination test results of soil and groundwater samples taken earlier this year.

423. Had BOEM complied with NEPA and undertaken a thorough environmental review, I would not be in a position where I am being denied information that reasonably poses an imminent threat to my physical safety and that of my family. I have a right to know the extent to which BOEM's approved Project threatens my health when substantive evidence gives cause to believe that contamination poses a significant risk to public health.

424. As a result of BOEM's action approving the Project, our property is less valuable.

425. The New York State Public Service Commission ("NYSPSC") did *not* require SFW, and SFW did not volunteer, to test soil or groundwater from *within* its construction corridor, despite a motion seeking to include such testing.

426. The NYS Article VII hearing (case 18-T-0604) denied intervenor-parties' rights to examine and cross-examine witnesses on such evidence.

427. The NYSPSC hearing lasted two years until the evidentiary record closed on December 8, 2020. On December 23, 2020 – just fifteen days *after* the NYSPSC hearing had concluded, SFW tested soil or groundwater from within its construction corridor for the first time.

428. By delaying testing for PFAS contamination, SFW avoided environmental review during the NYSPSC proceeding of *any* PFAS contamination test results of soil or groundwater from *within* its construction corridor.

429. Neither Federal nor State agencies thoroughly reviewed PFAS contamination to secure our health.

430. I have no option but to look into these matters *before* SFW causes further environmental damage.

431. Given that PFAS contamination poses a risk to human health, I have no other legal remedy other than to seek injunctive relief to allow time for South Fork Wind to disclose the laboratory results for PFAS contamination of soil or groundwater taken from within or near its onshore SFEC route, including but not limited to supporting documentation such as sampling plans, bore/well locations, maps, and borehole/well logs. Time is of the essence.

Treatment Facility for PFAS Contamination

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

“[...] SFW is unlikely to encounter any PFAS contamination during construction of the SFEC due to the fact that it is not performing any excavation in areas where PFAS has been released, [...] and also because most of the excavation will take place above the water table [emphasis added]” (NYSPSC DMM 254, available at dps.ny.gov, click here, at p. 17).

433. Three months later (in April 2022), SFW excavated and removed soil and groundwater

to install a transition vault at the southern end of Beach Lane, Wainscott.

434. The bottom of the excavation for the transition vault contained groundwater (see Appendix 1- PFAS Treatment, at p. 6, marked “F”) (also [available online, click here](#)).

435. Contrary to the characterization (in ¶ 432 above), in May 2022, South Fork Wind was treating PFAS-contaminated groundwater using four frac tanks with a combined capacity of 75,000 gallons and a Granular Activated Carbon filter at a treatment facility in the Town of East Hampton groundwater (see Appendix 1- PFAS Treatment, at pp. 1-4).

436. Defendants’ action has already caused substantial irreparable injury because of the concrete duct banks and vaults that South Fork Wind has installed. Leaving them where they are will permanently exacerbate and prolong the environmental harm. There is a substantial chance that upon the final resolution of the action, I cannot return to the position I previously occupied.

437. Both the balance of the equities and the public interest favor injunctive relief. Safeguarding a community’s water supply from contamination by dangerous chemicals, protecting the habitat of Cox Ledge and the Atlantic cod population, and ensuring that Defendants comply with the law serve Plaintiff’s interests and the public interest. They outweigh any harm that might result from an emergency temporary restraining order or preliminary injunction.

438. Defendants’ arbitrary exercise of power contrary to law permitted South Fork Wind to cause injury to me, my family, our property, and the public.

439. Constitutional, statutory, and regulatory limitations imposed by law upon BOEM’s action to approve the Project are essential to preserving my private rights of life, liberty, property, and due process of law.

440. I seek to enforce these limitations by judicial process as a means of protecting my rights

“against the power of numbers, and against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.”

See *Hurtado v. California*, 110 U.S. 516, 528, 532, 536 (1884).

XVII. FIRST CLAIM FOR RELIEF

Failure to include adverse environmental impacts

(Against all Defendants for violations of NEPA and the APA)

441. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

442. According to NEPA, 42 U.S.C. § 4332(2)(C), and its implementing regulations, an EIS must provide a full and fair discussion of significant “environmental impacts” and “any adverse environmental effects which cannot be avoided” to inform decisionmakers and the public of the reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment. In the EIS, it must be evident the agency took a “hard look” at the environmental consequences of its decision.

443. As described (above), Defendants buried deep within its FEIS an ambiguous reference to “perfluorinated compounds” (on page 655 of 1,317).

444. Defendants failed to identify the harmful contaminants, disclose their location relative to the Project, consider their impacts, or discuss PFAS contamination that they knew posed a threat to human health and the environment.

445. Defendants failed to address the imminent risks of the Project causing, exacerbating, prolonging, or otherwise furthering harmful PFAS contamination in the Town of East Hampton’s drinking water supply or impacting the nearby downgradient habitats and surface waters of Georgica Pond and Wainscott Pond.

446. Defendants failed to take a “hard look” into environmental contamination “to the fullest

extent possible” in accordance with Congress’ express direction that it does so pursuant to NEPA (42 U.S.C. 4321 *et seq.*) and its implementing regulations.

447. In approving a Project that relied on a deficient FEIS, Defendants failed to comply with NEPA and its implementing regulations and therefore engaged in final agency action that was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

448. According to the APA, 5 U.S.C. § 706(2)(A), the Court has the authority and duty to hold unlawful and set aside such agency action in the relevant part.

449. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

450. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

451. Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the South Fork Wind Farm (“SFWF”) and South Fork Export Cable (“SFEC”) corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and all and any other infrastructure and equipment related to the Project, and restoring the benthic environment on Cox Ledge.

XVIII. SECOND CLAIM FOR RELIEF

Failure to assume responsibility for environmental analyses

(Against all Defendant for violations of NEPA and the APA)

452. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

453. The “U.S. Environmental Protection Agency” (“EPA”) was a cooperating agency “during the development and review” of the FEIS (ROD at p. 1, PDF p. 3, ¶ 2).

454. According to NEPA (42 U.S.C. 4321 *et seq.*) implementing regulation 40 C.F.R. §

1501.6(b), cooperating agencies shall participate in the scoping process and “[a]ssume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.”

455. On October 18, 2021, EPA Administrator Michael S. Regan announced the agency’s PFAS Strategic Roadmap—laying out a whole-of-agency approach to addressing PFAS.

456. On June 15, 2022, the White House announced the following –

First, EPA is publishing four new drinking water lifetime health advisories for certain PFAS as part of the President’s plan to combat PFAS pollution and the Environmental Protection Agency’s (EPA) PFAS Roadmap. These health advisories reflect the Biden-Harris Administration’s commitment to follow the science and up-to-date public health information. Specifically:

- EPS is releasing *interim* updated drinking water lifetime health advisories for perfluorooctanoic acid [“PFOA”] and perfluorooctane sulfonic acid [“PFOS”] that replace those issued by EPA in 2016. The updated advisory levels are based on new science that indicates that some negative health effects may occur with concentrations of PFOA or PFOS in water that are near zero ...”.

The White House announcement says that PFOA and PFOS are part of a class of chemicals called “per- and polyfluoroalkyl substances (PFAS) ... that can cause cancer and other severe health problems, pose a serious threat across rural, suburban, and urban areas, and that disproportionately affect disadvantaged communities. PFAS are considered ‘forever chemicals’ because they are environmentally persistent, bioaccumulative, and remain in human bodies for a long time.” (<https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/15/fact->

sheet-biden-harris-administration-combatting-pfas-pollution-to-safeguard-clean-drinking-water-for-all-americans/, last accessed October 29, 2022).

457. The EPA has “special expertise” in the field of environmental contamination, including PFAS contamination.

458. Plaintiff had informed the EPA about the nature and extent of PFAS contamination in Wainscott, and South Fork Wind’s “proposed construction activities [that] would disturb approximately 10,000 tons short (US) of soil and undoubtedly impact the contamination site” (see Exhibit N- EPA Letter & Resp, PFAS & SFW).

459. Defendant BOEM and the named individual defendants working for BOEM “shall [...] use the environmental analysis and proposals of cooperating agencies with [...] special expertise, to the maximum extent possible consistent with its responsibility as lead agency” (40 C.F.R. § 1501.6(a)).

460. Contrary to substantive evidence of PFAS contamination that Plaintiff and others had provided BOEM, Defendant BOEM and the named individual defendants working for BOEM prepared, reviewed, and approved the FEIS, falsely concluding that—

“Overall, existing groundwater quality in the analysis area appears to be good”
(FEIS at H-23, PDF p. 655, second paragraph).

461. Defendant BOEM and the named individual defendants working for BOEM suppressed information on PFAS contamination provided by the EPA in violation of 40 C.F.R. § 1501.6(a)(2).

462. Defendant EPA failed to assume responsibility for developing and preparing environmental analyses concerning information already in its possession in violation of 40 C.F.R. § 1501.6(b).

463. Defendant BOEM as the lead agency, the named individual defendants working for BOEM, and the EPA as a cooperating agency developed a FEIS that ignored critical information

concerning environmental (PFAS) contamination that poses a risk to human health and the environment that Plaintiff and others had brought to their attention.

464. Defendants failed to comply with NEPA and its implementing regulations and are responsible for a final agency action that was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

465. According to the APA, 5 U.S.C. § 706(2)(A), the Court has the authority and duty to hold unlawful and set aside such agency action in the relevant part.

466. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

467. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

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

XIX. THIRD CLAIM FOR RELIEF

Failure to evaluate and verify information

(Against all Defendants for violations of NEPA and the APA, except Defendant EPA)

469. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

470. According to NEPA (42 U.S.C. 4321 et seq.), implementing regulation 40 C.F.R. § 1506.5(a), when “an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, [...] [t]he agency shall independently evaluate the information submitted and shall be responsible for its accuracy.”

The section continues— “If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§ 1502.17). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.” Regulation § 1506.5(c) reads: “If 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.”

471. “BOEM prepared the FEIS with the assistance of a third-party contractor, SWCA, Inc.” (ROD, at p. 1, PDF p. 3, ¶ 2).

472. Defendant BOEM and the named individual defendants working for BOEM on the Project’s review and approval failed to independently evaluate and verify information it received from the applicant, South Fork Wind, and are responsible for its contents.

473. If BOEM and the named individual defendants working for BOEM had independently verified its purpose and needs statement against the information it received nine months *before* issuing its ROD, or readily accessible public records, the purposes and needs would have been proven false. Instead, Defendant BOEM and the named defendants working for BOEM ignored comments it received and relied on fraudulent purposes and needs to support the Project.

474. BOEM’s purpose and needs statement alleges that “[t]he purpose of the Project is to develop a commercial-scale offshore wind facility” (FEIS, at ii, PDF 6, fifth paragraph).

475. According to the New York State Energy Research and Development Authority, the South Fork Wind Farm does *not* have a commercial capacity large enough to achieve economic advantages of scale, a fact admitted to by the ultimate owners of the Project, Ørsted and

Eversource.

476. BOEM's purpose and needs statement alleges that the Project "is designed to contribute to New York's renewable energy requirements, particularly, the state's goal of generating 9,000 megawatts of offshore wind energy by 2030" (FEIS at i, PDF 5, last paragraph), referring to the New York's 2019 CLCPA, even though South Fork Wind designed the Project three-and-half-years *before* the law's enactment; and, supposing *arguendo* the law did apply (it does not apply), would have failed to satisfy the law's requirements.

477. BOEM's purpose and needs statement (falsely) alleges that the underlying "power purchase agreement executed in 2017" between LIPA and South Fork Wind resulted from a "technology-neutral competitive bidding process" (FEIS at ii, PDF 6, fifth paragraph) in reference to the South Fork RFP (that is *sine qua non* to BOEM's review and approval challenged herein), contrary to conclusive evidence showing that the procurement was *not* a "technology-neutral competitive bidding process."

478. BOEM's purpose and needs statement alleges that its "action is needed to further the United States' policy to make OCS energy resources available for [...] development, subject to environmental safeguards[,] [in a manner which is consistent with the maintenance of competition] (43 U.S.C. § 1332 (3)), including consideration of natural resources" (FEIS, at ii, PDF 6, sixth paragraph), contrary to substantive evidence showing that the Project: (i) poses a risk to human health and ignores environment safeguards such as excavating over 30,000 tons of material from a highly contaminated area; and (ii) was born from a rigged procurement process specifically designed to thwart competition.

479. Defendants DOI, BOEM, and the named individual defendants working for BOEM violated NEPA (42 U.S.C. 4321 *et seq.*), implementing regulation 40 C.F.R. § 1506.5 by failing

to independently evaluate or verify critical information in the FEIS on the Project's purpose and need, and engaged in final agency action that was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

480. According to the APA, 5 U.S.C. § 706(2)(A), the Court has the authority and duty to hold unlawful and set aside such agency action in the relevant part.

481. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

482. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

483. Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the SFWF and SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and all and any other infrastructure and equipment related to the Project, and restoring the benthic environment on Cox Ledge.

XX. FOURTH CLAIM FOR RELIEF

**Failure to verify NYS concurrence with Federal Consistency Certification
(Against all Defendants for violations of CZMA, NEPA and the APA)**

484. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

485. I reallege paragraphs 470-472 (above) as if set forth in full herein.

486. The freshwater habitat of Wainscott Pond is approximately eight hundred feet (800 ft) to the west of the SFEC construction corridor, and the habitat of Georgica Pond is about five hundred feet (500 ft) to the northwest of the corridor (at Wainscott NW Road).

487. The hydrogeology beneath the SFEC construction corridor route is interconnected via

groundwater flow to the hydrogeology of Wainscott Pond and Georgica Pond.

488. South Fork Wind has begun and plans to continue excavation and horizontal directional drilling activities on Beach Lane and Wainscott North West Road (and at other locations) where it will encounter groundwater.

489. Groundwater beneath Beach Lane contains high levels of PFAS contamination, such as PFOA contamination detected in a groundwater monitoring well (MW-4A) at 82 ppt, exceeding the 2016 EPA Health Advisory Levels.

490. Groundwater beneath Wainscott NW Road contains high concentration levels of PFAS contamination, such as PFOS contamination detected in a groundwater monitoring well (MW-15A) at 15 ppt that exceeds the NYS Maximum Contamination Limit.

491. “Wainscott Pond” is *not* mentioned in the FEIS or ROD, *at all*.

492. BOEM did *not* consider the freshwater habitat of Wainscott Pond.

493. The Project’s environmental impact from underground concrete duct banks and vaults in an area where groundwater contains high levels of PFAS contamination will exacerbate, prolong, and enhance the contamination.

494. The Project’s environmental impact on PFAS contamination will adversely impact sensitive habitats in proximity to the west (Wainscott Pond) and east (Georgica Pond) of the Project’s construction corridor through groundwater flow.

495. Contrary to CZMA Enforceable Policy 44, Defendants permitted South Fork Wind to install concrete duct banks and vaults and undertake excavation and horizontal directional drilling activities that will pollute, degrade, and place the habits of Wainscott Pond and Georgivca Pond in peril.

496. Contrary to CZMA Enforceable Policy 27, Defendants permitted South Fork Wind to site

its renewable energy project in the Town of East Hampton's Coastal Management Zone.

497. The Project is *not* designed to serve residents' needs for power during peak demand during the summer but will provide more energy during the winter when the Town does *not* need it. The Project will serve residents of other localities to the west.

498. Contrary to CZMA Enforceable Policy 38 and 38a, which require the protection of surface water and groundwater supplies, "particularly where such waters constitute the primary or sole-source of water supply" and to maintain their "purity [...] to safeguard public health[,]"" BOEM permitted South Fork Wind to begin onshore construction of a high-voltage transmission system and underground infrastructure through a square mile with more PFAS-contaminated drinking water wells than at any other location in Suffolk County.

499. According to the Coastal Zone Management Act ("CZMA"), the State of New York Department of State ("NYDOS") "shall also consult with the Federal agency responsible for approving the federal license or permit to ensure that proposed conditions satisfy federal as well as management program requirements" (15 C.F.R. § 930.62(d)).

500. Defendants failed to ensure that the Project satisfied federal and CZMA enforceable policies in violation of 15 C.F.R. § 930.62.

501. Defendants failed to independently evaluate and verify federal and CZMA policies according to NEPA (42 U.S.C. 4321 *et seq.*) implementing regulation 40 C.F.R. § 1506.5.

501.01 According to the APA, 5 U.S.C. § 706(2)(A), the Court has the authority and duty to hold unlawful and set aside such agency action in the relevant part.

501.02 Plaintiff and the public are entitled to a judgment, so holding and setting aside.

Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such

unlawful final agency action.

501.03 Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the SFWF and SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and all and any other infrastructure and equipment related to the Project.

XXI. FIFTH CLAIM FOR RELIEF

Failure to specify an underlying purpose or need

(Against all Defendants for violations of NEPA and the APA, except Defendant EPA)

502. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

503. According to NEPA (42 U.S.C. 4321 *et seq.*) and regulation 40 C.F.R. § 1502.13—

“The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action [emphasis added].”

504. Defendants DOI, BOEM, and the named individual defendants working for BOEM (falsely) state that the “proposed action” is included in the “underlying purpose and need to which the agency is responding, contrary to fact and in violation of 40 C.F.R. § 1502.13 as follows—

505. I reallege Paragraph 474-475 (above) as if set forth in full herein.

506. Defendants DOI, BOEM, and the named individual defendants working for BOEM allege that “[t]he purpose of the Project is to develop a commercial-scale offshore wind energy facility” (ROD, at 7, PDF 9, seventh paragraph), contrary to fact. The allegation is *not* based on fact and violates 40 C.F.R. § 1502.13 because the stated purpose does *not* include the proposed action.

507. I reallege Paragraph 476 (above) as if set forth in full herein.

508. Defendants DOI, BOEM, and the named individual defendants working for BOEM allege

“the Project ... is designed to contribute to New York’s renewable energy requirements, particularly, the state’s goal of generating 9,000 megawatts of offshore wind energy by 2030” (FEIS, at i, PDF 5, last paragraph), contrary to fact. The allegation is *not* based on fact and violates 40 C.F.R. § 1502.13 because the stated purpose does *not* include the proposed action.

509. Defendants DOI, BOEM, and the named individual defendants working for BOEM (falsely) allege that “SFW’s [South Fork Wind’s] goal is to fulfill ... contractual commitments” (FEIS, at ii, PDF 6, fifth paragraph) without specifying *any* contractual commitments in violation of 40 C.F.R. § 1502.13. It is impossible for Defendants DOI, BOEM, and the named individual defendants working for BOEM to measure and assess alternatives against such unspecified purposes and needs according to 40 C.F.R. § 1502.13.

510. I reallege Paragraph 477 (above) as if set forth in full herein.

511. Defendants DOI, BOEM, and the named individual defendants working for BOEM (falsely) allege, in violation of 40 C.F.R. § 1502.13, that the 2017 PPA resulted from a “technology-neutral competitive bidding process” (FEIS, at ii, PDF 6, fifth paragraph), contrary to clear substantial evidence provided by Plaintiff to BOEM *before* making its decision showing that the Project did *not* result from a “technology-neutral competitive bidding process.” The allegation is contrary to fact and violates 40 C.F.R. § 1502.13 because the stated purpose does *not* include the proposed action.

512. Defendants DOI, BOEM, and the named individual defendants working for BOEM assert that “[t]he purpose of BOEM’s action is to respond to and determine whether to approve, approve with modifications, or disapprove the COP” (FEIS, at ii, PDF 6, paragraph six). Under such criteria, any plausible set of facts conceived would support an alternative that would be approved, modified, or disapproved, thereby making it impossible to assess and respond to

alternatives where no matter what alternatives were proposed, they would *all* satisfy BOEM's purpose. Defendants DOI, BOEM, and the named individual defendants working for BOEM defined a purpose that denies the agency the opportunity to assess and respond in proposing alternatives in violation of 40 C.F.R. § 1502.13.

513. I reallege Paragraph 478 (above) as if set forth in full herein.

514. Defendants DOI, BOEM, and the named individual defendants working for BOEM (falsely) allege that its "action is [...] subject to environmental safeguards[,] [in a manner which is consistent with the maintenance of competition] (43 U.S.C. § 1332 (3)," (FEIS, at ii, PDF 6, sixth paragraph)), contrary to clear substantial evidence provided by Plaintiff to BOEM *before* making its decision showing that the Project ignores safeguards that protect human health and the environment from PFAS contamination and resulted from a non-competitive procurement process contrary to the maintenance of competition. The allegation is contrary to fact and violates 40 C.F.R. § 1502.13 because the stated purpose does *not* include the proposed action.

515. In approving the Project that relied on a deficient FEIS, Defendants DOI, BOEM, and the named individual defendants working for BOEM violated NEPA (42 U.S.C. 4321 *et seq.*) and implementing regulation 40 C.F.R. § 1502.13, and therefore engaged in final agency action that was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

516. According to the APA, 5 U.S.C. § 706(2)(A), the Court has the authority and duty to hold unlawful and set aside such agency action in the relevant part.

517. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

518. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

519. Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the SFWF and SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and all and any other infrastructure and equipment related to the Project, and restoring the benthic environment on Cox Ledge.

XXII. SIXTH CLAIM FOR RELIEF

Failure to consider alternatives

(Against all defendants for violations of NEPA and the APA)

520. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

521. Defendants neither acknowledged nor considered an alternative to South Fork Wind that would combine it with Sunrise Wind.

522. Defendants failed to “[r]igorously explore and objectively evaluate all reasonable alternatives” in violation of 40 C.F.R. § 1502.14(a) and failed to “[d]evote substantial treatment to each alternative considered” in violation of 40 C.F.R. § 1502.14(b).

523. Defendants (falsely) assert that—“No other cable landing site alternatives were identified during Project development or scoping ... (see New York Article VII submitted by SFW)” (FEIS at 2-19, PDF 45, final paragraph). Contrary to Defendants’ (false) claim, the Sunrise Alternative was identified and discussed during the project’s development, scoping, and the “New York Article VII” hearing that identifies the Sunrise/South Fork alternative *eight times*. Defendants did *not* acknowledge or consider the Sunrise/South Fork alternative and are *not* relieved of their statutory obligations irrespective of a non-cooperating state agency action that contradicts clear substantial evidence provided to Defendant BOEM by Plaintiff.

524. Defendants failed to “[i]nclude reasonable alternatives not within the jurisdiction of the

lead agency” in violation of 40 C.F.R. § 1502.14(c).

525. In approving the Project, Defendants violated 40 C.F.R. § 1502.14.

526. In approving the Project that relied on a deficient FEIS, Defendants failed to comply with NEPA (42 U.S.C. 4321 *et seq.*) and implementing regulations and therefore engaged in final agency action that was arbitrary, capricious, and an abuse of discretion, and otherwise not in accordance with the law.

527. According to the APA, 5 U.S.C. § 706(2)(A), the Court has the authority and duty to hold unlawful and set aside such agency action in the relevant part.

528. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

529. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

530. Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the SFWF and SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and all and any other infrastructure and equipment related to the Project, and restoring the benthic environment on Cox Ledge.

XXIII. SEVENTH CLAIM FOR RELIEF

The Project was not subject to safety and environmental safeguards
(Against all defendants for violations of OCSLA and the APA)

531. I reallege paragraphs **F1-1 through F8-6** and **1 through 440** (above) as if set forth in full herein.

532. According to the OSCLA, the Defendant Secretary of the Interior “shall ensure that any activity under this subsection [granting of leases, easements, or rights-of-way for energy and

related purposes] is carried out in a manner that provides for [...] safety [...] [and] protection of the environment” (43 U.S.C. § 1337(p)(4)(A) and (B)).

533. Defendants did not ensure that the Project provided for the safety of human health or protection of the environment from adverse impacts related to PFAS contamination.

534. The FEIS merely refers to a “fourth site” where sampling has “indicated the presence of perfluorinated compounds” without admitting to the name of the compounds, their concentrations, the nature, extent, or relative proximity of such indicative compounds to the Project’s planned excavation and underground construction activity.

535. Only at the “fourth site” does the FEIS acknowledge the presence of compounds and only site-related compounds.

536. “Site-related compounds” can include *any* compound related to a site, whether a harmful contaminant or safe naturally occurring compounds such as calcium or sodium.

537. Defendants failed to acknowledge PFAS contamination *within* its construction corridor.

538. Defendants failed to proffer *any* discussion concerning the adverse human health and environmental impacts of excavating over 30,000 tons of material from an area containing PFAS contamination exceeding the 2016 EPA Health Advisory Level.

539. The area Defendant BOEM approved for the excavation of material, including soil and groundwater, is the same square mile, containing more contaminated drinking water wells than anywhere else in Suffolk County.

540. Defendants failed to address the potential for the Project it approved to adversely impact downgradient habitats by spreading, altering the course of, exacerbating, prolonging, or intensifying existing PFAS contamination.

541. By approving the Project, Defendants violated 43 U.S.C. § 1337(p)(4).

542. In granting approvals based on a deficient FEIS, Defendants failed to comply with the OCSLA and, therefore, engaged in final agency action that was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

543. According to the APA, 5 U.S.C. § 706(2)(A), the Court has the authority and duty to hold unlawful and set aside such agency action in the relevant part.

544. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

545. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

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

XXIV. EIGHTH CLAIM FOR RELIEF

The Project is not subject to environmental safeguards
(Against all defendants for violations of OCSLA and the APA)

547. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

548. Congress declared it “to be the policy of the United States that— [...] the outer Continental Shelf [...] should be made available for [...] development, subject to environmental safeguards [...] [emphasis added]” (43 U.S. Code § 1332(3)).

549. “The term development means those activities which take place [...], including geophysical activity, drilling, [...], and operation of all onshore support facilities, [...]. (43 U.S. Code § 1331(l)).

550. I reallege Paragraphs 533-540 (above) as if set forth in full herein.

551. Defendants did not meet their statutory obligations to ensure the Project's development would be subject to proper environmental safeguards that protect human health and the environment regarding PFAS contamination in violation of 43 U.S. Code § 1332(3).

552. Defendants did *not* ensure the Project's development was subject to proper environmental safeguards that exposed construction works and residents to PFAS contamination in violation of 43 U.S. Code § 1332(3).

553. In granting approvals based on a deficient FEIS, Defendants failed to comply with OCSLA and, therefore, engaged in final agency action that was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

554. According to the APA, 5 U.S.C. § 706(2)(A), the Court has the authority and duty to hold unlawful and set aside such agency action in the relevant part.

555. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

556. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

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

XXV. NINTH CLAIM FOR RELIEF

Inconsistent with the maintenance of competition

(Against all defendants for violations of OCSLA and the APA, except Defendant EPA)

558. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

559. Congress declared it “to be the policy of the United States that— [...] the outer Continental Shelf [...] should be made available for [...] development, [...] in a manner which is consistent with the maintenance of competition [...] [emphasis added]” (43 U.S. Code § 1332(3)).

560. Defendants DOI, BOEM, and the named individual defendants working for BOEM received clear substantive evidence contrary to their assertions that the 2017 PPA resulted from a “technology-neutral competitive bidding process.”

561. Defendants DOI, BOEM, and the named individual defendants working for BOEM failed to take a “hard look” into the non-competitive nature of the South Fork RFP, under which proposals were advanced based on their technology.

562. Defendants DOI, BOEM, and the named individual defendants working for BOEM merely parroted the Applicant, blindly relying on its information without ensuring the Project was consistent with the maintenance of competition.

563. The Project resulted from a non-competitive procurement process that advanced proposals based on their technology in violation of “a manner which is consistent with the maintenance of competition [...]” (43 U.S. Code § 1332(3)).

564. Defendants DOI, BOEM, and the named individual defendants working for BOEM approved the Project at inflated rates despite receiving clear substantive evidence that the Project resulted from a technology-dependent, non-competitive procurement outside the operations of a competitive market in violation of 43 U.S. Code § 1332(3).

565. In approving the Project, Defendants DOI, BOEM, and the named individual defendants

working for BOEM maintain a monopoly on the supply of energy where the set price of the contract resulted from a non-competitive procurement outside the scope of *any* Federal or State regulatory oversight in violation of 43 U.S. Code § 1332(3). Plaintiff wrote to Defendant BOEM in 2018, explaining that the price of energy from the (then-90-megawatt) South Fork Wind Farm was 21.9 cents,⁵⁶ which exceeded the price (of 6.5 cents) for the same renewable energy from a nearby offshore wind farm, Vineyard Wind, by more than three times. The cost of power from the expanded (130-megawatt) South Fork Wind Farm (19 cents) is nearly two and half times the average price (7.9 cents) of the other wind farms in the same area, according to the U.S.

Department of Energy's National Renewable Energy Laboratory ("NREL") (see ¶¶ 158-179).

566. In granting approvals reliant upon a deficient FEIS, Defendants DOI, BOEM, and the named individual defendants working for BOEM failed to comply with OCSLA and, therefore, engaged in final agency action that was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

567. According to the APA, 5 U.S.C. § 706(2)(A), the Court has the authority and duty to hold unlawful revoke or set aside such agency action in relevant part.

568. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

569. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

570. Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the SFWF and SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and

⁵⁶ According to the utility, Long Island Power Authority, that price was 21.9 cents per kilowatt-hour, or \$1,624,738,893 for 7,432,080 megawatt-hours over twenty years (371,604 megawatt-hours per year).

all and any other infrastructure and equipment related to the Project, and restoring the benthic environment on Cox Ledge.

XXVI. TENTH CLAIM FOR RELIEF

Contrary to the Executive Order on Environmental Justice

(Against all defendants for violations of Executive Order 12898, except Defendant EPA)

571. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

572. Executive Order 12898 requires that "each Federal agency shall make achieving environmental justice part of its mission [...]."

573. 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."

573.01 Defendants DOI, BOEM, and the named individual defendants working for BOEM rely on a biased economic analysis that ignores the Project cost of \$2 billion and its disproportionate impact on "minority populations, low-income populations, or Indian tribes, including human health, social, and economic effects." While the FEIS recognized *beneficial* economic impacts, it glosses over the two-billion-dollar *adverse* economic impact that exceeds the *estimated* benefits by over four times (§§ 180-218).

573.02 Defendants DOI, BOEM, and the named individual defendants working for BOEM limit the economic analysis to the "ocean economy" that includes only 3.9% of the population of Suffolk County and ignores over one million people in Suffolk County, including the Plaintiff,

who will have to pay for the two-billion-dollar Project in their electricity bills for the next twenty years (¶¶ 180-218).

574. The Project approved by Defendants DOI, BOEM, and the named individual defendants working for BOEM violates Executive Order 12898– Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.

575. According to the APA, 5 U.S.C. § 706(2)(A), the Court has the authority and duty to hold unlawful revoke or set aside such agency action in relevant part.

576. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

577. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

577.01 Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the SFWF and SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and all and any other infrastructure and equipment related to the Project, and restoring the benthic environment on Cox Ledge.

XXVII. ELEVENTH CLAIM FOR RELIEF

Contrary to U.S. Constitutional right to due process
(Against all defendants for violations of the U.S. Constitution)

578. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

579. Defendants failed to acknowledge existing PFAS contamination *within* the proposed construction corridor.

580. Defendants failed to consider and ensure that the Project avoided a square mile with more private drinking water wells containing detectible levels of harmful PFAS contaminants than anywhere else on Long Island.

581. Defendants (unlawfully) allowed the developer to begin and continue to excavate soil and groundwater containing PFAS contamination that poses a risk to human health and the environment.

582. The New York State Public Service Commission (“NYSPSC”) did *not* require SFW, and SFW did not volunteer, to test soil or groundwater from *within* the proposed construction corridor during the proceeding despite motions seeking to include such testing in the (narrowly-limited) review.

583. The NYSPSC deprived intervenor-parties’ including Plaintiff, of their rights to examine and cross-examine witnesses on evidence related to PFAS contamination *within* the construction corridor.

584. The NYSPSC deprived intervenor-parties’ including Plaintiff, of their rights to examine and cross-examine witnesses on the South Fork RFP and the 2017 PPA that it then relied on to support the basis of need for the Project.

585. The NYSPSC deprived intervenor-parties’ including, Plaintiff, of their rights to examine and cross-examine new evidence disclosed soon after the NYSPSC proceeding had concluded. Such evidence included South Fork Wind’s testing for PFAS contamination within the proposed corridor and information provided by LIPA showing that the South Fork RFP was *not* a “technology-neutral competitive bidding process” (ROD at p. 7, PDF p. 9, ¶ 7).

586. The NYSPSC admitted under cross-examination that it had *not* considered the two-billion-dollar cost of energy from the Project to be borne by ratepayers.

587. Defendants failed to consider the same information (¶¶ 582-586) that the NYSPSC failed to consider.

588. Defendants received clear substantive evidence showing that the project does *not* satisfy the purposes and needs in the ROD and FEIS but ignored such evidence.

589. No Federal or State government agency acted responsibly or transparently concerning my and my family's health, safety, and the environment we used to enjoy.

590. Federal and State administrative fiat has supplanted fact.

591. Federal and State administrative proceedings relied on demonstrably false presumptions despite receiving clear substantive evidence sufficient to sustain the burden of rebutting those presumptions.

592. Plaintiff has no option but to pursue justice for himself, his family, and the public before the Project Defendants (unlawfully) approved causes further injury to his health and the health of his family and community and causes irreparable environmental damage.

593. PFAS contamination poses a risk to human health. I have no other legal remedy.

594. Defendants denied me my right to due process of law guaranteed by the Fourteenth Amendment of the U.S. Constitution.

595. Defendants approved the Project involving my life, liberty, and property. Defendants acted arbitrarily and in violation of lawful procedure by denying me a fair opportunity to examine and cross-examine witnesses. Defendants made materially fraudulently misrepresentations and relied on their fraud to unlawfully approve the South Fork Wind Project. Defendants have *not* filed answers to my Complaint and have *not* responded to my Cross-Motion for Partial Summary Judgment, for which the statutory deadline has passed. Plaintiff has been raising issues about the Project's unlawful conduct for four years, but he has been denied due

process of law.

596. Plaintiff has been denied his Fourteenth Amendments Rights to due process of law guaranteed under the U.S. Constitution.

596.01 Plaintiff and the public are entitled to a judgment, so holding and setting aside.

596.02 Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

596.03 Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the SFWF and SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and all and any other infrastructure and equipment related to the Project, and restoring the benthic environment on Cox Ledge.

XXVIII. TWELFTH CLAIM FOR RELIEF

Failure to comply with NEPA & FOIA time limits

(Against Defendants DOI and BOEM for violations of NEPA and FOIA)

597. I reallege paragraphs **F1-1 through F8-6** and **1 through 440** (above) as if set forth in full herein.

598. Defendants DOI and BOEM “must” ensure that a determination is made of whether to provide expedited processing of FOIA Request DOI-BOEM-2022-004796 (see Exhibit O- FOIA Request) pursuant to the Freedom of Information Act (“FOIA”) and give notice of such determination, “within 10 days after the date of the request” (5 U.S.C. § 552(a)(6)(E)(ii)(I)).

599. Defendants DOI and BOEM failed to provide notice of their determination of whether to provide expedited processing of the aforementioned request made on July 6, 2022, in violation of

5 U.S.C. § 552.

600. “Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection [5 U.S.C. § 552 (a)] shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.”

601. “[F]ailure by an agency to respond in a timely manner to such a request shall be subject to judicial review” (5 U.S.C. § 552 (a)(6)(E)(iii)).

602. According to NEPA, Defendants DOI and BOEM must disclose “to the public as provided by [FOIA] section 552 of title 5” information related to “comments and views” of a Federal agency that is “authorized to develop and enforce environmental standards” such as the EPA (NEPA, 42 U.S. Code § 4332(2)(C)).

603. Defendants DOI and BOEM violated NEPA, 42 U.S.C. § 4332(2), and FOIA, 5 U.S.C. § 552.

603-01 Expand FOIA Claims ...

XXIX. THIRTEENTH CLAIM FOR RELIEF

Fraudulent and misleading statements regarding
adverse population-level impacts on Atlantic cod
(Against defendants listed)

Fraud: Atlantic Cod

604. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

605. On November 24, 2021, DEFENDANT Bureau of Ocean Energy Management and the defendants herein listed (below) made fraudulent and misleading statements, were involved in events leading up to those statements, or failed to correct such statements concerning adverse population-level impacts on Atlantic cod. The defendants’ false representations were part of the

Record of Decision (ROD) approving the final environmental impact statement (FEIS) for the South Fork Wind Project’s construction and operations plan (COP). Defendants acted in their official capacity when making fraudulent and misleading statements, thereby giving those statements the additional weight of authority and creditability, further compounding the fraud against Plaintiff and the public by an institution set up to protect and safeguard the public. The defendants are as follows—

- a. In her official capacity, DEFENDANT DEB HAALAND, Secretary of the Interior, U.S. DEPARTMENT OF THE INTERIOR, who is ultimately responsible for the actions of the Department of the Interior;
- b. In her official capacity, DEFENDANT LAURA DANIELS-DAVIS, Principal Deputy Assistant Secretary, Land and Mineral Management who signed the record of decision on November 24, 2021, on behalf of the U.S. Department of the Interior;
- c. DEFENDANT AMANDA LEFTON, in her official capacity as Director, Bureau of Ocean Energy Management, who is responsible for overseeing and managing BOEM;
- d. DEFENDANT JAMES F. BENNETT, in his official capacity working for the Bureau of Ocean Energy Management, who, by his own admission, “was actively involved in the work leading to the approval of the South Fork Wind COP” (ECF No. 25-1, at 1, ¶ 2, last sentence). Mr. Bennett corresponded with the National Oceanic and Atmospheric Administration (NOAA) National Marine Fisheries Service (NMFS) regarding Atlantic cod on October 7 and 25, 2021;
- e. DEFENDANT MARY C. BOATMAN, in her official capacity as Environmental Studies Chief, Office of Renewable Energy Programs, Bureau of Ocean Energy Management who, according to the FEIS, was the “National Environmental Policy Act (NEPA)

Coordinator” for the Project’s review and approval and is a Contributor responsible for “NEPA Compliance” (FEIS, at B-1, PDF 297, Table B-1);

- f. DEFENDANT MICHELLE MORIN, in her official capacity as Chief, Environment Branch for Renewable Energy, Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor in the Project’s review and approval process and responsible for “NEPA Compliance” (FEIS, at B-1, PDF 297, Table B-1). Ms. Morin received correspondence from the NOAA NMFS regarding Atlantic cod on June 7 and October 25, 2021, and is listed as the “contact” in a letter from BOEM (James F. Bennett) to NOAA NMFS on October 7, 2021; and
- g. DEFENDANT BRIAN HOOKER, in his official capacity as Lead Biologist, Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the Project’s review and approval and responsible for “Benthic, finfish, invertebrates, and essential fish habitat; commercial fisheries and for-hire recreational fishing” (FEIS, at B-1, PDF 297, Table B-1). Mr. Hooker was copied on correspondence between BOEM and the NOAA NMFS regarding Atlantic cod on June 7 and October 25, 2021;

606. Upon information and belief, said defendants knowingly and intentionally made fraudulent and misleading statements, were involved in events leading up to those statements or failed to correct such statements concerning adverse population-level impacts on Atlantic cod to deceive the Plaintiff and the public.

607. In approval of the South Fork Wind Project, said defendants relied on their fraudulent and misleading statements.

Reliance on Misrepresentation

607(a) On October 19, 2018, BOEM published a Notice of Intent (“NOI”). It reads—

“Consistent with the regulations implementing the National Environmental Policy Act ...

(BOEM) is announcing its intent to prepare an Environmental Impact Statement (EIS) [emphasis added]” (Federal Register, Vol. 83, No. 203, at 53104–53105).

607(b) Plaintiff-Appellant Kinsella relied on BOEM’s expressions of “intent” to prepare a NEPA-compliant EIS based on a thorough environmental and socioeconomic review by submitting comments in response to the NOI on November 19, 2018 (*id.*, ¶ 17-20).

607(c) The NOI misleads Mr. Kinsella and the public into believing that BOEM would, pursuant to NEPA, “determine significant resources and issues, impact-producing factors, reasonable alternatives (e.g., ... restrictions on construction and siting of facilities and activities), and potential mitigation measures to be analyzed in the EIS” (Federal Register, *supra*).

607(d) On January 8, 2021, BOEM published a “Notice of availability of a Draft Environmental Impact Statement and public meetings” (Federal Register, Vol. 88, No. 5, at 1520–1521).

607(e) BOEM’s notice opens by asserting its act is “[i]n accordance with regulations issued under the National Environmental Policy Act” (*id.*, at 1520, first column, “SUMMARY”). The notice continues— “The DEIS analyzes reasonably foreseeable effects from the Project. The analysis ... assesses cumulative impacts that could result from the incremental impact of the proposed action and action alternatives ... when combined with past, present, or reasonably foreseeable activities, including other potential future offshore wind activities” (*id.*, at 1520, second column, last paragraph).

607(f) On February 22, 2021, Mr. Kinsella sent Defendant-Appellee Michelle Morin of BOEM comments in response to South Fork Wind’s DEIS (ECF No. 3-1, at 15–25) (*id.*, ¶¶ 21-25).

Included with the comments letter were two hundred and seven exhibits (see [Addendum BOEM Exhibits, No. 22-5316, Doc. 1979671](#)).

607(g) The letter explains that “it is necessary to include these documents; otherwise substantial parts of the proposed Project will not be subject to any environmental review whatsoever” (ECF No. 3-1, at 2, PDF 16, third paragraph).

607(h) The comments letter continues— “I respectfully request that the documents herein listed [see Addendum BOEM Exhibits] be incorporated by reference and form part of my comments ... and that BOEM, as lead agency, conduct[s] a broad review of the whole Project[,] including in all respects the onshore and offshore components and ‘use all practicable means and measures... to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans’” (citing NEPA Section 101(a); 42 U.S.C. § 4331(a)) (*id.*, fifth paragraph).

607(i) Mr. Kinsella relied on BOEM to perform such a review.

607(j) The public also relied on BOEM to conduct a thorough environmental and socio-economic review, according to NEPA and the OCSLA.

Atlantic Cod Population-Level Impacts: Fraudulent and misleading statements

608. BOEM asserts that the Project’s construction and installation would have “[n]egligible to moderate impacts” on benthic habitat, Essential Fish Habitat (“EFH”), and finfish (including Atlantic cod); and that “[o]verall cumulative impacts ... would be moderate” (ROD at 11, PDF 13, Table 2, fourth row, last column).

609. BOEM defines “negligible” as having “[n]o measurable impacts to species or habitat[,]” and “moderate” to be a situation where –

Impacts to species are unavoidable but would not result in population-level effects [emphasis added]. Impacts to habitat may be short term, long term, or permanent and may include impacts to sensitive habitats but would not result in population-level effects to species that rely on them [emphasis added].

(FEIS at 3-12, PDF 64, Table 3.4.2-1.)

610. BOEM’s ROD contradicts scientific evidence it received a month before approving the Project’s FEIS (on November 24, 2021). On October 25, 2021, the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (“NOAA Fisheries”) wrote to BOEM’s Chief of Office of Renewable Energy Programs, James Bennett (“NOAA Fisheries Letter”). That letter reads as follows—

Based on our Northeast Fisheries Science Center’s fisheries science expertise and supporting peer-reviewed publications, this project has a high risk of population-level impacts on Southern New England Atlantic cod [emphasis added] [Exhibit 01 – NOAA Fisheries Letter, at 1, second paragraph].

611. The NOAA Fisheries Letter continues –

Given the emerging data on the significance of Cox Ledge for spawning Southern New England cod, it is important we maintain a consistent and common understanding of the potential effects of offshore wind development to this spawning population. This is a high priority given the cumulative and population level impacts this project and additional proposed development on Cox Ledge could have on this important cod population [emphasis added].”

612. BOEM restricts pile driving only from January 1 through April 30 and permits pile driving during November when cod are spawning despite the “high risk of population-level impacts on Southern New England Atlantic cod” (Exhibit 01 – NOAA Fisheries Letter, at 1, second paragraph).

613. The developer must obtain prior authorization from BOEM (before September 1, 2022) before BOEM will permit pile driving during December. BOEM will only grant approval where “unanticipated delays due to weather or technical problems arise that necessitate extending pile driving through December” (ROD at A-23, PDF 47, ¶ 1.7.1).

614. The Plaintiff does *not* know whether BOEM has granted the developer authorization to perform piling driving in December (2022). If BOEM has granted such approval, it has *not* disclosed to the public the letter granting the developer permission to pile drive in December.

615. BOEM requires the developer to consider only “the risk of exposure of NARWs [North Atlantic Right Whales] to pile-driving noise” when it submits an “enhanced survey plan” with its letter seeking approval for pile driving during December.

616. BOEM does *not* consider Atlantic cod spawning aggregations when deciding whether to permit the developer to pile drive during December (2022).

617. BOEM could avoid disturbing the benthic habitat and harming EFH by prohibiting construction preparation and installation (such as scouring the seafloor, clearing boulders, pile driving, etc.) from November 1 to December 31 (in addition to keeping the agreed restrictions in place from January 1 through April 30). Instead, BOEM decided against such conditions. The potential absence of any construction preparation and installation prohibitions from November 1 through December 31 may adversely impact cod spawning and risk the Atlantic cod population.

Duty to Disclose

617-01 BOEM has a duty as lead federal agency responsible for reviewing and approving the South Fork Wind Project, under the NEPA. According to BOEM, “[t]his ROD [Record of Decision] was prepared following the requirements of the National Environmental Policy Act (NEPA; 42 U.S.C. §§ 4321 et seq.) and 40 C.F.R. parts 1500-1508.1. BOEM prepared the FEIS [Final Environmental Impact Statement] with the assistance of a third-party contractor, SWCA, Inc.” (ROD, at 1, PDF 3, first and second paragraphs).

617-02 NEPA mandates that BOEM shall independently evaluate the final environmental impact statement prior to its approval and take responsibility for its scope and contents.

617-03 NEPA mandates that BOEM shall independently evaluate the information submitted by South Fork Wind and shall be responsible for its accuracy.

617-04 Under NEPA, Congress authorizes and directs that, to the fullest extent possible BOEM shall include in every recommendation or report on actions significantly affecting the quality of the human environment, a detailed statement on the environmental impact of South Fork Wind's proposed project.

617-05 NEPA places upon BOEM the obligation to consider every significant aspect of the environmental impact of a proposed action.

617-06 NEPA is designed to ensure that BOEM will inform the public that it has indeed considered environmental concerns in its decision-making process.

617-07 BOEM has a duty under the OCSLA to ensure development is subject to environmental safeguards considering natural resources in a manner consistent with competition. SFW has a duty to disclose pursuant to OCSLA regulations that require SFW to submit detailed information, including Water quality and Social and economic resources, in its Construction and Operations Plan (COP).

617-08 BOEM asserts that its "action is needed to further the United States' policy to make OCS energy resources available for expeditious and orderly development subject to environmental safeguards [in a manner which is consistent with the maintenance of competition] (43 U.S.C. §1332(3)), including consideration of natural resources and existing ocean uses [emphasis added]" (ROD at p. 7, PDF p. 9, last paragraph).

617-09 The OCSLA defines "development" to mean "those activities which take place [...], including geophysical activity, drilling, platform construction, and operation of all onshore support facilities, [...]" (43 U.S. Code § 1331(1)), including onshore infrastructure for high-

voltage transmission lines for an offshore wind farm.

617-10 Defendant Secretary of the Interior “shall ensure that any activity under this subsection [granting of leases, easements, or rights-of-way for energy and related purposes] is carried out in a manner that provides for [...] safety [...] [and] protection of the environment” (43 U.S.C. § 1337(p)(4)(A) and (B)).

617-11 Neither NEPA nor the OCSLA exempts BOEM from compliance, and BOEM has not asserted such a defense

Knowledge of Falsity

618. According to NOAA Fisheries, BOEM’s assertion that adverse impacts on cod are “unavoidable” and will not result in “population-level effects” is contrary to fact.

619. On October 25, 2021, NOAA Fisheries Assistant Regional Administrator for Habitat and Ecosystem Services Louis A. Chiarella wrote to BOEM’s Chief of Office of Renewable Energy Programs, James Bennett (copied to BOEM’s Lead Biologist, Mr. Brian Hooker, and BOEM’s Lead Environmental Protection Specialist, Mr. Brian Krevor). Mr. Chiarella repeated NOAA Fisheries’ concerns regarding “the southern New England region cod population that relies on Cox Ledge for spawning[,] ... [and that] pile driving and cable laying activities were identified as the most impactful project activities, with pile driving identified as the most detrimental for population level effects” (at 2, second paragraph). However, BOEM ignored NOAA Fisheries’ warnings, and a month later (on November 24, 2021), BOEM issued its Record of Decision approving the Project based on the following fraudulent and misleading representations—

- a. The Project’s construction and installation would have “unavoidable” impacts on species, including Atlantic cod (see ¶¶ 605-606) when in fact, BOEM can avoid such adverse effects;

- b. The Project’s construction and installation would “not result in population-level effects” (see ¶¶ 605-606), contradicting NOAA Fisheries’ scientific experts who maintain the “project has a high risk of population-level impacts on Southern New England Atlantic cod” (see ¶ 607).
- c. The Project’s construction and installation “may include impacts to sensitive habitats but would not result in population-level effects to species that rely on them” (see ¶ 605-606), contradicting NOAA Fisheries’ scientists who maintain that “[g]iven ... the significance of Cox Ledge for spawning Southern New England cod, ... [t]his is a high priority given the cumulative and population level impacts this project and additional proposed development on Cox Ledge could have on this important cod population.”

Intent to Deceive

619-13 BOEM did *not* post the NOAA Fisheries Letter on its website and did *not* disclose the letter to the public.

619-14 By concealing the letter, BOEM violated one of the two principle aims of NEPA— to ensure “that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process” (*Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983)).

619-15 The letter was brought to the Plaintiff’s attention only in October 2022, a year *after* NOAA Fisheries’ Assistant Regional Administrator for Habitat and Ecosystem Services, Mr. Louis A. Chiarella, had written to BOEM.

619-15 By concealing the letter from the public, BOEM’s intention was clearly to conceal population-level damage to the cod breeding on Cox Ledge.

619-16 BOEM intended to deceive the public into believing that SFW's construction would *not* harm offshore fisheries.

Relief Sought

620. Plaintiff seeks equitable relief for himself and the public and the Court's intervention to correct the particular injustices resulting from the Defendants' fraudulent and misleading representations not limited to making Plaintiff and the public whole by providing fair compensation for all expenses, time, opportunity cost, and non-pecuniary damages including emotional pain, suffering, inconvenience, anxiety, frustration, mental anguish, loss of reputation and loss of quality and enjoyment of life, with pre-judgment and post-judgment interest as applicable.

621. Defendants risk the Southern New England Atlantic cod population on Cox Ledge by relying on fraudulent and misleading representations.

622. Plaintiff claims Defendants intentionally committed fraud against Plaintiff and the public.

623. Plaintiff and the public are entitled to equitable relief, and this Court has the authority to grant such relief as it sees fit.

624. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

625. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

626. Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the SFWF and SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and all and any other infrastructure and equipment related to the Project, replacing boulders, and restoring the benthic environment on Cox Ledge.

XXX. FOURTEENTH CLAIM FOR RELIEF

Fraudulent and misleading statements regarding
social and economic resources: a lop-sided economic analysis

(Against defendants listed)

BOEM: Economic Analysis

627. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

627(a) I reallege paragraphs 111 through 135 and 166 through 199 of Affidavit of Plaintiff-Appellant Simon V. Kinsella in Support of Response to Defendant-Intervenor-Appellee South Fork Wind LLC's Motion to Dismiss for Lack of Jurisdiction (USCA Case No. 22-5361, 1979671) as if set forth in full herein.

628. On November 24, 2021, DEFENDANT Bureau of Ocean Energy Management and the defendants herein listed (below) made fraudulent and misleading statements, were involved in events leading up to those statements, or failed to correct such statements concerning the Project's impact on social and economic resources. Instead, the defendants relied on a lop-sided economic analysis that fraudulently misrepresented the nature of the Project's impact on social and economic resources. The defendants' false representations were part of the Record of Decision (ROD) approving the final environmental impact statement (FEIS) for the South Fork Wind Project's construction and operations plan (COP). Defendants acted in their official capacity when making fraudulent and misleading statements, thereby giving those statements the additional weight of authority and creditability, further compounding the fraud against Plaintiff and the public by an institution set up to protect and safeguard the public. The defendants are as follows—

- a. In her official capacity, DEFENDANT DEB HAALAND, Secretary of the Interior, U.S.

DEPARTMENT OF THE INTERIOR, who is ultimately responsible for the actions of the Department of the Interior;

- b. In her official capacity, DEFENDANT LAURA DANIELS-DAVIS, Principal Deputy Assistant Secretary, Land and Mineral Management who signed the record of decision on November 24, 2021, on behalf of the U.S. Department of the Interior;
- c. DEFENDANT AMANDA LEFTON, in her official capacity as Director, Bureau of Ocean Energy Management, who is responsible for overseeing and managing BOEM;
- d. DEFENDANT JAMES F. BENNETT, in his official capacity working for the Bureau of Ocean Energy Management, who, by his own admission, “was actively involved in the work leading to the approval of the South Fork Wind COP” (ECF No. 25-1, at 1, ¶ 2, last sentence). Mr. Bennett corresponded with the National Oceanic and Atmospheric Administration (NOAA) National Marine Fisheries Service (NMFS) regarding Atlantic cod on October 7 and 25, 2021;
- e. DEFENDANT MARY C. BOATMAN, in her official capacity as Environmental Studies Chief, Office of Renewable Energy Programs, Bureau of Ocean Energy Management who, according to the FEIS, was the “National Environmental Policy Act (NEPA) Coordinator” for the Project’s review and approval and is a Contributor responsible for “NEPA Compliance” (FEIS, at B-1, PDF 297, Table B-1);
- f. DEFENDANT MICHELLE MORIN, in her official capacity as Chief, Environment Branch for Renewable Energy, Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor in the Project’s review and approval process and responsible for “NEPA Compliance” (FEIS, at B-1, PDF 297, Table B-1);
- g. DEFENDANT EMMA CHAIKEN, in her official capacity as an economist for the Bureau

of Ocean Energy Management, who, according to the FEIS, was a Contributor to the Project's review and approval and responsible for "[d]emographics, employment, and economics; recreation and tourism; land use and coastal infrastructure; commercial fisheries and for-hire recreational fishing" (FEIS, at B-1, PDF 297, Table B-1);

- h. DEFENDANT MARK JENSEN, in his official capacity as an economist for the Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the Project's review and approval and responsible for "[d]emographics, employment, and economics; recreation and tourism; land use and coastal infrastructure; commercial fisheries and for-hire recreational fishing" (FEIS, at B-1, PDF 297, Table B-1); and
- i. DEFENDANT JENNIFER DRAHER, in her official capacity working for the Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the Project's review and approval and responsible for "water quality" (FEIS, at B-1, PDF 297, Table B-1).

629. Upon information and belief, said defendants knowingly and intentionally made fraudulent and misleading statements, were involved in events leading up to those statements or failed to correct such statements concerning the Project's impact on social and economic resources to deceive Plaintiff and the public.

630. In approval of the South Fork Wind Project, said defendants relied on a lop-sided economic analysis that fraudulently misrepresented the nature of the Project's impact on social and economic resources.

Reliance on Misrepresentation

630(a) I reallege paragraphs 607(a) through 607(j) (above) as if set forth in full herein.

Lop-sided Economic Analysis

631. BOEM fraudulently asserts that its “OREP [Office of Renewable Energy Programs] has determined that the COP includes all the information required” in 30 C.F.R. § 585.627 for the Proposed Project [emphasis added] (ROD at D-6, PDF 98, third paragraph).

632. According to 30 C.F.R. § 585.627(a)(7) –

(a) You must submit with your COP detailed information to assist BOEM in complying with NEPA and other relevant laws [emphasis added]. Your COP must describe those resources, conditions, and activities listed in the following table that could be affected by your proposed activities, or that could affect the activities proposed in your COP [emphasis added], including:

Type of information:	Including:
(7) Social and economic resources	<u>Employment</u> , existing offshore and coastal infrastructure (including <u>major sources of supplies, services, energy, and water</u>), land use, subsistence resources and harvest practices, ... <u>minority and lower income groups</u> , coastal zone management programs, ... [emphasis added].”

633. BOEM’s Guidelines for Information Requirements for a Renewable Energy Construction and Operations Plan (version 3.0, dated April 7, 2016) reads as follows (in relevant part)—

CONSTRUCTION AND OPERATIONS PLAN (COP)			
30 CFR 585.627(a)(7) Social and Economic Resources			
	Construction Phase	Operation Phase	Conceptual Decommissioning Phase
Focus	<ul style="list-style-type: none"> Describe the onshore economic baseline of the coastal areas that <u>may</u> be affected by your project [emphasis added]. 		
Scope	<ul style="list-style-type: none"> Describe what socioeconomic activity and resources in the onshore and coastal environment are affected by your project phases. 		
Information Needs for	<ul style="list-style-type: none"> Identify the major coastal industries (onshore and offshore) of the affected area Describe any economic modeling (e.g., job creation) 		

COP Submittal	<ul style="list-style-type: none"> Describe ... <u>employment and demographic patterns</u> (particularly those related to <u>environmental justice</u> considerations) ... that would be affected by your construction and operations activities [emphasis added].
Presentation of Results	<ul style="list-style-type: none"> Narrative of each topic that includes data/information. Summarize in tables and maps where appropriate.

634. “There should be enough detail to support the environmental analyses required by NEPA and other relevant environmental laws.”⁵⁷

635. Contrary to BOEM's false assertion that “the COP includes all the information required [emphasis added,]” BOEM does *not* acknowledge, discuss, or consider the Project’s cost, initially valued at \$1.6 billion⁵⁸ but now exceeds \$2 billion.⁵⁹ The multi-billion-dollar price tag represents money that will take out of the Suffolk County economy monthly or every quarter in the form of additional charges on residents’ electricity bills for twenty years. BOEM ignores the Project’s cost, which is two to three times more expensive for the same renewable energy from the other offshore wind farms in the area (see ¶¶ 168 – 173).

636. BOEM’s economic analysis considers *beneficial* economic impacts such as spending in the local economy on capital expenditures (\$185 – 247 million)⁶⁰ and operational costs (\$6 – \$12 million per year).⁶¹ The total *beneficial* economic impact is estimated at \$307 – 493 million (over the twenty-year contract term).⁶²

⁵⁷ BOEM, Office of Renewable Energy Program, Guidelines for Information Requirements for a Renewable Energy Construction and Operations Plan, Version 3.0, April 7, 2016 (at 36)

⁵⁸ New York Office of the State Comptroller valuation of the South Fork PPA is \$1,624,738,893 (<https://wwe2.osc.state.ny.us/transparency/contracts/contracttransactions.cfm?Contract=0000000000000000024767>),

⁵⁹ New York Office of the State Comptroller valuation of the South Fork PPA is \$2,013,198,056 (<https://wwe2.osc.state.ny.us/transparency/contracts/contracttransactions.cfm?Contract=0000000000000000085553>)

⁶⁰ Final Environmental Impact Statement (FEIS), at p. F-17, PDF p. 587, Table F-10

⁶¹ *Ibid.*

⁶² Local Operating Expenses (with taxes) ranging from \$6.16 to \$12.32 million per year, or from \$123.20 to \$246.40 million over twenty years. These Local Operating Expenses in addition to

637. BOEM's biased economic analysis accounts for *beneficial* impacts but ignores *adverse* effects that exceed the benefits by four to six and a half times.

638. The prejudicial financial analysis fails to recognize the net adverse economic impact estimated to be from \$1.5 to \$1.7 billion.

639. Moreover, BOEM does *not* acknowledge that the *negative* economic effects are fixed under a power purchase agreement, whereas the *positive* economic impacts are merely *estimates* with little substantive support, given that the project's major components (i.e., the wind turbine generators, submarine cables, etc.) are manufactured overseas.

Duty to Disclose

639-01 I reallege paragraphs 617-01 through 617-06 (above) as if set forth in full herein.

639-02 NEPA does *not* exempts BOEM from compliance, and BOEM has not asserted such a defense

Knowledge of Falsity

640. In November 2018 – three years *before* BOEM issued its approval – BOEM received notice of the Project's high price of power (22 ¢/kWh) compared to Vineyard Wind (6.5 ¢/kWh). Furthermore, the letter notified BOEM of the developer's failure to comply with 30 CFR 585.627(a)(7) regarding adverse impacts on employment, the economy, and environmental justice.⁶³ BOEM ignored that letter and a subsequent reminder in February 2021.⁶⁴ BOEM did *not* require the Applicant to comply with 30 CFR 585.627(a)(7) or its guidelines regarding the Project's impact on the energy industry, energy prices, employment, demographics, or

Local Capital Expenses (with taxes) of \$184.24 to \$246.81 million, is equal to total beneficial economic impacts of \$307.44 – 493.21 million (over 20 years).

⁶³ <https://www.regulations.gov/comment/BOEM-2018-0010-0074> (at pp. 4-5)

⁶⁴ <https://www.regulations.gov/comment/BOEM-2020-0066-0343> (at pp. 4-5)

environmental justice considerations (see ¶¶ 180-218).

Intent to Deceive

640-01 BOEM's intention from the consequences of its acts is clear because BOEM kept repeating the same act of omitting the project cost (\$2.013 billion) from the review. It was *not* an accident. Despite receiving information on the high price of South Fork Wind's project as early as 2018, BOEM consistently omitted it from its socio-economic impact analysis over a three-year period (from 2018 through 2021). The consequence materially misrepresented the project's impact on Suffolk County and jobs. What BOEM claims to be a *beneficial* impact is actually a net *adverse* impact once the project cost of \$2.013 billion is accounted for in its economic analysis.

640-02 BOEM and SFW were consistent with each other in keeping the project cost out of their respective economic analyses.

640-03 The consequences of BOEM's repeated failures to consider the project cost was the same, to mislead the public into believing SFW's project was commercially viable, reasonably priced, and would create jobs, contrary to fact. BOEM intended to deceive.

Relief Sought

641. Plaintiff seeks equitable relief for himself and the public and the Court's intervention to correct the particular injustices resulting from the Defendants' fraudulent and misleading representations not limited to making Plaintiff and the public whole by providing fair compensation for all expenses, time, opportunity cost, and non-pecuniary damages including emotional pain, suffering, inconvenience, anxiety, frustration, mental anguish, loss of reputation and loss of quality and enjoyment of life, with pre-judgment and post-judgment interest as applicable.

642. Defendants fraudulently misrepresented the economic and socioeconomic impact of the

South Fork Wind Project by failing to consider the Project's cost of \$2 billion, thereby making it impossible to compare the actual economic impact to alternatives with any accuracy.

643. Plaintiff claims Defendants intentionally committed fraud against Plaintiff and the public.

644. Plaintiff and the public are entitled to equitable relief, and this Court has the authority to grant such relief as it sees fit.

645. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

646. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

647. Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the SFWF and SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and all and any other infrastructure and equipment related to the Project, replacing boulders, and restoring the benthic environment on Cox Ledge.

XXXI.FIFTEENTH CLAIM FOR RELIEF

Fraudulent and misleading
statements regarding water quality
(Against defendants listed below)

BOEM: Water Quality

648. I reallege paragraphs F1-1 through F8-6, and 1 through 440 (above) as if set forth in full herein.

648(a) I reallege paragraphs 93 through 110 of Affidavit of Plaintiff-Appellant Simon V.

Kinsella in Support of Response to Defendant-Intervenor-Appellee South Fortk Wind LLC's

Motion to Dismiss for Lack of Jurisdiction (USCA Case No. 22-5361, 1979671) as if set forth in

full herein.

649. On November 24, 2021, DEFENDANT Bureau of Ocean Energy Management and the defendants herein listed (below) made fraudulent and misleading statements, were involved in events leading up to those statements and failed to correct such statements concerning harmful contamination of the drinking water supply.

650. The defendants' false representations were part of the Record of Decision (ROD) approving the final environmental impact statement (FEIS) for the South Fork Wind Project's construction and operations plan (COP). Defendants acted in their official capacity when making fraudulent and misleading statements, thereby giving those statements the additional weight of authority and credibility, further compounding the fraud against Plaintiff and the public by an institution set up to protect and safeguard the public. The defendants are as follows—

- a. In her official capacity, DEFENDANT DEB HAALAND, Secretary of the Interior, U.S. DEPARTMENT OF THE INTERIOR, who is ultimately responsible for the actions of the Department of the Interior;
- b. In her official capacity, DEFENDANT LAURA DANIELS-DAVIS, Principal Deputy Assistant Secretary, Land and Mineral Management who signed the record of decision on November 24, 2021, on behalf of the U.S. Department of the Interior;
- c. DEFENDANT AMANDA LEFTON, in her official capacity as Director, Bureau of Ocean Energy Management, who is responsible for overseeing and managing BOEM;
- d. DEFENDANT JAMES F. BENNETT, in his official capacity working for the Bureau of Ocean Energy Management, who, by his own admission, “was actively involved in the work leading to the approval of the South Fork Wind COP” (ECF No. 25-1, at 1, ¶ 2, last sentence). Mr. Bennett corresponded with the National Oceanic and Atmospheric

Administration (NOAA) National Marine Fisheries Service (NMFS) regarding Atlantic cod on October 7 and 25, 2021;

- e. DEFENDANT MARY C. BOATMAN, in her official capacity as Environmental Studies Chief, Office of Renewable Energy Programs, Bureau of Ocean Energy Management who, according to the FEIS, was the “National Environmental Policy Act (NEPA) Coordinator” for the Project’s review and approval and is a Contributor responsible for “NEPA Compliance” (FEIS, at B-1, PDF 297, Table B-1);
- f. DEFENDANT MICHELLE MORIN, in her official capacity as Chief, Environment Branch for Renewable Energy, Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor in the Project’s review and approval process and responsible for “NEPA Compliance” (FEIS, at B-1, PDF 297, Table B-1);
- g. DEFENDANT EMMA CHAIKEN, in her official capacity as an economist for the Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the Project’s review and approval and responsible for “[d]emographics, employment, and economics; recreation and tourism; land use and coastal infrastructure; commercial fisheries and for-hire recreational fishing” (FEIS, at B-1, PDF 297, Table B-1);
- h. DEFENDANT MARK JENSEN, in his official capacity as an economist for the Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the Project’s review and approval and responsible for “[d]emographics, employment, and economics; recreation and tourism; land use and coastal infrastructure; commercial fisheries and for-hire recreational fishing” (FEIS, at B-1, PDF 297, Table B-1); and
- i. DEFENDANT JENNIFER DRAHER, in her official capacity working for the Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the

Project’s review and approval and responsible for “water quality” (FEIS, at B-1, PDF 297, Table B-1).

651. Upon information and belief, said defendants knowingly made fraudulent and misleading statements, were involved in events leading up to those statements and failed to correct such statements concerning harmful PFAS contamination of the drinking water supply to deceive Plaintiff and the public.

652. In approval of the South Fork Wind Project, said defendants relied on their fraudulent and misleading statements.

Reliance on Misrepresentation

652(a) I reallege paragraphs 607(a) through 607(j) (above) as if set forth in full herein.

False Representation

653. BOEM fraudulently asserts that its “OREP [Office of Renewable Energy Programs] has determined that the COP includes all the information required” in 30 C.F.R. § 585.627 for the Proposed Project [emphasis added] (ROD at D-6, PDF 98, third paragraph).

654. According to 30 C.F.R. § 585.627(a)(2) —

(a) You must submit with your COP detailed information to assist BOEM in complying with NEPA and other relevant laws [emphasis added]. Your COP must describe those resources, conditions, and activities listed in the following table that could be affected by your proposed activities, or that could affect the activities proposed in your COP, including [emphasis added]:

Type of information:

(2) Water quality

Including:

Turbidity and total suspended solids from construction.

655. BOEM’s Guidelines for Information Requirements for a Renewable Energy Construction and Operations Plan published by the Office of Renewable Energy Programs (OREP) (version 3.0, dated April 7, 2016) reads as follows –

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

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

656. Contrary to BOEM’s fraudulent representations that— the “COP includes all the information required” in 30 C.F.R. § 585.627 (ROD at D-6, PDF 98, third paragraph)— the plan does not contain *any* of “the information required” on PFAS contamination whatsoever.

657. Moreover, BOEM’s FEIS acknowledges only the *indicative presence* of perfluorinated compounds (an outdated term for PFAS contamination) “at the fourth site, NYSDEC #152250.” BOEM does *not* say where that “fourth site” is relative to the construction corridor (it is adjacent and upgraded from the construction corridor) and does not discuss the exceedingly high levels of contamination or the impacts of such contamination on the sole-source aquifer that supplies drinking water to over twenty thousand residents in the Town of East Hampton.

658. BOEM’s FEIS does *not* acknowledge *any* PFAS contamination *within* the construction, whereas such contamination *within* the construction site exceeds 2016 EPA regulatory standards.

659. In the FEIS, BOEM identifies “a gas storage facility ... upgradient of the onshore SFEC route from the Hither Hills landing site ... and ... a former gasoline refinery facility that predates the 1930s.” It concludes that the sites are “not a concern for the onshore SFEC route” (FEIS, at H-23, PDF 655, second paragraph).

660. In stark contrast, BOEM ignores harmful contamination upgradient within 500 of the

SFEC route that the New York State Department of Environmental Conservation classifies “as a Class 2 site that presents a significant threat to public health and/or the environment”

(<https://www.dec.ny.gov/data/DecDocs/152250/Fact%20Sheet.HW.152250.2019-06-19.East%20Hampton%20Airport%20Class%2002%20Listing.pdf>, also see ¶¶ 72-135).

661. BOEM falsely states that— “Overall, existing groundwater quality in the analysis area appears to be good and meets NYSDEC (2018) groundwater quality[,]” contradicting substantive evidence to the contrary (see ¶¶ 72-108). For example, in June 2018, the majority of private drinking water wells (159) in Wainscott (303) showed detectible levels of PFOS and PFOA contamination (see ¶¶ 36-39). Wainscott had more contaminated drinking water well than anywhere else in Suffolk County (see ¶ 399). BOEM received indisputable evidence of existing PFAS contamination of groundwater (see ¶¶ 48-50) but turned a blind eye to extensive environmental contamination of a public health concern in the interests of the private developer.

Duty to Disclose

661-01 I reallege paragraphs 617-01 through 617-11 (above) as if set forth in full herein.

661-02 “It is also relevant, when assessing potential environmental and coastal zone harm, to consider the availability of regulatory measures to alleviate that harm. This does not mean that consideration of environmental damage may be postponed or foregone. But the potential for environmental harm cannot be adequately considered and weighed without a like examination of the potential to mitigate such harm.” *State of Cal. by and Through Brown v. Watt*, 668 F.2d 1290, 1317 (D.C. Cir. 1981). BOEM failed in “assessing potential environmental and coastal zone harm” from PFAS contamination and performed no “examination of the potential to mitigate such harm” (*ibid.*).

Knowledge of Falsity

661-03 Nine months before BOEM had approved SFW's Project, BOEM received comments dated February 22, 2021 ("2021 Comments"), in response to BOEM's Draft Environmental Impact Statement for SFW.

661-04 The 2021 Comments included two hundred and seven exhibits containing verifiable records such as testimony briefs, and government agency reports (Kinsella Aff., ¶¶ 21–25). The exhibits provided to BOEM that it uploaded to its website are incorporated by reference into the Complaint and First Amended Complaint (see Addendum BOEM Exhibits, No. 22-5316, Doc. 1979671) (also available at ECF No. 3-1, at 26–36).

661-05 The exhibits included government agency reports showing extensive environmental PFAS contamination of groundwater (and soil) in the area (Wainscott, NY) where SFW proposed building its underground high-voltage transmission infrastructure (Kinsella Aff., ¶¶ 24, 30–59).

661-06 For example, one exhibit contains eight interrogatories (144 pages) with notices, emails, and reports from Suffolk County Department of Health Services and NYS Department of Environmental Conservation on PFAS contamination (ECF No. 3-1, at 31, BOEM Exhibit #087) (https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_13.pdf).

661-07 The eight interrogatories (144 pages) included, inter alia, the first public acknowledgment of groundwater contamination in Wainscott, a Water Quality Advisory for Private-Well Owners in Area of Wainscott, issued by SCDHS on October 11, 2017; a list of 303 test results of private drinking water wells in Wainscott performed by SCDHS (dated June 15, 2018), and NYSDEC Site Characterization Reports for two properties registered with the NY State Super Fund Program adjacent and on either side of South Fork Wind's proposed

construction corridor (see Kinsella Aff., ¶¶ 85–86).

Intent to Deceive

661-08 BOEM’s intention from the consequences of its acts is clear because BOEM kept repeating the same act of omitting the nature and extent of environmental PFAS contamination from the review. It was *not* an accident. Despite receiving numerous government reports on PFAS contamination at least nine months *before* approving the project, BOEM did *not* discuss or consider the severe contamination in its environmental review. Based on the reports, BOEM knew that groundwater PFAS contamination exceeded EPA 2016 Health Advisory Levels throughout the area where SFW proposed underground construction but kept it out of consideration, out of the review, and out of the public eye. The consequence materially misrepresented groundwater quality. BOEM misrepresented groundwater quality by omitting PFAS contamination from consideration, in addition to falsely stating that groundwater quality was “good” when BOEM knew it was highly contaminated.

661-09 BOEM and SFW were consistent with each other in keeping onsite environmental PFAS contamination out of the review.

661-10 The consequences of BOEM’s repeated failures to consider environmental PFAS contamination from the review was the same, to mislead the public into believing that water quality was “good” when it was far from it. BOEM intended to deceive the public and largely succeeded.

Relief Sought

662. Plaintiff seeks equitable relief for himself and the public and the Court’s intervention to correct the particular injustices resulting from the Defendants’ fraudulent and misleading representations not limited to making Plaintiff and the public whole by providing fair compensation

for all expenses, time, opportunity cost, and non-pecuniary damages including emotional pain, suffering, inconvenience, anxiety, frustration, mental anguish, loss of reputation and loss of quality and enjoyment of life, with pre-judgment and post-judgment interest as applicable.

663. Defendants fraudulently misrepresented groundwater quality and intentionally concealed existing PFAS contamination within the proposed onshore construction corridor, making it impossible to compare the approved onshore cable corridor to alternatives accurately.

664. Plaintiff claims Defendants intentionally committed fraud against Plaintiff and the public.

665. Plaintiff and the public are entitled to equitable relief, and this Court has the authority to grant such relief as it sees fit.

666. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

667. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

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

XXXII. SIXTEENTH CLAIM FOR RELIEF

Fraudulent purpose and needs statements

(Against defendants listed)

Fraud: Purpose and Needs

669. I reallege paragraphs **F1-1 through F8-6** and **1 through 440** (above) as if set forth in full herein.

670. On November 24, 2021, DEFENDANT Bureau of Ocean Energy Management and the

defendants herein listed (below) made fraudulent and misleading statements, were involved in events leading up to those statements and failed to correct such statements concerning the Project's purpose and needs.

671. The defendants' false representations were part of the Record of Decision (ROD) approving the final environmental impact statement (FEIS) for the South Fork Wind Project's construction and operations plan (COP). Defendants acted in their official capacity when making fraudulent and misleading statements, thereby giving those statements the additional weight of authority and credibility, further compounding the fraud against Plaintiff and the public by an institution set up to protect and safeguard the public. The defendants are as follows—

- a. In her official capacity, DEFENDANT DEB HAALAND, Secretary of the Interior, U.S. DEPARTMENT OF THE INTERIOR, who is ultimately responsible for the actions of the Department of the Interior;
- b. In her official capacity, DEFENDANT LAURA DANIELS-DAVIS, Principal Deputy Assistant Secretary, Land and Mineral Management who signed the record of decision on November 24, 2021, on behalf of the U.S. Department of the Interior;
- c. DEFENDANT AMANDA LEFTON, in her official capacity as Director, Bureau of Ocean Energy Management, who is responsible for overseeing and managing BOEM;
- d. DEFENDANT JAMES F. BENNETT, in his official capacity working for the Bureau of Ocean Energy Management, who, by his own admission, "was actively involved in the work leading to the approval of the South Fork Wind COP" (ECF No. 25-1, at 1, ¶ 2, last sentence);
- e. DEFENDANT MARY C. BOATMAN, in her official capacity as Environmental Studies

Chief, Office of Renewable Energy Programs, Bureau of Ocean Energy Management who, according to the FEIS, was the “National Environmental Policy Act (NEPA) Coordinator” for the Project’s review and approval and is a Contributor responsible for “NEPA Compliance” (FEIS, at B-1, PDF 297, Table B-1);

- f. DEFENDANT MICHELLE MORIN, in her official capacity as Chief, Environment Branch for Renewable Energy, Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor in the Project’s review and approval process and responsible for “NEPA Compliance” (FEIS, at B-1, PDF 297, Table B-1);
 - g. DEFENDANT EMMA CHAIKEN, in her official capacity as an economist for the Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the Project’s review and approval and responsible for “[d]emographics, employment, and economics; recreation and tourism; land use and coastal infrastructure; commercial fisheries and for-hire recreational fishing” (FEIS, at B-1, PDF 297, Table B-1); and
 - h. DEFENDANT MARK JENSEN, in his official capacity as an economist for the Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the Project’s review and approval and responsible for “[d]emographics, employment, and economics; recreation and tourism; land use and coastal infrastructure; commercial fisheries and for-hire recreational fishing” (FEIS, at B-1, PDF 297, Table B-1);
672. Upon information and belief, said defendants knowingly made fraudulent and misleading statements, were involved in events leading up to those statements, and failed to correct such statements concerning the Project’s purpose and needs with intent to deceive Plaintiff and the public.
673. In approval of the South Fork Wind Project, said defendants relied on their fraudulent and misleading statements.

Reliance on Misrepresentation

673(a) I reallege paragraphs 607(a) through 607(j) (above) as if set forth in full herein.

False Representation

674. In approving the Project, BOEM relied on three demonstrably false claims in its Record of Decision as follows—

The procurement was *not* a “technology-neutral competitive bidding process.”

675. The ROD falsely claims that South Fork Wind’s “power purchase agreement executed in 2017 result[ed] from LIPA’s technology-neutral competitive bidding process [emphasis added],”⁶⁵ contradicting internal LIPA documents showing that proposals were advanced in the procurement process based on their technology. Thus, the South Fork RFP was *not* “neutral” on technology (see ¶¶ 281-358).

676. The South Fork Wind Project did *not* satisfy mandatory criteria or the minimum specifications and requirements of the South Fork RFP. The proposed South Fork Wind Farm was the successful bid in an RFP that precluded resources that were *not* “located on Long Island [emphasis added]” (see Exhibit P- Notice to Proposers). The South Fork Wind project was the *only* bid using offshore wind technology. The South Fork RFP was rigged to preclude competition from other offshore wind developers.

677. The New York State Governor, Andrew M. Cuomo, assured the success of the South Fork Wind proposal by interfering in an active procurement by advancing the interests of the bid to the detriment of the other bidders. On January 11, 2017, Governor Cuomo directed the utility’s board of trustees to approve the South Fork Wind Farm proposal in his State of the State address. Fourteen days later, the utility approved the Project (on January 25, 2021).

⁶⁵ ROD (at p. 7, PDF p. 9, ¶ 7)

The Project was *not* designed for and did *not* satisfy the 2019 CLCPA

678. “[T]he Project ... is designed to contribute to New York’s renewable energy ... goal of generating 9,000 megawatts of offshore wind energy by 2030”⁶⁶ in reference to the New York State’s Climate Leadership and Community Protection Act that was enacted *three-and-a-half years after* the Project was designed; and even if assuming *arguendo* the Act was applicable (it is not), the Project would have failed to satisfy the statute’s requirements (see ¶¶ 136-179).

According to the Project’s owners, the Project is *not* commercial-scale.

679. “The purpose of the Project is to develop a commercial-scale offshore wind energy facility [...][emphasis added]”⁶⁷ contradicting the joint and equal (indirect) owners of South Fork Wind, Ørsted and Eversource, that agree with NYSERDA⁶⁸ insofar as its Project would “not likely to deliver cost savings ... [d]ue to diseconomies of scale” (see ¶¶ 219-229). The relatively small scale of the wind farm (only 130 megawatts) compared to the length of the transmission (66 miles) requires four times the transmission per megawatt capacity than the average of the other three offshore wind farms in the same area (see Appendix 4, Table 1).

680. An agency’s decision-making should be “based on reasons and supported by facts.”⁶⁹ “Although we are dealing with the question whether agency action is arbitrary or capricious, ‘in their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same.’”⁷⁰

⁶⁶ FEIS (at p. I, PDF p. 5, last paragraph)

⁶⁷ ROD (at p. 7, PDF p. 9, ¶ 7)

⁶⁸ New York State Energy Research and Development Authority (“NYSERDA”)

⁶⁹ Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 234 (1974).

⁷⁰ *Butte County v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010), citing *Ass’n of Data, Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984); accord *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 243 (D.C. Cir. 2008)

Duty to Disclose

681-01 I reallege paragraphs 617-01 through 617-06 (above) as if set forth in full herein.

681-02 NEPA does *not* exempts BOEM from compliance, and BOEM has not asserted

Knowledge of Falsity

681-02 Nine months before BOEM had approved SFW's Project, BOEM received comments dated February 22, 2021 ("2021 Comments"), in response to BOEM's Draft Environmental Impact Statement for SFW.

681-03 The 2021 Comments included two hundred and seven exhibits containing verifiable records such as testimony briefs, and government agency reports (Kinsella Aff., ¶¶ 21–25). The exhibits provided to BOEM that it uploaded to its website are incorporated by reference into the Complaint and First Amended Complaint (see Addendum BOEM Exhibits, No. 22-5316, Doc. 1979671) (also available at ECF No. 3-1, at 26–36).

681-04 The 2021 Comments that BOEM received included a response to a request for information from the New York State Energy Research and Development Authority ("NYSERDA") from the project's joint and equal (indirect) owners, Ørsted and Eversource (under the name of Bay State Wind). The response from the (indirect) owners of South Fork Wind state that projects such as South Fork Wind (130 MW) are "not likely to deliver cost savings. Due to diseconomies of scale, the costs per unit of energy for projects of 100 MW and 200 MW in size are significantly higher than those for 400 MW projects" (ECF No. 3-1, at 35, Exhibit #169, at 2, fourth paragraph).

681-05 BOEM uploaded the NYSERDA response to its website, document 18-T-0604 - Testimony Pt 3 - Exhibit 3-6 - NYSERDA OSW RFI 2018 Orsted Eversource (near bottom of list) at— <https://www.regulations.gov/comment/BOEM-2020-0066-0387> (BOEM Exhibit #169).

681-06 BOEM knew that SFW’s project was **\$1,030,172,493 dollars overpriced** because BOEM uploaded to its website the price table comparison of South Fork Wind to Sunrise Wind, document Motion to Reopen Record Supp by Kinsella Jan 29 2021 (at p. 15) (halfway down the list) at— <https://www.regulations.gov/comment/BOEM-2020-0066-0385> (BOEM Exhibit #029).

681-07 BOEM knew that South Fork Wind Farm was *not* a commercial-scale facility.

681-08 BOEM knew that the project was submitted for consideration in the South Fork RFP when it was “designed” in 2015 (No. 22-5316, Doc. 1979671, Addendum BOEM Exhibits, at 3 of 11, BOEM Exhibit #030, at 7, footnote 5), which pre-dates by three-and-a-half years New York State’s enactment of the CLCPA (New York State’s renewable energy goal).

681-09 BOEM also knew that the SFW project would *not* have qualified under the CLCPA due to its high cost that is inconsistent with “a manner that seeks [...] to minimize costs” (NY ECL § 75-0109(3)(a)).

681-10 BOEM also knew there were questions about whether the South Fork RFP was a fair procurement process. During BOEM’s public hearing Public Hearing #3 (on February 16, 2021), BOEM heard the following testimony—

“The overall project cost of South Fork Wind is more than \$1 billion more expensive per unit of energy over 20 years, than Sunrise Wind. These costs have been concealed from ratepayers. Today, we still do not know the total amount of capacity that will be delivered by South Fork wind, nor do we know the final price that will be passed on to ratepayers for South Fork Wind. This information has been hidden from us. The company that administered the procurement process, PSEG Long Island, awarded South Fork Wind power purchase agreement to its business partner in a noncompetitive recruitment process.” (see Public Hearing Transcript, at PDF 47, from 442 01:18:46.650 to 445, 01:19:28.680) (Available on BOEM’s website, here— https://downloads.regulations.gov/BOEM-2020-0066-0380/attachment_1.pdf).

681-10 BOEM knew that the South Fork RFP was *not* “technology-neutral” (ROD, at 7, PDF 9, penultimate paragraph) (SFW COP May 2021, at ES-2, PDF 6, first sentence). BOEM received internal LIPA documents showing that the South Fork RFP was *not* a “technology-neutral” bidding process. The LIPA Memorandum shows that proposals were advanced in the procurement process based on their technology— “In some instances, proposals were advanced if they were the only proposal offering a particular technology” (No. 22-5316, Doc. 1979671, [Addendum BOEM Exhibits](#), at 3 of 11, [BOEM Exhibit #030](#), at 12, middle of the first paragraph). The South Fork RFP was not “neutral” on a proposal’s technology.

Intent to Deceive

681. The defendants identified in this claim for relief relied on their fraudulent representations: to conceal the role technology played and the non-competitive nature of the procurement; to back-date by three and a half years a state-legislated “renewable energy” mandate (the 2019 CLCPA); and to gloss over an expensive and uneconomic design that required a dedicated sixty-six-miles-long transmission system for a small 130-megawatt wind farm.

640-01 BOEM’s intention from the consequences of its acts is to misrepresent the critical purpose and needs of SFW’s project, including the project’s commercial scale (or lack thereof), the price that is double the average cost of surrounding offshore wind farms, its economic viability, whether it meets New York State energy mandates,⁷¹ and whether the project was subject to a technology-neutral competitive bidding process.

640-02 BOEM’s acts of omission and false statements are consistent with SFW’s acts of

⁷¹ SFW does not satisfy the NYS 2016 Clean Energy Standard, it is excluded from the New York 2018 Offshore Wind Master Plan, and the New York State 2019 Climate Leadership and Community Protection Act

omission and false statements. It was *not* an accident.

640-03 Despite receiving internal LIPA documents, sworn testimony, analysis, etc., sufficient to rebut the false claims regarding SFW's purpose and needs at least nine months *before* approval, BOEM still approved the project.

640-04 The consequences of BOEM's repeated failures during its review all had the same end, to mislead the public into believing SFW was a commercially viable, economical, cost-efficient, and environmentally sound when it was *not*. BOEM intended to deceive the public.

Relief Sought

682. Plaintiff seeks equitable relief for himself and the public and the Court's intervention to correct the particular injustices resulting from the defendants' fraudulent and misleading representations not limited to making Plaintiff and the public whole by providing fair compensation for all expenses, time, opportunity cost, and non-pecuniary damages including emotional pain, suffering, inconvenience, anxiety, frustration, mental anguish, loss of reputation and loss of quality and enjoyment of life, with pre-judgment and post-judgment interest as applicable.

683. Defendants fraudulently claimed the Project satisfied the purposes and needs (mentioned above) contrary to clear substantive evidence provided by Plaintiff to Defendant BOAM rebutting the claims. By intentionally falsifying the Project's qualifications, Defendants fatally undermined the environmental and economic review by failing to compare the Project to alternatives accurately.

684. Plaintiff claims Defendants intentionally committed fraud against Plaintiff and the public.

685. Plaintiff and the public are entitled to equitable relief, and this Court has the authority to grant such relief as it sees fit.

686. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

687. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

688. Plaintiff and the public are entitled to seek an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the SFWF and SFEC corridor to its original condition, including but not limited to removing all concrete duct banks and vaults and all and any other infrastructure and equipment related to the Project, replacing boulders, and restoring the benthic environment on Cox Ledge.

XXXIII. SEVENTEENTH CLAIM FOR RELIEF
Fraudulent statement regarding the Sunrise Alternative
(Against defendants listed below)

Sunrise/South Fork Alternative

689. I reallege paragraphs **F1-1 through F8-6** and **1 through 440** (above) as if set forth in full herein.

690. On November 24, 2021, DEFENDANT Bureau of Ocean Energy Management and the defendants herein listed (below) made fraudulent and misleading statements, were involved in events leading up to those statements and failed to correct such statements concerning an economically, environmentally, and technically superior alternative to the Project as proposed.

691. The Defendants' false representations were part of the Final Environmental Impact Statement (FEIS) that **BOEM** approved on November 24, 2021. Defendants acted in their official capacity when making fraudulent and misleading statements, thereby giving those statements the additional weight of authority and credibility, further compounding the fraud against Plaintiff and the public by an institution set up to represent the public interest. The defendants are as follows—

- a. In her official capacity, DEFENDANT DEB HAALAND, Secretary of the Interior, U.S. DEPARTMENT OF THE INTERIOR, who is ultimately responsible for the actions of the Department of the Interior;
- b. In her official capacity, DEFENDANT LAURA DANIELS-DAVIS, Principal Deputy Assistant Secretary, Land and Mineral Management who signed the record of decision on November 24, 2021, on behalf of the U.S. Department of the Interior;
- c. DEFENDANT AMANDA LEFTON, in her official capacity as Director, Bureau of Ocean Energy Management, who is responsible for overseeing and managing BOEM;
- d. DEFENDANT JAMES F. BENNETT, in his official capacity working for the Bureau of Ocean Energy Management, who, by his own admission, “was actively involved in the work leading to the approval of the South Fork Wind COP” (ECF No. 25-1, at 1, ¶ 2, last sentence);
- e. DEFENDANT MARY C. BOATMAN, in her official capacity as Environmental Studies Chief, Office of Renewable Energy Programs, Bureau of Ocean Energy Management who, according to the FEIS, was the “National Environmental Policy Act (NEPA) Coordinator” for the Project’s review and approval and is a Contributor responsible for “NEPA Compliance” (FEIS, at B-1, PDF 297, Table B-1);
- f. DEFENDANT MICHELLE MORIN, in her official capacity as Chief, Environment Branch for Renewable Energy, Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor in the Project’s review and approval process and responsible for “NEPA Compliance” (FEIS, at B-1, PDF 297, Table B-1);
- g. DEFENDANT EMMA CHAIKEN, in her official capacity as an economist for the Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the

Project's review and approval and responsible for "[d]emographics, employment, and economics; recreation and tourism; land use and coastal infrastructure; commercial fisheries and for-hire recreational fishing" (FEIS, at B-1, PDF 297, Table B-1); and

- h. DEFENDANT MARK JENSEN, in his official capacity as an economist for the Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the Project's review and approval and responsible for "[d]emographics, employment, and economics; recreation and tourism; land use and coastal infrastructure; commercial fisheries and for-hire recreational fishing" (FEIS, at B-1, PDF 297, Table B-1);
- i. DEFENDANT BRIAN HOOKER, in his official capacity as Lead Biologist, Bureau of Ocean Energy Management, who, according to the FEIS, was a Contributor to the Project's review and approval and responsible for "Benthic, finfish, invertebrates, and essential fish habitat; commercial fisheries and for-hire recreational fishing" (FEIS, at B-1, PDF 297, Table B-1). Mr. Hooker was copied on correspondence between BOEM and the NOAA NMFS regarding Atlantic cod on June 7 and October 25, 2021;
- j. DEFENDANTS, U.S. Environmental Protection Agency, and the Hon. Michael S. Regan, in his official capacity as Administrator of the U.S. Environmental Protection Agency.

692. Upon information and belief, said defendants knowingly made fraudulent and misleading statements, were involved in events leading up to those statements, and failed to correct such statements concerning the Project's purpose and needs with intent to deceive Plaintiff and the public.

Reliance on Misrepresentation

692(a) I reallege paragraphs 607(a) through 607(j) (above) as if set forth in full herein.

False Representation

693. When approving the Project's FEIS on November 24, 2021, Defendants fraudulently represented that— “No other cable landing site alternatives were identified during Project development or scoping ... (see New York Article VII submitted by SFW)” (see FEIS at 2-19, PDF 45, final paragraph).

694. **Federal Agency Defendants** relied on their fraudulent misrepresentation to eliminate and thereby avoid considering an economically, environmentally, and technically superior alternative to the Project as proposed.

695. Contrary to BOEM's fraudulent claim, the Sunrise/South Fork alternative *was* identified and discussed during the project's development and scoping, including during the “New York Article VII,” referring to the New York State Public Service Commission hearing (18-T-0604).

696. The Commission's final ruling, Order Adopting Joint Proposal, issued March 18, 2021, discusses the Sunrise/South Fork alternative. The Order refers to “Sunrise Wind” *eight times* and discusses the proposition “that the Sunrise Wind project and the South Fork Wind project should be combined, concluding that two nearby, but separate, projects make little economic sense” (Case 18-T-0604, Order Adopting Joint Proposal issued March 18, 2021, at 88, ¶ 3).

697. Defendants fraudulently assert that “[t]he final EIS evaluates and discloses the impacts of ... the Beach Lane ... site” as grounds for not carrying forward alternative landing sites “[e]liminating [the] Beach Lane landing site” (FEIS at 2-20, PDF 46, first paragraph). On the contrary, Defendants neither evaluated nor disclosed the environmental PFAS contamination of soil and groundwater within the proposed Beach Lane landing site that Defendants concealed.

698. Defendants fraudulently maintained that assessing other land sites was unnecessary by concealing the PFAS contamination within the proposed Beach Lane construction corridor.

699. An agency’s decision-making should be “based on reasons and supported by facts.”⁷² “Although we are dealing with the question whether agency action is arbitrary or capricious, ‘in their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same.’”⁷³ (see ¶¶ 252-280).

Duty to Disclose

699-01 I reallege paragraphs 617-01 through 617-11 (above) as if set forth in full herein.

Knowledge of Falsity

699-02 The 2021 Comments letter BOEM received (on February 23, 2021) included information on an alternative whereby South Fork Wind and Sunrise would be combined.

Intent to Deceive

699-03 Defendant BOEM fraudulently represented that— “No other cable landing site alternatives were identified during Project development or scoping ... (see New York Article VII submitted by SFW)” (FEIS at 2-19, PDF 45, final paragraph).

699-04 The consequence of BOEM’s false assertion was to keep other alternatives out of consideration in its review, including the Sunrise/SFW alternative.

699-05 BOEM intended to deceive.

Relief Sought

700. Plaintiff seeks equitable relief for himself and the public and the Court’s intervention to correct the particular injustices resulting from the defendants’ fraudulent and misleading

⁷² Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 234 (1974).

⁷³ *Butte County v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010), citing *Ass'n of Data, Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984); accord *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 243 (D.C. Cir. 2008)

representations not limited to making Plaintiff and the public whole by providing fair compensation for all expenses, time, opportunity cost, and non-pecuniary damages including emotional pain, suffering, inconvenience, anxiety, frustration, mental anguish, loss of reputation and loss of quality and enjoyment of life, with pre-judgment and post-judgment interest as applicable.

701. Defendants fraudulently claimed to have evaluated and disclosed the environmental impacts regarding the proposed Beach Lane landing corridor, thereby concealing onsite PFAS contamination of soil and groundwater, contrary to clear substantive evidence provided by Plaintiff to Defendant BOAM rebutting the claims. Defendants fatally undermined the environmental review by intentionally falsifying the Project's qualifications and could not have possibly accurately compared the Project's landing corridor to alternatives.

702. Plaintiff claims Defendants intentionally committed fraud against Plaintiff and the public.

703. Plaintiff and the public are entitled to equitable relief, and this Court has the authority to grant such relief as it sees fit.

704. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

705. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

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

XXXIV. EIGHTEENTH CLAIM FOR RELIEF
Fraudulent representation of groundwater quality
by South Fork Wind LLC in its Construction and Operations Plan

(Against defendant South Fork Wind LLC)

SFW: Groundwater Quality

707. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

708. In addition, I reallege paragraphs 65 through 92 and 110 of Affidavit of Plaintiff-Appellant Simon V. Kinsella in Support of Response to Defendant-Intervenor-Appellee South Fork Wind LLC's Motion to Dismiss for Lack of Jurisdiction ("Kinsella Aff.") (USCA Case No. 22-5361, 1979671) as if set forth in full herein.

709. When Defendant South Fork Wind submitted its final COP (dated May 7, 2021) to BOEM for review and approval, SFW made fraudulent and misleading statements, was involved in events leading up to those statements, and failed to correct such statements concerning harmful PFAS contamination of groundwater in Wainscott, Suffolk County, NY.

SFW: Duty to Disclose

710. The OCSLA implementing regulations require that SFW submit "detailed information" with its COP to "assist [BOEM] in complying with NEPA and other relevant laws." 30 C.F.R. § 585.627(a). "Your COP must describe those resources, conditions, and activities listed in the following table that could be affected by your proposed activities, or that could affect the activities proposed in your COP" (*id.*). Such resources include the following— "(2) Water quality | Turbidity and total suspended solids from construction" (*id.*).

711. BOEM's Guidelines for Information Requirements for a Renewable Energy Construction and Operations Plan published by the Office of Renewable Energy Programs (OREP) (version 3.0, dated April 7, 2016) ("BOEM's 2016 Guidelines") provides instructions on the information BOEM requires applicants to include in their COP (see ECF No. 34-10).

712. According to BOEM's 2016 Guidelines, SFW "must submit with your COP detailed information that describes resources, conditions, and activities that could be affected by your proposed project [emphasis added]. ... refer to Attachment E ... The tables [in Attachment E] ... describe the information requirements for 30 CFR 585.627(a). This information will be used by BOEM to comply with NEPA" (*id.*, at 19, first paragraph).

713. According to Attachment E, SFW must provide detailed information on "existing water quality conditions ... in the area proximal to your proposed activities ... Describe the general state of water quality in the area proposed for your project ... including ... contaminants in water." (*id.*, at 39, first three bullet points). Under "Impacting Factors," the guide requires information on "environmental hazards ... accidental releases of ... hazardous materials and wastes ... and any other pollution control plan prepared to avoid and minimize impacts to water quality" (*id.*, fifth and seventh bullet point). New York State classifies PFOS and PFOA contaminants as hazardous waste.

714. BOEM's 2016 Guidelines identify "contaminants in water" and refer explicitly to releases of "hazardous materials and wastes." If such environmental impacts were not material facts in an environmental review, BOEM would not have included them as examples in BOEM's 2016 Guidelines. Conversely, such environmental impacts are material facts in an environmental review.

715. Environmental PFAS contamination of groundwater fits neatly into BOEM's description—it qualifies under "contaminants in water" and releases of "hazardous waste" (New York State defines PFOS and PFOA as hazardous waste). In its environmental review, BOEM includes PFAS contamination as a material fact.

716. South Fork Wind had a duty to disclose onsite environmental PFAS contamination within its proposed onshore construction corridor in its final COP.

SFW: False Representations

717. Defendant South Fork Wind LLC fraudulently claims that its COP “provides a description of water quality and water resource conditions in the ... SFEC [South Fork Wind Export Cable, including the onshore corridor] as defined by several parameters including: ... contaminants in water” (COP May 2021, at 4-56, PDF 224, first paragraph).

718. 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.*).

719. SFW said that “the affected environment and assessment of potential impacts for water quality and water resources was evaluated by reviewing the revised Environmental Assessment completed as part of the BOEM NEPA review” (*id.*).

720. SFW’s statements (in ¶¶ 717–719, above) are contrary to fact.

SFW: Knowledge of Falsity

721. On January 2, 2020, SFW received detailed information on existing PFAS contamination of groundwater where it planned to build underground concrete infrastructure encroaching into groundwater, a sole-source aquifer used for drinking water. The information took the form of eight interrogatories served on SFW during discovery in the NYS Public Service Commission proceeding (case 18-T-0604).

722. The eight interrogatories (144 pages) included, *inter alia*, the first public acknowledgment of groundwater contamination in Wainscott, a Water Quality Advisory for Private-Well Owners in Area of Wainscott, issued by SCDHS on October 11, 2017; a list of three hundred and three (303) test results of private drinking water wells in Wainscott (performed by SCDHS, dated June 15, 2018), and NYSDEC Site Characterization Reports for two properties registered with the NY State

Super Fund Program adjacent and on either side of South Fork Wind’s proposed construction corridor (see Kinsella Aff., ¶¶ 85–86).

723. Despite updating its COP at least twice (in July 2020 and May 2021), SFW did *not* include *any* information on PFAS contamination of groundwater and soil before BOEM approved its project (November 24, 2021).

724. Four months *before* SFW submitted its final COP to BOEM (May 7, 2021), it performed onsite testing of soil and groundwater. The testing revealed PFAS contamination at levels exceeding the EPA 2016 HAL and NYS MCL (*id.*, ¶¶ 68–75).

725. SFW’s Environmental Investigation Report detected PFAS contamination in 20 wells within its construction corridor and noted that “levels of PFOA and PFOS exceeded NYSDEC’s Ambient Water Quality Criteria Guidance Values in one well each (MW-4A and MW-15A, respectively)” (*id.*, ¶ 71).

726. Monitoring Well MW-4A is on Beach Lane, and MW-15A is on Wainscott NW Rd, in Wainscott, N.Y. (*id.*, ¶ 72). The report (revised April 1, 2021) *pre-dates* BOEM’s approval of the Project (November 24, 2021) by eight months (*id.*, ¶ 68).

727. SFW did *not* inform BOEM of the environmental PFAS contamination, contrary to its statutory duty to do so.

728. South Fork Wind neither disclosed nor considered onsite environmental PFAS contamination of groundwater within its proposed onshore construction corridor in its final COP (May 7, 2021).

SFW: Intent to Deceive

729. South Fork Wind’s intent from the consequences of its acts is clear because SFW repeats the same act of knowingly omitting PFAS contamination from consideration in the review. SFW’s

acts were consistent over three years (from 2018 through 2021).

730. SFW's acts were consistent across two separate reviews—the federal review under BOEM (according to NEPA and the OCSLA) and the New York State Public Service (“NYSPSC”) review (under NY Public Service Law, Article VII). Across the two environmental examinations, from start (2018) to finish (2021), SFW consistently acted to keep the issues of PFAS contamination out of the reviews, out of consideration, and out of the public eye.

731. South Fork Wind's intent was to deceive people into believing that groundwater quality was “good” and that there was *no* possible adverse environmental impact from constructing underground concrete infrastructure in Wainscott. On the contrary, SFW knew that groundwater was highly contaminated but concealed it from BOEM and the public so that it could proceed with construction without regard to the environmental impact or possible impacts on human health.

Reliance on Misrepresentation

732. On August 5, 2017, during a presentation to the Wainscott Citizens' Advisory Committee (“WCAC”), SFW made the following misleading representations— (1) that its project was the result of a “technology-neutral competitive solicitation” (slide 5); and that “[p]ermitting will involve ... state and Federal Agencies” that included “New York State” and the “Bureau of Ocean Energy Management[,]” the implication being the permitting would be lawful (slide 13).

733. The WCAC (August 5, 2017) meeting minutes note that “[p]ermitting for the project will involve ... state and federal agencies, and is intentionally designed for transparency” and that “[t]he formal proposal is expected in early 2018, which will include technical and environmental impact studies.”

734. Mr. Kinsella was a member of the WCAC and Chairman of its Environmental Subcommittee tasked with assessing the South Fork Wind Project.

735. Mr. Kinsella relied on South Fork Wind's representations that its project would be subject to proper environmental and socio-economic review.

736. After five years (since the WCAC meeting of August 5, 2017), mountains of paper, endless work, and five lawsuits later, SFW still has *not* delivered its promised review pursuant to federal law. Instead, SFW undermined the federal (and state) review by concealing information.

Relief Sought

737. Plaintiff claims Defendant South Fork Wind made false representations, including by omission of material facts concerning groundwater quality in Wainscott, knowing the representations were false with intent to deceive. Plaintiff and the public relied on South Fork Wind's misrepresentations.

738. Plaintiff and the public are entitled to equitable relief, and this Court has the authority to grant such relief as it sees fit.

739. Plaintiff and the public are entitled to a judgment, so holding and setting aside.

740. Plaintiff and the public are entitled to an emergency temporary restraining order (TRO) and preliminary and permanent injunctions against any further work permitted pursuant to such unlawful final agency action.

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

742. Plaintiff seeks equitable relief for himself and the public and the Court's intervention to correct the particular injustices resulting from the defendants' fraudulent and misleading representations not limited to making Plaintiff and the public whole by providing fair compensation

for all expenses, time, opportunity cost, and non-pecuniary damages including emotional pain, suffering, inconvenience, anxiety, frustration, mental anguish, loss of reputation and loss of quality and enjoyment of life, with pre-judgment and post-judgment interest as applicable.

XXXV. NINETEENTH CLAIM FOR RELIEF

Fraudulent representation of the project’s socio-economic impact by South Fork Wind LLC in its Construction and Operations Plan (Against defendant South Fork Wind LLC)

SFW: Project Cost

743. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

744. In addition, I reallege paragraphs 111 through 165 of Affidavit of Plaintiff-Appellant Simon V. Kinsella in Support of Response to Defendant-Intervenor-Appellee South Fork Wind LLC’s Motion to Dismiss for Lack of Jurisdiction (“Kinsella Aff.”) (USCA Case No. 22-5361, 1979671) as if set forth in full herein.

745. When Defendant South Fork Wind submitted its final COP (dated May 7, 2021) to BOEM for review and approval, SFW made fraudulent and misleading statements, was involved in events leading up to those statements, and failed to correct such statements concerning harmful PFAS contamination of groundwater in Wainscott, Suffolk County, NY.

SFW: Duty to Disclose

746. The OCSLA implementing regulations require that SFW submit “detailed information” with its COP to “assist [BOEM] in complying with NEPA and other relevant laws.” 30 C.F.R. § 585.627(a). “Your COP must describe those resources, conditions, and activities listed in the following table that could be affected by your proposed activities, or that could affect the activities proposed in your COP” (*id.*). Such resources include the following— “(7) Social and economic

resources | Employment, ... minority and lower income groups” (*id.*).

747. BOEM’s Guidelines for Information Requirements for a Renewable Energy Construction and Operations Plan published by the Office of Renewable Energy Programs (OREP) (version 3.0, dated April 7, 2016) (“BOEM’s 2016 Guidelines”) provides instructions on the information BOEM requires applicants to include in their COP (see ECF No. 34-10).

748. According to BOEM’s 2016 Guidelines, SFW “must submit with your COP detailed information that describes resources, conditions, and activities that could be affected by your proposed project [emphasis added]. ... refer to Attachment E ... The tables [in Attachment E] ... describe the information requirements for 30 CFR 585.627(a). This information will be used by BOEM to comply with NEPA” (*id.*, at 19, first paragraph).

749. Under the heading, Social and Economic Resources, BOEM’s 2016 Guidelines identify “economic modeling (e.g., job creation)” and “employment ... particularly those related to environmental justice considerations) [.]” The project cost of \$2.013 billion outweighs many times over any other financial consideration in BOEM’s or SFW’s economic modeling/analyses on job creation (see *Kinsella Aff.* ¶¶ 136–165, 166–199). The project cost affects environmental justice. Again, if such economic impacts were not material facts in a socio-economic review, BOEM would not have included them as examples in BOEM’s 2016 Guidelines. Conversely, such economic impacts are material facts in a socio-economic review. Given the project cost (\$2.013 billion), the dominating financial consideration in economic modeling/analyses, BOEM’s socio-economic review includes the project cost as a material fact.

750. South Fork Wind had a duty to disclose the project cost in its final COP.

SFW: False Representations

751. In 2019, South Fork Wind filed an Economic Development and Jobs Analysis (“Economic

Analysis”) by Navigant Consulting Inc. (February 5, 2019) (No. 22-5316, Doc. 1979671, Exhibit E, SFW 2019 Economic Analysis).

752. SFW’s Economic Analysis reads— “This advisory opinion was prepared ... at the request of Ørsted North America (“Ørsted”) to conduct an analysis that estimates ... jobs and economic outputs that will result from ... the ‘Project’” (No. 22-5316, Doc. 1979671, Exhibit E, at 1, PDF 4, first paragraph).

753. Under the heading Summary Results, SFW’s Economic Analysis reads—

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), contrary to fact.

754. SFW’s economic analysis’s claims total beneficial impacts on NYS will be \$458 million (Kinsella Aff., ¶ 156) but is offset by the project cost’s adverse impact (\$2.013 billion), resulting in a *net adverse* impact of \$1.555 billion, representing a *capital outflow* leaving NYS (*id.*, ¶¶ 157–158).

755. SFW’s project will result in over one thousand job losses, contradicting SFW’s claim that it will *add* (in New York State/Suffolk County) one hundred and ninety-six (196) jobs. SFW’s Economic Analysis’ conclusion that “[t]he Project will clearly ... add a significant number of jobs” is contrary to fact (*id.*, ¶¶ 145–155).

756. SFW’s Economic Analysis does *not* account for the Project cost of \$2.013.

757. SFW’s Economic Analysis relies on a one-sided analysis to support the conclusion that “[t]he Project will clearly have a positive economic impact,” contrary to fact.

758. South Fork Wind neither discloses nor considers the project cost of \$2.013 within its final COP (dated May 7, 2021).

SFW: Knowledge of Falsity

759. South Fork Wind would have known the cost of its own project.

SFW: Intent to Deceive

760. South Fork Wind's intent from the consequences of its acts is clear because SFW repeats the same act of knowingly omitting the project cost (\$2.013 billion) from the review. SFW's acts were consistent over three years (from 2018 through 2021).

761. SFW's acts were consistent across two separate reviews—the federal review under BOEM (according to NEPA and the OCSLA) and the New York State Public Service (“NYSPSC”) review (under NY Public Service Law, Article VII). Across the two socio-economic examinations, from start (2018) to finish (2021), SFW consistently acted to keep the project cost (\$2.013 billion) out of the reviews, out of consideration, and out of the public eye.

762. South Fork Wind's intent was to deceive people into believing that its project would have a *beneficial* socio-economic impact. On the contrary, SFW knew the cost of its project far outweighed any possible *beneficial* socio-economic impacts and that its project would have an *adverse* socio-economic impact.

763. SFW concealed its project cost and the *adverse* socio-economic impact of its project from BOEM and the public so that it could proceed with construction without regard to the socio-economic impact.

Reliance on Misrepresentation

764. I reallege paragraphs 732 through 736 (above) as if set forth in full herein.

Relief Sought

765. Plaintiff claims Defendant South Fork Wind made false representations by omitting material facts concerning the project cost, knowing that by its omission, SFW intended to

deceive by misrepresenting the project's socio-economic impact. Plaintiff and the public relied on South Fork Wind's misrepresentations.

766. I reallege paragraphs 738 through 742 (above) as if set forth in full herein.

XXXVI. TWENTIETH CLAIM FOR RELIEF
Violation of the OCSLA
(Against Federal Agency Defendants DOI and BOEM)

BOEM: OCSLA

767. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

768. South Fork Wind LLC, formerly known as Deepwater Wind South Fork LLC and including actions of its promoters prior to incorporation (collectively "SFW"), was the principal beneficiary of the South Fork RFP procurement process.

769. The South Fork RFP was *not* a "technology-neutral" bidding process.

770. The South Fork RFP was *not* a "competitive" bidding process.

771. The South Fork RFP procurement was manipulated to stifle competition.

772. SFW was the sole bidder for offshore wind resources.

773. SFW participated in and benefited from a rigged procurement process, the South Fork RFP, designed to lessen competition in the market for renewable sources of energy within the meaning of 15 U.S.C. §§ 14–15.

774. Plaintiff informed Defendant BOEM of the anti-trust violations on February 22, 2021. Regardless, on November 24, 2021, BOEM approved the South Fork Wind Project.

775. According to the Outer Continental Shelf Lands Act ("OCSLA"), "the outer Continental Shelf is ... held by the Federal Government for the public, which should be made available for

... development ... in a manner which is consistent with the maintenance of competition” (43 U.S.C. § 1332 (3)).

776. Prior to approving SFW’s project, BOEM received information on possible SFW procurement violations that resulted in a power supply agreement where the generating resource is within BOEM’s jurisdiction on the Outer Continental Shelf.

777. BOEM refers to and relies upon the (false) claim that South Fork Wind’s “power purchase agreement executed in 2017 [“2017 PPA”] result[ed] from LIPA’s technology-neutral competitive bidding process [emphasis added]” (ROD, at 7, PDF 9, seventh paragraph), referring to the South Fork RFP.

778. BOEM granted approval to SFW, a merchant operator, to construct an offshore wind generating facility in federal jurisdiction and to transmit that electrical energy across the border into the jurisdiction of the State of New York for sale to Long Island Power Authority.

779. The OCSLA defines “antitrust law” to mean “(1) the Sherman Act (15 U.S.C. 1 *et seq.*); (2) the Clayton Act (15 U.S.C. 12 *et seq.*); (3) the Federal Trade Commission Act (15 U.S.C. 41 *et seq.*); (4) the Wilson Tariff Act (15 U.S.C. 8 *et seq.*); or (5) the Act of June 19, 1936, chapter 592 (15 U.S.C. 13, 13a, 13b, and 21a)” (43 U.S.C. § 1331(n)).

780. Prior to approving SFW’s project, BOEM failed to assess whether the area leased to SFW would be developed “in a manner which is consistent with the maintenance of competition,” according to the OCSLA.

781. BOEM violated the Outer Continental Shelf Act, 43 U.S.C. § 1331 *et seq.*

Relief Sought

782. I reallege paragraphs 738 through 742 (above) as if set forth in full herein.

XXXVII. TWENTY-FIRST CLAIM FOR RELIEF

Clayton Act Violations (triple damages)

(against Defendant SFW)

Clayton Act

783. I reallege paragraphs F1-1 through F8-6 and 1 through 440 (above) as if set forth in full herein.

784. Pursuant to the Clayton Act, 15 U.S.C. § 15(a)), which permits “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”

785. I have standing to bring this action under the Clayton Act and other antitrust law as defined within the OCSLA. I will have to pay higher prices for electrical power than I would have otherwise if it were *not* for South Fork Wind’s participation in a manipulated procurement process, the South Fork Request for Resources (“South Fork RFP”).

786. South Fork Wind LLC, formerly known as Deepwater Wind South Fork LLC and including actions of its promoters prior to incorporation (collectively “SFW”), was the principal beneficiary of the South Fork RFP procurement process.

787. The South Fork RFP was *not* a “technology-neutral” bidding process.

788. The South Fork RFP was *not* a “competitive” bidding process.

789. The South Fork RFP procurement was manipulated to stifle competition.

790. SFW was the sole bidder for offshore wind resources.

791. SFW participated in and benefited from a rigged procurement process, the South Fork RFP, designed to lessen competition in the market for renewable sources of energy within the meaning of 15 U.S.C. §§ 14–15.

792. SFW violated the Clayton Act.

793. South Fork Wind LLC is a Special Purpose Entity incorporated in the state of Delaware and controlled by its joint and equal (indirect) owners, Ørsted A/S (“Ørsted”) and Eversource.

794. Ørsted A/S (formerly DONG Energy) has its headquarters in Denmark. Ørsted lists its shares on Nasdaq Copenhagen, Denmark. Ørsted is majority owned by the state of Denmark.⁷⁴

795. Ørsted manages its United States operations through a wholly owned subsidiary, Orsted Wind Power North America LLC, a corporation registered in the state of Delaware with its headquarters at 1 International Place, 100 Oliver Street, Boston, Massachusetts.

796. Eversource transmits and delivers electricity and natural gas and supplies water to approximately four million customers in Connecticut, Massachusetts, and New Hampshire.

797. The joint and equal owners of South Fork Wind LLC, Ørsted and Eversource, are neither owned nor controlled from within New York State.

798. Plaintiff discovered critical information regarding the anti-trust violation upon disclosure by Long Island Power Authority (LIPA) pursuant to a Freedom of Information Law (FOIL) Request. The disclosure occurred on January 21, 2021. The critical information was LIPA’s internal valuation of SFW’s cost of power (i.e., 21.9 cents per kilowatt-hour), which was above market rates. Defendant SFW fraudulently concealed the price per unit of output to be passed onto ratepayers in LIPA’s service area.

Relief Sought

799. I reallege paragraphs 738 through 742 (above) as if set forth in full herein.

⁷⁴ According to Ørsted 2021 Annual Report, “Ørsted is a publicly listed company with the Danish State as majority shareholder with a 50.1 % ownership share. The Danish State exercises its ownership interest ... [via] a board of non-executive directors ... and executive directors ... [that] are responsible for the management of the company” (<https://orsted.com/en/investors/ir-material/annual-reporting-2021>), at 61, second column, first paragraph).

XXXVIII. NO PRIOR APPLICATIONS

800. No prior application for this or any similar relief has been made in this Court.

XXXIX. PRAYER FOR RELIEF

801. Wherefore, Plaintiffs pray for relief as follows:

- a. an emergency temporary restraining order and preliminary injunction against further construction work related to South Fork Wind's Project;
- b. a permanent injunction against further construction work related to South Fork Wind's Project;
- c. a declaratory judgment holding that BOEM's final agency action approving the Final Environmental Impact Statement for South Fork Wind's Construction and Operations Plan was unlawful and set aside in relevant part the final agency action challenged herein;
- d. a declaratory judgment holding the BOEM falsely represented material facts, including by omission, in its review, knowing of their falsity with intent to deceive;
- e. a declaratory judgment holding the SFW falsely represented material facts, including by omission, in its Construction and Operations Plan, knowing of their falsity with intent to deceive;
- f. restoration to the site's original condition, remediation of any damage, and dismantling of the facility under the oversight of Federal authorities;
- g. That the Court award treble damages to Plaintiff, the costs of this action, a reasonable attorneys' fee, and prejudgment interest pursuant to the Sherman and Clayton Act, including 15 U.S.C. § 15;

- h. equitable relief for himself and the public and the Court's intervention to correct the injustices resulting from Defendants' actions.
- i. costs of suit herein; and
- j. such other relief as the Court deems just and proper.