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

**No. 22-5316**

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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.

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**AFFIDAVIT OF PLAINTIFF-APPELLANT  
SIMON V. KINSELLA II, IN SUPPORT OF  
STATEMENT OF ISSUES AND MOTION FOR TEMPORARY  
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

**“Kinsella Affidavit II”**

(District Court’s Deficient Findings of Fact and Reasoning)

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SIMON V. KINSELLA, Mr. Kinsella *pro se*  
P.O. Box 792, Wainscott, N.Y. 11975  
Tel: (631) 903-9154 | [Si@oswSouthFork.Info](mailto:Si@oswSouthFork.Info)

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I, Simon V. Kinsella, Plaintiff-Appellant appearing *pro se*, state as follows pursuant to 28 U.S.C. § 1746—

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District Court for the District of Columbia  
Deficient Findings of Fact and Reasoning  
(in case 1:22-cv-02147)

1. It has been over five months, and still, Federal Agency Defendants have *not* –
  - a. Answered the Complaint or First Amended Complaint (Exhibit 8); or
  - b. Respond to a Motion for Partial Summary Judgement (Exhibit 9).
  
2. Defendants-Appellees include the U.S. Department of the Interior (“DIO”), U.S. Bureau of Ocean Energy Management (“BOEM”) and named individual employees of BOEM, and U.S. Environmental Protection Agency (“EPA”) (collectively “Federal Agency Defendants”).
  
3. This case centers on the review and approval by BOEM of a proposal by South Fork Wind LLC (“SFW”) for an offshore wind farm with a transmission cable connecting it to eastern Long Island.
  
4. SFW’s Project includes an offshore wind farm, offshore substation, offshore transmission/submarine cable, onshore underground concrete infrastructure (duct banks and vaults) and high-voltage transmission cables, and an onshore Interconnection Facility (collectively, “Project”).

5. On November 24, 2021, BOEM approved the Final Environmental Impact Statement (“FEIS”) for SFW’s Construction and Operations Plan (“COP”).
6. Soon after BOEM had approved the Project (in February 2021), SFW started onshore construction in an area south of East Hampton Airport, in Wainscott, Suffolk County, New York State.
7. On July 20, 2022, I (Plaintiff-Appellant Simon Kinsella) commenced this action in the District Court for the District of Columbia (case 1:22-cv-02147).
8. The Complaint (*id.*, ECF. No. 1) includes a claim for violating the Freedom of Information Act (“FOIA”) 5 U.S.C. § 552 (*id.*, at 89, ¶¶ 597–603) for which the statutory deadline for an agency to answer the pleadings is thirty days.
9. On September 8, 2022, Defendant Federal Agencies filed a Motion to Transfer the Case (*id.* ECF No. 11). That motion is subject to a Petition for a Writ of Mandamus (USCA Case No. 22-5317, Doc. 1976909) challenging the district courts ruling to transfer without a hearing on new information.

**A. Motion for Summary Judgement**

10. On September 22, 2022, frustrated by Defendant Federal Agencies’ failure to answer the Complaint, I filed a Cross-Motion for Partial Summary Judgement.
11. On September 26, 2022 (the following Monday), I filed a corrected version (*id.*, ECF No. 21) that includes a comprehensive Statement of Material Facts (*id.*, ECF No 21-4). See Exhibit 9.

12. On October 6, 2022, Federal Agency Defendants filed Motion to Strike Plaintiff's Motion for [Partial] Summary Judgment or, in the alternative, to Stay Briefing (*id.*, ECF No. 24).
13. On October 9, 2022 (Sunday), the district court judge entered the following MINUTE ORDER—

“ORDERS that briefing on Plaintiff's Motion for Summary Judgment [21](#) is stayed pending resolution of Defendants' Motion to Transfer [11](#).”
14. The judge stayed my Motion for Partial Summary Judgment (which it later ruled to strike) before I could respond to Federal Agency Defendants' motion.

**B. Motion for a TRO and PI**

15. On November 2, 2022, I concurrently filed an Emergency Motion for Temporary Restraining Order and a Preliminary Injunction (Exhibit 7) and First Amended Complaint (Exhibit 8).
16. On November 7, 2022, the judge entered the following MINUTE ORDER—

“The Parties are ORDERED to appear for a hearing regarding [11](#) Motion to Transfer Case and [35](#) Motion for a Temporary Restraining Order (TRO) on November 9, 2022, at 2:00 PM [emphasis added].”
17. The Hearing Transcript misstates that the “proceedings began at 1:01 p.m.” (No. 22-5316, Doc. 1979239, Hearing Tr., at 2:1–1). The hearing began a little after 2 p.m. (see ¶ 16 above).

18. On November 10, 2022, the district court judge entered the following MINUTE ORDER— “Finally, the Court DENIES Plaintiff’s Motion for a Temporary Restraining Order [35](#) for the reasons stated on the record at the hearing [emphasis added]” (No. 22-5316, Doc. 1979684, Underlying Decision in Case, Exhibit I, MINUTE ORDER (Nov 10, 2022), at 1, under Docket Text).
19. During the hearing (on November 9, 2022), the district court judge neither addressed the substantive arguments of my Motion for TRO and PI nor discussed the First Amended Complaint claims. The hearing was deficient in findings of fact and reasoning.
20. During the hearing on November 9, 2022, the district court judge heard *only* on peripheral issues related to SFW’s Project, *not* BOEM’s review and approval of the Project (i.e., the judge did *not* invite parties to speak on the Motion to Transfer or matters regards fraud).
21. The hearing focused on groundwater PFAS contamination of the sole-source aquifer. The judge said so—

“Okay. And so just as a preliminary matter, having reviewed the pleadings, I really want to focus on the drinking water contamination issue. From my perspective of the various harms in the complaint, that’s really the only one that could potentially, you know, even arguably be in the neighborhood of an irreparable injury.” (No. 22-5316, Doc. 1979239,

Hearing Tr., at 1:7–12).

**C. Motion to Transfer (no hearing)**

22. During the hearing, no party had an opportunity to be heard on issues related to the Motion to Transfer.

23. The judge did *not* raise the Motion to Transfer until the last three minutes of the hearing. Then, just before the hearing closed, the judge said—

“I told the parties I wanted to deal with the motion to transfer, is that I’ve reviewed the parties’ arguments, and I am going to issue a written opinion on that motion, and it will also explain why I am not ruling on the motion for a PI today. Because after considering the arguments, I am going to grant the request to transfer this case to EDNY, which is ECF 11.” (No. 22-5316, Doc. 1979239, at 24:5–11, 36 min, 10 sec).

24. The entire hearing lasted for approximately 39 minutes—

“Okay. So that’s all I have. Again, you will be getting orders shortly that memorialize my rulings. All right. So if there’s nothing else, thank you and have a great day.” (*id.*, at 26:1–3)

25. The judge disconnected almost before finishing the sentence and had disconnected from the hearing by the time the parties responded, “Thank you, Your Honor” (*id.*, at 26:4–5).

26. On November 29, 2022, I filed a Petition for Writ of Mandamus challenging the district court’s ruling to transfer (No. 22-5317, Doc. 1975638).

27. On December 7, 2022, I filed an Amended Petition for Writ of Mandamus

(*id.*, Doc. 1976909).

**D. Hearing on TRO and PI**

28. The transcript of the hearing (on November 9, 2022) is titled—

“PRELIMINARY INJUNCTION HEARING” (No. 22-5316, Doc. 1979239, Tr. Hearing, at 1, 1:8–8).

29. At the hearing—

a. BOEM was represented by “Amanda Stoner, Esquire” of the “United States Department of Justice” (*id.*, at 1, 1:13–14); and

b. SFW was represented by “Janice M. Schneider, Esquire” and “Stacey L. Van Belleghem, Esquire” of “Latham & Watkins, LLP” (*id.*, 1:16–18).

c. I appeared *pro se*.

30. During the entire hearing, Ms. Stoner was conspicuously silent. The *only* time Ms. Stoner spoke was to acknowledge her presence at the beginning of the hearing— “This is Amanda Stoner for the federal defendants, Your Honor” (*id.*, 2:11–12). That was the last we heard from counsel representing Federal Agency Defendants.

31. Although the defendants in the case are Federal Agencies, the Federal Agency Defendants remained silent throughout the hearing.

32. BOEM, for all practical purposes, was represented at the hearing by counsel for the world’s largest offshore wind developer, Ørsted, which speaks



volumes about BOEM's reliance on the industry it is supposed to regulate.

BOEM is supposed to be independent. Sadly, BOEM does *not* represent the public interest any more than South Fork Wind represents the public. That is, BOEM no longer concerns itself with the public interest.

33. The *only* people who participated in the hearing (counselors Ms. Schneider and Ms. Belleghem) represented SFW and its interest in the Project.
34. SFW is *not* a defendant in this case; it is an intervening party.
35. The offshore wind industry had hijacked the hearing in the same way it has hijacked this case.
36. The hearing was not on this case (BOEM's review and approval), it was on SFW's Project. The hearing was *solely* on the Project itself.
37. The district court judge asked me whether I was "concerned with alleged drinking water contamination from onshore drilling, impact on cod population and fish prices, and then other economic harms outlined in your motion?" (*id.*, 4:19–21). I agreed with the judge and began to speak about the review and approval (of the Project), the "surreptitious expansion, of the project that the public aren't aware of ... and for which there has been no cumulative analysis whatsoever" (*id.*, 5:3–6). The judge was not moved—

"[A]s a preliminary matter, having reviewed the pleadings, I really want to focus on the drinking water contamination issue. From my perspective of the various harms in the complaint, that's really the

only one that could potentially, you know, even arguably be in the neighborhood of an irreparable injury” (*id.*, 5:7–12).

38. Throughout the hearing, the judge did *not* address the core issues of the Complaint and First Amended Complaint— BOEM’s failure to consider ... issues such as PFAS groundwater contamination, population-level impacts to Atlantic Cod on Cox Ledge, the Project cost of \$2.013 billion, surreptitious expansion through an area zoned residential, *et cetera*.
39. Please see the article in Bloomberg on the threat to the Atlantic Cod population by South Fork Wind’s construction on Cox Ledge— US Ignored Own Scientists Warning in Backing Atlantic Wind Farm, by Jennifer Dlouhy, published December 29, 2022 (No. 22-5316, Doc. 1979671, Exhibit I, Bloomberg, SF Cod, Cox Ledge).
40. The district court judge did *not* address Federal Agency Defendants’ violations of the National Environmental Policy Act (“NEPA”) or the Outer Continental Shelf Lands Act (“OCSLA”).
41. The district court judge denied me the opportunity of being heard on issues that I had introduced to the case in my Amended Complaint, including fraud (Exhibit 8).
42. The First Amended Complaint (*id.*) claims for relief one through six centers on Federal Agency Defendants’ violations of NEPA. Claims seven through

nine center on violations of the OCSLA. Claim ten concerns Federal Agency Defendants' breach of Executive Order 12898 on environmental justice. Claim eleven is for Defendants' denial of my rights to due process of law guaranteed by the Fourteenth Amendment of the U.S. Constitution. Claim twelve is for Defendants' non-compliance with FOIA time limits, and claims thirteen through seventeen seek relief for their fraudulent representation of material facts knowing of their falsity with intent to deceive.

43. The district court did *not* address my claims (in ¶ 42 above).
44. The Emergency Motion for Temporary Restraining Order and Preliminary Injunction (Exhibit 7) reads—

“Plaintiff’s Amended Complaint shows that Defendants rely on seven counts of fraudulent [r]epresentation of material facts to support their decision to approve the construction” (at 5, second paragraph).
45. The Memorandum in Support lists the seven allegations of fraud against Federal Agency Defendants (Exhibit 7, at 2–4).
46. During the Preliminary Injunction Hearing, the district court judge did *not* address *any* fraud allegations and provided no reason for failing to address concerns about fraud.
47. In the closing minutes of the hearing, I tried to introduce the allegations of Federal Agency Defendants’ fraud—

“[W]here concrete injury has been suffered by many persons as in mass fraud [emphasis added]. So you have the public interest in keeping the integrity of the Court at stake. The Court cannot be seen to be making a ruling that is essentially inequitable and furthering the harm, and that’s what a ruling today will be doing. You will be ruling in favor of the wrongdoer and furthering -- [judge interrupting] -- the harm to the plaintiff” (case No. 22-5316, Doc. 1979239, Tr. Hearing, at 22:14–23).

The judge restricted the discussion to standing and *never* mentioned “fraud” during the hearing *at all*.

**E. Balance of (so-called) ‘Equities’**

48. During the hearing on November 9, 2022, Ms. Schneider (representing SFW) provided details on possible “liquidated damages” from a delay in SFW’s “tight schedule”—

“The Project has already mobilized and begun its prep work for the horizontal drilling, the HDD drilling, horizontal directional drilling. So that includes bringing highly specialized equipment that was reserved in advance of construction to the site at great expense, approximately \$40 million. ...

[W]e have mobilized ... the jack up barge drill has sailed up from Louisiana and is currently at Bridgeport and will be transiting to the project site very soon. It’s scheduled to arrive on the 15th.

We are on a very tight schedule ... vessel availability [] could prevent the Project from meeting its contractual power purchase

agreement requirements which could result in millions of dollars in liquidated damages and ultimately jeopardize the Project's over \$1 billion investment to date. ... vessel standby costs alone are \$262,000 per day as well as the potential claims under our contracts with contractors who are expecting to get under way.” (No. 22-5316, Doc. 1979239, Tr. Hearing, at 6:20–25, 7:1–19).

49. During the hearing, the court considered the potential economic harms to SFW outlined by Ms. Schneider when deciding to deny my Motion for a Temporary Restraining Order and Preliminary Injunction—

“I do consider the harms to South Fork and the economic harms that Ms. Schneider outlined if construction was to be delayed ... And I don't think that the equities support stepping in to overrule the results” (*id.*, 21:10–15).

50. The Emergency Motion for Emergency TRO and PI (Exhibit 7) reads—

“Defendant BOEM's grant of approval was unlawful. The TRO is necessary to prevent the Developer [SFW] from taking advantage of Defendants' wrongdoing, which will cause irreparable harm to Plaintiff and the public” (at 3, second paragraph)

51. The district court judge did *not* consider whether BOEM's review and approval or whether the information provided by SFW were fraudulent.
52. The district court judge turned a blind eye to substantiated allegations of SFW's and BOEM's fraudulent representations upon which they relied to gain

approval for the Project by deception.

53. Without considering the underlying wrongdoing, the district court permitted SFW to continue construction and to profit from its wrongdoing.
54. The court accepted SFW's 'equity' without questioning whether it was ill-founded.

**F. Retroactive reliance on NYSPSC**

55. Defendants seek to retroactively rely on the New York State Public Service Commission ("NYSPSC") Article VII review, writing in their Response in Opposition to Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction (Exhibit 10)—

"Indeed, the NYSPSC, the state agency responsible for permitting construction and design of the onshore portion of the South Fork Export Cable, expressly found that "the Project, as proposed and conditioned will not exacerbate existing PFAS." ECF No. 11-5, March 18, 2021 PSC Order, at 102 (emphasis added)" (at 19, second paragraph).

56. The NYSPSC was *not* a cooperating agency that contributed to the development of BOEM's Final Environmental Impact Statement ("FEIS").
57. BOEM's Record of Decision ("ROD") states that "Cooperating state agencies included the Massachusetts Office of Coastal Zone Management (MA CZM), Rhode Island Coastal Resource Management Council (RI CRMC), and Rhode

Island Department of Environmental Management [emphasis added]” (Exhibit 1 ROD (Nov 24, 2021), at 1, PDF 3, second paragraph).

58. Conspicuously absent are *any* New York State agencies, including the NYSPSC, a non-cooperating state agency.
59. BOEM did *not* consider, analyze or incorporate by reference in its review information from the NYSPSC. BOEM could *not* have possibly done so because the NYSPSC considered neither on-site PFAS contamination nor Project cost (\$2.013 billion).
60. Not coincidentally, neither BOEM nor the NYSPSC considered Project’s cost or PFAS contamination for the drinking water supply. The citizens of Wainscott have *not* been afforded ANY PROTECTION WHATSOEVER.
61. South Fork Wind tested on-site soil and groundwater for the first time on December 23, 2020,<sup>1</sup> fifteen days *after* the NYSPSC evidentiary record had closed (on December 8, 2020) (No. 22-5316, Doc. 1979671, Affidavit of Simon V Kinsella (Dec 30, 2022) (“**Kinsella Aff. I**”), at ¶¶ 68–76).
62. On October 11, 2017, Suffolk County Department of Health Services (“SCDHS”) issued a Water Quality Advisory for Private-Well Owners in Area of Wainscott (Exhibit 04, SCDHS, Water Qty Advisory (Oct 11, 2017)).

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<sup>1</sup> GZA’s Environmental Investigation Report is available NYSPSC, dps.ny.gov—  
<https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={7F6C6BBF-6053-455D-AF06-E440FB46C63F}>

The advisory was the first confirmed detection of PFAS contamination exceeding the EPA 2016 Health Advisory Level in Wainscott (Kinsella Aff. I, ¶ 86).

63. All the local and regional newspapers covered the news. See the following –
- a. Exhibit 05-1, 2017-10-11, Water Qty Advisory (27east)
  - b. Exhibit 05-2, 2017-10-11, PFAS Found (EH Star)
  - c. Exhibit 05-3, 2017-10-11, PFAS (Newsday)
  - d. Exhibit 05-4, 2017-10-12, Water Test (E End Beacon)
  - e. Exhibit 05-5, 2017-10-17, Well Testing PFAS (EH Star)
  - f. Exhibit 05-6, 2017-10-18, 250 Wells (Newsday)
64. On November 10, 2017, the Town of East Hampton, as the owner of East Hampton Airport, received a letter from the NYSDEC (Exhibit 06). The letter reads as follows—

“We have received information that certain perfluorinated compounds (PFCs) have been detected in nearby water supply wells, ... this letter constitutes DEC’s notification to you as the identified property owner that this property is considered a potential inactive hazardous waste disposal site” (at 1, first and second paragraphs).

“This letter also serves as DEC’s notification to you of the need to carry out an investigation in accordance with DEC’s technical requirements for a site characterization. In addition to carrying out the investigation (which will include installing and sampling on-site wells)” (*id.*, at 2, first paragraph).



65. PFAS contamination was widely known to exist south of East Hampton Airport in Wainscott as early as **October 2017**, a year *before* SFW submitted its Construction and Operations Plan to BOEM and its application to the NYSPSC (**September 2018**).
66. SFW knew PFAS contamination existed both up-gradient and down-gradient, from its proposed construction corridor through Wainscott two years before it began construction (in February 2022) but still proceeded with excavating soil and groundwater and constructing underground concrete infrastructure (see No. 22-5316, Doc. 1979671, Addendum Map #1 – #4) (Also Kinsella Aff. I, ¶¶ 84–86).
67. PFAS contamination was widely known to exist in the area where SFW proposed constructing underground concrete infrastructure as early as October **2017** (see ¶¶ 61–66 above). Still, SFW did *not* test its proposed construction corridor for contamination for three years, waiting until December 23, 2020, just fifteen days *after* the NYSPSC evidentiary record had closed on December 8, 2020 (see ¶ 61 above).
68. Evidence of on-site PFAS contamination was *not* admitted into the evidentiary record and was *not* considered during the NYSPSC proceeding.
69. When I filed a Motion to Reopen the Record in the NYSPSC proceeding to admit evidence of PFAS contamination (and procurement violations), the

motion was denied (Exhibit 11) (Also, No. 22-5316, Doc. 1979671, at 3, [BOEM Exhibit #021](#) and [BOEM Exhibit #029](#)).

70. During the hearing, the district court judge asked me—

“What is your ... evidence at this stage ... for me to reject the EDNY’s findings, the expert witness who South Fork presented in support of its claim? What specific record evidence do you have to counter that?” (No. 22-5316, Doc. 1979239, Tr. at 11:16–20).

71. I responded –

“South Fork Wind intentionally waited for three years before testing the site. They waited until 15 days after the evidentiary record had closed to avoid scrutiny in the New York State Public Service Commission hearing. So for them to say the hearing considered PFAS contamination, as a matter of fact, it did not consider PFAS contamination. And that is a matter of the record. They cannot dispute that. Parties such as myself were prohibited from cross-examining that evidence, and it was engineered that way so it would avoid public scrutiny. So they cannot rely on the Public Service Commission hearing conclusion that it considered PFAS contamination, because it did not” (*id.*, Tr. Hearing, at 11:16–20).

72. The district judge disregarded the irrefutable evidence showing that the NYSPSC failed to consider on-site PFAS contamination when approving SFW’s application for certification.

73. The NYS Department of Public Service (the administrative arm of the

NYSPSC) admitted under cross-examination that it did not consider the project cost (of \$2 billion) impact on ratepayers. “There’s no testimony in this, in our document, to the best of my recollection that addresses cost to rate payers.”<sup>2</sup>

**G. PFAS Diffusion with concrete**

74. When the district court judge asked me about my concerns during the hearing (on November 9, 2022), I identified diffusion into concrete as irreparable environmental harm. Specifically, diffusion into the concrete duct banks and vaults that SFW had installed underground in Wainscott. “The diffusion into the concrete, which is an irreparable harm, that’s the PFAS contamination” (No. 22-5316, Doc. 1979239, Tr. Hearing, at 5:1–3).
75. In my Reply to Federal Defendants’ Response in Opposition to Plaintiff’s Motion for a Temporary Restraining Order and Preliminary Injunction, I explained that I “swims, sails, jogs, etc., in the waters surrounding the onshore construction corridor” (Exhibit 12, at 2, second paragraph).
76. I explained that the waters “are directly linked via groundwater to the concrete duct banks and vaults that will become a secondary source of PFAS contamination from the contamination diffusing into the concrete. Even if the

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<sup>2</sup> <https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={BBB282D4-7CB2-4B7C-AC81-6B85F97B734B}> (at p. 595, lines 19-21)

primary source is remediated, the concrete duct banks and vaults will remain and become a secondary source that will continue to release PFAS contamination” (*id.*).

77. “Furthermore, once the PFAS is embedded into the concrete, it cannot be removed. Even if the concrete were to be removed, further environmental damage would have been done (and placing the concrete elsewhere would simply contaminate that other location)” (*id.*).
78. During the hearing, I referred to a scientific document published by the Per- and Polyfluoroalkyl Substances (PFAS) Team at the Interstate Technology Regulatory Council (ITRC) submitted as testimony by SFW.<sup>3</sup> SFW’s own testimony addresses the issue of possible diffusion of PFAS contaminants with concrete, creating a secondary source of contamination that may pro-long and exacerbate PFAS in groundwater even after the primary source is removed. The ITRC publication reads as follows—

“Diffusion in groundwater is often ignored ... However, diffusion of contaminant mass into ... **concrete may enhance the long-term persistence of PFAS in groundwater** [emphasis added]. For instance, at one site PFAS penetrated 12 cm into a concrete pad at a fire training area, and diffusion was a contributing process (Baduel, Paxman, and Mueller 2015)” (Exhibit 13, at 6, last paragraph).<sup>4</sup>

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<sup>3</sup> In the in the NYSPSC hearing (case 18-T-0604).

<sup>4</sup> Also available online at [dps.ny.gov](https://dps.ny.gov)—

79. I explained during the hearing that the ITRC publication provides “detail[s] on the impacts of diffusion specifically on concrete, which is exactly the same material that they have used in the duct banks and vaults. So, they have installed the duct banks and vaults. They [SFW] have admitted that it [the duct banks and vaults] encroaches into groundwater” (No. 22-5316, Doc. 1979239, Tr. Hearing, at 12:19–23).
80. I continue— “So, you’ve got the concrete lying in contaminated groundwater, and that groundwater, through a process of diffusion, is embedding itself into the concrete. But how do you get that contamination out of the concrete? You can’t. If it were in granulated activated carbon filtration, you could put it through a furnace at high temperatures ... But once it’s in concrete, you can’t. It is, by definition, irreparable. And even after you remediate a primary source at the [East Hampton] [A]irport, of which there is so much in the groundwater and the soil, even after that would be remediated, you would have concrete duct banks acting as a secondary source of contamination that would continue to contaminate the water supply ... near the airport where the public supply wells are. And this is why it’s so important to consider the profile analysis. Suffolk County Department of Health Services did the

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<https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={2E939DCB-551D-4B83-9948-3F7C830E1742}>

analysis. It was limited only down to 75 or 80 feet, and yet they showed at that depth contamination of PFAS at 307 parts per trillion. That's over four times the 2016 EPA health advisory level, already at half the depth to the [public supply] wells. The wells are only 150 feet deep" (*id.*, Tr., at 13:1–22). (Exhibit 14 SCDHS PFAS Profile Well Analysis) (Also, Exhibit 15 SCWA Public Supply Wells Map).

81. The day before the hearing (after 5 p.m. on November 8), I happened upon and downloaded Federal Defendants' Response in Opposition to Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction. It contained a litany of unsupported claims (see Exhibit 16).
82. For some unexplainable reason, I had *not* received an email notifying me of the Federal Agency Defendant's filing.
83. In reply (on the morning of the hearing), I rebutted Federal Agency Defendants' false statements. Also, I provided the district court with Suffolk County Department of Health Services ("SCDHS") Groundwater Profile Analysis (Exhibit 14) and Suffolk County Water Authority ("SCWA") public supply well map near East Hampton Airport (Exhibit 15).
84. The district court judge acknowledged reviewing the documentation I had provided the morning of the hearing (incl. Exhibit 13 ITRC, PFAS Fate & Transport, 2018) — "I have reviewed all of the pleadings ... including those

that were filed ... this morning” (No. 22-5316, Doc. 1979239, Tr. Hearing, at 4:3–5).

85. Still, during the hearing, the judge did *not* recognize the evidence— the ITRC scientific publication by the PFAS Team (Exhibit 13), the SCDHS Groundwater Profile Analysis (Exhibit 14), or the SCWA public supply well map (Exhibit 15)— despite that I had provided the court with that evidence. The Groundwater Profile Analysis showed contamination (307 ppt) that is “over four times the 2016 EPA health advisory level, already at half the depth to the [public supply] wells. The wells are only 150 feet deep” (*id.*, at 13:1–22). Still, despite being presented with **actual contamination** (*not* the likelihood of but *existing* contamination), the judge responded— “So I’m trying to understand what is your evidence, your record evidence, about the likelihood of this contamination occurring? What expert has said it?” (*id.*, at 13:23–25). I was speechless.
86. The judge then turned to counsel representing SFW, Ms. Schneider, a lawyer, *not* a scientist, *not* an expert, who has *no* personal knowledge or experience of the PFAS contamination of Wainscott’s drinking water supply. Ms. Schneider proceeded to make a series of unsupported and conclusory statements—
- “[T]here’s no evidence at all in the record that diffusion is occurring. Again, the vast majority of the facility is not in groundwater, so it’s impossible for diffusion to be occurring if it’s not in groundwater.

Additionally, at the TJB [Transition Joint Box/Vault] where we did encounter the groundwater, all of the soil and water that was encountered was tested, and it's all below New York State standards. So, you know, because it's not in groundwater, because it's below New York State PFAS regulatory standards, and because there's no evidence of diffusion into the concrete, we don't think there's any irreparable harm here. And then finally, as you said, it can all be remediated to the extent it were to occur, which we don't think it's actually occurring. (*id.*, at 14:9–22).

87. SFW provided *no evidence* to support *any* of its claims (in ¶ 86 above).
88. Not long before SFW had made the unfounded claims (in ¶ 86 above), I had informed the judge of “information that South Fork Wind itself submitted during that hearing which clearly shows -- it is docket in this case 3-5 at page 7 [corrected, page 6]. It goes through in detail the impacts of diffusion [with PFAS contamination] specifically on concrete, which is exactly the same material that they have used in the duct banks and vaults” (*id.*, at 12:16–21). The judge did *not* ask SFW to explain the conflicting evidence where SFW claimed both that “no evidence at all in the record that diffusion is occurring” (in ¶ 85 above) and that “diffusion of contaminant mass into ... concrete may enhance the long-term persistence of PFAS in groundwater” (in ¶ 77 above).
89. SFW provided *no evidence* to support its claim that “the vast majority of the facility is not in groundwater” (*id.*). SFW's claim that “it's impossible for



diffusion to be occurring if it's not in groundwater" (*id.*) is incorrect. SFW provided *no* evidence to support its claim. Diffusion may occur near the air-water interface at the capillary fringe in unsaturated conditions— "By design, many PFAS preferentially form films at the air-water interface ... suggest[ing] that PFAS accumulates at water surfaces (Prevedouros et al. 2006). ... This preference for the air-water interface may also influence vadose zone transport, where unsaturated conditions provide significant air-water interfacial area" (Exhibit 13, at 7, last paragraph).

90. SFW repeatedly refused to disclose any authorized laboratory PFAS test results (performed in 2022) to support its claim that "all of the soil and water that was encountered was tested, and it's all below New York State standards" (*id.*). SFW did *not* say to which standards it was referring (groundwater or drinking water standards applicable to a sole-source aquifer such as that in Wainscott). When SFW asserted that "there's no evidence of diffusion into the concrete" (*id.*), it did not cite any study that it performed supporting the claim.

91. Without *any* scientific evidence to support *any* of its claims, SFW concludes—  
— "we don't think there's any irreparable harm here." The only support SFW offers is the judge's unquestioning support— SFW concluded, "as you said [referring to the judge], it can all be remediated to the extent it was to occur,

which we don't think it's actually occurring." We are left guessing whether "we" includes the judge.

92. On the one hand, the judge ignored objective evidence— "[W]hat is your evidence, your record evidence, about the likelihood of this contamination occurring? What expert has said it?" (*id.*, at 13:23–25). I had provided the judge with irrefutable evidence (see ¶ 82 above) that I also documented in my Reply to Federal Defendants' Response to my Motion for TRO and PI (Exhibit 12) that the judge acknowledged reviewing that morning. The judge had also received voluminous records provided by the NYS Department of Environmental Conservation and other agencies showing PFAS contamination exceeding regulatory limits in Wainscott (No. 22-5316, Doc. 1979671, *Kinsella Aff. I* ¶ 24).
93. On the other hand, the judge agreed with everything SFW's counsel said without questioning it, despite being conclusory, contradictory, and provided by an interested party with an apparent conflict of interest.
94. During the hearing, the district court limited its findings and reasoning to one narrow issue, the Project's impact on groundwater contamination, which was based on conclusory and self-serving statements by SFW's counsel. SFW's assertions were *not* based on fact.

## **H. BOEM did not consider PFAS**

95. BOEM did *not* investigate or evaluate the risk to public health from exposure to PFAS contamination.
96. BOEM did *not* consider the potential impact of SFW's concrete infrastructure on PFAS contamination and the drinking water supply in Wainscott.
97. BOEM did *not* evaluate the possibility of diffusion with concrete duct banks and vaults prolonging and exacerbating PFAS contamination.
98. BOEM did *not* perform site-specific testing for PFAS contamination within SFW's proposed construction corridor in Wainscott. "PFAS distribution in soils is complex, reflecting several **site-specific** factors such as total organic carbon (TOC), particle surface charges, and phase interfaces (see Section 3)" (Exhibit 13, at 10, last paragraph). Section 3 reads— "Downward leaching of PFAS in unsaturated soils during precipitation or irrigation events is **site specific** and occurs as a function of media and PFAS structural properties (*id.*, at 7, top right, blue dialogue box, third bullet point).
99. **The district court judge did *not* address the issue of why BOEM had *not* considered the diffusion of PFAS contaminants with concrete or PFAS contamination *at all*.**

**I. BOEM falsified ROD and FEIS**

100. In its Record of Decision (“ROD”), issued November 24, 2021 (Exhibit 1), and its Final Environmental Impact Statement (“FEIS”), published August 16, 2021 (Exhibit 2), BOEM fraudulently represented groundwater quality in Wainscott (No. 22-5316, Doc. 1979671, Kinsella Aff. I ¶¶ 93 – 110) and the socio-economic impact of SFW’s Project by omitting its cost of \$2.013 billion (*id.*, ¶¶ 166 – 199).

**J. SFW falsified its COP**

101. In its Construction and Operations Plan (“COP”), issued May 7, 2021 (Exhibits 03-1 through 03-5), SFW fraudulently represented groundwater quality in Wainscott (*id.*, Kinsella Aff. I ¶¶ 65 – 92) and the socio-economic impact of its Project by omitting the cost of \$2.013 billion (*id.*, ¶¶ 136 – 165).

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 Affidavit in Support of Emergency Motion for a Temporary Restraining Order and Preliminary Injunction dated January 10, 2023, are true to the best of my knowledge, information, and belief.

Sworn to before me this  
10th day of January 2023

  
\_\_\_\_\_  
David Fink, Notary Public

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](mailto:Si@oswSouthFork.Info)