

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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Case Caption: Simon V. Kinsella

v.

Case No: 22-5316

Bureau of Ocean Energy Management,

TRANSCRIPT STATUS REPORT

- Final - No transcripts are necessary for this appeal as the case was decided on the pleadings.
Final - All transcripts necessary for the appeal have been completed and received.

Interim Part I - The following necessary transcripts have been ordered but not received.

Table with 3 columns: Date, Type of Proceeding, Court Reporter(s). Row 1: 11/9/2022, Hearing on Motion for TRO and Preliminary Injunction, Tammy Nestor

Note: Transcript at 25:6-7 reads: "MR. KINSELLA: (Unintelligible) a government agency, Your Honor."

It should read: "MR. KINSELLA: You're just protecting the government agency, Your Honor."

Interim Part II - The following necessary transcripts have been completed and received.

Table with 3 columns: Date, Type of Proceeding, Court Reporter(s). Multiple empty rows for reporting completed transcripts.

Interim Part III - State below any additional comments regarding the preparation of the transcripts or the record on appeal which may delay the briefing of this case.

Horizontal lines for providing additional comments.

Notes: A copy of this report shall be served on each court reporter for which transcripts are outstanding. Please attach additional blank sheets, if necessary, and a certificate of service to this report.

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SIMON V. KINSELLA,

Plaintiff(s),

v.

BUREAU OF OCEAN ENERGY  
MANAGEMENT, et al.,

Defendant(s).

Civil Case  
No. 22-02147 (JMC)

Washington, D.C.

November 9, 2022

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PRELIMINARY INJUNCTION HEARING  
BEFORE THE HONORABLE JIA M. COBB  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF(S): Simon V. Kinsella, Pro Se

FOR BUREAU OF OCEAN ENERGY MANAGEMENT: Amanda Stoner, Esquire  
United States Department of Justice  
150 M Street Northeast  
Washington, D.C. 20002

FOR SOUTH FORK WIND: Janice M. Schneider, Esquire  
Stacey L. Van Belleghem, Esquire  
Latham & Watkins, LLP  
555 11th Street Northwest  
Suite 1000  
Washington, D.C. 20004

REPORTED BY: Tammy Nestor, RMR, CRR  
Official Court Reporter  
333 Constitution Avenue NW  
Washington, D.C. 20001  
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1 The following proceedings began at 1:01 p.m.:

2 THE COURTROOM DEPUTY: We are on the record in Civil  
3 Case No. 22-2147, Simon Kinsella versus Bureau of Ocean Energy  
4 Management, et al.

5 Counsel, would you state your name for the record  
6 starting with pro se plaintiff, please.

7 MR. KINSELLA: Simon Kinsella, plaintiff, pro se.

8 THE COURT: Good afternoon.

9 MR. KINSELLA: Good afternoon, Your Honor.

10 THE COURT: Okay.

11 MS. STONER: This is Amanda Stoner for the federal  
12 defendants, Your Honor.

13 THE COURT: Good afternoon.

14 MS. SCHNEIDER: Good afternoon, Your Honor. This is  
15 Janice Schneider with Latham & Watkins on behalf of Defendant  
16 Intervenor South Fork Wind. And with me is my colleague Stacey  
17 Van Belleghem.

18 THE COURT: Okay. Thank you.

19 So we are here on Mr. Kinsella's motion for a TRO.  
20 Just as a housekeeping matter, I will grant ECF 34, which is  
21 Mr. Kinsella's motion to amend the complaint, which he was free  
22 to do as a matter of course at this stage of the proceedings.  
23 So I'll reflect this on the docket after the call, but I will  
24 grant that so that the record is clear that when we are  
25 referring to -- to the extent we need to refer to any

1 allegations, we are all talking about the same operative  
2 complaint.

3 Second, there was a motion for summary judgment that  
4 was filed, ECF 20, by Mr. Kinsella. I had granted a request to  
5 stay briefing of that.

6 And, Mr. Kinsella, for the reasons that I am going to  
7 explain to you shortly, I am going to grant the defendant's  
8 request to strike that motion at this stage. It is premature  
9 given that the defendants haven't formally responded. So I  
10 think it's appropriate to strike that, and then at the  
11 appropriate time, you know, when this case gets to a point  
12 where it's time to brief dispositive motions, then you, of  
13 course, would be free to file whatever dispositive motions you  
14 think are appropriate.

15 Usually that happens at some point after the  
16 defendants formally respond. There will be a conference  
17 between you and the defendants to work out a briefing schedule  
18 so that everyone is on the same page about when any dispositive  
19 motions are filed and when the responses are filed.

20 So, again, it's without prejudice for you to file it  
21 in the future, but just so that the docket is cleaned up and  
22 that defendants don't have this outstanding obligation to  
23 respond to a motion for summary judgment before they've  
24 responded to the complaint or compiled a record, I think, is  
25 necessary as a housekeeping matter.

1           Okay. So now I am prepared to turn to the main focus  
2 of the hearing, which is Mr. Kinsella's motion for a TRO, and a  
3 preliminary injunction, which is ECF 35. I have reviewed all  
4 of the pleadings in the case including those that were filed  
5 yesterday and this morning. I am prepared to rule.

6           I will give the parties an opportunity to make some  
7 arguments during this hearing. Certainly it's happened before  
8 where I thought I was prepared to rule in one way, and  
9 something raised during a hearing persuaded me to either change  
10 what I was thinking or reflect a little bit more.

11           So depending on what happens after the argument, it's  
12 my intent to rule on the record and issue a short minute order  
13 memorializing that ruling after the hearing.

14           So, Mr. Kinsella, let me make sure that I am on the  
15 same page with you as the specific harms that you are  
16 contending are irreparable for purposes of this motion.

17           I understand the case at large may have additional  
18 arguments, but am I correct that in bringing this motion, you  
19 are concerned with alleged drinking water contamination from  
20 onshore drilling, impact on cod population and fish prices, and  
21 then other economic harms outlined in your motion? Am I  
22 correct about that?

23           MR. KINSELLA: I think the -- my arguments are  
24 three-pronged. You are correct on a couple of them, just  
25 unclear on the other one, that yes, the Atlantic cod population

1 is a time of -- restriction time issue. The diffusion into the  
2 concrete, which is an irreparable harm, that's the PFAS  
3 contamination. And the other issue is the expansion,  
4 surreptitious expansion, of the project that the public aren't  
5 aware of and that is a part of the plan and for which there has  
6 been no cumulative analysis whatsoever.

7 THE COURT: Okay. And so just as a preliminary  
8 matter, having reviewed the pleadings, I really want to focus  
9 on the drinking water contamination issue. From my perspective  
10 of the various harms in the complaint, that's really the only  
11 one that could potentially, you know, even arguably be in the  
12 neighborhood of an irreparable injury.

13 So I would like to focus our arguments and discussion  
14 today on this issue with the PFAS contamination.

15 If I could hear from Ms. Schneider about, just to  
16 clarify, what is the status of drilling now and is it under  
17 way? And, you know, if it's under way, is there even any  
18 reason to think that if I were to halt anything, that it would  
19 prevent an injury?

20 MS. SCHNEIDER: Thank you, Your Honor. The project  
21 has already mobilized and begun its prep work for the  
22 horizontal drilling, the HDD drilling, horizontal directional  
23 drilling. So that includes bringing highly specialized  
24 equipment that was reserved in advance of construction to the  
25 site at great expense, approximately \$40 million.

1           We have not yet actually started to drill. That is  
2 currently scheduled to begin tomorrow. But we have mobilized  
3 everything else. And so the jack up barge drill has sailed up  
4 from Louisiana and is currently at Bridgeport and will be  
5 transiting to the project site very soon. It's scheduled to  
6 arrive on the 15th.

7           We are on a very tight schedule. We are actually  
8 already behind schedule, and there's really no cushion for  
9 delay in the schedule. If we are not able to start on the 10th  
10 because of subsequent work subject to very strict time of year  
11 restrictions, limited -- and limited vessel availability, that  
12 could prevent the project from meeting its contractual power  
13 purchase agreement requirements which could result in millions  
14 of dollars in liquidated damages and ultimately jeopardize the  
15 project's over \$1 billion investment to date.

16           I will also note, Your Honor, that just standby --  
17 vessel standby costs alone are \$262,000 per day as well as the  
18 potential claims under our contracts with contractors who are  
19 expecting to get under way.

20           MS. VAN BELLEGHEM: I would just add, Your Honor, that  
21 the horizontal directional drilling that we are discussing does  
22 not affect the drinking water, which I think is a really  
23 important point. The harms that Mr. Kinsella alleges with  
24 respect to the public drinking water supply are with respect to  
25 the installation of the duct banks and vaults, which is

1 approximately 99 percent complete at this point.

2 THE COURT: Mr. Kinsella, do you agree with that  
3 argument, that the horizontal drilling is not what you are  
4 alleging impacts the issue with thing drinking water?

5 MR. KINSELLA: Not entirely, Your Honor. The  
6 horizontal directional drilling is not something that's not on  
7 shore. It starts on shore. It's -- I'm not quite sure of the  
8 exact measurements, but it's between 500 and a thousand feet  
9 perhaps, one and a half thousand feet inland from the beach.  
10 So you will have impact, obviously. They've got on standby at  
11 the moment, they've got frac tanks to handle the contamination  
12 and the contaminated water.

13 What I am hearing from the defendant South Fork Wind  
14 is they have known this about this contamination since 2017,  
15 and they have gone ahead and now they are saying, well, you  
16 can't stop us now because we have already started. They  
17 shouldn't have. And now they want to take advantage of their  
18 own wrongdoing, their own violations, and say, well, poor us,  
19 we have spent all this money, too bad for the residents that  
20 live around there that might suffer further contamination or  
21 will suffer further contamination and exposure.

22 There's got to be a point at which we say no, enough  
23 is enough. Holding these back for a temporary time, a few  
24 days, is not going to jeopardize a billion-dollar project as  
25 South Fork Wind claims it will. It may cost them a bit of



1 money but not in comparison to contaminating the water supply  
2 on which so many people depend.

3 This whole project is premised on improving the  
4 environment. I don't think it's unreasonable that we make sure  
5 that the environment is safeguarded, especially with something  
6 such as drinking water contamination. And we all know, I don't  
7 think it's in dispute, how harmful these contaminants are.

8 MS. SCHNEIDER: Your Honor, if I might respond?

9 THE COURT: Of course.

10 MS. SCHNEIDER: Thank you. Just to follow up on that,  
11 I think it's important to note that the project has, as  
12 Ms. Van Belleghem said, already completed approximately 98 to  
13 99 percent of the duct bank and vault work on the uplands,  
14 which is outside of BOEM jurisdiction. During that  
15 construction, the --

16 MR. KINSELLA: Objection, Your Honor.

17 THE COURT: I'm sorry, Mr. Kinsella. I am going to  
18 let Ms. Schneider finish, and I will give you an opportunity to  
19 respond. Okay?

20 MR. KINSELLA: Thank you.

21 THE COURT: Go ahead, Ms. Schneider.

22 MS. SCHNEIDER: Thank you, Your Honor.

23 During that construction, the project has not hit  
24 groundwater at any spot during the installation except at the  
25 trans bay, joint bay right at the beach, which are the pictures

1 that Mr. Kinsella shared in his pleadings.

2 So it's important to understand that the vast majority  
3 of this project is not in groundwater. And, of course, when  
4 you are right by the beach, it is not unexpected to run into  
5 some groundwater at depth.

6 It's also important to understand that that  
7 groundwater is a mix of salt water and fresh water. It is not  
8 drinkable water because we are right by the ocean.

9 So the potential for the project to exacerbate PFAS  
10 contamination really, we think, is quite speculative and  
11 unwarranted as a claim.

12 THE COURT: Okay. Mr. Kinsella, I will give you an  
13 opportunity to respond to that.

14 MR. KINSELLA: Thank you, Your Honor.

15 I just wanted to correct counsel for South Fork Wind  
16 on this whole BOEM doesn't have jurisdiction issue. It's very  
17 clear in the statutes and case law that BOEM does have  
18 jurisdiction on shore. It's in BOEM's guidelines. It's a part  
19 of the Outer Continental Shelf Lands Act. It mentions onshore  
20 facilities. There's no dispute that this is within BOEM's  
21 jurisdiction.

22 THE COURT: Is there a specific reason why you didn't  
23 move for an injunction against NYPSC?

24 MR. KINSELLA: Sorry, Your Honor, it took me a while.  
25 I did move for preliminary injunctions and things, and there is

1 a case -- I have two cases against the Public Service  
2 Commission, but they are still pending. I asked for a  
3 rehearing. I have asked for everything I can.

4 THE COURT: And while we are talking about other  
5 litigation, can you just clarify the relationship between this  
6 case and Mahoney and why you think that I should grant a TRO  
7 where my understanding is that EDNY had denied a request for a  
8 preliminary injunction.

9 MR. KINSELLA: Firstly, the cases are completely  
10 different. This case centers on the economics which were  
11 completely ignored. It centers on expansion of the project.  
12 It centers on Cox's Ledge. Even with regards to the PFAS  
13 contamination, it's a different issue.

14 My concern is not just the horizontal direction or  
15 drilling, but it's also the concern with the contamination in  
16 the cement. Once the contamination is embedded in the cement,  
17 how do you get it out? You can't. To say that it's repairable  
18 or even if they were to dig up the concrete duct banks and  
19 vaults, where would they put them, because it would still  
20 contain all the contamination.

21 This is why you don't do this in a contaminated area.  
22 It's rule number one in construction. You don't disturb  
23 contamination. But South Fork Wind blindly went ahead,  
24 misrepresented themselves in their applications to both the  
25 Public Service Commission and BOEM, and now he's claiming poor

1 us because we have spent all this money.

2 THE COURT: Okay. And, Mr. Kinsella, I have some  
3 additional questions for you. The reason I have more questions  
4 for you than the other side at this point is obviously it's  
5 your burden, so I don't want you to think I am picking on you  
6 unnecessarily. But, you know, I think, again, when I started  
7 my inquiry, to the extent I'm interested in anything, I think  
8 it's the drinking water issue with respect to any kind of TRO.

9 And I reviewed the EDNY's docket and pleadings, and  
10 there was a finding in that case, at least as I understand it,  
11 based on evidence submitted, that the PFAS contamination is, in  
12 fact, redressable. And so South Fork has represented that  
13 there are preventive measures in place. They have submitted  
14 expert testimony that, you know, to the extent there is a  
15 problem, it would be contained and redressable.

16 What is your, you know, evidence at this stage either  
17 supported by an expert or otherwise for me to reject the EDNY's  
18 findings, the expert witness who South Fork presented in  
19 support of its claim? What specific record evidence do you  
20 have to counter that?

21 MR. KINSELLA: Two points. One, the case in the  
22 Eastern District of New York, it essentially relied on the New  
23 York State Public Service Commission conclusion, and it  
24 parroted that conclusion from a non-cooperating state agency.  
25 But in that hearing, they did not consider on-site PFAS

1 contamination.

2 South Fork Wind intentionally waited for three years  
3 before testing the site. They waited until 15 days after the  
4 evidentiary record had closed to avoid scrutiny in the New York  
5 State Public Service Commission hearing.

6 So for them to say the hearing considered PFAS  
7 contamination, as a matter of fact, it did not consider PFAS  
8 contamination. And that is a matter of the record. They  
9 cannot dispute that.

10 Parties such as myself were prohibited from  
11 cross-examining that evidence, and it was engineered that way  
12 so it would avoid public scrutiny.

13 So they cannot rely on the Public Service Commission  
14 hearing conclusion that it considered PFAS contamination,  
15 because it did not.

16 And the second prong of the argument is information  
17 that South Fork Wind itself submitted during that hearing which  
18 clearly shows -- it is docket in this case 3-5 at page 7. It  
19 goes through in detail the impacts of diffusion specifically on  
20 concrete, which is exactly the same material that they have  
21 used in the duct banks and vaults. So they have installed the  
22 duct banks and vaults. They have admitted that it encroaches  
23 into groundwater, which it does. By the way, they denied -- in  
24 the BOEM final impact statement, BOEM denied that it would  
25 impact groundwater, which is clearly wrong.

1           So you've got the concrete lying in contaminated  
2 groundwater, and that groundwater through a process of  
3 diffusion is embedding itself into the concrete. But how do  
4 you get that contamination out of the concrete? You can't.

5           If it were in granulated activated carbon filtration,  
6 you could put it through a furnace at high temperatures and  
7 things like that. But once it's in concrete, you can't. It is  
8 by definition irreparable.

9           And even after you remediate a primary source at the  
10 airport, of which there is so much in the groundwater and the  
11 soil, even after that would be remediated, you would have  
12 concrete duct banks acting as a secondary source of  
13 contamination that would continue to contaminate the water  
14 supply and it would do that all the way up near the airport  
15 where the public supply wells are. And this is why it's so  
16 important to consider the profile analysis.

17           Suffolk County Department of Health Services did the  
18 analysis. It was limited only down to 75 or 80 feet, and yet  
19 they showed at that depth contamination of PFAS at 307 parts  
20 per trillion. That's over four times the 2016 EPA health  
21 advisory level, already at half the depth to the wells. The  
22 wells are only 150 feet deep.

23           THE COURT: So I'm trying to understand, what is your  
24 evidence, your record evidence, about the likelihood of this  
25 contamination occurring? What expert has said it? What --

1 MR. KINSELLA: South Fork Wind has said it, Your  
2 Honor.

3 THE COURT: They are saying that it's unlikely to  
4 occur, and if it does occur, it's containable.

5 Am I summarizing your expert? I know very crudely,  
6 but that's how I read the expert's statement. Am I correct,  
7 Ms. Schneider?

8 MS. SCHNEIDER: That's correct, Your Honor. I mean,  
9 there's no evidence at all in the record that diffusion is  
10 occurring. Again, the vast majority of the facility is not in  
11 groundwater, so it's impossible for diffusion to be occurring  
12 if it's not in groundwater.

13 Additionally, at the TJB where we did encounter the  
14 groundwater, all of the soil and water that was encountered was  
15 tested, and it's all below New York State standards.

16 So, you know, because it's not in groundwater, because  
17 it's below New York State PFAS regulatory standards, and  
18 because there's no evidence of diffusion into the concrete, we  
19 don't think there's any irreparable harm here.

20 And then finally, as you said, it can all be  
21 remediated to the extent it were to occur, which we don't think  
22 it's actually occurring.

23 MR. KINSELLA: Ms. Schneider, I'm sorry, but you have  
24 just contradicted yourself about three or four times. You have  
25 said that -- you have admitted that the concrete will be in

1 groundwater. You said not the entire route, but some of it  
2 will be in groundwater. Is that correct?

3 MS. SCHNEIDER: The vast majority of this project is  
4 not in groundwater, and therefore --

5 MR. KINSELLA: But some of it is.

6 MS. VAN BELLEGHEM: The other thing I will note is the  
7 aquifer here is very, very permeable and moving in the  
8 direction -- you know, water runs downstream in the direction  
9 of the ocean and to the pond, right? It will run to the path  
10 of least resistance. It's not pressing up against a concrete  
11 structure in any way like the example that Mr. Kinsella uses in  
12 his papers where the PFAS was used in a firefighting material  
13 that was directly applied again and again and again and again  
14 and again and again at high volume to the concrete. That is  
15 not what even potentially is happening here.

16 And as Ms. Schneider said, the one place where  
17 groundwater was encountered, the one place, the TJB, it was  
18 tested and below the regulatory standards.

19 MR. KINSELLA: If that was true, why weren't any of  
20 these test results made public in all the 2022 test results  
21 that have been concealed from public scrutiny and they were  
22 concealed from BOEM? South Fork Wind did not provide any of  
23 these test results to BOEM or the public. So how do we know  
24 what you are saying is true? I mean the original test you did,  
25 you were testing to avoid the PFAS contamination, and then



1 after I brought that to everybody's attention, after that,  
2 South Fork Wind decided not to disclose any further testing.

3 MS. VAN BELLEGHEM: The test results, Your Honor, were  
4 provided to the Public Service Commission, the New York -- and  
5 to the -- I'm sorry, to the New York State Department  
6 Environmental Commission. These are the agencies with  
7 jurisdiction. They were provided.

8 MR. KINSELLA: But BOEM has not -- you have not --  
9 BOEM has not received any information on PFAS contamination  
10 whatsoever, and it has a statutory obligation to oversee the on  
11 shell component as a matter of law.

12 THE COURT: Mr. Kinsella, I understand -- I think your  
13 argument about this retroactive reliance is interesting on the  
14 merits, but I have to decide based on the record before me  
15 whether there's irreparable injury that rises to the level that  
16 I would halt this project, you know, at this juncture.

17 So why can't I consider, even if you would argue down  
18 the line for your APA claim that, you know, let's say BOEM has  
19 jurisdiction and they didn't consider these issues, I want to  
20 focus on the irreparable injury part and the evidence in the  
21 record before me that suggests that this is both likely to  
22 happen and that if this contamination occurred, it's unlikely  
23 that it would be able to be contained or redressed.

24 I understand your other arguments, you know, for  
25 your --

1 MR. KINSELLA: I understand. I get it, yeah.

2 Your Honor, it's definitely going to occur. I mean,  
3 it can't not occur. You've got these duct banks. I know three  
4 places, four places where they intersect with the groundwater,  
5 keeping in mind also that the groundwater level changes. Down  
6 near the beach, it changes up to 5 feet. Up near the airport,  
7 it changes up to 7 or 8 feet. So at different times, the  
8 bottom of the duct banks are going to be saturated with  
9 contaminated water, and it's going to diffuse into that  
10 concrete. This is a matter of fact.

11 South Fork Wind submitted the evidence that says, that  
12 specifically states that PFAS contamination diffuses into  
13 concrete. There's no dispute about that. South Fork Wind is  
14 just hiding the information and saying no, it's not going to.  
15 Of course it's going to. And it's going to probably do so down  
16 near the beach but also up near the airport where those public  
17 supply wells are. And all I'm asking is for time to sit down  
18 with South Fork Wind and try and come to a resolution before  
19 they let this continue.

20 THE COURT: Okay. And again, in the record before me  
21 or even in, you know, the record before the EDNY, if I wanted  
22 to look and confirm that there is some evidentiary support in  
23 the record for what you are contending, where would I look? Is  
24 there a declaration, **an expert witness?**

25 MR. KINSELLA: It's in this case, Your Honor. If you

1 look in this case, ECF 3-5, page 7.

2 THE COURT: Just a second. All right. Page 7.

3 MR. KINSELLA: Down at the bottom. I may have  
4 highlighted it.

5 No. Sorry. Hang on.

6 THE COURT: Okay. I see what you are -- am I right  
7 this is generally -- this is not any expert specific to this  
8 case who has indicated what is likely to happen in this case?  
9 This is kind of spelling out various adverse consequences that  
10 can occur and the factors that influence the migration of PFAS,  
11 but it's not the same as having an expert who's looked at this  
12 record because something can happen in general or that  
13 something, you know, can be strongly impacted by something  
14 doesn't tell me that in this case I could make a finding of  
15 irreparable harm.

16 But let me ask you this, Mr. Kinsella, before I move  
17 forward. You made the point about just wanting some time to be  
18 able to talk to South Fork to try to reach some resolution.  
19 And they have made an argument that this kind of dispute about  
20 this project has been going on for years and that you are only  
21 recently filing for a TRO kind of cuts against you when I  
22 balance equities. And I want to give you an opportunity to  
23 respond to that before I issue a ruling.

24 MR. KINSELLA: Thank you, Your Honor. I have been  
25 trying to talk with South Fork Wind about these issues since

1 2019; hence, all the cases and things. Their argument that  
2 this is all new and, you know, I waited for so long is  
3 completely false.

4           Firstly, you know, this nine months issue, I have been  
5 running with three other cases. A lot of that time is actually  
6 spent trying to find counsel to represent me in this case,  
7 which I think as everyone knows, I am not a lawyer. And so a  
8 lot of time has been consumed with that.

9           The whole idea that South Fork Wind can go ahead and  
10 do whatever it wants in violation of laws and cause irreparable  
11 damage to the environment including groundwater just because  
12 one litigant is busy with other cases against South Fork Wind  
13 and not keeping the pressure on one particular case in a timely  
14 manner is an untenable argument. It's not true, Your Honor.

15           THE COURT: Okay. I think that I am prepared to rule.  
16 And again, I have read everything. And, Mr. Kinsella, I  
17 understand that you have invested a lot of your personal time  
18 in this and that this is a matter that's very important to you,  
19 but a TRO is really an extraordinary remedy. It's among the  
20 most extraordinary things I can do. I have to make a finding  
21 not only of a substantial likelihood of success on the merits,  
22 but that you would suffer an irreparable injury if I granted it  
23 so much so that it can't even wait for the brief period of, I  
24 think, 14 days is how long the TRO would even be in effect.

25           MR. KINSELLA: Well, they said they are starting to

1 drill tomorrow.

2 THE COURT: I understand that. But I also have to  
3 show that an order would not interest -- injure, excuse me,  
4 other interested parties and that it furthers the public  
5 interest.

6 So I think I have already put my findings on the  
7 record about my view that harms to the local cod population and  
8 the other economic harms that are described in the briefing  
9 such as increased energy prices, I don't find those to be the  
10 type of immediate or irreparable injuries that would warrant a  
11 TRO.

12 I did carefully consider the issue about contaminants  
13 in drinking water because if I were convinced that the project  
14 that was to start tomorrow would likely result in harm to the  
15 population that is relying on well water in the area, that  
16 would be very concerning to me. But again, this says nothing  
17 about the ultimate -- you know, what might ultimately come out  
18 in the case. But what is before me now, I can't find  
19 irreparable injury.

20 I don't have evidence that the contamination will  
21 occur with respect to this project that's starting tomorrow,  
22 let alone immediately or that it would be irreparable. I have  
23 reviewed South Fork's declaration to show that the risk of  
24 contamination was seriously considered during the NYPSC review  
25 process. I certainly understand the retroactive reliance

1 argument. It's an interesting argument. But I have to look at  
2 what's before me in terms of determining irreparable harm.

3 They have also submitted evidence about precautions  
4 that are being taken and that even if the harm occurs, it is  
5 redressable. And I don't see any evidence in the record from  
6 an expert or someone else who testified by declaration who's  
7 connected to the project that can offer anything other than  
8 conclusory statements but not any type of evidence that I think  
9 matches the evidence that South Fork has put forward.

10 I do consider the harms to South Fork and the economic  
11 harms that Ms. Schneider outlined if construction was to be  
12 delayed particularly after so many years of what appears to  
13 have been a very involved licensing and planning process. And  
14 I don't think that the equities support stepping in to overrule  
15 the results of such a long process that occurred, from my  
16 count, across nearly a dozen agencies unless I had really  
17 compelling clear expert testimony or record evidence of a  
18 substantially severe harm on the other side.

19 And again, I'm not suggesting that contaminated water  
20 in and of itself is not a severe harm. That's why I zeroed in  
21 on that in reviewing it. I'm just saying that for the  
22 extraordinary remedy that a TRO is, the evidence I have to have  
23 before me, I have to have something to point to that is  
24 specific to this case that counteracts South Fork's evidence,  
25 and I just don't have that.

1 MR. KINSELLA: Your Honor, before you rule, could I  
2 just say something?

3 THE COURT: If I could just finish my ruling, and then  
4 you can say whatever you need to say.

5 MR. KINSELLA: I wanted to say it before you ruled on  
6 it.

7 THE COURT: Okay. Go ahead. I am ruling, but go  
8 ahead.

9 MR. KINSELLA: The first couple of lines of my  
10 submission this morning are just as important, and there was an  
11 exception in the high court which said, and I will read it here  
12 as a matter of the record, that the injury, in fact,  
13 requirement has been satisfied by congressional conferral upon  
14 all persons, but it noted one exception, a case where concrete  
15 injury has been suffered by many persons as in mass fraud.

16 So you have the public interest in keeping the  
17 integrity of the Court at stake. The Court cannot be seen to  
18 be making a ruling that is essentially inequitable and  
19 furthering the harm, and that's what a ruling today will be  
20 doing. You will be ruling in favor of the wrongdoer and  
21 furthering --

22 THE COURT: And, Mr. Kinsella --

23 MR. KINSELLA: -- the harm to the plaintiff.

24 THE COURT: I did read your response, and I just want  
25 to make clear, with respect to the first couple of paragraphs,

1 I have not said anything about standing or suggested that you  
2 don't have standing to bring this motion. So I just want that  
3 to be clear. That's not the basis for my ruling. I am  
4 weighing the TRO factors.

5 And, again, this is an extraordinary remedy, and I am  
6 constrained. I can't just grant TROs willy-nilly. I have to  
7 really have concrete evidence of a substantial likelihood on  
8 the merits, and I have to find irreparable harm.

9 So that means a certain likelihood that whatever you  
10 are alleging is going to happen will happen as well as that if  
11 it were to happen, that it can't be redressed or contained.

12 On one hand, I have a project. There is another court  
13 that denied a motion for a PI. It's been through countless  
14 proceedings and licensing proceedings, and again, that's not  
15 dispositive to me, but I am just laying the framework of what's  
16 happening here. And I have in this record expert testimony  
17 that answers both of those questions. But I don't have an  
18 expert on the other side or anything specific to say that these  
19 experts shouldn't be relied upon, that their findings are  
20 not -- are overly conclusory, that their findings are  
21 inaccurate.

22 I know you believe they are inaccurate, but I have to  
23 have something to point to. It's not just you may win. It's a  
24 substantial likelihood. It's a very high standard. So I'm  
25 compelled to deny the motion for a TRO. Again, I have not



1 reached any larger question about your standing. I think  
2 that's an argument that's more appropriately addressed, you  
3 know, if the defendants were to file a motion to dismiss, but  
4 I'm not needing to address that for purposes of this hearing.

5 So another factor, and I told the parties I wanted to  
6 deal with the motion to transfer, is that I've reviewed the  
7 parties' arguments, and I am going to issue a written opinion  
8 on that motion, and it will also explain why I am not ruling on  
9 the motion for a PI today. Because after considering the  
10 arguments, I am going to grant the request to transfer this  
11 case to EDNY, which is ECF 11.

12 Again, I don't think anyone is suggesting that this is  
13 not an appropriate forum. So venue is proper here. I'm not  
14 suggesting it isn't. But I have to evaluate transfer based on  
15 certain public and private interest factors as required by DC  
16 Circuit precedent.

17 And again, a written opinion that lays out very  
18 specific detail in my findings will issue shortly, but the most  
19 significant factors were the local interest and having a local  
20 controversy decided near home. And the fact that the  
21 transferee court is already dealing with another case, that  
22 while I understand there's differences, it's challenging the  
23 same project, it's raising many of the same harms, and quite  
24 frankly, it has greater expertise with this case than I do. I  
25 had to dig into it for the motion for a TRO, but that case was

1 filed first, and it makes sense to me that this case would be  
2 resolved by the same court.

3 I think it's important to ensure consistent results.  
4 I think it would not be good and it would be an unworkable  
5 situation --

6 MR. KINSELLA: (Unintelligible) a government agency,  
7 Your Honor.

8 THE COURT: Okay. Let me finish my ruling. I think  
9 it would be -- helping to ensure consistent results I also find  
10 is in the interest of justice.

11 The factor that did weigh in Mr. Kinsella's favor was  
12 I did credit his preference for forum. But in the absence of  
13 other significant factors weighing against transfer, I  
14 determined that the public interest outweighs Mr. Kinsella's  
15 preference.

16 So again, Mr. Kinsella, I understand you have been  
17 very invested in this. I know you don't like my ruling. That  
18 is my ruling. I will issue a minute order memorializing my  
19 findings on the TRO. I will issue a full written opinion that  
20 explains in great detail for all parties why I believe that  
21 this case is appropriately transferred to EDNY, and I will --  
22 when the case is transferred, I have not ruled on the motion  
23 for preliminary injunction. So, Mr. Kinsella, you are free to  
24 raise your PI motion with the transferee court if you choose to  
25 do so.

1 Okay. So that's all I have. Again, you will be  
2 getting orders shortly that memorialize my rulings. All right.  
3 So if there's nothing else, thank you and have a great day.

4 MR. KINSELLA: Thank you, Your Honor.

5 MS. SCHNEIDER: Thank you, Your Honor.

6 (The hearing concluded at 2:43 p.m.)

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8 C E R T I F I C A T E

9  
10 I hereby certify that the foregoing is an  
11 accurate transcription of the proceedings in the  
12 above-entitled matter.

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14  
15 12/8/22

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