UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIMON V. KINSELLA *Plaintiff,* v. BUREAU OF OCEAN ENERGY MANAGEMENT; DEB HAALAND, Secretary of the Interior, U.S. DEPARTMENT OF THE INTERIOR; MICHAEL S. REGAN, Administrator, U.S. ENVIRONMENTAL PROTECTION AGENCY; SOUTH FORK WIND LLC; *Defendants,* LONG ISLAND POWER AUTHORITY; *Nominal Joinder Parties*	:	Civil Action No.: **22-cv-02147 (JMC)**

Plaintiff's Response to Defendant Federal Agencies Memorandum in Opposition to Motion for Emergency TRO

Defendant Federal Agencies assert that Plaintiff cannot show an injury in fact. The Supreme Court, in rejecting the view that "the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons " (*Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 (1992)), noted an exception – "a case where concrete injury has been suffered by many persons, as in mass fraud [emphasis added]" (*id.*). The instant matter represents precisely that, as Plaintiff has made clear in his particularized allegations of fraud against Defendants.

> Making a claim of fraud in equity … does not require showing a particularized injury— as it "involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard

> the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."
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> *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 246 (1944).

In addition, Plaintiff can also establish standing— "[i]n environmental cases, plaintiffs can demonstrate their standing by showing they do or intend to use the relevant environment for, inter alia, fishing, camping, swimming, and bird watching; they may also show that property rights are less valuable as a consequence of the challenged actions" (*Friends of the Earth Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 181–84, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).) Plaintiff swims, sails, jogs, etc., in the waters surrounding the onshore construction corridor that 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 primary source is remediated, the concrete duct banks and vaults will remain and become a secondary source that will continue to release PFAS contamination. 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).

Regarding jurisdictional issues, Defendant Federal Agencies assert that Defendant Bureau of Ocean Energy Management ("BOEM") "has not authorized the onshore portions of

South Fork Wind Project where Plaintiff alleges that PFAS contamination will be exacerbated [emphasis added]" (Federal Defendants' Response in Opposition to Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction ("Fed. Def. Resp. in Opp. to TRO"), at 1, second paragraph), ignoring that the Outer Continental Shelf Lands Act expressly includes "orderly development" (43 U.S. Code § 1332(3)) such as "activities … including geophysical activity, drilling, … and operation of all onshore support facilities [emphasis added]" (43 U.S. Code § 1331(l)). In so doing, Defendants contradict their own record of decision ("ROD") that unambiguously avers its "action is needed … to make Outer Continental Shelf (OCS) energy resources available for … orderly development, subject to environmental safeguards (43 U.S.C. § 1332(3)) [emphasis added]" (ROD, at 1, PDF 3, third paragraph). Where Defendants' "action is needed … for … orderly development" that includes "all onshore support facilities[,]" and Defendants have "not authorized the onshore portions" then, by their own admission, South Fork Wind cannot proceed with "orderly development" (without authority). If BOEM "has not authorized the onshore portions[,]" this court has no option but to grant Plaintiff's Emergency Motion for TRO on the grounds that Defendant BOEM never authorized or has withdrawn its authorization for the onshore section of the South Fork Wind project. Accordingly, Plaintiff respectfully requests that his Motion for Emergency TRO be granted.

Regarding Cox Ledge on the Outer Continental Shelf, Defendants claim that "Plaintiff has offered no evidence to show that the market would not adjust or accommodate for a diminished regional harvest" (citing *Swanson Group Mfg. LLC v. Jewell*, 790 F.3d 235, 243 (D.C. Cir. 2015)) "(finding that plaintiffs had failed to meet their burden of showing that their economic losses were attributable to the agencies' action, as opposed to poor market conditions)"

(Fed. Def. Resp. in Opp. to TRO"), at 19, PDF 27, third paragraph). But the case of *Swanson Group Mfs* is easily distinguishable. In that case, the "timber … [was] not the company's sole source of supply" and it could purchase timber elsewhere. On the hand, in the instant matter, "Atlantic cod spawning on Cox Ledge have recently been identified as genetically distinct from other spawning groups" according to NOAA National Marine Fisheries Service letter of June 7, 2021 (see ECF No. 34-7, at 11, first paragraph). Thus, "[b]ased 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" (see ECF No. 35-5, at 1, first paragraph), which would affect the sole source of supply for that "genetically distinct" spawning group, and therefore, effect the market price.

Defendants assert that "BOEM's Final Environmental Impact Statement ["FEIS"] contains a thorough and robust examination of all relevant environmental and socio-economic factors [emphasis added] (*id*. third paragraph). On the contrary, Defendants' (so-called) "environmental and socio-economic" review ignores the environment (PFAS contamination and Cox Ledge Essential Fish Habitat) and the economy ($2 billion cost impact), and over one million residents/ratepayers who have the burden of paying for South Fork Wind. Defendants refer to "BOEM's well-reasoned analysis" (*id.*), but there is no analysis of PFAS contamination or economic impact (of $2 billion), let alone a reasoned one. It simply is *not* there. Defendants claim that its FEIS "contains a thorough and robust examination," but that claim does *not* withstand cursory scrutiny and is contrary to fact.

Defendants retroactively rely on the New York State Public Service Commission

("NYSPSC") Article VII review, stating that "the NYPSC, 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." But the NYSPSC was *not* a cooperating agency.

Defendant BOEM's 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]." Conspicuously absent are *any* New York State agencies, including the NYSPSC, a non-cooperating state agency. Moreover, Defendant Federal Agencies did *not* consider, analyze or incorporate by reference information from the NYSPSC in its review on PFAS contamination or project cost. How could it? Neither onsite PFAS contamination nor project cost was considered during the NYSPSC hearing. South Fork Wind first tested onsite soil and groundwater on December 23, 2020,[1] fifteen days *after* the NYSPSC evidentiary record had closed (on December 8, 2020), and 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."[2]

Plaintiff provided Defendant BOEM with clear substantive evidence sufficient to rebut the presumption of regularity attached to the NYSPSC's grant of Article VII certification pursuant to N.Y. Public Service Law, but BOEM ignored it.

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

Irrespective of a questionable (non-cooperating) state agency review (which is likewise the subject of multiple ongoing legal challenges), BOEM is *not* relieved of its statutorily mandated obligations pursuant to the National Environmental Policy Act or Outer Continental Shelf Lands Act (and their respective implementing regulations).

Defendants claim that "Plaintiff has not shown that the harm would be irreparable" (Fed. Def. Resp. in Opp. to TRO, at 12, PDF 20, last paragraph). On the contrary, in 1987 the Supreme Court held that –

> "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Production Co. v. Gambell*, 480 U.S. 531, 545 (1987)

Here, the environment includes a sole-source aquifer upon which thousand of residents rely daily for their drinking water. Six public supply wells are within one mile of the onshore construction corridor (see ECF No. 46-1). Of the six, the following three public supply wells draw water from the Upper Glacial Aquifer –

Town Line Road Well No. 2 (S-120019)	178 feet deep
Stephen Hands Paths Wells 1 and 2	148 feet deep

In May 2018, the Suffolk County Department of Health Services performed a "Profile Analysis" of wells proximal to South Fork Wind's onshore construction corridor. Notably, PFAS contamination (PFOS) was detected at the lowest depths of the analysis, at 75-80 feet. The highest level of PFAS contamination (PFOS) was 307 ppt (see ECF No. 46-2, at 5), which is more than four times the 2016 Environmental Protection Agency Health Advisory Level (of 70

ppt). Although the profile analysis did not examine groundwater at lower levels, the analysis proves that PFAS contamination penetrates deep into the aquifer and may affect public supply wells in time. These harms "demonstrate that irreparable injury is likely in the absence of an injunction." *Winter v. National Resources Defense Council, Inc.*, 555 U.S. 7 (2008) at 22. Given that PFAS chemical compounds do not readily break down in the environment, hence their name, 'forever chemicals,' the environmental injury is analogous to that deemed irreparable in *Amoco Production Co. v. Gambell*, *supra,* i.e., "permanent or at least of long duration" (480 U.S. at 534). It is also irreparable because "there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied" (*Leroy v. Hume*, ___ F. Supp. 3d ___, 2021 WL 4350502 4 (E.D.N.Y. Sept. 24, 2021 * 4).

In an analogous case, the court granted a preliminary injunction where a plaintiff presented evidence that ongoing excavation of sand, topsoil, and vegetation within 15 feet of Long Island's sole source aquifer presented "irreparable risks of contamination of drinking water supplies" (*Town of Brookhaven v. Sills Road Realty LLC,* 2014 WL 2854659, E.D.N.Y. June 23, 2014, at *7). That is, "absent preliminary relief, irreparable harm will result from defendants' activities." *Id*. Moreover, courts have recognized that "the threatened introduction of contaminants into drinking water, even if not in actual violation of applicable drinking water standards, is itself plainly significant." *United States v. 27.09 Acres of Land*, 760 F. Supp. 345, 353 (S.D.N.Y. 1991); see also *id*. at 354 (granting a preliminary injunction in that light and because "[o]nce begun," construction "cannot be undone"). Plaintiff are likely to suffer irreparable harm in the absence of a TRO.

League of Women Voters of United States v. Newby, 838 F.3d 1, 12 (D.C. Cir. 2016).

"[T]here is a substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations.' " Id. (quoting *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994)); see also *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 997 (8th Cir. 2011) (agreeing in a NEPA case that "an injunction was in the public interest because it would convey to the public the importance of having its government agencies fulfill their obligations and comply with the laws that bind them [cleaned up]"). Here, Defendants violated the APA by engaging in decision-making that was arbitrary and capricious and contrary to law. Those actions do not serve the public interest and are rightly enjoined.

Finally, the benefits of safeguarding the vital interests described above easily outweigh any harm that may result from granting Plaintiff's request for an emergency TRO. In weighing the equities, a court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. National Resources Defense Council, Inc.*, 555 U.S. 7 (2008) at 24. In the context of this case, that means asking whether it serves Plaintiff's and the public's interests to temporarily delay the South Fork project while Defendants comply with the Federal Law and work with Plaintiff to adequately assess possible resolutions to the project risk irreversibly contaminating the drinking water supply with harmful substances and causing irreversible population-level harm to Atlantic co on Cox Ledge.

Plaintiff respectfully requests the court to grant his Motion for Emergency RTO.

Date: November 9, 2022

Respectfully submitted,

Si Kinsella

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