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Office of Disciplinary Counsel
District of Columbia Court of Appeals
515 5th Street, N.W., Building A, Suite 117
Washington, DC 20001

Sent via email and online submission
Email: odcinfo@dcodc.org
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Re: Violations by Latham & Watkins' Partners of
District of Columbia Bar Rules of Professional Conduct

Dear Mr. Fox,

Words matter. They have consequences, more so when they carry the weight of professional authority. The instant matter concerns three partners of Latham & Watkins LLP,¹ who represent Defendant-Intervenor South Fork Wind LLC (“SFW”), opposing Plaintiff Simon Kinsella (me), a *pro se* litigant.

The partners of Latham & Watkins abused their position of authority by knowingly making false statements² and, relying on their professional standing, passing off their conclusory statements as facts. The partners take opportunistic advantage of a presumption that they comply with the District of Columbia Bar Rules of Professional Conduct. On the contrary, their legal submissions (as described below) violate those Rules and bring disrepute to the legal profession. Their vexatious statements have caused undue hardship and additional expense and serve no purpose other than to interfere with due process and frustrate a *pro se* litigant.³ In addition, their false statements concern harmful PFAS contamination of a sole-source aquifer that thousands of people rely on daily for drinking water. Thus, the lawyers' words are not only false but reckless. Furthermore, the partners' actions aided in assisting SFW in fraud.⁴

The Rules Governing the District of Columbia Bar mandate that members comply with the Rules of Professional Conduct and “[a]cts or omissions by an attorney, ... which violate the ... rules ... shall constitute misconduct and shall be grounds for discipline” (Rule XI, §§ 1–2).

¹ Latham & Watkins LLP, 555 11th Street N.W., Suite 1000, Washington, D.C. 20004

² In violation of the Rules of Professional Conduct, Rule 3.3(a)(1)

³ See Kinsella Affidavit III CONFIDENTIAL (sealed) (marked as Exhibit H).

⁴ In violation of the Rules of Professional Conduct, Rules 1.2(e), 3.3(a)(2), 8.4, and 1.16(a).

According to the D.C. Bar Association Rules of Professional Conduct, Rule 8.4, “[i]t is professional misconduct for a lawyer to: (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; [or] ... (c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation[.]” Pursuant to those Rules, I respectfully request that the Board on Professional Responsibility discipline the following partners at Latham & Watkins LLP (collectively “L&W Partners”)—

Janice M. Schneider (D.C. Bar No. 472037)
Stacey L. VanBelleghem (D.C. Bar No. 988144)
Devin M. O’Connor (D.C. Bar No. 1015632)

Ms. Schneider is Lead Counsel representing SFW in *Simon Kinsella v. Bureau of Ocean Energy Management et al.*⁵ Ms. Van Belleghem and Ms. O’Connor are 2nd and 3rd Counsel, respectively.⁶

In the district court, the L&W Partners knowingly made false statements of material fact *and* law in their Memorandum in Opposition to Emergency Motion for a Temporary Restraining Order and Preliminary Injunction.⁷ Their false statements were corrected at the time,⁸ but the partners failed to reflect those corrections in their legal submissions. Instead, the partners repeated the untruthful information on appeal in their Response in Opposition to Emergency Motion for a Temporary Restraining Order and Preliminary Injunction.⁹ Simply put, the three partners of Latham & Watkins LLP lied to the U.S. Court of Appeals. Their lies assisted SFW in perpetrating fraud.

1) L&W Partners Lies Re: PFAS Contamination

In the U.S. District Court for the District of Columbia, the L&W Partners knowingly made the following false statements regarding the state review of SFW’s project¹⁰—

The PFAS allegations at the heart of Plaintiff’s claims were also considered and rejected by the New York State Public Service Commission (“NYSPSC”) twice after extensive evidentiary proceedings [Exhibit B, DDC Case 1:22-cv-02147, ECF No. 40-1, at 3, PDF 9].

The NYSPSC Article VII conditions comprehensively cover the potential PFAS issues [*id.*, at 30, PDF 36].

⁵ See U.S. District Court for the District of Columbia (DDC), Case 1:22-cv-02147, filed July 20, 2022. *Also, see* U.S. Court of Appeals for the District of Columbia Circuit (D.C. Cir.), No. 22-5316/7, filed November 30, 2022.

⁶ See USCA, No. 22-5316, Doc. 1978475, Entry of Appearances (marked as Exhibit A).

⁷ See DDC Case 1:22-cv-02147, ECF No. 40-1 (marked as Exhibit B).

⁸ See DDC Case 1:22-cv-02147, ECF No. 44 (marked as Exhibit C).

⁹ See USCA, D.C. Cir., No. 22-5316, Doc. 1982288 (marked as Exhibit D).

¹⁰ Pursuant to Article VII of NY Public Service Law before the New York State Public Service Commission (“NYSPSC”), Case 18-T-0604.

Environmental matters and the allegations of exacerbating existing PFAS contamination were discussed throughout the Article VII process [*id.*, at 8, PDF 14].

The heart of the PFAS-related claims concerns the lack of examination and the refusal to admit *any* PFAS soil or groundwater test results within SFW’s proposed construction site during the federal or state review. Without submitting evidence of onsite PFAS contamination, issues such as the process of diffusion of PFAS contaminants into concrete could *not* have been considered.

The L&W Partners’ statements were corrected as follows (in the district court)—

Much like the selective environmental review ..., the NYSPSC Article VII review was similarly manipulated. For example, the NYSPSC evidentiary record closed on December 8, 2020, and just fifteen days later (on December 23, 2020), [the] Developer [SFW] took the first sample to test groundwater for PFAS contamination.² Although Suffolk County issued a Water Quality Health Advisory concerning PFAS contamination in Wainscott in October 2017, South Fork Wind waited three years until the Public Service Commission evidentiary record closed (on December 8) before testing its planned construction corridor for contamination. By delaying, South Fork Wind avoided formal environmental review of any testing of soil or groundwater for PFAS contamination taken from *within* its proposed construction corridor. South Fork Wind avoided environmental review of onsite PFAS contamination in the NYSPSC Article VII review and BOEM’s review.

[Footnote 2:] <https://ehamptonny.gov/DocumentCenter/View/12142/Table-3---LIRR-PFAS-Samples> [*id.*, Exhibit C, DDC Case 1:22-cv-02147, ECF No. 44, at 9].

The partners repeated similarly false statements regarding groundwater PFAS contamination but in reference to BOEM’s federal review, specifically about the Final Environmental Impact Statement (“FEIS”)¹¹ for SFW’s project—

The FEIS ... also recognizes that sampling near the East Hampton Airport has detected PFAS in the “soil and groundwater within and around the site.” *Id.*, at H-23.” [*see* Exhibit C, DDC 1:22-cv-02147, ECF No. 40-1, at 30, PDF 36].

Contrary to the partners’ false statements, the FEIS does *not* recognize PFAS in the soil and groundwater *within* or *around* the site (regardless of whether the “site” refers to East Hampton Airport or SFW’s proposed construction site). The FEIS reads— “Sampling at the fourth site, NYSDEC #152250 [the 610-acre East Hampton Airport site], has indicated the presence of perfluorinated compounds.”¹² The FEIS does *not* state whether the contamination exists in “soil or

¹¹ See USCA No. 22-5316, Doc. 1980954, Exhibit 2, FEIS. *Also, see* BOEM.gov, FEIS available online here—<https://www.boem.gov/renewable-energy/state-activities/sfwf-feis>.

¹² Perfluorinated compounds is an outdated term for “PFAS” (per/- and polyfluoroalkyl substance) contamination.

groundwater” (or concrete infrastructure, building materials, or anything else). The FEIS only claims that “[s]ite-related compounds have been identified in soil and groundwater within and around the site [emphasis added]” (FEIS at H-23, PDF 655, 2nd ¶). BOEM explicitly uses the phrase *site-related compounds*, which could be *any* compound onsite, including naturally occurring safe compounds such as calcium or sodium. The FEIS does *not* recognize *any* sampling that “detected PFAS” in groundwater; it *only* acknowledges site-related compounds. The partners of Lathan & Watkins provided false information.

[T]he FEIS appropriately incorporated the many testing, handling, and treatment requirements of the Article VII Order from the NYSPSC proceeding. *Id.*, at A-3. [see Exhibit C, DDC 1:22-cv-02147, ECF No. 40-1, at 30, PDF 36]

[T]he BOEM FEIS ... concluded that, with implementation of the conditions imposed by the NYSPSC and incorporated into the COP, the SFEC-Onshore does not present a risk of causing PFAS contamination in groundwater. [*id.*, at 31–32, PDF 37–38]

BOEM’s Record of Decision (“ROD”) lists all “[c]ooperating state agencies” (*see* ROD, at 1, PDF 3).¹³ No agency from New York State cooperated with BOEM “during the development and review” (*id.*) of the FEIS. The FEIS did *not* consider, analyze or incorporate by reference *any* information on PFAS contamination from NYSPSC’s review. How could it? The NYSPSC did *not* consider onsite PFAS contamination during the state evidentiary hearing.

[T]he BOEM FEIS *did* thoroughly discuss PFAS contamination [*id.*, at 31, PDF 37]

The FEIS addresses PFAS issues and concludes that with application of state law requirements “all activities would meet permit and regulatory requirements to continue protecting groundwater.” FEIS at H- 28; *see also id.* at H-23, H-27 [*id.*, at 6, PDF 12]

BOEM can and did rely on ... its finding that “all activities would meet permit and regulatory requirements to continue protecting groundwater as drinking water resources.” *Id.* at H-28. [*id.*, at 30, PDF 36].

None of the statements (above) by the L&W Partners is true. In response to these statements, the L&W Partners were corrected as follows (in the district court)—

[The] Developer [SFW] (falsely) claims that BOEM’s “FEIS ... addresses PFAS issues, and concludes that with application of state law requirements ‘all activities would meet permit and regulatory requirements to continue protecting groundwater

¹³ See South Fork Wind Record of Decision (ROD), issued November 24, 2021, USCA No. 22-5316, Doc. 1980954, Exhibit 1. *Also, see* ROD and Appendices, available online at BOEM.gov, here (<https://www.boem.gov/renewable-energy/state-activities/record-decision-south-fork>)

[emphasis added].’ FEIS at H-28; see also *id.* at H-23, H-27.” The full quote in context [*sic*] is as follows (FEIS at H-28)—

There are no onshore construction activities under the Proposed Action that would require ground disturbance at depths at or near groundwater resources, and all activities would meet permit and regulatory requirements to continue protecting groundwater as drinking water resources. The use of HDD [Horizontal Directional Drilling] 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.

The problem here is that none of what BOEM writes is true. It is yet another example of BOEM fraudulently misrepresenting the facts... See the photo (overleaf), taken on April 18, 2022, of the transition vault at the southern end of Beach Lane with groundwater visible at the bottom (see ECF No. 1-2, at 6). [The] Developer [SFW] installed a treatment facility designed specifically to treat groundwater containing PFAS contamination extracted during onshore construction. The facility comprised four Frac Tanks with a combined capacity of 75,000 gallons (see photos of the frac tanks at ECF No. 1-2, at 1-4). Plaintiff illustrates the depth of groundwater where the trenching encroaches into groundwater in his letter of March 11, 2022, to BOEM titled “URGENT: Imminent Risk to Public Health” (see ECF No. 3-3, Fig 7 at 15 and Fig 8 at 16). [Insert of photo of groundwater in transition vault here.] Contrary to Developer’s assertions that BOEM’s “FEIS addresses PFAS issues,” BOEM neither acknowledged nor discussed onsite PFAS contamination and did *not* address *any* issues concerning PFAS contamination. BOEM fraudulently concluded 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). [*id.*, ECF No. 44, at 3–5]

Plaintiff provided Developer with numerous reports that it had also provided to BOEM, including Site Characterization Reports performed for New York State Department of Environmental Conservation (see [BOEM Index Exhibit #066](#), [BOEM Index Exhibit #075](#), [BOEM Index Exhibit #078](#)) and over three hundred laboratory test results from Suffolk County Department of Health Services (see [BOEM Index Exhibit #166](#)) showing extensive PFAS contamination exceeding regulatory limits along Developer’s proposed onshore construction corridor. For example, on November 15, 2019, Plaintiff served on Developer Interrogatory SK1 (see ECF No. 44-3 NYSPSC IR SK1- PFAS and the figure overleaf). Developer responded by (falsely) stating that “the information asserted ... is inaccurate and not based in fact [emphasis added]” (see ECF No. 44-4 NYSPSC SFW Resp IR SK1- PFAS). On the contrary, the information was from NYSDEC reports based on scientific facts. [*id.*, at 7–8]

Although the L&W Partners’ false statements were corrected at the time in the district court, the partners repeated the untruthful information in the U.S. Appeals Court, as follows—

The Final Environmental Impact Statement analyzed potential PFAS-related impacts to groundwater onshore and incorporated the testing, handling, and treatment requirements imposed by the State. Decl. of Janice Schneider, *Kinsella*, Dkt. 40-2 (D.D.C. Nov. 5, 2022) (“Schneider Decl.”) Ex. 8 (Final Environmental Impact Statement excerpts) (Ex. D) at H-22, 23 (describing groundwater and uses); *id.* at H-23 (recognizing PFAS in soil and groundwater); *id.* at H-27 (acknowledging disturbance of soils near existing remediation sites); *id.* at A-3 (incorporated State testing, handling, and treatment requirements); *id.* at G-5 (again referencing State control measures). Based on all of these analyses and State requirements, the Bureau concluded that “all activities would meet permit and regulatory requirements to continue protecting groundwater as drinking water resources.” *Id.* at H-28. Nothing more is required under either the National Environmental Policy Act or Outer Continental Shelf Lands Act. [USCA 22-5316, Doc. 1982288, at 17, PDF 22].

The three partners of Latham & Watkins lied to the U.S. Appeals Court. Contrary to their false statements, BOEM’s environmental analysis of the largest PFAS contamination plume in Suffolk County (*see Kinsella Aff. I*, ¶ 110) consists of only one sentence that acknowledges “perfluorinated compounds” *somewhere else*.

In February 2022, without regard to public health, SFW commenced excavating soil and groundwater and pouring concrete for high-voltage transmission infrastructure in an area containing harmful PFAS chemical contaminants exceeding federal regulatory limits. BOEM failed to evaluate the impacts of underground concrete duct banks and vaults encroaching into *and* near groundwater.

2) L&W Partners Lies Re: BOEM’s onshore jurisdiction

In the district court, L&W Partners knowingly make false statements concerning BOEM’s onshore jurisdiction, as follows—

With respect to PFAS, New York State has exclusive jurisdiction over the onshore construction at issue in this case.

[*see* Exhibit C, DDC 1:22-cv-02147, ECF No. 40-1, at 26]

[T]he NYSPSC—not Federal Defendants—has jurisdiction over whether there is a need for the project [*id.*, at 28, PDF 34].

There is no “specific nexus” to Federal Defendant’s conduct here: BOEM does not have jurisdiction over the SFEC-Onshore, the installation of concrete duct banks and vaults or HDD drilling and can neither authorize nor prohibit any of that conduct underlying the purported need for a TRO here. *See Robbins v. U.S. Dep’t of Hous. & Urban Dev.*, 72 F. Supp. 3d 1, 6–7 (D.D.C. 2014). [*id.*, at 26, PDF 32]

With respect to PFAS, injunctive relief against the Federal Defendants will have no effect on construction activities over which those Federal Defendants lack jurisdiction. None of the Federal Defendants’ approvals or permits in this case authorize the installation of concrete duct banks and vaults or HDD drilling. *See Gearon Decl.* ¶¶ 7, 19, 23. Rather, the installation of concrete duct banks and vaults and HDD drilling is exclusively approved and permitted under other agency authority [*id.*, at 27, PDF 33].

BOEM’s jurisdictional authority

In response to the false statements (above), the L&W Partners were corrected as follows (in the district court)—

According to the Outer Continental Shelf Lands Act “the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards” (43 U.S. Code § 1332(3)). “The term ‘development’ means those activities ... including geophysical activity, drilling, ... and operation of all onshore support facilities” (43 U.S. Code § 1331(l)) ...

BOEM is *not* relieved of its statutorily mandated obligations pursuant to the National Environmental Policy Act [NEPA] or Outer Continental Shelf Lands Act [OCSLA] and their respective implementing regulations, irrespective of a non-cooperating state agency action that, as [the] Developer [SFW] acknowledges, is likewise the subject of many ongoing legal challenges. [*see* Exhibit D, DDC 1:22-cv-02147, ECF No. 44, at 11].

BOEM’s Record of Decision (“ROD”) states that “[t]he regulations at 30 C.F.R § 585.628 require BOEM to review the COP [Construction and Operations Plan for SFW] and all information provided therein [emphasis added]” (ROD, at 97, 2nd ¶). BOEM states “that a COP must ... describe all planned facilities to be constructed and used for the project, including onshore support facilities [emphasis added]” (*id.*, footnote 7). Subsection (a) of OCSLA regulation 30 C.F.R § 585.620 states that SFW “*must* describe *all* planned facilities ... including *onshore* ... facilities and all anticipated project easements [emphasis added].” Subsection (b) states that SFW “*must* describe *all* proposed activities including ... *all* planned facilities, including *onshore* ... facilities [emphasis added].” Subsection (c) states that SFW “*must* receive BOEM approval [emphasis added]” for its COP.

Moreover, BOEM’s 2016 Information Guidelines for a Renewable Energy Construction and Operations Plan (“COP”)(“Guidelines”)(DDC 1:22-cv-02147, ECF No. 34-10),¹⁴ provides instructions on the information BOEM requires applicants to include in their COP. According to the BOEM’s 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]. The Guidelines (see 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 and, as appropriate, other environmental laws” (Guidelines, at 19, 2nd ¶).

Under the heading 30 CFR 585.627(a)(2) Water Quality, the Guidelines assert that SFW *must* submit detailed information on “the water quality in the area proximal to your proposed activities and the incremental changes to the parameters that define water quality that may be caused by your proposed activities existing water quality conditions” (Guidelines, at 39, 2nd bullet point). SFW *must* submit detailed information on “the general state of water quality in the area proposed for your project by reporting typical metrics for quality including the ... presence or absence of contaminants in water or sediment” (*id.*, 3rd bullet point). SFW *must* submit detailed information on “[n]atural hazards—the environmental hazards and/or accidental events causing accidental releases of ... hazardous materials and wastes” (*id.*, 5th bullet point). The Guidelines state that “[a]dditional information may be needed to support the evaluation of water quality impacts, including but not limited to: ... any other pollution control plan prepared to avoid and minimize impacts to water quality” (*id.*, 7th bullet point). Further, “[i]f additional information requirements apply to the proposed project, [SFW *must*] provide any draft plans or quantitative assessments undertaken and/or describe any that are planned” (*id.*, 8th bullet point). Finally, SFW *must* submit detailed information on “any part of your project that is designed to minimize adverse effects on water quality” (*id.*, 10th bullet point).

Note: in New York State, PFAS contaminants, specifically PFOS and PFOA, are classified as hazardous waste.¹⁵

L&W Partners’ false statements concerning New York State’s “exclusive jurisdiction over the onshore construction” (*supra*) are contradicted by the OCSLA, its implementing regulations, and BOEM’s own guidelines. SFW *and* Latham & Watkins would have known that their jurisdictional claims were *not* supported by fact *or* law because SFW provides the same references in its Construction and Operations Plan— “The COP was prepared in accordance with Title 30 of the Code of Federal Regulations (CFR) Part 585 (30 CFR § 585), BOEM’s

¹⁴ BOEM Information Guidelines for a Renewable Energy Construction and Operations Plan (COP), Version 3, dated April 7, 2016 (<https://www.boem.gov/sites/default/files/documents/about-boem/COP-Guidelines-Archived.pdf>).

¹⁵ In 2016, the New York State Department of Environmental Conservation (“NYSDEC”) added PFOA and PFOS to New York State’s list of hazardous substances (6 NYCRR, § 597.3) by emergency regulation, making them hazardous wastes as defined by ECL (Environmental Conservation Law), Article 27, Title 13.

Guidelines for Information Requirements for a Renewable Energy Construction and Operations Plan (COP) (BOEM, 2016)” (see USCA 22-5316, Doc. 1980954, Exhibit 3-1, COP, at 1-1, PDF 49).¹⁶ It continues— “The COP includes the following:

- A description of *all planned facilities, including onshore and support facilities*
- A description of *all proposed activities, including construction activities, commercial operations, maintenance, and conceptual decommissioning plans*
- The *basis for the analysis of the environmental and socioeconomic impacts and operational integrity of the proposed construction, operation, maintenance, and decommissioning activities [emphasis added]*” (*id.*).

However, the COP does *not* include *any* analysis or discussion of onshore groundwater PFAS contamination.

Although L&W Partners’ false statements were corrected at the time in the district court, the partners repeated their false claims (about BOEM’s jurisdiction) in the U.S. Appeals Court, as follows—

[T]he State Commission—not Federal Defendants—has jurisdiction over whether there is a need for the project’s power generation [USCA 22-5316, Doc. 1982288, at 18, PDF 23].

According to NEPA, BOEM is not relieved of its statutorily mandated obligations,¹⁷ irrespective of a non-cooperating state agency review. In other words, the partners repeatedly lied to the U.S. Appeals Court.

3) L&W Partners Assisted SFW in Fraud

In support of this letter, see Statement of Issues (USCA 22-5316, Doc. 1980953, marked as Exhibit E), Kinsella Affidavit I (USCA 22-5316, Doc. 1979671, marked as Exhibit F), Kinsella Affidavit II (*id.*, Doc. 1980954, marked as Exhibit G), Kinsella Affidavit III (*id.*, Doc. 1981133, **SEALED**, marked as Exhibit H), and Second Amended Complaint (*id.*, Doc. 1980154-2, Exhibit A (marked as Exhibit I)

¹⁶ SFW COP, May 7, 2021, available here (<https://www.boem.gov/sites/default/files/documents/renewable-energy/South-Fork-Construction-Operations-Plan.pdf>).

¹⁷ According to National Environmental Policy Act (“NEPA”) regulation 40 C.F.R. § 1502.13, “[t]he [environmental impact] 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].” NB: According to BOEM, its “NEPA review of the proposed [SFW] Project began prior to the September 14, 2020, effective date of the updated regulations, [thus] BOEM prepared the FEIS and this ROD under the previous version of the regulations (1978, as amended in 1986 and 2005)” (see USCA No. 22-5316, Doc. 1980954, ROD, at 1, PDF 3, footnote 1).

Contrary to the D.C. Bar Association Rules of Professional Conduct,¹⁸ the three partners of Latham & Watkins knowingly made false statements (see above). The partners' false statements assisted South Fork Wind in engaging in conduct the partners knew was fraudulent.

“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is ... fraudulent” (Rules of Professional Conduct, Rule 1.2(e)).

The Second Amended Complaint (*see* Exhibit I)¹⁹ concerns eight instances of fraud by BOEM (where BOEM knowingly made false statements of material facts in its ROD *and* FEIS, intending to approve SFW's project by deception). SFW, too, knowingly made fraudulent representations with the intent to gain approval for its project via deceit. Still, this letter addresses *only one* (of the eight) instances where the three partners of Latham & Watkins assisted BOEM in fraud— by making false statements concerning groundwater PFAS contamination.

“To prove fraud, a plaintiff must show by clear and convincing evidence that there is a false representation of material fact which is knowingly made with the intent to deceive and action is taken in reliance upon the misrepresentation. *Bennett v. Kiggins*, [377 A.2d 57, 59](#) (D.C.), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 768, 54 L.Ed.2d 782 (1978). Nondisclosure of material information may constitute fraud, *id.*, especially where there is a duty to disclose. *Rothenberg v. Aero Mayflower Transit Co.*, [495 F. Supp. 399, 406](#) (D.D.C. 1980).” *Pyne v. Jamaica Nutrition Holdings Ltd.*, 497 A.2d 118, 131 (D.C. 1985).

In the context of this case, “the requisite elements of fraud are (1) a false representation [by non-disclosure of groundwater PFAS contamination contrary to a statutory duty]; (2) made in reference to a material fact [where there is a duty to disclose under NEPA and the OCSLA]; (3) with knowledge of its falsity [BOEM and SFW had prior knowledge of environmental PFAS contamination]; (4) with the intent to deceive [the public, which largely succeeded]; and (5) an action that is taken in reliance upon the representation [Plaintiff and the public relied on BOEM's and SFW's representations that there would be a legally sufficient review according to NEPA and the OCSLA].” *Daskalea v. Wash. Humane Soc'y*, 480 F. Supp. 2d 16, 37 (D.D.C. 2007) (*citing Daisley v. Riggs Bank, N.A.*, 372 F. Supp. 2d 61, 78 (D.D.C. 2005)).

In the instant matter, all five elements of fraud are satisfied.

(1) False representation of groundwater PFAS contamination

Neither SFW nor BOEM acknowledged or considered onsite PFAS contamination along SFW's proposed construction corridor through the residential streets of Wainscott.

¹⁸ Rules of Professional Conduct, Rule 3.3(a)

¹⁹ *See* USCA 22-5316, doc. 1980154-2, Exhibit A- Second Amended Complaint (executed) (marked as Exhibit I).

BOEM (falsely) concluded that “[o]verall, existing groundwater quality in the analysis area [Wainscott] appears to be good” (see Kinsella Aff. I, ¶ 93). BOEM claimed that SFW’s “COP includes all the information required” in 30 CFR § 585.627 when its COP did *not* contain *any* of “the information required” concerning severe environmental PFAS contamination of a public health concern (*id.*, ¶ 108). BOEM’s ROD reads— the “DOI [Department of Interior] weighed all concerns in making decisions regarding this Project ... to avoid or minimize [the project’s] environmental ... impacts” (*id.*, ¶ 214). However, BOEM, acting under authority delegated to it by the DOI, had *not* “weighed all concerns” (*id.*). It did *not* consider harmful PFAS contamination of groundwater, acknowledging only “perfluorinated compounds” *somewhere else* on a 610-acre State Superfund Site (*id.*, ¶¶ 213–214).

SFW (falsely) claimed that its COP “provides a description of water quality and water resource conditions ... as defined by several parameters including: ... contaminants in water” (*id.*, ¶ 83). Under the heading, Water Quality and Water Resources, SFW (falsely) 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.*). 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.*). SFW asserted that its “COP was prepared in accordance with ... 30 CFR § 585 ... [and] BOEM’s Guidelines” (*supra*). SFW’s statements are all contrary to fact.

BOEM and SFW falsely represented groundwater quality by omitting material facts about PFAS contamination and the project’s environmental impact on a sole-source aquifer used for drinking water despite knowing that groundwater in Wainscott was highly contaminated.

(2) Knowledge of its falsity

SFW: In January 2020, SFW received detailed information on existing groundwater PFAS contamination where it planned to build underground concrete infrastructure that would encroach into the groundwater (a sole-source aquifer). The information took the form of eight interrogatories (of 144 pages) that included, *inter alia*, a Water Quality Advisory for Private-Well Owners in Area of Wainscott, issued by Suffolk County Department of Health Services (“SCDHS”) in October **2017**,²⁰ a list of 303 test results of private drinking water wells in Wainscott (compiled by SCDHS, dated June 15, **2018**) (see Kinsella Aff. I, ¶ 33); and two NYSDEC Site Characterization Reports for properties registered with the NY State Super Fund Program adjacent *on either side* of SFW’s proposed construction corridor (*id.*, ¶¶ 85–86).

In December 2020 and January 2021, four months *before* SFW submitted its final COP to BOEM (in May 2021), it performed onsite soil and groundwater testing. The testing revealed PFAS contamination at levels exceeding regulatory standards (*id.*, ¶¶ 68–76). SFW’s

²⁰ USCA 22-5316, Doc. 1980954, Exhibit 4

Environmental Investigation Report detected PFAS contamination in 20 wells *within* its onshore construction corridor. It 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). 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 (on November 24, 2021) by eight months (*id.*, ¶ 68).²¹ Since receiving the information and despite updating its COP (in May 2021), SFW did *not* include the PFAS contamination test results of groundwater or soil prior to BOEM approving its project (on November 24, 2021).

BOEM: In February 2021, nine months *before* BOEM approved SFW’s Project, it received a comments letter that included 207 exhibits (“2021 Comments”). The letter contained verifiable records such as testimony, briefs, and government agency reports that BOEM uploaded to its website (*id.*, ¶¶ 21–25)(*also, see* DDC 1:22-cv-02147, ECF No. 3-1, at 15–24). See Addendum BOEM Exhibits (USCA 22-5316, doc. 1979671-9). Many exhibits, government agency reports, show extensive environmental PFAS contamination in the same area where SFW proposed building its underground high-voltage transmission infrastructure (Kinsella Aff. I, ¶¶ 24, 30–59). The exhibits also included the eight interrogatories served on SFW (referred to above) (*see* DDC 1:22-cv-02147, ECF No. 3-1, at 31, [BOEM Exhibit #087](#)).²² Still, BOEM fraudulently concluded that “[o]verall, existing groundwater quality in the analysis area appears to be good” (*supra*)(Kinsella Aff. I, ¶ 89), contradicting overwhelming evidence of PFAS contamination exceeding federal regulatory standards that it acknowledged receiving nine months earlier.

(3) Statutory Duty to Disclose Material Facts

“Where a court finds that a party had the duty to disclose material information, and failed to do so, there is an even greater likelihood that the nondisclosure will constitute fraud. *Pyne v. Jamaica Nutrition Holdings, Ltd.*, [497 A.2d 118, 131](#) (D.C. 1985)” (*Sage v. Broadcasting Publications, Inc.*, 997 F. Supp. 49, 52 (D.D.C. 1998)).

According to NEPA,²³ BOEM has a duty to disclose material facts in an environmental review, such as the largest groundwater plume of harmful environmental PFAS contamination in Suffolk County (*see* Kinsella Aff. I, ¶ 110)(*also, see* Exhibit J, USCA 22-5316, Doc. 1983691-2, Exhibit 2, Exposé on Forever Chemicals).

²¹ In December 2020 and January 2021, SFW tested areas and at depths to *avoid* detecting PFAS contamination (see USCA 22-5316, Doc. 1981133, letter to BOEM, dated March 11, 2022, Re: URGENT: South Fork Wind, Imminent Risk to Public Health). In February 2022, South Fork Wind re-tested the same Monitoring Wells: Well MW-4A showed onsite PFOA (82 ppt) contamination exceeding the EPA 2016 Health Advisory Level (of 70 ppt).

²² https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_13.pdf

²³ “BOEM’s NEPA review of the proposed Project began prior to the September 14, 2020, effective date of the updated regulations, BOEM prepared the FEIS and this ROD under the previous version of the regulations (1978, as amended in 1986 and 2005)” (USCA 22-5316, Doc. 1980954, Exhibit 1, ROD, at 1, PDF 3, footnote 1).

According to BOEM, “[t]his ROD 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 with the assistance of a third-party contractor, SWCA, Inc.” (ROD, at 1, PDF 3, first and second paragraphs). NEPA asserts that “Congress authorizes and directs that, to the fullest extent possible ... all agencies of the Federal Government shall ... include in every recommendation or report on ... actions significantly affecting the quality of the human environment, a detailed statement ... on (i) the environmental impact of the proposed action” (Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C)).

“This circuit has long held that courts must exercise heightened scrutiny of agencies’ compliance with NEPA’s procedures. *See, e.g., Scientists’ Institute for Public Information, Inc. v. AEC*, [481 F.2d 1079, 1092](#) (D.C. Cir. 1973); *Calvert Cliffs’ Coordinating Comm., Inc. v. AEC*, [449 F.2d 1109, 1115](#) (D.C. Cir. 1971). In *Calvert Cliffs*, we stated that “the requirement of environmental consideration ‘to the fullest extent possible’ sets a high standard for the agencies, a standard which must be rigorously enforced by a reviewing court.” [449 F.2d at 1114.](#)” *Potomac Alliance v. U.S. Nuclear Reg. Com’n*, 682 F.2d 1030, 1035 n.21 (D.C. Cir. 1982).

“The statutory requirement that a federal agency contemplating a major action prepare such an environmental impact statement serves NEPA’s “action-forcing” purpose in two important respects. *See Baltimore Gas Electric Co. v. Natural Resources Defense Council, Inc.*, [462 U.S. 87, 97](#) (1983); *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, [454 U.S. 139, 143](#) (1981). It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision. ... NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast. *See ibid.*; *Kleppe, supra*, at 409 ... Publication of an EIS, both in draft and final form, also serves a larger informational role. It gives the public the assurance that the agency “has indeed considered environmental concerns in its decisionmaking process,” *Baltimore Gas Electric Co., supra*, at 97, and, perhaps more significantly, provides a springboard for public comment, see L. Caldwell, *Science and the National Environmental Policy Act 72* (1982).” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

NEPA mandates that BOEM evaluate and verify information provided to it—

“The agency 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 ... be verified by the agency.” (NEPA 1978, 40 CFR 1506.5(a)).

“If the document is prepared by contract [SWCA, Inc.], the responsible Federal official shall ... participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents” (*id.*, (c)).

In addition to BOEM’s statutory duty to disclose material facts pursuant to NEPA, both BOEM *and* SFW have a similar duty under the OCSLA. For details of SFW’s duty to disclose, *see* **BOEM’s jurisdictional authority** (on pages 7–9).

Neither NEPA nor the OCSLA exempts BOEM or SFW from compliance, and neither BOEM nor SFW has asserted such a defense.

(4) Intent to deceive

One “may infer but [is] not required to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted” (*citing United States v. Mejia*, 597 F.3d 1329, 1341 (D.C. Cir. 2010)) *United States v. Williams*, 836 F.3d 1, 30 (D.C. Cir. 2016). SFW *and* BOEM establish a consistent pattern over a three-year period (from 2018 through 2021) of keeping the issue of *onsite* PFAS contamination out of the federal environmental review, out of consideration, and out of the public eye.²⁴ The consequence of their acts was that SFW gained project approval by concealing onshore PFAS contamination, enabling it to commence construction in February 2022.

NB: The following discussion on the NYSPSC proceeding is included to show that SFW’s acts of deception were consistent in the federal and state review.

In October 2017, a year *before* SFW submitted its COP to BOEM for approval (and its application to the NYSPSC), PFAS contamination in the area where SFW planned construction was widely known (Kinsella Aff. I, ¶¶ 31, 34). In 2016, the adverse health effects of such contamination were also widely published (*id.*, ¶ 32) (Kinsella Aff. II, ¶¶ 60–63). In June 2018, SCDHS found groundwater south of East Hampton Airport (in Wainscott) so toxic that hundreds of people were forced to drink, cook, wash, and bathe with bottled water (Kinsella Aff. I, at ¶ 33). Still, in September 2018, when SFW submitted its Construction and Operations Plan to BOEM *and* its application to the NYSPSC, it did *not* include *any* information on PFAS contamination.

²⁴ There are many other issues such as blatant procurements violations, numerous false purposes and needs, concealing of conflicts of interests, etc., but due to limitations, this motion is limited to the exclusion of the project cost and PFAS contamination from BOEM’s review.

Evidence of PFAS contamination was only entered into the NYSPSC evidentiary record two years *after* it had started and *not* by SFW (or the Town of East Hampton) (*id.*, ¶ 88). When the contamination was entered into the record (in September and October 2020), rather than address the issue of existing PFAS contamination, SFW moved to strike the testimony from the record (*id.*, ¶¶ 89–92). The “probable consequence[.]” (*United States v. Williams, supra*) of a motion to strike testimony is to remove it from the evidentiary record and consideration in the proceeding. Thus, SFW intended to deceive the public into believing there were no concerns with *onsite* PFAS contamination. Although the motion to strike was denied (in relevant part), it does not change its probable consequence; SFW’s intention to keep PFAS contamination *out* of the NYSPSC case. SFW’s intent to conceal PFAS contamination is reflected in BOEM’s federal review, where SFW succeeded in keeping the issue entirely out of consideration.

(5) Action taken in reliance upon fraudulent representation

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)” (*see* Exhibit K, USCA 22-5316, Doc. 1980953, Exhibit 2, Federal Register, Vol. 83, No. 203, at 53104–53105). I (and the public) relied on BOEM’s NOI to prepare a NEPA-compliant EIS based on a thorough environmental review by submitting comments (in response to the NOI) on November 19, 2018 (Kinsella Aff. I, ¶ 17-20). The NOI misleads the public and me 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*).

On January 8, 2021, BOEM published a “Notice of availability of a Draft Environmental Impact Statement and public meetings” (*see* Exhibit L, USCA 22-5316, Doc. 1980953, Exhibit 3, Fed. Reg., Vol. 88, No. 5, at 1520–1521). BOEM’s notice asserts that it acted “[i]n accordance with regulations issued under the National Environmental Policy Act” (*id.*, at 1520, first column). It 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).

On February 22, 2021, I sent Defendant-Appellee Michelle Morin of BOEM the 2021 Comments responding to SFW’s DEIS, including 207 exhibits (*see* Exhibit M, USCA 22-5316, Doc. 1980953-4, Exhibit 4, at 15–24). *See Addendum BOEM Exhibits* (*id.*, at 26–36)(Kinsella Aff. I., at ¶¶ 21-25). 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” (*id.*, at 2, PDF 16, third paragraph). The comments letter continues— “I respectfully request that the

documents herein listed 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). I (and the public) relied on BOEM to perform that review.

On August 5, 2017, during a presentation to the Wainscott Citizens’ Advisory Committee (“WCAC”), SFW made the following misleading representations— that its project was the result of a “technology-neutral competitive solicitation” (*see* Exhibit N, USCA 22-5316, Doc. 1980953-5, Exhibit 5, WCAC SFW Slides, PDF 5); and that “[p]ermitting will involve ... state and Federal Agencies” that included “New York State” and the “Bureau of Ocean Energy Management” with the implication that such permitting would be lawful (*id.*, PDF 13). The meeting minutes note that “[p]ermitting for the project will involve ... state and federal agencies, and is intentionally designed for transparency” (*see* Exhibit O, USCA 22-5316, Doc. 1980953-6, Exhibit 6, WCAC Minutes, at PDF 3, 1st ¶). The minutes continue, “[t]he formal proposal is expected in early 2018, which will include technical and environmental impact studies” (*id.*, at PDF 4, 2nd ¶). I was a member of the WCAC and Chairman of its Environmental Subcommittee tasked with assessing the SFW Project. I relied on SFW’s representations that its project would be subject to proper environmental review.

I relied on BOEM’s and SFW’s representations that a lawful permitting process would include a ‘hard look’ environmental review. Still, after five years (since the WCAC meeting in 2017), endless work, and five lawsuits, neither BOEM nor SFW has delivered on their promise to conduct such a review as required by federal law.

4) Conclusion

According to D.C. Bar Association Rules of Professional Conduct, “a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) The representation will result in violation of the Rules of Professional Conduct or other law [emphasis added]” (*see* Rule 1.16(a)).

As discussed (above), the three partners of Latham & Watkins have wilfully and repeatedly violated the Rules of Professional Conduct as follows: Rule 1.2(e) (by assisting a client in conduct that the lawyer knows is fraudulent); Rule 3.3(a) (by making false statements of fact *and* law to a tribunal *and* failing to correct the false statements of material facts *and* law, and assisting a client in engaging in conduct that the lawyer knows is fraudulent); and Rule 8.4 (by engaging in conduct involving dishonesty, fraud, deceit, *and* misrepresentation).

The comments to Rule 1.2, state that “[w]hen the client’s course of action has already begun and is continuing, the lawyer’s responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent ... A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is ... fraudulent [emphasis added]. The lawyer must, therefore, withdraw from the representation of the client in the matter [emphasis added]. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like.”

Accordingly, the three partners of Latham & Watkins must withdraw from representing South Fork Wind LLC while this matter is under investigation by the Office of Disciplinary Counsel for the District of Columbia Court of Appeals.

Should you have any questions, please do not hesitate to contact me via email (Si@oswSouthFork.Info) or my mobile (+1-631-903-9154).

Respectfully submitted this 21st day of February 2023,



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Attachments:

- Exhibit A - USCA, No. 22-5316/7, Doc. 1978475, Entry of Appearances
- Exhibit B - DDC Case 1:22-cv-02147, ECF No. 40-1
- Exhibit C - DDC Case 1:22-cv-02147, ECF No. 44
- Exhibit D - USCA, D.C. Cir., 22-5316, Doc. 1982288
- Exhibit E - Statement of Issues (USCA, D.C. Cir., 22-5316, Doc. 1980953)
- Exhibit F - Kinsella Affidavit I (USCA, D.C. Cir., 22-5316, Doc. 1979671)
- Exhibit G - Kinsella Affidavit II (USCA, D.C. Cir., 22-5316, Doc. 1980954)
- Exhibit H - Kinsella Affidavit III (USCA, D.C. Cir., 22-5316, Doc. 1981133, SEALED)
- Exhibit I - Second Amended Complaint (USCA, D.C. Cir., 22-5316, Doc. 1980154-2, Exhibit A)
- Exhibit J - Newsday Exposé on 'Forever Chemicals' in Suffolk County (USCA, D.C. Cir., 22-5316, Doc. 1983691-2, Exhibit 2)
- Exhibit K - BOEM Notice of Intent (USCA, D.C. Cir., 22-5316, Doc. 1980953, Exhibit 2, Federal Register, Vol. 83, No. 203, at 53104–53105)

Exhibit L - BOEM Notice of availability of a Draft Environmental Impact Statement (USCA, D.C. Cir., 22-5316, Doc. 1980953, Exhibit 3, Fed. Reg., Vol. 88, No. 5, at 1520–1521).

Exhibit M - Kinsella Comments 2018 & 2021 (USCA, D.C. Cir., 22-5316, Doc. 1980953-4)

Exhibit N - WCAC, SFW Slides (USCA, D.C. Cir., 22-5316, Doc. 1980953-5)

Exhibit O - WCAC Meeting Minutes (USCA, D.C. Cir., 22-5316, Doc. 1980953-6)

References:

ROD: Record of Decision (issued November 24, 2021), *see* USCA No. 22-5316, Doc. 1980954, Exhibit 1. *Also, see* ROD and Appendices, available online at BOEM.gov, <https://www.boem.gov/renewable-energy/state-activities/record-decision-south-fork>

FEIS: Final Environmental Impact Statement (issued August 16, 2021), *see* USCA No. 22-5316, Doc. 1980954, Exhibit 2. *Also, see* BOEM.gov, <https://www.boem.gov/renewable-energy/state-activities/sfwf-feis>

Guidelines: BOEM Information Guidelines for a Renewable Energy Construction and Operations Plan (“COP”), Version 3 (dated April 7, 2016), available online at BOEM.gov, <https://www.boem.gov/sites/default/files/documents/about-boem/COP-Guidelines-Archived.pdf>

COP: Construction and Operations Plan (“COP”) for South Fork Wind (dated May 7, 2021), available online at BOEM.gov, <https://www.boem.gov/sites/default/files/documents/renewable-energy/South-Fork-Construction-Operations-Plan.pdf>