No.

In the Supreme Court of the United States

SIMON V. KINSELLA,

Petitioner,

v.

U.S. BUREAU OF OCEAN ENERGY MANAGEMENT, ET AL.,

and

SOUTH FORK WIND, LLC,

Respondents.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The U.S. Bureau of Ocean Energy Management (BOEM) knowingly falsified its review of an offshore wind farm, concealing contamination harmful to human health, the project's cost ($2 billion), procurement manipulation, and other material facts. It approved the project based on *its own* deceit. BOEM has neither answered the complaint (7/20/2022) or the amended complaint (11/2/2022) nor responded to allegations of fraud. The court of appeals admitted the district court did *not* consider or allow argument on fraud claims (or parties named under those claims) before transferring the case. The transferee court did *not* recognize claims of fraud (or parties) before, without power, denying injunctive relief. Petitioner *pro se* first learned of that denial three weeks later.

1. Whether the Fifth Amendment requires that defendants answer allegations against them?

2. Whether fraud by a federal regulatory agency *sends the wrong message* to developers, regulators, and the public, and is the harm that flows from that message irreparable?

3. Whether construction, the plans for which the developer secured approval via fraudulent means, is a valid contributing economic injury when weighing the equities in contemplation of injunctive relief seeking to prevent that construction?

3. Whether 28 U.S.C. § 1404 requires consideration of the convenience of parties and witnesses before transferring a case three hundred miles from three federal agency defendants' offices, nine officials (defendants in fraud claims), potential witnesses, and seventeen causes of action to an *in*convenient forum prejudicial to claims filed in a permissible venue?

PARTIES TO PROCEEDINGS

Petitioner who was the plaintiff-petitioner is Simon V. Kinsella, *pro se*.

Respondents that were defendants-respondents are U.S. Bureau of Ocean Energy Management (BOEM); and in their official capacities working for BOEM: Director Elizabeth Klein; Chief Michelle Morin, Environment Branch for Renewable Energy; Program Manager James F. Bennett, Office of Renewable Energy Programs; Environmental Studies Chief Mary Boatman, Office of Renewable Energy Programs; Economist Emma Chaiken; Economist Mark Jensen; Biologist Brian Hooker; and Jennifer Draher; and Secretary of the Interior Deb Haaland, U.S. Department of the Interior (DOI); Principal Deputy Assistant Secretary Laura Daniels-Davis, Land and Mineral Management; and Administrator Michael S. Regan, U.S. Environmental Protection Agency (EPA).

Respondent that was intervenor-defendant-respondent is South Fork Wind LLC (SFW) (formerly Deepwater Wind South Fork LLC).

Note: BOEM Director was Amanda Lefton when filing the complaint on July 20, 2022, but Ms. Lefton resigned effective January 19, 2023.

RELATED CASES

The Supreme Court of the United States:

Simon Kinsella, Applicant v. Bureau of Ocean Energy Management, et al., (22A1097), Application for injunctive relief and a stay, submitted to The Chief Justice (dated June 12, 2023), Supplemental Brief (filed June 16, 2023).

United States Court of Appeals (D.C. Cir.):

In re: Simon V. Kinsella, No. 22-5317. Petition for a writ of mandamus seeking review of the district court's order granting defendants' motion to transfer the case to the Eastern District of New York (E.D.N.Y.). Judgment entered upon petition for writ of mandamus affecting the transfer *and* an emergency motion for a temporary restraining order and preliminary injunction entered May 17, 2023 (*denied*) (App 4a-5a). Judgment upon petitioner's motion to stay the mandate, treated as a motion to stay the effectiveness, entered June 9, 2023 (*denied*) (App 3a).

Simon V. Kinsella v. Bureau of Ocean Energy Management, et al., No. 22-5316. Judgment upon appellees-respondants' motion to dismiss entered February 23, 2023 (*granted*).

United States District Court (D.D.C.):

Simon V. Kinsella v. Bureau of Ocean Energy Management, et al., No. 1:22-cv-02147 (JMC). Judgment upon federal defendants' motion to transfer entered November 10, 2022 (*granted*). *See* Order (App 8a) and Opinion (App 9-19a).

United States District Court (E.D.N.Y.):

Simon V. Kinsella v. Bureau of Ocean Energy Management, et al., No. 2:23-cv-02915 (FB). Judgment upon plaintiff-petitioner's motion for preliminary injunction (D.D.C., No. 1:22-cv-02147, ECF 35) entered without power *before* the ruling to transfer (entered May 17, 2023) became effective contrary to D.C. Circuit order issued April 24, 2023 ("the case was transferred prematurely and in error … The case in the Eastern District of New York, No. 2:23-cv-02915, has been administratively closed") *See* E.D.N.Y. Docket entry 04/19/2023 (App 20a) and Docket entry 05/18/2023 "preliminary injunction is denied" (App 21a-22a). Petitioner was not notified. *See* MEMO and ORDER (App 28a-36a).

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The orders of the court of appeals (App. 3a, 4a-5a, 6a, 7a) are unreported. The order and opinion of the district court for D.C. (App. 8a, 9a-19a) are unreported. The orders and opinion of the district court for E.D.N.Y. (App. 20a-27a, 28a-35a) are unreported.

JURISDICTION

The judgment of the court of appeals ordered Petitioner's emergency motion for a temporary restraining order and preliminary injunction be *denied,* and the petition for a writ of mandamus seeking review of the district court order to transfer be *denied,* entered May 17, 2023. (App 4a-5a) The judgment of the court of appeals ordered Petitioner's motion to stay the mandate (treated as a motion to stay the effectiveness) be *denied*, entered June 9, 2023. (App 3a). The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions are set out in the appendix to the petition (App 36a-38a).

PRESERVING THE RECORD

On July 20, 2022, Petitioner submitted to the district court (on USB thumb drive) 207 exhibits (provided to Defendant Bureau of Ocean Energy Management on February 22, 2021). The court accepted the files (D.D.C., No. 1:22-cv-02147, ECF 3).

On November 29, 2022, Petitioner included "a USB Flash Drive containing the files submitted in the district court (docket l:22-cv-02147)" (D.C. Cir., No. 22-5317, 1976909, at vii). The documents form part of the record.

STATEMENT

The Fifth Amendment to the United States Constitution guarantees that "[n]o person shall … be deprived of life, liberty, or property, without due process of law …." If our Constitution is to have meaning, its guaranteed rights must be dependable. Petitioner invokes those guarantees now.

Three federal courts denied Petitioner the fundamental right to a fair hearing. The judgments of the district courts (for the District of Columbia and the Eastern District of New York (E.D.N.Y.)), and the Court of Appeals for the D.C. Circuit, have so far departed from the accepted and usual course of judicial proceedings, sanctioned (unconstitutional) procedure in aid of perpetuating fraud by a federal regulatory agency as to call for an exercise of this Court's supervisory power.

PROCEDURAL ABUSE: District Court for the District of Columbia

Seven months ago (November 2, 2022), Petitioner filed as of right First Amended Complaint that "state[s] with particularity the circumstances constituting fraud" (Fed. R. Civ. P. 9(b)) involving *nine* Bureau of Ocean Energy Management (BOEM) officials, named defendants (parties and potential witnesses) who participated in a fraudulent environmental review. BOEM has *not* answered the amended complaint. BOEM did *not* answer the

complaint filed ten months ago (July 20, 2022). BOEM did *not* respond to a summary judgment motion, including eighty-nine material facts where there is no genuine dispute (D.C. Cir., No. 22-5317, Doc. 1999552-21), filed eight months ago (September 26, 2022). Each time, BOEM had an opportunity to deny the allegations but did *not*. The district court repeatedly turned to procedural abuse in aid of protecting federal agency officials who knowingly made materially false statements concerning an offshore wind project, violating Petitioner's constitutional right to due process.

The evidence of fraud is disturbing. It conclusively shows that BOEM deliberately falsified the review of an offshore wind project promoted by South Fork Wind LLC (SFW),[1] concealing extensive environmental contamination harmful to human health (*see* Kinsella Affidavit, D.C. Cir., No. 22-5317, Doc. 1999552-02, ¶¶ 9-67)(App 39a-49a), the project cost ($2 billion) and its adverse socioeconomic impact (*id.*, ¶¶ 68-91)(App 49a-56a), procurement manipulation that stifled competition (*id.*, ¶¶ 92-106)(App 56a-62a), and other material facts such as adverse population-level effects on an essential fish habitat for Atlantic Cod (Cox Ledge), and a viable alternative offering the same energy at half the price.

Seven instances of BOEM's fraudulent review are prominently upfront in Petitioner's First Amended Complaint.[2] The district court accepted the amended complaint but refused to recognize substantive allegations of fraud or named defendants under the

[1] Formerly Deepwater Wind South Fork LLC

[2] *See* First Amended Complaint, *excerpts,* D.C. Cir., No. 22-5317, Doc. 1999552-22 (at 1-7)

five fraud claims introduced into the complaint. BOEM's only defense is for the courts to deprive Petitioner of a hearing on his fraud claims in violation of the Fifth Amendment. On November 29, 2022, Petitioner filed a Petition for a Writ of Mandamus seeking review of the district court's practice of denying Petitioner's rights to respond to defendants' motions and a fair hearing *five times in two months*,[3] as follows—

(1) September 13, 2022— the district court granted defendants' motion to extend time "for The Government to file its responsive pleading to the Complaint" that defendants filed *the day before*, thereby denying Petitioner the opportunity to respond. *See* No. 22-5317, Doc. 1999552-03, ("**D.D.C. DOCKET**") (at 4, MINUTE ORDER 09/13/2022).

Frustrated, Petitioner filed (September 26, 2022) a cross-motion for partial summary judgment and statement of material facts with eighty-nine facts where there is no genuine dispute (*see* No. 22-5317, 1999552-21). In response, BOEM filed a motion to strike or stay the briefing (October 6, 2022) (D.D.C. Docket, at 4, ECF 24).

(2) October 9 (Sunday)— the district court granted defendants' motion to strike or stay the briefing (filed three days earlier) on Petitioner's summary judgment motion (*stayed*), denying Petitioner the opportunity to respond (D.D.C. Docket, at 5, MINUTE ORDER 10/09/2022).

(3) November 9— A month later, the court ruled to *strike* Petitioner's summary judgment motion, "[i]t is premature given that the defendants haven't

[3] *See* Reply to Federal Defendants' Opposition to Mandamus Petition, No. 22-5317, Doc. 1994449, *corrected*)

formally responded" (*see* Hearing Tr., November 9, 2022, No. 22-5317, Doc. 1994062-11, at 3:8-9), "just so that the docket is cleaned up and that defendants don't have this outstanding obligation" (*id.*, 3:21-22). Petitioner did not have an opportunity to respond before the court ruled to *strike* (D.D.C. Docket, at 7, MINUTE ORDER 11/10/2022).

On November 2, 2022, Petitioner filed First Amended Complaint (as of right) concurrently with a motion for a temporary restraining order and preliminary injunction (D.D.C. DOCKET, at 5-6, ECF 34 and 35). The district court accepted the amended complaint (during the November 9 hearing) — "I will grant … Mr. Kinsella's motion to amend the complaint, which he was free to do as a matter of course at this stage of the proceedings … when we are referring … to any allegations, we are all talking about the same operative complaint."[4]

However, the district court did not address or allow comment on the amended complaint's five claims of fraud (and nine BOEM officials named defendants under those claims) or seven instances of fraud prominently upfront.[5] The D.C. Circuit admitted the district court did *not* "consider or allow argument on [Petitioner's five] claims of fraud" (or nine defendants, potential witnesses, named under the claims)(App 5a). During the November 9 hearing, the court did *not* grant Petitioner the opportunity to address issues regarding allegations of fraud (or BOEM's review).

(4) November 9— The district court ruled to transfer the case absent a hearing on claims of fraud

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[4] *See* November 9, 2022, Hearing Tr. (at 2:20-25 and 21:1-2)(D.C. Cir., No. 22-5317, Doc. 1994062-11).

[5] *See* First Amended Complaint, *excerpts*, No. 22-5317, Doc. 1999552-22, at 3-10)

or contemplation of parties and potential witnesses. It was the fourth time the district court denied Petitioner the right to respond or speak to fraud issues at a fair hearing.

(5) November 9— "[T]he Court DENIES [Petitioner's] Motion for a Temporary Restraining Order 35 for the reasons stated on the record at the hearing."[6] However, for the same reasons the hearing on the transfer order was deficient, the hearing on the TRO was also defective because it failed to address critical fraud arguments. Without considering critical elements of fraud (by BEOM *and* SFW), the court had no reason to question whether SFW's economic injury resulted from wrongdoing or fraud when weighing the equities in consideration of injunctive relief. It was the fifth time the district court had denied Petitioner his fundamental constitutional right to a fair hearing on fraud claims and due process of law.

District Court Order to Transfer

On July 20, 2022, Petitioner filed his complaint in Washington, D.C., a permissible venue easily commutable between the courthouse and three federal agency defendants' offices where the causes of action occurred giving rise to the claims under federal law— the National Environmental Policy Act (NEPA), Outer Shelf Continental Lands Act (OCSLA), Due Process Clause, and the Freedom of Information Act (FOIA). The District of Columbia is a forum with recognized expertise in FOIA complaints.[7]

The district court ordered the case be transferred from Washington, D.C., a convenient location for *all*

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[6] *See* D.D.C. DOCKET, MINUTE ORDER 11/10/2022 (D.C. Cir., No. 22-5317, Doc. 1999552-03, at 7)

[7] 5 U.S.C. § 552(a)(4)(B)

parties and potential witnesses chosen by Petitioner, to the district court in the E.D.N.Y., three hundred miles from three federal agency defendants' offices, nine BOEM officials (defendants and potential witnesses named in five fraud claims) and the seventeen causes of action. The courthouse in Central Islip is convenient for *no parties or potential witnesses.*

Court of Appeals for the D.C. Circuit

On November 29, 2022, Petitioner filed a Petition for a Writ of Mandamus seeking review of the district court's order transferring the case without a hearing or considering the convenience of parties and potential witnesses according to 28 U.S.C. § 1404.

On February 23, 2023, the assigned panel, Circuit Judges Wilkins, Rao, and Walker, ordered "the United States and South Fork Wind LLC [SFW] enter appearances and file responses to the mandamus petition" (App 7a), which they did (on March 27, 2023). Petitioner filed a timely reply (*see* No. 22-5317, Doc. 1994449, *corrected*).

On April 19, 2023, in what appeared to be an attempt to evade appellate scrutiny, the district court transferred the case to the E.D.N.Y. without power *before* the court of appeals had ruled on the mandamus petition. An emergency motion filed that day sought return of the files (*id.*, Doc. 1995489).

On April 24, 2023, a D.C. Circuit order confirmed that "the case was transferred prematurely and in error … [and] [t]he case in the Eastern District of New York, No. 2:23-cv-02915, has been administratively closed" (*id.*, Doc. 1996148) (ORDER App 6a)(E.D.N.Y Docket, App 20a).

However, the next day, the E.D.N.Y. case was "reassigned to Judge Frederic Block and Magistrate

Judge Steven Tiscione (as related to 22-cv-1305) for all further proceedings." (E.D.N.Y. Docket, App 20a-21a), and on May 1, reopened— "[o]rder[] by Judge Frederic Block" (*see* E.D.N.Y. Docket, 05/01/2023, App 21a). Petitioner had *not* been notified that his case had been reassigned and reopened.

Concerned about agency malfeasance by BOEM and continuing (unlawful) construction it approved based on fraud, Petitioner filed a motion for a temporary restraining order and preliminary injunction enjoining construction activities of respondent SFW on May 16, 2023 (at 9:02 p.m.).

On May 17, 2023 (12:10 p.m.), only hours after the motion had been filed, a *new* panel (Circuit Judges Millet, Pillard, and Rao) decided the case (initially assigned to Circuit Judges Wilkins, Rao, and Walker). The new panel denied the mandamus petition, thus affecting transfer, *and* denied injunctive relief (App 4a-5a). Such a swift decision left little time for consideration on the merits.

The court of appeals' order denying the mandamus petition (App 4a-5a) relies on a case concerning a prisoner in Arizona who sought to overturn a transfer order based on an alleged denial of access to legal materials, where he had filed *the same claims* in another U.S. District Court (in Arizona). "[T]he Arizona district court has found, on two previous occasions, that the law library at FCI-Tucson is constitutionally adequate. *See Tripati v. Henman,* No. 86-231 (D.Ariz. April 14, 1987); *Tripati v. Henman,* No. 85-170 (D.Ariz. May 13, 1987)." *Id.* In that case, the court concluded transfer was warranted "due to its familiarity with the related civil suits filed there [in Arizona in *federal court*] by Tripati[,]" citing "*Starnes v. McGuire,* 512 F.2d at 932" (*id.*), another

case concerning a prisoner and habeas issues. This case is *not* a habeas action, and Petitioner Kinsella is *not* a prisoner. Petitioner has commenced *only one* action in *any court* (federal or state), where he "state[s] with particularity the circumstances constituting fraud" (Fed. R. Civ. P. 9(b)) concerning *nine named BOEM officials* (defendants and potential witnesses) and a fraudulent environmental review by *a federal agency*.

The court of appeals' order denying injunctive relief gave no reason for its denial in conflict with this Court precedent (*see* p. 17).

The next day (May 18), the E.D.N.Y. court ordered "[p]laintiffs motion [in D.D.C., No. 1:22-cv-02147, ECF] 35 for a preliminary injunction is DENIED. Ordered by Judge Frederic Block on 5/18/2023" (App 21a)(App 28a-35a). The order was without power.

D.C. Circuit Rule 41(3) states that—

> No mandate will issue in connection with an order granting or denying a writ of mandamus … but the order or judgment … will become effective automatically 21 days after issuance ….

Twenty-one days after issuance of that order is June 7, 2023. However, the E.D.N.Y. court denied Petitioner's preliminary injunction on May 18, 2023 (App 28a-35a), twenty days *before* the transfer had become effective. The (unlawful) order denying Petitioner a preliminary injunction was *not* without prejudice. Petitioner had *not* been notified and was unaware of the proceedings. There was no hearing. The caption on the E.D.N.Y. court order (App 28a) *ex*cludes eight defendants (BOEM officials) named in

Petitioner's five fraud claims. The E.D.N.Y. court ignored Petitioner's amended complaint as if it, the defendants, and the fraud claims do not exist.

The E.D.N.Y. court order denying injunctive relief violates Petitioner's Fifth Amendment right to a hearing on fraud claims that had also been denied him in the D.C. district court and the D.C. Circuit.

BACKGROUND

Project: South Fork Wind (SFW)

The Project BOEM approved is an offshore wind farm (130 megawatts) approximately 19 miles southeast of Block Island, Rhode Island, and 35 miles east of Montauk Point, New York, in the Atlantic Ocean. The project includes high-voltage (138 kV) transmission and related infrastructure installed underneath local laneways and streets through a residential neighborhood in Wainscott, N.Y. (for approximately two-and-a-half miles).

SFW commenced construction in February 2022.

Bureau of Ocean Energy Management

Under Outer Continental Shelf Lands Act (OCSLA) regulations, BOEM has authority to "approve, disapprove, or approve with modifications" (30 C.F.R. § 585.628(f)) construction and operations plans for multi-billion-dollar offshore development in marine environments on the "[O]uter Continental Shelf [that] is a vital national resource reserve held by the Federal Government for the public" (43 U.S.C. § 1332(3)).

BOEM is the lead federal agency responsible for SFW's environmental review pursuant to the NEPA and the OCSLA. It developed the Final Environmental Impact Statement (FEIS) (August 16, 2021) for SFW's Construction and Operations Plan

(COP) (May 2021) and issued a Record of Decision (ROD) approving the FEIS (on November 24, 2021).

According to the ROD,

> [OCSLA] regulations at 30 C.F.R § 585.628 require BOEM to review the COP and all information provided therein pursuant to 30 C.F.R. §§ 585.626 and 585.627, to determine whether the COP contains all the information necessary to be considered complete and sufficient for BOEM to conduct technical and environmental reviews [*see* 22-cv-02147, ECF No. 45.2, at D-5, PDF 97, second paragraph].[8]

The ROD confirms that—

> Throughout the review process, BOEM evaluated the information [that] … South Fork Wind submitted, and determined that the information provided was sufficient in accordance with the regulations [*id.*, at D-6, PDF 98, second paragraph].
>
> OREP has determined that the COP includes all the information required in 30 C.F.R. §§ 585.626 and 585.627 for the Proposed Project [*id.*, third paragraph].

On January 18, 2022, BOEM "approved the Construction and Operations Plan (COP) that South

[8] *See* Record of Decision (ROD), issued by BOEM on November 24, 2022. Available at boem.gov— www.boem.gov/renewable-energy/state-activities/south-fork

Fork Wind, LLC initially submitted on June 29, 2018, and last updated on May 7, 2021 …." [9]

Fraud: PFAS[10] Contamination

SFW's COP acknowledges that onshore construction "activities [] could impact water quality and water resources … includ[ing] the installation of the underground transition vault at [] Beach Lane … [and] installation of the underground SFEC [South Fork Export Cable] [] [o]nshore route …." [11] BOEM's FEIS contradicts SFW's COP. BOEM asserts that "[t]here are no onshore construction activities under the Proposed Action that would require ground disturbance at depths at or near groundwater resources, and all activities would meet permit and regulatory requirements to continue protecting groundwater as drinking water resources … 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." [12] BOEM states that "groundwater quality in the analysis area appears to be good" (No 22-5317, Doc. 1999552-16, at 1). [13] BOEM knew its statements

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[9] *See* SFW COP (May 2021) (at 4-67, PDF 235, ¶ 6)—www.boem.gov/sites/default/files/documents/renewable-energy/South-Fork-Construction-Operations-Plan.pdf

[10] **PFAS**: Per/– and Polyfluoroalkyl Substance contamination.

[11] BOEM SFW COP Approval Letter, January 18, 2022 (at 1)—www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/SFWF-COP-Approval-Letter.pdf

[12] *See* FEIS (at H-28, PDF 660, ¶ 3). Available at boem.gov—www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/SFWF%20FEIS.pdf

[13] *See* Final Environmental Impact Statement (FEIS), August 16, 2021 (at H-23, PDF 655). Available at boem.gov (see link)—www.boem.gov/renewable-energy/state-activities/south-fork

on the project's impact on groundwater and existing groundwater quality were false.

In February 2021, nine months *before* BOEM approved the FEIS (November 24, 2021), BOEM received and uploaded (to regulations.gov) Petitioner's comments and 207 exhibits. Petitioner's letter asked BOEM "that the documents 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 …."[14]

The documents included multiple site characterization reports for two adjacent properties on either side of SFW's proposed construction corridor through Wainscott (two prepared for New York State Department of Environmental Conservation and another for the Town of East Hampton), hundreds of laboratory test results for PFAS contamination of private drinking water wells from Suffolk County Department of Health Services (SCDHS), testimony, and maps. The evidence shows beyond doubt that groundwater in the area where SFW proposed constructing concrete infrastructure for high-voltage transmission cables encroaching into and at the capillary fringe of a sole-source aquifer contains high levels of PFAS contamination exceeding regulatory limits. One document, an EPA "FACT SHEET" (2016) on "PFOA & PFOS[15] Drinking Water Health Advisories," reads— "[E]xposure to PFOA and PFOS over certain levels may result in adverse health effects, including developmental effects to fetuses during pregnancy or to breastfed infants (e.g., low birth weight, accelerated puberty, skeletal

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[14] *See* D.C. Cir., No. 22-5317, Doc. 1999552-12, at 2, 5th ¶)

[15] Perfluorooctanoic Acid (PFOA); Perfluorooctane Sulfonate (PFOS).

variations), cancer (e.g., testicular, kidney), liver effects (e.g., tissue damage), immune effects (e.g., antibody production and immunity), thyroid effects and other effects (e.g., cholesterol changes)."[16]

In Suffolk County, thirty-two percent (32%) of all wells with PFOA or PFOS contamination exceeding regulatory limits are in the exact same area where South Fork Wind proposed installing its underground concrete infrastructure.[17] Neither BOEM's FEIS nor SFW's COP mentions either chemical compound. *See* Kinsella Affidavit (D.C. Cir., No. 22-5317, Doc. 1999552-02, ¶¶ 9-53)(App 39a-46a).

Fraud: Project Cost ($2 billion)

In 2018, Petitioner informed BOEM of SFW's "fail[ure] to comply with 30 CFR 585.627(a)(7) with specific regard to its potential negative impact upon employment" and of the Project cost, "$1,624,738,893." Now that cost is $2,013,198,056. BOEM knew that SFW came at a price but failed to acknowledge or consider the project cost in its socioeconomic impact analysis. BOEM's one-sided economic analysis accounts for *beneficial* Project-related spending in the local economy but ignores the cost burden to ratepayers ($2 billion), which would *adversely* impact the local economy. The Project cost outweighs SFW's claimed beneficial spending many times over. For every dollar SFW puts into the economy, it takes out

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[16] *See* EPA FACT SHEET PFOA & PFOS (2016) at link—https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_13.pdf

[17] *See* Newsday, published April 4, 2022, 'Forever chemicals' found in Suffolk's private water wells since 2016 (D.C. Cir., No. 22-5317, Doc. 1999552-17, at 3-6) (www.newsday.com/long-island/environment/private-wells-testing-contaminants-drinking-water-pfas-v49xdvtl)

a multiple of that amount. *See* Kinsella Affidavit (D.C. Cir., No. 22-5317, Doc. 1999552-02, ¶¶ 68-91)(App 49a-56a).

Fraud: South Fork RFP

On November 8, 2021, NYSPSC General Counsel Robert Rosenthal admitted that "[i]n January 2017, LIPA … awarded SFW[] a PPA [power purchase agreement] for the supply of energy at an average price of 22 cents per kWh" and that "LIPA plans to purchase the same offshore wind renewable energy from another wind farm, Sunrise Wind, for 8 cents per kWh … The two offshore wind farms – SFWF and Sunrise Wind Farm – are only two miles apart and are owned and controlled indirectly by the same joint and equal partners, Ørsted and Eversource."[18] At the prices admitted by Mr. Rosenthal, ***SFW is overpriced by $1,025,415,962*** (*see* Kinsella Affidavit, ¶¶ 105-106)(App 61a-62a)

BOEM asserts that the "power purchase agreement executed in 2017 result[ed] from LIPA's technology-neutral competitive bidding process[,]" referring to the South Fork RFP (*id*, ¶ 102)(App 60a). SFW makes the same false claim in its COP (*id*, ¶ 103)(App 60a). Nine months *before* BOEM approved the Project, Petitioner provided BOEM with substantiating evidence contradicting BOEM's and SFW's claim. The documents show the South Fork RFP advanced proposals *based on* technology (*not* technology-neutral), was a manipulated procurement that stifled competition, permitted favoritism, and was *not*

[18] *See* Verified Petition (D.C. Cir., No. 22-5317, 1999552-09, ¶¶ 62-64) and Verified Answer (*id.*, 1999552-10, ¶¶ 62-64) in *Simon V. Kinsella v. NYSPSC* (index 2021-06572, N.Y. App. Div., 2d Dept.).

competitive (*id.*, ¶¶ 92-106)(App 56a-62a). BOEM approved SFW's project regardless.

REASON FOR GRANTING THE PETITION

The district court for D.C. repeatedly denied Petitioner answers to his complaint, amended complaint, and a response to his summary judgment motion and statement of material facts, violating his Fifth Amendment rights to due process of law.

The courts consistently deny Petitioner a hearing on his five fraud claims and consideration of named defendants under those claims, violating his Fifth Amendment right to a hearing on his claims.

The D.C. Circuit admitted "the district court did not explicitly consider or allow argument on [Petitioner's] independent claims of fraud [and nine named defendants under those claims], which were first raised in his amended complaint" (App 5a). Still, acknowledging the district court did *not* consider (explicitly or otherwise) Petitioner's fraud claims, thus denying Petitioner a fair hearing; the D.C. Circuit affirmed the district court's transfer order.

The D.C. Circuit and the district court rulings to transfer the case conflict with the plain language of the statute (28 U.S.C. § 1404)—

> **(a)** For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought ...

The courts' rulings conflict with this Court precedent. In *Van Dusen v. Barrack*, this Court held that the purpose of section 1404(a) "is to prevent the

waste of time, energy and money' and to protect litigants, witnesses and the public against unnecessary inconvenience and expense" (376 U.S. 612, 616 (1964)). "[T]he most convenient forum is frequently the place where the cause of action arose" (*id.*, at 628). "Section 1404(a) provides for transfer to a more convenient forum, not to a forum likely to prove equally convenient or inconvenient" (*id.*, at 646).

On May 17, 2023, the court of appeal for the D.C. Circuit denied Petitioner injunctive relief without a hearing (No. 22-5317, Doc. 1999552-0)(*see* p. 9). The appeals court gave no reason for denying preliminary injunction, contrary to this Court precedent in *Kelley v. Everglades District*, 319 U.S. 415, 416 (1943) ("[T]here must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion [on the relevant issue] can rationally be predicated … it is not the function of this Court to analyze the evidence in order to supply findings … sufficient to indicate the factual basis for its ultimate conclusion.")

The courts' orders denying answers to allegations of fraud, a hearing on fraud claims, and injunctive relief compromise proper judicial review of fraud claims and violate Petitioner's Fifth Amendment right to due process of law.

Petitioner's motion for injunctive relief makes a clear showing that "four factors, [when] taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); *see also Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288,

1291–92 (D.C. Cir. 2009)." *Pursuing Am.' Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 505 (D.C. Cir. 2016).

Please see Emergency Motion for a Temporary Restraining Order and Preliminary Injunction (No. 22-5317, Doc. 1999552-01, and Kinsella Affidavit (*id.*, Doc. 1999552-02).

1. Petitioner will likely succeed on the merits.

Nine months *before* BOEM approved the FEIS for SFW, BOEM acknowledged receiving conclusive evidence of PFAS contamination in soil and groundwater in the exact same area where SFW proposed installing underground concrete infrastructure for high-voltage transmission cables (*see* Kinsella Affidavit, ¶¶ 9-53)(App 39a-46a). Still, BOEM's FEIS contains no discussion, analysis, test results, or mitigation plans to minimize the project's impact on PFAS contamination. It does not consider the adverse health effects of chemicals the EPA links to cancer (*id*, ¶¶ 54-67)(App 46a-49a). In 2018, Petitioner notified BOEM that it had *not* considered the socioeconomic impact of the project's cost and that it was substantially more expensive than other nearby wind farms (*id*, ¶¶ 68-76) (App 49a-53a). BOEM failed to "independently evaluate the information" submitted by SFW, even after receiving information disproving SFW's claim. BOEM "shall be responsible for [the FEIS'] accuracy." (40 C.F.R. § 1506.5). BOEM did not ensure that SFW's development was "subject to environmental safeguards" (43 U.S.C. § 1332 (3)) concerning onshore PFAS contamination or "consistent with the maintenance of competition" (*id.*) regarding a non-competitive procurement process, where proposals were advanced based on technology (*id.*, ¶ 104). BOEM did *not* discuss alternatives *to avoid* a contaminated

area or obtain the same renewable energy at half the price from an offshore wind farm two miles away owned by the same joint and equal partners. "An EIS must discuss, among other things, 'alternatives to the proposed action,' NEPA § 102(2)(C)(iii), 42 U.S.C. § 4332(2)(C)(iii), and the discussion of alternatives forms 'the heart of the environmental impact statement.' 40 C.F.R. § 1502.14" *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 194 (D.C. Cir. 1991). BOEM is required to "consider every significant aspect of the environmental impact of [the] proposed action" *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983), and "to disclose the significant health, socioeconomic, and cumulative consequences of the environmental impact" (*id.*, at 106-07). It had to "take a 'hard look' at the environmental consequences before taking a major action" *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21 (1976).

BOEM did *not* consider the ($2 billion) project cost. In 2015, this Court made its position clear in a case concerning an EPA decision to reduce power plants' emissions of hazardous air pollutants, analogous to offshore wind's efforts to reduce the same emissions. There, "[t]he Agency gave cost no thought at all, because it considered cost irrelevant" *Michigan v. Envtl. Prot. Agency*, 135 S. Ct. 2699, 2706 (2015). Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR joined, dissenting, agreed with Justice SCALIA and the majority— "I agree with the majority—let there be no doubt about this—that EPA's power plant regulation would be unreasonable if '[t]he Agency gave cost no thought *at all*.' " *Id.*, (at 2714). Here, BOEM gave the cost ($2 billion) no thought *at all*.

Instead, BOEM not only neglected its duty to "inform the public that it has indeed considered environmental concerns in its decisionmaking process" (*Baltimore Gas, supra*, at 97), it went one step further— it falsified and concealed environmental contamination by asserting "existing groundwater quality in the analysis area appears to be good" (No. 22-5317, Doc. 1999552-16), and falsely stated the project's socioeconomic impact by omitting the project cost and the nature of the procurement process, contradicting evidence it acknowledged receiving *nine months before* approving the project.

BOEM's act satisfies the requisite elements of fraud. Petitioner can "show by clear and convincing evidence" (*Pyne v. Jamaica Nutrition Holdings Ltd.*, 497 A.2d 118, 131 (D.C. 1985)) that BOEM made a "false representation of material fact which is knowingly made" (*id.*) by falsely stating groundwater quality, the project's socioeconomic impact, and the nature of the procurement process, contrary to evidence it acknowledged receiving with the probable consequence of approving the project based on *its own* false representations. One "may infer … that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted" *United States v. Williams*, 836 F.3d 1, 30 (D.C. Cir. 2016). Knowing the "probable consequences" of its acts would be to approve the project *with* false statements absent accurate information, BOEM issued its ROD approving the FEIS on November 24, 2021. BOEM's false representations would naturally deceive the reader into believing the water quality in Wainscott is good, the price of renewable energy is reasonable, and the procurement was technology-neutral and

competitive, but it was *not.* BOEM deceived the public.

The final element to prove fraud is an "action [that] is taken in reliance upon the misrepresentation." *Pyne v. Jamaica Nutrition Holdings Ltd.*, (*supra*). On October 19, 2018, BOEM published a Notice of Intent to Prepare an Environmental Impact Statement for SFW "[c]onsistent with the regulations implementing the National Environmental Policy Act (NEPA)" (83 Fed. Reg. 53,104).[19] On January 8, 2021, BOEM published a Notice of Availability of a Draft Environmental Impact Statement "[i]n accordance with regulations issued under the National Environmental Policy Act" (86 Fed. Reg. 1520).[20] In response to both notices, Petitioner submitted comments (on November 18, 2018, and February 22, 2021, respectively).[21] Petitioner's February 2021 comments letter specifically requested "that BOEM, as lead agency, conduct a broad review of the whole Project including in all respects the onshore and offshore components and 'use all practicable means and measures' " (quoting NEPA 42 U.S.C. § 4331(a)).[22] Petitioner relied on BOEM to perform a legally sufficient review. However, BOEM deceived the public and Petitioner by failing to perform that review.

In addition, Petitioner can establish that the district courts (in D.C. and the E.D.N.Y.) and the D.C. Circuit deprived him of his Constitutional rights to due process of law.

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[19] *See* https://www.federalregister.gov/d/2018-22880/p-3. South Fork Wind LLC (formerly Deepwater Wind South Fork LLC)
[20] *See* https://www.federalregister.gov/d/2021-00100/p-3
[21] *See* No. 22-5317, Doc. 1999552-10 and Doc. 1999552-11.
[22] *Id.*, Doc. 1999552-11 (at 2, fifth paragraph).

> [A]s a matter of fundamental fairness the judge must accord an opportunity to be heard at least whenever there is a possibility that the hearing may develop facts bearing on the decision … *See Fine v. McGuire*, 433 F.2d 499, 501 (D.C. Cir. 1970).

The courts repeatedly denied Petitioner his right to a fair hearing on fraud claims and the contemplation of the convenience of nine BOEM officials and named defendants under those claims (parties and witnesses) before transferring the case and denying injunctive relief.

> The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). See *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

The D.C. Circuit admitted that the district court did not "consider or allow argument on [Petitioner's] independent claims of fraud" and named defendants under those claims (parties and witnesses) but still concluded "transfer was warranted." (App 4a-5a) Petitioner did not have an opportunity to be heard on his claims of fraud.

> Due process of law … implies the administration of law … by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing [internal quotes removed]. *See Jacob v. Roberts*, 223 U.S. 261, 262 (1912)

The district court in the E.D.N.Y. ordered that petition's preliminary injunction motion be denied (entered May 17, 2023) twenty days *before* the D.C. Circuit's order denying Petitioner's mandamus petition affecting transfer had become effective (June 7, 2023).[23] The E.D.N.Y. district court lacked jurisdiction to deny preliminary injunction. The court deleted from the order's case caption the BOEM officials named as defendants under the fraud claims(App 28a), and the order itself ignored the fraud claims (App 28a-35a). The E.D.N.Y. court denied Petitioner's preliminary injunction motion without his knowledge, without a hearing absent contemplation of fraud claims.

2. The Petitioner and the public will likely suffer irreparable harm.

> The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976)

Although *Elrod v. Burns* refers to First Amendment freedoms, the same applies to Plaintiff's rights to due process free of bias, but with a distinction. "The First Amendment does not mandate a viewpoint-neutral government" (internal quotes removed). *Agency for Int'l Development v. Alliance for Open Society*, 140 S. Ct. 2082, 2090 (2020) (Justice THOMAS concurring with Justice KAVANAUGH and the majority). The Due Process Clause requires a court to receive, in the first instance, substantive claims with a neutral

[23] *See* D.C. Circuit Rules 41(3)

viewpoint without pre-judging some claims to be set aside and to be wholly ignored, as in the case here regarding Petitioner's fraud claims. Both district courts (in D.C. and the E.D.N.Y.) deprived Petitioner of the right to hear his claims free from prejudice. Petitioner's claims were cherry-picked by the courts to suit a desired outcome.

Harm from the forbidden message

*W*hen considering Establishment Clause violations in *Chaplaincy of Full Gospel Churches*, the D.C. Circuit recognized that—

> [O]fficial preference of one religion over another, such governmental endorsement 'sends a message to nonadherents [of the favored denomination] that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.' *Lynch v. Donnelly,*465 U.S. 668, 688, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring)." (square brackets included in original text) [*supra*, at 302]. This harm … occurs merely by virtue of the government's purportedly unconstitutional policy or practice [*id.*] [S]pecifically, the harm that flows from the 'forbidden message' [*supra*, at 299].

The D.C. Circuit recognized "harm that flows from the 'forbidden message' " when government acts send an adverse message endorsing one religion over

another. Whether it be Establishment Clause or Due Process Clause violations, harm flows from the message unlawful government acts send. In this case, BOEM disregarded its statutorily mandated obligations and engaged in common law fraud against the public interest. The courts' violated Petitioner's Due Process Clause rights in aid of perpetuating BOEM's fraud. Such actions send the wrong message.

Fraud against the public interest by BOEM officials who have a duty to serve the public sends the wrong message to the offshore wind industry it regulates.

Marine Construction

The United States has embarked on one of the largest construction programs in its history. Private developers have submitted building plans for 3,031 offshore wind turbines[24] up to 1,171 feet tall,[25] double the height of the Washington Monument. Each wind turbine could have up to four foundation piles (12,124 piles), each with a diameter of up to 14.8 feet (half the width of the Washington Monument's top section).[26] Each foundation pile might penetrate the seabed down 197 feet.[27] To understand the construction program's scale, look at the Washington Monument and imagine more than three thousand monuments twice the height (half the width) with blades up to 935 feet in diameter[28] and streaks of oil and grease

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[24] *See* D.C. Cir., No. 22-5317, Doc. 1994062-07 (at 3)
[25] *Id.* (at 1)
[26] *See* SouthCoast Wind (formerly Mayflower Wind), COP, Vol. II, Rev-E (at 9-16, PDF 498, Table 9-10). At boem.gov (under the tap "Construction and Operation Plan")—
https://www.boem.gov/renewable-energy/state-activities/southcoast-wind-formerly-mayflower-wind
[27] *Id.*
[28] *See* D.C. Cir., No. 22-5317, Doc. 1994062-07 (at 3)

running down the sides from the mechanical turbines and rotating hubs. The (3,031) offshore wind turbines require repairs and maintenance and (in total) 4,089,015 gallons of coolant fluids, 8,849,066 gallons of oils and lubricants, and 2,212,425 gallons of diesel fuel,[29] which must be refilled and changed by boat in sometimes rough seas. The industrial-scale offshore development program has inherent risks to life, property, and the marine environment.

As of March 2023, BOEM had auctioned leases to private companies to develop 2.8 million acres of lease area off the U.S. coastline to offshore wind developers.[30] By 2024, BOEM plans to auction an additional 7.1 million acres (*id.*). Including areas for which BOEM has issued a Call for Information and Nominations (Oregon and the Gulf of Mexico), BOEM could potentially lease up to 45.3 million acres (*id.*), about the same size as the twelve largest U.S. National Parks combined.[31]

Any departure from the high standards of excellence that the nation expects of the federal agency overseeing such an ambitious build-out of our coastline could be disastrous. For example, the BP Deepwater Horizon Disaster, Report to the President (2011) reads— "With regard to NEPA specifically, some MMS [BOEM's predecessor] managers

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[29] *See* South Coast Wind (formerly Mayflower Wind), Draft Environmental Impact Statement, February 2023, Vol. II: Appendix D, Table D2-3. Offshore wind development activities on the U.S. East Coast (at D-79, PDF 83). *See* boem.gov at— https://www.boem.gov/renewable-energy/state-activities/southcoast-wind-draft-environmental-impact-statement

[30] *See* D.C. Cir., No. 22-5317, Doc. 1994062-06 (at 4)

[31] Approximately 45.8 million acres (*id.*, Doc. 1994062-08, at 1)

reportedly 'changed or minimized the … scientists' potential environmental impact findings in [NEPA] documents to expedite plan approvals.' According to several MMS environmental scientists, 'their managers believed the result of NEPA evaluations should always be a 'green light' to proceed.' " *See* No. 22-5317, Doc. 1994062-09 (at 14). "It should be no surprise under such circumstances that a culture of complacency with regard to NEPA developed" (*id.*).

Conflicted oversight

The three people overseeing the development of up to 45.3 million acres off the U.S. coastline all worked for a major law firm advising the offshore wind industry, Latham & Watkins LLP. The current U.S. Deputy Secretary of the Interior, Tommy Beaudreau, was a partner in the Washington, D.C. office of Latham & Watkins (2017–2021). The Nominee Report for Mr. Beaudreau lists "DE Shaw Renewable Investments" as a source of compensation. DE Shaw Renewable Investments owned South Fork Wind LLC (formerly Deepwater Wind South Fork LLC) before selling it to Ørsted A/S, another offshore wind developer from which Mr. Beaudreau received compensation. Mr. Beaudreau's Nominee Report lists a Latham & Watkins income of $2.4 million. It identifies the following offshore wind companies—Ørsted A/S, Avangrid Renewables, Vineyard Wind LLC, Beacon Offshore Energy, TOTAL, innogy Renewables US, Dominion Resources, Inc., DE Shaw Renewable Investments, and Anbaric Development Partners. *See* Beaudreau 2020 OGE Nominee Report (*id.*, 1994062-10). The Principal Deputy Assistant Secretary for Land and Minerals Management (L&MM), Ms. Laura Daniel-Davis, who signed

BOEM's Record of Decision for SFW, was a Senior Manager at Latham & Watkins (2001–2007). The Director of BOEM, Elizabeth (Liz) Klein, was an Associate at Latham & Watkins (2006–2010). Counsel representing SFW, Ms. Janice Schneider of Latham & Watkins, served as Assistant Secretary for L&MM (2014–2017).

Officials in charge of our nation's marine resources at the DOI and BOEM are conflicted. This case leaves no room for doubt that public officials blurred the lines between serving the *public* and *private* interests and, with the aid of the courts, attempted to conceal their choice to further SFW's interests to the public detriment.

The wrong message

By engaging in acts contrary to law constituting fraud, BOEM implicitly condones unlawful conduct in others, including developers operating offshore where few people can see what they are doing. BOEM's reckless neglect and fraudulent conduct send a clear message that developers need not comply with regulations and safety standards because BOEM, the regulator, does not. If a developer plans to build on a contaminated site, the message is that BOEM will help you cover it up and approve your project regardless; after all, it did it for SFW. The message is loud and clear: SFW does not have to comply with federal environmental law, so why should we? If federal regulators turn a blind eye to non-compliance and fraudulent representations, and if the courts turn to (unlawful) procedure to thwart proper judicial review, developers and the public will likewise act contrary to law.

Sending the wrong message regarding compliance to developers operating in unforgiving, sensitive, and critical ocean environments and onshore residential communities is harmful (*see* BP Deepwater Horizon Disaster on pp. 26-27).

Harm flows to the public from the message that government acts in violation of statutory, equity, common law, and constitutional law send. The public will lose confidence in the regulatory and judicial process. It demoralizes hardworking staff and scientists at government agencies and judges and officials at courthouses. It implicitly condones unlawful acts by developers, regulators, and the public. If government regulators violate the law and judges ignore the people's constitutional rights, the public will do the same. Such acts erode our constitutional protections.

The harm is irreparable.

In *Chaplaincy of Full Gospel Churches*, the D.C. Circuit finds the harm that flows from the 'forbidden message' is irremediable—

> [T]he inchoate, one-way nature of Establishment Clause violations, which inflict an 'erosion of religious liberties [that] cannot be deterred by awarding damages to the victims of such erosion,' *City of St. Charles,*794 F.2d at 275, we are able to conclude that where a movant alleges a violation of the Establishment Clause, this is sufficient, without more, to satisfy the irreparable harm prong for purposes of the preliminary injunction determination. [454 F.3d 290, 303 (D.C. Cir. 2006)]

In this case, the harm resulting from the message BOEM's and the courts' violations send also are of an "inchoate, one-way nature …" It includes the fishing industry struggling to defend the livelihood of its members, who rightly question the integrity of BOEM's decisions. It includes the petitioner, who doubts the integrity of BOEM and the federal courts. While Petitioner's heart still holds hope, experience tells him that a federal environmental review, like a federal court, is a charade and the Constitution is like an elusive mythical creature spoken about but never experienced. This Court can make the constitutional experience real.

Petitioner sends email updates to a list of over one thousand people who forward his emails to others. He posts information on his websites[32] that are accessible to the public. Petitioner communicates his experiences to countless others in an inchoate, one-way nature. Such a disparate group cannot receive damages. An award of damages cannot remediate the harm.

The FEIS states that other "[c]ooperating agencies may rely on this final EIS to support their decision-making." (FEIS, at ii, PDF 6, 3rd ¶). The U.S. Environmental Protection Agency is a listed cooperating federal agency (ROD, at 1, PDF 3, 2nd ¶). Should the EPA rely on BOEM's false representations that "[o]verall, existing groundwater quality in the analysis area appears to be good" (FEIS, at H-23, PDF 655), Wainscott will likely have problems securing federal assistance from the EPA regarding the remediation of harmful groundwater PFAS contamination. This is another example of the harm

[32] www.Wainscott.Life and www.oswSouthFork.info

from BOEM's unlawful act of fraudulently stating groundwater quality, sending the wrong message that ripples through agencies by word of mouth. Wainscott may not get the support it needs. Such harm is irremediable.

3. **The balance of equities favors Petitioner.**

> In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.' *Amoco Production Co.,*480 U.S., at 542, 107 S.Ct. 1396. 'In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.' *Romero–Barcelo,*456 U.S., at 312, 102 S.Ct. 1798; see also *Railroad Comm'n of Tex. v. Pullman Co.,*312 U.S. 496, 500, 61 S.Ct. 643, 85 L.Ed. 971 (1941). *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)

The balance of equities weighs the harm to Petitioner *without* injunctive relief against the harm to SFW *with* injunctive relief. Petitioner considers the harm to Defendant Federal Agencies and the public interest together. *See Pursuing Am.' Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016) ("assessing the harm to the opposing party and weighing the public interest 'merge when the Government is the opposing party' ").

Petitioner without injunctive relief

Petitioner jogs regularly along Beach Lane, where SFW has installed underground infrastructure for high-voltage transmission cables. The permanent concrete duct banks and vaults encroach into groundwater and are installed at the capillary fringe of a contaminated sole-source aquifer. BOEM did not perform the requisite 'hard look' environmental review of the likely chemical interaction between concrete and PFAS compound contaminants. Plaintiff has cause to suspect SFW's infrastructure will become a secondary source of contamination and prolong its harmful effects on the environment near his home. Plaintiff swims and sails in the waters surrounding the onshore construction corridor that is connected via groundwater to SFW's concrete duct banks and vaults. Plaintiff has cause to suspect that SFW's overpriced renewable energy will increase the cost of electricity and adversely impact the local economy more than would have occurred had BOEM considered the project's cost and procurement manipulation. BOEM engaged in fraud, denying Petitioner and the public the right to a legally sufficient environmental review. The federal courts repeatedly deny Petitioner his Fifth Amendment right to a hair hearing on his claims. Without immediate injunctive relief, the harm from the uncertainty due to the lack of an environmental review and the message unlawful government actions send will continue inflicting harm.

SFW with injunctive relief (denying fruits of fraud)

SFW will argue (as it did in the district court) that it "has already mobilized and begun its prep work … that includes bringing highly specialized equipment that was reserved in advance of construction to the site at great expense, approximately $40 million."

(November 9, 2022, Hearing Tr., at 5:20-25). SFW claims it will suffer potential economic injury should the district court grant Petitioner an injunction. However, the hearing occurred in November 2022, *after* SFW had begun construction. SFW does *not* explain why it failed to consider PFAS contamination when it was widely known in 2017. Suffolk County Department of Health Services issued a Water Quality Advisory on October 11, 2017. *See* Kinsella Affidavit, No. 22-5317, Doc. 1999552-02, ¶ 12)(App 41a). PFAS contamination in Wainscott was widely publicized three years *before* SFW submitted its final COP (May 7, 2021). On January 2, 2020, Petitioner provided SFW with conclusive evidence of extensive PFAS contamination (also provided to BOEM in February 2021). S*ee* link (last accessed June 17, 2023)—
https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_13.pdf.

Despite knowing the extent of contamination for at least a year before submitting its final COP, SFW did not alter its plans.

In December 2022 and January 2021, SFW tested its onshore construction corridor for PFAS contamination for the first time. The test results showed groundwater PFOA contamination (50 ppt), exceeding regulatory limits five times (s*ee* No. 22-5317, Doc. 1999552-20, at 1, 5th column). Groundwater PFOS contamination (14.7 ppt) exceeds regulatory limits (*id.*, at 2, 8th column). SFW's testing pre-dates its final COP (submitted on May 7, 2021) by four months. SFW did *not* disclose *its* test results showing PFAS contamination exceeding regulatory limits that the EPA links to cancer and other severe health problems (EPA FACT SHEET, on pp. 13-14)

but included other less harmful contaminants, such as "median groundwater nitrogen levels … [that] have risen 40 percent to 3.58 mg/L",[33]

SFW (falsely) claimed that its COP "provides a description of water quality and water resource conditions in the … [onshore] SFEC [South Fork Export Cable] as defined by several parameters including: … contaminants in water …" [34] Despite a clear duty to "[d]escribe the existing water quality conditions and your project activities that could affect water quality" (30 CFR 585.627(a)(2)), and to "[d]escribe 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" (*id.*) and any "environmental hazards and/or accidental events causing accidental releases of … hazardous materials and wastes" (*id.*), SFW remained silent on known onsite PFAS contamination. *See* Kinsella Affidavit (No. 22-5317, Doc. 1999552-02, ¶¶ 146-157)(App 63a-67a).

SFW's false representations of water quality satisfy the requisite elements of fraud. The Petitioner can "show by clear and convincing evidence" (*Pyne v. Jamaica Nutrition Holdings Ltd.*, *supra*) that SFW made a "false representation of material fact which is knowingly made" (*id.*) "The concealment of a fact that should have been disclosed is also a misrepresentation. *Feltman v. Sarbov,* 366 A.2d 137, 140-41 (D.C. 1976). Where a court finds that a party had the duty to disclose material information and

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[33] *See* COP May 2021 (at 4-61, PDF 229, 1st ¶). *See* SFW COP at boem.gov (under tab "Construction and Operations Plan")—www.boem.gov/renewable-energy/state-activities/south-fork

[34] *Id.*, (at 4-56, PDF 224, 1st ¶)

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 (DDC 1998). According to BOEM, SFW had a duty to disclose—

> Pursuant to 30 C.F.R. § 585.627, the Lessee [SFW] must submit information and certifications necessary for BOEM to comply with the National Environmental Policy Act of 1969 (NEPA)[8] and other relevant laws. [n.8 "42 U.S.C. § 4321 *et seq.*] *See* ROD (at D-5, PDF 97, third paragraph)

Contrary to its obligations, SFW did *not* submit to BOEM its *own* test results showing onsite groundwater PFAS contamination (but disclosed other less harmful contaminants). SFW falsely represented groundwater quality by omission, knowing it was contaminated, and sought project approval. One "may infer … that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted" *United States v. Williams* (*supra*). The "probable consequence" of SFW knowingly omitting environmental contamination would likely lead to BOEM's approval of its Project.

The final element of fraud is an "action [that] is taken in reliance upon the misrepresentation." *Pyne v. Jamaica Nutrition Holdings Ltd.*, (*supra*). Petitioner relied on the accuracy of SFW's COP and has read it several times out of concern that SFW would cause harm to him, his family, his community, and his

environment. His concerns have proved to be well-founded. SFW's actions constitute (civil) fraud.[35]

In *Simon Schuster v. Crime Victims Bd.*, this Court "recognized the 'fundamental equitable principle,' … that '[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity ...' " (502 U.S. 105, 119 (1991)). It is inconsistent with fundamental equitable principles for SFW "to profit by his own fraud" (*id.*), that is, the fraud when it knowingly omitted PFAS contamination from its COP that materially misrepresented groundwater quality and seeking "to take advantage of [its] own wrong" (*id.*) by using its construction (obtained by fraudulent representations) to defeat injunctive relief. SFW wants to keep what it gained through fraud despite the ongoing risks to public health and the environment absent a legally sufficient review.

4. **Injunctive relief favors the public interest.**

The case cries out for this Court to defend the public interest in having agencies comply with their statutorily mandated obligations and for courts to uphold the Constitution by granting Petitioner a fair hearing on his fraud claims.

> There is generally no public interest in the perpetuation of unlawful agency action. *PAG*, 831 F.3d at 511–12, 2016 WL 4087943, at *8; *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). To the contrary, there is a substantial public interest "in having govern[-]

[35] SFW's COP may have violated 18 U.S.C. § 1001.

> mental agencies abide by the federal laws that govern their existence and operations." *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994). *See League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

There is a public interest in courts guaranteeing Fifth Amendment rights to due process of law, including a fair hearing. "The public interest favors the protection of constitutional rights, *see, e.g.*, *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)" *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 335 (D.C. Cir. 2018).

Federal Defendants may argue that "the Project materially furthers federal renewable energy goals"[36] as they did in the D.C. Circuit. However, SFW's wind farm (130 MW) represents *only one-third of one percent* of U.S. approved offshore wind generating capacity (39,021 MW);[37] thus, it is *not* material. On the contrary, granting injunctive relief at this early stage of offshore wind development would send the industry and regulators a message that the nation expects higher standards. This Court could send that message without *materially* affecting offshore wind resources' overall generating capacity.

CONCLUSION

This Court recognized in *Percoco v. United States* that "an agent of the government has a fiduciary duty to the government and thus to the public it serves"

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[36] *See* D.C. Cir., No 22-5316, Doc. 1982686 (at 23)

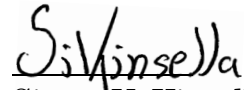
[37] Mayflower Wind's DEIS (February 2023), Volume II: Appendix D (D.C. Cir., No. 22-5317, Doc. 1994062-07, at 3). Table D2-1: OCS Total Generating Capacity (MW) is "39,021"

(No. 21-1158, 598 U.S. ---, --- S. Ct. ---, 2023 WL 3356527 (May 11, 2023)). It follows that if such *agent* has a fiduciary duty, then *actual* public officials employed by the government have a fiduciary duty to the public they serve. Here, clear and convincing evidence shows that public officials violated their fiduciary duty and engaged in common law fraud. Simply put, it cannot be that fraud by a federal regulatory agency is acceptable.

Petitioner has no alternative remedy.

For the reasons stated herein, Petitioner respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted this 22nd day of June 2023,



Simon V. Kinsella,
Petitioner *pro se*
P.O. Box 792,
Wainscott, NY 11975
Tel: (631) 903-915
Si@oswSouthFork.info

Court of Appeals Orders

D.C. Circuit, *In re: Simon V. Kinsella* (No. 22-5317)

District Court Order & Opinion (D.D.C.)

For the District of Columbia, *Simon V. Kinsella* v. *Bureau of Ocean Energy Management, et al.*

No. 22-cv-02147 (JMC)

District Court Order & Opinion (E.D.N.Y.)
For the Eastern District of New York
Kinsella v. Bureau Of Ocean Energy Management et al.
No: 2:23-cv-02915 (FB)

Statutory and Regulatory Provisions Involved

Excerpts **Affidavit of Petitioner Simon V. Kinsella** in Support of an Emergency Motion for a Temporary Restraining Order and Preliminary Injunction (dated May 10, 2023)

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5317 **September Term, 2022**
1:22-cv-02147-JMC
Filed On: June 9, 2023

In re: Simon V. Kinsella,

Petitioner

BEFORE: Millett, Pillard, and Rao, Circuit Judges

ORDER

Upon consideration of the motion to stay the mandate, which the court construes as a motion to stay the effectiveness of the court's May 17, 2023 order, it is

ORDERED that the motion be denied. Petitioner has not shown that his application to the Supreme Court for emergency relief or for a writ of certiorari presents a substantial question and that there is good cause for a stay. See D.C. Cir. Rule 41(a)(3); cf. Fed. R. App. P. 41(d)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5317 **September Term, 2022**
1:22-cv-02147-JMC
Filed On: May 17, 2023

In re: Simon V. Kinsella,

Petitioner

BEFORE: Millett, Pillard, and Rao, Circuit Judges

ORDER

Upon consideration of the amended petition for writ of mandamus, the responses thereto, and the replies; and the emergency motion for a temporary restraining order and preliminary injunction, it is

ORDERED that the emergency motion for a temporary restraining order and preliminary injunction be denied. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. The district court did not abuse its discretion in transferring petitioner's case to the Eastern District of New York. See In re Tripati, 836 F.2d 1406, 1407 (D.C. Cir. 1988) (per curiam). Petitioner does not dispute that venue is proper in the Eastern District of New York. See 28 U.S.C. § 1391(e)(1); 5 U.S.C. § 552(a)(4)(B). And upon review of the entire record, we conclude that the district court reasonably weighed the various factors for and against transfer and concluded that, on

balance, transfer was warranted. Petitioner is correct that the district court did not explicitly consider or allow argument on his independent claims of fraud, which were first raised in his amended complaint. Nonetheless, we are not convinced that consideration of these claims would have altered the outcome of the district court's analysis or that vacating the district court's otherwise proper exercise of its discretion is "essential to the interests of justice." See Starnes v. McGuire, 512 F.2d 918, 929 (D.C. Cir. 1974) (en banc).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Scott H. Atchue
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5317 **September Term, 2022**
1:22-cv-02147-JMC
Filed On: April 24, 2023 [1996148]

In re: Simon V. Kinsella,
Petitioner

ORDER

Upon consideration of petitioner's emergency motion to return files to the District of Columbia, it is

ORDERED that the motion be dismissed as moot. The docket in No. 1:22-cv-02147 reflects that the case was transferred prematurely and in error, and it has been reopened. The case in the Eastern District of New York, No. 2:23-cv-02915, has been administratively closed.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Catherine J. Lavender
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5317 **September Term, 2022**

1:22-cv-02147-JMC

Filed On: February 23, 2023

In re: Simon V. Kinsella,

Petitioner

BEFORE: Wilkins, Rao, and Walker, Circuit Judges

ORDER

Upon consideration of amended petition for writ of mandamus, which contains a request for initial hearing en banc, it is

ORDERED that the request for initial hearing en banc be denied. See Fed. R. App. P. 35(a). It is

FURTHER ORDERED, on the court's own motion, that the United States and South Fork Wind, LLC enter appearances and file responses to the mandamus petition, not to exceed 7,800 words each, within 30 days of the date of this order. See Fed. R. App. P. 21(d); D.C. Cir. Rule 21(a). Petitioner may file a reply, not to exceed 3,900 words, within 14 days of the filing of the responses.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Scott H. Atchue
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIMON V. KINSELLA, Plaintiff, v. BUREAU OF OCEAN ENERGY MANAGEMENT, et al, Defendants, and SOUTH FORK WIND, LLC, Defendant-Intervenor.	Civil Action No. 22-2147 (JMC)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that this civil action is **TRANSFERRED** to the United States District Court for the Eastern District of New York.

SO ORDERED.

DATE: November 10, 2022

Sincerely,
s/
Jia M. Cobb
U.S. District Court Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIMON V. KINSELLA, Plaintiff, v. BUREAU OF OCEAN ENERGY MANAGEMENT, et al, Defendants, and SOUTH FORK WIND, LLC, Defendant-Intervenor.	Civil Action No. 22-2147 (JMC)

MEMORANDUM OPINION

Plaintiff Simon Kinsella brought this action under the Administrative Procedure Act (APA), challenging the Bureau of Ocean Energy Management's approval of a wind farm off the coast of Long Island, New York.[1] Defendants moved to transfer the case to the District Court for the Eastern District of New York. ECF 11. The Court GRANTS that motion and transfers the case.

[1] Unless otherwise indicated, the formatting of quoted materials has been modified throughout this opinion, for example, by omitting internal quotation marks and citations, and by incorporating emphases, changes to capitalization, and other bracketed alterations therein. All pincites to documents filed on the docket are to the automatically generated ECF Page ID number that appears at the top of each page.

I. BACKGROUND

Plaintiff Simon Kinsella is a resident of Wainscott, in the Town of East Hampton, Suffolk County, New York. ECF 34-2 ¶ 5.[2] He challenges the Bureau of Ocean Energy Management's (BOEM) approval of the South Fork offshore wind energy project, which is to be constructed thirty-five miles east of Montauk Point, Long Island. *Id.* ¶¶ 11–12; ECF 11-3 at 7. The Project has two components: the South Fork Wind Farm and the South Fork Export Cable project. ECF 11-3 at 10. BOEM, a component of the Department of the Interior, held a competitive sale and awarded the lease to a company that is now called South Fork Wind, LLC. *Id.* at 6. On November 24, 2021, BOEM, together with the National Marine Fisheries Service (NMFS), issued a Record of Decision (ROD) approving the project with modifications. *Id.* at 4, 18.

The approval process included myriad opportunities for input from other agencies and stakeholders. The ROD itself was prepared with the cooperation of more than a half-dozen federal, state, and local agencies, including: the U.S. Army Corps of Engineers, the Bureau of Safety and Environmental Enforcement, the U.S. Coast Guard, the U.S. Environmental Protection Agency, the Massachusetts Office of Coastal Zone Management, the Rhode Island Coastal Resource Management Council, the Rhode Island Department of Environmental Management, the Town of East Hampton, and the Trustees of the Freeholders and

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[2] All citations to the Complaint are to the First Amended Complaint, ECF 34-2, which was submitted to the Court on November 2, 2022. The Court granted Kinsella's Motion to Amend as a matter of course on November 9, 2022.

Commonality of the Town of East Hampton. *Id.* at 4. Also, during the public comment period for the project's Environmental Impact Statement (EIS), BOEM held three virtual public hearings and received nearly 400 unique submittals from the public, agencies, and other interested groups. *Id.* at 6. In addition to BOEM's review, permits were issued for the onshore component of the project by the New York Public Service Commission (NYPSC)—which conducted its own, lengthy approval process. ECF 11-5 at 7–12. Kinsella was a formal party to that proceeding. *Id.* at 4; ECF 34-2 ¶ 111.

The South Fork project has been challenged in other courts. The NYPSC's approval was appealed and upheld in New York state court. *See Mahoney v. U.S. Dep't of the Interior*, No. 22-cv-01305, 2022 WL 1093199, at *2 (E.D.N.Y. 2022). In another action, residents of the town of Wainscott petitioned a state court to invalidate an easement granted for the project—a petition that was denied. *Id.* In another action, Wainscott residents moved the District Court for the Eastern District of New York for a preliminary injunction to halt construction of the onshore export cable. *Id.* That motion for an injunction was denied in April 2022. *Id.* at *3. Kinsella himself has sued (in state-court actions separate from this case) the NYPSC, the New York State Department of Public Service, and the Long Island Power Authority. ECF 34-2 ¶¶ 411, 412; see also ECF 40-1 at 17.

In this case, Kinsella claims that BOEM's approval of the South Fork project should be set aside (and construction on the project be enjoined) because of various deficiencies under the APA. ECF

34-2 ¶ 708. Amongst other things, Kinsella alleges that BOEM failed to consider adverse environmental impacts of the project, including the contamination of East Hampton's drinking water, *id.* ¶ 445, and the adverse population-level impacts on Atlantic cod, *id.* ¶ 605. Kinsella also alleges that the competitive bidding process was deficient, *id.* ¶ 563, that BOEM failed to sufficiently consider alternative plans, *id.* ¶¶ 523–24, and that BOEM failed to consider the economic downsides of the project, *id.* ¶ 639. In addition to his claims under the APA, Kinsella also alleges violations of the National Environmental Policy Act, *id.* at 2, the Outer Continental Shelf Lands Act, *id.*, the Coastal Zone Management Act, *id.* ¶ 499, Executive Order 12898 (relating to environmental justice), *id.* ¶ 574, and the Due Process Clause of the Fourteenth Amendment, *id.* ¶ 594.

Kinsella moved for a Temporary Restraining Order (TRO) on November 2, 2022, ECF 35, which was denied on November 9, 2022. Still pending before the Court is Kinsella's Motion for a Preliminary Injunction. ECF 35. This opinion addresses only Defendants' Motion to Transfer the case to the United States District Court for the Eastern District of New York. ECF 11. Plaintiff filed an opposition to the Motion, ECF 19, Defendants filed a Reply, ECF 25, and Plaintiff filed (with leave of the Court) a Surreply, ECF 27.

II. LEGAL STANDARD

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought . . . ." 28 U.S.C. § 1404(a).

Section 1404 provides the Court with a mechanism to transfer a case, even in cases where venue is proper in the transferor court, in order "to prevent the waste of time, energy and money[,] and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964).

The Court employs a two-step analysis to determine whether a case should be transferred. First, the Court determines if the case could have been brought in the transferee district. *S. Utah Wilderness All. v. Lewis*, 845 F. Supp. 2d 231, 234 (D.D.C. 2012). If so, the Court turns to an analysis of the public and private interests supporting transfer. The public-interest factors include: (1) "the local interest in having local controversies decided at home," (2) "the transferee's familiarity with the governing laws" and the pendency of related litigation; (3) "the relative congestion of the calendars of the transferor and transferee courts." *Pres. Soc'y of Charleston v. U.S. Army Corps of Eng'rs*, 893 F. Supp. 2d 49, 54 (D.D.C. 2012). The private-interest factors include: (1) "the plaintiff's choice of forum;" (2) "the defendant's choice of forum;" (3) "whether the claim arose elsewhere;" (4) "the convenience of the parties;" (5) "the convenience of the witnesses;" and (6) "the ease of access to sources of proof." *Id.*

III. ANALYSIS

Kinsella does not dispute that venue is proper in the transferee court. *See* ECF 19 at 8. The Court therefore moves to the second part of the analysis—weighing the public and private-interest factors for and against transferring the case. Based on its

analysis of those factors, the Court determines that the case should be transferred.

A. The public-interest factors weigh strongly in favor of transferring the case.

The "most important" of the public interest factors is "the local interest in having local controversies decided at home," *Charleston*, 893 F. Supp. 2d at 57, so that concerned members of the public can engage with the proceedings. Pursuant to that principle, other courts in this jurisdiction have said that suits involving "water rights, environmental regulation, and local wildlife . . . should be resolved in the forum where the people whose rights and interests are in fact most vitally affected" are located. *Trout Unlimited v. U.S. Dep't of Agric.*, 944 F. Supp. 13, 19–20 (D.D.C. 1996). The Court finds that the first public-interest factor weighs heavily in favor of transfer because the South Fork project directly affects the rights of residents of the transferee district, while having no impact at all on the residents of the District of Columbia. Moreover, the heavy involvement of the local public in the approval process preceding the project's approval, see id. at 20, together with the pendency of multiple court cases challenging the project "demonstrates that other parties in [the transferee district] are interested" in the controversy, *Villa v. Salazar*, 933 F. Supp. 2d 50, 56 (D.D.C. 2013).

The second public-interest factor also weighs in favor of transfer. Although the transferee court has the same expertise as this Court regarding the laws governing this action, the transferee court is far more familiar with the facts and parties in this case. That is because there is at least one pending lawsuit

in the transferee jurisdiction involving a challenge to the same project on similar grounds. See *Mahoney*, 2022 WL 1093199; *see also Bartolucci v. 1-800 Contacts, Inc.*, 245 F. Supp. 3d 38, 50 (D.D.C. 2017) ("Courts in this district have consistently held that the interests of justice are better served when a case is transferred to the district where related actions are pending."). The Court takes Kinsella's point that there are differences between that case and the present action: the *Mahoney* defendants include the Army Corps of Engineers; this action involves claims under laws that are not at issue in that case; and the scientific process through which Kinsella claims the groundwater will be contaminated is different than the one highlighted by the plaintiffs in Mahoney. ECF 19 at 17–19. But those distinctions do not change the fact that the administrative record will be largely the same in each case, as are at least some of the alleged harms. For example, the transferee court has already heard testimony and considered a motion for a preliminary injunction made largely on the same harms as the pending motion in this case. *Mahoney,* 2022 WL 1093199, at *1. The transferee court's familiarity with the facts and background of this controversy weighs in favor of transfer.[3]

As for the third public-interest factor, Kinsella emphasizes and Defendants acknowledge that the transferee court's docket is more congested than this Court's. ECF 19 at 16–17; ECF 11-1 at 19. However,

[3] Kinsella's Opposition to the Motion to Transfer suggests that the transferee court will not be impartial due to its proximity to the NYPSC. ECF 19 at 13. The Court rejects the argument that the transferee court will not be able to fairly adjudicate Kinsella's claims, and thus gives no weight to that argument.

that one factor does not outweigh the other two. *Cf. W. Watersheds Project v. Jewell*, 69 F. Supp. 3d 41, 44 (D.D.C. 2014). Moreover, the potential prejudice caused by the additional congestion (i.e., potential delay in the adjudication of the case) is offset by the fact that the transferee court is already familiar with the facts and record in this case. Accordingly, the Court finds that the public-interest factors, on balance, weigh strongly in favor of transfer.

B. The private-interest factors weigh slightly against transferring the case, but they are outweighed by the public interest in transferring the case.

Most of the private-interest factors are neutral with regard to this case. However, the Court does give weight to Kinsella's preference that the case be heard by this Court, and therefore the private-interest factors, taken together, weigh slightly against transfer. That does not change the Court's conclusion that transfer is appropriate, however, because the public interest factors far outweigh Kinsella's preference.

The first two private-interest factors, taken together, weigh against transfer. Kinsella prefers his claims be heard by this Court. Defendants prefer the transferee court. Defendants argue Kinsella's preference should be given little weight because the District of Columbia is not his "home forum," and because his choice of forum was made in part to avoid unfavorable precedent in the transferee court, ECF 11-1 at 20–21. Kinsella counters that his preference should be given priority because—regardless of his personal connection to the District—there is a "substantial connection" between his chosen forum

and "the subject matter of the action." *Akiachak Native Cmty. v. Dep't of Interior*, 502 F. Supp. 2d 64, 67 (D.D.C. 2007). The Court agrees with Kinsella. Because the final approval of the project occurred in the District, there is "a sufficiently substantial nexus" between the controversy and the forum. *Id.* The Court therefore grants more weight to Kinsella's preference than Defendants'. *See id.*; *Gross v. Owen*, 221 F.2d 94, 95 (D.C. Cir. 1955).

The third factor weighs neither for nor against transfer. In considering where a claim arose, both the location of the decision-making process and the location of the impacts of the project are considered. *See Ctr. for Env't. Sci., Accuracy & Reliability v. Nat'l Park Serv.*, 75 F. Supp. 3d 353, 357–58 (D.D.C. 2014). Defendants acknowledge that the final approval of the ROD took place in the District. ECF 11-1 at 22. On the other hand, Defendants point out that the bulk of the underlying work leading up to that approval happened outside of this jurisdiction, at BOEM's offices in Sterling, Virginia. ECF 25 at 10; ECF 25-1 at ¶¶ 6, 9. *See also Seafreeze Shoreside Inc. v. U.S. Dep't of the Interior*, Nos. 21-3276, 22-237, 2022 WL 3906934, at *3, n.1 ("[A]nalysis that occurred in . . . Sterling, Virginia, would be a basis for venue in . . . the Eastern District of Virginia, not the District of Columbia."). Moreover, there is nothing to suggest that BOEM's approval of the project will have any impact whatsoever in the District of Columbia. *See Ctr. for Env't. Sci., Accuracy, & Reliability*, 75 F. Supp. at 358 (transferring a case where the impacts of the project-in-controversy would be felt in the transferee district, even though agency decisionmakers were in

the District of Columbia). Accordingly, the Court finds that the third private-interest factor weighs neither for nor against transfer.

Kinsella focuses much of his argument on the remaining private-interest factors—"convenience of the parties;" "convenience of the witnesses;" "the ease of access to sources of proof." *Trout Unlimited*, 944 F. Supp. at 16. He emphasizes that the nearest courthouse is sixty miles from the site of the controversy, and that there is no reason to think that the requested transfer would make it any more convenient for any of the parties to make the trip.[4] [4]ECF 19 at 7. Kinsella also points out that the Defendant-agencies, as well as their lawyers, are located in the District of Columbia. *Id.* at 6. Finally, he asserts that this case may well involve extra-record evidence, which would be more easily gathered in the District. *Id.* at 10. The Court is not convinced by those arguments. As an initial matter, the location of the parties' *attorneys* is not relevant to the transfer inquiry. *Charleston*, 893 F. Supp. 2d at 56. More importantly, this is an APA case that will likely be decided at summary judgment on the basis of the administrative record. There is no reason to expect that there will be a trial, or witnesses, or the need for significant extra-record evidence. *See Greater Yellowstone Coal. v. Kempthorne,* Nos. 07-2111, 07-2112, 2008 WL 1862298, at *4 (D.D.C.

[4] Defendants respond that they would seek to transfer the case to the E.D.N.Y. courthouse in Brooklyn. ECF 25 at 8 n.1. Although a courthouse in New York City would undoubtedly be more convenient for D.C.-based parties and their lawyers, that added convenience does not weigh heavily in the Court's decision here.

2008). Accordingly, the Court concludes that these factors are neutral, and that the private-interest factors, taken as a whole, weigh slightly against transfer.

Although the Court gives due weight to Kinsella's preference that the case be heard by this Court, that consideration is ultimately outweighed by the public-interest factors, which weigh heavily in favor of transfer. In short, the Court concludes that (1) the local interest in having a local controversy adjudicated locally, and (2) the fact that the transferee court is more familiar with the issues in this case, make transferring the case the better course of action here.

IV. CONCLUSION

The Court GRANTS Defendants' Motion to Transfer the Case to the District Court for the Eastern District of New York. Accordingly, the Court declines to rule on Plaintiffs' Motion for a Preliminary Injunction. ECF 35.

SO ORDERED.

DATE: November 10, 2022

Sincerely,
s/
Jia M. Cobb
U.S. District Court Judge

U.S. District Court
Eastern District of New York (Central Islip)
CIVIL DOCKET FOR CASE #: 2:23-cv-02915-FB-ST

Kinsella v. Bureau Of Ocean Energy Management et al	Date Filed: 04/19/2023
Assigned to: Judge Frederic Block	Jury Demand: None
Referred to: Magistrate Judge Steven Tiscione	Nature of Suit: 895 Freedom of Information Act
Case in other court: District of Columbia, 1:22-cv-02147	Jurisdiction: U.S. Government Defendant
Cause: 42:4321 Review of Agency . Environment	

04/19/2023		Incomplete ACO Case Termination/Statistical/Non Reportable Closing. (DC) (Entered: 04/20/2023)
04/19/2023		District of Columbia Case number 1:22-cv-02147, Kinsella v. Bureau Of Ocean Energy Management et al, was transferred to The Eastern District of New York in error. E.D.N.Y. case number 23-cv-02915-GRB-SIL has been administratively closed. (AC) (Entered: 04/24/2023)
04/25/2023		ORDER REASSIGNING CASE. Case reassigned to Judge

		Frederic Block and Magistrate Judge Steven Tiscione (as related to 22-cv-1305) for all further proceedings. Judge Gary R. Brown, Magistrate Judge Steven I. Locke no longer assigned to case Please download and review the Individual Practices of the assigned Judges, located on our website. Attorneys are responsible for providing courtesy copies to judges where their Individual Practices require such.Ordered by Chief Judge Margo K. Brodie on 4/25/2023. (KD) (Entered: 04/25/2023)
05/01/2023		ELECTRONIC ORDER REOPENING CASE: Ordered by Judge Frederic Block on 5/1/2023. (MI) Modified on 5/18/2023 TO REFLECT THAT THERE ARE NO LONGER ANY PENDING APPEALS IN THE D.C. CIRCUIT. (MI). (Entered: 05/01/2023)
05/18/2023	56	MEMORANDUM AND ORDER: Plaintiffs motion 35 for a preliminary injunction is DENIED. Ordered by Judge Frederic Block on 5/18/2023. (MI) (Entered: 05/18/2023)

05/18/2023	57	NOTICE of Appearance by Vincent Lipari on behalf of Bureau of Ocean Energy Management, Deb Haaland, Michael S. Regan (aty to be noticed) (Lipari, Vincent) (Entered: 05/18/2023)
06/12/2023	58	SCHEDULING ORDER: An initial conference will be held at 10:30 a.m. on July 6, 2023 before the undersigned by phone. Counsel for all parties must participate and shall connect to the conference through dial-in number 888-557-8511 with access code 3152145. The attached Discovery Plan Worksheet is to be completed by counsel and electronically filed with the Court by July 3rd. **THE PARTIES ARE REMINDED that audio or video recording of proceedings by any party other than the Court, is strictly prohibited by Local Civil Rule 1.8. Violation of this rule may result in sanctions, including removal of court issued media credentials, restricted entry to future hearings, denial of entry to future hearings, or**

		any other sanctions deemed appropriate by the Court. So Ordered by Magistrate Judge Steven Tiscione on 6/12/2023. (LV) (Entered: 06/12/2023)
06/13/2023	59	MOTION to Appear Pro Hac Vice Filing fee $ 150, receipt number ANYEDC-16793536 by South Fork Wind, LLC. (Attachments: # 1 Declaration of Janice M. Schneider in Support of Motion to Admit Counsel Pro Hac Vice, # 2 Exhibit A - Certificates of Good Standing, # 3 Proposed Order Granting Motion to Admit Counsel Pro Hac Vice) (Schneider, Janice) (Entered: 06/13/2023)
06/13/2023	60	MOTION to Appear Pro Hac Vice Filing fee $ 150, receipt number ANYEDC-16793569 by South Fork Wind, LLC. (Attachments: # 1 Declaration of Stacey L. VanBelleghem in Support of Motion to Admit Counsel Pro Hac Vice, # 2 Exhibit A - Certificates of Good Standing, # 3 Proposed Order Granting Motion to Admit Counsel Pro Hac Vice) (VanBelleghem, Stacey) (Entered: 06/13/2023)

06/13/2023	61	MOTION to Appear Pro Hac Vice Filing fee $ 150, receipt number ANYEDC-16793592 by South Fork Wind, LLC. (Attachments: # 1 Declaration of Devin M. O'Connor in Support of Motion to Admit Counsel Pro Hac Vice, # 2 Exhibit A - Certificates of Good Standing, # 3 Proposed Order Granting Motion to Admit Counsel Pro Hac Vice) (O'Connor, Devin) (Entered: 06/13/2023)
06/14/2023		ORDER granting 59 Motion for Leave to Appear Pro Hac Vice. Having reviewed the Pro Hac Vice application 59 submitted by Janice M. Schneider for Defendant-Intervenor South Forth Wind, LLC and found it to be in compliance with the local rules concerning attorney admissions, the application is approved. If not already done, the attorney shall register for ECF which is available online at the NYED's homepage. Once registered, the attorney shall file a notice of appearance and ensure that he/she receives electronic notifications of activity in this case. The attorney shall ensure that the

		$150 admission fee is submitted or has been submitted to the Clerk's Office. So Ordered by Magistrate Judge Steven Tiscione on 6/14/2023. (LV) (Entered: 06/14/2023)
06/14/2023		ORDER granting 60 Motion for Leave to Appear Pro Hac Vice. Having reviewed the Pro Hac Vice application 60 submitted by Stacey L. VanBelleghem for Defendant-Intervenor South Fork Wind, LLC and found it to be in compliance with the local rules concerning attorney admissions, the application is approved. If not already done, the attorney shall register for ECF which is available online at the NYED's homepage. Once registered, the attorney shall file a notice of appearance and ensure that he/she receives electronic notifications of activity in this case. The attorney shall ensure that the $150 admission fee is submitted or has been submitted to the Clerk's Office. So Ordered by Magistrate Judge Steven Tiscione on 6/14/2023. (LV) (Entered: 06/14/2023)

06/14/2023		ORDER granting 61 Motion for Leave to Appear Pro Hac Vice. Having reviewed the Pro Hac Vice application 61 submitted by Devin M. O'connor for Defendant-Intervenor South Forth Wind, LLC and found it to be in compliance with the local rules concerning attorney admissions, the application is approved. If not already done, the attorney shall register for ECF which is available online at the NYED's homepage. Once registered, the attorney shall file a notice of appearance and ensure that she receives electronic notifications of activity in this case. The attorney shall ensure that the $150 admission fee is submitted or has been submitted to the Clerk's Office. So Ordered by Magistrate Judge Steven Tiscione on 6/14/2023. (LV) (Entered: 06/14/2023)
06/16/2023		NOTICE of Appearance by Kegan Andrew Brown on behalf of South Fork Wind, LLC (aty to be noticed) (Brown, Kegan) (Entered: 06/16/2023)
06/16/2023		NOTICE of Appearance by Janice Schneider on behalf of

		South Fork Wind, LLC (notification declined or already on case) (Schneider, Janice) (Entered: 06/16/2023)
06/16/2023		NOTICE of Appearance by Stacey VanBelleghem on behalf of South Fork Wind, LLC (notification declined or already on case) (VanBelleghem, Stacey) (Entered: 06/16/2023)
06/16/2023		NOTICE of Appearance by Devin M. O'Connor on behalf of South Fork Wind, LLC (notification declined or already on case) (O'Connor, Devin) (Entered: 06/16/2023)
06/16/2023		Letter MOTION for pre motion conference by South Fork Wind, LLC. (Brown, Kegan) (Entered: 06/16/2023)
06/16/2023		CERTIFICATE OF SERVICE by South Fork Wind, LLC (O'Connor, Devin) (Entered: 06/16/2023)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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SIMON V. KINSELLA,
Plaintiff,
-against
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,
Defendants.
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MEMORANDUM AND ORDER
Case No. 23-CV-02915-FB-ST

Appearances:

For the Pro Se Plaintiff: SIMON V. KINSELLA
P.O. Box 792
Wainscott, N.Y. 11975

For Defendants:
AMANDA STONER
U.S. Department of Justice
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For Intervenor Defendant:
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Lathan & Watkins LLP
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BLOCK, Senior District Judge:

Pro Se Plaintiff Simon Kinsella ("Kinsella"), a resident of the Wainscott hamlet of the Town of East Hampton, New York, is seeking a preliminary injunction to halt construction of the South Fork Wind Farm and South Fork Export Cable Project (the "Project"). Kinsella claims that as a result of the Project, which is currently under construction, irreparable harm will occur (i) to the drinking water near the onshore portion of the Project and (ii) to the Atlantic cod population near the offshore portion of the Project. For the reasons that follow, Kinsella's motion is denied.

I. FACTS AND PROCEDURAL HISTORY

Kinsella's action challenges the approval of the Project granted by the Bureau of Ocean Energy Management ("BOEM"), which is part of the United States Department of the Interior ("DOI"). Specifically, Kinsella argues that BOEM violated the Administrative Procedure Act (the "APA") by failing to adequately consider the Project's potential harm to the area's drinking water and the offshore Atlantic cod population, as well as the Project's negative economic impact. Kinsella also argues that the bidding process for the Project was deficient, that BOEM violated the National Environmental Policy Act ("NEPA"), the Outer Continental Shelf Lands Act ("OCSLA"), the Coastal Zone Management Act ("CZMA"), Executive Order 12898, and the Due Process Clause of the Fourteenth Amendment.

On November 2, 2022, Kinsella moved in the U.S. District Court for the District of Columbia (D.D.C.) for a temporary restraining order, which was denied one week later. Subsequently, the D.D.C.

granted Defendants' motion to transfer this case, along with Kinsella's pending motion for a preliminary injunction, to this Court since the Project is located in Suffolk County, New York and another case challenging the same Project is pending before the Court. See *Mahoney v. U.S. Dep't of the Interior*, No. 22-cv-01305, 2022 WL 1093199 (E.D.N.Y. 2022). Kinsella's challenge to the Project is largely the same as that brought by the *Mahoney* plaintiffs, though he adds to their argument by bringing claims under CZMA, the Fourteenth Amendment and an executive order, in addition to the APA, NEPA, and OCSLA. He also does not include the U.S. Army Corp of Engineers as defendants. However, the bulk of the harm claimed by Kinsella is largely the same as that claimed by the *Mahoney* plaintiffs, with the additions of the allegations of harm to the offshore cod population and the potential economic harm caused by the Project. Because these harms underpin all of Kinsella's numerous claims, the Court will address the harms claimed, rather than each individual cause of action, in explaining why Kinsella is not entitled to a preliminary injunction.

The Project—the same one challenged by the *Mahoney* plaintiffs—involves construction of a wind farm located 35 miles east of Montauk Point, Long Island, and the onshore cables that export the energy produced by the windmills to the onshore electric grid in East Hampton. The cables will be contained in underground trenches that will run through Wainscott, where portions of the groundwater are contaminated by perfluoroalkyl and polyfluoroalkyl substances ("PFAS"). The offshore portion of the

Project will involve seafloor construction in an area apparently known for Atlantic cod spawning.

As the D.D.C. pointed out in its November 10, 2022 memorandum and order transferring the venue of this action, the Project's "approval process included myriad opportunities for input from other agencies and stakeholders." Several federal, state, and local agencies participated in the process of preparing the Record of Decision, which approved the Project, and BOEM conducted a public comment period, which included three public hearings, and the review of nearly 400 submittals from the public, agencies, and other interested parties.

Ultimately, the permits to conduct the offshore portion of the Project were issued by Defendants. Permits for the onshore portion of the Project were issued by the New York Public Service Commission ("NYPSC") after years of administrative proceedings which considered the issue of PFAS pollution exacerbation, among other things. An appeal of this approval was denied in New York State court. Separately, residents of Wainscott brought an action in New York State court challenging an easement granted for the trenching in question, which was also denied. In March 2022, the *Mahoney* plaintiffs petitioned this Court for a preliminary injunction to block construction of the onshore portion of the Project, which they claimed would disrupt PFAS in the ground and irreparably harm their already contaminated groundwater quality. The Court denied their request the following month. Kinsella has also brought actions in state court related to the Project.

Now, Kinsella seeks the relief from this Court that he and his neighbors have repeatedly sought and failed to obtain—a bar to the Project's construction. However, Kinsella, like his unsuccessful neighbors, has failed to demonstrate that irreparable harm will result in the absence of a preliminary injunction. Therefore, his motion for the extraordinary relief of a preliminary injunction is denied.

II. PRELIMINARY INJUNCTION

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). If an injunction "disrupt[s] the status quo, a party seeking one must meet a heightened legal standard by showing 'a clear or substantial likelihood of success on the merits.'" *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018) (quoting *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294 (2nd Cir. 2012)).

"Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." *Bell & Howell: Mamiya Co. v. Masel Supply Co. Corp.*, 719 F.2d 42, 45 (2d Cir. 1983). To establish irreparable harm, a movant "must demonstrate an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by

an award of monetary damages." *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995) (internal quotation omitted).

In addition, because Kinsella's claims concern an administrative agency decision, the Court reviews his claims under the standard provided by the APA. Courts shall set aside agency action when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Agency decision-making is arbitrary and capricious when the agency bases its decision on "factors which Congress has not intended it to consider," when the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency," or its reasoning "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Alzokari v. Pompeo*, 973 F.3d 65, 70 (2d Cir. 2020) (internal quotation marks and citation omitted).

III. ANALYSIS

First, Kinsella argues that the digging for these trenches will disrupt the PFAS in the ground, exacerbating existing groundwater pollution in the area. Though the area and manner in which Kinsella argues that PFAS will be disrupted differs from that of the *Mahoney* plaintiffs, the harm claimed is the same. The same reasoning that the Court applied in denying the *Mahoney* plaintiffs' request for a preliminary injunction applies here. Kinsella's argument likewise fails on the first prong of the preliminary injunction analysis: irreparable harm.

Kinsella need not show that irreparable harm is a guaranteed outcome, but he must show that it is likely. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* Kinsella has not met his burden of demonstrating a likelihood of harm. Aside from the fact that New York State agencies issued the permits for the onshore portion of the Project, not BOEM, and enjoinment of its authorization of the Project would not halt the onshore portion of the Project, the NYPSC has already found that the Project as proposed will not exacerbate existing PFAS, in part because of mitigation measures included in the Project's plan. And, even if the Project did ultimately exacerbate PFAS contamination, PFAS contamination can be remediated post-facto. See *Mahoney* 2022 WL 1093199, at *2.

Next, Kinsella argues that the seafloor construction undertaken to build the offshore portion of the Project will cause irreparable harm to the cod population, which will in turn drive up the cost of cod. Not only is this argument speculative, far from meeting the standard of a likelihood of harm, but it points to a financial harm generally outside the purview of injunctive relief. It is well-settled that "[m]onetary loss alone will generally not amount to irreparable harm." *Borey v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 934 F.2d 30, 34 (2d Cir. 1991). Kinsella's unsubstantiated argument

about the Project's potential effect on the price of cod and the harm he may suffer as a result is exactly the sort of speculative argument that Borey forecloses. The same is true of Kinsella's final harm claimed: a potential increase in electricity prices in the area resulting from the Project's expense. Kinsella argues that the Project is based on "one-sided economic[s]" and will cause an increase in electricity prices in the area, which could be disproportionately borne by low-income residents. This argument likewise fails at the preliminary injunction stage for its failure to show a likelihood of irreparable harm and its singular basis on monetary harm that could be remedied with standard damages. *See id*.

Finally, as with *Mahoney*, Kinsella waited until several bites at the apple were taken in various judicial and administrative forums, with significant passage of time, before filing this action. This time lapse "undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *Tough Traveler, Ltd. v. Outbound Prod.*, 60 F.3d 964, 968 (2d Cir. 1995) (quoting *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 277 (2nd Cir. 1985)).

CONCLUSION

Plaintiff's motion for a preliminary injunction is **DENIED**.

SO ORDERED.

/S/ Frederic Block
FREDERIC BLOCK
Senior United States
District Judge

Brooklyn, New York
May 18, 2023

The United States Constitution, Amendment V provides that:

> "No person shall … be deprived of life, liberty, or property, without due process of law …"

28 U.S.C. § 1404 Change of venue provides that:

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented."

National Environmental Policy Act (NEPA)
42 U.S.C. § 4332 provides that:

The Congress authorizes and directs that, to the fullest extent possible:

(1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and

(2) all agencies of the Federal Government shall-

…

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

…

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

Outer Continental Shelf Lands Act (OCSLA)
43 U.S.C. § 1332 provides:

It is hereby declared to be the policy of the United States that –

(3) 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, in a manner which is consistent with the maintenance of competition and other national needs;

PFAS Contamination Submitted to BOEM

9. On February 22, 2021, Mr. Kinsella submitted comments letter to BOEM in response to its Draft Environmental Impact Statement ("DEIS") (issued January 8, 2021), addressed to: Chief Michelle Morin, Environment Branch for Renewable Energy, BOEM Office of Renewable Energy Programs.
   See Exhibit 11, Kinsella Comments, Feb 2021

10. BOEM received the comments letter nine months before it approved the SFW Project (November 24, 2021). BOEM acknowledged receiving the documents and uploaded them to its website (see ¶ 11 below).

11. BOEM received the following documents on PFAS contamination—

    a) NYS DEC Site Char. Rpt, East Hampton Airport (Nov 30, 2018) https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_8.pdf

    b) NYS DEC Site Char. Rpt, Wainscott Sand & Gravel (July 2020) https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_25.pdf

    c) PFAS Contamination Heat Map of Cable Route (p. 1) https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_74.pdf

    d) SCDHS PFAS Lab. Reports, 303 Wainscott Wells https://downloads.regulations.gov/BOEM-2020-0066-0387/attachment_72.pdf

e) PFAS Zone - Onshore Route (decided *after* PFAS detected) (p. 1) https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_75.pdf

f) PFAS Contamination of Onshore Corridor (satellite map) (p. 2) https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_65.pdf

g) PFAS release within 500 feet of SFEC route (surface runoff) (p. 2) https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_71.pdf

h) NYS PSC, Kinsella Report No 3 - PFAS Contamination (p. 91) https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_9.pdf

i) NYS PSC, Kinsella Testimony 1-1, PFAS (Sep 9, 2020) (p. 37) https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_32.pdf

j) NYS PSC, Kinsella Testimony 1-2, PFAS (Oct 9, 2020) (p. 11) https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_36.pdf

k) NYS PSC, Kinsella Testimony, Rebuttal (Oct 30, 2020) (p. 13) https://downloads.regulations.gov/BOEM-2020-0066-0387/attachment_63.pdf

l) NYS PSC, Kinsella, Brief; Initial (Jan 20, 2021) (p. 34) https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_9.pdf

m) NYS PSC, Kinsella, Brief; Reply & Exhibits (Feb 3, 2021) (p. 29) https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_16.pdf

n) NYS PSC, Kinsella, Motion to Reopen Record (Jan 13, 2021)(p. 21) https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_29.pdf

12. On October 11, 2017, Suffolk County Department of Health Services ("SCDHS") issued a Water Quality Advisory for Private-Well Owners in Area of Wainscott. The advisory was the first confirmed detection of PFAS contamination in Wainscott. It made the front page of all the local and regional newspapers. The Water Quality Advisory said it "has begun a private well survey in the vicinity of the [East Hampton] airport property. PFOS and PFOA have been detected in some of the private wells that have been tested so far. One private well had PFOS and PFOA detected above the USEPA lifetime health advisory level" (see link below) – https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_13.pdf

13. At the time, approximately ninety percent (90%) of residents used private wells for all their drinking water needs.

14. In 2016, the EPA released a "FACT SHEET" on "PFOA & PFOS Drinking Water Health Advisories." It reads— "[E]xposure to PFOA and PFOS over certain levels may result in adverse health effects, including developmental effects to fetuses during pregnancy or to breastfed infants

(e.g., low birth weight, accelerated puberty, skeletal variations), cancer (e.g., testicular, kidney), liver effects (e.g., tissue damage), immune effects (e.g., antibody production and immunity), thyroid effects and other effects (e.g., cholesterol changes)." (see link below, at PDF 2, second paragraph)—
https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_33.pdf

15. In June 2018, East Hampton Town Supervisor Van Scoyoc received an email from SCDHS stating that "PFC [PFAS] results have been received for 303" private wells, of which "[t]hirteen (13) wells are above the USEPA Health Advisory Level" and "[o]ne hundred and forty-four (144) wells had no detections of PFOS/PFOA." Conversely, one hundred and fifty-nine (159) wells, or fifty-three percent (53%), had detectible levels of harmful PFOS/PFOA contamination" (see link below, at PDF 17)—
https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_13.pdf

16. The highest recorded PFOS/PFOA contamination level was 791 ppt, more than seven times the EPA 2016 Health Advisory Level (*id.* at PDF 22, table, top row).

17. When SFW submitted its application to NYSPSC (September 14, 2020), it "determined that there were no hydraulically upgradient or adjacent properties along the study corridor that would represent a significant environmental risk to

subsurface conditions." [5] SFW knew to avoid the source of contamination (at East Hampton Airport)— "The study corridor consists of the Long Island Railroad (LIRR) right-of-way that begins (from west-to-east) approximately 0.20 mile west of the Wainscott-Northwest Road crossover[,]"[6] and includes a "500-foot radius[.]"[7] SFW included within its "study corridor" only the railroad tracks and knew not to investigate the residential area of Wainscott south of East Hampton Airport, where it planned to build underground transmission infrastructure.

18. The PFAS contamination concentration levels quoted herein (see ¶¶ 39–59) are from the NYS DEC Site Characterization Reports for East Hampton Airport and Wainscott Sand & Gravel (see ¶ 7(a)-(b) above) —

19. East Hampton Airport Monitoring Wells (upgradient): EH-19A, EH-19A2, and EH-19B are within 1,000 feet from SFW's construction corridor, and Well EH-1 is within 500 feet upgradient from SFW's construction corridor.

20. Wainscott Sand and Gravel ("Wainscott S&G") (NYSDEC site: 152254) is adjacent and

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[5] See Article VII application, Appendix F Part 2, Phase I Environmental Assessment prepared by VHB Engineering, Surveying, and Landscape Architecture P.C. - Hazardous Materials Desktop Analysis, dated March 30, 2018 (at PDF 142, first paragraph). See dps.ny.gov— https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={D741B793-DFC1-4056-BCCC-6F46E06C4616}

[6] *Id.* (at PDF 124, first paragraph).

[7] *Id.* (at PDF 125, first paragraph).

downgradient from SFW's construction corridor on the opposite side of the source of PFAS contamination at East Hampton Airport.

21. Wainscott S&G Monitoring Wells (downgradient): MW5, MW3, and MW4 (groundwater), and Wells: S1, S11, and S16 (soil), are within one hundred and fifty feet downgradient from SFW's construction site.

22. A similar profile of PFAS contamination at East Hampton Airport (the source of contamination) is evident in wells on the opposite downgradient side of the construction corridor at the Wainscott S&G site.

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

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

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

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

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

28. Soil contamination levels from PFOS, PFOA, and PFHxS chemical compounds detected on the

shallow surface at the Airport site upgradient within one thousand feet of the construction corridor are as follows –

29.	Well: EH-19A (soil)	– PFOS =	3,900 ppt
30.		– PFOA =	180 ppt
31.		– PFHxS =	170 ppt
32.	Well: EH-19B (soil)	– PFOS =	12,000 ppt
33.		– PFOA =	3,800 ppt
34.		– PFHxS =	3,800 ppt
35.	Well: EH-1 (soil)	– PFOS =	10,000 ppt
36.		– PFOA =	180 ppt
37.		– PFHxS =	170 ppt

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

39. According to the NYSDEC Superfund Designation Site Environmental Assessment of the Wainscott S&G— "Overall, the highest total PFAS detections were in monitoring wells MW3, MW5, MW6 located on the Western (side-gradient) and Northern (upgradient) boundaries of the site, indicating a potential off-site source." See link (below) (at 2) —

    https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_4.pdf

40. Contamination levels in groundwater monitoring wells within one hundred and fifty feet

downgradient from the corridor (on the western side of the Wainscott S&G site) for groundwater ("GW") Monitoring Wells MW5, MW3, and MW4 are as follows—

41. Well: MW5 (GW) – PFOS = 877 ppt
42. – PFOA = 69 ppt
43. – PFHxS = 566 ppt
44. – PFOS/PFOA = 946 ppt
(exceeds 2016 HAL by 13.5 x)

45. Well: MW3 (GW) – PFOS =1,010 ppt
46. – PFOA = 28 ppt
47. – PFHxS = 306 ppt
48. – PFOS/PFOA =1,038 ppt
(exceeds 2016 HAL by 14.8 x)

49. Well: MW4 (GW) – PFOS = 232 ppt
50. – PFOA = 5.57 ppt
51. – PFHxS = 43.4 ppt
52. – PFOS/PFOA = 238 ppt
(exceeds 2016 HAL by 3.4 x)

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

BOEM's Fraud: PFAS

54. BOEM mentions "perfluorinated compounds" (aka PFAS) only once in its FEIS (of 1,317 pages) *somewhere else* "on a fourth site, NYSDEC #152250," referring to East Hampton Airport. *See* Exhibit 15, FEIS, *excerpt* p. 655 *only* (at 1).

55. The FEIS (falsely) states that all "four NYSDEC Environmental Remediation Sites are mapped near the interconnection facility" (*id.*). However, the fourth site, East Hampton Airport, is approximately two miles from the interconnection facility (see Exhibit 15, Map, at 2).

56. The FEIS fails to identify a specific "perfluorinated compound" from the thousands of compounds in the broad class of PFAS chemical compounds.

57. In NYS, only two PFAS compounds are regulated, PFOA and PFOS.

58. The FEIS does *not* identify the precise location of the "perfluorinated compounds" relative to the construction site. The FEIS states the compounds are "on a fourth site, NYSDEC #152250" that could be *anywhere* on the 610-acre East Hampton Airport site.

59. The FEIS contains no analysis, test results, mitigation plans, or discussion on alternatives for the specific purpose of avoiding a contaminated area.

60. BOEM did *not* consider the Project's impact on groundwater contamination that the EPA links to cancer and other adverse health effects. (*see* ¶ 14 above).

61. Federal Defendants fail to explain how BOEM arrived at the (false) conclusion that "existing groundwater quality in the analysis area appears to be good" (FEIS, at H-23, PDF 655, 2nd ¶), in opposition to the overwhelming evidence it

acknowledged receiving *nine months before* approving SFW's Project.
See Exhibit 15, FEIS, *excerpt* p. 655 *only* (at 1) and (¶¶ 9-53 above).

62. The groundwater in Wainscott contains levels of PFAS contamination exceeding federal and NYS regulatory standards.

63. To install underground concrete duct banks and vaults for over two miles through Wainscott, SFW had to excavate soil and groundwater containing PFAS contaminants.

64. SFW's construction impacted soil and groundwater containing PFAS contaminants.

65. SFW's underground concrete infrastructure will come in contact with groundwater PFAS contamination.

66. According to an exposé, 'Forever chemicals' found in Suffolk's private water wells since 2016, data shows, published in Newsday (on April 2, 2022), the Suffolk County Department of Health Services detected harmful levels of PFAS contamination (exceeding the NYS Maximum Contamination Level of 10 parts per trillion for PFOS and 10 parts per trillion for PFOA) in 202 wells in Suffolk County. PFAS chemicals are also known as 'forever chemicals.' Of the total number of contaminated wells in Suffolk County, thirty-two percent (32%) were in Wainscott downgradient from East Hampton Airport in the same area where South Fork Wind proposed installing underground concrete infrastructure for high-voltage transmission cables (see ¶¶ 11(c),

(e)-(f) above). The area with the next highest number of contaminated wells, Yaphank, had less than half the number of contaminated wells (32) than Wainscott (65).
See Exhibit 16, PFAS in Wainscott Wells (Newsday) (at 3-6).

67. As of May 2023, SFW has completed most of its onshore construction without regard to human health or the environment.

BOEM's Fraud: Project Cost ($2 bn)

68. On November 19, **2018**, Petitioner wrote to BOEM concerning SFW's "fail[ure] to comply with 30 CFR 585.627(a)(7) with specific regard to its potential negative impact upon employment" *See* Exhibit 10, Kinsella Comments, November 2018. The comments letter warns BOEM that SFW "will charge approximately 22 ¢/kWh" and that a "similar wind farm, Vineyard Wind" that is near SFW "will charge only 6.5 ¢/kWh" (*id.*, at 4). The letter also informed BOEM that the SFW would cost (in 2018) "$1,624,738,893 (NYS Comptroller, 20-year term)" *Id.* See New York State Office of the State Comptroller, Open Book (link below) –

(https://wwe2.osc.state.ny.us/transparency/contracts/contracttransactions.cfm?Contract=00000000000000000000024767)

69. In February 2021, BOEM received comprehensive information on SFW's Project cost submitted by Petitioner-Plaintiff Kinsella in response to BOEM's Draft Environmental Impact Statement ("DEIS") (issued January 8, 2021) for

SFW. The comments letter included an internal LIPA Encumbrance Request, signed by LIPA CFO Joseph Branco on January 30, 2017 (see link below)—
https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_36.pdf
Also, see Exhibit 11, Kinsella Comments, February 2021

70. The Encumbrance Request shows the Project Cost, $1,624,738,893, and Total Projected Energy, 7,432,080 MWh (371,604 MWh per year over 20 years). The price (cost/energy) is $219 per MWh or 22 cents per kWh.

71. The Project cost and price of energy BOEM received in 2018 and 2021— $1,624,738,893 and 22 cents per kilowatt-hour— reconcile.

72. On September 30, 2021, SFW and LIPA agreed to expand the offshore wind farm from 90 to 130 MW. The revised Project cost is $2,013,198,056.
NY Office of the State Comptroller, Open Book, Contract: C000883 at –
https://wwe2.osc.state.ny.us/transparency/contracts/contracttransactions.cfm?Contract=00000000000000000000085553 (last accessed April 16, 2023).

73. The energy price is 19 c/kWh (cents per kilowatt-hour). *See* Exhibit 17, COMPLAINT, Appendix 4, Price Tables (at 3).

74. Nine months *before* BOEM approved the Project (February 2021), it received comments regarding the Project cost (for a second time). The price was compared to Sunrise Wind, which is also owned

(indirectly) by the same joint and equal partners, Ørsted A/s and Eversource. The letter reads as follows (see Exhibit 11, Kinsella Comments Feb 2021)—

> By comparison (on October 23, 2019), Ørsted A/S announced a power purchase agreement for Sunrise Wind with a price of only $80.64/MWh. If the same amount of energy (i.e. 7,432,080 MWh) was purchased from Sunrise Wind instead of South Fork Wind, it would cost only $599,322,931, which is $1,025,415,958 less expensive [emphasis added]" (3-1, at 18, third paragraph).

75. The 2021 Comments included a table comparing South Fork Wind's price and energy deliveries to Sunrise Wind. The table has been included here (overleaf). *See* the original table at the following link (at 15) — https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_32.pdf

    Please see the table (overleaf).

[blank]

	South Fork Wind (cost of delivered energy)			Sunrise Wind (equivalent cost of delivered energy)		
Contract Year	Energy Deliveries (MWh)	Price ($/MWh)	SFW Yearly Payments	Sunrise Price ($/MWh)	Sunrise Yearly Payments	Sunrise Discount (from SFW)
0	37,040	$160.33	$5,938,623	$80	$2,963,200	50%
1	371,604	$168.35	$62,558,233	$80	$29,728,320	52%
2	371,604	$176.76	$65,686,144	$80	$29,728,320	55%
3	371,604	$185.60	$68,970,452	$80	$29,728,320	57%
4	371,604	$194.88	$72,418,974	$80	$29,728,320	59%
5	371,604	$200.73	$74,591,543	$80	$29,728,320	60%
6	371,604	$206.75	$76,829,290	$80	$29,728,320	61%
7	371,604	$212.95	$79,134,168	$80	$29,728,320	62%
8	371,604	$219.34	$81,508,194	$80	$29,728,320	64%
9	371,604	$225.92	$83,953,439	$80	$29,728,320	65%
10	371,604	$228.18	$84,792,974	$80	$29,728,320	65%
11	371,604	$230.46	$85,640,903	$80	$29,728,320	65%
12	371,604	$232.77	$86,497,312	$80	$29,728,320	66%
13	371,604	$235.10	$87,362,286	$80	$29,728,320	66%
14	371,604	$237.45	$88,235,908	$80	$29,728,320	66%
15	371,604	$237.45	$88,235,908	$80	$29,728,320	66%
16	371,604	$237.45	$88,235,908	$80	$29,728,320	66%
17	371,604	$237.45	$88,235,908	$80	$29,728,320	66%
18	371,604	$237.45	$88,235,908	$80	$29,728,320	66%
19	371,604	$237.45	$88,235,908	$80	$29,728,320	66%
20	334,564	$237.45	$79,440,906	$80	$26,765,120	66%
			$1,624,738,893[8]		$594,566,400	63.4%

South Fork Wind

Sunrise Wind

[8] New York Office of the State Comptroller, Open Book, Contract Number: C000883 https://wwe2.osc.state.ny.us/transparency/contracts/contractsearch.cfm

South Fork Wind is $1 billion more expensive for the same renewable energy.

76. In the knowledge of SFW's vastly overpriced (by $1 billion) offshore wind farm, BOEM gave cost no thought *at all*, and approved it.

77. In BOEM's FEIS (issued August 16, 2021), under the heading "Demographics, Employment, and Economics" "Affected Environment" (FEIS, at 3-153, PDF 205, section 3.5.3.1), BOEM writes –

> "In the COP, SFW does not indicate that any single state or county would be the primary recipient of the Project's economic impacts, adverse or beneficial … Table 3.5.3-1. documents the ports, communities, counties, and states that could be directly or indirectly affected by the Project." (*id.*, last paragraph).

BOEM's ROD and FEIS and SFW's COP are available at boem.gov— https://www.boem.gov/renewable-energy/state-activities/south-fork

78. As the heading, "Ports, Communities, Counties, and States in the Analysis Area" for Table 3.5.3-1 indicates (*id.*, at 3-154, PDF 206), the table lists the geographic areas "that could be directly or indirectly affected by the Project." BOEM identifies *only* individual ports or towns *within* Suffolk County— the Town of East Hampton (East Hampton), Port of Montauk (Montauk), Shinnecock Fishing Dock (Hampton Bays), and Greenport Harbor (Greenport).

79. BOEM does *not* list Suffolk County, as a whole, in Table 3.5.3-1 (above), that could be affected by the Project. Ratepayers living in Suffolk County, LIPA's service area, will bear the economic burden of having to pay for the SFW Project, estimated to be over $2 billion. BOEM does *not* include the area of Suffolk County in its analysis of impacts resulting from the SFW Project on demographics, employment, and economics.

80. BOEM's economic analysis area focuses on the "ocean economy" that does *not* include Suffolk County as a whole. BOEM describes the economic characteristics of its analysis area as follows—

> "[The] focus of this analysis is the GDP for the "ocean economy," which includes economic activity dependent upon the ocean, such as commercial fishing and seafood processing, marine construction, commercial shipping and cargo handling facilities, ship and boat building, marine minerals, harbor and port authorities, passenger transportation, boat dealers, and ocean-related tourism and recreation (National Ocean Economics Program 2020)" (FEIS, at 3-157, PDF 209, last sentence).

81. BOEM devotes nearly two hundred pages to the "ocean economy" and the socio-economic impact on the fisheries industry (FEIS, at 3-86 to 3–183, PDF 138–235, 197 pages). By comparison, BOEM remains silent, not a word, on the Project

cost of $2 billion and any potential *adverse* economic effects on Suffolk County, LIPA's service area.

82. In the ROD, BOEM summarizes impacts on demographics, economics, and employment from the SFW Project as follows—

> "The FEIS also found that the Proposed Project could have, to some extent, beneficial impacts on … demographics, employment, and economics" (ROD, at D-8, PDF 100, first paragraph).

83. BOEM's ROD identifies possible "beneficial impacts" but does not identify any potential adverse impacts on demographics, employment, or economics. For example, BOEM does not acknowledge any potential adverse effects resulting from the two-billion-dollar cost burden to over one million people in LIPA's service area.

84. BOEM's economic analysis considers beneficial economic impacts such as local spending on capital expenditures of $184 to $247 million (depending on the wind farm's capacity) (FEIS, at F-17, PDF 587, Table F-10).

85. BOEM considers beneficial impacts from operational spending of $6.2 to $12.3 million per year (id., Table F-11), that is, $123 to $246 million over the 20-year contract term.

86. BOEM accounts for beneficial impacts from spending in the local economy by SFW on capital and operational expenses of $307 to $493 million

(the addition of capital expenditure and operational spending.

87. BOEM's analysis is one-sided. BOEM accounts for Project-related inflows into the local economy but ignores outflows. Project-related outflows ($2 billion) outweigh inflows ($307 to $493 million) by 4 to 7 times. To put it another way, for every dollar South Fork Wind puts into the economy, it takes out four-to-seven times that amount.

88. The net outflow (i.e., inflows of $307 to $493 million less an outflow of $2 billion) equals $1.5 to $1.7 billion, exiting Suffolk County's economy.

89. BOEM does not acknowledge, let alone consider, the adverse economic impacts of withdrawing $2 billion from Suffolk County's economy. Moreover, the negative economic impact ($2.013 billion) is fixed under the terms of the PPA. In contrast, the limited beneficial effects are estimates.

90. BOEM has used biased financial data to support its decision.

91. BOEM failed to consider both the Project's cost of $2 billion and the people in Suffolk County who will have to pay that cost, including lower-income families.

BOEM's Fraud: South Fork RFP

92. On June 24, 2015, PSEG Long Island, on behalf of Long Island Lighting Company d/b/a LIPA, issued a Notice to Proposers soliciting bids in the South Fork RFP procurement. The RFP sought

"sufficient local resources to meet expected peak load requirements until at least 2022 in the South Fork of Long Island … Such resources will be located on Long Island and provided to LIPA." *See* Exhibit 4, RFP Notice to Proposers (2015).

93. The notice unambiguously invites bidders to submit proposals for "local resources … located on Long Island" *and nowhere else*. PSEG Long Island repeats the specification twice, highlighting its significance. However, it is irrefutable that an offshore wind farm thirty-five miles off-coast from Montauk Point, such as SFW, is *not* a "local resource[]" that is "located on Long Island[,]" it is *on* the Outer Continental Shelf *in* the Atlantic Ocean.

94. Moreover, offshore wind technology is the least likely technology to provide power to meet "peak demand" for electricity. On eastern Long Island's South Fork, "peak demand" for electricity occurs in response to air conditioning usage on hot (typically windless) summer days when, *not* coincidently, power generation from offshore wind is minimal (due to less wind).

95. Please read the Complaint challenging the South Fork RFP (only 15 pages) –

    Exhibit 12, *Kinsella v LIPA* (621109-2021), Complaint) and compare the allegations to the South Fork RFP (see Exhibit 00, South Fork RFP).

96. Empirical evidence supports offshore wind's inability to provide power efficiently during the summer. The Block Island Wind Farm ("**BIWF**")

commenced operations in late 2016 and is in the same area as the proposed South Fork Wind Farm ("**SFWF**"). Its actual generating capacity in August (a six-year average from 2017 through 2022) was only 24% of its nameplate capacity, operating at an average capacity of 7.3 of 30 MW (its nameplate capacity). The wind farm's average output in August was around half the average amount of electricity generated in December (52.7%) over the same period (2017 through 2022). Although the South Fork RFP specifically sought resources to meet "peak demand[,]" it awarded the PPA to an offshore wind farm that was more likely *not* to provide power to meet peak demand.
See Exhibit 6, Block Island Wind Farm Power Output Graph (2017–2022).

97. SFW does *not* meet the South Fork RFP's minimum specifications and requirements. *See* Exhibit 12, *Simon V. Kinsella et al. v. Long Is. Power Auth., et al.*, (index 621109-2021, NY Sup. Ct. Suffolk County). Please compare the allegations to the South Fork RFP (Exhibit 14).

98. Although the Notice to Proposers *precluded* offshore wind proposals, the procurement made an exception for SFW. Despite *not* meeting the RFP's minimum specifications and requirements, SFW was treated favorably and allowed as the *only bidder* to submit an offshore wind proposal. The South Fork RFP was manipulated to stifle competition.

99. The South Fork RFP **permitted favoritism** in another critical respect. On January 11, 2017,

then-Governor of New York State, Andrew M. Cuomo, in his 2017 State of the State address, directed the LIPA Board of Trustees to approve SFW's proposal.

100. Governor Cuomo's speech read as follows (*see* Exhibit 18, Governor Cuomo 2017 State of the State, *excerpts* (pages 1, 54–56)—

> The first major step in the State's offshore wind development plan is a 90 megawatt [SFW's original size], 15-turbine project off the East End of Long Island. The Governor calls on the Long Island Power Authority to approve this critical project, which would be approximately 30 miles southeast of Montauk … This innovative project is the least expensive proposal, including proposals for both renewable and conventional power generation, to meet the growing energy needs of the South Fork and to provide cleaner energy for all of Long Island [i.e., suggesting expansion][emphasis added]."

101. Fourteen days later (on January 25, 2021), the LIPA Board of Trustees approved SFW's Project. Governor Cuomo appointed the majority of the LIPA Board of Trustees. By "call[ing] on the Long Island Power Authority to approve this critical project[,]" Governor Cuomo interfered in an active procurement (the South Fork RFP) to advance the interests of a private developer to the detriment of the other bidders, the public, and Petitioner.

102. On November 24, 2021, BOEM issued its ROD approving the Project's FEIS. BOEM's ROD (falsely) asserts that SFW's "power purchase agreement executed in 2017 result[ed] from LIPA's technology-neutral competitive bidding process [emphasis added]" (ROD, at 7), referring to the South Fork RFP.[9]

103. SFW also makes the same (false) claim in its COP (*see* Exhibit 7, SFW COP, Executive Summary, *excerpt*).[10]

104. LIPA disagrees. A Memorandum from LIPA to the N.Y. Office of the State Comptroller (January 27, 2017) reads— "In some instances, proposals were advanced if they were the only proposal offering a particular technology." *See* LIPA Memo (at 12, first paragraph) (uploaded by BOEM link below) – https://downloads.regulations.gov/BOEM-2020-0066-0385/attachment_49.pdf
LIPA continues— "Two other proposals (i.e., Deepwater Wind … and Fuel Cell Energy …) were designated as Semi-Finalists because … they were the only proposals offering a particular technology … Deepwater Wind was the only proposal offering offshore wind technology" (*id.*, at 13, first paragraph) (Deepwater Wind refers to SFW). The South

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[9] *See* ROD (at 7, PDF 9, ¶ 7). BOEM provides the same false information in its FEIS. *See* FEIS (at ii, PDF 6, penultimate paragraph). ROD and FEIS are available at the link below— https://www.boem.gov/renewable-energy/state-activities/south-fork

[10] *See* Exhibit 7, SFW COP May 2021, Executive Summary, *excerpt* (at ES-2, PDF 3).

Fork RFP procurement advanced proposals <u>*based on*</u> their technology (LIPA has *not* disclosed relative costing information comparing other bids). Thus, the bidding process was *not* "*neutral*" on technology. Where proposals can be advanced based solely on the technology (i.e., offshore wind technology), and there is only one bidder offering that technology, then the procurement process is *not* competitive. As SFW was the only bidder to submit a proposal for offshore wind resources (in a solicitation that precluded such resources), **SFW had no competition**. Thus, the South Fork RFP was *not* a "competitive bidding process[,]" as BOEM (SFW and the NYSPSC) claim.

105. On November 8, 2021, NYSPSC General Counsel Robert Rosenthal answered the Verified Petition in *Simon V. Kinsella v. NYSPSC* (index 2021-06572, N.Y. App. Div., 2d Dep't),[11] admitting the following (*see* Exhibit 9, NYSPSC Verified Answer (index 2021-06572)—

    a) [<u>Verified Petition Paragraph 62</u>] In January 2017, LIPA and PSEG Long Is., acting on behalf of LIPA, awarded SFW 25 a PPA for the supply of energy at an average price of 22 cents per kWh over the life of the contract (*see* Exhibit 2 – LIPA Contract Valuation for SFW).

[11] In answer to Verified Petition in *Simon V. Kinsella v. NYSPSC* (index 2021-06572, N.Y. App. Div., 2d Dep't). *See* Exhibit 8, Verified Petition, and Exhibit 9, Verified Answer

b) [Verified Petition Paragraph 63] LIPA plans to purchase the same offshore wind renewable energy from another wind farm, Sunrise Wind, for 8 cents per kWh, nearly one-third the price of SFW (see Exhibit 3 – Ørsted's Sunrise Wind PPA (at p. 1)).

c) [Verified Petition Paragraph 64] The two offshore wind farms – SFWF and Sunrise Wind Farm – are only two miles apart and are owned and controlled indirectly by the same joint and equal partners, Ørsted and Eversource.

106. According to LIPA, Total Projected Energy Deliveries for South Fork Wind over the 20-year contract term is 7,432,080 MWh, and the Total Annual Contract Payments over the same period are $1,624,738,893. SFW's average renewable energy price is $218.61/MWh or 21.9 cents/kWh. *See* Exhibit 2, LIPA Contract Valuation for SFW. Had LIPA purchased the same energy (7,432,080 MWh) but from Sunrise Wind at 8.064 cents per kWh (the published PPA price), it would have cost LIPA only $599,322,931, representing a saving of $1,025,415,962 (NB: the variance between the calculation and the price table is due to a rounding error in Sunrise Wind's price of energy) (*see* ¶¶ 75-76 above).

SFW Fraud: PFA S [12]

146. SFW argued in the district court that it is "on a very tight schedule … there's really no cushion for delay … limited vessel availability [] could prevent the project from meeting its contractual power purchase agreement requirements, which could result in millions of dollars in liquidated damages [emphasis added]" (*See* Hearing Tr. 11/09/2022 (22-516, Doc. 1979239, at 6:7-15).

147. SFW obtained that power purchase agreement via a manipulated procurement process, the South Fork RFP.

148. SFW knowingly provided false information to BOEM in its final COP. It falsely represented groundwater quality (by concealing onsite groundwater PFAS contamination) and the Project's socioeconomic impact (by omitting the Project cost of $2 billion).

149. SFW (falsely) claimed that its COP "provides a description of water quality and water resource conditions in the … SFEC[13] as defined by several parameters including: … contaminants in water" (*see* COP May 2021, at 4-56, PDF 224, first paragraph). Under the heading, "Water Quality and Water Resources," SFW asserts its COP "discusses relevant anthropogenic activities that have in the past or currently may

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[12] Per– and Polyfluoroalkyl Substance ("PFAS") contamination

[13] South Fork Export Cable (SFEC), which includes onshore construction for high-volatge transmission cable through Wainscott

impact water quality, including point and nonpoint source pollution discharges, … and pollutants in the water" (*id.*). On the contrary, SFW does *not* describe "contaminants in water" (*id.*) or discuss "relevant anthropogenic activities" (*id.*), such as the use of firefight foam discharging "pollutants" (*id.*), such as harmful PFAS contamination into groundwater.

150. SFW ignored groundwater PFAS contamination in the area where it proposed installing underground concrete infrastructure (for two miles) encroaching into and impacting that groundwater (a sole-source aquifer used for drinking water). That area had more affected private drinking water wells by double the number of wells anywhere else in Suffolk County (*see* ¶ 67 above).

151. SFW tested its onshore construction corridor for PFOA/PFOS [14] contamination in January 2021. The test results showed groundwater PFOA contamination (of 50 ppt) that exceeds NYS' drinking water standard by five times (Well MW-4A, sampled 01/14/2021) and groundwater PFOS contamination (of 14.7 ppt) that also exceeds NYS' drinking water standard (Well SB/MW-15A, sampled 1/18/2021).[15] The testing pre-dates by four months the final COP SFW submitted to BOEM (in May 2021). S*ee* Exhibit

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[14] Perfluorooctanoic Acid ("PFOA") and Perfluorooctane Sulfonate ("PFOS") are chemical compounds classified as hazardouse waste in NYS (contaminants) within a broard class of manmade chemicals known as PFAS.

[15] New York State Maximum Contamination Level (NYS MCL): PFOA, 10 ppt and PFOS, 10 ppt.

19, SFW PFAS Test Results, *excerpts*, Wells MW-4A (at 1) and SB/MW-15A (at 2). The complete Environmental Investigation Report by GZA GeoEnvironmental of New York (on behalf of Ørsted) contains test results performed in December 2020 and January 2021, four months *before* South Fork Wind submitted its final COP to BOEM in May 2021. GZA's report (revised April 1, 2021) reads as follows—

> PFAS were detected in samples from 20 wells [within SFW's construction corridor]; levels of PFOA and PFOS exceeded NYSDEC's Ambient Water Quality Criteria Guidance Values in one well each (MW-4A and MW-15A, respectively)" (at 8, PDF 34, Groundwater Results).

Monitoring Well MW-4A is on Beach Lane, and MW-15A is on Wainscott NW Rd, in Wainscott, N.Y. The revised report was uploaded to the NYSPSC website (on April 21, 2021) (File No.: 282, Appendix H - Final HWPWP Part 3, Attachment E) (last accessed April 16, 2023). Available at dps.ny.gov—
https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={7F6C6BBF-6053-455D-AF06-E440FB46C63F})

152. Despite including other chemical contaminants, such as "median groundwater nitrogen levels" (*see* ¶ 162 below), SFW did *not* include the PFAS contamination test results in the final COP submitted to BOEM. SFW concealed the test results showing groundwater PFAS

contamination from BOEM, consistent with an established pattern of denying and hiding the existence, nature, and extent of onshore PFAS contamination in Wainscott.

153. SFW identified other less harmful contaminants, such as "median groundwater nitrogen levels … [that] have risen 40 percent to 3.58 mg/L" (COP May 2021, at 4-61, PDF 229, first sentence), but did *not* acknowledge the presence of chemicals "that can cause cancer and other severe health problems" (ECF No. 34-2, at 3, last sentence).

154. In February 2022, South Fork Wind's tested the same Monitoring Wells: Well MW-4A showed onsite PFOA (82 ppt) contamination exceeding the EPA 2016 Health Advisory Levels (70 ppt) and the NYS MCL (10 ppt) by eight times, and Well MW-15A showed onsite PFOS (12 ppt) contamination exceeding the NYS MCL (10 ppt). Limited, summarized, unsigned, and unsubstantiated test results (without authorized laboratory results) were posted on East Hampton Town's website by the Town (*not* South Fork Wind).
See the East Hampton Town Website (last accessed April 16, 2022)—
https://ehamptonny.gov/DocumentCenter/View/11757/SFW-Monitoring-Well-summary-Feb-21-2022.

155. In 2022, South Fork Wind did *not* publicly disclose the *actual* laboratory reports for PFAS contamination, breaking with prior practice. Previously (in April 2021), SFW had disclosed

its PFAS laboratory test results of groundwater and soil samples (taken in December 2020 and January 2021). **Note: Soil and groundwater samples were taken *after* the NYSPSC evidentiary record had closed, thereby avoiding examination and cross-examination of witnesses during the NYSPSC proceeding**.

156. SFW did *not* include *any* PFAS contamination results in its final COP.

157. SFW did *not* identify PFAS contamination in *any* of the six updates to its Construction and Operations Plan submitted to BOEM.

SFW Fraud: Cost ($2 bn)

158. SFW submitted an Economic Development and Jobs Analysis (by Navigant Consulting Inc., February 5, 2019) to BOEM for review and approval. *See* Exhibit 24, SFW Economic Analysis. Under the heading "Summary Results," SFW's report (falsely) asserts that—

> The Project will clearly have a positive economic impact and will add a significant number of jobs to the United States and to the state of New York [emphasis added]" (*id.*, at 1, PDF 4, penultimate paragraph).

159. According to the analysis, the best-case scenario will have a total beneficial impact on NYS of $458 million.[16] However, the Project cost of

[16] Summary of Jobs and Investiment Impacts for New York (at 3, PDF 6, Table 1-2). Total construction phase benefical

$2.013 billion (paid by ratepayers in Suffolk County) will offset beneficial in-state spending and result in a *net adverse* impact of $1.555 billion.

160. A total *beneficial impact* ($458 million) *may* have resulted in additional jobs (SFW claims 196 jobs), but the ($2.013 billion) *adverse impact* resulting from the Project cost cancels out those jobs four times over. The Economic Analysis' conclusion that the Project will "add a significant number of jobs" is one-sided, omitting the more considerable *negative* economic impact of the Project cost. SFW neither disclosed, discussed, nor considered the Project cost ($2.013 billion) in its final COP (May 2021) submitted to BOEM.

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economic impact is $186.1 million (Earning $74.1, Output $81.9, and Value Add 57.1 million). Total operational phase benefical economic impact is $272 million (Earning $2.8, Output $6.8, and Value Add $3.9: sum muliplied by 20 years).