No. 22-1251

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

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The Order of the U.S. District Court for the District of Columbia (D.D.C.) (Supp App. 3a) is 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 (Supp App 2a).

STATEMENT

Pursuant to this Court's Rule 15.8, Petitioner calls the Court's attention to intervening actions by the transferee court, the District Court for the Eastern District of New York ("EDNY"), subsequent to petitioner's last filing in this Court on June 22, 2023.

The Complaint was filed in Washinton, D.C., a permissible venue (chosen by Petitioner) convenient to *all* parties and potential witnesses within an easily computable distance to where *all* seventeen causes of action occurred giving rise to the claims under federal law. Still, the U.S. District Court for the District of Columbia ("DC") ordered that the case be transferred (under 28 U.S.C. § 1404) to the EDNY district court,[1] a venue convenient to ***no parties or potential witnesses***.

Section 1404(a) reads—

> ***For the convenience of parties and witnesses***, in the interest of justice, a district court may transfer any civil action to any other district … [emphasis added]. (Supp App 2a)

The intervening actions of the district court for EDNY highlight the waste of time, energy, and money the transfer has caused Petitioner *pro se*, contrary to 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)). However, the actions of the district

[1] *See* Petition for a Writ of Certiorari (App 8a and 9a)

court for EDNY have had the opposite effect by prolonging the procedural abuse in aid of thwarting proper judicial review of fraud by Defendant Bureau of Ocean Energy Management ("BOEM") and BOEM officials named under the particularized fraud claims in Plaintiff's First Amended Complaint.[2]

The Petition for a Writ of Certiorari's first question asks whether the Fifth Amendment requires that defendants answer the allegations against them. Although Petitioner filed his amended complaint over eight months ago (on November 2, 2022), neither BOEM nor Intervenor-Defendant South Fork Wind LLC ("SFW") has answered the amended complaint. It has also been over a year since Petitioner filed his (original) complaint (on July 20, 2022), in response to which BOEM did *not* file answers.

On September 13, 2022, District Judge Jia M. Cobb ruled that "having considered the motion and for good cause shown, it is ORDERED that … [t]he time for The Government file its responsive pleading to the Complaint in this lawsuit is extended thirty days after … the case is transferred" (*see* Kinsella Affidavit ¶ 4) (Supp App 45a), and on November 7, 2022, Judge Cobb ordered that SFW "file its Answer or other responsive pleading on the same date as Federal Defendants" (*id.*, ¶ 6) (Supp App 45a). Accordingly, BOEM *and* SFW were due to answer Plaintiff's amended complaint by ***July 7, 2023*** (*id.*, ¶ 14)(Supp

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[2] References to Defendant Bureau of Ocean Energy Management ("BOEM") in this Supplemental Brief include officials working for BOEM named under the amended complaint's fraud claims in addition to U.S. Department of the Interior (DOI) Secretary Deb Haaland.

App 47a) However, that date has come and gone, and neither BOEM nor SFW has filed answers to the complaint.

Instead, under Federal Rule of Civil Procedure 12(a)(4)(A) and Rule 2.A of District Judge Block's Individual Motion Practices and Rules, BOEM and SFW filed letter motions requesting a pre-motion conference regarding their intent to file Rule 12(b) motions to dismiss; thus, they believed, extending the time to file responsive pleadings (*id.*, ¶ 19 and ¶ 22) (Supp App 48a-51a).

On June 30, 2023, the district court for EDNY issued an "ORDER granting 70 Motion to Adjourn Conference. The Initial Conference … is adjourned sine die (*id.*, ¶ 16) (Supp App 47a-48a). On July 5, 2023, the court issued a "SCHEDULING ORDER: Movant South Fork Wind's letter application 66 dated 6/16/23 and the defendants letter application 68 dated 6/20/23 are GRANTED" (*id.*, ¶ 17)(Supp App 48a).

However, conspicuously absent from the Order of Magistrate Judge Tiscione (issued June 30, 2023) and the Scheduling Order of District Judge Block (issued July 5, 2023), was *any reason* for granting BOEM's and SFW's letter motions that as BOEM and SFW explain in a joint letter, "extends such party's time to file a responsive pleading until 14 days after notice of the court's order denying the motion or postponing its disposition until trial" (*id.*, ¶ 18).[3]

[3] *See* Defendant-Intervenor South Fork Wind, LLC and Federal Defendants joint submission in opposition to Plaintiff's Request for Certificate of Default filed on July 11, 2023 (ECF #77 and 79) and his Supplemental Information Regarding Request for a Certificate of Default filed on July 17, 2023 (ECF #80) (EDNY, 23-cv-02915, ECF #82, at 2, penultimate paragraph).

The complaint and amended complaint include a claim made under the Freedom of Information Act ("FOIA") (*see* Twelfth Claim for Relief). As such, the time for serving answers or otherwise pleading to *any complaint* is governed by FOIA. The pertinent section of FOIA reads as follows—

> *Notwithstanding any other provision of law*, the defendant shall serve an answer or otherwise plead to *any complaint* made under this subsection within thirty days … unless the court otherwise ***directs for good cause shown*** [emphasis added]. 5 U.S.C. § 552(a)(4)(C) (Supp App 2a)

Despite Congress' clear language, neither the order of Magistrate Judge Tiscione nor District Judge Block *directs* BOEM or SFW *for good cause shown*; the orders merely *directs*. The orders grant BOEM and SFW an open-ended extension ***on top of the eight months*** already granted ***for no apparent reason***. "[C]ongressional intent should guide us in matters of statutory interpretation" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 595 (2007). Had Congress omitted the words "*directs for good cause shown*[,]" the judges' orders would have satisfied Congress' express intent, but that is not the text of the statute that Congress enacted. Petitioner is left wondering when the Fifth Amendment's due process clause requires defendants to answer the allegations.

In this instance, BOEM and SFW did *not* merely seek an extension of a few weeks past the thirty-day

statutory deadline (that expired eight months ago)[4] to file answers. They filed a three-page letter (citing vague and dubious grounds) seeking an open-ended extension to avoid having to answer substantive allegations of fraud against the public and Petitioner. (*see* Kinsella Aff. ¶¶ 19-24)(Supp App 48a-55a). In short, BOEM and SFW sought to *avoid* having to answer the complaint and due process of law guaranteed under the Fifth Amendment, and the court granted their requests ***without good cause shown***.

BOEM's and SFW's dubious grounds for avoiding due process of law

BOEM's and SFW's letters express their intent to file motions to dismiss all seventeen claims but for the FOIA claim in the amended complaint for lack of standing and failure to state a claim. BOEM and SFW also mischaracterize the case as an action brought solely under the Administrative Procedure Act, ignoring fraud claims (*see* Kinsella Aff. ¶¶ 19-24)(Supp App 48a-55a) that District Judge Block also ignored (*see* Cert. Petition, at 9-10). This case alleges fraud.

BOEM and SFW made similar overtures regarding standing and failure to state a claim in district court for DC during a hearing on November 9, 2022. During

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[4] Plaintiff filed his First Amended Complaint particularizing allegations of fraud pursuant to Federal Rule of Civil Procedure 9(b) on November 2, 2022. The statutory deadline for serving an answer or otherwise plead to any complaint under 5 U.S.C. § 552(a)(4)(C) is thirty days, which expired on December 2, 2022.

that hearing, the Honorable Jia M. Cobb responded to BOEM's and SFW's allegations as follows—

> I just want to make clear … I have not … suggested that you [Petitioner] don't have standing to bring this motion. So I just want that to be clear.[5]

Judge Cobb's response was in reference to motion papers regarding injunction relief filed by Petitioner. The pertinent section reads as follows—

> Defendant Federal Agencies assert that [Petitioner-]Plaintiff cannot show an injury in fact. The Supreme Court, in rejecting the view that "the injury-in-fact requirement had been satisfied by congressional conferral upon all persons" (*Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 (1992)), noted an exception – "a case where concrete injury has been suffered by many persons, as in mass fraud [emphasis added]" (*id.*). The instant matter represents precisely that, as [Petitioner-]Plaintiff has made clear in his particularized allegations of fraud against Defendants.
>
> > Making a claim of fraud in equity … does not require showing a particularized injury— as it "involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in

[5] *See* November 9 Hearing Tr. 22:10-25 and 23:1-4 (D.C. Cir., No. 22-5317, 1994062-11, at 22-23, PDF 23-24)

> which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."
>
> *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 246 (1944).[6]

Further undermining BOEM's and SFW's letter motions that express a sudden desire to file motions to dismiss is the fact that neither BOEM nor SFW filed a motion to dismiss in the district court for D.C. after the complaint was filed (on July 20, 2022) or when Petitioner filed his amended complaint (on November 2, 2022), or *at all*. Then, they could have filed *actual* motions to dismiss rather than merely letter motions expressing a vague unsubstantiated intent to file a motion to dismiss at an unspecified future time. So, why did BOEM and SFW wait until the case was before Judge Block and Magistrate Judge Tiscione before filing (vague and dubious) letter motions expressing an intent to file Rule 12(b) motions to dismiss rather than an *actual* motions to dismiss?

As their court orders attest, neither Judge Block nor Magistrate Judge Tiscione required that BOEM or SFW show good cause. Judge Block and Magistrate Judge Tiscione abused their authority by granting BOEM's or SFW's letter motions requesting a pre-

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[6] *See* Petitioner-Plaintiff's Response to Defendant Federal Agencies Memorandum in Opposition to Motion for Emergency TRO (D.D.C., No. 1:22-cv-02147, ECF 47, at 1-2)

motion conference that have the practical effect of extending their time to file responsive pleadings ***in the absence of a court order that*** "***directs for good cause shown***" in violation of FOIA (5 U.S.C. § 552(a)(4)(C)). Congress expressly requires that a court *directs for good cause shown*. The district court for EDNY failed to comply with the statute's plain language, thereby violating the statute *and* due process of law guaranteed by the Fifth Amendment.

In the absence of an order that "*directs for good cause shown*[,]" neither BOEM nor SFW is relieved of the prior rulings of District Judge Cobb, who, "having considered the motion and *for good cause shown* … ORDERED that the … time for … fil[ing] [] responsive pleading[s] to the Complaint in this lawsuit" is thirty days after … the case is transferred [emphasis added]" that is ***July 7, 2023*** (*see* Kinsella Aff. ¶ 14)(Supp App 47a). Thus, BOEM and SFW are in violation of District Judge Cobb's court orders directing them to file their responsive pleading to the (amended) complaint by July 7, 2023.

Request for a Certificate of Default

On July 11, 2023, Petitioner submitted a Request for a Certificate of Default to the Clerk of the Court, Ms. Brenna B. Mahoney (in the EDNY district court) against BOEM and SFW pursuant to Federal Rule of Civil Procedure 55(a) and Local Civil Rule 55.1 for failure to plead or otherwise defend this action.[7] (Supp App 8a)

[7] *See* EDNY, Case 23-cv-02915, ECF 77

In *United States v. Conolly,* the Second Circuit held that—

> Under Rule 55(a) of the Federal Rules of Civil Procedure, "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend . . . , the clerk *must* enter the party's default." Fed. R. Civ. P. 55(a) (emphasis added). After this non-discretionary default is entered by the clerk, "[t]he court may set aside an entry of default for good cause." Fed. R. Civ. P. 55(c). [No. 14-2579-cv, at *3 (2d Cir. May 25, 2017)]

Contrary to Second Circuit precedent (above), Federal Rule of Civil Procedure 55(a), and Local Rule 55.1, the Clerk of the Court failed to enter the default of either BOEM or SFW. The Clerk's failure to perform a "non-discretionary" ministerial act mandated under Rule 55(a) denied the district court the opportunity to consider whether "good cause" exists under Rule 55(c).

The Petition for a Writ of Certiorari cites numerous examples of procedural abuse by the federal courts in aid of perpetuating fraud by BOEM *and* SFW to the detriment of Petitioner and the public. As described in this Supplemental Brief, the intervening actions of the district court for EDNY confirm that such abuse continues. The district court for DC ordered that the case be transferred allegedly "***[f]or the convenience of parties and witnesses***" (28 U.S.C. § 1404). Surely it cannot be that Congress intended that Section 1404 meant a court could transfer a case "for the convenience of parties" on one side so that they could

avoid filing answers to a complaint within thirty days ***without*** having to show "good cause" (5 U.S.C. § 552(a)(4)(C)) or *arbitrarily for no cause at all.*

The intervening actions of the district court for EDNY violate FOIA (5 U.S.C. § 552(a)(4)(C)), this Court's precedent in *Van Dusen v. Barrack* (*supra*) by further wasting time, energy, and money, *and* Petitioner's right to due process of law guaranteed under the Fifth Amendment.

Counsel's knowingly false statements regarding BOEM's jurisdiction onshore

Counsel for SFW, four partners at Latham & Watkins LLP ("L&W), continue to knowingly make false statements before the courts despite Petitioner's complaint to the DC Bar Association on February 21, 2023 (*please read* DC Bar Association Letter) (Supp App 8a)— counsel representing BOEM parrots the same false information.

For example, counsel for SFW *and* BOEM knowingly provided the court with false information concerning BOEM's onshore jurisdiction in their letter motions seeking leave to file Rule 12(b) motions to dismiss that both Magistrate Judge Tiscione and District Judge Block granted (on June 30 and July 5, 2023, respectively) *for no apparent reason shown*.

Counsel for SFW falsely claims that "onshore construction work was authorized by the NYSPSC and the Town, not Federal Defendants[.]"[8] Moreover, "[e]ven if Federal Defendants' approvals for the Project were set aside, that relief would not affect the nearshore work or the [] onshore cable over which

[8] *See* EDNY, 23-cv-02915, ECF #66 (at 3)

Federal Defendants lack jurisdiction[.]"[9] (*id.*). Counsel for BOEM also falsely claims that "onshore construction activity was authorized by, and within the *exclusive* jurisdiction of, the PSC and other State and local authorities [emphasis added]. BOEM has no authority to regulate this activity because its jurisdiction is limited to the submerged lands starting three miles from state coastlines and extending seaward [citing 43 U.S.C. §§ 1331(a)]."[10] Petitioner's letter to the DC Bar Association quickly disproves counsel for SFW's and BOEM's unsubstantiated allegations (Supp App 8a).

Enactment of Section 388(a) of the Energy Policy Act (2005) authorized BOEM to grant leases for activities that "produce or support production, transportation, or transmission of energy from sources other than oil and gas" (43 USC 1337(p)(1)(C)) such as offshore wind, and "which authorizes exploration for, and development and production" of resources (43 USC § 1331(c)), where "development" is defined to include the "operation of all onshore support facilities" (*id.*, (l)) and "production" to include the "transfer" of resources "to shore" (*id.*, (m)).

Contrary to the false assertions by counsel for BOEM and SFW, BOEM exercised jurisdictional authority by approving onshore construction as confirmed by BOEM's Record of Decision.[11] BOEM "approve[d], with modifications, the COP for South Fork Wind adopting Habitat Alternative" Layout B.[12]

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[9] *Id.*

[10] *Id.*, ECF #68 (at 2-3)

[11] *See* Record of Decision ("ROD"), issued November 24, 2021—www.boem.gov/renewable-energy/state-activities/record-decision-south-fork (last accessed August 11, 2023).

[12] *Id.*, (at 15, PDF 17, 1st ¶).

Under that alternative, BOEM reduced the number and adjusted the siting of offshore turbines (WTGs), but "[a]ll other Project components and construction and installation" would remain "identical to the Proposed Action[,]"[13] which BOEM described to include the "South Fork Export Cable (SFEC)" consisting of a "cable and an [onshore] interconnection facility" connected "to the existing [onshore] mainland electric grid in East Hampton, New York, for the delivery of power to the South Fork of Suffolk County, Long Island." [14]

[left blank]

[13] *See* Final Environmental Impact Statement ("FEIS"), issued August 16, 2021 (at 2-12, PDF 38, 4th & 5th ¶¶). Available at—www.boem.gov/renewable-energy/state-activities/sfwf-feis

[14] *See* ROD (at 7, PDF 9, 2nd bullet point)

CONCLUSION

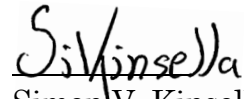
Plaintiff respectfully requests that this Court—

(1) Holds Federal Defendants and Defendant-Intervenor South Fork Wind LLC in contempt of court for violating the court orders of District Judge Jia M. Cobb by their failure to answer Plaintiff's amended complaint;

(2) Plaintiff be awarded sanctions against Federal Defendants and Defendant-Intervenor; and

(3) For the reasons stated herein and in the Petition for a Writ of Certiorari, Petitioner humbly asks that this Court grant certiorari.

Respectfully submitted this 11th day of August 2023,



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Statutory and Regulatory Provisions Involved

District Court Order & Opinion (D.D.C.)
For the District of Columbia
Kinsella v. Bureau Of Ocean Energy Management et al., Case No: 1:22-cv-02147 (JMC)

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

Statutory and Regulatory Provisions Involved

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."

5 U.S.C. § 552(a)(4)(C) provides that:

> *Notwithstanding any other provision of law*, the defendant shall serve an answer or otherwise plead to *any complaint* made under this subsection within thirty days … unless the court otherwise directs for good cause shown.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIMON V. KINSELLA, *Plaintiff,* v. BUREAU OF OCEAN ENERGY MANAGEMENT; DEB HAALAND, Secretary of the Interior; U.S. DEPARTMENT OF THE INTERIOR; MICHAEL S. REGAN, Administrator, U.S. ENVIRONMENTAL PROTECTION AGENCY, *Defendants,* and SOUTH FORK WIND, LLC, *Proposed Defendant-Intervenor.*	Case No. 1:22-cv-02147-JMC

ORDER

The Court having considered the Unopposed Motion of South Fork Wind, LLC to Intervene as a Defendant pursuant to Federal Rule of Civil Procedure 24(a)(2), it is hereby ORDERED that the motion is GRANTED. It is further ORDERED that Intervenor-Defendant South Fork Wind, LLC's lodged Opposition to Plaintiff's Emergency Motion

for a Temporary Restraining Order, ECF 40-1, shall be docketed for consideration. It is further ORDERED that Intervenor-Defendant South Fork Wind, LLC shall file its Answer or other responsive pleading on the same date as Federal Defendants.

SO ORDERED this 7th date of November, 2022.

Sincerely,
s/
Honorable 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 and in their official capacities, Director ELIZABETH KLEIN,[1] Environment Branch for Renewable Energy ("OREP") Chief MICHELLE MORIN, OREP Program Manager JAMES F. BENNETT, OREP Environmental Studies Chief MARY BOATMAN, Economist EMMA CHAIKEN, Economist MARK JENSEN, Biologist BRIAN HOOKER, and JENNIFER DRAHER; and DEB HAALAND, Secretary of the Interior, U.S. Department of the Interior; LAURA DANIELS-DAVIS, in her official capacity as Principal Deputy Assistant Secretary, Land and Mineral Management; and MICHAEL S. REGAN, Administrator, U.S. Environmental Protection Agency;

Defendants,

and

SOUTH FORK WIND, LLC,

Proposed Defendant-Intervenor.

Case No. 2:23-cv-02915-FB-ST

REQUEST FOR CERTIFICATE OF DEFAULT

TO: BRENNA B. MAHONEY
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Please enter the default of Defendants and Defendant-Intervenor in the caption (above) pursuant to Rule 55(a) of the Federal Rules of Civil Procedure and Local Civil Rule 55.1 for failure to plead or otherwise defend this action as fully appears from the court file herein and from the attached affidavit of Simon V. Kinsella, Plaintiff *pro se*.

Defendants are in violation of an order of the U.S. District Court for the District of Columbia issued by District Judge Jia M. Cobb in civil case no. 22-02147 on September 13, 2022 (*see* Exhibit C, MINUTE ORDER, at 4), and Defendant-Internevor is in violation of an order issued on November 7, 2022 (*see* Exhibit D). The Court ordered Defendants and Defendant-Internevor to file their "responsive pleading to the Complaint in this lawsuit … *thirty days after* … the case is transferred and a new docket number and judge is assigned [emphasis added]" (*see* Exhibit C, MINUTE ORDER, at 4).

On May 17, 2023, the Court of Appeals for the D.C. Circuit in case no. 22-5317 (Doc. 1999608) transferred the case to the Eastern District of New York by "ORDER[ING] 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* Exhibit E. According to Local Rule 41(3) for the Court of Appeals for the D.C. Circuit, "[n]o 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

….". Therefore, the transfer order of May 17 became effective (21 days later) on June 7, 2023. Defendants and Defendant-Intervenor were ordered to file their responsive pleading to the complaint *thirty days after* the case was transferred, July 7, 2023.[1]

Accordingly, Plaintiff respectfully requests that this court enter the default of Defendants and Defendant-Intervenor.

Further, Plaintiff respectfully requests that Defendants and Defendant-Intervenor be held in contempt of court for violating Federal District Judge Jia M. Cobb's orders of September 13 and November 7, 2022, by not filing answers to the First Amended Complaint. If Defendants or Defendant-Intervenor do not answer the First Amended Complaint within the next fourteen days (from the date of this Request for Default), Plaintiff will apply for sanctions against Defendants and Defendant-Intervenor.

Plaintiff reserves his right to apply for entry of judgment pursuant to Rule 55(b) of the Federal Rules of Civil Procedure.

Respectfully submitted this 11th day of July 2023,

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[1] New judges were assigned to the case (Senior District Judge Frederic Block and Magistrate Judge Steven Tiscione) on April 25, 2023.

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February 21, 2023

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Re: Violations by Latham & Watkins' Partners of District of Columbia Bar Rules of Professional Conduct

Dear Mr. Fox,

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

The partners of Latham & Watkins abused their position of authority by knowingly making false

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

statements[2] and, relying on their professional standing, passing off their conclusory statements as facts. The partners take opportunistic advantage of a presumption that they comply with the District of Columbia Bar Rules of Professional Conduct. On the contrary, their legal submissions (as described below) violate those Rules and bring disrepute to the legal profession. Their vexatious statements have caused undue hardship and additional expense and serve no purpose other than to interfere with due process and frustrate a *pro se* litigant.[3] In addition, their false statements concern harmful PFAS contamination of a sole-source aquifer that thousands of people rely on daily for drinking water. Thus, the lawyers' words are not only false but reckless. Furthermore, the partners' actions aided in assisting SFW in fraud.[4]

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

According to the D.C. Bar Association Rules of Professional Conduct, Rule 8.4, "[i]t is professional misconduct for a lawyer to: (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly

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

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

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

assist or induce another to do so, or do so through the acts of another; [or] … (c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation[.]" Pursuant to those Rules, I respectfully request that the Board on Professional Responsibility discipline the following partners at Latham & Watkins LLP (collectively "L&W Partners")—

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

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

In the district court, the L&W Partners knowingly made false statements of material fact *and* law in their Memorandum in Opposition to Emergency Motion for a Temporary Restraining Order and Preliminary Injunction.[7] Their false statements were corrected at the time,[8] but the partners failed to reflect those corrections in their legal submissions. Instead, the partners repeated the untruthful information on appeal in their Response in Opposition to Emergency Motion for a

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

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

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

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

Temporary Restraining Order and Preliminary Injunction.[9] Simply put, the three partners of Latham & Watkins LLP lied to the U.S. Court of Appeals. Their lies assisted SFW in perpetrating fraud.

1) L&W Partners Lies Re: PFAS Contamination

In the U.S. District Court for the District of Columbia, the L&W Partners knowingly made the following false statements regarding the state review of SFW's project[10]—

> The PFAS allegations at the heart of Plaintiff's claims were also considered and rejected by the New York State Public Service Commission ("NYSPSC") twice after extensive evidentiary proceedings [Exhibit B, DDC Case 1:22-cv-02147, ECF No. 40-1, at 3, PDF 9].
>
> ---
>
> The NYSPSC Article VII conditions comprehensively cover the potential PFAS issues [*id.*, at 30, PDF 36].
>
> ---
>
> Environmental matters and the allegations of exacerbating existing PFAS contamination were discussed throughout the Article VII process [*id.*, at 8, PDF 14].

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

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

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

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

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

> Fork Wind avoided environmental review of onsite PFAS contamination in the NYSPSC Article VII review and BOEM's review.
>
> [Footnote2:] https://ehamptonny.gov/DocumentCenter/View/12142/Table-3---LIRR-PFAS-Samples [*id.*, Exhibit C, DDC Case 1:22-cv-02147, ECF No. 44, at 9].

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

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

Contrary to the partners' false statements, the FEIS does *not* recognize PFAS in the soil and groundwater *within* or *around* the site (regardless of whether the "site" refers to East Hampton Aiport or SFW's proposed construction site). The FEIS reads—"Sampling at the fourth site, NYSDEC #152250 [the 610-acre East Hampton Airport site], has indicated the

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

presence of perfluorinated compounds." [12] The FEIS does *not* state whether the contamination exists in "soil or groundwater" (or concrete infrastructure, building materials, or anything else). The FEIS only claims that "[*s*]*ite-related compounds* have been identified in soil and groundwater within and around the site [emphasis added]" (FEIS at H-23, PDF 655, 2nd ¶). BOEM explicitly uses the phrase *site-related compounds*, which could be *any* compound onsite, including naturally occurring safe compounds such as calcium or sodium. The FEIS does *not* recognize *any* sampling that "detected PFAS" in groundwater; it *only* acknowledges site-related compounds. The partners of Lathan & Watkins provided false information.

> [T]he FEIS appropriately incorporated the many testing, handling, and treatment requirements of the Article VII Order from the NYSPSC proceeding. *Id.*, at A-3. [*see* Exhibit C, DDC 1:22-cv-02147, ECF No. 40-1, at 30, PDF 36]
>
> [T]he BOEM FEIS … concluded that, with implementation of the conditions imposed by the NYSPSC and incorporated into the COP, the SFEC-Onshore does not present a risk of causing PFAS contamination in groundwater. [*id.*, at 31–32, PDF 37–38]

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[12] Perfluorinated compounds is an outdated term for "PFAS" (per/- and polyfluoroalkyl substance) contamination.

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

> [T]he BOEM FEIS *did* thoroughly discuss PFAS contamination
> [*id.*, at 31, PDF 37]
>
> The FEIS addresses PFAS issues and concludes that with application of state law requirements "all activities would meet permit and regulatory requirements to continue protecting groundwater." FEIS at H- 28; *see also id.* at H-23, H-27
> [*id.*, at 6, PDF 12]
>
> BOEM can and did rely on … its finding that "all activities would meet permit and regulatory requirements to continue protecting groundwater as drinking water resources." *Id.* at H-28.
> [*id.*, at 30, PDF 36].

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

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

> [The] Developer [SFW] (falsely) claims that BOEM's "FEIS … addresses PFAS issues, and concludes that with application of state law requirements 'all activities would meet permit and regulatory requirements to continue protecting groundwater [emphasis added].' FEIS at H-28; see also id. at H-23, H-27." The full quote in contaxt [*sic*] is as follows (FEIS at H-28)—
>
> > There are no onshore construction activities under the Proposed Action that would require ground disturbance at depths at or near groundwater resources, and all activities would meet permit and regulatory requirements to continue protecting groundwater as drinking water resources. The use of HDD [Horizontal Directional Drilling] at the landing sites would negate the need for trenching in areas where shallow groundwater would intersect the trench excavation. Onshore subsurface ground-disturbing

> activities would not be placed at a depth that could encounter groundwater, and would therefore not result in impacts on water quality.

The problem here is that none of what BOEM writes is true. It is yet another example of BOEM fraudulently misrepresenting the facts… See the photo (overleaf), taken on April 18, 2022, of the transition vault at the southern end of Beach Lane with groundwater visible at the bottom (see ECF No. 1-2, at 6). [The] Developer [SFW] installed a treatment facility designed specifically to treat groundwater containing PFAS contamination extracted during onshore construction. The facility comprised four Frac Tanks with a combined capacity of 75,000 gallons (see photos of the frac tanks at ECF No. 1-2, at 1-4). Plaintiff illustrates the depth of groundwater where the trenching encroaches into groundwater in his letter of March 11, 2022, to BOEM titled "URGENT: Imminent Risk to Public Health" (see ECF No. 3-3, Fig 7 at 15 and Fig 8 at 16). [Insert of photo of groundwater in transition vault here.] Contrary to Developer's assertions that BOEM's "FEIS addresses PFAS issues," BOEM neither acknowledged nor discussed

onsite PFAS contamination and did *not* address *any* issues concerning PFAS contamination. BOEM fraudulently concluded that "[o]verall, existing groundwater quality in the analysis area appears to be good" (see FEIS at p. H-23, PDF p. 655 of 1,317). [*id.*, ECF No. 44, at 3–5]

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

> information was from NYSDEC reports based on scientific facts. [*id.*, at 7–8]

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

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

> Environmental Policy Act or Outer Continental Shelf Lands Act. [USCA 22-5316, Doc. 1982288, at 17, PDF 22].

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

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

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

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

> With respect to PFAS, New York State has exclusive jurisdiction over the onshore construction at issue in this case.
> [*see* Exhibit C, DDC 1:22-cv-02147, ECF No. 40-1, at 26]

> [T]he NYSPSC—not Federal Defendants—has jurisdiction over

> whether there is a need for the project [*id.*, at 28, PDF 34].
>
> There is no "specific nexus" to Federal Defendant's conduct here: BOEM does not have jurisdiction over the SFEC-Onshore, the installation of concrete duct banks and vaults or HDD drilling and can neither authorize nor prohibit any of that conduct underlying the purported need for a TRO here. *See Robbins v. U.S. Dep't of Hous. & Urban Dev.*, 72 F. Supp. 3d 1, 6–7 (D.D.C. 2014). [*id.*, at 26, PDF 32]
>
> With respect to PFAS, injunctive relief against the Federal Defendants will have no effect on construction activities over which those Federal Defendants lack jurisdiction. None of the Federal Defendants' approvals or permits in this case authorize the installation of concrete duct banks and vaults or HDD drilling. *See* Gearon Decl. ¶¶ 7, 19, 23. Rather, the installation of concrete duct banks and vaults and HDD drilling is exclusively approved and permitted under other agency authority [*id.*, at 27, PDF 33].

BOEM's jurisdictional authority

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

> According to the Outer Continental Shelf Lands Act "the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards" (43 U.S. Code § 1332(3)). "The term 'development' means those activities … including geophysical activity, drilling, … and operation of all onshore support facilities" (43 U.S. Code § 1331(l)) …
>
> BOEM is *not* relieved of its statutorily mandated obligations pursuant to the National Environmental Policy Act [NEPA] or Outer Continental Shelf Lands Act [OCSLA] and their respective implementing regulations, irrespective of a non-cooperating state agency action that, as [the] Developer [SFW] acknowledges, is likewise the subject of many ongoing legal challenges. [*see* Exhibit D, DDC 1:22-cv-02147, ECF No. 44, at 11].

BOEM's Record of Decision ("ROD") states that "[t]he regulations at 30 C.F.R § 585.628 require BOEM to review the COP [Construction and Operations Plan for SFW] and all information provided therein [emphasis added]" (ROD, at 97, 2nd ¶). BOEM states "that a COP must … describe all planned facilities to be constructed and used for the project, including onshore support facilities

[emphasis added]" (*id.*, footnote 7). Subsection (a) of OCSLA regulation 30 C.F.R § 585.620 states that SFW "*must* describe *all* planned facilities … including *onshore* … facilities and all anticipated project easements [emphasis added]." Subsection (b) states that SFW "*must* describe *all* proposed activities including … *all* planned facilities, including *onshore* … facilities [emphasis added]." Subsection (c) states that SFW "*must* receive BOEM approval [emphasis added]" for its COP.

Moreover, BOEM's 2016 Information Guidelines for a Renewable Energy Construction and Operations Plan ("COP")("Guidelines")(DDC 1:22-cv-02147, ECF No. 34-10),[14] provides instructions on the information BOEM requires applicants to include in their COP. According to the BOEM's Guidelines, SFW "*must* submit with your COP *detailed information* that describes *resources*, *conditions*, and activities that *could* be affected by your proposed project [emphasis added]. The Guidelines (see tables in Attachment E) "describe the information requirements for 30 CFR 585.627(a). This information will be used by BOEM to comply with NEPA and, as appropriate, other environmental laws" (Guidelines, at 19, 2nd ¶).

Under the heading 30 CFR 585.627(a)(2) Water Quality, the Guidelines assert that SFW *must* submit detailed information on "the water quality in

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

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

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

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[15] In 2016, the New York State Department of Environmental Conservation ("NYSDEC") added PFOA and PFOS to New York State's list of hazardous substances (6 NYCRR, § 597.3) by emergency regulation, making them hazardous wastes as

L&W Partners' false statements concerning New York State's "exclusive jurisdiction over the onshore construction" (*supra*) are contradicted by the OCSLA, its implementing regulations, and BOEM's own guidelines. SFW *and* Latham & Watkins would have known that their jurisdictional claims were *not* supported by fact *or* law because SFW provides the same references in its Construction and Operations Plan— "The COP was prepared in accordance with Title 30 of the Code of Federal Regulations (CFR) Part 585 (30 CFR § 585), BOEM's Guidelines for Information Requirements for a Renewable Energy Construction and Operations Plan (COP) (BOEM, 2016)" (*see* USCA 22-5316, Doc. 1980954, Exhibit 3-1, COP, at 1-1, PDF 49).[16] It continues— "The COP includes the following:

• A description of *all planned facilities*, *including onshore* and support *facilities*

• A description of *all proposed activities*, including construction activities, commercial operations, maintenance, and conceptual decommissioning plans

• The *basis for the analysis of the environmental and socioeconomic impacts* and operational integrity of the proposed construction, operation, maintenance, and decommissioning activities [emphasis added]" (*id.*).

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defined by ECL (Environmental Conservation Law), Article 27, Title 13.

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

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

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

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

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

3) L&W Partners Assisted SFW in Fraud

In support of this letter, *see* Statement of Issues (USCA 22-5316, Doc. 1980953, marked as Exhibit E), Kinsella Affidavit I (USCA 22-5316, Doc.

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[17] According to Natonal Environmental Policy Act ("NEPA") regulation 40 C.F.R. § 1502.13, "[t]he [environmental impact] statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action [emphasis added]." NB: According to BOEM, its "NEPA review of the proposed [SFW] Project began prior to the September 14, 2020, effective date of the updated regulations, [thus] BOEM prepared the FEIS and this ROD under the previous version of the regulations (1978, as amended in 1986 and 2005)" (*see* USCA No. 22-5316, Doc. 1980954, ROD, at 1, PDF 3, footnote 1).

1979671, marked as Exhibit F), Kinsella Affidavit II (*id.*, Doc. 1980954, marked as Exhibit G), Kinsella Affidavit III (*id.*, Doc. 1981133, **SEALED**, marked as Exhibit H), and Second Amended Complaint (*id.*, Doc. 1980154-2, Exhibit A (marked as Exhibit I)

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

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

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

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[18] Rules of Professional Conduct, Rule 3.3(a)

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

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

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

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

(1) False representation of groundwater PFAS contamination

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

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

SFW (falsely) claimed that its COP "provides a description of water quality and water resource conditions … as defined by several parameters including: … contaminants in water" (*id.*, ¶ 83). Under the heading, Water Quality and Water Resources, SFW (falsely) asserts its COP "discusses relevant anthropogenic activities that have in the past or currently may impact water quality, including point and nonpoint source pollution

discharges, … and pollutants in the water" (*id.*). SFW said that "the affected environment and assessment of potential impacts for water quality and water resources was evaluated by reviewing the revised Environmental Assessment completed as part of the BOEM NEPA review" (*id.*). SFW asserted that its "COP was prepared in accordance with … 30 CFR § 585 … [and] BOEM's Guidelines" (*supra*). SFW's statements are all contrary to fact.

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

(2) Knowledge of its falsity

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

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

Fund Program adjacent *on either side* of SFW's proposed construction corridor (*id.*, ¶¶ 85–86).

In December 2020 and January 2021, four months *before* SFW submitted its final COP to BOEM (in May 2021), it performed onsite soil and groundwater testing. The testing revealed PFAS contamination at levels exceeding regulatory standards (*id.*, ¶¶ 68–76). SFW's Environmental Investigation Report detected PFAS contamination in 20 wells *within* its onshore construction corridor. It noted that "levels of PFOA and PFOS exceeded NYSDEC's Ambient Water Quality Criteria Guidance Values in one well each (MW-4A and MW-15A, respectively)" (*id.*, ¶ 71). Monitoring Well MW-4A is on Beach Lane, and MW-15A is on Wainscott NW Rd, in Wainscott, N.Y. (*id.*, ¶ 72). The report (revised April 1, 2021) *pre-dates* BOEM's approval of the project (on November 24, 2021) by eight months (*id.*, ¶ 68).[21] Since receiving the information and despite updating its COP (in May 2021), SFW did *not* include the PFAS contamination test results of groundwater or soil prior to BOEM approving its project (on November 24, 2021).

BOEM: In February 2021, nine months *before* BOEM approved SFW's Project, it received a comments letter that included 207 exhibits ("2021

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

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

(3) Statutory Duty to Disclose Material Facts

> "Where a court finds that a party had the duty to disclose material information, and failed to do so, there is an even greater likelihood that the nondisclosure will constitute fraud. *Pyne v. Jamaica Nutrition Holdings, Ltd.*,497 A.2d 118, 131 (D.C. 1985)" (*Sage v. Broadcasting*

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

Publications, Inc., 997 F. Supp. 49, 52 (D.D.C. 1998).

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

According to BOEM, "[t]his ROD was prepared following the requirements of the National Environmental Policy Act (NEPA; 42 U.S.C. §§ 4321 *et seq.*) and 40 C.F.R. parts 1500-1508.1. BOEM prepared the FEIS with the assistance of a third-party contractor, SWCA, Inc." (ROD, at 1, PDF 3, first and second paragraphs). NEPA asserts that "Congress authorizes and directs that, to the fullest extent possible … all agencies of the Federal Government shall . . . include in every recommendation or report on … actions significantly affecting the quality of the human environment, a detailed statement . . . on (i) the environmental impact of the proposed action" (Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C)).

"This circuit has long held that courts must exercise heightened scrutiny of agencies' compliance with NEPA's procedures. *See, e.g., Scientists'*

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

*Institute for Public Information, Inc. v. AEC,*481 F.2d 1079, 1092 (D.C. Cir. 1973); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC,*449 F.2d 1109, 1115 (D.C. Cir. 1971). In *Calvert Cliffs,* we stated that "the requirement of environmental consideration `to the fullest extent possible' sets a high standard for the agencies, a standard which must be rigorously enforced by a reviewing court." 449 F.2d at 1114." *Potomac Alliance v. U.S. Nuclear Reg. Com'n*, 682 F.2d 1030, 1035 n.21 (D.C. Cir. 1982).

"The statutory requirement that a federal agency contemplating a major action prepare such an environmental impact statement serves NEPA's "action-forcing" purpose in two important respects. See *Baltimore Gas Electric Co*. v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983); *Weinberger* v. *Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 143 (1981). It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision. … NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast. See *ibid.; Kleppe, supra*, at 409 … Publication of an EIS, both in draft and final form, also serves a larger informational role. It gives the public the assurance that the agency "has indeed considered environmental concerns in its

decisionmaking process," *Baltimore Gas Electric Co., supra*, at 97, and, perhaps more significantly, provides a springboard for public comment, see L. Caldwell, Science and the National Environmental Policy Act 72 (1982)." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

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

> "The agency shall independently evaluate the information submitted [by South Fork Wind] and shall be responsible for its accuracy … It is the intent of this paragraph that acceptable work … be verified by the agency." (NEPA 1978, 40 CFR 1506.5(a)).

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

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

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

(4) Intent to deceive

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

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

In October 2017, a year *before* SFW submitted its COP to BOEM for approval (and its application to the NYSPSC), PFAS contamination in the area where SFW planned construction was widely known (Kinsella Aff. I, ¶¶ 31, 34). In 2016, the adverse health effects of such contamination were also widely published (*id.*, ¶ 32) (Kinsella Aff. II, ¶¶ 60–63). In June 2018, SCDHS found groundwater south of East Hampton Airport (in Wainscott) so toxic that hundreds of people were forced to drink, cook, wash,

[24] There are many other issues such as blantant procurements violations, numberous false purposes and needs, concealing of conflicts of interests, etc., but due to limitations, this motion is limited to the exclusion of the project cost and PFAS contamiantion from BOEM's review.

and bathe with bottled water (Kinsella Aff. I, at ¶ 33). Still, in September 2018, when SFW submitted its Construction and Operations Plan to BOEM *and* its application to the NYSPSC, it did *not* include *any* information on PFAS contamination.

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

(5) Action taken in reliance upon fraudulent representation

On October 19, 2018, BOEM published a Notice of Intent ("NOI"). It reads— "Consistent with the regulations implementing the National Environmental Policy Act … (BOEM) is announcing its intent to prepare an Environmental Impact

Statement (EIS)" (*see* Exhibit K, USCA 22-5316, Doc. 1980953, Exhibit 2, Federal Register, Vol. 83, No. 203, at 53104–53105). I (and the public) relied on BOEM's NOI to prepare a NEPA-compliant EIS based on a thorough environmental review by submitting comments (in response to the NOI) on November 19, 2018 (Kinsella Aff. I, ¶ 17-20). The NOI misleads the public and me into believing that BOEM would, pursuant to NEPA, "determine significant resources and issues, impact-producing factors, reasonable alternatives (e.g., … restrictions on construction and siting of facilities and activities), and potential mitigation measures to be analyzed in the EIS" (Federal Register, *supra*).

On January 8, 2021, BOEM published a "Notice of availability of a Draft Environmental Impact Statement and public meetings" (*see* Exhibit L, USCA 22-5316, Doc. 1980953, Exhibit 3, Fed. Reg., Vol. 88, No. 5, at 1520–1521). BOEM's notice asserts that it acted "[i]n accordance with regulations issued under the National Environmental Policy Act" (*id.*, at 1520, first column). It continues— "The DEIS analyzes reasonably foreseeable effects from the project. The analysis … assesses cumulative impacts that could result from the incremental impact of the proposed action and action alternatives … when combined with past, present, or reasonably foreseeable activities, including other potential future offshore wind activities" (*id.*, at 1520, second column, last paragraph).

On February 22, 2021, I sent Defendant-Appellee Michelle Morin of BOEM the 2021 Comments responding to SFW's DEIS, including 207 exhibits (*see*

Exhibit M, USCA 22-5316, Doc. 1980953-4, Exhibit 4, at 15–24). See Addendum BOEM Exhibits (*id.*, at 26–36)(Kinsella Aff. I., at ¶¶ 21-25). The letter explains that "it is necessary to include these documents; otherwise substantial parts of the proposed Project will not be subject to any environmental review whatsoever" (*id.*, at 2, PDF 16, third paragraph). The comments letter continues— "I respectfully request that the documents herein listed be incorporated by reference and form part of my comments … and that BOEM, as lead agency, conduct[s] a broad review of the whole Project[,] including in all respects the onshore and offshore components and 'use all practicable means and measures... to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans'" (citing NEPA Section 101(a); 42 U.S.C. § 4331(a)) (*id.*, fifth paragraph). I (and the public) relied on BOEM to perform that review.

On August 5, 2017, during a presentation to the Wainscott Citizens' Advisory Committee ("WCAC"), SFW made the following misleading representations–– that its project was the result of a "technology-neutral competitive solicitation" (*see* Exhibit N, USCA 22-5316, Doc. 1980953-5, Exhibit 5, WCAC SFW Slides, PDF 5); and that "[p]ermitting will involve … state and Federal Agencies" that included "New York State" and the "Bureau of Ocean Energy Management" with the implication that such permitting would be lawful (*id.,* PDF 13). The meeting minutes note that "[p]ermitting for the project will involve … state and federal agencies, and is intentionally designed for

transparency" (*see* Exhibit O, USCA 22-5316, Doc. 1980953-6, Exhibit 6, WCAC Minutes, at PDF 3, 1st ¶). The minutes continue, "[t]he formal proposal is expected in early 2018, which will include technical and environmental impact studies" (*id.*, at PDF 4, 2nd ¶). I was a member of the WCAC and Chairman of its Environmental Subcommittee tasked with assessing the SFW Project. I relied on SFW's representations that its project would be subject to proper environmental review.

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

4) Conclusion

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

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

and law, and assisting a client in engaging in conduct that the lawyer knows is fraudulent); and Rule 8.4 (by engaging in conduct involving dishonesty, fraud, deceit, *and* misrepresentation).

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

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

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

Respectfully submitted this 21st day of February 2023,

Simon v. Kinsella, Plaintiff *Pro Se*
P.O. Box 792, Wainscott, NY 11975
Tel: (631) 903-9154 |
Si@oswSouthFork.Info

Attachments:

Exhibit A- USCA, No. 22-5316/7, Doc. 1978475, Entry of Appearances
Exhibit B- DDC Case 1:22-cv-02147, ECF No. 40-1
Exhibit C- DDC Case 1:22-cv-02147, ECF No. 44
Exhibit D- USCA, D.C. Cir., 22-5316, Doc. 1982288
Exhibit E- Statement of Issues (USCA, D.C. Cir., 22-5316, Doc. 1980953)
Exhibit F- Kinsella Affidavit I (USCA, D.C. Cir., 22-5316, Doc. 1979671)
Exhibit G- Kinsella Affidavit II (USCA, D.C. Cir., 22-5316, Doc. 1980954)
Exhibit H- Kinsella Affidavit III (USCA, D.C. Cir., 22-5316, Doc. 1981133, SEALED)
Exhibit I - Second Amended Complaint (USCA, D.C. Cir., 22-5316, Doc. 1980154-2, Exhibit A)
Exhibit J - Newsday Exposé on 'Forever Chemicals' in Suffolk County (USCA, D.C. Cir., 22-5316, Doc. 1983691-2, Exhibit 2)
Exhibit K- BOEM Notice of Intent (USCA, D.C. Cir., 22-5316, Doc. 1980953, Exhibit 2, Federal Register, Vol. 83, No. 203, at 53104–53105)
Exhibit L- BOEM Notice of availability of a Draft Environmental Impact Statement (USCA, D.C. Cir., 22-5316, Doc. 1980953, Exhibit 3,

Fed. Reg., Vol. 88, No. 5, at 1520–1521).

Exhibit M-Kinsella Comments 2018 & 2021 (USCA, D.C. Cir., 22-5316, Doc. 1980953-4)
Exhibit N-WCAC, SFW Slides (USCA, D.C. Cir., 22-5316, Doc. 1980953-5)
Exhibit O-WCAC Meeting Minutes (USCA, D.C. Cir., 22-5316, Doc. 1980953-6)

References:

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

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

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

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

Supplemental Appendix J

Affidavit of Petitioner Simon V. Kinsella in Support of Supplemental Brief

(dated August 11, 2023)

I, Simon V. Kinsella, Petitioner *pro se*, being duly sworn, say under penalty of perjury:

1) I am a resident of Wainscott in the Town of East Hampton, State of New York.

2) On July 20, 2022, I filed a Freedom of Information Act ("FOIA") Complaint against Defendants Bureau of Ocean Energy Management ("BOEM"), the U.S. Department of the Interior ("DOI"), and the U.S. Environmental Protection Agency ("EPA") (collectively, "Federal Defendants") (*see* D.D.C., 1:22-cv-02147, ECF #1).

3) The pleading to which no response has been made was served according to Rule 4 of the Federal Rules of Civil Procedure, as follows—

   a. A Summons and Complaint were sent (return receipt acknowledged) by the U.S. Attorney General (Department of Justice Department), U.S. Attorney for the District of Columbia, U.S. Department of the Interior, U.S. Bureau of Ocean Energy Management, and U.S. Environmental Protection Agency (*see* E.D.N.Y., 2:23-cv-02915, ECF #77-3, Exhibit A).

   b. South Fork Wind was served notice of the Complaint (*id.*, Exhibit B, at 1-6, PDF 2-7).

4) The U.S. District Court for the District of Columbia ordered Federal Defendants "to file its responsive pleading to the Complaint in this lawsuit … ***thirty days after*** … ***the case is transferred and a new docket number and judge is assigned*** … Signed by Judge Jia M. Cobb on 9/13/2022" (emphasis added) (*id.*, Exhibit C, at 50, Civil Docket MINUTE ORDER, 09/13/2022).

5) On November 2, 2022, Plaintiff filed (as of right) First Amended Complaint against Federal Defendants (*see* D.D.C., 1:22-cv-02147, ECF 34-2).

6) On November 7, 2022, the district court for the District of Columbia granted South Fork Wind's Motion to Intervene and "ORDERED that Intervenor-Defendant South Fork Wind, LLC shall file its Answer or other responsive pleading on the same date as Federal Defendants" (i.e., thirty days after the case is transferred and a new docket number and judge is assigned, ref. ¶ 4 above). *See* ORDER (Supp App 3a-4a) (E.D.N.Y., 2:23-cv-02915, ECF #77-3, Exhibit D, at 1, PDF 2).

7) On November 9, 2022, during a hearing, the district court for the District of Columbia accepted Plaintiff's First Amended Complaint—"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." *See* November 9 Hearing Tr. (D.C. Cir., No. 22-5317, Doc. 1994062-11, at 2:20-25 and 21:l-2). *Also, see*

E.D.N.Y., 2:23-cv-02915, ECF #77-3, Exhibit C (MINUTE ORDER, 11/10/2022, at PDF 53).

8) On May 17, 2023, the Court of Appeals for the D.C. Circuit (No. 22-5317, Doc. 1999608) transferred the case and "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* Cert. Petition (App 4a-5a).

9) On April 19, 2023, "[t]he case of **Kinsella v. Bureau of Ocean Energy Management et al**, has been transferred from **U.S. District Court, District of Columbia** to the Eastern District of New York. The new case number is **23-cv-2915-GRB-SIL**." *See* Exhibit F (E.D.N.Y., 23-cv-02915, ECF 77-3, (at PDF 62).

10) On April 24, 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)" (*id.*).

11) On April 25, 2023, according to an "ORDER REASSIGNING CASE[,] [the] Case [was] reassigned to Judge Frederic Block and Magistrate Judge Steven Tiscione (as related to 22-cv-1305)for all further proceedings." (*id.*).

12) On May 1, 2023, the E.D.N.Y. Civil Docket Sheet reads— "ELECTRONIC ORDER REOPENING

CASE: Ordered by Judge Frederic Block on 5/1/2023. (MI) Modified on 5/18/2023" (*id.*).

13) As of August 11, 2023, Federal Defendants have *not* filed answers to Plaintiff's Complaint filed over a year ago (on July 20, 2022)(*see* D.D.C., 1:22-cv-02147, ECF 1) and have *not* responded to Plaintiff's cross-Motion for Partial Summary Judgment and Statement of (eighty-nine) Material Facts where there is no genuine dispute filed over ten months ago (on September 26, 2022)(*id.*, ECF 21). Neither Federal Defendants *nor* South Fork Wind filed answers to the First Amended Complaint that Plaintiff filed over nine months ago (on November 2, 2022)(*id.*, ECF 34-2).

14) According to Local Rule 41(3) for the Court of Appeals for the D.C. Circuit, "[n]o 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 ….". Therefore, the transfer order of May 17 became effective (21 days later) on June 7, 2023. Defendants and Defendant-Intervenor were ordered to file their responsive pleading to the complaint thirty days after the case was transferred, ***July 7, 2023***.

15) New judges were assigned to the case (Senior District Judge Frederic Block and Magistrate Judge Steven Tiscione) on April 25, 2023.

16) On June 30, 2023, the district court for EDNY issued an "ORDER granting 70 Motion to Adjourn Conference. The Initial Conference … is

adjourned sine die" (*see* E.D.N.Y., 23-cv-02915, electronic ORDER, entered 06/30/2023).

17) On July 5, 2023, the court issued a "SCHEDULING ORDER: Movant South Fork Wind's letter application 66 dated 6/16/23 and the defendants letter application 68 dated 6/20/23 are GRANTED" (*id.*, SCHEDULING ORDER, entered 07/05/2023).

18) Neither the electronic order of Magistrate Judge Steven Tiscione (entered June 30, 2023) nor District Judge Frederic Block's electronic order (entered July 5, 2023) provided *any* reason or for good cause shown.

19) On June 16, 2023, counsel for Defendant-Intervenor South Fork Wind LLC filed a letter motion ("**SFW Letter Motion**") "request[ing] a pre-motion conference regarding SFW's intent to file a partial motion to dismiss all but the Freedom of Information Act ("FOIA") claim in Plaintiff Simon V. Kinsella's ("Plaintiff") First Amended Complaint ("Complaint") under Federal Rule of Civil Procedure 12(b)." *See* SFW Letter Motion (E.D.N.Y., 23-cv-02915, ECF 66, at 1, 1st ¶).

20) The SFW Letter Motion provides the following reason for dismissing Petitioner's claims—

"First, Plaintiff lacks Article III standing. *See, e.g., Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (standing requires: (1) injury-in-fact; (2) causal connection between the injury and the conduct complained of; and (3) likelihood that the alleged injury will be redressed by a favorable

decision). Plaintiff's allegations that onshore cable construction will exacerbate pre-existing per- and polyfluoroalkyl substance ("PFAS") contamination, that wind farm construction will lead to increased cod prices, and that the Project will spur other wind energy projects in the Town are speculative and do not state concrete, particularized, actual, or certainly imminent injuries as a matter of law. Further, Plaintiff's alleged injuries are not fairly traceable to Federal Defendants' Project approvals, as onshore construction work was authorized by the NYSPSC and the Town, not Federal Defendants, and the economic claims associated with declining cod populations over the past decade are not attributable to any action by Federal Defendants in connection with this Project. Finally, a decision in Plaintiff's favor on claims relating to onshore and nearshore work that are within the jurisdiction of state and local government and asserted economic harms, will not redress his alleged injuries because they are not fairly traceable to Federal Defendants' Project approvals. Even if Federal Defendants' approvals for the Project were set aside, that relief would not affect the nearshore work or the now-complete onshore cable over which Federal Defendants lack jurisdiction, *see* Mem. And Order, Kinsella, ECF #56 at 7, nor the economic harms Plaintiff claims."

"Second, Plaintiff's claims regarding onshore Project siting and construction are now moot because the construction of the underground transmission cable is complete and the Court can

no longer grant Plaintiff any effective relief for these claims. "[W]hen it becomes impossible for the courts, through the exercise of their remedial powers, to do anything to redress" the alleged injury, there is no Article III case or controversy to resolve, such that the action is moot and the Court lacks subject matter jurisdiction. *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993) (quotations omitted); *see also Powers v. Long Island Power Auth.*, 2022 WL 3147780, at *3 (2d Cir. Aug. 8, 2022) (dismissing claims as moot because construction at center of claims was completed). When a party seeks to enjoin a construction project—including in NEPA cases—the case becomes moot when the construction is completed. *See, e.g.*, *Strykers Bay Neighborhood Council, Inc. v. City of New York*, 695 F. Supp. 1531, 1543-44 (S.D.N.Y. 1988). Because Plaintiff's injury can no longer be redressed by the Court, there is no longer any "case" or "controversy" for purposes of Article III jurisdiction, and Plaintiff's claims related to onshore Project construction and siting must be dismissed. *See Cook*, 992 F.2d at 19."

"Finally, Plaintiff's Complaint fails to plausibly state a claim for relief with respect to alleged fraud and violations of the CZMA, OCSLA[4], Executive Order 12898 (environmental justice), and due process under the Fourteenth Amendment to the U.S. Constitution."

Footnote 4 reads: "Plaintiff also failed to comply with OCSLA's 60-day notice requirement, 43 U.S.C. § 1349(a)(1), (2), and/or his claims are not

within the zone of interests OCSLA was designed to protect, 43 U.S.C. §§ 1331(a), 1301(a)."

See SFW Letter Motion (E.D.N.Y., 23-cv-02915, ECF 66, at 2-3).

21) Contrary to SFW's false statement, Petitioner-Plaintiff Kinsella *did* comply with the "OCSLA's 60-day notice requirement[.]" In fact, Mr. Kinsella sent two notices to BOEM and federal and state agencies 60 days *before* filing his lawsuit on July 20, 2022. *See* "60-day Notice of Intent to Sue" (D.D.C., 22-cv-02147, ECF 3-2). *Also, see* "URGENT: South Fork Wind Imminent Risk to Public Health" (D.D.C., 22-cv-02147, ECF 3-3).

22) On June 21, 2023, counsel for Defendant BOEM (and other Federal Defendants) filed a letter motion ("**BOEM Letter Motion**") "request a pre-motion conference for leave to move to dismiss the complaint (except for the Twelfth Cause of Action which asserts a claim under the Freedom of Information Act ["FOIA"]) pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6) and 12(c) for lack of standing and failure to state a claim." *See* BOEM Letter Motion (E.D.N.Y., 23-cv-02915, ECF 68, at 1, 1st ¶).

23) The BOEM Letter Motion provides the following reason for dismissing Petitioner's claims—

"Plaintiff's complaint (except for the twelfth claim made under FOIA), must be dismissed for lack of subject matter jurisdiction because plaintiff lacks standing. 'To have Article III standing, (1) the plaintiff must have suffered an injury in fact, (2)

there must be a causal connection between the injury and the conduct complained of, and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.' Vengalattore v. Cornell U., 36 F.4th 87, 112–13 (2d Cir. 2022) (citing Lujan v. Defenders of Wildlife, 504 U.S. 505, 560-61 (1992). An injury is redressable if it 'is likely and not merely speculative that [it] will be remedied by the relief plaintiff seeks in bringing suit.' Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 273–74 (2008) (internal quotation marks omitted). To show "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.' Lujan, 504 U.S. at 560–61 (citation omitted)."

"Here, as noted by this court in Kinsella, 2023 WL 3571300, at *1, while plaintiff pleads 12 claims for relief, three alleged 'harms underpin all of [his] numerous claims' -- i.e., (1) PFAS contamination to the drinking supply caused by SFW's onshore trenching and construction activities; (2) increase in the price of Atlantic cod due to the harm that the offshore work will cause to the cod population; and (3) economic harm because the Project will increase the cost of electricity. None of these alleged injuries confer standing on plaintiff to maintain this action."

First, Kinsella alleges the same injury from the onshore work as alleged by the plaintiffs in Mahoney; i.e., that SFW's onshore trenching

activity will supposedly spread PFAS into the ground water. The onshore construction activity was authorized by, and within the exclusive jurisdiction of, the PSC and other State and local authorities. BOEM has no authority to regulate this activity because its jurisdiction is limited to the submerged lands starting three miles from state coastlines and extending seaward. 43 U.S.C. §§ 1331(a), 1301(a)(2). Thus, as the Federal Defendants and SFW show in their pending motions to dismiss Mahoney for lack of standing (ECF 67-82), plaintiff lacks standing because he cannot show that any alleged injury from SFW's onshore work is either (1) caused by the actions of the Federal Defendants or (2) redressable by any relief against the Federal Defendants. See Kinsella, 2023 WL 3571300, at *3 ("New York State agencies issued the permits for the onshore portion of the Project, not BOEM, and enjoinment of its [BOEM's] authorization of the Project would not halt the onshore portion of the Project[. Further,] 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) (citing Mahoney 2022 WL 1093199, at *2))"

"Second, plaintiff lacks standing to bring his claims relating to the offshore portion of the Project because he fails to plead or show that he has suffered an injury that is "concrete and particularized" as well as "actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560 (quotation marks and citations omitted). Specifically, plaintiff alleges that he will be

injured by BOEM's approval of SFW's offshore activities because those activities will cause cod populations to decline, resulting in higher cod prices at his local market. As previously noted by this court, and as the Federal Defendants will show, these claims are entirely speculative and hypothetical. See Kinsella, at *3 (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 [v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania, 934 F.2d 30, 34 (2d Cir. 1991)] forecloses")."

Third, any alleged economic injury from an increase in Kinsella's electricity rates are not caused by the Federal Defendants' actions, nor are they redressable by any relief against the Federal Defendants. Instead, any such rate increases are the result of a Power Purchase Agreement between the Long Island Power Authority ("LIPA") and SFW entered into on February 6, 2017, well before BOEM issued the FEIS and Record of Decision in 2021. Indeed, plaintiff sought to void the Power Purchase Agreement on many of the grounds asserted here, but was denied any relief by the New York State Courts. See, Kinsella et al. v. Long Island Power Authority et al., No. 621109/2021 (N.Y. Sup. Ct. Suffolk Cty. filed Nov. 9, 2021)."

"Finally, even if Kinsella sustained a judicially recognizable injury and had standing to assert any of his claims, as will be shown in Federal Defendants' motion, all such claims, except the

FOIA claim, fail to state a cause of action and must be dismissed."

See BOEM Letter Motion (E.D.N.Y., 23-cv-02915, ECF 68, at 2-3).

24) Petitioner-Plaintiff Kinsella First Amended Complaint is exhaustive at 141 pages.

See First Amended Complaint (D.D.C., 22-cv-02147, ECF 34-2).

I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge, information, and belief.

Dated: August 11, 2023

/s/_____
Simon V. Kinsella
Plaintiff *Pro Se*
P.O. Box 792
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Tel: (631) 903-9154
Si@oswSouthFork.Info

Sworn to before me this
11th day of August 2023

_____
Notary Public