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.*	Civil Action No. 22-cv-02147-(JMC)

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO TRANSFER VENUE TO THE EASTERN DISTRICT OF NEW YORK

Dated: September 8, 2022

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

KINSELLA – MOTION TO TRANSFER VENUE – LIST OF EXHIBITS

1. Exhibit A – Mahoney Complaint
2. Exhibit B – ROD
3. Exhibit C – FEIS
4. Exhibit D – Excerpt of March 18, 2021 PSC Order Adopting Joint Proposal
5. Exhibit E – Order Denying Petitions for Rehearing
6. Exhibit F – Consent Motion to Modify Scheduling Order – D. Mass

INTRODUCTION

This case should be transferred to the United States District Court for the Eastern District of New York ("EDNY"). Plaintiff Simon Kinsella challenges the Bureau of Ocean Energy Management's ("BOEM") approval of the South Fork offshore wind energy project ("South Fork Wind Project"), which is to be constructed off the east coast of Long Island, New York.[1] Plaintiff's claims focus on the installation of the onshore transmission cable, which Mr. Kinsella alleges will contribute to perfluoroalkyl and polyfluoroalkyl substance ("PFAS") contamination in the ground and drinking water in Suffolk County, New York. The Complaint alleges violations of the National Environmental Policy Act ("NEPA"), the Outer Continental Shelf Lands Act ("OCSLA"), the Coastal Zone Management Act ("CZMA,"), Executive Order 12898 (relating to environmental justice), and Constitutional due process. The Complaint also raises a Freedom of Information Act ("FOIA") claim.

But the only connection that Plaintiff's case has to the District of Columbia is that certain of Defendant Agencies maintain offices here. The South Fork Wind Project is not located in the District of Columbia; Plaintiff does not reside in the District of Columbia; the electricity generated by the Project will not be consumed in the District of Columbia; and none of the alleged environmental impacts and other injuries that purportedly emanate from the Project are alleged to occur in the District of Columbia. Instead, the locus of all of these actions and purported effects is within the geographical bounds of the United States District Court for the Eastern District of New York. As this Court stated years ago and has repeated many times with regard to federal agency approvals of large projects, "justice requires that . . . localized

[1] The Complaint identifies the Environmental Protection Agency ("EPA") and EPA's Administrator Regan as defendants, but does not identify or challenge any EPA action.

controversies should be decided at home." *Citizen Advocs. for Responsible Expansion, Inc. (I-Care) v. Dole*, 561 F. Supp. 1238, 1240 (D.D.C. 1983).

Other factors weigh in favor of transfer to the EDNY. Another case challenging the same agency actions and permits that Plaintiff challenges here is pending against BOEM and the U.S. Army Corps of Engineers ("Corps") in the EDNY. *See* Ex. A (Complaint, *Mahoney v. U.S. Dep't of Interior, et al.*, Case No. 2:22-cv-01305-FB-ST (E.D.N.Y filed March 9, 2022)). Further, litigating this case in the EDNY will not present any inconvenience to Plaintiff who, per the Complaint, lives and recreates in Suffolk County, New York. Moreover, Plaintiff's Administrative Procedure Act Claims will be decided based on the administrative record. Thus, those claims will not involve depositions, discovery, or testimony for which the Court would need to consider the location of potential witnesses. Finally, transfer will not delay or otherwise prejudice resolution of Plaintiff's claims.

For these reasons and those more fully detailed below, the Court should transfer this action to the EDNY.

BACKGROUND

A. The Project and Defendant Agencies

The South Fork Wind Project is an offshore wind energy project planned for an area on the Outer Continental Shelf that is approximately 35 miles east of Montauk Point, New York, in the Atlantic Ocean. *Mahoney v. U.S. Dep't of Interior*, No. 22-cv-01305-FB-ST, 2022 WL 1093199, at *1 (E.D.N.Y. April 12, 2022). One of the goals of the Project is to supply electricity to approximately 70,000 homes and businesses in New York, and the Project has been designed to help the state of New York achieve its renewable energy goal of generating 9,000 megawatts of offshore wind energy by 2030. *See New York's First Offshore Wind Project Starts Construction*, New York State, (Feb. 11, 2022), https://www.nyserda.ny.gov/About/Newsroom/2022-Announcements/2022-02-11-New-York--First-Offshore-Wind-Project-Construction.

The Project has two components: the South Fork Wind Farm ("SFWF") and the South Fork Export Cable project ("SFEC"). Compl., ECF No. 1 at ¶¶ 11-14. The SFWF includes 12 wind turbine generators, submarine cables between the wind turbine generators ("inter-array cables"), an offshore substation, and an onshore operations and maintenance facility. *See* Ex. B ("Record of Decision ("ROD") Excerpt") at 7, 15; *South Fork*, Bureau of Ocean Energy Management, https://www.boem.gov/renewable-energy/state-activities/south-fork (providing links to a full copy of the South Fork Final Environmental Impact Statement ("FEIS"), Construction and Operations Plan ("COP") Letter of Approval, and the ROD). The SFEC has both an offshore and onshore component. The SFEC offshore component involves installation of a power cable extending through federal waters from the offshore substation, crossing into state waters 3 nautical miles offshore of Long Island, New York. Ex. C ("FEIS Excerpt") at 2-4. The onshore component begins at the transition vault located at the landing site and ends at the interconnection facility. *Id*. The onshore component connects the SFWF to the existing mainland electric grid in East Hampton, New York, and delivers power to the South Fork of Suffolk County, Long Island. Ex. B ("ROD Excerpt") at 7.

In July 2013, following a multi-year process involving extensive efforts by an intergovernmental renewable energy task force, BOEM, a component of the Department of the Interior, held a competitive lease sale, awarding the lease to Deepwater Wind New England LLC (which subsequently changed its name to South Fork Wind LLC ("South Fork")). Ex. B ("ROD" Excerpt) at 4-6. In June 2018, South Fork sought BOEM's approval of the Project's Construction and Operations Plan ("COP"). *Id*. at 3. BOEM then initiated a lengthy review under NEPA, which included three public hearings in New York, Massachusetts, and Rhode Island. *Id*. at 1. Cooperating state and local agencies included the Massachusetts Office of Coastal Zone Management (MA CZM), Rhode Island Coastal Resource Management Council (RI CRMC), and Rhode Island Department of Environmental Management. *Id*. The Town of East Hampton and the Trustees of the Freeholders and Commonality of the Town of East Hampton were cooperating local government agencies. *Id*. at 1. In August 2021, BOEM

published a notice of availability of its Final Environmental Impact Statement ("FEIS") for the project. *Id*. at 3.

BOEM also initiated consultation under the Endangered Species Act ("ESA") with Defendant National Marine Fisheries Service ("NMFS"), a component of Defendants National Oceanic and Atmospheric Administration ("NOAA") and a cooperating agency under NEPA. Acting pursuant to the ESA, NMFS issued a Biological Opinion ("BiOp") in October 2021, addressing the Project's potential effects on listed species and designated habitat. Ex. B ("ROD Excerpt") at 3. NMFS also issued an Incidental Harassment Authorization ("IHA") under the Marine Mammal Protection Act, 16 U.S.C. §§ 1631 *et seq*. ("MMPA"), for a small number of marine mammals that may be "harassed" incidental to Project construction. Taking Marine Mammals Incidental to Construction of the South Fork Offshore Wind Project, 87 Fed. Reg. 806 (January 6, 2022). The Corps also participated in the development and review of the FEIS as a cooperating agency, and the Corps later adopted the FEIS and issued its own permit. *See Mahoney*, 2022 WL 1093199, at *1. In November 2021, BOEM and NMFS issued a Joint Record of Decision ("ROD") describing their respective actions. Ex. B ("ROD Excerpt"). In January 2022, BOEM approved South Fork's COP for the Project, subject to various terms and conditions. *See South Fork*, *supra* pp. 3. These actions, approvals and permits effectively allow South Fork to proceed with the Project, subject to federal requirements contained in the above-described approvals and permits, as well as state law requirements.

B. New York State Agency Proceedings

The SFEC was subject to the approval of the New York State Public Service Commission ("PSC"), which regulates the siting of electric transmission lines within New York State jurisdiction under Article VII of the New York State Public Service Law. Ex D ("Excerpt of March 18, 2021 PSC Order Adopting Joint Proposal"). In March 2021, after years of public hearings, testimony, and other administrative proceedings, the PSC issued an order granting SFW's predecessor, Deepwater, a Certificate of Environmental Compatibility and Public Need under Article VII of the Public Service Law. *Id*. at 3. This order authorizes the construction of

the onshore portion of the South Fork Export Cable. *Id*.

The Joint Proposal was broadly supported and signed by a number of state and local stakeholders, including South Fork Wind, the New York State ("NYS") Department of Public Service, the NYS Department of Environmental Conservation ("NYSDEC"), the NYS Department of Transportation, the NYS Department of State, the NYS Office of Parks, Recreation and Historic Preservation, PSEG (acting on behalf of and as an agent of Long Island Power Authority), The Trustees of the Freeholders and Commonalty of the Town of East Hampton, Win with Wind, Montauk United, the Concerned Citizens of Montauk, the Group for the East End, Inc., and a number of individuals. *Id*. at 2. The Joint Proposal contains 195 separate conditions that minimize, to the extent practicable, the adverse environmental impacts associated with constructing, operating, maintaining, and decommissioning the SFEC within New York State jurisdiction. *Id*. at 100. While a detailed discussion of the proceedings is beyond the scope of the instant motion, the PSC considered and rejected, among other things, the same claim Plaintiff makes here; *i.e.*, that the trenching of underground cables along the onshore route will result in or exacerbate PFAS contamination. *Id*. at 60-62; 80-84; 102.

C. The Plaintiff and the Complaint

Plaintiff alleges that he is a full-time resident of Wainscott, in the Town of East Hampton, Suffolk County, New York, and that he recreates in and around New York waters that have purportedly been impaired by PFAS contamination released during the construction of the SFEC. Compl., ECF No. 1 ¶ 5, 7. Mr. Kinsella was a formal party to the New York State Public Service Commission Article VII proceeding. Compl. ¶ 111.[2] As noted above, that proceeding, including the evidence and testimony that Mr. Kinsella submitted, addressed the very same

[2] *See also Application of Deepwater Wind South Fork, LLC*, No. 18-T-0604, (N.Y. Dep't of Public Service filed Sept. 14, 2018), https://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=18-T-0604&CaseSearch=Search (last accessed Sept. 1, 2022).

PFAS contamination issues Mr. Kinsella raises in this case. Compl., ¶ 111; Ex. D ("Excerpt of PSC Order Adopting Joint Proposal") at 9, 60-62; 80-84; 102. Mr. Kinsella petitioned for a rehearing and stay of the PSC's Article VII Order, and the PSC denied the petition. Ex. E. ("PSC Order Denying Petitions for Rehearing").

Plaintiff has also sued, in New York State court, the New York State PSC, New York State Department of Public Service ("DPS"), and Long Island Power Authority. Compl. ¶ 411, 412; ECF No. 3-2 at 15, 19, 29-53. In the state court actions involving the PSC, Plaintiff raises similar contentions regarding PFAS contamination. ECF No. 3-2 at 15; ECF No. 3-3 at 20.

Plaintiff's Complaint requests that BOEM's ROD approving the South Fork Wind Project's COP be declared illegal and be vacated. Compl. ¶ 605. Plaintiff contends that Federal Defendants violated various provisions or requirements of NEPA, OCSLA, the CZMA, Executive Order 12898 (relating to environmental justice), FOIA, and Constitutional due process. Plaintiff appears to have no complaint about the SFWF or the offshore component of the SFEC; his claims instead focus on the onshore SFEC component. Compl. ¶¶ 7, 14, 19-39, 385-89, 400, 402, 413-431; *see id*. at ¶¶ 451, 468, 483, 519, 530, 546, 557, 570 ("seek[ing] an order compelling South Fork Wind to dismantle, remove, and remediate any damage and return the *SFEC corridor* to its original condition" (emphasis added)). The Complaint alleges that three examples of concrete environmental harm that will purportedly result from these alleged violations: (1) PFAS contamination of soil, groundwater, and surface waters of Georgica Pond and Wainscott Pond; (2) electromagnetic radiation; and (3) thermal effects. Compl. ¶ 7.

D. Similar Challenges Already Filed in the EDNY & District of Massachusetts

There is presently an earlier-filed case pending in the EDNY that challenges the same agency action at issue here and that will be reviewed based on the same administrative record

that will form the basis for judicial review in this case. *See* Ex. A ("*Mahoney* Complaint"). The *Mahoney* plaintiffs also describe themselves as "long-time residents of East Hampton, New York" who allege that the SFEC will exacerbate PFAS contamination in local groundwater supplies and impair the well water supply on their properties in New York. *Id*. ¶¶ 1, 25-32, 46. The *Mahoney* plaintiffs seek the same relief (vacating the ROD), from the same agency (BOEM), for the same agency action (approving the COP), taken with regard to the same project component (the SFEC). *Id*. ¶¶ 39, 43, 64-70.

The *Mahoney* plaintiffs filed a motion for a preliminary injunction to "halt onshore trenching for the South Fork Wind Farm and South Fork Export Cable Project." *Mahoney v. U.S. Dep't of Interior*, 22-cv-01305-FB-ST, 2022 WL 1093199, at *1, ECF No. 7 (E.D.N.Y Apr. 12, 2022). In April, the EDNY denied the motion, finding that plaintiffs failed to demonstrate that they would suffer irreparable harm should the project not be enjoined. *Id*. at 2-3. BOEM will file the administrative record in this case by October 23, 2022. *Mahoney*, No. 2:22cv1305 (August 30, 2022 Minute Entry). Briefing on Federal Defendants' and Intervenor-Defendant's respective motions to dismiss the Mahoney complaint is to conclude on October 28, 2022. *Mahoney*, No. 2:22cv1305 (September 7, 2022 Minute Entry).

A separate challenge to BOEM's approval of the South Fork Wind Project is currently pending in the District of Massachusetts. *Allco Renewable Energy Limited v. Deb Haaland*, No. 1:22-cv-10921-(IT) (D. Mass. filed July 18, 2021). However, the parties to that proceeding have filed a consent motion indicating that the plaintiffs intend to drop all claims except those brought against the NMFS pursuant to the Marine Mammal Protection Act. Ex. F ("Consent Motion to Modify Scheduling Order – D. Mass.").

STANDARD OF REVIEW FOR CONSIDERING A TRANSFER REQUEST

Defendants do not dispute that, under 28 U.S.C. § 1391(e)(1), venue is proper in this District. Regardless of the technical propriety of venue, however, the Court has broad authority to transfer the case to another more appropriate district. *Stewart Org.. Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988). "[F]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

The purpose of Section 1404(s), among others, is to provide a district court with a mechanism to allow for transfer in order "to prevent the waste 'of time, energy[,] and money' and 'to protect litigants, witnesses[,] and the public against unnecessary inconvenience and expense.'" *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (citation omitted). Thus, the statute facilitates the transfer of cases to a more appropriate federal forum. *Id*. at 622 (affording district courts broad discretion to transfer venue "according to an individualized, case-by-case consideration of convenience and fairness."); *see also Valley Cmty. Pres. Comm'n v. Mineta*, 231 F. Supp. 2d 23, 44–45 (D.D.C. 2002), *transferred*, 246 F. Supp. 2d 1163 (D.N.M. 2002), *aff'd*, 373 F.3d 1078 (10th Cir. 2004); *Hawksbill Sea Turtle (Eretmochelys Imbricata) v. FEMA*, 939 F. Supp. 1, 3 (D.D.C. 1996).

District courts are to use a two-step analysis to determine whether a case should be transferred. A court must first determine if the case could have been brought in the transferee district. *S. Utah Wilderness All. v. Lewis* ("*SUWA*"), 845 F. Supp. 2d 231, 235 (D.D.C. 2012). If the answer is in the affirmative, the Court then turns to an analysis of the public and private interests supporting transfer. The factors the Court should consider in assessing the public and private interests are set forth below.

ARGUMENT

I. PLAINTIFF COULD HAVE BROUGHT THIS ACTION IN THE EDNY

The "threshold question" under 28 U.S.C. § 1404(a) is whether Plaintiff could have brought this action in the EDNY, the transferee court proposed by Federal Defendants. *Niagara Pres. Coal., Inc. v. FERC*, 956 F. Supp. 2d 99, 103 (D.D.C. 2013); *Van Dusen*, 376 U.S. at 616-17. The general venue provision, 28 U.S.C. § 1391(e)(1), provides that

> a civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity. . . or an agency of the United States[] or the United States[] may . . . be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides.

Similarly, with respect to the FOIA claim, "the district court of the United States *in the district in which the complainant resides*, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B) (emphasis added).

Plaintiff alleges that he lives and recreates in the EDNY and that the construction activities giving rise to his claims occurred onshore in Suffolk County, New York, which is in the Eastern District. *See* 28 U.S.C. 112(c). Thus, there is no question that Plaintiff's lawsuit, including the FOIA claim, could have been brought in the EDNY.

II. THE PUBLIC INTEREST AND PRIVATE CONSIDERATIONS STRONGLY SUPPORT TRANSFER OF THIS ACTION TO EDNY

After concluding that the case could have been brought in the transferee court, the Court is to then assess the private- and public-interest factors that underlie the case-specific discretionary transfer inquiry under 28 U.S.C. § 1404(a). The private-interest factors include: (1)

"the plaintiff's choice of forum;" (2) "the defendant['s] choice of forum;" (3) "whether the claim arose elsewhere;" (4) "the convenience of the parties;" (5) "the convenience of the witnesses;" and (6) "the ease of access to sources of proof." *See Trout Unlimited v. U.S. Dep't of Agric.*, 944 F. Supp. 13, 16 (D.D.C. 1996), *transferred*, 320 F. Supp. 2d 1090 (D. Colo. 2004). The public-interest factors include: (1) "the transferee's familiarity with the governing laws" and the pendency of related litigation; (2) "the relative congestion of the calendars of the transferor and transferee courts;" and (3) "the local interest in having local controversies decided at home." *Pres. Soc'y of Charleston v. U.S. Army Corps of Eng'rs*, 893 F. Supp. 2d 49, 54 (D.D.C. 2012) ("*Charleston*"); *Mineta*, 231 F. Supp. 2d at 45; *Nat'l Parks Conservation Ass'n v. Zinke*, No. 18-cv-00753 (TNM), 2018 WL 9650176, at *2 (D.D.C. July 25, 2018). In this case, each of these factors supports transfer to the EDNY. *Cf. Seafreeze Shoreside, Inc. v U.S. Dep't of Interior*, No. 1:21-cv-03276, 2022 WL 3906934, at *12-13, 14-15 (D.D.C. 2022) (transferring a case challenging BOEM's approval of the Vineyard Wind Project in Massachusetts from this Court to the District of Massachusetts).

A. The Public Interest Factors Weigh in Favor of Transfer to EDNY

1. The Public Interest Weighs in Favor of Having the Local Controversy Regarding PFAS Contamination Decided In the EDNY – Public Interest Factor 3

The "arguably most important" of the public interest factors is "the local interest in having local controversies decided at home." *Charleston*, 893 F. Supp. 2d at 53; *S. Utah Wilderness Alliance v. Norton*, Civ. A. No. 01-2518 (CKK), 2002 WL 32617198, at *5 (D.D.C. June 28, 2002). "Controversies should be resolved in the locale where they arise" so that a case can be heard where the people who are most directly affected by the actions in dispute are located. *Trout Unlimited*, 944 F. Supp. at 19; *Am. Dredging Co. v. Miller*, 510 U.S. 443, 448

(1994); *see also Adams v. Bell*, 711 F.2d 161, 167 n. 34 (D.C. Cir. 1983) (providing that cases should be resolved within view of people "whose rights and interests are in fact most vitally affected by the suit").

Nowhere is this truer than where the case involves challenges to federal agency determinations made under federal environmental laws for site-specific projects. *See Seafreeze*, 2022 WL 3906934, at *8-12. Suits involving "environmental regulation, and local wildlife—matters that are of great importance in the [State]—should be resolved in the forum where the people 'whose rights and interests are in fact most vitally affected'" are located. *Trout Unlimited*, 944 F. Supp. at 19–20 (citations omitted); *see Mineta*, 231 F. Supp. 2d at 47 ("At bottom, the resolution of this action will have its most profound impact on . . . residents who live in the area of the proposed construction project."); *Seafreeze*, 2022 WL 3906934, at *8-9. Thus, "courts in this District have routinely found it appropriate to transfer cases involving land and local wildlife to the local forum." *W. Watersheds Project v. Tidwell*, No. 17-cv-1063 (KBJ), 2017 WL 5900076, at *8 (D.D.C. Nov. 20, 2017) (granting motion to transfer case involving elk feeding program on Bridger-Teton National Forest to Wyoming); *see also*, *SUWA*, 845 F. Supp. 2d at 237-38 (transferring case concerning resource management plans for lands located in Utah); *Nat'l Wildlife Fed'n v. Harvey*, 437 F. Supp. 2d 42, 50 (D.D.C. 2006) (transferring suit regarding Everglades to Florida).

Here, the local interests in litigating this suit concerning New York environmental resources in the state of New York strongly favor transfer to the EDNY. Plaintiff's Complaint contains no mention of the District of Columbia, except in the caption identifying this Court and in the paragraph asserting venue. In stark contrast, the Complaint alleges in paragraph after paragraph that the purported environmental effects of BOEM's statutory violations did or will

occur in and around the SFEC Project area, which is in New York. Compl., ECF No. 1 at ¶¶ 5, 6, 14-39, 48-108, 109-135. The local nature of this suit is corroborated by the fact that Plaintiff has filed at least two suits challenging New York State agency's approval of the project in State court. *Id*. ¶¶ 411, 412; *see also id*. at ¶¶ 425-430, 582-86 (alleging that the New York PSC deprived Plaintiffs of his rights, "relied on demonstrably false presumptions," failed to "thoroughly reviewed PFAS contamination," and engaged in "regulatory fiat"). Consequently, this case should be transferred because "the interests of justice [would be] promoted [if this] localized controversy is resolved in the region it impacts [New York]." *W. Watersheds Project v. Pool*, 942 F. Supp. 2d 93, 102 (D.D.C. 2013); *Seafreeze*, 2022 WL 3906934, at *8 ("[T]he impact of the Vineyard Wind project . . . will be felt primarily in Massachusetts and nearby states.").

2. The Relative Congestion of Court Calendars Should Not Outweigh the Local Interest in Local Controversies – Public Interest Factor 2

As to court congestion, the EDNY was more congested than this District in June 2022. *See* Administrative Office of the U.S. Courts (showing 401 pending cases per judgeship in the District of Columbia and 815 cases per judgeship in the EDNY).[3] However, the same was also true in *Seafreeze, Pool* and *Jewell*, and those courts did not find that consideration to be weighty, much less dispositive. 2022 WL 3906934, at 13; *Pool*, 942 F. Supp. 2d at 101-102; *W. Watersheds Project v. Jewell*, 69 F. Supp. 3d 41, 44 (D.D.C. 2014). As in those cases, the Court can conclude that "this one factor, on its own, does not outweigh all of the others." *Jewell*, 69 F. Supp. 3d at 44.

[3] *U.S. District Courts, National Judicial Caseload Profile* 2, 10 (2022), https://www.uscourts.gov/sites/default/files/fcms_na_distprofile0630.2022_0.pdf.

3. The Pending *Mahoney* Case Weighs in Favor of Transfer Given the EDNY's Familiarity with the Project and Alleged Harms – Public Interest Factor 1

It is certainly true that all district courts would be equally equipped to resolve the merits questions presented in this case. As this Court has explained, "[a]s the action concerns federal law, neither court is better suited than the other to resolve these issues." *Mineta*, 231 F. Supp. 2d at 45; s*ee also*, *Charleston*, 893 F. Supp. 2d at 57 ("The Court sees no need to deviate from 'the principle that the transferee federal court is competent to decide federal issues correctly.'") (citation omitted). Since "both courts are competent to interpret the federal statutes involved[,] . . . there is no reason to transfer or not transfer based on this factor." *Nat'l Wildlife Fed'n v. Harvey*, 437 F. Supp. 2d 42, 49 (D.D.C. 2006); *see Sierra Club v. Flowers*, 276 F. Supp. 2d 62, 70 n. 6 (D.D.C. 2003).

Nonetheless, "[u]nder this factor, courts can also consider 'the courts' respective knowledge of the parties and facts,' [including] . . . the pendency of related litigation." *Seafreeze*, 2022 WL 3906934, at 12 (citations omitted). Here, there is already an existing case in the EDNY challenging the same agency action, carried out by the same agency, based on the same administrative record, making overlapping claims of violation of the same environmental statutes. Because the EDNY has greater familiarity with the facts of this case, "[j]udicial economy therefore favors transfer." *Seafreeze*, 2022 WL 3906934, at 12.

B. The Private Interest Factors Weigh in Favor of Transfer to EDNY

1. Plaintiff's Choice of Forum Is Entitled to Little Deference Because the District of Columbia Is Not Plaintiff's Home Forum- Private Factor 1

While a plaintiff's choice of forum is generally entitled to some deference, that is not the case where (1) "the [challenged] activities have little, if any, connection with the chosen forum," and (2) Plaintiff has brought suit outside of his home forum. *Mineta*, 231 F. Supp. 2d at 44

(quoting *Armco Steel Co. v. CSX Corp.*, 790 F. Supp. 311, 323 (D.D.C. 1991)); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981); *U.S. Dominion, Inc. v. Powell*, 554 F. Supp. 3d 42, 69 (D.D.C. 2021), *appeal dismissed sub nom. U.S. Dominion, Inc. v. My Pillow, Inc.*, No. 21-7103, 2022 WL 774080 (D.C. Cir. Jan. 20, 2022), *petition for cert. docketed*, No. 21-1580 (U.S. June 22, 2022); *Intrepid Potash-N.M., LLC v. U.S. Dep't of Interior*, 669 F. Supp. 2d 88, 95 (D.D.C. 2009). Here, the Complaint makes clear that Plaintiff resides in the EDNY, the Project he challenges is located in EDNY, and his alleged environmental injuries relating to PFAS contamination all purportedly occur in EDNY. Thus, "[P]laintiff lacks significant ties to the District of Columbia, and need not be afforded the substantial deference given to litigants in choosing their home forum." *Niagara Pres. Coal.*, 956 F. Supp. 2d at 104.

Still another reason for limited deference is the fact that Plaintiff may have elected to bring this New York-centered suit in this Court, at least in part, to avoid unfavorable precedent. As is outlined above, the EDNY already denied the *Mahoney* Plaintiff's motion for a preliminary injunction based on some of the same legal theories and alleged harms Plaintiff has set forth in his motion. "To the extent that plaintif[f] [is] engaging in forum shopping, it weighs in favor of transfer to the more appropriate forum." *Onyeneho v. Allstate Ins. Co.*, 466 F. Supp. 2d 1, 5 (D.D.C. 2006); *see M & N Plastics, Inc. v. Sebelius*, 997 F. Supp. 2d 19, 25 (D.D.C. 2013) (granting motion to transfer where plaintiffs' decision to file "in this district instead of their home district was motivated by an attempt to take advantage of favorable precedent here").

2. Defendant's Choice of Forum Is Entitled to Some Deference Given the Location of the South Fork Wind Project - Private Factor 2

Courts accord weight to the defendant's choice of forum "where the harm from a federal agency's decision is felt most directly in the transferee district," or when "the economic and environmental impacts of the Project will be felt most acutely" in the Defendant's choice of

forum. *Gulf Restoration Network v. Jewell*, 87 F. Supp. 3d 303, 313 (D.D.C. 2015). Here, the Complaint provides that the "on the ground" events giving rise to Plaintiff's claims took place in the EDNY and nowhere near the District of Columbia. Thus any "harm" or "environmental impacts" caused by the SFEC would be felt "most directly" in the EDNY, Defendants preferred forum, and transfer is appropriate.

3. The Claims Did Not Solely Arise in the District – Private Factor 3

In determining where a claim arose, both the location of the decision-making process and the location of the impacts of the project are considered. *See Ctr. for Env't. Sci., Accuracy & Reliability v. Nat'l Park Serv.*, 75 F. Supp. 3d 353, 357 (D.D.C. 2014). Here, the ROD adopting the COP, which represented the culmination of BOEM's decision-making process, was signed by a Department of the Interior official located in the District of Columbia. *See* Ex. B ("ROD Excerpt") at 19 (signed by Laura Daniel-Davis Principal Deputy Assistant Secretary - Land and Mineral Management). However, as is discussed above, the project at issue, and the alleged impacts of the challenged documents, will occur in the EDNY. *See supra* pp. 5, 10-12. Because the decision-making process occurred in the District of Columbia, but the alleged impacts of the decision will be felt in New York, this factor "weighs in favor of transfer." *Seafreeze*, 2022 WL 3906934, at *16.

4. Convenience of the Parties and Witnesses Is Neutral – Private Factors 4 and 5

With respect to Plaintiff's APA claims, there is no basis to conclude that the EDNY is any less convenient for parties or witnesses than the District of Columbia. APA claims are decided on motions based on the administrative record. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency

presents to the reviewing court."); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."). Thus, for Plaintiff's APA claims, there should be no court testimony, no depositions, and no discovery. To the extent, arguendo, there are hearings or jurisdictional discovery before the Court, there is no basis to conclude that EDNY is less convenient for Plaintiff than the District of Columbia. As noted, the Plaintiff lives in New York and appears to have no connection whatsoever to the District of Columbia.

Likewise, with respect to Plaintiffs' FOIA claim, given that Plaintiff resides in New York, there is also no basis to conclude that litigating this claim in the EDNY will be any less convenient for him than this Court. But, should this Court conclude that it would be more convenient for the parties to litigate Plaintiffs' FOIA claim in this District, this Court could sever and retain jurisdiction over that claim while transferring the APA claims to the EDNY. *Owens v. Republic of Sudan*, No. 01-2244 (JDB), 2021 WL 131446, at *3 (D.D.C. Jan. 14, 2021) ("A court 'may sever claims for the purpose of permitting transfer' to a different judge.") (quoting *Dickerson v. Novartis Corp.*, 315 F.R.D. 18, 27 (S.D.N.Y. 2016)).

5. The Ease of Access to Sources of Proof Is Not a Relevant Factor – Private Factor 6

While the location of the record has sometimes been considered by some courts in addressing a motion to transfer APA claims, that is irrelevant here. For Plaintiffs APA claims, the administrative record will be transmitted to Plaintiff (and to the Court) on the date it is due. There is no office, warehouse, or other location to which Plaintiff would have to travel in order to review or obtain any part of the administrative record.

Indeed, where the case is generally one to be decided on the administrative record generated by government agencies, this factor (as well as convenience of the parties and witnesses, private factors 4 and 5 discussed above) are effectively nullified.

> The final two private-interest factors, the convenience of witnesses and the ease of access to sources of proof, are neutral with respect to transfer. In all likelihood, this case will be decided on the basis of the administrative record, without discovery. *See* 5 U.S.C. § 706; *Camp v. Pitts*, 411 U.S. 138, 142 … (1973). These two factors then "[have] less relevance [to the transfer inquiry] because this case involves judicial review of an administrative decision...." *Trout Unlimited*, 944 F. Supp. at 18; *see also* [*S. Utah Wilderness All. v. Norton*, 315 F. Supp. 2d 82, 88 (D.D.C. 2004)] (finding convenience of witnesses irrelevant where parties agreed case would be decided solely on administrative record); [*Sierra Club v. Flowers*, 276 F. Supp. 2d 62, 69 (D.D.C. 2003)] ("the location of witnesses is not a significant factor" in judicial review of agency action).

Charleston, 893 F. Supp. 2d at 56; *see also Neighbors Against Bison Slaughter v. Nat'l Park Serv.*, No. 19-cv-3144 (BAH), 2019 WL 6035356, at 6 (D.D.C. Nov. 14, 2019) ("Resolution of these claims [under NEPA and the APA are based on the administrative record and] will not turn on the testimony of witnesses and thus the first three factors are neutral.").

With respect to Plaintiffs' FOIA claim, Plaintiff will not have easier access to sources of proof if this case is litigated in this District. All relevant records will be transmitted to Plaintiff at his residence in New York. As is noted above, however, should this Court decide to retain jurisdiction over Plaintiff's FOIA claim, it could sever the APA claims and transfer them to the EDNY. *Owens*, 2021 WL 131446, at *3.

CONCLUSION

Although Plaintiff had the right to file his action in this Court, the will suffer no prejudice or inconvenience from transfer. The strong interests in justice, judicial economy, and the local interests in the South Fork Export Cable project militate in favor of transfer to the EDNY, where

another case challenging the same project is already pending. Accordingly, this Court should grant Defendants' Motion to Transfer this action to the EDNY.

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Respectfully submitted,

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