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,* SOUTH FORK WIND LLC; LONG ISLAND POWER AUTHORITY; *Nominal Joinder Parties*	:	Civil Action No.: 22-cv-02147-JMC

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO TRANSFER VENUE

I, Simon V. Kinsella, Plaintiff *Pro Se*, respectfully submit this Response to Defendants' Motion to Transfer Venue from this Court in the District of Columbia and request the motion be denied.

Plaintiff's Response to Defendants' Motion to Transfer Venue is filed together with Plaintiff's Cross-Motion for Partial Summary Judgment that seeks to expedite the hearing and request that the Court retain jurisdiction; to be heard concurrently, as follows:

I. INTRODUCTION

The case before this U.S. District Court of Columbia (the "**Court**") centers on Defendant Federal Agencies' review and approval. The Defendants are Federal government agencies based in Washington, D.C., where the twenty or more people who performed the review and were

involved in the approval worked. Defendants' records are in Washington, D.C., where their lawyer is. Defendants' have no connection to the forum. They do not have officers in the Eastern District of New York and did *not* undertake the review and approval there.

Lawyers representing the developer are based in Washington, D.C. Prophetically, one lawyer, Janice Schneider of Latham & Watkins LLP, was granted leave *not* to attend the court in the Eastern District of New York because "she is located out of State [Washington, D.C.] she may participate by telephone at the in person per-motion conference" instead of having to travel to Central Islip on Long Island, NY. Supposing the case were to be transferred to New York's Eastern District, *arguendo*, will everyone involved in the federal agency review and approval apply to telephone into the NYED court?

The Motion to Transfer Venue is a ploy by Defendants to remove the matter as far away as possible from where it happened.

Defendants' blatant disregard for federal environmental law permitted a developer to rush ahead in an attempt to avoid upcoming new rule changes that will "designate [two specific PFAS chemical compounds known as] PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which will enable EPA to leverage the full range of Superfund authorities, including requiring reporting of PFOA and PFOS releases and to hold polluters accountable by recovering cleanup costs."[1] Had Defendants *not* violated federal law, the developer would *not* have been permitted to build what will likely become a two-mile-long Superfund site.

Defendants permitted underground infrastructure construction for two miles that they would only have to dig up and remediate the site, costing tens of millions of dollars.

[1] FACT SHEET: Biden-Harris Administration Combatting PFAS Pollution to Safeguard Clean Drinking Water for All Americans, *supra*

BOEM's unlawful grant of approval allows the developer to continue building. In only eleven days (on October 3, 2022), the developer plans to begin irreversible and destabilizing drilling activities for half a mile (through contaminated soil and groundwater). According to a recent update, "[t]his phase of construction will begin October 3rd and will include use of a horizontal drilling operation and barge […]" (see Exhibit A).

BOEM seeks to delay the case with procedural maneuvering to avoid the chance of it being heard on the merits anytime soon. Such maneuvering includes this Motion to Transfer Venue to the U.S. District Court for the Eastern District of New York ("**NYED**") on the pretense that another case "as challenged in this case"[2] is currently pending. The two cases are divergent with little commonality in their legal arguments, such that this matter would have to be heard *de novo*, thus nullifying any meaningful judicial economy.

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[2] ECF No. 11 – Motion to Transfer Venue (at p. 1, opening paragraph)

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II. ARGUMENTS

Defendants seek to transfer this case to the Eastern District of New York ("**NYED**") pursuant to 28 U.S.C. § 1404(a), which 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 or division where it might have been brought […]."

Defendant Federal Agencies have no connection to the forum where they seek to transfer the case (to the NYED). Defendants' representative, Amanda M. Stoner of the U.S. Department of Justice's Environment & Natural Resources Division, is based in Washington, D.C. (at 4 Constitution Sq., 150 M St., NE). Defendants are federal government agencies based in Washington, D.C. Twenty people or more who undertook to review and approve the development project all worked out of the Washington D.C. area. The Plaintiff (me) chose Washington, D.C. because that is where the claims arose and where it is most convenient for the parties involved, except, perhaps, me (but I'm over fifty years old, and I don't need Defendants' counsel telling me my mind).

Defendants (wrongly) assert that "the only connection that Plaintiff's case has to the District of Columbia is that certain of Defendant Agencies maintain offices here [emphasis added]," ignoring that the review and decision-making all took place in Washington, D.C.

Defendants overlook that the case challenges an agency's review and approval of a development proposal (*not* the development itself), and the Defendants are government agencies (*not* the developer).

In *National Ass'n of Home Builders v. United States Environmental Protection Agency*, this court held that "the plaintiffs' claims [..][against an EPA decision] arose in the District of Columbia. Consequently, the plaintiffs are entitled to substantial deference in their choice

of forum, and this factor weighs against permitting transfer to the District of Arizona. *See Akiachak*, 502 F. Supp. 2d at 68 (holding that the case "present[ed] a sufficiently substantial nexus to this district to warrant deference to [the plaintiff's] choice of forum"); *Greater Yellowstone Coal. v. Bosworth*, 180 F. Supp. 2d 124, 129 (D.D.C. 2001) (explaining that because the controversy bore a substantial connection to the plaintiffs' chosen forum, the plaintiffs' choice of forum received greater deference than the defendants' choice of forum [emphasis added])" (675 F. Supp. 2d 173 (D.D.C. 2009)).

Defendants repeatedly state and rely upon the premise that "localized 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)." However, Defendants do not acknowledge that the courthouse where they propose transferring that case is *not local.* The proposed courthouse is mid-Long Island in Central Islip, sixty (60) miles from where Defendants allege the controversy occurred. The courthouse is *not* a ten-minute drive to the local town center. It is a three-to-four hour (round trip). I cannot imagine anyone traveling from East Hampton Town to Central Islip for three to four hours in heavy traffic. The U.S. District Court for the Eastern District in Central Islip is *not* local and *not* "at home" for any parties (or the public) involved in this matter.

The NYED court is inconvenient for *both* Defendants *and* Plaintiff.

The *Citizen Advocs. for Responsible Expansion* case is distinguishable because the plaintiffs sought "relief against the further planning and construction by defendants of two segments of highway located in Fort Worth [emphasis added]." In that case, the defendants undertook "planning and construction […] in Fort Worth," and much of the defendants' activities took place in the forum to where the case would be transferred (the Northern District of Texas (Fort Worth Div.). Both defendants and plaintiffs had strong connections to the transfer forum.

On the contrary, in the instant matter, the Defendants have no connection to where they seek to transfer the case (to the NYED).

Defendants (wrongly) assert that the issues under consideration are merely local matters that will *not* have an impact outside New York State. However, the Defendants overlook the impact of the suggested alternative (also ignored by Defendant BOEM in its review)— to combine the developer's proposed offshore wind farm (the South Fork Wind Project) with the Sunrise Wind Farm— which are both in Federal waters.

This case *will* impact federal waters, including a 62-mile-long submarine cable (and also a two-mile-long onshore corridor). Nonetheless, the central issues are questions of federal law.

Defendants' procedural violations also involve two subjects with which the United States is grappling— harmful PFAS contamination and whether the drive towards renewable energy overrides environmental review and due process of law. What this Court decides will implicate multitudes of cases nationwide. Contrary to the Defendants' claims, PFAS contamination is a nationwide problem, and ecological and socioeconomic impact assessment of renewable energy projects equally carries significant weight beyond a short landing corridor.

Plaintiff does not dispute that the case "might have been brought" in the Eastern District of New York. Although, Plaintiff opted for the District of Columbia for good reasons.

As Plaintiff, I selected the District of Columbia because the case is *solely* about a federal agency action indisputably centered on Washington, D.C. According to its Internet site, BOEM's "Atlantic Outer Continental Shelf (OCS) renewable energy resources is managed by the Office of Renewable Energy Programs," based in the Washington D.C. area. BOEM's Final Environmental Impact Statement ("**FEIS**") lists approximately twenty people who were directly

involved in the review and decision-making process, all of whom work in "two offices in the Washington D.C. area."[3] BOEM's final action, its Record of Decision ("**ROD**"), is executed by Laura Daniel-Davis, Principal Deputy Assistant Secretary, Land and Minerals Management, at 1849 C Street NW, Washington, DC 20240.

BOEM's Office of Renewable Energy Programs, which performed the review and is responsible for approving the Project, does *not* have an office in New York State.

Defendants cite a pending case in New York's Eastern District (NYED)[4] that challenges the same agency action in this case as further reason for transferring the. As explained in greater detail later, the two cases differ significantly, and there are few overlapping legal arguments that would result in any meaningful judicial economy. If this Court were to transfer the case, it would have to be heard *de novo*.

On August 29, 2022, the presiding judge in the pending case in the NYED granted counsel for the developer (South Fork Wind, LLC), Janice Schneider's telephone application because "she is located out of State she may participate by telephone at the in person per-motion conference […]." Ms. Schneider (and Stacey Van Belleghem) of Latham & Watkins LLP work out of Washington, D.C. The developer's lawyer, the defendant in that case, evidently finds the NYED courthouse inconvenient, as would all the people involved in the agency review and approval who live and work in the Washington, D.C., area.

Defendants argue that because the action is brought under the Administrative Procedure Act ("**APA**"), the claims for relief will be decided on the administrative record, and there will be no need for "depositions, discovery, or testimony for which the Court would need to consider the

[3] See Exhibit E - "About BOEM Fact Sheet" (at p. 3, last paragraph)
[4] U.S. District Court Eastern District of New York (Central Islip), CASE #: 2:22-cv-01305-FB-ST

location of potential witnesses." However, Defendants overlook that the Complaint involves multiple instances where evidence is sufficient to rebut the presumptions of regularity attached to the challenged agency action. Defendants fail to consider that BOEM approved the development without independently evaluating and verifying information underpinning its purpose and needs statement upon which the entire NEPA review depends. Given the glaring deficiencies in BOEM's review, the Court may contemplate admitting evidence beyond the record in these highly unusual circumstances and the severe nature of the violations that have ramifications insofar as they impact public health. Here, the location of documents and potential witnesses is an issue to consider and supports keeping the case in Washington, D.C. (See further details under section B(5) at p. 22)

Defendants finally assert that should this Court transfer the case; it will not cause any "delay or otherwise prejudice resolution of Plaintiff's claims." But considering Plaintiff's Response to Defendants' Motion to Transfer Venue includes a Cross-Motion for Summary Judgement, a transfer *would* likely delay resolution, and any delay, given the request for an expedited hearing, *would* prejudice the case.

The Interests of Justice Favors of Washington D.C.

As the Complaint notes (at p. 7, ¶ 4), I hope that the choice of venue "will promote objectivity, and lead to a just decision based on the merits."[5]

Defendants raised the issue of the New York State Public Service Commission ("**NYSPSC**") administrative hearing and correctly stated that I was a party-intervenor. An exposé published in Politico (2017) broadly reflects my experiences in this regard. According to Marie French and David Giambusso, the disgraced former Governor Cuomo turned "the Public

[5] ECF No. 1, COMPLAINT (at p. 7, ¶ 4)

Service Commission, the state's powerful utility regulator, into an organ of executive power in ways that critics find unprecedented and potentially troubling. […] 'It's an agency that carries out the governor's orders regardless of the impact on the ratepayers,' Earthjustice attorney Chris Amato said of the utility regulator. 'The public process is a charade, it's a play act.'"[6]

Tellingly, to keep the issues raised during the NYSPSC hearing and the records out of the federal review, not one New York State agency (or authority) is listed as a cooperating agency in the development and review of the FEIS. To overcome New York State's careless oversight, in February 2021, I include many records from the NYSPSC hearing in comments submitted to BOEM that are now part of BOEM's administrative record (see Complaint Exhibit C, BOEM Index of NYSPSC Documents).

The documents show that BOEM's review employs a similar strategy to that practiced during the NYSPSC hearing – to ignore the cost of the Project ($2 billion) and to conceal the existence of harmful environmental contamination.

By its admission, the NYSPSC did *not* consider the impact of the Project's cost on those who will have to pay for it – ratepayers—

> *There's no testimony in this, in our document, to the best of my recollection that addresses cost to rate payers.*[7]

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[6] Politico, Critics see Cuomo power play at the PSC, by Marie French and David Giambusso, published June 5, 2017 (www.politico.com/states/new-york/albany/story/2017/06/05/critics-see-cuomo-power-play-at-the-psc-112491). Also, read Ronan Farrow's exposé published in The New Yorker, Andrew Cuomo's WarAgainst a Federal Prosecutor, August 10, 2021 (www.newyorker.com/news/news-desk/andrew-cuomos-war-against-a-federal-prosecutor?utm_medium=social&utm_social-type=owned&mbi%E2%80%A6).

[7] See BOEM Index Exhibit #009 - Initial Brief by Simon V. Kinsella, dated January 20, 2021 (at p. 15, last paragraph), *citing* NYSPSC Case 18-T-0604, DPS Staff Panel, Cross-Examination by Kinsella, December 7, 2020 (at p. 595, lines 19-21).

Equally egregious is the NYSPSC's refusal to admit evidence into the record of PFAS contamination from samples of soil and groundwater taken from *within* the proposed construction corridor. As described in my Motion to Reopen the Record –

> *The Applicant knew of the existence of soil and groundwater contamination since November 2019, but chose to wait over a year until just days after December 23rd, 2020, when ALJ Belsito issued his Ruling Admitting Evidence before commencing its Environmental Surveys & Site Evaluation. By delaying its Environmental Surveys & Site Evaluation, the Applicant avoided including in the evidentiary record PFAS contamination test results of soil and groundwater samples taken from its proposed construction corridor. There is no reason for the Applicant to have had waited over a year before conducting its Environmental Surveys & Site Evaluation other than to avoid the Commission taking a hard look at issues involving PFAS contamination when making its determination as to whether to grant the Applicant a Certificate of Environmental Compatibility and Public Need, or not.* [8]

One year ago, I filed a lawsuit challenging the NYSPSC's grant of a certificate. Still, the Second Department of the N.Y. Supreme Court's Appellate Division has slow-walked proceedings, allowing the developer to proceed with construction unabated in violation of federal law. My understanding is that the court is secretive. For example, case documents are *not* available online to the public (or me as the plaintiff). The papers had to be collected in person so that I could upload the petition to my website (so the public could read what was going on).

[8] See BOEM Index Exhibit #021 - Motion to Reopen Record by Simon V. Kinsella, dated January 13, 2021 (at pp. 10-11, last paragraph)

New York State Public Service Commission: Pending Legal Cases

- *Simon V. Kinsella, et al. v. N.Y.S. Public Service Commission, et al.*, N.Y. Supreme Court, Appellate Div. - 2nd Dept., filed September 9th, 2021 (index 006572/2021)(available online, click here, or visit www.oswSouthFork.info).
- *Citizens for the Preservation of Wainscott, Inc. et al. v. N.Y.S. Public Service Commission, et al*., N.Y. Supreme Court, Appellate Div. - 2nd Dept., filed September 9th, 2021 (index: 006582/2021)(see online, click here, or visit www.oswSouthFork.info).

The benefit of first-hand experience having worked on the NYSPSC case (from 2018 to 2021) gave me more reason to seek to have this matter heard by an objective court *not* located on Long Island that will, merely by virtue of distance, apply the law more impartially to the facts.

On Long Island, issues relating to South Fork Wind are charged. For example, in March 2022, South Fork Wind's Site Manager, Mr. Todd Akers, filed a police report making spurious allegations against me and threatening me with "possible criminal charges," which later proved to be false. Mr. Akers was forced to withdraw his fictitious police report (see Exhibit B). Further (in May 2022), South Fork Wind's lawyers filed with the NYSPSC statements about me that are materially false and defamatory. Members of the East Hampton Town Board subsequently circulated South Fork Wind's untruthful comments to discredit me.

A typical example is where South Fork Wind misquoted me, then (falsely) asserted with reckless disregard to the truth that— "This is another of Mr. Kinsella's patently false statements" (see Exhibit C). The only people lying are South Fork Wind's lawyers. Moreover (in 2020), the Town of East Hampton Town Board issued an inaccurate, unsubstantiated, and defamatory press release on official Town of East Hampton letterhead titled "Statement from the office of East

Hampton Town Supervisor Peter Van Scoyoc" (see Exhibit D). Town Supervisor Van Scoyoc makes a series of unsubstantiated false statements, many of which are defamatory. It is all part of an ongoing smear campaign to discredit me publicly. If this Court transferred the case to New York's Eastern District, the lawyers and local elected officials (the Town stands to receive around $27 million if the Project proceeds) would use the case as a platform to inflict further injury against me. Therefore, in the interest of justice, according to 28 U.S.C. § 1404(a), I respectfully request that this matter remains in Washington, D.C.

For convenience, the following responses to Defendants' Motion to Transfer Venue are enumerated according to Defendants' Memorandum in Support.

A. Public Interest Factors

1. Local Agency Controversy – Favors Washington, D.C.

Defendants argue that "[c]ontroversies 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 v. U.S. Dep't of Agric.*, 944 F. Supp. 13, 16 (D.D.C. 1996)). The case is easily distinguished. There, where the case was transferred (Colorado), is where the vast majority of the work took place and the decisions took place— "the office of the Regional Forester of The Rocky Mountain Region is located in Colorado. M.M. Underwood, the Forest Supervisor for the Arapaho and Roosevelt National Forests is located in Colorado. The Aparaho and Roosevelt National Forests are located entirely within Colorado. The Environmental Impact Statement prepared by the U.S. Forest Service was prepared at the direction and under the supervision of Mr. Underwood in Colorado. The record of decision involving Long Draw Dam and Reservoir was issued by Mr. Underwood in Colorado and plaintiffs' administrative appeal was to the Regional Forester in Colorado. Review of the Record

of Decision was done by the Regional Forester's office in Denver and all records are located there. The easement authorizing the operation of the enlarged Long Draw Dam and Reservoir was issued in Colorado by the Regional Forester of the Rocky Mountain Region in Denver. The Joint Operations Plan involves the release of water from reservoirs located in Larimer County, Colorado into the Cache la Poudre River at points in Larimer County, Colorado." Whereas, here, in the instant case, all the work and the decision took place in Washington, D.C., thus supporting Plaintiff's choice of forum. The Defendants maintain that the case should "be heard where the people who are most directly affected by the actions in dispute are located."[9] However, the Defendants may not be aware that the people (in the Defendants' retelling) "most directly affected" actually reside sixty miles (60 miles) away from the court Defendants propose transferring the case (in Central Islip). In support, the Defendants cite *Citizen Advocates for Responsible Expansion, Inc. v. Dole*, but there, "the Court [was] unable to state with certainty that this case would most conveniently be tried in Fort Worth. However, it does appear that Fort Worth is no less convenient a forum than is this Court." (561 F. Supp. 1238, 1240 (D.D.C. 1983)).

Defendants assert that "[t]he 'arguably most important' of the public interest factors is "the local interest in having local controversies decided at home" (citing *Pres. Soc'y of Charleston v. U.S. Army Corps of Eng'rs*, 893 F. Supp. 2d 49 (D.D.C. 2012). Again, the case is easily distinguishable. In that case, "the relevant decisionmakers in the Corps are there as well[,]" referring to the District Court of South Carolina where the case was transferred. That case stands in contrast to the case at hand because the "relevant decisionmakers" are all located

[9] ECF No. 11-1 – Memorandum in Support of Motion to Transfer, supa, (at p. 10, PDF p. 17, last ¶)

in Washington, D.C. The case of *Pres. Soc'y of Charleston,* therefore, supports keeping the case in Washington D.C. (where the "relevant decisionmakers" are located).

Similarly, Defendants rely heavily on the case of *Seafreeze Shoreside, Inc. v U.S. Dep't of Interior*, No. 1:21-cv-03276, 2022 WL 3906934 (D.D.C. 2022), but that case, too, is easily distinguished for the same reason. There, "defendants have established that a substantial amount of the agency work done on the Vineyard Wind lease occurred in Massachusetts[,]" where the defendants sought to transfer the case. "[T]he Army Corps of Engineers review of the Vineyard Wind permit occurred entirely in the New England District Office of the Corps in Concord, Massachusetts, or at Jacek's residence in Massachusetts [...]." Again, the case of *Seafreeze Shoreside, Inc.* supports keeping the case in Washington, D.C., where the work reviewing and approving the developers' Project took place. BOEM did *not* perform its work on Long Island. BOEM does not have an office in New York State.

2. Court Congestion – Favors Washington, D.C.

Defendants note that the court in the NYED is twice as congested (815 cases per judgeship) as this Court (401 cases per judgeship) but dismisses the consideration. Defendants argue that "the same was also true in *Seafreeze, Pool* and *Jewell*[,]" but the "defendants and Seafreeze agree that the District of Massachusetts is not any more or less congested than the District of Columbia" (*Seafreeze Shoreside, Inc., supra*). In the case of *Pool*, the "court congestion factor is significant and germane here [emphasis added]," and concludes that "the District of Utah has over one hundred and fifty more pending cases per judgeship than the District of Columbia, its docket is more congested than this Court's and thus this factor weighs against transfer [emphasis added]." (See *W. Watersheds Project v. Pool*, 942 F. Supp. 2d 93, 101 (D.D.C. 2013)). As Defendants note, "[t]he sole factor that perhaps militates in favor of

maintaining venue in this district is the relative congestion of the two districts [emphasis added]" *W. Watersheds Project v. Jewell*, 69 F. Supp. 3d 41, 44 (D.D.C. 2014). But in the instant matter, court congestion is one of many factors favoring maintaining the venue in Washington, D.C.

Furthermore, the NYED court's relatively high congestion will impact its ability to expedite a hearing. Perhaps this is why Defendants prefer their case is heard there.

The relatively high caseload in New York's Eastern District favors Washington, D.C.

3. Pending Case in the NYED (neutral)

Defendants move to transfer this case to NYED on the pretense that another case "as challenged in this case" is currently pending in the NYED (ECF No. 11 – Motion to Transfer Venue, opening paragraph). On the contrary, the two cases are very different and there is little, if any, commonality in the legal arguments. The case would have to be reargued *de novo*; thus, nullifying any advantage of "judicial economy" (quoting *Seafreeze Shoreside, Inc., supra*, 2022 WL 3906934, at 12). Although, the case of *Seafreeze Shoreside, Inc., supra* is distinguishable. In that case, "three cases remain pending" that "are based on the same administrative record" (*Id.* at p. 12), whereas, here, there is only one case pending in the NYED where defendants anticipate filing a Motion to Dismiss (*Mahoney v. U.S. Dep't of Interior* (No. 22-cv-01305-FB-ST, 2022 WL 1093199 (E.D.N.Y.) April 12, 202 – ECF No's 57, 58, 59).

The Complaint filed in the NYED (of 12-page) centers solely on one issue, per- and polyfluoroalkyl substance ("PFAS") contamination, and the administrative record is narrowly focused on that issue alone. Moreover, the scope of review concerns only one technical characteristic of PFAS contamination— "the cable trench will become a preferential pathway for the movement of PFAS and, as such, will transport PFAS contaminants to locations that otherwise would not be impacted […][that] will harm Plaintiffs because it will facilitate the

movement of […] PFAS onto the Mahoney Property and the Solomon Property [emphasis added][,]" the Plaintiffs in that case (who are *not* plaintiffs in this case). That case depends on a single technical method of PFAS contaminant transport known as a preferential pathway. Contrary to the defendants' assertion, the mode of contaminant transport is *not* central to the case before this Court. The two cases and issues are so different from each other that they do *not* overlap; therefore, there are no potential savings from the judicial economy.

The instant matter before this Court is far broader and the challenged actions far more egregious as detailed in the Complaint (91-page), which includes—

a) BOEM's reliance on a one-sided economic analysis designed to overstate the relatively small *beneficial* economic impacts and conceal the far greater *adverse* economic impact of $2 billion (the cost of the Project);
b) The contravention of executive orders on environmental justice and BOEM's failure to consider the impact that falls disproportionally on lower-income families from the vastly overpriced contract award;
c) Defendant Agencies' approval that permitted the developer to proceed with construction based on material misinformation contradicting the administrative record relating to the Project's underlying purpose and need;
d) BOEM's failure to consider an economically, environmentally, and technically superior alternative that would provide the same renewable energy at less than half the price;
e) A complete lack of *any* comparative economic analysis of other offshore wind farms in the same area;

f) Federal agencies are turning a blind eye to the Project's flawed and uneconomic design that specifies the installation of four times more transmission per megawatt capacity than the average of three other offshore wind projects in the same area; and

g) Federal Agencies' reliance on materially false information contradicting their records without verifying such statements that include (falsely) concluding that—"Overall, existing groundwater quality in the analysis area appears to be good[,]"[10] contrary to overwhelming evidence of environmental contamination (PFAS) generally, and specifically, evidence that concrete materials used in construction may prolong the harmful effects of such contamination via a process called diffusion;

Defendants claim the two cases challenging "the same agency action, carried out by the same agency [emphasis added]." But in the instant matter, Defendants are the U.S. Department of the Interior, BOEM, and the EPA; and do *not* include the U.S. Department of the Army or the U.S. Army Corps of Engineers. Moreover, the NYED case contains only three claims for relief, one of which is for violations under the Clean Water Act. In contrast, the instant action does *not* allege violations of the Clean Water Act. It contains twelve claims for relief, including (as noted in the Defendants' Motion to Transfer), violations of "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" (at p. 1, PDF p. 8, ¶ 1).[11] None of these issues are raised in the other case before the court in the NYED. Thus, that court is *not* "uniquely competent to resolve the […] case" National Wildlife

[10] FEIS at p. H-23, PDF p. 655

[11] ECF No. 11-1 – Memo in Support of Motion to Transfer Venue, *supra* (at p. 1, PDF p. 8, ¶ 1)

Federation v. Harvey, 437 F. Supp. 2d 42, 45 (D.D.C. 2006). Moreover, the issue of PFAS contamination is *not* unique to the Eastern District of New York but a national crisis that is before courts throughout the United States.

Although both cases concern BOEM's review of the same Project, that is where the similarity stops. The basis and analysis for the claims approach the federal agencies' review from different angles that do *not* intersect. Having to reargue the case *de novo* nullifies any potential judicial economy.

Considering there is no significant advantage to be gained by having the two cases heard in the same court, the fact that there is a pending case in the NYED has little bearing on whether to transfer this case there.

B. Private Interest Factors

1. Strong Deference to Plaintiff's Choice of Forum – Favors Washington, D.C

"It is almost a truism that a plaintiff's choice of a forum will rarely be disturbed and, so far as the private interests of the litigants are concerned, it will not be unless the balance of convenience is strongly in favor of the defendant [emphasis added]" (*Gross v. Owen*, 221 F.2d 94, 95 (D.C. Cir. 1955)). Furthermore, "Defendants have the burden to demonstrate that transfer under § 1404 is proper." See *Citizen Advocates for Responsible Expansion, Inc. v. Dole*, 561 F. Supp. 1238, 1239 (D.D.C. 1983), citing *Oudes v. Block*, 516 F. Supp. 13, 15 (D.D.C. 1981); *Lopez Perez v. Hufstedler*, 505 F. Supp. 39, 41 (D.D.C. 1980). Defendants counter and rely heavily on the case of *Valley Community Preservation Commission v. Mineta* (231 F. Supp. 2d 23 (D.D.C. 2002)) to dilute the Defendants' burden of demonstrating that a transfer is warranted, holding "that such consideration is greatly diminished when the activities at issue have little, if

any, connection with the chosen forum[,]"[12] but with the following caveat— "Although convenience of the parties, convenience of the witnesses, and the interests of justice are the three principle factors to consider in determining whether to transfer a case [emphasis added][…]." Moreover, "the main purpose of section 1404(a) is to afford defendants protection where maintenance of the action in the plaintiff's choice of forum will make litigation oppressively expensive, inconvenient, difficult or harassing to defend [emphasis added]." *Oceana v. Bureau of Ocean Energy Mgmt.*, 962 F. Supp. 2d 70, 73 (D.D.C. 2013). Defendants have failed to satisfy the "three principle factors" — "convenience of the parties, convenience of the witnesses, and the interests of justice" — and have been unable to show that the Plaintiff's choice to have the case heard in Washington D.C. (where the action being challenged occurred, and the people work who were involved in the review and the decision) "will make litigation oppressively expensive, inconvenient, difficult or harassing to defend" (*Oceana v. Bureau of Ocean Energy Mgmt.*, *supra*).

2. Defendants' Choice of Forum (affords no weight)

"A defendant's 'choice of forum must be accorded some weight' if the defendant presents legitimate reasons for preferring to litigate the case in the transferee district. *Nat'l Wildlife Fed'n v. Harvey,* 437 F.Supp.2d 42, 48 (D.D.C.2006)." *Gulf Restoration Network v. Jewell*, 87 F. Supp. 3d 303, 313 (D.D.C. 2015). That case is easily distinguishable given that much of the work by Defendants resulting from the Deepwater Horizon oil spill occurred in the forum where the case would be transferred. Here, in the instant matter, Defendant Federal Agencies performed no work reviewing or approving the proposal in the forum to where they propose moving the case.

[12] Citing *Consolidated Metal Products, Inc. v. American Petroleum Institute*, 569 F. Supp. 773, 775 (D.D.C. 1983)

The lead agency, BOEM, does not have an office on Long Island (or New York). Defendants have failed to present convincing legitimate reasons to transfer the case to the EDNY. Therefore, Defendants' choice of forum should be afforded little weight.

3. Plaintiff's Claims Arose Solely in Washington D.C.

Defendants admit that the Record of Decision ("**ROD**") adopting the COP "was signed by a Department of the Interior official located in the District of Columbia […][and] signed by Laura Daniel-Davis Principal Deputy Assistant Secretary - Land and Mineral Management" (Memorandum in Support, *supra.,* at p. 15, PDF p. 22). However, Defendants then make an unfounded leap. Defendants conclude that "[b]ecause the decision-making process occurred in the District of Columbia, but the alleged impacts of the decision will be felt in New York," for some unexplained reason, that means the case should be transferred (citing *Seafreeze Shoreside, Inc.*, where the decision-making process occurred in the forum where the case was to be transferred). As noted earlier, the defendants in *Seafreeze Shoreside* "established that a substantial amount of the agency work done on the Vineyard Wind lease occurred in Massachusetts[,]" where the case was transferred, and the "Army Corps of Engineers review of the Vineyard Wind permit occurred entirely in […] Massachusetts[.]" In stark contrast, Defendant Federal Agencies, in the instant matter, performed no work in the NYED, and the lead agency, BOEM, has no office in New York State. Defendants work in Washington, D.C., where the case should remain.

4. Convenience of the Parties & Witnesses – Favors Washington, D.C.

The Court House to where Defendants seek to transfer the case (in Central Islip) is about two-thirds the distance from Montauk to New York City (60 miles) and, on a typical weekday, may take anywhere from three to four hours (return trip). For Plaintiff (me), who lives on the far

eastern end of Long Island in the Town of East Hampton, a three-to-four-hour return trip stretches the definition of "convenient" and "local." But the trip would be near to impossible for the twenty or more people involved in the federal action in the Washington D.C. area. The return trip is approximately 600 miles (from 12 to 16 hours driving time), and to fly from Washington, D.C. to JFK, then driving to the Eastern District courthouse (in Central Islip, N.Y.) would be around five hours (return trip). Defendants' argument of convenience leads to the nonsensical conclusion that it is better to inconvenience twenty people (including additional expense and time) than to inconvenience one person. "[T]he purpose of the 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.'" (quoting *Continental Grain*,364 U.S. at 26, 27, 80 S.Ct. 1470)). When venue is properly laid in this district, "[t]ransfer elsewhere under Section 1404(a) must ... be justified by particular circumstances that render [this] forum inappropriate by reference to the considerations specified in that statute. Absent such circumstances, transfer in derogation of properly laid venue is unwarranted." (*Oceana v. Bureau of Ocean Energy Mgmt., supra,* citing Starnes v. McGuire,512 F.2d 918, 927 (D.C.Cir.1974).

5. Access to Source Proof – Favors Washington, D.C.

Defendants argue that because the action is brought under the Administrative Procedure Act ("**APA**"), the claims for relief will be decided on the administrative record, and there will be no need for "depositions, discovery, or testimony for which the Court would need to consider the location of potential witnesses." The case of *Greater Yellowstone Coalition v. Kempthorne* concludes that where "an action for review of an administrative record and live testimony is unlikely, the Court need not consider the fifth and sixth factors" (Civil Action No. 07-2111(EGS), Civil Action No. 07-2112(EGS), at *10 (D.D.C. Apr. 24, 2008)). That case is *not*

true in the matter at hand, where Defendants' received clear substantive evidence rebutting the presumption of regularity attached to the FEIS, ROD, and the South Fork RFP. Defendants DOI and BOEM approved the development without independently evaluating and verifying the FEIS, ROD, and South Fork RFP to ensure, for example, that the contract resulted from a "technology-neutral competitive bidding process" (Complaint ¶ 347). The Complaint shows that BOEM relied on false presumptions of regularity from non-cooperating state agencies, contradicting readily available public information that it failed to examine, and more so when it was provided with that information.

Given the glaring deficiencies in BOEM's review, the Court will likely have to look beyond the record to verify its accuracy, especially where the evidence on the record is sufficient to establish that the agency's action was, at best questionable. Moreover, given the unusual circumstances, severe violations, and public health ramifications, verifying the record's accuracy carries more significant weight.

In this case, the location and ready access to records and potential witnesses support keeping the matter in Washington, D.C.

III. CONCLUSION

This claim arose from Defendant Federal Agencies' review and approval in the Washington, D.C. area, where the multitude of people from various Federal Agencies performed the work governed by Federal Law. The controversy of the case is a review and approval that violated NEPA and the OCSLA (*not* the development proposal). The court where Defendants move to transfer the case is twice as congested as this Court, and even when there is a pending

case with two common defendants and common action, the two matters share very little in claims or legal arguments.

The "plaintiff's choice of a forum will rarely be disturbed […] not be unless the balance of convenience is strongly in favor of the defendant [emphasis added]" (*Gross v. Owen*, *supra*). "Defendants have the burden to demonstrate that transfer under § 1404 is proper" (*Citizen Advocates for Responsible Expansion, Inc., supra*). Even where the Plaintiff "has brought suit outside of his home forum" (Mineta, *supra*), "convenience of the parties, convenience of the witnesses, and the interests of justice are the three principle factors to consider in determining whether to transfer a case" (*Consolidated Metal Products, Inc., supra*). Defendants have failed to sustain the burden of proof establishing that by transferring the case to where it is *not* convenient for the multitude of Defendants (and the Plaintiff), away from access to potential witnesses and records that may be required to prove the accuracy of documents upon which Defendants' review and approval rests (and against the interests of justice), somehow a transfer is warranted. Defendants cannot show that transferring the case to a courthouse sixty miles from the nearest party servers "the main purpose of section 1404(a) [which] is to afford defendants protection where maintenance of the action in the plaintiff's choice of forum will make litigation oppressively expensive, inconvenient, difficult or harassing to defend" (*Oceana, supra*).

For the reasons mentioned above, I respectfully request that Defendant's Motion to Transfer Venue be denied.

Respectfully submitted,

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