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

MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGEMENT

Plaintiff respectfully requests that his Cross-Motion for Partial Summary Judgment and Response to Defendants' Motion to Transfer Venue be heard concurrently.

Plaintiff's Cross-Motion for Partial Summary Judgement, filed pursuant to Federal Rule of Civil Procedure, Rule 55(b), seeks to vacate and remand to Defendant Bureau of Ocean Energy Management ("BEOM") for reconsideration of the decision by the (above-captioned) "Defendant Federal Agencies" to approve a proposal for an offshore wind farm and transmission line (the "**Project**"). Defendant Federal Agencies failed to acknowledge or discuss with any reasoned elaboration the relatively high Project cost ($2 billion), overwhelming evidence of environmental (PFAS) contamination, and relied on "plainly erroneous"[1] information

[1] *Cassell v. FCC*, 154 F.3d 478, 484 (D.C. Cir. 1998)

contradicting its own record. Still, in violation of Defendant Federal Agencies' statutorily mandated obligations under the National Environmental Policy Act and the Outer Continental Shelf Lands Act, Defendants issued a Record of Decision ("**ROD**") approving the Project's Construction and Operations Plan ("**COP**") and Final Environmental Impact Statement ("**FEIS**") on November 24, 2021. Consequently, the developer took full advantage of Defendant Federal Agencies' unlawful approval and began building in February 2021.

Please note, that "[a]s a threshold matter, we do not agree with [the] suggestion that this court no longer has jurisdiction because construction of the facility has begun. […] The plaintiffs […] claim that the permit was improperly issued. The injuries that flow from this unsanctioned issuance, they claim, occur […] in the construction […] of the facility. If plaintiffs […] were to succeed in showing that the permit had to be revoked or modified, we presumably could order that the facility be dismantled, altered or operated differently."[2]

Given the severity and the number of egregious violations, of which some pose a risk to human health, Plaintiff moves the Court to expedite a hearing for partial summary judgment as soon as possible. Furthermore, Plaintiff requests that the Court retain jurisdiction.

For the convenience of the Court and Defendants, and in accordance with U.S. District Court of Columbia Local Civile Rule 7(n)(3), Plaintiff requests permission to submit a separate appendix containing a Statement of Material Facts with his memorandum in support of his cross-motion for summary judgment. The Statement of Material Facts contains publicly accessible administrative records of Defendant BOEM, together with "extra-judicial evidence that was not initially before the agency but [which] the [Plaintiff] believes should nonetheless be included in

[2] *Van Abbema v. Fornell*, 807 F.2d 633, 636-37 (7th Cir. 1986)

the administrative record."[3] Such extra-judicial evidence comprises information from other Federal and New York State agencies that provide substantive evidence rebutting presumptions of regularity upon which Defendant Federal Agencies based their decision to approve the final agency action.

I. REQUEST FOR EXPEDITED HEARING

Defendants' blatant disregard for federal environmental law permitted the developer to rush ahead in the hope of avoiding upcoming new Environmental Protection Agency ("**EPA**") rule changes. The proposed rule changes 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."[4]

In violation of Federal Law, Defendant Federal Agencies permitted the developer to build underground concrete infrastructure (for high-voltage transmission cables) that will likely become a two-mile-long Superfund site. The developer may have to dig up the infrastructure and remediate the site, costing tens of millions of dollars. Defendant Federal Agencies' unlawful approval allows the developer to continue building.

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[3] *Univ. of Colo. Health v. Azar*, 486 F. Supp. 3d 185, 200 (D.D.C. 2020)

[4] WHITE HOUSE— FACT SHEET: Biden-Harris Administration Combatting PFAS Pollution to Safeguard Clean Drinking Water for All Americans (June 15, 2022), Statements and Releases https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/15/fact-sheet-biden-harris-administration-combatting-pfas-pollution-to-safeguard-clean-drinking-water-for-all-americans/

In only eleven days (on October 3, 2022), the developer plans to begin irreversible and destabilizing drilling activities for half a mile in an area where soil and groundwater are contaminated. 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 being heard on the merits with procedural maneuvers, such as its recent Motion to Transfer Venue to the U.S. District Court for the Eastern District of New York.

Finally, I am acting *pro se*, and this matter is taking its toll and keeping me from traveling to see my parents (in Australia), who are declining faster than expected.

Given the unusual circumstances, the severity of the violations, and public health ramifications, I respectfully request an expedited hearing at the Court's earliest convenience.

II. INTRODUCTION

The administrative record of BOEM's review is void of *any* admission or discussion about the cost of the Project, initially valued at $1.6 billion [see Statement of Material Facts ("MF") #3, 14, 17] but is now over $2 billion [MF #26].[5] On one side of the equation, BOEM's economic analysis accounts for *beneficial* economic impacts such as local spending on capital expenditures ($185 – 247 million)[MF#22][6] and spending on operational costs ($6 – $12 million per year)[MF #22].[7] However, the (one-sided) economic analysis fails to acknowledge *any adverse* economic impacts from withdrawing $2 billion [MF #26] out of Suffolk County's economy. Further, the negative economic effects are fixed under a contract that dwarfs the

[5] Long Island Power Authority (LIPA) valued the power purchase agreement (PPA) between it and South Fork Wind LLC at $2,013,198,056 (see Complaint at p. 30, ¶159) [MF #17, #18, #88].
[6] Final Environmental Impact Statement (FEIS), at p. F-17, PDF p. 587, Table F-10
[7] *Ibid.*

estimated beneficial economic impacts by four to six times. BOEM used biased and misleading financial data to support its decision.

BOEM uses an equally one-sided environmental analysis. The administrative record shows groundwater in the square mile BOEM approved for construction contains per– and polyfluoroalkyl substance ("**PFAS**") contamination. However, contradicting its record, BOEM concludes that— "Overall, existing groundwater quality in the analysis area appears to be good [....][MF #52]."[8] On the contrary, a year *before* the developer submitted its Construction and Operations Plan to Defendant BOEM, Suffolk County of Health Services found groundwater in the analysis so toxic that residents could no longer use their private wells for drinking water [see MF #86].[9]

On November 24, 2021, despite knowing of PFAS contamination's risks to human health (and the environment), BOEM permitted the developer to begin construction through the middle of the most contaminated groundwater in Suffolk Country [see MF #79, #80]. Now, BOEM attempts to delay this case from being heard on the merits with procedural maneuvering so that the developer can proceed as early as October 3 with 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).

The lack of discussion surrounding the Project's cost and degree of contamination compared to alternatives is as conspicuous in the review by BOEM as in the New York State

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

[9] On October 11, 2017, Suffolk County of Health Services issued Water Quality Advisory for Private-Well Owners in Wainscott. A year later (September 4, 2018), then Deepwater Wind South Fork LLC (now South Fork Wind LLC) submitted its Constructions and Operations Plan to Defendant BOEM.

Public Service Commission's review. Both federal and state agencies responsible for reviewing such a large public project circumvent their statutorily mandated obligations to assess the socioeconomic and environmental impacts (relative to alternatives), in clear violation of due process of law.

"An agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of § 706"[10] of the Administrative Procedure Act and a "reviewing court shall […] hold unlawful and set aside agency action, findings, and conclusions found to be […] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law […][emphasis added]."[11]

BOEM's review relies on information that, according to its administrative record, is plainly and demonstrably false. The three examples (listed below) lie at the heart of the review as they relate to the Project's purpose and needs statement. The quotes are from BOEM's Record of Decision ("ROD") and Final Environmental Impact Statement ("**FEIS**")— and all three are contrary to fact—

1) "South Fork Wind's […] power purchase agreement executed in 2017 resulting from LIPA's technology-neutral competitive bidding process [emphasis added][MF #30, 43, 44]."[12]
2) "[T]he Project, […] is designed to contribute to New York's renewable energy […] goal of generating 9,000 megawatts of offshore wind energy by 2030 […][MF #19, 45-49]."[13]
3) "The purpose of the Project is to develop a commercial-scale offshore wind

[10] *Butte County v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010)
[11] 5 U.S.C. § 706(2)
[12] ROD (at p. 7, PDF p. 9, ¶ 7)
[13] FEIS (at p. I, PDF p. 5, last paragraph)

energy facility […][emphasis added][MF #42]."[14]

An agency's decision-making should be "based on reasons and supported by facts."[15] "Although we are dealing with the question whether agency action is arbitrary or capricious, 'in their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same.'"[16]

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[14] ROD (at p. 7, PDF p. 9, ¶ 7)
[15] Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 234 (1974).
[16] Butte County v. Hogen, 613 F.3d 190, 194 (D.C. Cir. 2010), citing *Ass'n of Data, Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984); *accord Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 243 (D.C. Cir. 2008)

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https://www.suffolkcountyny.gov/Departments/Health-Services/Health-News/ArtMID/3434/ArticleID/1926/Water-Quality-Advisory-for-Private-Well-Owners-in-Area-of-Wainscott

SCDHS— BOEM received three hundred and three (303) PFAS laboratory test results, in February 2021, of groundwater samples taken from the area where South Fork Wind proposed construction (416 pages) P. 34

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Fact Sheet.HW.152250.2019-06-19.EH Airport Class 02 Listing.pdf (ny.gov)

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Draft Environmental Impact Statement (Appendix D-3)— Environmental Assessment of the Wainscott Commerical Center, East Hampton, by Alpha Geoscience (Jan 2019) (Fig 7 at PDF p. 129, Fig 3 at PDF p. 125) P. 35

https://downloads.regulations.gov/BOEM-2020-0066-0386/attachment_24.pdf

Comments-Letters submitted by Plaintiff to Defendant BOEM

November 19, 2018— Comments in response to the Construction and Operations Plan by the Deepwater Wind South Fork LLC (now South Fork Wind LLC), submitted to Defendant BOEM by Plaintiff P. 24

https://downloads.regulations.gov/BOEM-2018-0010-0074/attachment_1.pdf

February 16, 2021— Oral Testimony of Plaintiff during Public Hearing #3 (call-in)(beginning 01:18:08.430)

https://downloads.regulations.gov/BOEM-2020-0066-0380/attachment_1.pdf

February 22, 2021— Comments in response to Defendant BOEM's Draft Environmental Impact Statement (DEIS) by Plaintiff P. 15

https://www.regulations.gov/comment/BOEM-2020-0066-0343
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VII. AUTHORITY AND RECORDS

Plaintiff seeks partial summary judgment pursuant to Federal Rules of Civil Procedure, Rules 54(b), 56, and U.S. District Court for the District of Columbia Local Civil Rule 7 on the claims and causes of action by Defendant Deb Haaland in her official capacity as Secretary of

the Interior, U.S. Department of the Interior ("**Interior Secretary Haaland**"), Defendant Bureau of Ocean Energy Management ("**BOEM**"), and Defendant Michael S. Regan, in his official capacity as Administrator of the U.S. Environmental Protection Agency according to in the (above-captioned) Complaint for Declaratory and Injunctive Relief ("**Complaint**") (ECF No. 1) filed by Plaintiff *Pro Se*.

The Complaint, brought under the Administrative Procedure Act, 5 U.S.C § 706, challenges the (selective) environmental review by BOEM, as lead agency, in violation of the National Environmental Policy Act, 42 U.S.C.§§ 4321, *et seq.* (regulations of 1978, as amended in 1986 and 2005, before the revised regulations issued by the CEQ on July 16, 2020) (*hereinafter* "**NEPA**"); and the Outer Continental Shelf Lands Act, 43. U.S.C. §§ 1331, *et seq.* (*hereinafter* "**OCSLA**").

This Motion for Partial Summary Judgment seeks judicial review, vacatur, and remand for reconsideration of Defendants' decision to approve the Final Environmental Impact Statement ("**FEIS**") and Construction and Operations Plan ("**COP**") for the Project.

On November 24, 2021, Defendant BOEM, as the lead agency responsible for reviewing the Project, issued its Record of Decision ("**ROD**") that "constitutes the final decision of the Department of the Interior."[17]

With the Complaint, Plaintiff filed a list of over two hundred (207) documents that Defendant BOEM received in February 2021, nine months *before* approving the Project (see Exhibit C – BOEM Index of Documents). Plaintiff also submitted a Statement of Material Facts according to LCvR 7(h)(1), to which I contend there is no genuine issue (with linked references). The Statement of Material Facts supports my cross-motion for partial summary judgment. At

[17] ROD at p. 19, PDF p. 21

this time, Defendant Federal Agencies have not filed a certified list of contents of the record.

VIII. PROCEDURAL HISTORY

Defendant BOEM is the lead agency responsible for reviewing the Project.

On November 24, 2021, Defendant BOEM issued its ROD approving the FEIS (issued August 16, 2021) and the COP (Revision 3, Updated May 2021) for the Project.

On December 18, 2021, Defendant BOEM received (along with other Federal, State, and local agencies and the Project's developer) Sixty Days' Notice of Intent to Sue (see Complaint Exhibit D). Defendant BOEM neither contacted Plaintiff to discuss his notice nor, to the best of his knowledge, made a substantive effort to resolve the issues raised in the (53-page) document.

On March 11, 2022, Defendant BOEM received (along with other Federal, State, and local agencies and the Project's developer) letter-testimony concerning flawed soil and groundwater testing for PFAS contamination *within* the proposed construction corridor (see Complaint Exhibit E). Defendant BOEM neither contacted Plaintiff to discuss his letter titled "Re: URGENT: South Fork Wind Imminent Risk to Public Health" nor, to my knowledge, made a substantive effort to resolve the issues raised in the (31-page) document.

On July 21, 2022, Plaintiff filed the above-captioned complaint ("Complaint") concerning BOEM's selective environmental and economic review of the Project.

On September 8, 2022, Defendant Federal Agencies filed a Motion to Transfer Venue to the U.S. District Court for the Eastern District of New York.

On September 22, 2022, Plaintiff filed a Cross-Motion for Partial Summary Judgement and a Response to Defendants' Motion to Transfer Venue. Plaintiff seeks vacatur and remand for reconsideration and requests an expedited hearing on the Motion for Partial Summary Judgement.

IX. Statutory And Regulatory Framework

The National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, "is our basic national charter for protection of the environment."[18] Defendant BOEM's ROD states that the NEPA "review of the proposed 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)."[19]

According to NEPA, Congress "declares that it is the continuing policy of the Federal Government, in cooperation with State […], to use all practicable means and measures, […] to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of […] Americans [emphasis added]." Among NEPA's primary goals are to "assure for all Americans safe, healthful, [and] productive […] surroundings […][and to] attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences [emphasis added][…]."[20]

"NEPA's purpose is […] to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment [emphasis added]."[21]

[18] 40 C.F.R. § 1500.1(a)
[19] ROD at p. 1, PDF p. 3, footnote 1
[20] 42 U.S.C. §4331. NEPA Congressional Declaration
[21] 40 C.F.R. § 1500.1(c)

Under NEPA, Congress not only "authorizes" federal agencies but expressly "directs that, to the fullest extent possible: […] all agencies of the federal government shall [emphasis added] —

> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures […], which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations [emphasis added];
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes[.]"[22]

[22] 42 U.S.C. § 4332

Where "an agency requires an applicant to submit environmental information for possible use by the agency […], [t]he agency shall independently evaluate the information submitted and shall be responsible for its accuracy [emphasis added]. […] It is the intent of this paragraph that acceptable work […] be verified by the agency [emphasis added]."[23]

"[A]ny environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency […]. […] If the document is prepared by contract, the responsible Federal official [… shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents [emphasis added]."[24]

Agencies "shall prepare a concise public record of decision."[25] The ROD shall "[i]dentify all alternatives considered by the agency in reaching its decision […][and] discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions [emphasis added]. An agency *shall* identify and discuss *all* such factors […] which were balanced by the agency in making its decision and state how those considerations entered into its decision [emphasis added]."[26] Furthermore, an Agency "shall […] [s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not [emphasis added]."[27]

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[23] 40 C.F.R. § 1506.5
[24] *Id.* (c)
[25] *Id.* § 1505.2 Record of decision
[26] *Id.* (b)
[27] *Id.* (c)

X. Standard of Review

The complaint against Defendant Federal Agencies for violations of NEPA and the OCSLA is reviewable under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701—706, specifically, the "reviewing court shall […] hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; […] [or] (D) without observance of procedure required by law [emphasis added][.]"[28]

Judge Garland notes that although the standard of review under the APA is generally deferential to the agency, that "[d]eference, of course, does not mean blind obedience. The agency's interpretation still must not be "plainly erroneous or inconsistent with the regulation" it is interpreting. *Cassell v. FCC*, 154 F.3d 478, 484 (D.C. Cir. 1998) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). And even if the interpretation meets this standard, the [agency] need not follow it if it "is arbitrary, capricious, or otherwise not according to law."[29]

In *Tourus Records v. D.E.A.* (2010), this Court held that "the agency must explain why it decided to act as it did. The agency's statement must be one of 'reasoning'; it must not be just a 'conclusion'; it must 'articulate a satisfactory explanation' for its action. 259 F.3d at 737 (*quoting* Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 Duke L.J. 199, 222, and *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). Second, an agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of § 706. *See, e.g., State Farm*, 463 U.S. at 43, 103

[28] 5 U.S.C. § 706 Scope of review
[29] *Garvey v. National Transportation Safety Bd.*, 190 F.3d 571, 580 (D.C. Cir. 1999)

S.Ct. 2856; *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009). This proposition may be deduced from case law applying the substantial evidence test, under which an agency cannot ignore evidence contradicting its position. "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88, 71 S.Ct. 456, 95 L.Ed. 456 (1951). Although we are dealing with the question of whether agency action is arbitrary or capricious, "in their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same." *Ass'n of Data, Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984); *accord Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 243 (D.C. Cir. 2008).[30]

In the more recent case of *White v. Mattis*, this Court concluded— "Similarly, [u]nder the substantial-evidence standard, a court looks to an existing administrative record and asks whether it contains sufficient evidence to support the agency's factual determinations. In doing so, a court must consider the whole record upon which an agency's factual findings are based, including whatever in the record fairly detracts from the evidence supporting the agency's decision. "Evidence that is substantial viewed in isolation may become insubstantial when contradictory evidence is taken into account." *Id*. Thus, an agency cannot ignore evidence contrary to its action or dismiss such evidence without adequate explanation." *Id*. *White v. Mattis*, Civil Action No. 18-02867 (ESH), at *9-10 (D.D.C. Dec. 11, 2019) (citation and internal quotation marks omitted).

The Court must "perform a searching and careful inquiry into the facts underlying the agency's decision" to "ensure that the [agency] has examined the relevant data and has

[30] Butte County v. Hogen, 613 F.3d 190, 194 (D.C. Cir. 2010)

articulated an adequate explanation for its action." American Farm v. E.P.A, 559 F.3d 512 (D.C. Cir. 2009) (internal citations and quotation marks omitted). In addition, an agency decision is "arbitrary and capricious if the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency [...]."[31]

To the extent that an agency's action turns on the meaning of the statutes, the Court's review is governed by the framework set forth in *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). Where "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." On the other hand, if the Court finds that "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. However, such interpretations raised for the first time on judicial review warrant no deference. *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011).[15]

In reviewing BOEM's decision, "[t]he function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues."[32] This requires that the court "calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts [...][and] assure that the agency's

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[31] *Motor Vehicle Manufacturers Assoc. of the United States, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983)

[32] *Greater Boston Television Corp. v. F.C.C*, 444 F.2d 841 (D.C. Cir. 1970), citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 792, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968); *City of Pittsburgh v. F.P.C.*, 99 U.S.App.D.C. 113, 237 F.2d 741 (1956); *Scenic Hudson Preservation Conference v. F.P.C.*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941, 86 S.Ct. 1462, 16 L.Ed.2d 540 (1966).

policies effectuate general standards, applied without unreasonable discrimination." [33]

The Court should "intervene […] if the court becomes aware […] that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making."[34]

XI. ARGUMENTS

1. One-sided Economic Analysis

In 2020, BOEM's Acting Director, Walter D. Cruickshank, emphasized the central role economic analysis plays in BOEM's decision-making – "[E]conomics is a critical component of BOEM's work. It's so vital that it is mentioned in our mission: "…to manage development of U.S. Outer Continental Shelf energy and mineral resources in an environmentally and economically responsible way [emphasis added]. […] BOEM's analysis of offshore energy projects' total economic impact helps keep policymakers and the public informed on the economic activity associated with OCS energy development [emphasis added]."[35] BOEM Science's Editorial Board defines the importance of economic analysis as follows –

> *Economics is the study of choices – how people choose to allocate their resources (e.g., time and money) among competing uses or alternatives* [emphasis added].
>
> *Just as individuals consider options and their tradeoffs, federal agencies are*

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[33] *Ibid.*, citing *WAIT Radio v. F.C.C.*, 135 U.S. App.D.C. 317, 320, 418 F.2d 1153, 1156 (1969); *City of Chicago v. F.P.C.*, 128 U.S.App.D.C. 107, 385 F.2d 629 (1967), cert. denied, 390 U.S. 945, 88 S.Ct. 1028, 19 L.Ed.2d 1133 (1968).

[34] *Greater Boston Television Corp. v. F.C.C*, *supra*

[35] BOEM Ocean Science, Vol. 17, Issue 2, 2020 (at p. 3, ¶ 2) https://www.boem.gov/sites/default/files/documents/newsroom/ocean-science/BOEM%20Ocean%20Science%202020%20Issue%202.pdf

required to consider them as well. At BOEM, economic analyses help formalize this analytical process and provide both quantitative and qualitative information about the underlying tradeoffs associated with different policy options [emphasis added].[36]

BOEM explains that "[e]conomics is also a factor in designing fiscal and lease terms for […] renewable energy lease sales […][and] the OCS Lands Act specifically states that […] the OCS should be "made available for expeditious and orderly development" (43 U.S.C. §1332 (3)). Economic analysis helps decision makers […] facilitate orderly development when designing fiscal terms by highlighting the trade-offs associated with different policy options under consideration [emphasis added]."[37] By its own admission, BOEM maintains a level of expertise in economic analysis necessary to achieve its mission "to manage development […] in an environmentally and economically responsible way."[38]

Initially, Long Island Power Authority ("**LIPA**") valued the power purchase agreement ("**PPA**") between it and South Fork Wind LLC (formerly Deepwater Wind South Fork LLC) at $1,624,738,893 [MF #3, 17], but on September 30, 2020, executed a PPA amendment expanding the facility by forty megawatts (40 MW) (from 90 MW to 130 MW). The cost increased by $388 million [MF #18] to over $2 billion (see Complaint at p. 30, ¶159).[39]

In 2017, LIPA estimated the average cost of power from the proposed 90 MW facility to be $218.61 per megawatt-hour ("**MWh**") or 21.9 cents per kilowatt-hour ("**kWh**") [MF #3, #17].

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[36] *Id.* (at p. 3, colored insert box)
[37] *Id.* (at p. 5, last paragraph)
[38] *Id.* (at p. 3, ¶ 2)
[39] Also, see NY Office of the State Comptroller, Open Book, Contract Number: C000883 at – https://wwe2.osc.state.ny.us/transparency/contracts/contracttransactions.cfm?Contract=00000000000000000085553 (last accessed September 3, 2022) [MF #88].

The calculation provided to BOEM in 2018, estimating the cost to be "22 cents per kilowatt hour" [MF #3], proved to be accurate when compared to LIPA's "Contract Encumbrance Request" [MF #17]. On September 30, 2021 (when LIPA amended the PPA expanding the facility), it slightly reduced the average cost of power to $187.53 per MWh or 18.75 cents per kWh [see Complaint Appendix 4 at p. 3].[40]

BOEM knew the (90 MW) Project was expensive when compared to another "similar wind farm, Vineyard Wind, which is just 20 miles from the Applicant's proposed South Fork Wind Farm, will charge only 6.5 ¢/kWh" as early as 2018 [MF #3, #4]. The November 2018 letter to BOEM reads as follows (see Complaint Exhibit A) [MF #6]—

> *The Applicant has failed to comply with 30 CFR 585.627(a)(7) with specific regard to its potential negative impact upon lower income groups*
>
> *Any increase in electricity prices will fall disproportionally on those who can least afford it. A family on a low income will have to heat or cool their home in the same way a family on a higher income will have to do, so any increase in electricity prices will represent a larger proportion of a low-income family's income than it will a higher-income family. This will cause families on lower incomes who are already hurting to suffer further more economic hardship than families on higher incomes.*

Nine months *before* BOEM approved the development, it received comments regarding the project's cost (for a second time). This time, the price is compared to another offshore wind farm, Sunrise Wind, which is also (indirectly) owned by the same joint and equal partners, Ørsted A/s and Eversource. The letter reads as follows (see Complaint Exhibit B, at p. 4, ¶ 4) [MF #14]—

[40] NYOSC and LIPA PPA valuation of $2,013,198,056 divided by LIPA projected delivered energy of 10,735,220 MWh.

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

Yet, despite the knowledge that the project was vastly overpriced (by $1 billion), BOEM still failed to consider the overall cost *at all*.

In *Michigan v. EPA*,[41] the Supreme Court held that a federal agency (EPA) had improperly interpreted statutory language to preclude consideration of costs in making its determination. In the opinion, Justice Scalia wrote: "Federal administrative agencies are required to engage in "reasoned decision-making." *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374, 118 S.Ct. 818, 139 L.Ed.2d 797 (1998) (internal quotation marks omitted). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Ibid*. It follows that agency action is lawful only if it rests "on a consideration of the relevant factors." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (internal quotation marks omitted). […] EPA refused to consider whether the costs of its decision outweighed the benefits. The Agency gave cost no thought *at all*, because it considered cost irrelevant to its initial decision to regulate. […] We review this interpretation under the standard set out in *Chevron U.S.A. Inc. v. Natural Resources* **2707* Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Chevron directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers. *Id.*, at 842–843, 104 S.Ct. 2778. Even under this deferential standard,

[41] *Michigan v. EPA* (135 S. Ct. 2699 (2015))

however, "agencies must operate within the bounds of reasonable interpretation." *Utility Air Regulatory Group v. EPA*, 573 U.S. ——, ——, 134 S.Ct. 2427, 2442, 189 L.Ed.2d 372 (2014) (internal quotation marks omitted). EPA strayed far beyond those bounds when it read § 7412(n)(1) [in defining the word "appropriate"] to mean that it could ignore cost when deciding whether to regulate power plants."

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR joined, dissenting, agreed with Scalia and the majority— "I agree with the majority—let there be no doubt about this—that EPA's […] regulation would be unreasonable if '[t]he Agency gave cost no thought *at all*.'"[42]

In the instant matter, BOEM neither acknowledges nor considers the Project cost in either its FEIS or ROD. BOEM gave cost no thought *at all*. This fact alone warrants remand.

"Normally, an agency rule would be arbitrary and capricious if the agency […] entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency […]" (*Motor Vehicle Manufacturers Assoc. of the United States, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

As discussed above, BOEM promotes the importance of economic analysis in carrying out its statutory mission. Thus, its failure to consider the Project's cost in its financial analysis and failure to assess its *adverse* economic impact "*at all*" clearly falls into the category described by the U.S. Supreme Court as arbitrary and capricious.

Under the heading of "Demographics, employment, and economics" (see ROD at p. 12, PDF p. 14, ¶ 3), BOEM concludes that the impact would be "[n]egligible to minor adverse and

[42] *Michigan v. EPA* (135 S. Ct. 2699 (2015))

minor to moderate beneficial impacts to the socioeconomic analysis area in terms of employment, federal revenue, and income […][emphasis added]." However, BOEM's "socioeconomic analysis area" was limited to solely the "ocean economy" within "[f]ive-km zones [that] were drawn around potentially affected ports or landing sites"[43] such as New Bedford (MA), Providence (RI), New London (CT), and Montauk (NY) [MF #21, #23, #24, #25]. On the other hand, the economic burden of paying for the Project (costing $2 billion) rests with ratepayers in the LIPA service area that encompasses all of Suffolk County, not just a small area around a few ports. According to BOEM, the population of Suffolk County is 1,497,595 (see FEIS at p. 3-169, PDF p. 221, Table 3.5.4-1), but the population within the five-kilometer zone was only 58,878, or 3.9% of the total population of Suffolk County (see FEIS at p. 3-172, PDF p. 224, Table 3.5.4-2) [MF #25].[44] In other words, BOEM failed to consider both the Project's cost (of $2 billion) and the people who would have to pay that cost, including lower-income families.

BOEM summarizes the Project's impact on economics and employment as follows: "The FEIS also found that the Proposed Project could have, to some extent, beneficial impacts on […] employment, and economics (at p. D-8, PDF p. 100, ¶ 1). BOEM fails to mention *any* potential *adverse* economic impact on employment or the economy from increases in the price of electricity that would affect over one million people in LIPA's service area.

In 2018, BOEM was informed that there "are well over one million ratepayers living on Long Island who will be forced to absorb into their everyday household budgets vastly inflated

[43] See ROD at p 3-170, PDF p. 222, ¶ 1

[44] The populations within the five-kilometer zones in Suffolk County include: Shinnecock Fishing Dock (9,321), Greenport Harbor (11,189), Montauk (3,662), Hither Hills to Substation (18,796), and Beach Lane to Substation (15,910). The total population considered by BOEM was only 58,878, or 3.9% of 1,497,595.

prices for electricity, more than three times the price in Massachusetts for the same electricity." BOEM ignored that letter (see Complaint Exhibit A).

Contrary to BOEM's assertion that "the proposed Project could have, to some extent, beneficial impacts on […] employment[,]" the high cost of South Fork Wind will have a $2 billion *adverse* economic impact that dwarfs BOEM's *estimated beneficial* economic impact.

On one side, BOEM's economic analysis accounts for *beneficial* economic impacts such as local spending on capital expenditures ($184.24 – 246.81 million)[MF#22][45] and spending on operational costs ($6.16 – $12.32 million per year)[MF #22].[46] Given the PPA term is twenty years, operating expenditure over the contract's life ranges from $123.2 to $246.4 million.[47] Therefore, the total of BOEM's beneficial economic impact ranges from $307 to $493 million.[48]

This one-sided analysis fails to acknowledge *any adverse* economic impacts from withdrawing $2 billion [MF #26] out of Suffolk County's economy.

Moreover, the *adverse* economic impact is fixed under the PPA's terms, which is four to six times the *estimated beneficial* economic effects.[49] BOEM used heavily biased and misleading financial data to support its decision.

Contrary to BOEM's assertion that the Project will have a "[n]egligible to minor adverse and minor to moderate beneficial impacts to the socioeconomic analysis area[,]" the Project will

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[45] Final Environmental Impact Statement (FEIS), at p. F-17, PDF p. 587, Table F-10

[46] *Id.* Table F-11

[47] The range in operating expenditure from $123.2 to $246.4 million is equal to $6.16 million and $12.32 million, each multiplied by 20 years respectively

[48] $307 million (capital expenditure of $184.24 million in addition to operating expenditure of $123.2 million) to $493 million (capital expenditure of $246.81 million in addition to operating expenditure of $246.4 million).

[49] The project's total cost of $2 billion divided by the beneficial economic impact, from $307.44 to $493.21 million, is a multiple of 4 to 6 times.

have a net *adverse* economic impact of $1.5 to $1.7 billion.[50]

BOEM's conclusion "runs counter to the evidence"[51] where for every dollar South Fork Wind puts into the economy, it is withdrawing from the economy from four to six times that amount (Complaint at pp. 33-36, ¶¶ 180-203).

> "[A]n EIS serves two functions. First, it ensures that agencies take a hard look at the environmental effects of proposed projects. Second, it ensures that relevant information regarding proposed projects is available to members of the public so that they may play a role in the decision-making process. [*Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989)]. For an EIS to serve these functions, it is essential that the EIS not be based on misleading economic assumptions [emphasis added].
>
> Misleading economic assumptions can defeat the first function of an EIS by impairing the agency's consideration of the adverse environmental effects of a proposed project. See *South La. Envtl. Council, Inc. v. Sand*, 629 F.2d 1005, 1011-12 (5th Cir. 1980). NEPA requires agencies to balance a project's economic benefits against its adverse environmental effects. *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1113 (D.C. Cir. 1971). The use of inflated economic benefits in this balancing process may result in approval of a project that otherwise would not have been approved because of its adverse environmental effects. Similarly, misleading economic assumptions can also defeat the second function of an EIS by skewing the public's evaluation of a project." See *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996). *Johnston v. Davis* , 698 F.2d 1088, 1094–95 (10th Cir.1983) (disapproving of misleading statements resulting in 'an unreasonable comparison of alternatives' in an EIS)." *Guardians v. U.S. Forest Serv.*, 120 F. Supp. 3d 1237, 1248 (D. Wyo. 2015)

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[50] The project's total cost of $2 billion less the beneficial economic impact ($307.44 to $493.21 million), is $1,692.56 to $1,506.79 million.

[51] *Motor Vehicle Manufacturers Assoc. of the United States, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983)

BOEM devotes nearly two hundred pages to discussing the "ocean economy" and the socioeconomic impact on the fisheries industry.[52] Still, by comparison, BOEM proffers not one word on how much the Project will cost ratepayers in LIPA's service area (Suffolk County).

Justice SCALIA (in *Michigan v. EPA, supra*) expands further on the scope and importance for a federal agency to account for the cost of its action as follows—

> In addition, "cost" includes more than the expense of complying with regulations; any disadvantage could be termed a cost. EPA's interpretation precludes the Agency from considering any type of cost—including, for instance, harms that regulation might do to human health or the environment. The Government concedes that if the Agency were to find that emissions from power plants do damage to human health, but that the technologies needed to eliminate these emissions do even more damage to human health, it would still deem regulation appropriate. […] No regulation is "appropriate" if it does significantly more harm than good.

In the instant matter, BOEM fails to consider the Project cost ($2 billion), the people who will have to pay that cost, and it also fails to consider the cost to "human health [and] the environment" by selecting the *only* beach landing site on Long Island that requires excavating over 30,000 tons of soil and groundwater [MF #81, #82], much of which contains harmful chemical contaminants that the NYS Department of Environmental Conservation ("**NYSDEC**") classifies as a "significant threat to public health and/or the environment [MF #72.]"[53]

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[52] Final Environmental Impact Statement, pp. 3-86 to 3-183, PDF pp. 138-235, a total of 197 pages.

[53] See NYSDEC State Superfund Site Classification Notice for East Hampton Airport (site no. 152250) dated June 2019, avaiable at Fact Sheet.HW.152250.2019-06-19.East Hampton Airport New Class 02 Listing.pdf (ny.gov)

2. Failure to Evaluate and Verify Information

In 2020, BOEM's Acting Director, Walter D. Cruickshank, emphasized the central role BOEM asserts that its "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."[54] On the contrary, BOEM's review made a mockery of NEPA, the OCSLA, and Congress' express directions.

An "agency shall independently evaluate the information submitted and shall be responsible for its accuracy [emphasis added]. […] It is the intent of this paragraph that acceptable work […] be verified by the agency [emphasis added]."[55] However, Defendant Federal Agencies failed to independently evaluate and verify the accuracy of the information they received, their work, and their decisions.

Defendant BOEM asserts the following without evaluating or verifying the information that, according to its own record, is "plainly erroneous"[56]—

1. "The Project's purpose is to develop a commercial-scale offshore wind energy facility […]."[57] As discussed above, BOEM failed to acknowledge the Project's ($2 billion) cost, but its failure would have made it impossible to conclude that the Project is a large enough scale to be commercial. Measuring whether a project is commercial necessarily requires calculating the cost and comparing it to the estimated revenue or return. Without knowing and accounting for a project's cost, it would be impossible to determine whether it is commercial. Thus, BOEM could not have known or verified that the Project was "a

[54] ROD at p. 1, ¶1
[55] 40 C.F.R. § 1506.5
[56] *Cassell v. FCC*, 154 F.3d 478, 484 (D.C. Cir. 1998) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)
[57] ROD at p. 7, PDF p. 9, ¶ 7

commercial-scale" without first establishing and considering the Project cost of $2 billion.

Moreover, according to the findings of the New York State Energy Research and Development Authority ("**NYSERDA**") and the New York Offshore Wind Masterplan, NYSERDA concluded that "[s]mall initial projects are not likely to deliver cost savings. Due to diseconomies of scale, the costs per unit of energy for projects of 100 MW and 200 MW in size [the (130 MW) Project falls within that range] are significantly higher than those for 400 MW projects." Furthermore, BOEM received a copy of a Request for Information OSW-2018 ("RFI") from the Project's joint and equal (indirect) owners, Ørsted A/S and Eversource (under Bay State Wind LLC), in which they repeat and agree with NYSERDA's findings [MF #42]. The Project's owners, in the RFI, admit that its (130 MW) project will *not* "deliver cost savings" due to "diseconomies of scale," or in other words, it is not a commercial scale (see BOEM Exhibit #169, and Complaint, ¶¶ 219-229) [MF #42]. BOEM received the information in February 2021 [MF #42] but ignored it.

2. The contract, a power purchase agreement ("PPA") between South Fork Wind LLC and LIPA, resulted from a "technology-neutral competitive bidding process [emphasis added][MF #30]"[58]

BOEM's assertion contradicts LIPA internal documents showing that the procurement was not a "technology-neutral and competitive" process. A memorandum from LIPA to the New York Office of the State Comptroller reads as follows— "In some instances, proposals were advanced if they were the only proposal offering a particular technology

[58] See ROD at p. 7, PDF p. 9, ¶ 7

[MF #43]."[59] Further, "Deepwater Wind [now South Fork Wind] was the only proposal offering offshore wind technology [MF #44]."[60] If a proposal is advanced through the procurement process based on its technology, then the bidding process cannot be said to be *neutral* on technology. Again, BOEM received this information in February 2021 [MF #43] but failed to evaluate or consider it.

3. The South Fork Wind Project "is designed to contribute to New York's renewable energy requirements, particularly the state's goal of generating 9,000 megawatts of offshore wind energy by 2030 [MF #19]."[61] Publicly available records, on the other hand, easily prove that BOEM's claim is implausible. South Fork Wind designed its Project three-and-a-half years *before* New York State enacted its renewable energy "goal of generating 9,000 megawatts of offshore wind energy by 2030."[62] Contrary to the FEIS' assertion, the South Fork Wind Project was "designed" in December 2015, when the developer submitted it for consideration in the South Fork Wind RFP procurement process [MF #45]. The South Fork RFP and the South Fork RFP Evaluation Guide mandate that the Project meets "Mandatory Criteria," otherwise the proposal "will be eliminated from consideration [MF #46]. For the proposal to satisfy the mandatory criteria specified within the South Fork RFP procurement documentation (such as committing to a price) [MF #47, #48, #49], South Fork Wind would have had to commit to a design (in 2015). On the other hand, New York's "goal of generating 9,000 megawatts of offshore wind energy by 2030" is part of the Climate Leadership and Community Protection Act ("**2019**

[59] See Complaint Exhibit C, BOEM Index #030 at p. 12, first paragraph below the table.
[60] *Id.* at p. 13, first bullet-point.
[61] See FEIS at p. I, PDF p. 5, last paragraph
[62] See Complaint at pp. 27-29, ¶¶ 136-155

CLCPA") was enacted in July 2019 (see New York Environmental Conservation Law § 75-0103(13)(e)). South Fork Wind's design *pre-dates* enactment of the 2019 CLCPA by three-and-a-half years. Again, BOEM received a copy of the South Fork RFP (BOEM Index Exhibit #102 and #110) and the South Fork RFP Evaluation Guide (BOEM Index Exhibit #043). Regardless, BOEM failed to verify the accuracy of its statement.

4. BOEM's FEIS (falsely) concludes that— "Overall, existing groundwater quality in the analysis area appears to be good […][MF #52]."[63] On the contrary, a year *before* the South Fork Wind submitted its COP to BOEM, Suffolk County Department of Health Services found groundwater in the analysis area so toxic that residents could no longer use their private wells for drinking water [MF #86]. The cause of contamination came from releases of "two chemicals known as PFOS (perfluorooctane sulfonate) and PFOA (perfluorooctanoic acid) […][MF #86]."[64] BOEM knew groundwater contained harmful contaminants that were a risk to public health and the environment [MF #72]. BOEM also knew that "PFC [aka PFAS] results have been received for 303 […] wells sampled" in Wainscott south of East Hampton Airport and that "[t]hirteen (13) wells are above the USEPA Health Advisory Level (HAL) of 70 parts per trillion" and that "eighteen (18) […] wells have detections of combined PFOS/PFOA above 20 ppt, ranging from 22 ppt to 59.3 ppt [MF #66][BOEM Index Exhibit #167]." BOEM received 416 pages of PFAS laboratory test results of private drinking water wells performed by Suffolk County

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

[64] See Water Quality Advisory for Private-Well Owners in Area of Wainscott issued by Suffolk County Department of Health Services on October 11, 2017, a year *before* the Applicant, South Fork Wind, submitted its Construction and Operations Plan (in September 2018). https://www.suffolkcountyny.gov/Departments/Health-Services/Health-News/ArtMID/3434/ArticleID/1926/Water-Quality-Advisory-for-Private-Well-Owners-in-Area-of-Wainscott.

Department of Health Services [MF #166] [BOEM Index Exhibit #166]. BOEM received thirteen (13) maps showing PFAS in that same area where the developer planned to install underground concrete infrastructure [MF #59 through MF #64]. BOEM received multiple Site Characterization Reports performed for the NYS Department of Environmental Conservation (NYSDEC) showing PFAS contamination exceeding the EPA 2016 Health Advisory Level within five hundred feet of the construction corridor upgradient and downgradient [MF #69, #70, #71]. However, BOEM ignored the mountain of evidence. BOEM failed to discuss or acknowledge *any* PFAS contamination *within* the proposed construction corridor and neither considered alternatives to avoid the area of environmental contamination nor mitigate its effects.

3. Failure to Consider PFAS Contamination

Congress "directs that, to the fullest extent possible: […] all agencies of the federal government shall […] include in every recommendation or report on proposals […] the environmental impact […][and] any adverse environmental effects which cannot be avoided […].[65] BOEM failed to acknowledge severe environmental contamination of groundwater (and soil) within the construction corridor it approved.

Neither BOEM's ROD nor FEIS lists *any* agency or authority in New York State as a cooperating agency. BOEM did *not* develop a joint FEIS with the New York State Public Service Commission or any other New York State agency or authority; and none were involved in BOEM's decision-making process in approving the Project. Irrespective of the NYS Public Service Commission's decision (which, during the hearing, also refused to consider PFAS

[65] 42 U.S.C. § 4332

contamination within the construction corridor and the Project's cost impact on ratepayers), BOEM is not relieved of its statutorily mandated obligation pursuant to NEPA and the OCSLA.

In February 2021, BOEM received testimony, briefs, and exhibits (see Complaint Exhibit C) and was compelled to take a "hard look" and "use all practicable means" to ensure residents living in Wainscott enjoy "safe, [and] healthful, […]surroundings"[66] (see Complaint ¶ 300).

BOEM had "practicable means" to access its own electronic files containing over two hundred (207) documents it received in February 2021 (because it posted them online)(see Complaint ¶ 301 and Complaint Exhibit C). BOEM had online access to publicly available NYSDEC records, including access to the NYSDEC State Superfund Program under site record at East Hampton Airport (see https://www.dec.ny.gov/data/DecDocs/152250/, and for site record at Wainscott S&G (see https://www.dec.ny.gov/data/DecDocs/152254/) [see MF #72]. BOEM had online access to publicly available New York Office of the State Comptroller records, specifically its Open Book of public contract valuations (see https://wwe2.osc.state.ny.us/transparency/contracts/contracttransactions.cfm?Contract=0000000000000000000085553) [see MF #88]. BOEM had online access to the publicly available records of the New York State Public Service Commission ("**NYSPS**") under case 18-T-0604 (see https://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=18-T-0604&submit=Search) [see MF #77, #87, #88]. NYSPSC records contain, *inter alia*, reports showing PFAS contamination exceeding regulatory limits *within* the proposed construction corridor in April 2021 (MF #89). The independent consultant's report pre-dates BOEM's approval by five months. Still, BOEM did not take a "hard look" into possible environmental contamination.

[66] 42 U.S.C. § 4331. NEPA Congressional Declaration

On July 21, 2022, soon *after* filing the Complaint with the District Court for the District of Columbia, Plaintiff received a response from BOEM to a Freedom of Information Act ("**FOIA**") request (DOI-BOEM-2022-004796) that reads— "We are writing to respond to your request. After a thorough search of our files, it has been determined that the BOEM has no records responsive to your request" (see Exhibit B).

The FOIA requested "'[r]ecords generated by a certified scientific laboratory performing analysis to determine concentration levels of per- and polyfluoroalkyl substance ("PFAS") contaminants in soil or groundwater taken from within or near the onshore South Fork Export Cable ("SFEC") route. Such PFAS contaminants (perfluorinated compounds) include but are not limited to perfluorooctanoic acid ("PFOA"), perfluorooctane sulfonic acid ("PFOS"), perfluorobutane sulfonate ("PFBS"), and GenX chemicals. The onshore SFEC route refers to the construction corridor from the mean high-water mark at the beach at Beach Lane in Wainscott to (and including) the interconnection facility in the Town of East Hampton, Suffolk County, NY. 2) Records generated for designing or performing on-site soil or groundwater sampling for the said testing (referred to in paragraph 1 above), such as sampling plans, bore/well locations, maps, and borehole/well logs" (see Exhibit B).

BOEM "shall prepare a concise public record of decision"[67] and "*shall* identify and discuss *all* such factors […] which were balanced by the agency in making its decision and state how those considerations entered into its decision [emphasis added]."[68] Also, an Agency "shall […] [s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not [emphasis added]."[69]

[67] *Id.* § 1505.2 Record of decision
[68] *Id.* (b)
[69] *Id.* (c)

Given that BOEM is statutorily compelled to keep records on PFAS contamination (if it had such records), and, by its own admission, it has "no records" after "a thorough search of [its] files," BOEM, therefore, must not have considered PFAS contamination at all; otherwise it would have the records. However, BOEM's FOIA response contradicts its FEIS. The FEIS reads—"Sampling at the fourth site, NYSDEC #152250, has indicated the presence of perfluorinated compounds." So, BOEM must have checked NYSDEC site record "#152250 (for East Hampton Airport [MF #70, #72]); otherwise, it would not have known that the site has "indicated the presence of perfluorinated compounds." In that case, why did BOEM fail to include the results and a discussion of its implications in its FEIS? We are left guessing. This much is clear, BOEM had ready access to voluminous information on PFAS contamination but failed to acknowledge and discuss known PFAS contamination *within* the construction corridor in violation of NEPA.

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3. No Environmental Safeguards

BOEM asserts its "action is needed to further the United States' policy to make OCS energy resources available for expeditious and orderly development, subject to environmental safeguards (43 U.S.C. §1332(3)), including consideration of natural resources and existing ocean uses."[70] However, given indisputable evidence of pervasive environmental PFAS contamination, BOEM could *not* have ensured that "orderly development" was the subject of "environmental safeguards" or that it considered "natural resources" when it allowed the developer to proceed with construction through a highly contaminated area unabated in violation

[70] See ROD at p. 7, PDF p. 9, ¶ 7

of the Outer Continental Shelf Lands Act (43. U.S.C. §§ 1331, *et seq)*. The OCSLA expressly defines "development" to mean "those activities which take place […], including geophysical activity, drilling, […], and operation of all onshore support facilities, […]" (43 U.S. Code § 1331(l)), including onshore infrastructure for the transmission line.

For example, according to South Fork Wind's Final Hazardous Waste and Petroleum Work Plan, dated April 2021 (which is publicly available on the NYSPSC website)— "Fire Incident No. 8 - Fire at a house on Wainscott-Northwest Road in Wainscott. 75 Wainscott-Northwest Road in Wainscott, close to Montauk Highway" [MF #87, #88]. On March 21, 2022, construction workers are seen in a photograph standing shoulder-deep in the soil near 75 Wainscott NW Road [MF #Penultimate Photo on PDF p. 89 of 90]. The picture indicates that little regard was shown for the safety of workers in proximity to PFAS-contaminated material and no regard for environmental impacts from underground concrete infrastructure and excavation activities (see Appendix 2- Construction near house Fires, at p. 1).

Again, according to South Fork Wind's Final Hazardous Waste and Petroleum Work Plan, "Mr. and Mrs. John C. Tysen's summer home on Beach Lane, Wainscott was destroyed by fire" [MF #88]. The photograph of construction workers standing shoulder-deep in the soil is near the monitoring well (MW-4A) on Beach Lane, where PFAS contamination exceeds the 2016 EPA Health Advisory Level. The picture indicates that little regard was shown for the safety of workers in proximity to PFAS-contaminated material and no regard for environmental impacts from underground concrete infrastructure and excavation activities (see Appendix 2- Construction near house Fires, at p. 2) [MF #Last Photo on PDF p. 90 of 90].

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4. Environmental Justice Ignored

BOEM maintained that it complied with Executive Order 12898, specifically that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations, low-income populations, Native American tribes, and indigenous peoples" (EPA 2019). Still, as discussed above, BOEM contradicted its assurances by failing to consider low-income families who would be adversely affected, disproportionally, by higher electricity rates in the LIPA's service area [MF #33 through #39].

"NEPA serves two fundamental objectives. First, it "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). And, second, it requires "that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision." *Id.* NEPA does not impose substantive obligations on the action agency, but it does establish "procedural requirements designed to force agencies to take a 'hard look' at environmental consequences." *Earth Island Inst. v. U.S. Forest Serv.,* 351 F.3d 1291, 1300 (9th Cir.2003). NEPA and the Council on Environmental Quality's ("CEQ") regulations implementing NEPA, 40 C.F.R. §§ 1500–1508, prescribe the procedures that must be followed in conducting environmental review. *Churchill Cnty. v. Norton,* 276 F.3d 1060, 1071 (9th Cir.2001). "We must ... strictly interpret the

procedural requirements in NEPA and the CEQ regulations to the fullest extent possible consistent with the policies embodied in NEPA." *Id.* at 1072 (internal quotations omitted)." *See WildEarth Guardians v. Mont. Snowmobile Ass'n*, 790 F.3d 920, 924 (9th Cir. 2015)

XII. Conclusion

BOEM asserts that its "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."[71] Further, BOEM maintains that "DOI weighed all concerns in making decisions regarding this Project and has determined that all practicable means within its authority have been adopted to avoid or minimize environmental and socioeconomic impacts associated with the selected alternative and the approval of the COP. The Department selected the Habitat Alternative Layout B after DOI's consideration of 10 letters received commenting on the FEIS. None of these letters identified issues that would require supplementing the FEIS."[72]

The facts do not support BOEM's statements (above).

"[A]n agency cannot ignore evidence contradicting its position […]."[73] However, BOEM ignored the Project cost ($2 billion), ignored its statutorily mandated obligations to evaluate and verify information, ignored PFAS contamination within and around the proposed construction corridor, ignored its responsibility to ensure the development was subjected to environmental safeguards and ignored Execute Order 12898 on environmental justice.

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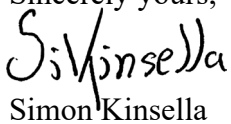
[71] ROD (at p. 1, PDF p. 3, ¶ 1)
[72] *Id.* (at p. 17, PDF p. 19, ¶ 2)
[73] Butte County v. Hogen, 613 F.3d 190, 194 (D.C. Cir. 2010)

For the reasons mentioned above, and many more reasons not mentioned here, I respectfully request partial summary judgment on the claims based on the material facts that show no genuine dispute, move the Court to retain jurisdiction, and seek an expedited hearing.

Dated: September 22, 2022
Corrected: September 26, 2022

Sincerely yours,



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