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EPAExecSec <EPAExecSec@epa.gov>
FW: POTENTIAL HARM FROM PFAS CONTAMINATION AND CLEAN AIR ACT POLICY -- SOUTH FORK OFFSHORE WIND FARM
To: "CMS.OEX" <cms.oex@epa.gov>

Reading file

From: gouri.edlich@wainscott.org <gouri.edlich@wainscott.org>
Sent: Tuesday, January 11, 2022 1:16 PM
To: Regan, Michael <Regan.Michael@epa.gov>
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Subject: POTENTIAL HARM FROM PFAS CONTAMINATION AND CLEAN AIR ACT POLICY -- SOUTH FORK OFFSHORE WIND FARM

Dear Administrator Regan,

My name is Gouri Edlich and I am Chairwoman of the Citizens for the Preservation of Wainscott (CPW). CPW is devoted to preserving the natural beauty and bucolic character of Wainscott, New York.

We write this email to you with respect to the South Fork Wind Farm (SFWF), located at the eastern port of Long Island, New York. This offshore project will include 12 wind turbine generators, submarine cables, an offshore substation, an alternative current (AC) electric cable and interconnection facility that connects the SFWF to the existing mainland electric grid in East Hampton, New York.

We are specifically concerned about the serious public health and environmental impacts resulting from the project's proposed construction of a 138kilovolt AC transmission cable that will run through the hamlet of Wainscott in the Town of East Hampton, New York.

CPW fully supports renewable energy and New York state's commitment to increase renewable energy development to address the serious issue of climate change. Our serious concern arises from SFWF's reckless and unprecedented proposal to construct a high-voltage transmission line, connecting electricity generated from offshore wind turbines to an onshore substation, directly through a residential community and adjacent to a state Superfund site. This onshore construction has the potential for increased exposure from the spread of per- and polyfluoroalkyl substances (PFAS), including perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS), among others.

We are also concerned about the air emissions resulting from the offshore construction activities from the SFWF and the significant change in policy to not require those emissions to be offset.

There are three letters attached that are addressed to you requesting that the U.S. Environmental Protection Agency (EPA) act. The first two letters relate to using EPA's authority under the Clean Water Act (CWA) and Safe Drinking Water Act (SDWA) to prevent PFAS exposure from onshore construction activities from the SFWF AC transmission cable. EPA has broad authority and an imperative to protect our water quality and we believe that these authorities must be used before any construction is allowed to begin.

The third letter relates to the Clean Air Act (CAA) and the significant change in air permitting policy that seems to have occurred related to the CAA Section 328 air permit for the SFWF. While EPA has historically required companies to purchase offsets for offshore construction activities the EPA completely changed course during this permit and is now proposing to not require these offsets. This change means that EPA would no longer require the company to obtain up to 400 tons of nitrous oxide (NOx) offsets, or more than 16 times the estimated annual operation-phase offset requirement.

To ensure that there is full transparency and understanding, we have also attached a similar letter on the Clean Water Act Section 404 permit issues that we have concurrently sent to the U.S. Army Corps of Engineers.

Thank you very much for your consideration,

Gouri Edlich

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Gouri Edlich
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January 11, 2022

Submitted via Email and read receipt requested

Stephan Ryba
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New York District
ATTN: Regulatory Branch
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New York, N.Y. 10278-0090
Stephen.a.ryba@usace.army.mil

RE: SERIOUS CONCERNS AND IMMEDIATE REQUESTED ACTION WITH RESPECT TO SOUTH FORK WIND FARM PERMITTING PROCESS

Dear Mr. Ryba:

The Citizens for the Preservation of Wainscott (CPW) write to express our serious concerns regarding the South Fork Wind Farm (SFWF), located in eastern Long Island. This offshore project, sponsored by Ørsted and Eversource, will include 12 wind turbine generators, submarine cables, an offshore substation, an alternative current (AC) electric cable and interconnection facility that connects the SFWF to the existing mainland electric grid in East Hampton, New York.[1] Without immediate action before January 18, SFWF will be free to begin on-shore construction, and there is clear evidence that construction could potentially pose significant risks groundwater, which supplies much of the community's drinking water needs. Meanwhile, the United States Army Corps of Engineers (the Corps) has not conducted the legally required analysis to properly understand that risk *before* irrevocable harm could ensue.

We are specifically concerned about the potentially serious environmental and public health impacts resulting from the project's proposed construction of a 138-kilovolt AC transmission cable that will land on a residential road in the hamlet of Wainscott in the Town of East Hampton, New York and burial of the transmission cable in a known area of groundwater contamination related to two state Superfund sites.[2] In this letter, CPW asks the Corps to do the following:

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[1] South Fork Wind Farm and South Fork Export Cable Project: Final Environmental Impact Statement, BOEM 2020-057, Bureau of Ocean Management, U.S. Department of the Interior (Aug. 2021 (SFWF FEIS), at 1-1, *available at* https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/SFWF%20FEIS.pdf.
[2] *Id.*

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- **Immediately pause the issuance of the permits pursuant to Section 10 of the Rivers and Harbors Act (RHA, 33 U.S.C. § 403) and Section 404 of the Clean Water Act (CWA, 33 U.S.C. § 1344) authorizing the discharge of dredged or fill material into waters of the United States. Swift action is needed as this permitting is currently scheduled for January 18, 2022, which will authorize immediate construction of the high-voltage transmission cable. Fortunately, this date is arbitrary and not required by law.[3] Instead, the Corps should allow for a reasonable amount of time to conduct a more comprehensive, scientifically based hard-look evaluation as it relates to per- and polyfluoroalkyl substance (PFAS) exposures, monitoring, and containment plans associated with the Beach Lane "proposed action alternative" identified in Bureau of Ocean Energy Management's (BOEM) Final Environmental Impact Statement (FEIS)/Record of Decision (ROD) for the SFWF;**

- **Pursuant to your Clean Water Act 404(b)(1) guidelines, engage with the Environmental Protection Agency (EPA) to impose mandatory conditions including, but not limited to, a robust monitoring and sampling plan to ensure that, before SFWF receives additional permits, including the 404 permit, federal regulators and the public have an informed, legally required understanding of how construction of the high-voltage transmission line will affect the occurrence and movement of PFAS in the community and the health of local residents; and**

- **Forego adopting BOEM's FEIS/ROD until the Corps, in conjunction with EPA, conducts monitoring and sampling to understand the full environmental and public health impacts of PFAS contamination in Wainscott associated with construction of the high-voltage transmission line.**

CPW fully supports renewable energy and New York State's commitment to address the important issue of climate change. Our serious concern arises from SFWF's reckless and unprecedented proposal to construct a high-voltage transmission line, connecting electricity generated from offshore wind turbines to an onshore substation, directly through a residential community and adjacent to two state Superfund sites. The proposal is especially disconcerting considering CPW has proposed viable alternative routes that avoid residential areas while avoiding any potential environmental and public health concerns from the spread of PFAS.

At the outset of the development of the project, we noted our right to be heard in the permitting process, including during its current stage. The SFWF is a Federal Permitting Improvement Steering Council (FPISC) covered project. As such, a lead, participating, or cooperating agency "shall consider new information received after the close of a comment period" if the information satisfies the "requirements under regulations implementing the National Environmental Policy

[3] We are not aware of any current federal requirement or administrative guidance from the Executive Office of the President requiring the Corps to issue a 404 permit within 90 days of BOEM's ROD. In fact, on September 19, 2021, BOEM submitted a request to the Executive Director of the Federal Permitting Improvement Steering Council (FPISC) requesting an extension to the final completion date for EPA's action, "issuance of a final decision for permit approval" for the "Outer Continental Shelf (OCS) air permit," from October 31, 2021, to January 18, 2022.

Act (NEPA)."[4] Our official correspondence as delineated herein, detailing significant violations of administrative process related to the siting and construction of SFWF's high-voltage transmission cable, meets these requirements, and thus requires your urgent consideration.

From the start, through every step of a hurried, arbitrary process, the Town Board of East Hampton and the project developers, Ørsted and Eversource, have, with the acquiescence of federal and state officials, largely ignored or downplayed the presence of PFAS in the Town of East Hampton. Instead of fully investigating the potential consequences of routing the transmission cable through a known area of PFAS-contaminated groundwater they seem to have "just gone through the motions" in their examination as to whether construction of the transmission line will affect the disposition of PFAS in the local environment, and ignore alternative cable routes that would avoid PFAS contamination entirely

BOEM skirted its legal obligations under NEPA. NEPA requires all federal agencies, including BOEM, to take a hard look at the "environmental consequences of proposed federal actions, consider alternatives, and publicly disseminate such information before taking final action."[5] These steps are undeniably required when providing federal permits for the unprecedented construction of a high-voltage transmission cable from an offshore wind farm through a residential community.

Yet BOEM issued an FEIS/ROD for the SFWF that avoided meaningful discussion and analysis of several issues, including the significant presence of PFAS in soil and groundwater along the construction route of the high-voltage transmission cable. BOEM claimed that the "final EIS analyzes impacts associated with the export [high-voltage transmission] cable over its offshore and onshore portions."[6] But it did no such thing. Instead, it brushed aside community concerns, concluding in the FEIS, without evidence or analysis, that environmental impacts "resulting from the Proposed Action alone would be short term to long term and negligible to minor."[7]

The basis for this conclusion is a mystery, given that BOEM *effectively deferred* consideration of critically important issues, including PFAS contamination, to EPA and the Corps—a step that creates a glaring legal deficiency in the FEIS/ROD. As BOEM itself stated in the FEIS:

> BOEM's obligation is to review the proposed Project as outlined in the COP [Construction and Operations Plan] as well as alternatives that meet the purpose and need. Additionally, before any decision is made on the applications before the USACE, *the USACE will perform all reviews required under the statutory authorities governing its actions. These reviews will consider information in this final EIS.*[8]

(Emphasis added.)

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[4] 42 U.S.C. § 4370m–6(2)(A).
[5] The Legal Framework of the National Environmental Policy Act, Congressional Research Service, at 1 (updated Sept. 22, 2021), *available at* https://crsreports.congress.gov/product/pdf/IF/IF11549.
[6] SFWF FEIS, *supra* n.1, at I-68.
[7] *Id.* at H-94.
[8] *Id.* at I-193.

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As we understand it, the Corps is currently preparing a dredge-and-fill permit under Section 404 of the Clean Water Act, which, if granted, would authorize construction of the high-voltage transmission cable. Because BOEM's FEIS/ROD lacks the required thoroughgoing analysis of PFAS contamination tied to the construction of the high-voltage transmission cable, **the Corps cannot use it to inform its analysis supporting the 404 permit.**

As the Corps itself commented, in its role as a cooperating agency in BOEM's EIS process, "Issuance of Section 10 or Section 404 permits *requires NEPA compliance*, which will be met via adoption of BOEM's EIS and issuance of the ROD."[9] (Emphasis added.) But as noted earlier, BOEM *did not comply* with NEPA. **Therefore, the Corps must remedy the deficiencies in BOEM's EIS by conducting its own supplemental risk analysis, pursuant to its statutory authorities, to determine how the construction of the high-voltage transmission cable will affect pre-existing PFAS contamination in Wainscott**.

If the 404 permit were granted by the Corps as scheduled on January 18, 2022, the Corps, following BOEM, will have ignored clear evidence from monitoring wells directly adjacent to the construction route showing the presence of two types of PFAS chemicals, perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS)—at levels above what EPA and the New York State Department of Environmental Conservation (NYSDEC) deem safe.

We note that the Corps, should it choose to issue the 404 permit without conducting a proper review of PFAS contamination, would be disregarding its own policy precedent, *established as recently as last month*. The Corps' Norfolk District and the United States Air Force (USAF) jointly issued a final environmental assessment (EA) under NEPA concerning acquisition of property from the city of Newport News, Virginia. The property was required to expand and enhance the main access gate at Joint Base Langley–Eustis (JBLE-Eustis), Fort Eustis, Virginia.[10]

The parallels to the SFWF, particularly as it relates to Wainscott and its PFAS contamination problem, are striking. Both Wainscott and JBLE-Eustis face legacy contamination from "Aqueous Film Forming Foam" (AFFF) used for fire-suppression at airports. As noted above, Wainscott sits adjacent to the East Hampton airport, designated by the state as a Superfund site, because of the airport's longtime use of AFFF, components of which include two types of PFAS: perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS), among others. Notably, in 2017, officials from the Suffolk County Department of Health tested private wells in the area and found levels of PFOA and PFOS above the EPA's lifetime health advisory levels for

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[9] *Id.* at A-6.

[10] Final Environmental Assessment for Proposed Access Control Point Main Gate with Property Acquisition, United States Air Force & United States Army Corps of Engineers (Dec. 17, 2021) (Main Gate FEA), *available at* (https://www.jble.af.mil/Portals/46/Documents/Eustis%20Environmental/Pollution%20Prevention-Planning/JBLE-E_acp_main_gate_draft_final_EA_3DEC2021_w_appendices_.pdf?ver=eIOkdJ48rLCqnBmJM9HVLA%3D%3D).

both substances.[11] Town residents were offered bottled water as a precaution until the extent of the contamination was more fully understood.[12]

In the EA, the Corps and USAF acknowledge that PFAS "are a source of soil and groundwater contamination at JBLE-Eustis," and that PFAS "are highly toxic compounds that are components of legacy Aqueous Film Forming Foam (AFFF) that the Air Force used in the 1970s, 80s, and early 90s as a firefighting agent to extinguish petroleum fires." The EA identified "three potential PFAS release areas." The Corps and the USAF also conducted a "relative risk evaluation" at each site "that included soil and groundwater sampling to determine the potential risk to public safety, human health, or the environment."[13]

The Corps must do the same for Wainscott and avoid repeating BOEM's, as well federal, state, and local officials', indifference to the long history of PFAS contamination in the Town of East Hampton. As testing of wells in the area has confirmed, PFOA, PFOS and other PFAS compounds have migrated from the airport and adjacent sand and gravel operation and into the surrounding community.[14] The planned SFWF transmission cable alignment passes across the plume of PFAS-contaminated groundwater. Yet, with approval from state and local officials, Ørsted and Eversource have repeatedly claimed, without evidence, that construction activities are unlikely to encounter PFAS—and, even if construction activities did encounter PFAS, the companies claim (again without evidence) that their mitigation plan is sufficient to safely address it.[15]

But according to an affidavit filed by geologist John Conrad, SFWF's "Environmental Management and Construction Plan" includes a monitoring proposal that lacks rigor and contains multiple gaps.[16] For example, Conrad noted "especially large gaps between monitoring wells along the transmission cable corridor in the Wainscott Sand and Gravel area (the 'Gravel Pit') where PFAS-contaminated groundwater is known to exist at shallow depths."[17]

He further noted that "**the cable excavation is likely to extend into PFAS-contaminated groundwater known to exist at shallow depth on and near the Gravel Pit.**"[18] (Notably, there are no known studies or analyses that show that SFWF's construction actions *will likely not*

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[11] Contaminants Found in Drinking Water Near East Hampton Airport, Joanne Pilgrim, The East Hampton Star (Oct. 11, 2017), *available at* https://www.easthamptonstar.com/archive/contaminants-found-drinking-water-near-east-hampton-airport.
[12] Statement from the office of East Hampton Town Supervisor Peter Van Scoyoc (Aug. 3, 2020), *available at* https://ehamptonny.gov/DocumentCenter/View/5187/Pr-Rel-Aug-2-Statement-from-Supervisor.
[13] Main Gate FEA, *supra* n.10 at 3-1.
[14] Hydrologic Assessment of the Wainscott Commercial Center East Hampton, New York, Alpha Geoscience at 8 – 9 (Nov. 2018), *available at* https://www.dec.ny.gov/data/DecDocs/152250/Report.HW.152250.2018-11-12.Alpha%20Geoscience%20Hydrogeology%20Report%20Wainscott%20Sand%20and%20Gravel.pdf. *See also* Health Department Expands Water Quality Testing in Wainscott, Kathryn Menu, Sagharbor.com (May 30, 2018), *available at* https://sagharborexpress.com/health-department-expands-water-quality-testing-wainscott/.
[15] *See generally* Petitioner's Reply Memorandum of Law in Further Support of Motion for Stay Pending Appeal (Petitioner's Reply Memorandum), at 11-16, *Citizens for the Preservation of Wainscott, Inc. v. N.Y.S. Pub. Serv. Comm'n et al.*, No. 2021-06582 (N.Y. 2d App. Div. filed Jan. 3, 2022).
[16] *See generally* Reply Affidavit of John A. Conrad, attached to Petitioner's Reply Memorandum, *supra* n.15.
[17] *Id.* at ¶ 14.
[18] *Id.* at ¶ 18.

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result in PFOA and PFOS migration stemming from construction activities.) In addition, Conrad concluded that "more work is needed to confirm whether the cable system will be in contact with PFAS-contaminated groundwater in the known PFAS plume area and along the entire route."[19]

Finally, Mr. Conrad conclusively demonstrates that SFWF's wells and well testing as part of SFWF's compliance plan fail to meet requirements included in the easement it received from the Town of East Hampton, including installation of wells at 500-feet intervals to measure depth to groundwater and test groundwater samples for PFAS where groundwater is shallow.[20] Conrad noted that, as part of the easement, these actions are to be taken *120 days prior to construction*.[21] "As of the date of the filing of this affidavit [January 3, 2022]," Conrad testified, SFWF "has not satisfied these conditions."[22]

These facts necessitate a delay to give the Corps and EPA appropriate time to gather additional data through monitoring and sampling before issuing the 404 permit. This is especially the case given EPA's growing concerns, raised publicly throughout the permitting process for the SFWF, regarding the public health impacts from PFAS. They are as follows:

- In October, EPA issued a PFAS Strategic Roadmap.[23] The Roadmap states that PFAS "are an urgent public health and environmental issue" and that EPA's integrated approach to PFAS is focused on three central directives including pursuing "a comprehensive approach to proactively prevent PFAS from entering air, land, and water at levels that can adversely impact human health and the environment."[24]

- On November 16, 2021, EPA transmitted to the EPA Science Advisory Board four draft documents with, as EPA reported, "recent scientific data and new analyses that indicate that negative health effects may occur at much lower levels of exposure to PFOA and PFOS than previously understood." These new analyses also indicate to EPA that "PFOA is a likely carcinogen."[25]

- EPA is planning to develop regulations, and to finalize them "in the spring of 2022," to determine PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability (CERCLA or Superfund Act).[26]

- EPA states that they plan to finalize a risk assessment of PFOA and PFOS in November 2024 to determine the potential harm associated with human exposure to chemicals.

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[19] *Id.* at ¶ 19.
[20] *See id.* at ¶¶ 3, 12, 14.
[21] *Id.* at ¶ 20.
[22] *Id.*
[23] PFAS Strategic Roadmap: EPA's Commitments to Action 2021 – 2024, U.S. Environmental Protection Agency (PFAS Strategic Roadmap) (Oct. 2021), EPA-100-K-21-002, *available at* https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf.
[24] *Id.* at 5.
[25] EPA Advances Science to Protect the Public from PFOA and PFOS in Drinking Water (Nov. 16, 2021), *available at* https://www.epa.gov/newsreleases/epa-advances-science-protect-public-pfoa-and-pfos-drinking-water.
[26] PFAS Strategic Roadmap, *supra* n.23, at 13.

- In December, EPA granted a petition from several environmental groups to require testing of PFAS chemicals in North Carolina due to the potential harm to local communities.[27]

As EPA has explained in its PFAS Roadmap, "hazardous substances" designations for PFOA and PFOS "would require facilities across the country to report on PFOA and PFOS releases that meet or exceed the reportable quantity assigned to these substances." The hazardous substance designations would also, EPA continued, "enhance the ability of federal, Tribal, state, and local authorities to obtain information regarding the location and extent of releases."

The Corps would be prudent to delay the planned issuance of the Section 404 permit next week until EPA completes its PFOA and PFOA hazardous designations rulemaking. Moreover, the Corps must know that designating PFOA and PFOS as hazardous substances gives EPA authority to require additional sampling and testing at Superfund sites and adjacent areas. In the case of the SFWF, the limited monitoring and sampling to date, and the testing and remediation promised if SFWF "encounters" PFAS during construction, falls far short of what EPA could require with a new hazardous-substances designation.

These significant issues are not limited to federal permits. We have raised similar concerns about state approvals that were issued without due attention given to serious environmental and public health issues, including contamination from PFAS associated with SFWF's construction activities. Unfortunately, those concerns were ignored. This forced our hand, as we have filed suit in New York State Appellate Court to stay construction until our concerns have been adequately addressed.[28]

From the start, through every step of a hurried process, the Town Board of East Hampton and the project developers, Ørsted and Eversource, have, with the acquiescence of federal and state officials, largely ignored or downplayed the concerning presence of PFAS in the Town of East Hampton. We urge you to take a decidedly different course, in which you conduct the legally required steps to gather more data and information about PFAS contamination stemming from this project. This will ensure that, before construction of the high-voltage transmission cable through Wainscott begins, federal, state, and local officials have a complete understanding of the public health issues at stake, and that the citizens of Wainscott are afforded the full protections of the law.

If the Corps were to issue the permit in the face of the procedural and legal defects and known health risks set out above, litigation could ensue. Parties may have no choice but to seek immediate injunctive relief in federal district court to prevent imminent and irreparable harm to

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[27] Letter Granting Petition, from Michal Freedhoff, Ph.D., Assistant Administrator, Office of Chemical Safety and Pollution Prevention, U.S. Environmental Protection Agency, to Robert M. Sussman, Sussman and Associates (Dec. 28, 2021), *available at* https://www.epa.gov/system/files/documents/2021-12/pfaspetitionresponse.pdf.

[28] *See Citizens for the Preservation of Wainscott, Inc. v. N.Y.S. Pub. Serv. Comm'n et al.,* No. 2021-06582 (N.Y. 2d App. Div. filed Sept. 9, 2021); *Citizens for the Preservation of Wainscott, Inc. et al. v. Town Board of the Town of East Hampton et al.*, No. 601847/2021 (N.Y. Sup. Ct. Suffolk Cnty. filed Feb. 1, 2021).

human health and the environment, and to seek a remand to the Corps to remedy these defects and comply with the law and proper policy.

Thank you for your consideration,

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CC:

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January 11, 2022

Submitted via Email and read receipt requested

The Honorable Michael Regan
Administrator
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Regan.Michael@epa.gov

RE: IMMEDIATE ACTION REQUIRED RELATED TO PFAS WATER POLLUTION ISSUES WITH RESPECT TO SOUTH FORK WIND FARM

Dear Administrator Regan:

The Citizens for the Preservation of Wainscott (CPW) write with respect to the South Fork Wind Farm (SFWF), a proposed offshore wind facility with a cable landing intended for eastern Long Island, New York. The project will include 12 wind turbine generators, submarine cables, an offshore substation, an alternative current (AC) electric cable and interconnection facility that connects the SFWF to the existing mainland electric grid in East Hampton, New York.[1] We request the Environmental Protection Agency (EPA) immediately intervene in a planned January 18 permitting issuance from the U.S. Army Corps of Engineers (Corps).

We are specifically concerned about the potentially serious environmental and public health impacts resulting from the project's proposed construction of a 138-kilovolt AC transmission cable that will land on a residential road in the Town of East Hampton, New York. Construction activities from this project will have water quality impacts stemming from per- and polyfluoroalkyl substances (PFAS), including perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS).

CPW fully supports New York State's commitment to increase renewable energy development to address the important issue of climate change. Our serious concern arises from SFWF's reckless and unprecedented proposal to construct a high-voltage transmission line, connecting electricity generated from offshore wind turbines to an onshore substation, directly through a residential

[1] South Fork Wind Farm and South Fork Export Cable Project: Final Environmental Impact Statement, BOEM 2020-057, Bureau of Ocean Management, U.S. Department of the Interior (Aug. 2021), at 1-1, *available at* https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/SFWF%20FEIS.pdf. (BOEM FEIS)

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community, adjacent to two state Superfund sites and through highly contaminated areas associated with those sites. The proposal is especially disconcerting considering CPW has proposed viable alternative routes that avoid residential areas while protecting against any potential environmental and public health risks from the spread of PFAS.

The Corps is currently developing a permit for the SFWF project under Clean Water Act (CWA) Section 404 (33 U.S.C. § 1344). As part of the CWA § 404 review process, the Corps consults with the EPA. The Corps and EPA have established multiple memoranda of agreement (MOA) to ensure that EPA can provide data and analysis related to water quality as part of the CWA § 404 permit process.[2]

As explained in more detail below, the Corps cannot rely on the Bureau of Ocean Energy Management's (BOEM) final environmental impact statement (FEIS)[3] nor the New York State Public Service Commission's (NY PSC) water quality certification (WQC)[4] for its CWA § 404 determination, as **neither of those permits appropriately considered the environmental impacts from the SFWF construction activities related to PFAS exposure**.[5]

The SFWF construction activities are likely to result in a significant degradation of municipal water supplies (including surface or ground water),[6] and we urge EPA to take the following actions to protect the quality of our water:

- **Immediately engage with the Corps before the Corps' planned January 18 issuance of a final permit under CWA § 404 for SFWF to ensure that the Corps thoroughly evaluates the potential public health and environmental impacts of PFAS contamination from onshore construction activities;**

- **If the Corps does not thoroughly evaluate the potential public health and environmental impacts of PFAS contamination and issues a permit under CWA § 404, EPA should exercise its authority under CWA § 404(c) to "veto" the 404 permit. It should also require SFWF and the Corps to conduct additional analyses before issuing the permit under 404; and**

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[2] *See e.g.,* Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines, U.S. Environmental Protection Agency and U.S. Department of the Army (February 9, 1990), *available at* https://www.epa.gov/sites/default/files/2019-05/documents/1990_army-epa_mitigation_moa.pdf; CWA Section 404(q): Memorandum of Agreement between EPA and Department of the Army (text), U.S. Environmental Protection Agency, U.S. Department of the Army (August 11, 1992), *available at* https://www.epa.gov/cwa-404/cwa-section-404q-memorandum-agreement-between-epa-and-department-army-text.
[3] BOEM FEIS, *supra* n.1.
[4] New York State Public Service Commission. "§401 of the Federal Water Pollution control Act, 33 U.S.C. § 1341, and Article 10 of the New York Public Service Law." November 22, 2021. Available at https://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?Mattercaseno=18-T-0604. (NY PSC WQC)
[5] To note, we have concurrently sent you a letter on PFAS water issues and the need for EPA to use your Safe Drinking Water Act (SDWA) emergency authority to prevent construction before more analysis is completed.
[6] Clean Water Act: Section 404(c) "Veto Authority," U.S. Environmental Protection Agency, *available at* https://www.epa.gov/sites/default/files/2016-03/documents/404c.pdf.

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- **Certify compliance of the monitoring, containment and mitigation conditions related to the unregulated contaminants not currently subject to a national primary drinking water regulation set forth in the NY PSC's WQC issued on November 11, 2021, pursuant to Section 401 of the CWA, 33 U.S.C. § 1341, and Article 10 of the New York Public Service Law, and the Nationwide Fifth Unregulated Contaminant Monitoring Rule (UCMR 5), issued on December 20, 2021.**

I. BACKGROUND

Section 404(a) of the CWA regulates the "discharge of dredged or fill material into the navigable waters at specified disposal sites" and requires the Corps to provide a permit to companies before they can begin construction or operation. Before the Corps can issue the CWA § 404 permit, the NY PSC must issue SFWF a Water Quality Certification (WQC) under Section 401 of the CWA, which it issued to the SFWF on November 22, 2021.[7]

Section 404(c) of the CWA "authorizes EPA to prohibit, restrict, or deny the discharge of dredged or fill material at defined sites in waters of the United States (including wetlands) whenever it determines, after notice and opportunity for public hearing, that use of such sites for disposal **would have an unacceptable adverse impact** on one or more of various resources, including fisheries, wildlife, municipal water supplies, or recreational areas" (emphasis added).[8] This provision of the CWA is known as EPA's "veto authority" of a Corps permit.

EPA has used its veto authority in several instances during the 404 permit process after it concluded that specific projects presented unacceptable threats to water quality.[9] EPA does not need to wait for the Corps to provide its 404 permit as the D.C. Circuit Court of Appeals has held that EPA can exercise its 404(c) veto authority at any time, even in an *ex post* manner.[10]

II. NEITHER THE BOEM FEIS NOR THE NY PSC WATER QUALITY CERTIFICATION APPROPRIATELY CONSIDERED THE IMPACT FROM PFAS DURING CONSTRUCTION

To expedite the SFWF permits to begin construction, federal and state officials failed to thoroughly analyze how construction activities would affect local water quality and the health of residents in Wainscott from PFAS contamination. BOEM's and the NY PSC's failure to sufficiently consider PFAS contamination resulting from sediment and dredge fill impacts requires the Corps to conduct further analysis to address risks to human health and safety before issuing its CWA § 404 permit.

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[7] NY PSC WQC, *supra* n.4.
[8] Restriction of Disposal Sites under CWA Section 404(c), U.S. Environmental Protection Agency, *available at* https://www.epa.gov/cwa-404/restriction-disposal-sites-under-cwa-section-404c.
[9] Chronology of CWA Section 404(c) Actions, U.S. Environmental Protection Agency, *available at* https://www.epa.gov/cwa-404/chronology-cwa-section-404c-actions.
[10] *See Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 713 (D.C. Cir. 2016) ("The EPA's *ex post* withdrawal is a product of its broad veto authority under the CWA, not a procedural defect.").

A. BOEM's FEIS failed to take a hard look at the impacts of PFAS as required by the National Environmental Policy Act (NEPA)

BOEM did not conduct the appropriate survey analysis related to PFAS, deferring that required work to EPA and the Corps, which resulted in a glaring legal deficiency in BOEM's FEIS/ROD. BOEM's failure to adequately address likely impacts to degradation of municipal water supplies (not to mention significant loss of or damage to fisheries, shellfishing, wildlife habitat, or recreation areas) requires meaningful and timely engagement between EPA and the Corps.

As part of the NEPA process, BOEM develops a draft EIS (DEIS) and then releases it for public comment. This is followed by an FEIS that includes responses to public comments. During the DEIS public comment period, community stakeholders requested that BOEM include references to the New York State Department of Environmental Conservation (NYSDEC) East Hampton Airport state Superfund site, listed as such by NYSDEC nearly 14 months earlier, to address the potential impacts of PFAS groundwater contamination.[11]

BOEM's response to comments in the FEIS referenced the East Hampton Superfund site. BOEM acknowledged the importance of the Long Island aquifer as "a sole source supplier" of groundwater in a New York-designated "Special Groundwater Preserve Area" and the presence of PFAS "within and around the site." However, BOEM's FEIS omits any further considerations or direction to EPA or the Corps under CWA § 404(b)(1) for appropriate monitoring, containment or mitigation activities related to PFAS.[12]

While CPW raised significant safety and environmental concerns during the public comment period, BOEM's response fails to adequately address local stakeholder concerns, particularly as they related to the proximity of Wainscott residents to two active Superfund sites, and the emerging PFAS risks EPA raised (more detail on this below) during the drafting of BOEM's FEIS.[13]

BOEM's FEIS also referenced NYSDEC's 1999 "Technical Guidance for Screening Contaminated Sediments." However, neither BOEM's FEIS nor the NY PSC WQC identify any state or federal actions to investigate the nature and extent of any sediment contamination.

Also of note, the nature and extent of the risk of PFAS concentrations and the risk of migration of such contamination from the East Hampton State Superfund site is still under a state-led

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[11] BOEM FEIS, *supra* n.1, at I-94.
[12] *Id.*
[13] *Id.* at I-104.

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investigation. The second and third phases of that state-led investigation are not expected to be completed until Spring 2023[14] (the first phase was scheduled to begin in September 2021).[15]

It would be imprudent for EPA and the Corps to rush to approve a dredge and fill construction permit before completion of a critical state investigation to define the nature and extent of PFAS contamination in soil, surface water, groundwater, and any other parts of the environment that may be affected.

B. NY PSC water quality certification did not appropriately analyze the impacts of PFAS

The NY PSC issued a WQC for the project but failed to appropriately consider the potential impacts from additional PFAS exposure. The NY PSC WQC relies on deficient monitoring and sampling conditions, explained in greater detail in Section V below.

III. EPA HAS ACKNOWLEDGED THAT PFAS IS A RISK TO HUMAN HEALTH AND ENVIRONMENT

EPA has expressed significant concern about the dangers PFAS pose to public health and is taking several actions to address them.

- In October, EPA issued a PFAS Strategic Roadmap.[16] The Roadmap states that PFAS "are an urgent public health and environmental issue" and that EPA's integrated approach to PFAS is focused on three central directives including pursuing "a comprehensive approach to proactively prevent PFAS from entering air, land, and water at levels that can adversely impact human health and the environment"[17]

- EPA plans to finalize a risk assessment of PFOA and PFOS in November 2024 to determine the potential harm associated with human exposure to chemicals

- EPA is planning to develop regulations, and propose them "in the spring of 2022," to designate PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability (CERCLA or Superfund Act)[18]

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[14] East Hampton Airport - Wainscott Well Sampling Plan, NYSDEC, *available at* https://www.dec.ny.gov/data/DecDocs/152250/. Remedial Investigation/Feasibility Study Work Plan Prepared for East Hampton Airport Site—NYSDEC Site No. 152250 (May 2021), at 3-18, figure 3.7.1, *available at* https://www.dec.ny.gov/data/DecDocs/152250/Work%20Plan.HW.152250.2021-06-30.East%20Hampton%20Airport%20Site%20RIFS%20WP-FINAL%20.pdf (showing exposure assessment scheduled to be completed Spring 2023).

[15] "East Hampton Now Superfund Site," by Christopher Walsh, *East Hampton Star*, September 8, 2021 (East Hampton Airport Now Superfund Site | The East Hampton Star).

[16] PFAS Strategic Roadmap: EPA's Commitments to Action 2021 – 2024, U.S. Environmental Protection Agency (Oct. 2021), EPA-100-K-21-002, *available at* https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf.

[17] *Id.* at 5.

[18] *Id.* at 13.

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- In December, EPA granted a petition from several environmental groups to require testing of PFAS chemicals in North Carolina due to the potential harm to local communities[19]

The foregoing information, and other information developed by federal and state governments, clearly indicate that PFAS, especially PFOA and PFOS, endanger public health and environment and must be prevented from spreading in Wainscott. Significant additional testing is required before the start of any construction of SFWF's high-voltage transmission cable.

IV. THERE IS A HISTORY OF HARMFUL PFAS EXPOSURE IN EAST HAMPTON

As noted above, there is a long history of PFAS exposure in the Town of East Hampton. In fall 2017, NYSDEC provided initial findings of PFOA and PFOS in over 258 home wells in Westhampton and Wainscott and urged residents to have their wells tested.[20] In response to those tests, the Suffolk County Water Authority extended public water mains through the area and provided $3,000 grants to residents whose wells were contaminated with PFAS.[21] These procedures cost the county over $7.7 million.[22]

Also, in June 2019, and as referenced above, as part of the PFAS testing and review process, NYSDEC declared the East Hampton Airport a state Superfund site under the "Inactive Hazardous Waste Disposal Site Program" (State Superfund Program).[23] The East Hampton Airport was designated a state Superfund site due to fire-fighting foam containing PFAS – including PFOA and PFOS – being used and stored in East Hampton Airport during crash response and training. In response to that Superfund site designation, Suffolk County and the Town of East Hampton have begun mitigating PFAS exposures through various measures. The Town of East Hampton has filed a lawsuit against the East Hampton Fire Department, in which it declared that the costs of cleanup could be in the tens of millions of dollars.[24]

In 2019, NYSDEC designated the Wainscott Sand and Gravel Property as a potential Superfund site due to sampling that showed PFAS at levels greater than those deemed safe by the state of New York.[25]

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[19] Letter Granting Petition, from Michal Freedhoff, Ph.D., Assistant Administrator, Office of Chemical Safety and Pollution Prevention, U.S. Environmental Protection Agency, to Robert M. Sussman, Sussman and Associates (Dec. 28, 2021), *available at* https://www.epa.gov/system/files/documents/2021-12/pfaspetitionresponse.pdf.
[20] Earth Matters: Cleanup slow for Long Island's superfund sites, Francine Furtado, The Island Now (May 24, 2019), *available at* https://theislandnow.com/blog-112/earth-matters-cleanup-slow-for-long-islands-superfund-sites/
[21] Parts of East Hampton Airport added to State Superfund Registry, Christopher Walsh, The East Hampton Star (June 5, 2019), *available at* https://www.easthamptonstar.com/top-news-government/201966/east-hampton-airport-added-state-superfund-registry.
[22] PFAS Lawsuit Shows Pandemic Is Not Stopping Contamination Claims, Jessica Deyoe, CMBG3 Law (Apr. 20, 2020, *available at* https://www.cmbg3.com/pfas-lawsuit-ny.
[23] *Id.*
[24] *Id.*
[25] DEC's Assessment of the Wainscott Sand and Gravel Property, Nicholas C. Rigano, Rigano LLC, *available at* https://ehamptonny.gov/DocumentCenter/View/5914/DEC-site-characterization-presentation-PDF.

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V. SFWF CONSTRUCTION IS LIKELY TO RESULT IN PFAS ENTERING CITIZENS' DRINKING WATER

The proposed SFWF proposed high-voltage cable consists of three segments within New York: (1) a 3.5-mile submarine segment of cable running through New York State territorial waters; (2) a 4.1-mile underground segment of cable running through East Hampton (almost entirely through Wainscott); and (3) a new substation to connect the high-voltage cable to the existing East Hampton substation.[26]

The high-voltage cable would entail thousands of feet of directional drilling, high-decibel noise, diesel fumes, miles of trenching for installation of a concrete encased duct bank system, splice boxes and manholes, cable pulling into the duct system, splicing together of cable segments, and complex logistics and methods.[27]

The trenching crosses the plume of PFAS-contaminated groundwater that originated at the East Hampton Airport and expanded southward to the adjacent Gravel Pit, which is currently contaminated with PFAS. Installation of the high-voltage cable in this area will entail excavating within the PFAS contaminant plume that is known to present in shallow groundwater in the area. Excavation could become a pathway for movement of PFAS-contaminated groundwater causing other areas – including residential water wells – to be contaminated or further contaminated.[28]

SFWF has conceded that: (1) PFAS is dangerous to (i.e., endangers) public health and the environment; (2) PFAS contamination near the East Hampton Airport can move laterally with groundwater and such contamination would most likely be encountered via migration of groundwater towards the project; and (3) PFAS contamination at the Gravel Pit site south of the East Hampton Airport along SFW's proposed land route.[29] Indeed, the route for the high-voltage transmission cable crosses a known PFAS plume where the water table is shallow enough for the cable excavation to intersect contaminated groundwater.[30]

The planned transmission cable corridor is directly adjacent (within 50 feet) of the East Hampton Airport and will almost certainly encounter PFAS contamination that has migrated from the airport.[31] Utility trenches that intersect contaminated groundwater have the potential to become conduits for movement of the contaminants. Therefore, this project has the potential to increase the likelihood of PFAS exposure in the Town of East Hampton.

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[26] Verified Petition and Complaint at 15, *Citizens for the Preservation of Wainscott, Inc. et al. v. Town Board of the Town of East Hampton et al.*, No. 601847/2021 (N.Y. Sup. Ct. Suffolk Cnty. filed Feb. 1, 2021), Doc. No. 1.
[27] *Id.* at 21.
[28] *Id.* at 24-25.
[29] *See id.* at 30-31.
[30] Petitioner's Reply Memorandum of Law in Further Support of Motion for Stay Pending Appeal at 14, *Citizens for the Preservation of Wainscott, Inc. v. N.Y.S. Pub. Serv. Comm'n et al.*, No. 2021-06582 (N.Y. 2d App. Div. filed Jan. 3, 2022).
[31] *Id.* at 13. *See also* Reply Affidavit of John A. Conrad at ¶¶ 3, attached to Petitioner's Reply Memorandum of Law in Further Support of Motion for Stay Pending Appeal, *Citizens for the Preservation of Wainscott, Inc. v. N.Y.S. Pub. Serv. Comm'n et al.*, No. 2021-06582 (N.Y. 2d App. Div. filed Jan. 3, 2022) ("SFW has not properly accounted for the very real possibility that known PFAS contaminants will be encountered during construction along its preferred Beach Lane route.") (footnote omitted), 18 ("[T]he cable excavation is likely to extend into PFAS-contaminated groundwater known to exist at shallow depth on and near the Gravel Pit ...").

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According to an affidavit filed by geologist John Conrad, SFWF's "Environmental Management and Construction Plan" includes a monitoring proposal that lacks rigor and contains multiple gaps.[32] For example, Conrad noted "especially large gaps between monitoring wells along the transmission cable corridor in the Wainscott Sand and Gravel area (the 'Gravel Pit') where PFAS-contaminated groundwater is known to exist at shallow depths."[33]

He further noted that "**the cable excavation is likely to extend into PFAS-contaminated groundwater known to exist at shallow depth on and near the Gravel Pit.**"[34] (Notably, there are no known studies or analyses that show that SFWF's construction actions *will likely not result* in PFOA and PFOS migration stemming from construction activities.) **In addition, Conrad concluded that "more work is needed to confirm whether the cable system will be in contact with PFAS-contaminated groundwater in the known PFAS plume area and along the entire route."**[35]

Finally, he conclusively demonstrates that SFWF's wells and well testing as part of SFWF's compliance plan fail to meet requirements included in the easement it received from the Town of East Hampton, including installation of wells at 500-feet intervals to measure depth to groundwater and test groundwater samples for PFAS where groundwater is shallow.[36] Conrad noted that, as part of the easement, these actions are to be taken *120 days prior to construction*.[37] "As of the date of the filing of this affidavit [January 3, 2022]," Conrad testified, SFWF "has not satisfied these conditions."[38]

VI. THE CORPS CANNOT RELY ON BOEM'S FEIS OR NY PSC'S WQC FOR ITS CWA 404 DETERMINATION AND MUST PERFORM ITS OWN SURVEYS AND ANALYSIS

For these and other reasons stated above, the Corps cannot rely on either BOEM's FEIS or the NY PSC's WQC to conclude that water quality is being protected by the SFWF project. Both analyses are deficient in their response to, and limited analysis of, potential PFAS contamination and ignore the significant new information about the risks of PFAS from EPA and by NYSDEC's designation of the East Hampton Airport as a Superfund site and new state regulations governing PFAS.

Due to the significant deficiencies in those permits, the Corps should perform its own surveys and analysis of the potential harm of PFAS contamination from construction activities. If it does not have the resources to conduct such activity, it should request EPA to conduct those required actions.

We note that the Corps, should it choose to issue the 404 permit without conducting a proper review of PFAS contamination, would be disregarding its own policy precedent, *established as*

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[32] *See generally id.*
[33] *Id.* at ¶ 14.
[34] *Id.* at ¶ 18.
[35] *Id.* at ¶ 19.
[36] *See id.* at ¶¶ 3, 12, 14.
[37] *Id.* at ¶ 20.
[38] *Id.*

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recently as last month. The Corps' Norfolk District and the United States Air Force (USAF) jointly issued a final environmental assessment (EA) under NEPA concerning acquisition of property from the city of Newport News, Virginia. The property was required to expand and enhance the main access gate at Joint Base Langley–Eustis (JBLE-Eustis), Fort Eustis, Virginia.[39]

The parallels to the SFWF, particularly as it relates to Wainscott and its PFAS contamination problem, are striking. Both Wainscott and JBLE-Eustis face legacy contamination from "Aqueous Film Forming Foam" (AFFF) used for fire-suppression at airports. As noted above, the East Hampton airport was designated by the state as a Superfund site because of the airport's longtime use of AFFF, components of which include two types of PFAS: perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS), among others. Notably, in 2017, officials from the Suffolk County Department of Health tested private wells in the area and found levels of PFOA and PFOS above the EPA's lifetime health advisory levels for both substances.[40] Town residents were offered bottled water as a precaution until the extent of the contamination was more fully understood.[41]

In the EA, the Corps and USAF acknowledge that PFAS "are a source of soil and groundwater contamination at JBLE-Eustis," and that PFAS "are highly toxic compounds that are components of legacy Aqueous Film Forming Foam (AFFF) that the Air Force used in the 1970s, 80s, and early 90s as a firefighting agent to extinguish petroleum fires." The EA identified "three potential PFAS release areas." The Corps and the USAF also conducted a "relative risk evaluation" at each site "that included soil and groundwater sampling to determine the potential risk to public safety, human health, or the environment."[42]

The Corps must do the same for Wainscott and avoid repeating BOEM's, as well federal, state, and local officials,' indifference to the long history of PFAS contamination in the Town of East Hampton.

VII. IT IS EPA'S RESPONSIBILITY TO PROTECT OUR NATION'S WATER QUALITY

If the Corps does rely on these deficient analyses noted above, EPA must intervene immediately and exercise its veto authority under CWA § 404(c) to protect our water from dangerous PFAS contamination. EPA is responsible for protecting our water quality and human health, and providing healthy habitat for fish, plants, and wildlife.[43] If SFWF's high-voltage transmission

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[39] Final Environmental Assessment for Proposed Access Control Point Main Gate with Property Acquisition, United States Air Force & United States Army Corps of Engineers (Dec. 17, 2021) (Main Gate FEA), *available at* (https://www.jble.af.mil/Portals/46/Documents/Eustis%20Environmental/Pollution%20Prevention-Planning/JBLE-E_acp_main_gate_draft_final_EA_3DEC2021_w_appendices_.pdf?ver=eIOkdJ48rLCqnBmJM9HVLA%3D%3D).
[40] Contaminants Found in Drinking Water Near East Hampton Airport, Joanne Pilgrim, The East Hampton Star (Oct. 11, 2017), *available at* https://www.easthamptonstar.com/archive/contaminants-found-drinking-water-near-east-hampton-airport.
[41] Statement from the office of East Hampton Town Supervisor Peter Van Scoyoc (Aug. 3, 2020), *available at* https://ehamptonny.gov/DocumentCenter/View/5187/Pr-Rel-Aug-2-Statement-from-Supervisor.
[42] Main Gate FEA, *supra* n.37 at 3-1.
[43] Summary of Clean Water act, U.S. Environmental Protection Agency, *available at* https://www.epa.gov/laws-regulations/summary-clean-water-act.

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cable were allowed to proceed without a proper analysis and understanding of the impacts from PFAS, EPA will fail to meet its fundamental statutory obligations and allow serious harm to befall the citizens of Wainscottt. The Corps' plans to finalize this defective and dangerous permit by January 18 heighten the urgency of this situation.

Thank you for your consideration,

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January 11, 2022

Submitted via Email and read receipt requested

The Honorable Michael Regan
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
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RE: DEFECT IN SOUTH FORK WIND REVISED DRAFT AIR PERMIT: FAILURE TO REQUIRE OFFSETS FOR CONSTRUCTION-RELATED AIR EMISSIONS

Dear Administrator Regan:

We write to urge you to correct an egregious legal and policy defect in the Revised Draft air permit for the South Fork Wind Farm (SFWF), a 132-megawatt offshore wind project comprised of 12 turbines, located 35 miles east of Montauk, New York.[1] If you do not correct this failure, you will be endangering the health of residents onshore, particularly asthmatic children, as well as overseeing an opaque and unjustified departure from over a decade of Environmental Protection Agency (EPA) practice, as well as from Congress's intent in enacting the Clean Air Act.

The Citizens for the Preservation of Wainscott (CPW) fully support New York State's ambitious climate change goals. This includes the commitment to increase renewable energy development, such as offshore wind, to address the important issue of climate change. Nonetheless, we object to the project's hurried environmental review process at the federal, state, and local levels, which, in important respects, compromised legal requirements to consider impacts to public health and the environment in a careful and deliberate manner.

These failures were particularly acute with respect to the South Fork Export Cable, a high-voltage transmission line that will connect the project to an onshore substation. The landing site and cable will be sited directly through a residential area and adjacent to a Superfund site which is the locus of contamination from per- and polyfluoroalkyl substances (PFAS), including perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS).

[1] *See* South Fork Wind – Powered by Ørsted & Eversource, *available at* https://southforkwind.com/.

The placing of the landing site in a residential area was unprecedented both in New York and Denmark (the home country of SFWS's parent Ørsted) and was taken despite the availability of viable alternative routes. Officials ignored or gave short shrift to serious environmental concerns, such as contamination from PFAS and the threat that this contamination poses to drinking and groundwater in the Town of East Hampton.

These significant issues are not limited to federal permits. We have raised similar concerns about state approvals that were issued without due attention given to serious environmental and public health issues, including contamination from perfluoroalkyl substances, associated with SFWF's construction activities. Unfortunately, those concerns were ignored. This forced our hand, as we have filed suit in New York State Appellate Court to stay construction until our concerns have been adequately addressed.[2]

There are other aspects of the project that permitting officials appeared to gloss over and, in some cases, violate precedent and clear federal and state legal mandates. This is the case with Clean Air Act requirements governing offshore construction. We are concerned that SFWF's construction-related emissions, in the absence of any offset requirement, will endanger air quality for, and the health of, residents in areas closest to the offshore construction site.

- In its Revised Draft Outer Continental Shelf (OCS) Air Permit, EPA departed from the original Draft Permit for SFWF by dropping *all* analysis of the required offsets for air emissions associated with the wind farm's construction. As we address in more detail below, this departure from longstanding EPA practice is incompatible with the Clean Air Act and unjustifiable as a matter of air-quality policy.

- This sudden and unjustifiable change from EPA's initial Draft Permit renders the project legally vulnerable and, more importantly, endangers the health of onshore residents. Their lungs will be exposed to the increased emissions associated with the wind farm's construction without the benefits of offsetting emission reductions. The revised permit's abandonment of this requirement represents a dereliction of EPA's duty to protect the health of the American people in accordance with the requirements of the Clean Air Act.

- EPA must revise the draft permit to reinstate the construction-emissions offset analysis and requirements, in keeping with the proper approach contained in the initial draft permit but abandoned in the revised draft permit. If EPA wishes to explore changes to its OCS permitting policy of this magnitude, *it should do so only through formal notice-and-comment rulemaking procedures compliant with the requirements for such rulemakings under the Administrative Procedure Act and the Clean Air Act.*

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[2] *See Citizens for the Preservation of Wainscott, Inc. v. N.Y.S. Pub. Serv. Comm'n et al.*, No. 2021-06582 (N.Y. 2d App. Div. filed Sept. 9, 2021); *Citizens for the Preservation of Wainscott, Inc. et al. v. Town Board of the Town of East Hampton et al.*, No. 601847/2021 (N.Y. Sup. Ct. Suffolk Cnty. filed Feb. 1, 2021).

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I. THE CLEAN AIR ACT REQUIRES OUTER CONTINENTAL SHELF AIR PERMITS TO TAKE INTO ACCOUNT CONSTRUCTION-RELATED EMISSIONS AND REQUIRE EMISSIONS OFFSETS WHERE INDICATED

Section 328 of the Clean Air Act, 42 U.S.C. § 7627, governs EPA's control of air pollution from OCS sources. The statute explicitly defines such sources to include construction activities:

> The terms "Outer Continental Shelf source" and "OCS source" include any equipment, activity, or facility which— (i) emits or has the potential to emit any air pollutant, (ii) is regulated or authorized under the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.], and (iii) is located on the Outer Continental Shelf or in or on waters above the Outer Continental Shelf.
>
> Such activities include, but are not limited to, platform and drill ship exploration, *construction*, development, production, processing, and transportation. For purposes of this subsection, emissions from any vessel servicing or associated with an OCS source, including emissions while at the OCS source or en route to or from the OCS source within 25 miles of the OCS source, shall be considered direct emissions from the OCS source.

42 U.S.C. § 7627(a)(4)(C) (emphasis added).

EPA's prior practice demonstrates that it understands that construction-related emissions are included within the congressional mandate for it to control air pollution from OCS sources. As recently as *this past summer*, in an air permit for Vineyard Wind, another offshore wind farm project near Massachusetts, EPA included construction-related emissions in its analysis, and included three pages of detailed analysis and offset requirements.[3]

This section of the Vineyard Wind permit included detailed requirements for that project's permittee to record "each and every day" the construction-phase emissions from equipment and vessels, including detailed formulas for calculating emissions, and specific requirements on how the permittee could obtain emissions offsets for its construction emissions.[4] Indeed, the construction phase offset analysis section of the Vineyard Wind permit (three full pages) is far longer and more detailed than the analysis for operational-phase offsets (approximately half a page).

As the "fact sheet" accompanying EPA's revisions to the Revised Draft Permit acknowledges, the (proper) approach that EPA took with respect to Vineyard Wind was not a one-off. Indeed, EPA similarly required offsets for construction-related emissions in the first OCS wind farm permit it issued, for Cape Wind in 2011.[5]

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[3] Outer Continental Shelf Air Permit OCS-R1 03, Vineyard Wind 1, LLC, U.S. Environmental Protection Agency—Region 1 (June 2021), at 15-18 ("V. NNSR Offsets-- A. Construction Phase"), *available at* https://www.epa.gov/sites/default/files/2021-06/documents/vineyard-wind-1-llc-final-permit.pdf.
[4] *Id.*, *see esp.* at 15.
[5] Supplemental Fact Sheet (Oct. 20, 2021), at 10 & n.8, *available at* https://www.epa.gov/system/files/documents/2021-10/sfw-supplemental-fs-10-20-2021.pdf.

In the matter of SFWF, EPA *initially* appeared to comply with the Clean Air Act and its own longstanding practice. In its first Draft Permit for South Fork, issued shortly after the final permit for Vineyard Wind, EPA properly included a detailed analysis and set of requirements for South Fork's construction emissions and required offsets. (Again, this analysis was considerably longer than that for the operational phase.[6])

As analyzed in the initial Draft Permit, South Fork would have been required to obtain offset credits in the amount of up to 403 tons of nitrogen oxides (NO_X) to offset its construction-related emissions.[7] **This figure represented more than *sixteen times* the annual operational-phase offset requirement.**

II. EPA'S REVISED DRAFT PERMIT FOR THE SOUTH FORK WIND FARM PROJECT ABANDONED ALL CONSTRUCTION-RELATED OFFSET ANALYSIS AND REQUIREMENTS WITHOUT AN ADEQUATE JUSTIFICATION

The only comment on the initial draft permit received by the EPA was from SFWF itself.[8] The company's comments provided detailed, page-by-page responses to many aspects of the initial draft permit. While the company made multiple specific, line-item comments on certain aspects of the construction-offset section, it said not a word about *entirely removing* the construction offset requirement.[9] Presumably this was because the company knew full well, as did the EPA itself, that including that requirement was in keeping with the Clean Air Act and EPA's prior practice in offshore wind permitting.

When EPA issued a Revised Draft Permit for the SFWF, however, it abruptly abandoned its longstanding practice and its proper observance of the Clean Air Act's requirements. The Revised Draft Permit *entirely omits* the construction-phase offset section that had appeared in the initial Draft Permit (similar to the one appearing in the final Vineyard Wind permit).[10] *The Revised Draft Permit, on its face, does not appear to provide any explanation for this change of course.*

In a "Supplemental Fact Sheet" accompanying the Revised Draft Permit, EPA announced:

> Since the initial public comment period on the draft permit, EPA Regional Offices and Headquarters have undertaken an assessment of the application of the offset requirements

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[6] *Compare* Draft Outer Continental Shelf Air Permit OCS-R1-04, U.S. Environmental Protection Agency—Region 1 (June 24, 2021), at 12-14 (construction phase), *with id.* at 14 (operational phase), *available at* https://www.epa.gov/system/files/documents/2021-07/south-fork-draft-permit.pdf.

[7] Fact Sheet (June 24, 2021), at 56, Table 8, *available at* https://www.epa.gov/system/files/documents/2021-07/south-fork-draft-permit-fs.pdf

[8] *See* South Fork Wind LLC's - South Fork Windfarm Draft Outer Continental Shelf Air Permit, *available at* https://www.epa.gov/caa-permitting/south-fork-wind-llcs-south-fork-windfarm-draft-outer-continental-shelf-air-permit.

[9] *See* Comments, South Fork Wind (Aug. 5, 2021), available at https://www.epa.gov/system/files/documents/2021-10/sfw-ocs-air-permit-cover-letter-comments-8-5-21.pdf.

[10] Revised Draft Outer Continental Shelf Air Permit OCS-R1-04, U.S. Environmental Protection Agency Region 1 (Oct. 20, 2021), *available at* https://www.epa.gov/system/files/documents/2021-10/sfw-revised-draft-permit-ocs-r1-04_1.pdf.

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> under the Nonattainment New Source Review (NNSR) program to OCS sources subject to Part 55. As a result of EPA's assessment, *EPA is now proposing that the emission offset requirements under the CAA and NNSR regulations do not apply to construction emissions on the OCS.*

Supplemental Fact Sheet at 5 (emphasis added).

The why and how of EPA's decision to change course here are unclear. The project proponent—at least judging by its publicly filed comments—did not request it. And the general and vague reference to "EPA Regional Offices" (which ones?) "and Headquarters" (which offices? At what level of management?) raises more questions than it answers. *What is clear is that EPA's explanation for its change in course is legally dubious, fails to consider important aspects of the problem, and was carried out without the level of transparency and public participation befitting such a momentous change in policy.*

EPA's explanation of its new policy is, at base, a sleight of hand. It engages in a deep dive into the *generally applicable* New Source Review permitting section of the Clean Air Act, Section 173, as well as EPA's regulations and Massachusetts's law governing that permitting program. EPA, in a departure from its prior requirements, purports to discover that nowhere do these laws and regulations explicitly require offsets for construction-related emissions. And so, EPA decided to stop requiring them.

What EPA ignores is the full importance of the language in Section 328, which, as explained above, explicitly defines an OCS Source to include "construction" activities. EPA does note the fact of this language early in its discussion,[11] but never explains how it is compatible with its newly minted interpretation and policy, which have the effect of entirely freeing construction activities from offset requirements.

As noted above, in the case of South Fork, the construction-phase offsets anticipated in the initial Draft Permit were more than *sixteen times* the anticipated annual required operation-phase offsets. This discrepancy demonstrates that EPA's abandonment of the construction-phase offset requirement is no minor change. Indeed, this policy change has the effect of gutting Section 328's explicit command that construction activities be included in the ambit of EPA's OCS source air-pollution control program.

EPA now claims that its earlier permits for other offshore wind projects, and its initial Draft Permit for South Fork, "did not provide a robust explanation for why EPA required offsets from construction emissions."[12] There's an obvious explanation for why EPA didn't feel the need to write treatises in those prior permits and draft permits: they were in keeping with the plain text and clear intent of Section 328. EPA's embedding a legal brief in this "Supplemental Fact Sheet" obscures the significance of this change in approach. This increases the likelihood that the

[11] Supplemental Fact Sheet at 7.
[12] *Id.* at 10.

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public wouldn't notice that this change will allow many more tons of emissions without required offsets.

This alarming departure from precedent is not an acceptable method for EPA to make significant changes to its policies. Instead, any such changes should only be undertaken through observance of all applicable notice-and-comment procedures established by the Administrative Procedure Act and the Clean Air Act. *See also* 42 U.S.C. § 7627(a)(1) (specifically directing EPA to establish OCS air-pollution control requirements "by rule").

Indeed, EPA's failure to consider the magnitude of the implications of its decision is a tell-tale sign—as the Supreme Court has long held—that the agency is acting in an arbitrary and capricious manner. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Specifically, nowhere in the Supplemental Fact Sheet does EPA even *acknowledge* that abandoning its longstanding practice (and the requirements of the Clean Air Act) that offset requirements apply to offshore construction will result in more emissions being unabated by offsets. The failure of the nation's top environmental regulator, charged by Congress in the Clean Air Act with protecting air quality and human health impacted by it, to *even consider* the health and environmental impacts of this about-face is completely unacceptable.

III. THE CONSTRUCTION-RELATED EMISSIONS, WHICH EPA IS UNJUSTIFIABLY NO LONGER REQUIRING TO BE OFFSET, WILL HARM RESIDENTS ONSHORE

EPA's abandonment of its longstanding practice and the requirements of the Clean Air Act, a move with significant implications for air quality and public health is highly suspect, particularly given the massive commitments to expanding offshore wind that this Administration has made. EPA's choice to make this about-face on policy in the obscure record of an individual permitting action, rather than in a publicly transparent way where the public has a full opportunity to comment on its legality and health impact, is improper. If EPA were to finalize the revised Draft Permit, the final permit would be vulnerable to legal challenge. Moreover, the permitting would trigger significant environmental and health harms that will flow both directly from this permit and from the apparent precedent it sets for EPA's permitting approach going forward.

The revised Draft Permit would allow pollution affecting the health of onshore residents—hundreds of tons of construction-related NO_X emissions—with no offsets. EPA in other contexts is well aware that this will negatively impact public health. As the agency itself warns: "Children -- including teenagers -- are among the groups of people considered most at risk from exposure to ground-level ozone [for which NO_X is a precursor], a key component of smog."[13] This type of pollution exacerbates lung diseases, including asthma, and "[a]sthma disproportionately affects children, families with lower incomes, and minorities, including Puerto Ricans, Native Americans/Alaska Natives and African-Americans."[14]

[13] The National Ambient Air Quality Standards – OZONE AND CHILDREN'S HEALTH (Apr. 2016), at 1, *available at* https://www.epa.gov/sites/default/files/2016-04/documents/20151001childrenhealthfs.pdf.
[14] *Id.* at 2.

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Massachusetts, whose people are, sadly, no strangers to this health problem,[15] is the nearest mainland area to the construction site, and it is the area from which South Fork would have had to obtain construction-phase emissions offsets.[16] Hundreds of thousands of children in the state suffer from asthma, and the problem is worse for children from low-income families.[17] And Black residents of the state are almost four times more likely to be hospitalized for asthma.[18] EPA's surreptitious and questionable change of policy here will hurt precisely these children whom the state—and EPA—are bound to protect. While no monetary estimate can adequately measure the harm that this new policy will inflict, EPA's own figures suggest that allowing over 403 tons of NO_x pollution to go without offsets means EPA is foregoing over $5.2 million in health benefits from this project alone—to say nothing of future projects to which EPA will now apply this misguided "see no evil" policy of no longer requiring offsets for construction-related emissions for Outer Continental Shelf sources.[19]

EPA should reverse course and restore the construction-phase offset requirements, in keeping with the initial Draft Permit for South Fork, its longstanding practice for offshore wind permitting, and the requirements of the Clean Air Act. Finalizing the revised Draft Permit, with its removal of construction-phase offset requirements, would be unacceptable as a policy matter and vulnerable as a matter of law.

Thank you for your consideration,

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[15] Asthma Among Children in Massachusetts, Mass. Dept. of Public Health (Jan. 2017), *available at* https://www.mass.gov/doc/pediatric-asthma-data-bulletin-0/download.
[16] *See, e.g.*, Initial Draft Permit at 12.
[17] *See* Asthma Among Children in Massachusetts, *supra* n.16, at 4.
[18] *Id.*
[19] *See* EPA, Benefits Mapping and Analysis Program (BenMAP) – Response Surface Model (RSM)-based Benefit Per Ton Estimates, *available at* https://www.epa.gov/benmap/response-surface-model-rsm-based-benefit-ton-estimates (providing figure of $13,000/ton of mobile source NO_x reduced, for 2020 no threshold scenario, in 2006 dollars).

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January 11, 2022

Submitted via Email and read receipt requested

The Honorable Michael Regan
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RE: IMMINENT AND SUBSTANTIAL ENDANGERMENT TO EAST HAMPTON, NEW YORK DRINKING WATER FROM SOUTH FORK WIND FARM – POTENTIAL PFAS EXPOSURE

Dear Administrator Regan:

We write with respect to the South Fork Wind Farm (SFWF), located in eastern Long Island, New York. This offshore project will include 12 wind turbine generators, submarine cables, an offshore substation, an alternative current (AC) electric cable and interconnection facility that connects the SFWF to the existing mainland electric grid in East Hampton, New York.[1] We are specifically concerned about the public health and environmental impacts potentially resulting from placing the landing site for a 138-kilovolt AC transmission cable on a residential road and adjacent to two Superfund sites where groundwater is known to be contaminated in the hamlet of Wainscott in the Town of East Hampton, New York.

Unless you and your agency intervene and exercise the legal authority you possess, construction of the landing site and cable installation will commence in short order, meaning the residents of East Hampton will be subject to potentially serious health risks from contamination from per- and polyfluoroalkyl substances (PFAS), including perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS), among others.

The Citizens for the Preservation of Wainscott (CPW) fully support renewable energy and New York State's commitment to increase renewable energy development to address the important issue of climate change. Our serious concern arises from SFWF's reckless and unprecedented proposal to construct a high-voltage transmission line, connecting electricity generated from

[1] South Fork Wind Farm and South Fork Export Cable Project: Final Environmental Impact Statement, BOEM 2020-057, Bureau of Ocean Management, U.S. Department of the Interior (Aug. 2021), at 1-1, *available at* https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/SFWF%20FEIS.pdf.

offshore wind turbines to an onshore substation, directly through a residential community and adjacent to two state Superfund sites. The proposal is especially disconcerting considering CPW has proposed viable alternative routes that will avoid residential areas and groundwater contamination while protecting against any potential environmental and public health risks from the spread of PFAS.

These significant issues are not limited to federal permits. We have raised similar concerns about state approvals that were issued without due attention given to serious environmental and public health issues, including contamination from PFAS associated with SFWF's construction activities. Unfortunately, those concerns were ignored. This forced our hand, as we have filed suit in New York State Appellate Court to stay construction until our concerns have been adequately addressed.[2]

From the start, through every step of a hurried process, the Town Board of East Hampton and the project developers, Ørsted and Eversource, have, with the acquiescence of federal and state officials, largely ignored or downplayed the presence of PFAS in the Town of East Hampton. They have seemed to just go through the motions in their examination as to whether construction of the transmission line will affect the disposition of PFAS in the local environment.

They did this notwithstanding the town's long, well-documented history of serious PFAS contamination. For example, in 2017, officials from the Suffolk County Department of Health tested private wells in the area and found levels of two specific types of PFAS, perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS), above the EPA's lifetime health advisory levels for both substances.[3] Town residents were offered bottled water as a precaution until the extent of the contamination was more fully understood.[4]

This disturbing situation should have been anticipated, given that the East Hampton Airport, which sits adjacent (within 50 feet) to the planned transmission cable corridor, has been designated by the state as a superfund site. For decades, the airport used aqueous film-forming foam (AFFF) for fire suppression.[5] PFOA and PFOS are components of AFFF.[6] In addition, the transmission line's construction pathway lies near the Wainscott Sand and Gravel Property, located just south of the airport, which also has elevated levels of PFAS in groundwater. The airport is a known source of PFOA and PFOS and this is the basis for its designation by New York State as a potential superfund site.

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[2] *See Citizens for the Preservation of Wainscott, Inc. v. N.Y.S. Pub. Serv. Comm'n et al.,* No. 2021-06582 (N.Y. 2d App. Div. filed Sept. 9, 2021); *Citizens for the Preservation of Wainscott, Inc. et al. v. Town Board of the Town of East Hampton et al.*, No. 601847/2021 (N.Y. Sup. Ct. Suffolk Cnty. filed Feb. 1, 2021).

[3] Contaminants Found in Drinking Water Near East Hampton Airport, Joanne Pilgrim, The East Hampton Star (Oct. 11, 2017), *available at* https://www.easthamptonstar.com/archive/contaminants-found-drinking-water-near-east-hampton-airport.

[4] Statement from the office of East Hampton Town Supervisor Peter Van Scoyoc (Aug. 3, 2020), *available at* https://ehamptonny.gov/DocumentCenter/View/5187/Pr-Rel-Aug-2-Statement-from-Supervisor.

[5] Christopher Walsh. "East Hampton Town Sues Village Over Firefighting Foam at Airport." April 23, 2020. Available at https://www.easthamptonstar.com/government/2020423/east-hampton-town-sues-village-over-firefighting-foam-airport.

[6] *Id.*

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As testing of wells in the area has confirmed, PFOA and PFOS have migrated from the airport onto the gravel site and into the surrounding community.[7] Of particular concern is the fact that SFWF's high-voltage landing cable will run directly through and along these areas. Yet with approval from state and local officials, Ørsted and Eversource have repeatedly claimed, without evidence, that construction activities are unlikely to encounter PFAS—and even if they did, that their "we'll deal with it when it's a problem" mitigation plan is sufficient to safely address and remediate it.

But according to an affidavit filed by geologist John Conrad, SFWF's "Environmental Management and Construction Plan" includes a monitoring proposal that lacks rigor and contains multiple gaps.[8] For example, Conrad noted "especially large gaps between monitoring wells along the transmission cable corridor in the Wainscott Sand and Gravel area (the 'Gravel Pit') where PFAS-contaminated groundwater is known to exist at shallow depths."[9] He further noted that "the cable excavation is likely to extend into PFAS-contaminated groundwater known to exist at shallow depth on and near the Gravel Pit."[10] (Notably, there are no known studies or analyses that show that SFWF's construction actions *will likely not result* in PFOA and PFOS migration stemming from construction activities.)

In addition, Conrad concluded that "more work is needed to confirm whether the cable system will be in contact with PFAS-contaminated groundwater in the known PFAS plume area and along the entire route."[11]

Finally, he conclusively demonstrates that SFWF's wells and well testing as part of its compliance plan fail to meet requirements included in the easement it received from the Town of East Hampton, including installation of wells at 500-feet intervals to measure depth to groundwater and test groundwater samples for PFAS where groundwater is shallow.[12] Conrad noted that, as part of the easement, these actions are to be taken *120 days prior to construction*.[13] "As of the date of the filing of this affidavit [January 3, 2022]," Conrad testified, SFWF "has not satisfied these conditions."[14]

Our concerns were only reinforced when your agency, on November 16, 2021, transmitted to the EPA Science Advisory Board four draft documents with, as EPA reported, "recent scientific data and new analyses that indicate that negative health effects may occur at much lower levels of exposure to PFOA and PFOS than previously understood." These new analyses also indicate to EPA that "PFOA is a likely carcinogen."[15]

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[7] Kathryn Menu. Sagharbor.com. "Health Department Expands Water Quality Testing in Wainscott." May 30, 2018. Available at https://sagharborexpress.com/health-department-expands-water-quality-testing-wainscott/.
[8] *See generally* Reply Affidavit of John A. Conrad, attached to Petitioner's Reply Memorandum of Law in Further Support of Motion for Stay Pending Appeal, *Citizens for the Preservation of Wainscott, Inc. v. N.Y.S. Pub. Serv. Comm'n et al.*, No. 2021-06582 (N.Y. 2d App. Div. filed Jan. 3, 2022) (Conrad Affidavit).
[9] *Id.* at ¶ 14.
[10] *Id.* at ¶ 18.
[11] *Id.* at ¶ 19.
[12] *See id.* at ¶¶ 3, 12, 14.
[13] *Id.* at ¶ 20.
[14] *Id.*
[15] EPA Advances Science to Protect the Public from PFOA and PFOS in Drinking Water (Nov. 16, 2021), *available at* https://www.epa.gov/newsreleases/epa-advances-science-protect-public-pfoa-and-pfos-drinking-water.

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Based on the foregoing, SFWF's construction activities create an ***imminent and substantial endangerment*** to the public health of the citizens of East Hampton.

Given the troubling history of PFAS contamination in our area, and SFWF's abject lack of concern or appropriate level of rigor in addressing PFAS along the transmission construction corridor prior to construction, we urge you to intervene immediately to stop construction. EPA has authority to do so under Section 1431 of the Safe Drinking Water Act. EPA must stop SFWF's construction activities of the transmission cable until the following actions are taken:

1. **EPA investigates to determine the nature and extent of potential contamination in the environment**

2. **EPA establishes a monitoring plan with robust enforcement provisions for any potential construction**

I. EPA HAS THE STATUTORY AUTHORITY TO TAKE ACTION ON PFAS IN SUFFOLK COUNTY

Section 1431 of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300i, provides EPA with broad powers to take appropriate actions to prevent an "impending dangerous condition from materializing, or to reduce or eliminate a dangerous situation once it has been discovered." Preventing the impending construction by SFWF is well within EPA's statutory authority under SDWA.

On May 30, 2018, EPA published guidance to assist the agency with implementing emergency authority under Section 1431 of SDWA.[16] We have followed the framework provided within that guidance to show why EPA must act. The guidance states that Section 1431 orders from EPA "should ideally be issued early enough to *prevent* the potential hazard for materializing" and, accordingly, EPA should not wait until after construction to act[17] (Emphasis in original.) EPA must act, as the SFWF construction activities meet the requirements described in further detail below under Section 1431 of SDWA:

- PFAS, specifically PFOA and PFOS, is potentially hazardous and is already present in Wainscott
- SFWF construction activity may result in PFAS exposure in significant levels in residents' drinking water
- SFWF construction activity is an imminent and substantial endangerment to the public health of the local citizens, and
- New York and Suffolk County officials are not taking the appropriate action, thus requiring EPA to intervene.

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[16] Updated Guidance on Emergency Authority under Section 1431 of the Safe Drinking Water Act, U.S. Environmental Protection Agency, (May 30, 2018), *available at* https://www.epa.gov/sites/default/files/2019-10/documents/wsg_210_updated_guidance_on_emergency_authority_under_sdwa_section_1431_5_30_2018508.pdf (EPA Updated Guidance).

[17] *Id.* at 7.

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II. EPA HAS ACKNOWLEDGED THAT PFAS IS A SIGNIFICANT NATIONAL ISSUE AND ENDANGERS THE PUBLIC

EPA has expressed significant concern about the dangers PFAS pose to public health and is taking several actions to address them.

- In October, EPA issued a PFAS Strategic Roadmap.[18] The Roadmap states that PFAS "are an urgent public health and environmental issue" and that EPA's integrated approach to PFAS is focused on three central directives including pursuing "a comprehensive approach to proactively prevent PFAS from entering air, land, and water at levels that can adversely impact human health and the environment."[19]

- EPA states that they plan to finalize a risk assessment of PFOA and PFOS in November 2024 to determine the potential harm associated with human exposure to chemicals

- EPA is planning to develop regulations, and to finalize them "in the spring of 2022," to determine PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability (CERCLA or Superfund Act).[20]

- In December, EPA granted a petition from several environmental groups to require testing of PFAS chemicals in North Carolina due to the potential harm to local communities.[21]

The foregoing information, and other information developed by federal and state governments, clearly indicate that PFAS, especially PFOA and PFOS, endanger public health and environment and must be prevented from spreading in Wainscott. Significant additional testing is required before the start of any construction of SFWF's transmission line.

III. THERE IS A HISTORY OF HARMFUL PFAS EXPOSURE IN SUFFOLK COUNTY

As noted above, there is already a history of PFAS exposure in the Town of East Hampton. In fall 2017, the New York State Department of Environmental Conservation (NYSDEC) provided initial findings of PFOA and PFOS in over 258 home wells in Westhampton and Wainscott and urged residents to have their wells tested.[22] In response to those tests, the Suffolk County Water Authority extended public water mains through the area and provided $3,000 grants to residents

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[18] PFAS Strategic Roadmap: EPA's Commitments to Action 2021 – 2024, U.S. Environmental Protection Agency (Oct. 2021),, EPA-100-K-21-002, *available at* https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf.
[19] *Id.* at 5.
[20] *Id.* at 13.
[21] Letter Granting Petition, from Michal Freedhoff, Ph.D., Assistant Administrator, Office of Chemical Safety and Pollution Prevention, U.S. Environmental Protection Agency, to Robert M. Sussman, Sussman and Associates (Dec. 28, 2021), *available at* https://www.epa.gov/system/files/documents/2021-12/pfaspetitionresponse.pdf.
[22] Earth Matters: Cleanup slow for Long Island's superfund sites, Francine Furtado, The Island Now (May 24, 2019), *available at* https://theislandnow.com/blog-112/earth-matters-cleanup-slow-for-long-islands-superfund-sites/

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whose wells were contaminated with PFAS.[23] These procedures cost the county over $7.7 million.[24]

Also, as part of the PFAS testing and review process, in June 2019, NYSDEC declared the East Hampton Airport, located in Wainscott, a state superfund site under the Inactive Hazardous Waste Disposal Site Program (State Superfund Program).[25] The East Hampton Airport was designated a state Superfund site due to fire-fighting foam containing PFAS – including PFOA and PFOS – being used and stored in East Hampton Airport during crash response and training. In response to that superfund designation, Suffolk County and the Town of East Hampton have begun mitigating PFAS exposures through various measures. The Town of East Hampton has filed a lawsuit against the East Hampton Fire Department and states that the costs of cleanup are expected to be in the tens of millions of dollars.[26]

In 2019, NYSDEC designated the Wainscott Sand and Gravel Property as a potential Superfund site due to sampling that showed PFAS at levels greater than those deemed safe by the state of New York.[27]

IV. SFWF CONSTRUCTION COULD RESULT IN ADDITIONAL PFAS ENTERING THE DRINKING WATER AQUIFER

The proposed SFWF proposed high-voltage cable consists of three segments within New York: (1) a 3.5-mile submarine segment of cable running through New York State territorial waters; (2) a 4.1-mile underground segment of cable running through East Hampton (almost entirely through Wainscott); and (3) a new substation to connect the high-voltage cable to the existing East Hampton substation.[28]

The high-voltage cable would entail thousands of feet of directional drilling, high-decibel noise, diesel fumes, miles of trenching for installation of a concrete encased duct bank system, splice boxes and manholes, cable pulling into the duct system, splicing together of cable segments, and complex logistics and methods.[29]

The trenching will be adjacent to the Gravel Pit, just south of the East Hampton Airport, which is currently contaminated with PFAS. Installation of the high-voltage cable in this area will entail excavating within the PFAS contaminant plume that is known to present in shallow groundwater in the area. The excavations and cable installations could become a pathway for movement of

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[23] Parts of East Hampton Airport added to State Superfund Registry, Christopher Walsh, The East Hampton Star (June 5, 2019), *available at* https://www.easthamptonstar.com/top-news-government/201966/east-hampton-airport-added-state-superfund-registry.
[24] PFAS Lawsuit Shows Pandemic Is Not Stopping Contamination Claims, Jessica Deyoe, CMBG3 Law (Apr. 20, 2020, *available at* https://www.cmbg3.com/pfas-lawsuit-ny.
[25] *Id.*
[26] *Id.*
[27] DEC's Assessment of the Wainscott Sand and Gravel Property, Nicholas C. Rigano, Rigano LLC, *available at* https://ehamptonny.gov/DocumentCenter/View/5914/DEC-site-characterization-presentation-PDF.
[28] Verified Petition and Complaint at 15, *Citizens for the Preservation of Wainscott, Inc. et al. v. Town Board of the Town of East Hampton et al.*, No. 601847/2021 (N.Y. Sup. Ct. Suffolk Cnty. filed Feb. 1, 2021), Doc. No. 1.
[29] *Id.* at 21.

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PFAS-contaminated groundwater causing other areas – including residential water wells – to be contaminated or further contaminated.[30]

SFWF has conceded that: (1) PFAS is dangerous to (i.e., endangers) public health and the environment; (2) PFAS contamination near the East Hampton Airport can move laterally with groundwater and such contamination would most likely be encountered via migration of groundwater towards the project; and (3) PFAS contamination at the Gravel Pit site south of the East Hampton Airport along SFW's proposed land route.[31] Indeed, the route for the high-voltage transmission cable crosses a known PFAS plume where the water table may be shallow enough for the cable excavation to intersect contaminated groundwater.[32]

The planned project also travels directly adjacent (e.g., within 50 feet) of the East Hampton Airport and will almost certainly encounter PFAS contamination that has migrated from the airport.[33] Therefore, this project has the potential to increasing PFAS exposure in the Town of East Hampton.

V. THERE IS AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO PUBLIC HEALTH FROM PFAS EXPOSURE

The purposes of a Section 1431 action, according to EPA, are to "prevent an impending dangerous condition from materializing, or to reduce or eliminate a dangerous situation once it has been discovered."[34] Section 1431 focuses on "imminent and substantial endangerment," which EPA states is a "broadly defined concept." For example, EPA explained that "one major function of Section 1431 is its use as a preventative enforcement measure."[35]

A. Imminent endangerment

The SFWF construction activities are "imminent" in that the activities will increase the potential of PFAS exposure in the community, thus meeting EPA's guidance on the meaning of "imminent." According to EPA's guidance, a hazard may be deemed imminent "at any point in a chain of events that may ultimately result in harm to the public."[36] Moreover, an endangerment is imminent "if conditions which give rise to it are present, even though the actual harm may not be realized for years."[37]

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[30] *Id.* at 24-25.
[31] *See id.* at 30-31.
[32] Petitioner's Reply Memorandum of Law in Further Support of Motion for Stay Pending Appeal at 14, *Citizens for the Preservation of Wainscott, Inc. v. N.Y.S. Pub. Serv. Comm'n et al.*, No. 2021-06582 (N.Y. 2d App. Div. filed Jan. 3, 2022).
[33] *Id.* at 13. *See also* Conrad Affidavit, *supra* n.8, at ¶¶ 3 ("SFW has not properly accounted for the very real possibility that known PFAS contaminants will be encountered during construction along its preferred Beach Lane route.") (footnote omitted), 18 ("[T]he cable excavation is likely to extend into PFAS-contaminated groundwater known to exist at shallow depth on and near the Gravel Pit . . . .").
[34] EPA Updated Guidance, *supra* n.16, at 4.
[35] *Id.*
[36] *Id.* at 8.
[37] *Id.*

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Importantly, EPA's guidance states that "contaminants that lead to chronic health effects, such as carcinogens, also may be considered to cause 'imminent endangerment'" even though "there is a period of latency before those contaminants, if introduced into a drinking water supply, might cause adverse health effects."[38] EPA's guidance cites as an example an "exposure, or threat of exposure, to chronic contaminants at levels exceeding their MCLs or health advisory levels (**e.g., PFOA**)."[39] (Emphasis added.)

Given the existence in Wainscott of PFOA and PFOS above EPA's health advisory levels,[40] *EPA is entirely within its legal authority under SDWA—and, one could reasonably argue, is legally obligated—to block any construction activities by SFWF before the agency can conduct proper testing and monitoring.*

SFWF may argue that the harms are "speculative" (as they have in court). But that flawed characterization stems from SFWF's, and New York State's, refusal to complete the testing and monitoring necessary to understand the nature of PFAS contamination and how construction would affect the surrounding community. SFWF has conceded the risks from their project with PFAS but have – without any substantiation – stated that there are no real risks from the project.[41] At a minimum we ask that the developer complete the routine and mandatory monitoring and testing that it is required to do before commencement of construction.

B. Substantial endangerment

PFAS, specifically PFOA and PFOS, meet the standards as an existing or threatened hazard. According to EPA's guidance, no actual reports of human illness are necessary to meet the "substantial endangerment" threshold and only requires "a reasonable cause of concern that someone may be exposed to a risk of harm."[42] As stated above, EPA has stated publicly that PFAS is a reasonable cause of concern throughout the United States and requires more investigation and regulation. With respect to Wainscott, local authorities have already found levels of PFOA and PFOS above the MCLs allowed under EPA's requirements.[43]

SFWF construction's pathway in the midst of PFAS contamination clearly meets the "substantial endangerment" standard required for EPA to take emergency action under SDWA. The only time that the endangerment would *not* be considered substantial is if the risk of harm were completely speculative in nature or *de minimis*.[44] However, it is well known that there are PFAS chemicals

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[38] *Id.* at 9.
[39] *Id.* at 10.
[40] *See* Water Quality Advisory for Private-Well Owners in Area of Wainscott, Suffolk County Government (Oct. 11, 2017), *available at* https://www.suffolkcountyny.gov/News/water-quality-advisory-for-private-well-owners-in-area-of-wainscott.
[41] Petitioner's Reply Memorandum of Law in Further Support of Motion for Stay Pending Appeal, at 12-13, *Citizens for the Preservation of Wainscott, Inc. v. N.Y.S. Pub. Serv. Comm'n et al.*, No. 2021-06582 (N.Y. 2d App. Div. filed Jan. 3, 2022).
[42] EPA Updated Guidance, *supra* n.16, at 11.
[43] *See supra* n.40.
[44] *Id.*

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already in the area; it is not speculative to contend that construction activity could potentially result in PFAS exposure to residents in the community.[45]

VI. STATE AND LOCAL AUTHORITIES HAVE NOT TAKEN APPROPRIATE ACTION

The analysis and actions around the SFWF epitomize elevating climate change concerns—entirely legitimate and important as they are—over environmental issues such as clean water and clean air. We must not cut corners on critical clean water protections and process as a means to achieve laudable climate change goals.

On August 26, 2020, NYSDEC adopted drinking water standards for public water systems that set maximum containment levels (MCLs) of 10 parts per million (ppt) for PFOA and PFOS – thus acknowledging the significant hazard related to PFOA and PFOS.[46]

SFWF has claimed that there are multiple conditions that they have agreed to as part of their construction plan to minimize potential PFAS exposures.[47] Yet one cannot trust SFWF's commitments, given that they have made misrepresentations or failed to follow through on their promises. For example, they represented that they were legally required to obtain an easement before seeking state and federal approvals, but that turned out to be false. They committed to CPW that they would explore alternative landing sites to Beach Lane, [48] and failed to do so. Assemblyman Fred Thiele, Jr. (District 1) anticipated SFWF's tactics when he wrote, "Because of the bait and switch tactics of Deepwater/Ørsted, I cannot trust them with my community's future. Local government should also consider these unethical tactics before it makes any more decisions about this project."[49]

Neither SFWF, NYSDEC, East Hampton, nor Suffolk County officials has clarified or explained what testing or mitigation each has done consistent with their requirements. New York and Suffolk County have been silent on any tests of PFAS from construction activity, while the Suffolk County Water Authority has stated that all the necessary water treatment systems to protect against PFAS will not be completed until August 2022.[50]

While Suffolk County Water Authority has taken steps to mitigate some of the other PFAS issues within Suffolk County, neither it nor the state has taken appropriate action to stop this

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[45] *See supra* n.33.

[46] Public Water Systems and NYS Drinking Water Standards for PFOA, PFOS, and 1,4-Dioxane, New York State Department of Health (Sept. 2020), *available at* https://www.health.ny.gov/environmental/water/drinking/docs/water_supplier_fact_sheet_new_mcls.pdf.

[47] Petitioner's Reply Memorandum of Law in Further Support of Motion for Stay Pending Appeal, at 13, *Citizens for the Preservation of Wainscott, Inc. v. N.Y.S. Pub. Serv. Comm'n et al.*, No. 2021-06582 (N.Y. 2d App. Div. filed Jan. 3, 2022).

[48] Letter from Thomas Brostrøm, CEO, Ørsted US Offshore Wind, to Citizens for the Preservation of Wainscott (May 31, 2019).

[49] Statement from Assemblyman Fred W. Thiele, Jr. to the Town of East Hampton Regarding the Deepwater Wind Project (Jan. 24, 2019), *available at* https://nyassembly.gov/mem/Fred-W-Thiele-Jr/story/84596.

[50] Emerging Contaminants, Jeffrey Szabo, CEO, Suffolk County Water Authority, *available at* https://www.scwa.com/emerging-contaminants/.

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known threat to the people of East Hampton.[51] Similarly, we have no assurance that the Town of East Hampton has held SFWF to its obligations to conduct testing as required under the terms of the easement it granted to SFWF.

VII. POTENTIAL SUPERFUND LIABILITY AND RELATED CONCERNS

While not directly related to the emergency authority request under SDWA, as stated above, we also have serious concerns related to the significant potential for liability related to the East Hampton Airport superfund site. The Town of East Hampton has already been exposed to significant environmental damage and is currently liable for tens of millions of dollars in cleanup expenses.

If the SFWF project results in increased exposure of PFAS, the Town of East Hampton – although they are not responsible for that release – are liable for the environmental damage and costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) joint and several and strict liability provisions.[52]

Not only are we concerned about the health, environmental, and economic damage to ourselves, but Ørsted and Eversource are also potentially exposed to the full superfund cleanup costs from their project. However, our review of official public statements to the U.S. Securities and Exchange Commission (SEC) and Ørsted and Eversource's respective websites do not include any information about this significant potential liability from the SFWF project. We are thus concerned that these multibillion-dollar companies will subject our county and its citizens to protracted litigation to avoid any responsibility for future cleanup costs.

Thank you for your consideration,

Gouri.Edlich@wainscott.org

[51] SCWA, Town of East Hampton, Announce Completion of Wainscott Water Main Installation, Suffolk County Water Authority (Dec. 21, 2018), *available at* https://www.scwa.com/scwa_town_of_east_hampton_announce_completion_of_wainscott_water_main_installation/.

[52] Superfund Liability, U.S. Environmental Protection Agency, *available at* https://www.epa.gov/enforcement/superfund-liability.

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