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Submitted via Email and read receipt requested

The Honorable Michael Regan
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
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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.*

[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).

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.

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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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