

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

CITIZENS FOR THE PRESERVATION OF
WAINSCOTT, INC., PAMELA MAHONEY,
MICHAEL MAHONEY, ROSEMARIE ARNOLD,
JOSE ARANDIA, OLGA ARANDIA, KENNETH
HANDY, JANE HARRINGTON, MITCHELL
SOLOMON, LISA SOLOMON, DUNE ALPIN FARM
PROPERTY OWNERS ASSOCIATION INC.,
DUNE ALPIN FARM CORP., ANDREA BERGER,
ROBERT BERGER, GUNILLA BERLIN, CINDY
CIRLIN, AMY DEPAULO, ROSALIND DEVON,
KATHERINE EPSTEIN, DAVID EPSTEIN, NEIL
FABER, MARIANO GAUT, DANIEL GETTINGS,
TERRY GOLDSTEIN, STEVEN ISRAEL, LYNN
JEROME, LINDA KAYE, GEORGE LEE, SUSAN
RIELAND, ANTHONY D. ROMERO, ALBERT
RUBEN, GIL RUBENSTEIN, ARNOLD SCHILLER,
And JUDITH WIT,

Petitioners-Plaintiffs,

- against -

TOWN BOARD OF THE TOWN OF EAST
HAMPTON and PETER VAN SCOYOC in his
Capacities as Supervisor of the Town of East Hampton
and Member of the Town Board of the Town of East
Hampton,

Respondents-Defendants,

- and-

SOUTH FORK WIND, LCC f/k/a/ Deepwater Wind South
Fork, LLC,

Nominal Respondent-Defendant

Index No.: 601847/2021
Hon. William G. Ford

**PROPOSED AMICUS
BRIEF OF WIN WITH
WIND**

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STATEMENT OF INTEREST OF AMICUS CURIAE

Proposed *amicus* Win With South Fork Wind, Inc. (Win With Wind) is an independent, nonpartisan group of private citizens that is not affiliated with or funded by any wind or energy development company.¹ Win With Wind's members are residents of East Hampton and other towns on the South Fork of Long Island.² Win With Wind aims to produce fact-based information regarding the benefits of offshore wind energy and supports the South Fork Wind Farm as an opportunity to place its community at the forefront of clean energy leadership.³

Win With Wind actively participated in the Article VII proceeding before the Public Service Commission on South Fork Wind's application for a certificate to construct the South Fork Export Cable. Win With Wind participated in settlement discussions that lasted nearly a year; settlement conferences were held in person or by telephone on November 8, 2019, November 20-21, 2019, December 13, 2019, December 18, 2019, January 8-9, 2020, January 22-23, 2020, February 5-6, 2020, February 28, 2020, March 4-6, 2020, March 10, 2020, March 30-31, 2020, April 7 and 9, 2020, April 17, 2020, April 21, 2020, May 7, May 8, May 19, and May 27, June 8, June 23, 2020, and July 28, 2020, and electronic communications were also utilized to facilitate settlement discussions. ECF No. 79 (Bowes Aff. Exh. A) at 5.⁴ After settlement was reached and a joint proposal filed, Win With Wind submitted testimony regarding the South Fork Export Cable's importance to meeting New York State's statutory renewable energy targets, and filed briefs to support the adoption of the joint proposal.⁵

¹ Gerrard Aff. ¶ 3.

² *Id.* ¶ 5.

³ *Id.* ¶ 3.

⁴ Case No. 18-F-0604, *Application of Deepwater Wind, South Fork LLC for a Certificate of Environmental Compatibility and Public Need*, Joint Proposal (Sept. 17, 2020) at 5.

⁵ *See, e.g.*, Case 18-T-0604, *Proceeding on Application of Deepwater Wind South Fork, LLC*, Direct Testimony of Cullen Howe on behalf of Win With Wind (Oct. 9, 2020); Case 18-T-0604,

Win With Wind has also supported the South Fork Wind Farm itself in comments to the U.S. Bureau of Ocean Energy Management, which has permitting authority over the wind turbines that are proposed to be constructed in federal waters.⁶ In addition to the group's legal advocacy, Win With Wind members have supported the project through letters to the editor and by educating their community and the broader public about the benefits of offshore wind energy.⁷ Win With Wind members have also attended Town Board meetings and advocated for granting the easement throughout the process.⁸

Win With Wind members, as residents of the South Fork, will benefit from the renewable energy produced by the South Fork Wind Farm. Moreover, as residents of a coastal community that is vulnerable to storms and sea-level rise, they are concerned about climate change and supportive of state and local renewable energy goals. In 2019 the state enacted the Climate Leadership and Community Protection Act ("CLCPA"), providing that 70% of statewide electric generation must be supplied by renewable energy by 2030, and that 100% must be derived from zero-emission sources by 2040. NY PUB. SERV. LAW § 66-p(2)(a), (b). The CLCPA further requires the development of 9,000 megawatts of offshore wind by 2035. *Id.* § 66-p(5). In

Proceeding on Application of Deepwater Wind South Fork, LLC, Initial Brief of Win With Wind (Jan. 20, 2020); Case 18-T-0604, *Proceeding on Application of Deepwater Wind South Fork, LLC*, Reply Brief of Win With Wind (Feb. 4, 2020).

⁶ Comment by Francesca Bochner-Brown, Win with South Fork Wind, Inc. (Feb. 19, 2021), available at <https://www.regulations.gov/comment/BOEM-2020-0066-0147>.

⁷ See, e.g., Win With Wind, *The Case for Wind Energy* (visited Apr. 6, 2021), <https://winwithwind.blog/the-case-for-wind-energy/>; Judith Hope, *Hopeful News*, EAST HAMPTON STAR, June 24, 2019.

⁸ Gerrard Aff. ¶7.

October 2020 the Public Service Commission amended the Clean Energy Standard to incorporate the 9,000-megawatt target.⁹

Additionally, on May 20, 2014 the Town of East Hampton Town Board adopted a resolution setting two clean energy goals: to meet 100% of community-wide electricity consumption with renewable energy by 2020; and to meet the equivalent of 100% of economy-wide energy consumption using renewable energy sources by 2030.¹⁰

Win With Wind's members would like to see the South Fork Export Cable move forward because it is a critical component of New York's first offshore wind farm, ECF No. 78 (Bowes Aff.) ¶ 3, which will set an important precedent and affirm New York's commitment to its renewable energy targets. Win With Wind's members also include residents of East Hampton who have witnessed and supported the Town's thoughtful consideration and negotiation of the easement agreement with South Fork Wind. Win With Wind has spent years advocating for the cable, and does not want the project to be delayed due to baseless litigation. For these reasons, Win With Wind has an interest in a swift dismissal of the petition-complaint.

POINT I

THE TOWN'S GRANTING THE EASEMENT IS EXEMPT FROM SEQRA

Win With Wind concurs in the arguments set forth in the memoranda of law in support motions to dismiss the petition-complaint, as submitted by Certilman Balin Adler & Hyman, LLP on behalf of the Town Board of the Town of East Hampton and Peter Van Scoyoc, the

⁹ Case No. 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and Clean Energy Standard*, Order Adopting Modifications to the Clean Energy Standard (issued Oct. 15, 2020) at p. 48.

¹⁰ V.B. 1 *Energy Goals for the Town of East Hampton*, Res-2014-662 (May 20, 2014), available at <https://bit.ly/2PumzhF>.

Town Supervisor; and by Harris Beach PLLC on behalf of South Fork Wind, LLC. We will not burden the court by repeating those arguments.

However, Win With Wind wishes to write separately on the State Environmental Quality and Review Act (“SEQRA”) issues raised by Petitioners-Plaintiffs. The undersigned counsel is lead author of a two-volume treatise on SEQRA – Michael B. Gerrard, Daniel A. Ruzow & Philip Weinberg, *Environmental Impact Review in New York*, originally published by Matthew Bender & Co. in 1990, with later annual editions published by its successor, LexisNexis. Counsel and his co-authors have written annual updates to the book in each of the 30 years since its initial publication. Additionally, every year starting in 1991 and extending through 2020 (so far), the undersigned counsel has written the annual SEQRA review for the *New York Law Journal*, and numerous other articles on SEQRA. He has also litigated numerous SEQRA cases and advised many clients on SEQRA compliance in his more than 40 years practicing environmental law in New York.¹¹

The Town of East Hampton’s approval of the Easement Agreement that is the subject of this litigation is exempt from SEQRA. This is plain from the face of the statute as applied to the facts of this case.

The key operative provision of SEQRA is NY ENVIR. CONSER. LAW §8-0109.2, which provides: “All agencies ... shall prepare ... an environmental impact statement on any action they propose or approve which may have a significant effect on the environment.”

Exclusions to this requirement are set forth in NY ENVIR. CONSER. LAW §8-0111.5, which provides in pertinent part:

5. Exclusions. The requirements of subdivision two of section 8-0109 of this article shall not apply to:

¹¹ Gerrard Aff. ¶14.

...(b) Actions subject to the provisions requiring a certificate of environmental compatibility and public need in articles seven, eight and ten of the public service law.

As all parties agree, the Easement Agreement is to allow a cable to carry power from the South Fork Wind Farm to the electric grid. This cable requires a certificate of environmental compatibility and public need under Article VII of the Public Service Law. After extensive proceedings in which Petitioners-Plaintiffs vigorously participated, the New York Public Service Commission granted the cable the requisite certificate under Article VII on March 18, 2021. *See* ECF No. 79 (Bowes Aff. Exh. A).

This unmistakable exemption is reiterated in the SEQRA regulations of the New York State Department of Environmental Conservation. In particular 6 N.Y.C.R.R. §617.5, headed “Type II Actions,” provides:

(a) Actions or classes of actions identified in subdivision (c) of this section are not subject to review under this Part... These actions have been determined not to have a significant impact on the environment *or are otherwise precluded from environmental review* under Environmental Conservation Law, Article 8. The actions identified in subdivision (c) of this section apply to *all agencies*.

....

(c) The following actions are not subject to review under this Part:
...(44) actions requiring a certificate of environmental compatibility and public need under article VII, VIII, X or 10 of the Public Service Law and the consideration of granting or denial of any such certificate. (Emphasis added.)

The reference to “all agencies” is especially significant here because the SEQRA regulations define “agency” as “a State or local agency.” 6 N.Y.C.R.R. §617.2(c). This includes the Town Board of the Town of East Hampton.

Thus the Town Board is precluded from conducting SEQRA review of the easement for the cable, since the cable requires (and has received) a certificate under Article VII.

This inescapable reading of the SEQRA statute and regulations is not an accident of drafting. A central purpose of Article VII (and its companion Article X, which applies to major

electricity generating units) is to provide as close to “one stop shopping” as possible for the covered facilities.¹² Indeed, numerous commentaries use the phrase “one stop shopping” to refer to Article VII and Article X.¹³ The evident purpose is to expedite the approval of these essential facilities and not to allow them to be bogged down in duplicative permitting processes by multiple agencies. This legislative purpose is further shown by the provision in Article VII that with very limited exceptions, “no court of this state shall have jurisdiction ... to stop or delay the construction of a major facility except to enforce with this article or the terms and conditions of a certificate issued hereunder.” NY PUB. SERV. LAW §129.

A review of the evolution of the related articles of the Public Service Law stated:

The Siting Board application and procedure examined each proposed facility’s environmental impacts; the need for, and alternatives to, each proposed facility were examined... The Board application and process were the functional equivalent of an environmental review under [SEQRA] but more comprehensive. For this reason, and because the Article VIII power plant siting law was enacted two years before SEQRA, Article VIII and X proceedings were excluded from SEQRA review, which would have been duplicative.¹⁴

The Article VII proceeding in this case involved an exhaustive review of the environmental impacts of the cable, including those in the Town of East Hampton. The

¹² When he signed Article X, Governor Mario Cuomo wrote that the new law provided a “comprehensive framework for developing and implementing sound energy policy for the State that integrates energy planning with consideration of environmental quality and provides a one-stop process for the siting of major electric generating facilities.” Nicholas Faso and Terresa Bakner, “The Return to Article X: A New Paradigm for Approving Energy Projects in New York State,” 12 NO. 2 NYZONING-R 1, 1 (September/October 2011) (quoting Governor’s Approval Memorandum, 1992 N.Y. Sess. Laws 2898 (July 24, 1992)).

¹³ E.g., Sam Laniado, *Siting Renewable and Other Electric Generation Under Article 10 of the New York Public Service Law*, NEW YORK ENVIRONMENTAL LAWYER (Spring/Summer 2016) at 38; Stephen P. Sherwin, *Comment: Deregulation of Electricity in New York: A Continuing Odyssey 1996-2001*, 12 ALB. L.J. SCI. & TECH. 263 (2001) at 299; G.S. Peter Bergen, *Electric Generating Facility Siting and Licensing in New York State’s Restructured Electric Utility System*, ENVIRONMENTAL LAW IN NEW YORK (July 1999) at 110; see also Philip Weinberg, et al., 9A N.Y.Prac., *Environmental Law and Regulation in New York* § 15:7 (2d ed. Sept. 2020).

¹⁴ Michael B. Gerrard, Daniel A. Ruzow & Philip Weinberg, *Environmental Impact Review in New York*, §8B.02[1].

application included twenty appendices and six exhibits—containing over 18,000 pages of information—sponsored by over twenty witnesses.¹⁵ Numerous expert agencies reviewed these documents and signed the joint proposal, including the Department of Environmental Conservation, the Staff of the Department of Public Service, the Office of Parks, Recreation and Historic Preservation, the Department of State, and the Department of Transportation. ECF No. 80 (Bowes Aff. Exh. B) at 2. Over the course of nearly a year of settlement discussions, the parties to the joint proposal negotiated 195 conditions covering over 20 different categories, including environmental management and construction, terrestrial and wildlife resources, and water resources. *See* ECF No. 79 (Bowes Aff. Exh. A); ECF No. 80 (Bowes Aff. Exh. B) at 100. Extensive opportunities were provided for public comment and other input. ECF No. 80 (Exh. B to Bowes Aff.) at 94.

In sum, the SEQRA exemption described above does not allow projects subject to Article VII to skirt environmental review – far from it. But it means they only undergo environmental review once in a unified process. To require the Town to undertake its own environmental review would be directly contrary to the explicit language and intent of SEQRA and of Article VII.

POINT II

THE TOWN FOLLOWED PROPER PROCEDURE IN GRANTING THE EASEMENT

The Town of East Hampton followed typical procedure and took time to negotiate a fair easement agreement. Although Petitioners argue that the Town should have waited to grant the

¹⁵ *See generally* Case 18-T-0604, *Proceeding on Application of Deepwater Wind South Fork, LLC* (filed Sept. 14, 2018).

easement until after the Article VII process had run its course, it is not unusual for an easement agreement to be reached while an Article VII application is pending.¹⁶ Moreover, the easement agreement is the result of approximately four years of negotiations between the Town and South Fork Wind, during which time the total host community agreement amount increased from approximately \$7 million to approximately \$29 million.¹⁷ ECF No. 93 (Van Scoyoc Aff.) ¶11(b).

Further, the easement is contingent on South Fork Wind's receipt of an Article VII certificate and a permit from the U.S. Bureau of Ocean Energy Management, each of which require their own extensive environmental review. ECF No. 93 (Van Scoyoc Aff.) ¶11(c). In granting the Article VII certificate, the Public Service Commission conducted a thorough assessment of the potential environmental impacts, aided by the expertise of the numerous state agencies that participated in the proceeding and signed the joint proposal. ECF No. 80 (Exh. B to Bowes Aff.) at 12-35, 100-104. The Public Service Commission concluded, based on evidence in the record, that construction of the South Fork Export Cable will avoid or minimize environmental impacts as required by law. *Id.* at 105, 210.

Contrary to Petitioners' claims, the Town has acted appropriately to protect its own property and the property, safety, and wellbeing of its residents in negotiating and granting the easement.

CONCLUSION

¹⁶ See, e.g., Case No. 18-T-0207, *Application of New York Power Authority for a Certificate of Environmental Compatibility and Public Need*, Order Granting Certificate of Environmental Compatibility and Public Need (issued Nov. 14, 2019) ¶23 (noting that SUNY Canton had agreed to grant the applicant the easement rights necessary to construct and operate the transmission project at issue); see also Town Br. at 11 (noting that there is no requirement to wait for an Article VII proceeding to conclude before granting an easement).

Following years of advocacy before the Public Service Commission and in their own community, the members of Win With Wind want to see the South Fork Export Cable and the South Fork Wind Farm move forward, and to avoid any delays due to meritless litigation. For the forgoing reasons, Win With Wind urges this Court to grant the motions to dismiss.

Respectfully submitted,



Dated: April 13, 2021
Chappaqua, New York

Michael B. Gerrard
Attorney for Win With Wind
Arnold & Porter Kaye Scholer LLP
250 W 55th St.
New York, NY 10019
212-836-8000
Michael.Gerrard@arnoldporter.com
Hillary Aidun
Sabin Center for Climate Change Law
Columbia Law School
435 West 116th St.
New York, NY 10027
212-854-0081
hwa2108@columbia.edu
Attorney for Win With Wind