

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Application of

SIERRA CLUB-Long Island Group, The Concerned
Citizens of the Mill River Flood Plain
and Joseph P. Forgione,

Petitioners,

Index No.

for a Judgment Pursuant to Article 78 of the New
York Civil Practice Law and Rules,

-against-

Governor's Office of Storm Recovery; New York State
Office of Parks, Recreation and Historic Preservation;
New York State Division of Housing and Community
Renewal; New York State Department of Environmental
Conservation; and Matt Accardi, Assistant General
Counsel and Certifying Corporate Officer for the
Governor's Office of Storm Recovery,

Respondents.
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**PETITIONERS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR VERIFIED PETITION**

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PRELIMINARY STATEMENT

This proceeding is brought pursuant to CPLR Article 78 to challenge the Negative Declaration and Final Environmental Assessment (the “Determinations”) issued by Respondent Governor’s Office of Storm Recovery (“GOSR”), (copies of which are annexed to the Verified Petition as Exhibit “A”) on the ground that Respondents failed to comply with the State Environmental Quality Review Act (“SEQRA”) and its regulations.

FACTUAL BACKGROUND

The catastrophic damage caused by Superstorm Sandy (“Hurricane Sandy” or the “Storm”) on October 29, 2012, is by now widely known. One of the largest Atlantic hurricanes to make landfall in the U.S., Hurricane Sandy was responsible for the loss of 73 lives¹ and for the damage or destruction of “28 fire stations, 26 schools, 3 police stations, ... 44 power stations,” and more than 95,000 buildings.² Declared a federal disaster area, Nassau County saw devastating damage, with more than 35,000 people displaced from their homes and hundreds of thousands losing power for days.³ County residents were also forced to deal with the release of “hundreds of millions of gallons of raw and partially treated sewage into waterways, streets, and homes” from the inundated Bay Park Sewage Treatment Plant,⁴ and were instructed to avoid drinking tap water due to potential

¹ There were 73 direct fatalities and 87 indirect fatalities. See “Tier 1 Environmental Review Record Community Development Block Grant – Disaster Recovery Program NY Rising Housing Recovery Program: Environmental Assessment for 5+ Unit Residential Properties Nassau County, NY,” Prepared by Prosource Technologies, LLC for New York State Homes And Community Renewal (August 2014-amended), at 2, available at https://stormrecovery.ny.gov/sites/default/files/uploads/MFH_Nassau_NEPA_EA_Amended.pdf, (last visited June 29, 2020) (hereafter “NY Rising”).

² See Interboro Team for Rebuild By Design, “Living with the Bay: A Comprehensive Regional Resiliency Plan for Nassau County’s South Shore,” (March 25, 2014), at 12, available at https://www.hud.gov/sites/documents/INTERBORO_IP_BRIEFING_BOOK.PDF, (last visited June 29, 2020) (hereafter “Plan Design”).

³ See *id.*

⁴ The Bay Park Sewage Treatment Plant spill was the largest in New York history. Located in East Rockaway, the Plant serves 550,000 people and treats 40 percent of Nassau County’s waste. After Hurricane Sandy flooded its pumping and electrical systems, the Plant was knocked out of service for more than 42 hours. During the 44 days it took to restore plant operations, 2.2 billion gallons of partially treated sewage overflowed into the bay. See *id.* at 55.

contamination.⁵ The shoreline and other low-lying areas of the County were severely inundated, with flooding exceeding the long-standing boundaries established for emergency evacuation set by FEMA.⁶

Hurricane Sandy's swath of damage in Nassau County was caused by a concatenation of factors. The County, located between the Long Island Sound and the Atlantic Ocean, covers 453 square miles, of which only 287 are land, and has a natural propensity for flooding.⁷ Second, more than 70% of the housing stock in Nassau County was built prior to 1960, when flood information either was not available or was not taken into account when homes were built, creating the twin vulnerabilities of location and construction.⁸ Third, the Storm's inundation area reached communities that had already suffered substantial damage from Hurricane Irene and Tropical Storm Lee in 2011, and had not been fully restored when Hurricane Sandy hit just one year later.⁹ Fourth, much of the County's flood control infrastructure—dams, culverts, conduits, and other protections—had been overlooked for years and had eroded,¹⁰ and the storm surge (*i.e.*, the rise in sea level due to the low pressure, high winds, and high waves associated with a hurricane as it makes landfall) readily overwhelmed those protections remaining in place.¹¹ Communities situated within the Mill River watershed, and particularly those near Hempstead Lake State Park and those located on the River, were inundated by stormwater runoff and surface water overflow,

⁵ *Id.* at 12.

⁶ *See* NY Rising at 9.

⁷ *Id.* at 7.

⁸ *Id.* at 21.

⁹ *Id.*

¹⁰ *See* Affidavit of David Stern, sworn to on August 22, 2020 ("Stern Aff."), attached to the Petition as Exhibit "E" at ¶¶ 12, 16, 20-21.

¹¹ National Hurricane and Center and Central Pacific Hurricane Center, National Oceanic and Atmospheric Administration, "Storm Surge Definition," available at <https://www.nhc.noaa.gov/surge/#:~:text=Storm%20surge%20is%20produced%20by,the%20shore%20by%20the%20wind>, (last visited June 29, 2020). "Storm surge is an abnormal rise of water generated by a storm, over and above the predicted astronomical tides. Storm surge should not be confused with storm tide, which is defined as the water level rise due to the combination of storm surge and the astronomical tide." *Id.*

and those by the coast were battered by wind and waves which created a storm tide of over 18 feet.¹²

Beyond the toll on people, homes, and commercial buildings, the Storm exposed existing pressures on the natural ecology of Hempstead Bay (“Bay”), which has long been “the cultural, ecological, and economic engine of the entire region.”¹³ Nassau County faces serious threats from sea level rise, stormwater runoff, sewage wastewater effluent, and saltwater intrusion of the aquifer.¹⁴ The problem of sea level rise—a Sandy-like storm surge in slow motion—is an inexorable phenomenon that may not engender a sense of immediate crisis, but nevertheless portends extreme hardships. Overdevelopment, which creates an impervious cover blocking all, natural outlets for water, has led to an increase of stormwater runoff into the County’s rivers and creeks where, during periods of heavy rain and storm surge, water rises above the level of outflow pipes, causing major backups at storm drains. Unfiltered stormwater runoff is a major source of pollution directly threatening the quality of the Bay’s ecological system. And partially treated sewage effluent exacerbates nitrogen levels which cause harmful algae blooms, hypoxia, and excessive *Ulva* seaweed growth, and deteriorate salt marshes that otherwise would help protect County residents from storm surge.¹⁵

Hurricane Sandy was the catalyst for the allocation of disaster relief funds under the federal Community Development Block Grant—Disaster Recovery Program (“CDBG-DR”). Following FEMA damage assessments, Congress passed the “Disaster Relief Appropriations Act, 2013,” (Public Law 113-2, approved January 29, 2013), which included \$16 billion in funding for disaster

¹² Water weighs approximately 1,700 pounds per cubic yard; extended pounding by frequent waves can demolish any structure not specifically designed to withstand such forces. [Storm surge and wave action] work together to increase the impact on land because the surge makes it possible for waves to extend inland.” *Id.*

¹³ *See* NY Rising at 21.

¹⁴ All of Long Island’s tap water is pumped from the aquifer. However, because groundwater is insufficiently recharged, saltwater intrusion is contaminating the aquifer. *See* Plan Design at 55.

¹⁵ *Id.* at 54.

relief, long-term recovery, restoration of infrastructure and housing, and economic revitalization in the areas most affected by the storms of 2011 and 2012. The U.S. Department of Housing and Urban Development (“HUD”) is responsible for administration of the CDBG-DR program.

In June 2013, HUD initiated its Rebuild by Design program, a competition soliciting proposals designed to respond to Hurricane Sandy’s devastation and promote “a design-led approach to pro-active planning for long-term resilience and climate change [sic]adaption.”¹⁶ One year later, HUD announced that Nassau County’s Living with the Bay Plan (“LWTB Plan”) had been selected and that New York State had been allocated \$125 million in CDBG-DR program funds to implement the Plan.

According to GOSR’s LWTB Plan documents, New York’s proposal “promoted a watershed approach to protect and enhance the diverse area.” GOSR, “Living with the Bay Resiliency Strategy Watershed Management Plan and Preliminary Design Report,” (December 2017), at 2.¹⁷ The Mill River winds through the Town of Hempstead, the Villages of West Hempstead, Lynbrook, Rockville Centre, Oceanside, Malverne, and East Rockaway, and travels through freshwater lakes, ponds, and pipes before emptying into the Bay near Harbor Isle and Island Park.¹⁸ The entire watershed, which covers approximately 10,000 acres, includes additional tributaries and more communities.

The LWTB Plan was designed to address flooding problems in the watershed “caused by inadequate drainage collection and conveyance capacity, high tailwater conditions (the level of water downstream of hydraulic structures, i.e., dams, culverts, and outfalls),” inadequate

¹⁶ Governor’s Office of Storm Recovery, “Hempstead Lake State Park Project Information Document,” (2017), at 1, available at https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/Hempstead%20Lake%20State%20Park%20Project%20Information%20Document_6-16-17.pdf, (last visited July 6, 2020).

¹⁷ Available at <https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/Objective%209.pdf>, (last visited August 2, 2020).

¹⁸ See Plan Design at 136.

stormwater systems, and “overtopping storm surge events.” *See* GOSR, October 5, 2018 Draft Environmental Assessment, at 6.¹⁹ GOSR’s Plan was also designed to remediate the watershed’s long-standing problems of “degradation and loss of habitat and flora and fauna, shoreline degradation, and compromised water quality,” and to account for sea level rise projections. *Id.* at 6-7. The Mill River was originally fed from groundwater, which was continuously recharged by fresh water infiltration, and the river, in turn, fed Nassau County’s bays with fresh water and sediment, crucial for a healthy environment. The river now gets its water almost entirely from rain and is mainly used to drain and channel stormwater from upland neighborhoods through low-lying communities.²⁰ Because of the prior extraction of groundwater for daily use and the decrease in its recharge (due to increases in impermeable areas), groundwater levels have dropped significantly and the water quality is extremely poor.²¹

The LWTB Plan called for a holistic, “buffered bay” approach to the water-based threats facing communities in the Mill River watershed.²² According to GOSR, the Plan would foster long-term resilience in Mill River communities by providing “natural flood protections” and “strategically deploying protective measures like constructed marshes, dikes, and cross structures along the urbanized edge.”²³ Further, it would assist in the ecological recovery of the watershed by recovering the sediment system and rebuilding coastal and riverine ecosystems, and would restore water quality by managing stormwater to mitigate the damage from rain and pollution.

¹⁹ Available at <https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/Hempstead%20Lake%20State%20Park%20Environmental%20Assessment.pdf>, (last visited August 9, 2020).

²⁰ *See id.* at 54.

²¹ *See id.* at 55.

²² *See id.* at 17.

²³ Georgetown Climate Center, “Rebuilding with Resilience: Lessons from the Rebuild By Design Competition After Hurricane Sandy,” (2016), at 57, available at <http://www.rebuildbydesign.org/data/files/504.pdf>, (last visited July 6, 2020).

Finally, the green infrastructure approach would contribute to the continued vitality of the relationship between people and nature by revitalizing natural systems used by birds and wildlife.²⁴

By October 2018, however, GOSR had abandoned virtually all of the cardinal elements of the LWTB Plan, including its focus on fostering social resiliency and mitigating flooding through the use of sound ecological measures. Apparently, in order to meet federal deadlines for spending grant dollars, GOSR decided to sever portions of the LWTB Plan, rework these “new” projects, and push agency actions forward without an in-depth environmental review. *See* GOSR, October 5, 2018 Draft Environmental Assessment (“Draft EA”), at 6; Action Plan Amendment 16 (stating that no environmental impact statement will be needed for future projects).²⁵

The Hempstead Lake State Park Project (“HLSP Project”) is one of the severed pieces of the LWTB Plan. There are five other projects that, along with the HLSP Project, now constitute the revised LWTB Plan: (1) creating additional stormwater storage capacity at Smith Pond by dredging; (2) reducing the vulnerability to flooding of the area along the west bank of the Mill River, including East Rockaway High School and Lister Park, increasing storm surge storage capacity, and stabilizing eroding shoreline; (3) restoring the coastal marshes where the Mill River drains into the Bay to attenuate wave energy and prevent erosion; (4) developing a continuous greenway from Hempstead Lake State Park south to Bay Park and Hewlett Bay; and (5) improving stormwater collection and conveyance to mitigate flooding and improve water quality across the watershed. *See* Draft EA, at 6.²⁶

²⁴ *See* Design Plan at 17.

²⁵ Available at <https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/Hempstead%20Lake%20State%20Park%20Environmental%20Assessment.pdf>, (last visited August 9, 2020).

²⁶ Available at <https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/Hempstead%20Lake%20State%20Park%20Environmental%20Assessment.pdf>, (last visited August 9, 2020).

Hempstead Lake State Park (the “Park”) was established in 1873, when Hempstead Creek was dammed to create a drinking water reservoir for the then City of Brooklyn.²⁷ Today, the Park is a 521-acre, multi-use facility²⁸ enjoyed by more than 350,000 visitors a year, with the vast majority coming from neighboring communities. For generations, the Park has served as a cherished green space used by the surrounding communities for recreation, and as a critical environmental recharge and filtration area. *See* Affidavit of Joseph P. Forgione, sworn to August 11, 2020 (“Forgione Aff.”), Ex. D at ¶ 4; Affidavit of Charles Bevington, sworn to July 30, 2020 (“Bevington Aff.”), Ex. B at ¶ 2. The Park’s trees capture carbon, cleaning the air, and its wetlands filter pollutants and absorb annual rainfall and stormwater surges that have been steadily increasing due to climate change.

In addition, the Park is Nassau County’s best terrestrial bird-watching site and “a designated New York State Important Birding Area,”²⁹ *see* Affidavit of Carolyn Bauer, sworn to July 30, 2020 (“Bauer Aff.”), Ex. H at ¶ 8, which provides crucial habitat for “nesting Great Horned Owls, resident Ospreys, Bald Eagles, and many other sensitive species, including migrating warblers, vireos, tanagers, and flycatchers.” *See* South Shore Audubon Society, “Comments on the Hempstead Lake State Park Environmental Review,” (July 2017); *see also* Bauer Aff. at ¶¶ 7-11, 16-19. The South Shore Audubon Society’s recent bird surveys have also confirmed the presence of many freshwater shorebirds (such as the Solitary Sandpiper, Semipalmated Plover, and Greater and Lesser Yellowlegs), wading birds (such as the Great Egret, Snowy Egret, Great Blue Heron, Black-crowned Night Heron, and Glossy Ibis), and dabbling

²⁷ *See* Sergey Kadinsky, *Hidden Waters of New York*, (Countryman Press: March 14, 2016).

²⁸ New York State Office of Parks, Recreation, and Historic Preservation, “Hempstead Lake State Park,” available at <https://parks.ny.gov/parks/hempsteadlake/details.aspx>, (last visited August 8, 2020); GOSR Project Description, Letter to USFWS, Draft EA, Appendix H, dated July 17, 2017, available at <https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/Appendix%20H%20-%20USFWS%20Consultation.pdf>, (last visited August 9, 2020).

²⁹ *See* <https://parks.ny.gov/newsroom/press-releases/release.aspx?r=873>.

ducks (including the American Black Duck, Wood Duck, Blue-winged Teal, Gadwall, and Northern Pintail).³⁰

Furthermore, when it broke the LWTB Plan into smaller projects for individual environmental review, GOSR failed to examine how the new projects might affect each other or how they might affect watershed communities. For example, the East Rockaway High School Project, which entails the construction of a two-foot bulkhead on the west side of the Mill River while leaving the east side of the River unaddressed, will inevitably cause a significant rise in the river, which will only increase during precipitation and storm surge events, resulting in the flooding of east side communities. *See* Affidavit of Linda Marshall, sworn to July 28, 2020 (“Marshall Aff.”), Ex. C at ¶ 7. And, as discussed below, this problem will be exacerbated by GOSR’s failure to restore and strengthen the Hempstead Lake Dam to the level needed to protect watershed communities from storm surge. The cumulative impacts of the East Rockaway High School bulkhead construction and the inadequate dam remediation will inevitably cause severe flooding for those living on the east side of the Mill River. There has been no consideration whatsoever of the cumulative impact of the two projects on these communities. *See* Marshall Aff. at ¶ 7.

There are many other problems with GOSR’s approach, beyond its ditching of the LWTB Plan’s purpose, goals, and methods, not the least of which is that Hempstead Park, with its significant surface waters, is not an end point for the flow of the Mill River in the watershed. Given the Park’s location in the middle of a dynamic water system and the well-documented effects of storm surge and tidal surge that occurred during Hurricane Sandy and prior storms, any

³⁰ *See* South Shore Audubon Society, “Comments on the Hempstead Lake State Park Environmental Review, Presented at Governor’s Office of Storm Recovery Public Hearing at Hempstead Town Hall, (July 2017), Stern Aff. at ¶ 6.

remedial actions on Hempstead Lake Dam *must* take into account the potential impacts of overtopping both downstream and upstream from the Park. *See* Stern Aff. at ¶ 12. In fact, Hempstead Lake Dam has been of concern to the Dam Safety Section of the New York Department of Environmental Conservation for many years because of the amount of water its holds back (its impoundment capacity) and the density of the population living downstream of the Dam. *See* DEC Hempstead Lake Dam Inspection Reports, Revised EA (December 2019), Appendix F.³¹ The current Plan, however, does not provide for the Dam to be restored to a level that will prevent overtopping and the flooding of Watershed communities. *See* Stern Aff. at ¶¶ 10-12.

In short, Hempstead Lake State Park is a natural green oasis offering a respite from the heat and congestion of Nassau County's developed suburban area, a space to relax in nature, and place to enjoy outdoor activities such as hiking, birdwatching, and fishing. In place of these shared social values and cultural and environmental treasures, however, Respondents have pushed through a project which: fails to address the very serious deficiencies of dams; clear-cuts forested areas serving as a carbon sink; fragments bird and wildlife habitat; and eliminates wetlands serving toxin removal functions. *See* Stern Aff. at ¶¶ 33, 38-48; and Bauer Aff. at ¶¶ 17-23. There could not be a more blatant deviation from the Living with the Bay Plan nor a more flagrant flouting of a lead agency's responsibility under SEQRA to take a "hard look" at the environmental impacts of its planned actions.

³¹ Available at

<https://stormrecovery.ny.gov/sites/default/files/cip/community/documents/Appendix%20F%20Dam%20Safety%20Inspections%20and%20Letters.pdf>, (last visited August 9, 2020).

ARGUMENT

POINT I

RESPONDENTS FAILED TO COMPLY WITH SEQRA BY ISSUING A NEGATIVE DECLARATION FOR GOSR'S HEMPSTEAD LAKE STATE PARK PROJECT

In adopting the New York State Environmental Quality Review Act (“SEQRA”), New York Environmental Conservation Law (“ECL”) § 8-0101, *et seq.* (McKinney 2014), “[t]he State has made protection of the environment one of its foremost policy concerns.” *Matter of E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359, 371 (1988) (citation omitted). Consistent with this mandate, the “environment” that SEQRA protects is broadly defined:

“Environment” means the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution or growth, and existing community or neighborhood character.

ECL § 8-0105(6). SEQRA accomplishes its beneficial purposes by “inject[ing] environmental considerations directly into governmental decision-making,” *Coca-Cola Bottling Co. of New York, Inc. v. Bd. of Estimate of the City of New York*, 72 N.Y.2d 674 (1988), and requiring that “[a]s early as possible in the formulation of a proposal for an action, the responsible agency shall make an initial determination whether an environmental impact statement need be prepared for the action.” ECL § 8-0109(4); *see Sun Beach Real Estate Dev. Corp. v. Anderson*, 98 A.D.2d 367 (2d Dep’t 1983), *aff’d*, 62 N.Y.2d 965 (1984).

For purposes of SEQRA, agency “actions” that trigger a substantive environmental assessment include:

- (i) projects or activities directly undertaken by any agency; or projects or activities supported in whole or part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies; or projects or activities involving the issuance to a person of a lease,

permit, license, certificate or other entitlement for use or permission to act by one or more agencies;

(ii) policy, regulations, and procedure-making.

ECL § 8-0105(4). The DEC's implementing regulations further refine the meaning of a SEQRA “action” by establishing three categories: Type I, Type II, and Unlisted. Type I actions are those “more likely to require the preparation of an EIS.” 6 NYCRR § 617.4. When a project is designated as a Type I action, the agency must undertake an environmental assessment—*i.e.*, prepare an extensive Environmental Assessment Form designed to elicit critical information concerning a proposed project’s potential environmental impacts—to determine whether the proposed action may have a significant effect on the environment. *Id.* §§ 617.6(a)(2), (3). In undertaking its environmental assessment, the responsible or lead agency must identify all relevant areas of environmental concern, “thoroughly analyze” each concern in light of the criteria set forth in the regulations, assess each activity’s potential for causing adverse impacts, and publish a determination of significance containing a “reasoned elaboration” for each conclusion with reference to supporting documentation. *Id.* § 617.7(b); *see Bd. of Co-op. Educ. Servs. of Albany-Schoharie-Schenectady-Saratoga Counties v. Town of Colonie*, 268 A.D.2d 838 (3d Dep’t 2000); *Cathedral Church of St. John the Divine v. Dormitory Auth. of State of N.Y.*, 224 A.D.2d 95, 100 (3d Dep’t 1996) (“Prior to issuing a negative declaration, an agency must evaluate numerous criteria, take a ‘hard look’ at relevant areas of environmental concern and make a written ‘reasoned elaboration’ of its basis for the determination.”).

If, after considering the regulatory criteria, the lead agency determines that the Type I action will not have *any* significant adverse environmental impacts, it must document its determination and rationale in a “negative declaration.” *Id.* §§ 617.7(b)(4), (d); *see*

Bd. of Co-op. Educ. Servs. of Albany-Schoharie-Schenectady-Saratoga Counties v. Town of Colonie, 268 A.D.2d 838, 840 (3d Dep't 2000); *Tonery v. Planning Bd. of Town of Hamlin*, 256 A.D.2d 1097, 1099 (4th Dep't 1998) *opinion amended on reargument sub nom. In re Tonery v. Planning Bd. of Town of Hamlin*, 703 N.Y.S.2d 762 (1999) (“[T]he lead agency must provide a reasoned elaboration for its determination of nonsignificance. Conclusory statements, unsupported by empirical or experimental data, scientific authorities or any explanatory information will not suffice as a reasoned elaboration for its determination of environmental significance or nonsignificance.”).

SEQRA's substantive mandate is further explicated in the implementing regulations, which make clear that no action may be undertaken prior to full compliance with the law:

No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQR. A project sponsor may not commence any physical alteration related to an action until the provisions of SEQR have been complied with.... An involved agency may not issue its findings and decision on an action if it knows any other involved agency has determined that the action may have a significant adverse impact on the environment, until a final EIS has been filed.

6 NYCRR § 617.3(a). In fact, a key provision in the SEQRA regulations requires an agency to rescind a negative declaration if substantive new information becomes available after its issuance but prior to a decision to undertake, fund, or approve the action. 6 NYCRR § 617.7(f)(1) (stating that “a lead agency *must* rescind a negative declaration when substantive ... new information is discovered”) (emphasis added). An inaccurate or incomplete environmental assessment may require annulment of a negative declaration. *See Yellow Lantern Kampground v. Cortlandville*, 279 A.D.2d 6, 12 (3d Dep't 2000) (“By failing to fulfill the requirements [for an environmental assessment], the Town Board failed to fulfill its

obligations under SEQRA, requiring annulment of its negative declaration and its ensuing application approvals.”).

A. Respondent GOSR Violated SEQRA’s Procedural Requirements

The purpose of SEQRA is to ensure “that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.” ECL § 8-0103(8). In defiance of this principle, and with a superficial environmental review and minimal public scrutiny, Respondents have authorized a plan that will cause an unprecedented and irreversible alteration of treasured public park land, eliminate or fragment critical wildlife and bird habitats, caused an upsurge of noise and traffic and an increase in solid waste pollution in the Park, degrade critical public and health and safety storm surge and tidal surge protections. *See Stern Aff.* at ¶¶ 38-41, 44; *Bauer Aff.* at ¶¶ 10-12; *Bevington Aff.* at ¶ 7.

New York courts require literal and strict compliance with SEQRA’s procedural mechanisms and have long held that anything less will result in annulment of the lead agency’s determination of significance. “Strict compliance with SEQRA guarantees that environmental concerns are confronted and resolved prior to agency action.” *New York City Coalition to End Lead Poisoning v. Vallone*, 100 N.Y.2d 337, 350 (2003); *see King v. Saratoga Cnty. Bd. of Supervisors*, 89 N.Y.2d 341, 348, 653 N.Y.S.2d 233, 235-36 (1996) (“[a]nything less than strict compliance ... offers an incentive to cut corners and then cure defects only after protracted litigation, all at the ultimate expense of the environment.”); *Badura v. Guelli*, 464 N.Y.S.2d 98 (4th Dep’t 1983) (town board violated SEQRA when it failed to prepare either an EIS or a negative declaration before it rezoned land from residential to industrial, a Type I action); *Rye Town/King Civic Assn. v Town of Rye*, 82 A.D.2d 474, 480-481 (2d Dep’t 1981) (literal compliance with SEQRA is mandated and “substantial compliance with the ‘spirit’ of the act does not constitute

adherence to its policies ‘to the fullest extent possible.’”); *Glen Head-Glenwood Landing Civ. Council v Town of Oyster Bay*, 88 A.D.2d 484, 491 (2d Dep’t 1982) (“the town board’s failure to make the necessary ‘explicit’ SEQRA findings in rezoning the property was fatal”).

In the name of ensuring that the grant funding would be spent within the program’s mandated timeframe, (See Forgiione Aff. at ¶ 7) Respondent GOSR took numerous unlawful shortcuts, even going so far as to tell coordinating agencies—long before it had undertaken the required environmental assessment—that even though many of the LWTB Plan’s “new” projects had not yet been designed, they would not have a significant impact on the environment. In fact, on August 1, 2017, GOSR issued Action Plan Amendment No. 16, a document circulated more than *one year prior* to GOSR’s issuance of its Draft Environmental Assessment on October 4, 2018 and Finding of No Significant Impact on October 5, 2018, in which it boldly announced its pre-assessment determination of no significant impacts:

*The LWTB Plan is in the preliminary design phase, therefore, the project has not completed the environmental review or permitting process. Based on the available information pertaining to the **potential** projects that will be completed through LWTB, GOSR does not anticipate a need to complete an EIS for the LWTB Plan. Rather, GOSR intends to complete Environmental Assessments and to issue Findings of No Significant Impact for multiple projects and groups of projects. Environmental permitting and Environmental Assessments will be performed as each LWTB focus area enters the 30% design stage”*

Action Plan Amendment No. 16, at 38, (see footnote 25 above) (emphasis added).

Respondent GOSR’s conclusion that LWTB Plan projects and activities—including those taken as part of the Hempstead Lake State Park Project, a Type I Project that presumptively requires an Environmental Impact Statement (“EIS”)—will have no significant impact on the environment *prior* to the design and/or delineation of those actions unequivocally violates SEQRA’s procedural requirements. Such evasions or manipulations of regulatory requirements

violate SEQRA's fundamental policy of "inject[ing] environmental considerations directly into governmental decision-making at the earliest possible time so that agencies conduct their affairs in a manner which will protect the environment." *WEOK Broad. Corp. v. Planning Bd. of Town of Lloyd*, 165 A.D.2d 578, 580- 81 (3d Dep't 1991), *aff'd*, 79 N.Y.2d 373 (1992).

The law is clear that agencies must undertake an analysis and make an in-depth determination of environmental significance *before* a decision is reached whether to undertake a proposed action. After-the-fact determinations—and their corollary, post hoc justifications—make a mockery of SEQRA's purpose and violate both the letter and the spirit of the law. See *Matter of E.F.S. Ventures* 71 N.Y.2d at 371; *WEOK Broad. Corp. v. Planning Bd. of Town of Lloyd*, 165 A.D.2d 578, 580- 81 (3d Dep't 1991), *aff'd*, 79 N.Y.2d 373 (1992); *cf. 24 Franklin Ave. R.E. Corp. v. Heaship*, 139 A.D.3d 742, 745, 30 N.Y.S.3d 695, 698 (2d Dep't 2016) (holding that a Town Board's failure to prepare a complete EAF prior to enacting an amendment to a local zoning law rendered the amendment invalid). And the same is true of pre-assessment determinations, which are "[c]onclusory statements, unsupported by empirical or experimental data, scientific authorities or any explanatory information, [and] will not suffice as a reasoned elaboration for its determination of environmental significance or nonsignificance." *Tonery v. Planning Bd. of Town of Hamlin*, 256 A.D.2d 1097, 1099 (4th Dep't 1998) *opinion amended on reargument sub nom. In re Tonery v. Planning Bd. of Town of Hamlin*, 703 N.Y.S.2d 762 (1999) (holding that lead agency failed to provide a reasoned elaboration for its determination of nonsignificance). See also *Baker v. Vill. of Elmsford*, 70 A.D.3d 181, 190 (2d Dep't 2009) (finding that the negative declaration was "merely conclusory ... and does not represent the 'hard look' with 'reasoned elaboration' mandated by SEQRA").

The penalty for GOSR's pre-assessment determination of no significant environmental impact--the worst kind of sleight of hand--must at least be on par with that imposed when an agency's malfeasance is reliance on an incomplete Environmental Assessment Form: annulment of the negative declaration and all agency action relying on it. *See Yellow Lantern Kampground v. Cortlandville*, 279 A.D.2d 6, 12 (3d Dep't 2000) ("By failing to fulfill the requirements [for submission of a completed EAF], the Town Board failed to fulfill its obligations under SEQRA, requiring annulment of its negative declaration and ensuing application approvals.").

B. Respondent GOSR Violated SEQRA by Failing to Consider Key Areas of Environmental Concern and take a "Hard Look" at Potential Significant Adverse Environmental Impacts

As noted above, SEQRA requires an agency to conduct a full environmental review of any proposed action "that may have a significant effect on the environment." ECL § 8-0109(2); *see Cathedral Church of St. John the Divine v. Dormitory Auth. of State of N.Y.*, 224 A.d.2d 95,99 (3d Dep't 1996). Thus, before deciding that an EIS "can be dispensed with," *Desmond-Americana v. Jorling*, 153 A.D.2d 4, 10 (3d Dep't 1989), the agency must determine, in the form of a "filed and published" negative declaration, 6 NYCRR § 617.2(y), "that there will be no adverse environmental impacts" associated with the proposed action. *Id.* § 617.7(a)(2); *see Troy Sand & Gravel Co. v. Town of Nassau*, 82 A.D.3d 1377, 1378 (3d Dep't 2011).

The courts have made clear that because the statute uses the word "may" as the trigger for requiring a full environmental review, "there is a relatively low threshold for the preparation of an EIS," *Matter of Barrett v. Dutchess Cnty. Legislature*, 38 A.D.3d 651, 655 (2d Dep't 2007), and this is particularly so with regard to a Type I project. *See Shawangunk Mountain Env'tl. Ass'n v. Planning Bd.*, 157 A.D.2d 273, 275 (3d Dep't 1990) (citing *H.O.M.E.S. v. N.Y.S. Urban Dev. Corp.*, 69 A.D.2d 222, 232 (4th Dep't 1979)). In contrast, to support a negative declaration

concluding that a full review and EIS are not required, the agency must show that “there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant.” 6 NYCRR § 617.7(a)(2); *see id.* § 617.2(y) (defining a “negative declaration” as “a written determination by a lead agency that the implementation of the action as proposed *will not result in any significant adverse environmental impacts*”) (emphasis added). In short, the existence of even *one* significant environmental impact from HLSP Project activities is enough to require the preparation of an EIS; and GOSR may avoid that obligation only by demonstrating that *no* such impacts will occur. Respondent GOSR has made no such showing, nor could it have, given the Park’s existing conditions, history of environmental enforcement issues, and the administrative record in this matter.

When making its significance determination for the HLSP Project, GOSR was required to identify the relevant areas of environmental concern and take a “hard look” at them to determine if the Project might have a significant adverse impact. *Id.* § 617.7(b); *see also Save the Pine Bush, Inc. v. Planning Bd. of the City of Albany*, 130 A.D.2d 1, 3 (3d Dep’t 1987). The SEQRA regulations set forth an illustrative but not exhaustive list of 12 “indicators of significant adverse impacts on the environment,” *id.* § 617.7(b)-(c), and the following six criteria are applicable on their face to the proposed HLSP Project:

(i) a substantial adverse change in existing air quality, ground or surface water quality or quantity, traffic or noise levels ... a substantial increase in potential for erosion, flooding, leaching or drainage problems;

(ii) the removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat area;

(iv) the creation of a material conflict with a community's current plans or goals as officially approved or adopted;

(vii) the creation of a hazard to human health;

(viii) a substantial change in the use, or intensity of use, of land including agricultural, open space or recreational resources, or in its capacity to support existing uses;

(xi) changes in two or more elements of the environment, no one of which has a significant impact on the environment, but when considered together result in a substantial adverse impact on the environment; or

(xii) two or more related actions undertaken, funded or approved by an agency, none of which has or would have a significant impact on the environment, but when considered cumulatively would meet one or more of the criteria in this subdivision.

Respondent GOSR utterly disregarded its obligations under these significance criteria, choosing instead to address some issues and flatly disregard others, all the while eschewing any substantive explanation for its decisions on which issues to address. In fact, when called to account by coordinating agencies and neutral experts for the omissions in its environmental assessment, GOSR merely repeated the same conclusory statement that the Project presented no such issue. *See Forgiione Aff.* at ¶ 7. The agency also ignored numerous repeated requests for information made by its own Citizens Advisory Committee, refusing to respond to any Committee inquiries for more than a year. *See id.* at ¶¶ 7-8. Such intransigence is hardly the mark of an engaged agency invested in meeting SEQRA's requirements.

As set forth in the Verified Petition and supporting affidavits, GOSR disregarded and dismissed issues about the HLSP Project raised by the Concerned Citizens of the Mill River Flood Plain, South Shore Audubon Society, Sierra Club-Long Island Local Chapter, Open Space Council, Environmental Justice Initiative, and Citizens Advisory Committee regarding: a) storm recovery and resiliency initiatives; b) ground and surface water quality; c) dam deterioration; d) increased flood and associated health risks to residents of Mill River communities and Mill River watershed ecosystems; e) environmental justice concerns; f) plans for handling the

contaminated sediment from pond dredging; g) the removal of vegetation and trees and effects on the habitats of resident waterfowl, forest birds, and other wildlife species; and h) the fundamental change in the character of a treasured public social, cultural, and educational green space. *See* Forgone Aff. at ¶ 1; Bevington Aff. at ¶¶ 4-7 and Exhibit 1 thereto; Marshall Aff. at ¶ 7.

Dam Deterioration and Insufficient Remediation

Of the myriad comments filed, one of immediate and urgent concern is the highly unstable condition of the Hempstead Lake Dam. Respondent GOSR failed to respond to experts' and community groups' concerns about the agency's planned remediation effort and the Hempstead Lake Dam's ability to handle storm surge. Instead, it wholly abandoned the LWTB Plan's goals of flood mitigation and preservation of quality of life. *See* Stern Aff. at ¶¶ 14, 21. By scrapping the LWTB Plan's primary objective of increasing resiliency by reducing the risk of flooding in watershed communities, GOSR turned a blind eye to the risks of catastrophic floods likely to surpass those which have been documented over decades. *See* Stern Aff. at ¶¶ 16-18. As shown below, there can be no doubt that GOSR's actions on this issue violate SEQRA's requirement that lead agencies address potential significant adverse impacts due to "a substantial adverse change in ... surface water quality or quantity ... a substantial increase in potential for erosion, flooding, leaching or drainage problems," 6 NYCRR § 617.7(b)(i), and the risks of creating "a hazard to human health." 6 NYCRR § 617.7(b)(vii).

The Hempstead Lake Dam, an earthen dam more than 147 years old and lacking in the modern structures used to avoid erosion and overtopping during storms, was downgraded by the DEC to Class C - High Hazard status in 2010. *See* Revised EA (December 2019), Appendix F, at 12.³² A post-inspection letter from the DEC's Dam Safety Section to the Hempstead Park Manager

³² Available at <https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/Appendix%20F%20Dam%20Safety%20Inspections%20and%20Letters.pdf>, (last visited August 9, 2020).

in 2010, not only catalogued the Dam's deficiencies, it also recounted a regulatory record of the Office of Park's failures to respond to DEC deficiency notices issued in 2003, 2006, and 2007. *Id.* Of particular note in the deficiency notices are the Dam's lack of spillway capacity (a structure used for the controlled release of flows from a dam into a downstream area to prevent the overtopping of the dam during storms), nonoperational gates, and malfunctioning drains, as well as the lack of an Emergency Action Plan. *Id.* The Dam's lack of spillway capacity had been flagged as problematic by the U.S. Army Corps of Engineers as far back as 1981, nearly 40 years ago, *id.*, and was raised again quite recently, and in very stark terms, by an environmental engineer from the DEC's Dam Safety Section reporting her findings to the Office of Parks Recreation after an inspection in November 2016:

As you aware, the structure's spillway does not have adequate capacity to pass the design flood for a high hazard dam. Such an event will result in the overtopping of the dam and its embankments. Since overtopping of dam embankment may result in its failure, it is important that the inadequate spillway capacity be addressed. This is a high hazard dam which means failure of this dam can result in loss of life and serious economic damage.

See Revised EA (December 2019), Appendix F: Dam Safety Inspections and Letters, at 14.

Despite numerous pleas from experts, environmental groups, and the public that GOSR revise its plans for the Dam, GOSR blithely pushed ahead, without undertaking a comprehensive study of the Dam's integrity, leaving County residents in an even more precarious situation than they had been prior to the commencement of the HLSP Project. *See* Stern Aff. at ¶¶ 16-17, 21, 47; Revised EA (December 2019), Appendix F: Dam Safety Inspections and Letters, at 11-20 (DEC notes that the removal of mature trees without fill and compaction would be a destabilizing force on the Dam); Appendix E: United States Army Corps of Engineers 1981 National Dam Safety Program, at 13 (stating that "larger hardwood trees should not be removed, but should be inventoried and their condition monitored. . . . [and] [i]f a tree dies, the area around the tree should

then be monitored for possible seepage.”); LKP 2014 Report (noting that removing mature trees can cause dams to fail due to sudden water level rise). In fact, the situation was deemed so troubling that as recently as December 4, 2019, Donna Mahon, HUD’s Field Environmental Officer, wrote a letter to Matt Accardi, GOSR’s Counsel in charge of shepherding the HLSP Project, detailing deficiencies in GOSR’s EA analysis. *See* HUD FOIA Response to Request 20-FI-RO2-00358, attached to the Petition as Exhibit I. Ms. Mahon’s letter concluded:

We are concerned that the lack of analysis of the potential direct impacts of dam operations leaves the State’s FONSI [finding of no significant impact] unsupported and vulnerable to legal challenge. And further suggesting that the operations will be subject to change in the future without additional NEPA analysis or approval is an abdication of GOSR’s responsibilities under Part 58 for both monitoring and reevaluation of findings based on changed conditions.

Id. The statement by Ms. Mahon, apparently responding to GOSR’s indication that it intended to make changes in Dam operations in the future *without* complying with NEPA environmental review requirements, reveals yet another instance of GOSR’s open defiance of federal and state environmental laws.

Among the specific criticisms of GOSR’s environmental assessment is the agency’s plan to increase Hempstead Lake’s water levels, which would require a higher impoundment capacity for the Dam. Speaking to this issue, the HUD Field Environmental Officer noted that “[c]urrently there is no discussion of what events might trigger the need for such increased water levels, how often such events might take place or for how long the elevated impoundment levels would last. These events could and would likely have direct impacts upon the existing littoral zones of Hempstead Lake that should be evaluated as part of the NEPA process.” *Id.* The HUD Officer also noted “the lack of a model supporting GOSR’s plan to maintain a constant water level.” *Id.* GOSR’s failures to “define the operations schedule for the newly repaired dam,” “provide information on the [dam’s] potential emergency operations,” or model and evaluate “the impacts

from the proposed general operations schedule of the newly functional dam,” should be distressing to community residents, institutions, government agencies, and businesses located in the Mill River watershed. *Id.* This is particularly so given that GOSR states that it is not the agency’s responsibility to consider who would operate the Dam’s gates once they are opened—or how that person would be funded to do so—to adjust the water levels. *See Stern Aff.* at ¶ 24. Such intransigence in the face of express government and expert warnings of risks to human and ecological health is, frankly, incomprehensible.

The serious risks posed to people, built communities, and the ecology of the watershed by GOSR’s detrimental dam remediation plan are compounded by its deeply flawed flood risk analysis. *See Affidavit of Paul A. Rubin*, sworn to August 21, 2020, a copy of which is annexed to the Petition as Exhibit “G”, (“Rubin Aff.”) at ¶ 4. GOSR’s model estimating probable maximum precipitation and probable maximum floods, which were used in its design of the remediation plans for the Hempstead Lake Dam, spillways, and other flood controls, was based on: (a) woefully out-of-date precipitation data and stream flow data; (b) the improper calibration of the model; (c) insufficient data underlying the estimation of the frequency and magnitude of flood events; (d) a failure to consider climate change effects of increased extreme storm events, precipitation quantities, and flood frequencies; (e) the lack of assessment of flooding risks stemming from channel inundation from Hewlett Bay storm surges; (f) the failure to consider the additive and/or synergistic effects of multiple sources of increased storm surges. *See Rubin Aff.* at ¶ 4.

GOSR relied on extremely limited data despite the fact that it does not represent the current stream flow conditions and precipitation quantities in the Mill River watershed and does not take into account the increasing frequency and severity of extreme weather events. Importantly, GOSR

relied on this data even though existing data for the region are readily available and would have corrected the agency's significant undervaluation of flood risks. *See* Rubin Aff. at ¶ 20.

GOSR's model analyzing Hempstead Lake Dam's impoundment capacity and its structural strength relies on a determination of the "Probable Maximum Precipitation" value, defined as the greatest depth of precipitation for a given duration that is physically possible over a given storm size area at a particular geographic location at a given time of the year. The Probable Maximum Precipitation value ("PMP") is a concept used by hydrologists to estimate probable maximum floods, which, in turn, are used in risk assessments and the design of hydrological structures such as dams, spillways, levees, and other flood control works intended to protect downstream populations and structures. *See* Rubin Aff. at ¶ 6. The PMP value must be accurately determined in order to predict peak stream flow rates that would result from storms of various magnitudes and recurrence intervals. Once a PMP value is set, its predictive force is evaluated by feeding data from actual past events into the model to see whether its predictions of peak flow rates were close to the actual data for the past events. Running the model using existing data for past events provides confirmation that the model is properly calibrated. The results of this modeling effort are important because, as noted above, they are used as the basis for drafting engineering designs for projects that must provide sufficient protection for downstream residents, buildings and the environment. *See* Rubin Aff. at ¶ 7. GOSR failed to undertake this calibration effort, and as a result, its model presents a highly inaccurate prediction of peak storm surges. *Id.* at ¶ 7.

Projects involving the assessment of floodwaters should always be predicated on the most recent data available. Yet, Appendix O to the Draft EA, GOSR's Hydrological and Hydraulic Assessment,³³ states that the PMP value for the HLSP Project was generated using data published

³³ Draft EA, Appendix O: Hydrological and Hydraulic Assessment, available at <https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/Appendix%20O%20-%20Hydrological%20and%20Hydraulic%20>

by the U.S. Army Corps of Engineers, the National Oceanic and Atmospheric Administration, and the National Weather Service in June 1978, some *42 years ago*. See Draft EA, Appendix O; See Rubin Aff. at ¶ 8. With regard to flood prediction, the longer the period over which stream gaging and precipitation data is collected, the more reliable a model's predictions will be. Without current data, a model is highly likely to be incorrect. In the EA, however, GOSR states that because there was no stream flow data for the Mill River and only limited data for Pines Brook, it used the peak stream flow data for Pines Brook *alone* and rainfall data for a *single storm* that occurred on January 3, 1999. See Rubin Aff. at ¶ 13. Then, based on its intuition that the flow results were too high, GOSR reduced the model's numbers by ten percent and then re-ran its model. The EA states: "*The model's predicted flows, while lower, were still more conservative than the recorded data. It was determined that we would use the lower curve numbers throughout the model. No further calibration was attempted since the information about the Pines Brook gauge was very limited.*" See Rubin Aff. at ¶ 13.

In fact, GOSR failed to make use of existing meteorological and hydrological data that is of crucial importance to model calibration and safe project design. Hydrologic models should be calibrated with as much empirical data as possible to ensure the accuracy of predictions that will serve as the bases for structures intended to protect people, communities, wildlife, and habitat. Empirical hydrologic data from a single storm event gives a very limited picture based on factors that might react differently in light of numerous other affecting alternate conditions, such as pre-storm stream flow, soil type, antecedent soil moisture condition, vegetative cover, precipitation amount and intensity, snowmelt, and temperature. See Rubin Aff. at ¶ 14. Despite these widely accepted principles, GOSR made no attempt to identify other data sources that could be used to

[Assessment.pdf](#), (last visited August 9, 2020).

test its model's accuracy and reliability. And had the agency looked, it would have found that stream flow data from USGS gaging station 01310500 in East Meadow Brook at Freeport, just 4.0 miles east of the Dam, has been collected over the period from 1937 to the present, *76 years*, with only a few years missing from the data set. *Id.* at ¶ 15.

The agency's utilization of an extremely limited data set that fails to accurately represent current stream flow conditions and precipitation quantities or take into account the increasing frequency and severity of extreme weather events, presents an extremely skewed analysis of the flood risks from storm surges for watershed communities surges. *See Stern Aff.* at ¶ 16; *Rubin Aff.* at ¶ 3. And importantly, GOSR relied on this deficient dataset even though available datasets would have corrected its gross undervaluation of flood risks. *See Stern Aff.* at ¶¶ 30-31; *Rubin Aff.* at ¶ 23. Records of local precipitation, peak stream flows, and storm surge have been a matter of public record for many years and could have been used by the agency had it chosen to do so. *See Stern Aff.* at ¶¶ 30-31; *Rubin Aff.* at ¶ 23. These facts alone provide a sufficient basis for the Court to require GOSR to undertake a much more in-depth analysis and prepare an Environmental Impact Statement. *See Anderson v. Town of Chili Planning Board*, 12 N.Y.3d 901 (2009) (town planning board violated SEQRA by failing to consider effects of potential explosion and fire at proposed metal shredder); *see also San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 499 F.3d 1016, 1033 (9th Cir. 2006) (requiring preparation of an EIS due to "events with potentially catastrophic consequences 'even if their probability of occurrence is low, provided that the analysis or impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason'").

Furthermore, GOSR's statistical flood frequency analysis shows that it used the very limited Pines Brook storm data, likely associated with only a 10-year storm, as the basis to predict

storm surges from a 100-year storm. *Id.* at ¶¶ 36-38. As a result, the HLSP Project’s design is based on rainfall totals that are far below what will occur during a 100-year flood event. The documented rainfall of 13.57 inches that fell in Islip (23 miles from Hempstead Lake) over a 24-hour period is 6.07 inches higher than the 100-year 7.5-inch rainfall value that GOSR used in HLSP Project design. Rubin Aff. at ¶ 11. Clearly, six or more inches of additional rainfall above that used in the design of flood protection measures will have devastating health and safety impacts. *Id.* at ¶ 39. The additional study required to ensure that GOSR’s remediation plan would safeguard the public simply was not done. And yet GOSR baldly concludes that its actions in the Park will not result in significant river flood levels or property damage during a 100-year storm event. The agency’s failure to utilize the correct environmental baseline for flood events renders its Negative Declaration fatally flawed. *See Friends of Back Bay v. U.S. Army Corps of Engineers*, 681 F.3d 581, 588 (4th Cir. 2012) (“A misapprehension of the baseline conditions existing in advance of an agency action can lay the groundwork for an arbitrary and capricious decision”); *Half Moon Bay Fishermans’ Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988) (“[w]ithout establishing ... baseline conditions ... there is simply no way to determine what effect [an action] will have on the environment and, consequently, no way to comply with NEPA”); *see also W. Watersheds Project v. Bureau of Land Mgmt.*, 552 F. Supp. 2d 1113, 1126 (D. Nev. 2008) (“In analyzing the affected environment, NEPA requires the agency to set forth the baseline conditions”); *Cnty. of Amador v. El Dorado Cnty. Water Agency*, 76 Cal. App. 4th 931, 953 (1999) (“This dispute highlights the importance of an adequate baseline description, for without such a description, analysis of major impacts, mitigation measures, and project alternatives becomes impossible”); Council on Environmental Quality, *Considering Cumulative Effects under the National Environmental Policy Act*, 13 (May 1999) (“The concept of a baseline against which to

compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process”).

Exacerbating the dangers further is the agency’s outright refusal to consider how climate change effects might function in the County’s flood protection system. *See* FEA, Appendix AA, (stating that climate change is beyond the scope of the project). This was done despite GOSR’s express statement to the contrary in its “May 2020 Updated LWTB BCA Description of Changes,” which provides updates on the agency’s LWTB Plan and its projects, including the HLSP Project:

There are long-term risks associated with climate change adaptation. While the damage from Hurricane Sandy was caused primarily by storm surge, stormwater flooding poses a significant risk from precipitation events. Both storm surge and stormwater flooding may be exacerbated through the impacts of climate change. Localized stormwater flooding, which occurs approximately twice a month on spring tide and moon tides, is expected to increase as a result of anticipated increases in general sea level and frequency of extreme events such as high wind induced surges. These risks would continue into the future (i.e., 5, 20, and 50 years) if the LWTB Project were not implemented. These risks would increase with climate change and sea level rise. Risks to low-to-moderate income populations or populations exposed to other adverse environmental factors would continue.

GOSR, “May 2020 Updated LWTB BCA Description of Changes,” at 23.³⁴ In relation to another HUD project proceeding along the same timeline, the agency stated further that “[i]n consideration of climate change, design standards for infrastructure projects subject to tidal influence should incorporate the NYSDEC sea-level rise projections, as described in 6 NYCRR Part 490.... This calculation should consider the life of the infrastructure.” GOSR Environmental Guidance Manual at 7.³⁵ And indeed, the directive in GOSR’s Guidance Manual is correct. On September 22, 2014, Governor Cuomo signed into law the Community Risk and Resiliency Act, Chapter 355 of the

³⁴ Available at https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/20200519_Updated_LWTB_BCA_Final_0_0.pdf, (last visited August 17, 2020).

³⁵ Available at <https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/Environmental%20Review%20Guidance%20for%20CR%20Projects.pdf>, (last visited August 3, 2020).

Laws of 2014 (“CRRA”). The CRRA is intended to ensure that state agencies and applicants for permits, approvals, and funding consider climate risk, including sea-level rise. Among other things, the CRRA required the DEC to adopt regulations establishing science-based State sea-level rise projections. In fact, the DEC’s regulations are now on the books, and Part 490 of the regulations establishes science-based sea-level rise projections for New York New York State’s tidal coast, including the marine coast of Nassau County. Respondent DEC’s projections for sea-level rise for the Long Island Region, set forth in 6 NYCRR § 490.4, are:

Time Interval	Low Projection	Low-Medium Projection	Medium Projection	High-Medium Projection	High Projection
2020s	2 inches	4 inches	6 inches	8 inches	10 inches

According to the DEC’s definitions, the medium projection of a 6-inch rise represents “the amount of seal-level rise that about as likely is not (the mean of the 25th and 75th percentiles of ClimAID model outputs) to be exceeded by the specified time interval.” 6 NYCRR § 490.3(n).

Courts have required that environmental assessments take into account climate change assessment for many years now. *See, e.g., City of Los Angeles v. National Highway Traffic Safety Administration*, 912 F.2d 478 (D.C. Cir. 1990) (holding that plaintiffs have standing to challenge the setting of the corporate average fuel economy (CAFE) standard); *Border Power Plant Working Group v. Department of Energy*, 260 F.Supp.2d 997 (S.D. Cal. 2003) (holding that carbon dioxide emissions from the construction of transmission lines to carry electricity from new power plants in Mexico to users in Southern California should have been analyzed under the NEPA); *see also Friends of the Earth, Inc. v. Mosbacher*, 488 F.Supp.2d (N.D. Cal., Mar. 20, 2007) (holding that energy projects abroad that would generate GHGs which would affect the climate in the United States should have been analyzed under NEPA); *cf. Laidlaw Energy and Environmental, Inc. v. Town of Ellicottville*, 59 A.D.3d 1084, 1085-86 (N.Y. App. Div. 2009) (affirming Planning

Board's decision denying permit applications to construct a cogeneration plant citing an unacceptable adverse impact due to greenhouse gas emissions). Despite these facts and the DEC's own climate change regulations requiring project applicants to address sea-level rise, however, DEC eventually approved GOSR's Hempstead Lake Dam remediation plan with no such consideration. *See Stern Aff.* at ¶ 22.

The SEQRA regulations require that the significance of a likely impact be assessed in connection with its setting, probability of occurrence, duration, irreversibility, geographic scope, magnitude, and number of people affected. 6 NYCRR § 617.7(c)(3). Here, the effects of a storm causing a surge that overtops the Hempstead Lake Dam would be catastrophic, given the close proximity to so many residential communities. The Dam's unstable condition, the agency's insufficient plans for remediation, and the lack of an updated Emergency Action Plan, *see Revised EA, Appendix F*, combine to create a hazard to human health sufficient to require the preparation of an Environmental Impact Statement. *See* 6 NYCRR § 617.7(b)(vii).

For all of these reasons, GOSR erred in issuing a Negative Declaration. *See Anderson v. Town of Chili Planning Board*, 12 N.Y.3d 901 (2009) (town planning board violated SEQRA by failing to consider effects of potential explosion and fire at proposed metal shredder); *Riverhead Bus. Imp. Dist. Mgmt. Ass'n, Inc. v. Stark*, 253 A.D.2d 752, 753 (2d Dep't 1998) (annulling town board's negative declaration because of possible release of toxic or hazardous materials into groundwater and potential for accidental release or explosion were significant effects requiring preparation of EIS); *Price v. Common Council of City of Buffalo*, 3 Misc. 3d 625 (S.Ct. Erie Co. 2004) (holding that city council violated SEQRA by failing to take a "hard look" at hospital's helipad proposal because it failed to consider potential danger to surrounding neighborhood of fire and explosion of liquid oxygen tanks); *see also Gov't of the Province of Manitoba v. Salazar*, 691

F.Supp.2d 37, 50 (D.D.C. 2010) (“It may be that the risk of a breach is low given the pipeline’s construction, but that is not an excuse ... to refuse entirely to analyze the *consequences*. When the *degree* of potential harm could be great, *i.e.*, catastrophic, the degree of analysis and mitigation should also be great.” (emphasis in original).

No Consideration of Cumulative Impacts

Another aspect of GOSR’s breach of SEQRA’s “hard look” requirement is the agency’s failure to examine the cumulative impacts of HLSP Project actions. For the purpose of determining significance, SEQRA regulations describe cumulative impacts as “changes in two or more elements of the environment, no one of which has a significant impact on the environment, but when considered together result in a substantial adverse impact on the environment;” or “two or more related actions undertaken, funded or approved by an agency, none of which has or would have a significant impact on the environment, but when considered cumulatively would meet one or more of the criteria in this subdivision.” 6 NYCRR § 617.7(c)(1)(xi)-(xii). Notably, impacts also can be significant if they are exponential, where the effects “increase in magnitude and severity at a faster rate than the increase in the size or number of projects.” Michael B. Gerrard, Daniel A. Ruzow & Philip Weinberg, *Environmental Impact Review in New York*, § 1.03[1] (2005). at § 5.10[4][a][iii]. An example of such impacts is a highway operating at or close to capacity—greater, more significant traffic congestion and environmental impacts may occur with the addition of only a few cars. *See id.*

The Court of Appeals has repeatedly affirmed the importance of cumulative impact review in the SEQRA process. In *Save the Pine Bush v. City of Albany*, 70 N.Y.2d 193 (1987), the Court annulled an EIS prepared by the respondent municipality because it failed to consider the cumulative impact of 10 similar rezoning proposals that would have affected 295 acres of an

ecologically sensitive and unique area. In so ruling, the Court found that “the City of Albany’s failure to consider the potential cumulative impacts of other pending projects ... upon the Pine Bush before granting the zoning change constituted a violation of its obligations pursuant to SEQRA.” *Id.* at 206. In *Village of Westbury v. N.Y. Dept. of Transportation*, 75 N.Y.2d 62, 69 (1989), the Court found that a parkway widening project and an interchange reconstruction were sufficiently related that “the [SEQRA] regulations require the consideration of their effects.”

SEQRA’s requirement that the cumulative effects of related actions be considered is of particular importance where, as here, a unique ecological resource is at stake. As noted by the Third Department:

[W]here there is really but one plan for the development of a *single* area of special environmental significance, the accurate ecological/social/economic balancing of costs and benefits mandated under SEQRA requires that the cumulative effects of all actions within the plan for that area be weighed.

Stewart Park & Reserve Coalition v. N.Y. Dept. of Transportation, 157 A.D.2d 1, 10 (3d Dep’t 1990) (emphasis in original). GOSR’s use of an incorrect baseline for estimating flood frequency and magnitude coupled with its flawed Hempstead Lake Dam remediation plan unequivocally meets SEQRA’s definition of a cumulative action likely to cause an adverse impact on the environment, as does the agency’s plan for wetlands reduction and alteration and woodland destruction as shown below.

Respondent GOSR’s deliberate contravention of SEQRA’s “hard look” mandate is evident in its handling of other key aspects of the HLSP Project as well. Neither the agency’s plan for wetlands alterations nor its plan for forest clear-cutting appear to have been subject to even the most basic scrutiny in terms of impacts. GOSR’s plan calls for the net loss of 2.76 acres of wetlands despite the DEC’s position, set forth in its “Freshwater Wetlands Regulation Guidelines on Compensatory Mitigation,” that “[i]t is very often necessary to replace more acreage than has

been impacted to fully compensate for losses. Larger acreage may be needed as insurance against the uncertainties associated with trying to create a new wetland. Higher replacement ratios may also be needed to compensate for the long time it will take for a mitigation wetland to function at the same level and provide the benefits of the wetland being replaced.”³⁶ Further, the concept of compensatory mitigation is premised on the replacement of wetlands with wetlands of the same type, serving the same functions. But that is not the case here. The FEA table shows 1.76 acres of emergent wetlands will be lost and only 0.16 acres of emergent wetlands created. *See* FEA, at 98. The lack of equivalency among different types of wetlands is important in evaluating environmental impacts given that not all wetlands are suitable for every species. The FEA indicates that the compensatory mitigation proposal is still awaiting approval by the U.S. Army Corps of Engineers leaving unanswered the question of the viability of GOSR’s plan. *See* Revised EA, Appendix O: Compensatory Mitigation Proposal, at 14.

In addition, the existing wetlands serve as an important buffer for stormwater flowing into the Park, and act as a filter for contaminants in the water and sediment in the Park’s two North Ponds. GOSR’s wetlands plans will undermine both of these critical functions as well. *See* Stern Aff. at ¶¶ 32, 34, 37-39. Despite numerous comments by experts, GOSR simply refused to address the concerns raised. A number of the involved federal agencies found that the EA was deficient in terms of mitigating the loss of wetlands. In their respective comments on the wetlands assessment, the U.S. Fish and Wildlife Service notes that GOSR’s wetlands calculations are incorrect, and U.S. EPA notes that there is insufficient information about grading plans, berms, sediment basins, and shore-bank stabilization, concluding that the EA does not meet the requirements for a finding of no significant impact. In the FEA, GOSR itself notes that dredging

³⁶ Available at https://www.dec.ny.gov/docs/wildlife_pdf/wetlmit.pdf, (last visited August 3, 2020).

for sediment basins may disturb contaminants, including dioxin and heavy metals, causing their dispersal throughout the watershed:

Dredging would increase turbidity and expose nutrient-rich sediments. If disturbed, these sediments could cause contaminants to be suspended in the water column of NE Pond, which could cause the contamination to spread to other areas of NE and NW Ponds, Hempstead Lake State Park, and farther downstream through the Mill River Watershed. Such disturbance presents a potential impact of exposing aquatic biota to acute toxic effects associated with potentially contaminated sediments suspended in the water column.

FEA, at 120. Yet the agency fails to address this significant problem, choosing instead to focus on how it will comply with the DEC's requirement that GOSR either complete a Toxicity Characteristic Leaching Procedure analysis to determine whether the excavated material exceeds hazardous waste thresholds or commit to the disposal of all dredged sediments off of Long Island in order to protect groundwater resources. *Id.* Furthermore, the increase in trail width, opening of trails to incompatible activities and increased traffic, creation of viewing points, and construction and use of kayak launches will result in the destruction of the valuable and rare wetland habitat of shallow open water and mudflats used by many species of birds and the removal of vegetation that provides crucial shelter for birds. *See Bauer Aff.* at ¶ 22. No study was made of the impact of these changes.

The installation of floatables collectors—structures designed to collect large pieces of trash floating through the watershed—is highly likely to exacerbate the pollution problem in the Park's surface waters by causing a build-up of trash and disturbing valuable habitat. With no funding allocated for Park staff who would empty the collectors, the debris would likely remain. In fact, beyond creating a jam point of trash, disturbing habitat, and creating an eyesore for those who visit the Park, the proposed collection systems will not be especially effective given that it will neither prevent floatables from entering the watershed, which happens upstream from the Park, nor filter

out small pieces of trash, micro-plastics, and other toxins and prevent them from moving further downstream—one of the key objectives of the LWTB Plan. Furthermore, given that the floatable catchers have the capacity to meet only a one-year storm, *see* FEA, Appendix AA, any storm of greater intensity than a common rainstorm will result in the debris flowing over the collectors. *See Stern Aff.* at ¶ 32. Given these flaws in the collection system, it is difficult to understand why GOSR did not consider the alternative of locating the floatables collectors upstream to prevent floatables, micro-plastics, and toxins from entering the watershed at their source. *See id.* at ¶ 46. Had the Respondents prepared an environmental impact statement a scoping session would have taken place, at which time various alternatives to the Plan which was adopted by the Respondents would have had to have been considered. *See* 6 N.Y.C.R.R. §§ 617.8 and 617.9(a)(7).

GOSR's past and future tree removal activities cut deep into the heart of the Park's ecological, social, and cultural value to watershed communities. The Park is a natural treasure in the midst of paved towns and villages. It is a place where people from nearby communities can go to walk quietly in the woods, sit under the trees in the cool shade, meet with friends and family in a common green space, and go birding to see species that are difficult to find locally. Although GOSR initially committed to halt tree removals during the period from April 1 through October 31 so as not interfere with the migration and nesting seasons, it reneged on that commitment and in fact commenced tree removal on Earth Day (April 22, 2020) during the "restricted" period. *See* FEA at 132-133. The Park provides stopover habitat for migrating birds, songbirds and shorebirds, and breeding habitat for birds and other wildlife, and construction and tree removal activities will disturb these critical functions. As Ornithologist Dr. Carolyn Bauer notes in her affidavit, these activities should at the very least be delayed because the Park "attracts and supports a very large number of migratory birds," Bauer Aff. at ¶ 8, and "elevated noise levels and disturbances from

increased human activity,” *id.* at ¶¶ 18-20, significantly increase birds’ stress hormone levels, leading to reproductive malfunction, molecular damage, and death. *Id.* at ¶¶ 18-19.

GOSR’s plan to remove additional trees on top of the 1,041 already removed is of even greater concern. According to Dr. Bauer, the loss of such a great number of trees in the Park would “eliminate or fragment critical wildlife, waterfowl, and forest bird habitat and both accelerate and exacerbate the loss of Eastern forest bird species ... which have been declining over that last 30 years.” *Id.* at ¶ 10. This habitat is especially critical to the survival of resident raptor species, like Great Horned Owls and Ospreys, and sensitive forest birds, such a vireos, tanagers, and flycatchers. *Id.* at ¶ 7. While the EA acknowledges that “waterfowl and waterbird use of the NE and NW Ponds may be diminished from an increase in human disturbance related to the reduced buffer distances and increased human activity along trails,” Revised EA, at 146, it fails to consider that the “edge effects”—which refers to the fact that “bird species fare best when they are far from the edges of habitat patches”—of habitat reduction increase in a non-linear fashion.” *Id.* at ¶ 9. Thus, a “reduction in a habitat patch's area by 50% generally causes a reduction in bird species by much more than 50% ... because birds living on the edges of a habitat patch are more vulnerable to predators and other forces destructive to bird populations.” *Id.* Moreover, these adverse effects will be worsened by GOSR’s plans to widen trails, build piers for launching kayaks, and create more parking spaces, all of which will increase traffic and noise, rendering long-time bird and wildlife habitats undesirable to resident species. *Id.* at ¶¶ 5-11, 18-20.

The HLSP Project will transform a significant portion of the natural portion of the Park into industrial facilities (such as floatable collection and detention basins), built recreation areas (such as expanded trails and kayak piers), and buildings (such as the education center)—actions that will be undertaken in the absence of a master plan or even an articulated vision of the Park

regarding which the public has been given an opportunity to comment. *See Stern Aff.* at ¶ 51. These changes alone account for an additional 8 acres of impervious ground cover, a result that is the least helpful action when the goal is reducing the risk of flooding. *Id.* at ¶ 51. The EA lacks any assessment of these changes, and contains no discussion of possible mitigation efforts either—points not lost on HUD, whose environmental officer noted in a November 22, 2019 letter to the DEC that:

There is a glaring omission of specifics on the value of the habitat for the various species that are identified as being within the project area.... The EA doesn't detail that there are large trees to be removed.... The [USFWS] previous comment to GOSR was that they need to discuss the value of the existing and proposed habitat and to fully assess the impacts to wildlife and birds which is on line with the Fish and Wildlife Conservation Act.

Final EA (January 2020), Appendix AB.³⁷

Indeed, GOSR's environmental analysis details in bold relief the agency's failure to consider the impacts of the HLSP Project on the character of the Park. The express terms of SEQRA and the DEC's implementing regulations define the "environment" to include "existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character." ECL § 8-0105(6); 6 NYCRR § 617.2(1). The Court of Appeals has stressed that impacts on community and neighborhood character must be assessed independently of impacts on other parts of the physical environment:

[T]he impact that a project may have on population patterns or existing community character, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis since the statute includes these concerns as elements of the environment. That these factors might generally be regarded as social or economic is irrelevant in view of this explicit definition. By their express terms, therefore, both SEQRA and CEQR require a lead agency to consider more than impacts on the physical environment in determining whether to require the preparation of an EIS. In sum, population patterns and neighborhood character are physical conditions of the environment

³⁷ Available at <https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/Appendix%20AB%20-%20January%202020%20Coded%20Comments.pdf>, (last visited August 9, 2020).

under SEQRA and CEQR regardless of whether there is any impact on the physical environment.

Chinese Staff & Workers Ass'n v. City of New York, 68 N.Y.2d 359, 365-66 (1986).

In urban areas, the pervasive adverse environmental impacts generated by concentrated industrial activity and an extensive built environment—such as air pollution, urban heat islands, and poor stormwater drainage—can be mitigated by green space. See Jason Byrne and Jennifer R. Wolch, “Nature, Race, and Parks: Past Research and Future Directions for Geographic Research,” *Progress in Human Geography*, 33, 6, 743-765 (March 13, 2009).³⁸ Trees assist in the filtration of air pollutants and provide cool, shaded areas, while grassy groundcover efficiently absorbs excess rainwater. See Jennifer R. Wolch, *et al.*, “Urban Green Space, Public Health, and Environmental Justice: The Challenge of Making Cities ‘Just Green Enough’,” *Landscape and Urban Planning*, 25 (May 2014).³⁹

Access to green space can greatly enhance the quality of life of people living in cities and exurbs. See Ben R. Newell, *et al.*, “The Psychology of Environmental Decisions,” *The Annual Review of Environment and Resources*, 39, 443-67 (2014).⁴⁰ Natural areas offer highly urbanized communities a reprieve from city life by providing a space for recreation and relaxation. See Wolch, *et al.*, “Urban Green Space,” at 447. A longstanding body of literature has linked exposure to nature to enhanced mood and reduced feelings of stress and fatigue. See, *e.g.*, Roger S. Ulrich, “Natural Versus Urban Scenes: Some Psychophysiological Effects,” *Environment and Behavior*, 13(5), 523–556 (1981).⁴¹ And studies have found a connection between close proximity to a public park and increased levels of physical activity.

³⁸ Available at <https://doi.org/10.1177/0309132509103156>.

³⁹ Available at <https://doi.org/10.1016/j.landurbplan.2014.01.017>.

⁴⁰ Available at <https://doi.org/10.1146/annurev-environ-010713-094623>.

⁴¹ Available at <https://doi.org/10.1177/0013916581135001>.

The SEQRA regulations plainly require that, in defining the proposed “action” under consideration, the lead agency must consider other related actions. “Actions commonly consist of a set of activities or steps. The entire set of activities or steps must be considered the action, whether the agency decision-making relates to the action as a whole or to only a part of it.” 6 NYCRR § 617.3(g). The requirement to consider related actions is further underscored in the section of the regulations governing determinations of significance:

For the purpose of determining whether an action may cause one of the consequences listed in paragraph (1) of this subdivision, *the lead agency must consider reasonably related long-term, short-term, direct, indirect and cumulative impacts, including other simultaneous or subsequent actions* which are:

- (i) included in any long-range plan of which the action under consideration is a part;
- (ii) likely to be undertaken as a result thereof, or
- (iii) dependent thereon.

Id. § 617.7(c)(2) (emphasis added); see *Bergami v. Town Bd. of Town of Rotterdam*, 97 A.D.3d 1018, 1021 (3d Dep’t 2012) (quoting and applying 6 NYCRR § 617.7(c)(2)).

Courts applying SEQRA have consistently refused to sanction agency attempts to segment environmental review of projects as contrary to the law’s intent. In *Concerned Citizens for the Environment v. Zagata*, 243 A.D.2d 20, 22 (3d Dep’t 1998), *leave to appeal denied*, 92 N.Y.2d 808, the Appellate Division elaborated on the pitfalls of segmented review:

It is clear that segmentation, which is the dividing of environmental review of an action in such a way that the various segments are addressed as though they were independent and unrelated activities, is contrary to the intent of SEQRA and is disfavored. Nevertheless, segmented review is permissible where the lead agency believes that it is warranted under circumstances, provided that the agency clearly states its reasons therefor and demonstrates that such review is no less protective of the environment. Additionally, the related actions must be identified and discussed to the fullest extent possible....

[T]he reasons for disfavoring segmentation are twofold. First is the danger that in considering related actions separately, a decision involving review of an earlier action may be “practically determinative” of a subsequent action ... The

second danger occurs when a project that would have a significant effect on the environment is broken up into two or more component parts that, individually, would not have as significant environmental impacts as the entire project or, indeed, where one or more aspects of the project might fall below the threshold requiring any review. (Citations omitted.)

GOSR's actions reveal both of these problems as well as several others.

GOSR's segmentation of both the LWTB Plan, as well as the HLSP Project, a Plan component, has been effectuated by three strategies: (1) the agency's perpetual revision of planned activities; (2) its delay in committing to definitive actions regarding key Project elements until long after it has issued the Negative Declaration and FEA; and (3) its use of "Action Plan Amendments" to fundamentally alter the nature and objectives of, and actions to be accomplished under the Resiliency Plan. These actions have resulted in a "distortion of the process" that fundamentally undermines SEQRA review. *See Long Island Pine Barrens Society v. Planning Board*, 204 A.D.2d 548, 550 (2d Dep't 1994) ("The regulations generally prohibiting segmentation are designed to guard against a distortion of the approval process by preventing a project with potentially significant effects from being split into two or more smaller projects, each falling below the threshold requiring full-blown review").

The agency has repeatedly revised its plans for dredging the North Ponds, which all agree have highly contaminated sediment. *See Stern Aff.* at ¶¶ 38-39. GOSR initially planned to dredge both the Northeast and Northwest Ponds to create greater impoundment capacity. However, upon receiving a warning from the DEC that the sediment would have to be contained and disposed of somewhere off of Long Island, GOSR indicated that it would not dredge the Ponds, and stated so publicly at the CAC's final meeting on May 4, 2020. *See Marshall Aff.* at ¶ 9. Upon more directed questioning from a CAC member, however, GOSR admitted that there would be *some* dredging of the Northwest Pond to accommodate the installation of the floatables collectors and sediment

basins. The agency has provided no explanation for what this would entail or how the agency would handle the toxic sediment pulled from the Pond.

Second, GOSR's plans for wetland alterations are illustrative of the agency's segmentation by means of delay in committing to a definitive set of actions. Because GOSR's original plan called for the alteration of freshwater wetlands critical to the survival of numerous bird species, it engendered a large public outcry as well as objections from federal agencies, resulting in GOSR's withdrawal of its original plan for the Park's wetlands. *See Stern Aff.* at ¶ 6. However, GOSR's revised plan only marginally reduced the impacts. *Id.* at ¶ 6. In fact, GOSR's December 18, 2019 Negative Declaration was issued without a final wetlands mitigation plan and without the completion of the process for Title 5, Article 15: Dam; Title 5, Article 15: Excavation and Fill in Navigable Waters; and Title 5, Article 24: Freshwater Wetlands permits.

Third, GOSR used "Action Plan Amendments" to fundamentally alter the nature, objectives, and activities of the LWTB Plan. In its Action Plan Amendment No. 16, discussed *supra*, the agency formally delineated its plan to carve up the Plan and issue findings of no significant environmental impacts for all future actions. *See Stern Aff.* at ¶¶ 6, 11, 45. The implementation of this type of segmentation has also been accomplished by discarding planned actions and shifting the funding to others. *See Bevington Aff.* at ¶ 5. In 2019, GOSR shifted more than \$89,000,000 from the \$125 million HUD Rebuild by Design grant to cover the costs of the renovation of various projects including the Long Beach Sewage Treatment Plant, (*id.* at ¶¶ 5, 10), a facility that is not within the Mill River Watershed and will not provide any of the resiliency benefits promised under the LWTB Plan.

GOSR employed a point system to rank 37 actions that were part of its LWTB Plan. *See Forgione Aff.* at ¶ 9. It then diverted from its own priority ranking and jettisoned 8 out of the 11

actions which had been assigned higher priority rankings than the HLSP Project. These actions, intended to provide resiliency benefits through restoration and increased flood protection, apparently are no longer part of any GOSR plan. *See* Forgiione Aff. at ¶ 9. *See also Long Island Pine Barrens Society*, 204 A.D.2d at 550 (2d Dep’t 1994) (holding that prohibition of segmentation is designed to guard against splitting one project into two or more smaller projects which fall below the threshold for a full review thereby circumventing the statute), *Teich v. Buchheit*, 221 A.D.2d 452 (2d Dep’t 1995) (holding that planning board’s failure to consider a proposed parking lot as part of an environmental review for a hospital expansion was an improper segmentation); *City of Buffalo v. Dep’t of Environmental Conservation*, 184 Misc.2d 243 (S.Ct. Erie. Co. 2000) (failure by DEC to consider impacts of new bridge construction together with renovation of adjacent plaza deemed improper segmentation).

Finally, the concrete dangers that may arise from unlawful segmentation are illustrated by GOSR’s departure from the LWTB Plan with its goals of assisting watershed communities with resiliency and flood mitigation, *see* Design Plan, at 2,⁴² to a plan focusing on achieving greater impoundment capacity and pollution collection in the Park. The first Plan activity, to create a framework to “evaluate flood mitigation interventions throughout coastal areas subjected to tidal and storm surge flooding but also upland areas impacted by stormwater runoff,” *id.*, was entirely abandoned. Indeed, when it came to addressing the Hempstead Lake Dam’s deficiencies in terms of meeting the safety standards required during severe storms, GOSR did *not* consider the effects of its dam remediation plans on *any* other portions of the Watershed, even those neighborhoods which are immediately adjacent to the Park. *See* Stern Aff. at ¶¶ 11-12, 15. Moreover, the agency omitted such an analysis despite the fact that its own “Hydrological and Hydraulic Assessment,”

⁴² Available at <https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/Objective%209.pdf>, (last visited August 2, 2020).

see Draft EA, Appendix O at 45, states that “[t]he difficulty with trying to make the dam meet current standards is that both the upstream and downstream ends of the watershed are flooded prior to the dam overtopping.” As GOSR’s statement shows, and Dr. Stern’s Affidavit firmly establishes, it simply is not possible to design and ensure the reliability of flood protection measures without examining and accounting for upstream and downstream surge events. See Stern Aff. at ¶¶ 11, 12, 15, 24, 26, 39, 40, 41, 43.

CONCLUSION

The deficiencies in GOSR’s Negative Declaration are the result of the agency’s use of inaccurate data and incorrect analyses, its wanton disregard of expert and public testimony, its refusal to consider the documented and state-calculated impacts of climate change, its willingness to fragment and destroy habitat that will causing a substantial decrease the species and numbers of birds and other wildlife the public visits the Park to see, its unlawful segmentation of the LWTB Resiliency Project, its failure to consider the cumulative impacts of the HLSP Project, and its careless disregard for the health and safety of the communities surrounding and downstream of the Park which will bear the brunt of the agency’s fatally flawed determination of significance. See 6 NYCRR § 617.7(c) (setting forth the significance criteria); § 617.2(m) (stating that “[a] properly completed EAF must contain enough information to describe the proposed action, its location, its purpose and its potential impacts on the environment”); *Corrini v. Vill. of Scarsdale*, 1 Misc.3d 907(A) (S.Ct. Westchester Co. 2003) (citing *Niagara Mohawk Power Co. v. Green Island Power Authority*, 265 A.D.2d 711 (3d Dep’t 1999), *app. dismissed*, 94 N.Y.2d 891 (annulling negative declaration because proposed project “has the potential to affect noise, visual aesthetics (lights), traffic patterns, and the community or neighborhood character (even if those effects may not prove

to be significant) [and] the responses provided on the EAF were misleading and failed to provide an adequate basis for the Board's adoption of a negative declaration in this case").

Because Respondents improperly segmented its review and GOSR's Negative Declaration and EA fail to identify relevant areas of environmental concern, take a hard look at potential environmental impacts or provide a reasoned elaboration for the finding of non-significance, this Court should invalidate the Determinations, permits and plan amendments, and enjoin GOSR's activities in Hempstead Lake State Park and East Rockaway pending a proper environmental review of the cumulative impacts of the same. *See Chinese Staff & Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 369 (1986) (annulling permit due to deficiencies in SEQRA review). *See also* 6 NYCRR § 617.3 ("A project sponsor may not commence any physical alteration related to an action until the provisions of SEQRA have been complied with.")

Dated: New York, New York
August 24, 2020

Respectfully submitted,

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