

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,

VERIFIED PETITION

-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 Sierra Club—Long Island Group, Concerned Citizens of Mill River Flood
Plain, and Joseph P. Forgione (collectively "Petitioners"), for their verified petition pursuant to
Article 78 of the New York Civil Practice Law and Rules ("CPLR"), by their attorneys allege as
follows:

PRELIMINARY STATEMENT

1. Petitioners bring this action to challenge the December 18, 2019 Negative
Declaration and January 21, 2020 Final Environmental Assessment issued by Respondent
Governor's Office of Storm Recovery (the "Determinations") approving one component of
Respondents' Living with the Bay Plan, which was designed to address flooding and pollution and
foster resilience in communities within the Mill River Watershed by managing stormwater,

improving water quality, and increasing public access to the waterfront.¹ Copies of the Determinations are attached hereto as Exhibit “A.”

2. The purpose of the State Environmental Quality Review Act (“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).

3. In open defiance of this legislative policy, Respondents are attempting to authorize the irreversible destruction of public park land, wildlife habitat, protected wetlands, critical public health and safety storm surge protections, and pollution prevention mechanisms, with superficial environmental review and minimal public scrutiny.

4. Respondents’ Final Environmental Assessment (“FEA”) is legally deficient within the meaning of SEQRA because it is premised upon a fundamentally flawed environmental analysis which: failed to take a hard look at numerous significant environmental impacts; improperly segmented the Hempstead Lake State Park Project (“HLSP Project”) from the Living with the Bay Plan; was based on incorrect data, and failed to consider the Project’s immediate and long-term cumulative impacts on the health and welfare of residents in neighboring Environmental Justice and low- and middle-income communities as well as the health of the Mill River Watershed ecosystem.

5. Specifically, Respondents violated SEQRA when they relied on an FEA which: (a) represents an unlawful segmentation of the Living with the Bay Plan that is designed to address the dynamic system of the Mill River Watershed; (b) fails to analyze myriad likely significant

¹ See 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.

environmental impacts arising from the fact that Hempstead Lake State Park is situated on the Mill River Watershed, a floodplain that has proved to be vulnerable to sea level rise, polluted stormwater runoff, storm surges, tidal surges, and the failure of dams and other impoundment systems; (c) overlooks the egregious environmental consequences of extensive tree removals in terms of soil disturbance, loss of wildlife habitat, and loss of atmospheric carbon reduction capacity; (d) ignores the adverse impacts on bird and other wildlife habitat arising from the destruction and alteration of the Park's protected wetlands; (e) elides the SEQRA criteria for determining the Project's significance and for requiring the preparation of an Environmental Impact Statement, including, but not limited to, 6 NYCRR 617.7(C)(1)(i), (C)(1)(ii), (C)(1)(vii), (C)(1)(viii) and (C)(1)(ix); (f) disregards the serious impacts of forest clear-cutting and wetland reduction on the Park's ability to absorb rainfall and hold back storm surges; (g) ignores New York State's responsibility to assess existing and Project-related risks of severe flooding in – and attendant harms to – Environmental Justice and low- and middle-income communities adjacent to and south of the Park due to storm and tidal surges, high precipitation, and other extreme weather events and dam deficiencies; and (h) fails to provide adequate protective measures to prevent human and wildlife exposures to these toxic contaminants.

6. The adverse environmental impacts of the HLSP Project are by no means benign, and yet Respondents failed to address these impacts, much less give the same the “hard look” that is required under SEQRA.

7. Respondents' FEA falls far short of the “reasoned elaboration” required under SEQRA to support a finding that the proposed action will have no significant environmental impacts.

8. Because Respondents' FEA and Negative Declaration fail to comply with SEQRA, Petitioners seek to have the Determinations and any permits issued pursuant to them annulled and vacated as arbitrary and capricious, an abuse of discretion, and contrary to law.

PARTIES

9. Petitioner Sierra Club is a national not-for-profit organization with approximately 3,188 members in Nassau County. *See* Affidavit of Dr. Charles Bevington, sworn to on July 30, 2020 ("Bevington Aff.") ¶ 2 attached to this Petition as Exhibit "B." Sierra Club's mission is to protect the environment and promote the responsible use of the earth's ecosystems and resources. Sierra Club's standing to participate in actions of this type is well established and its efforts include improving public health and the environment in New York by, among other things, working to preserve the state's natural resources and protect the health of communities seeking to enjoy the benefits of those resources, like the Lakeview community bordering Hempstead Lake State Park. The Sierra Club-Long Island Group ("Sierra Club"), a local chapter of Sierra Club New York, has more than 160 members living in the Lakeview community and neighboring communities whose health and property will be adversely affected by the Hempstead Lake State Park Project to a degree greater than that of the public at large, Bevington Aff. at ¶ 2, as well as numerous other members who recreate at the Park. Bevington Aff. at ¶ 2. Sierra Club participated in the administrative proceeding that is the subject of this Petition. Petitioner Sierra Club's submission with respect to the HLSP Project are annexed to the Bevington Aff., as attachment 2.

10. Petitioner The Concerned Citizens of Mill River Flood Plain ("Concerned Citizens") is an unincorporated association of local community residents, scientists, and engineers formed to represent the interests of the public, including individual residents and local community groups, who are concerned about and effects by the public health and adverse environmental

impacts of the HLSP Project and other ongoing projects which GOSR failed to properly consider in issuing the Determinations. *See* Affidavit of Linda Marshall, sworn to on July 28, 2020 (“Marshall Aff.”), attached to this Petition as Exhibit “C.” Members of Concerned Citizens participated in the proceedings held on the HLSP Project and requested a reconsideration of Respondents’ finding of no significant impact and the Determinations. Petitioner Concerned Citizens’ submission with respect to the HLSP Project are annexed to the Marshall Aff., as attachment 1.

11. Petitioner Joseph P. Forgione, is a resident of East Rockaway, Nassau County, New York, has been the co-chair of Respondent’s Citizens Advisory Committee (“CAC”) since its inception, and is a frequent visitor to Hempstead Lake State Park where he hikes and runs. Mr. Forgione participated in the environmental review process regarding the HLSP Project since it began. Mr. Forgione’s home in East Rockaway is in the Mill River Watershed and will be adversely impacted by the HLSP Project to a degree greater than that of the public at large. Petitioner Forgione has also submitted an Affidavit, sworn to on August 11, 2020, (“Forgione Aff.”) a copy of which is annexed to the Petition as Exhibit “D.”

12. Respondent Governor’s Office of Storm Recovery (“GOSR”) is an office within the New York State Homes and Community Renewal’s Housing Trust Fund Corporation, a public benefit corporation and subsidiary of the New York State Housing Finance Agency. Respondent. GOSR provides assistance for communities’ reconstruction, recovery, and resilience-building in four areas: housing recovery, small business recovery, community reconstruction, and infrastructure rebuilding and stabilization. *See* GOSR website, available at <https://stormrecovery.ny.gov/about>. GOSR’s Infrastructure Program is intended to protect New York communities from future incidents of extreme weather, leverage local resources and invest in projects to transform

the State's infrastructure, transportation networks, energy supply, coastal protection, weather warning system and emergency management programs. *Id.* Respondent GOSR is the New York agency that submitted a proposal—the Living with the Bay Resiliency Plan—to the U.S. Department of Housing & Urban Development's Community Development Block Grant – Disaster Recovery Program. Upon information and belief, GOSR is a direct recipient of the funding provided to New York under this program. Respondent GOSR is the SEQRA Lead Agency, E.C.L. § 8-0111(6), and the NEPA Responsible Entity, 24 C.F.R. 58(a)(7)(i), for the Living with the Bay Plan as well as the HLSP Project. As such, GOSR is responsible for ensuring that New York State meets its substantive and procedural obligations under all applicable federal and state environmental laws and regulations.

13. Respondent New York State Office of Parks, Recreation, and Historic Preservation (“Office of Parks”) is an agency within the New York State Executive Department charged with the operation of state parks within New York State. *See* Parks, Recreation and Historic Preservation Law § 3.03. The Office of Parks manages 250 state parks, historic sites, and public facilities, including Hempstead Lake State Park which is the subject of this action. *Id.* One of the Office of Parks' key priorities is “to expand diverse and equitable access to parks so that people from all communities and across all ages and abilities are included and can fully experience the parks and historic sites.” *See* New York State Council of Parks, Recreation & Historic Preservation 2019 Annual Report (February 2020) at 5–8, available at <https://parks.ny.gov/state-council/documents/2014StateCouncilAnnualReport.pdf>.

14. Respondent New York State Homes and Community Renewal (“NYSHCR”) is New York State's “affordable housing agency, with a mission to build, preserve, and protect affordable housing and increase homeownership throughout New York State.” New York Homes

and Community Renewal website, available at <https://hcr.ny.gov/hcr-overview>, (last visited on July 12, 2020). Respondent NYSHCR is comprised of 16 offices and agencies, one of which is the Housing Trust Fund Corporation (“HTFC”), a subsidiary public benefit corporation of the New York State Housing Finance Agency. Upon information and belief, the HTFC was a direct recipient of the federal funding provided by HUD under the Community Development Block Grant -- Disaster Recovery Program.

15. Respondent New York State Department of Environmental Conservation’s (“DEC”) mission is “[t]o conserve, improve and protect New York's natural resources and environment and to prevent, abate and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well-being.” DEC website, available at <https://www.dec.ny.gov/24.html> (last visited on June 22, 2020). DEC's “goal is to achieve this mission through the simultaneous pursuit of environmental quality, public health, economic prosperity and social well-being, including environmental justice and the empowerment of individuals to participate in environmental decisions that affect their lives.” *Id.* DEC’s Region 1 Office covers Nassau County, the county in which the Hempstead Lake State Park is located. *Id.* Respondent DEC has responsibility for dam safety in New York State, including the Hempstead Lake dam identified by the DEC as ID #234-0193, and for wetland regulation, including the more than 26 acres of vegetated wetlands located in Hempstead Lake State Park. *See* GOSR, “Floodplain and Wetlands 8-Step Process in Accordance with Executive Order 11988: Floodplain Management and Executive Order 11990: Wetlands,” (October 4, 2018), available at 2, [https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/Appendix %20M%20-%208-Step%20Floodplain%20and%20Wetland%20Process.pdf](https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/Appendix%20M%20-%208-Step%20Floodplain%20and%20Wetland%20Process.pdf), (last visited on July 14, 2020).

16. Respondent Matt Accardi, Assistant Attorney General, is named solely in his official capacity as the Certifying Officer for the Governor’s Office of Storm Recovery.

Respondent Accardi signed the Certification of NEPA Classification which states that: “Part or all of the project is located in an area identified as a floodplain or wetland. For projects located in a floodplain or wetland, evidence of compliance with Executive Orders 11988 and/or 11990 is required.” *See* Certification of NEPA Classification and Certification of SEQRA Classification. Respondent Accardi also shepherded the creation and staffing of the Citizens Advisory Committee, created to serve as the sole viable avenue for public input in the SEQRA review process, and was involved in the drafting of GOSR’s replies to public comments submitted on the project from 2017 through the present.

JURISDICTION

17. This action is ripe for adjudication because the Determinations have enabled New York State to utilize the funds allotted by HUD for the State’s Living with the Bay Plan and to commence planned Project activities. On March 31, 2020, Respondent DEC granted GOSR a permit to remove trees from Hempstead Lake and South Pond dams in the Park. Pursuant to that permit, hundreds of trees were destroyed.

18. Respondent GOSR issued its FEA on January 21, 2020. *See* GOSR, “Final Environmental Assessment,” (January 21, 2020), available at <https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/Hempstead%20Lake%20State%20Park%20Final%20Environmental%20Assessment%20%28EA%29.pdf>, a copy of which is attached to this Petition as Exhibit “A.”

19. Petitioners Sierra Club and Concerned Citizens, organizations which dedicate their budgets to advocacy on local ecology and public health matters, are comprised of individuals who are directly affected by the actions complained of in this Petition. Both organizations participated in the administrative proceedings below. *See* Bevington Aff. at ¶ 8; Marshall Aff. at ¶¶ 9, 14-15.

20. Petitioner Joseph P. Forgione is a Nassau County resident who lives within walking distance of, often visits and utilizes Hempstead Lake State Park and who opposed certain of the

actions taken by Respondents herein during the SEQRA process related to the Hempstead Like State Park Project, including but not limited to the issuance of the Negative Declaration and the refusal to require an Environmental Impact Statement. See *Forgione Aff.* at ¶¶ 4, 6, 7, 10.

FACTS

21. Superstorm Sandy (“Hurricane Sandy” or the “Storm”), one of the largest Atlantic hurricanes to make landfall in the U.S., caused devastating damage on Long Island. More than 35,000 Nassau County (“County”) residents were displaced from their homes due to flooding, and hundreds of thousands lost power for days.² 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,³ and were instructed to avoid drinking tap water due to potential contamination.⁴ Nassau County’s shoreline, other low-lying areas, and communities in the Mill River Corridor were severely impacted, with flooding exceeding the long-standing boundaries established for emergency evacuation and flood heights previously set by FEMA.⁵

² 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 12, available at https://stormrecovery.ny.gov/sites/default/files/uploads/MFH_Nassau_NEPA_EA_Amended.pdf (last visited on June 29, 2020).

³ 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 55, available at https://stormrecovery.ny.gov/sites/default/files/uploads/MFH_Nassau_NEPA_EA_Amended.pdf (last visited on June 29, 2020).

⁴ 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 12 (citations omitted), available at https://stormrecovery.ny.gov/sites/default/files/uploads/MFH_Nassau_NEPA_EA_Amended.pdf (last visited on June 29, 2020).

⁵ 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

22. Much of Nassau County’s flood and pollution control infrastructure—such as dams, culverts, stormwater drains, and pollution prevention systems—had fallen into disrepair over the years,⁶ and the storm surge from Hurricane Sandy (*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) overwhelmed the protections that were still in place.⁷ Neighborhoods adjacent to and south of Hempstead Lake State Park were inundated by stormwater runoff, surface water overflow, and rainfall, and neighborhoods by the coast were battered by wind and waves which created a storm tide of over 18 feet.⁸

23. Beyond the toll on Nassau County residences and commercial buildings, the Storm etched in bold existing pressures on the natural ecology of the Mill River Watershed and Hempstead Bay, which has long functioned as “the cultural, ecological, and economic engine of the entire region.”⁹ Experts as well as Government officials have opined that Nassau County faces serious threats from sea level rise, polluted stormwater, wastewater and insufficient groundwater recharging. *See, e.g.*, EA, Appendix C (DEC’s sediment findings); Appendix G (DEC’s wildlife, plants, and natural communities findings); Appendix H (U.S. Fish and Wildlife Service’s

And Community Renewal (August 2014-amended), at 9, available at https://stormrecovery.ny.gov/sites/default/files/uploads/MFH_Nassau_NEPA_EA_Amended.pdf (last visited on June 29, 2020).

⁶ *Id.*

⁷ 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 on 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.*

⁸ U.S. Geological Survey, “Hurricane Sandy Storm Surge,” (November 2012).

⁹ *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 21, available at https://stormrecovery.ny.gov/sites/default/files/uploads/MFH_Nassau_NEPA_EA_Amended.pdf, (last visited on June 29, 2020).

endangered and threatened species findings); Affidavit of David Stern, sworn to on August 22, 2020, (“Stern Aff.”), attached to the Petition as Exhibit “E” at ¶ 50.

24. Long Island’s tap water is pumped from an aquifer. Insufficient recharge of the groundwater has led to saltwater intrusion and contamination of the aquifer. *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 55, available at https://www.hud.gov/sites/documents/INTERBORO_IP_BRIEFING_BOOK.PDF, (last visited on June 29, 2020) (citations omitted).

25. The Bay Park Sewage Treatment Plant, located in East Rockaway, serves 550,000 people and treats 40 percent of Nassau County’s waste. After Hurricane Sandy flooded its pumping and electrical systems, the Treatment Plant was knocked entirely out of service for more than 42 hours. During the 44 days it took to fully restore the plant’s operations, a total of 2.2 billion gallons of partially treated sewage overflowed into the bay.¹⁰ The flow of wastewater into the bay has resulted in algal blooms that reduce oxygen levels in the water, suffocating plants and animals and creating dead zones where the waters are essentially devoid of life. People who come into contact with germ-ridden water after a spill of raw or partially-treated wastewater, are exposed to pathogens causing hepatitis, meningitis, and other serious illnesses.¹¹

26. Equally troubling is stormwater runoff, which contains toxic chemicals, heavy metals, plastics, and other materials—including gasoline, antifreeze, coolant, industrial waste,

¹⁰ *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 55, available at https://stormrecovery.ny.gov/sites/default/files/uploads/MFH_Nassau_NEPA_EA_Amended.pdf (last visited on June 29, 2020).

¹¹ *See* Natural Resources Defense Council, “Water Pollution: Everything You Need to Know,” (July 2020), available at <https://www.nrdc.org/stories/water-pollution-everything-you-need-know#common> (last visited on July 13, 2020).

solvents, rat poison, pesticides, herbicides, and litter—that are carried off the streets into feeder streams and Mill River, and ultimately the bay. Chemicals and heavy metal contaminants are toxic to aquatic life—most often reducing an organism’s life span and ability to reproduce—and make their way up the food chain as predator eats prey. Litter, such as plastic bags, soda bottles, and fishing lines, are responsible for harming more than 200 different species of marine life.¹² Nassau County’s Living with the Bay Plan.

27. The catastrophic damage caused by Hurricane Sandy was the catalyst for the allocation of disaster relief funds under the HUD Community Development Block Grant—Disaster Recovery (“CDBG-DR”) Program. Following FEMA damage assessments, Congress passed the “Disaster Relief Appropriations Act, 2013,” (Pub. L. 113-2, approved January 29, 2013), which included \$16 billion in funding for disaster relief, long-term recovery, restoration of infrastructure and housing, and economic revitalization in the areas most affected by Hurricane Sandy, Hurricane Irene, and Tropical Storm Lee. The U.S. Department of Housing and Urban Development (“HUD”) is responsible for administration of the CDBG-DR program.

28. 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 designed approach to pro-active planning for long-term resilience and climate change adaption.”¹³ One year later, HUD announced that Nassau County’s Living with the Bay Plan (“LWTB Plan”) had

¹² See Natural Resources Defense Council, “Water Pollution: Everything You Need to Know,” (July 2020), available at <https://www.nrdc.org/stories/water-pollution-everything-you-need-know#common> (last visited on July 13, 2020).

¹³ 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 on July 6, 2020).

been selected and that New York State had been allocated \$125 million of CDBG-DR Program funds to implement the project.

29. Nassau County's LWTB Plan called for a "buffered bay" approach to protect against the region's multiple water-based threats: sea-level rise, storm surges, stormwater, and wastewater. The LWTB Plan was intended to create a comprehensive and unified suite of interventions that would "provide long-term resilience and climate change adaption [sic] for Nassau County communities within the Mill River Watershed," by managing storm water, improving coastal habitat and water quality, and increasing public access to the waterfront.¹⁴

30. Upon information and belief, due to the limited amount of funding provided and the impending deadline for expenditure of the funding, GOSR altered the LWTB Plan from one focusing on flood prevention, storm surge protection, water quality improvement, and pollution remediation across the Mill River Watershed to one focusing on water storage (impoundment) capacity and stormwater drainage management down a narrow corridor along a portion of the Mill River.

31. Cardinal elements of the LWTB Plan have been abandoned, including a focus on creating social resiliency and mitigating flooding through the use of sound ecological measures and green infrastructure in Mill River Watershed communities, retaining large areas of important wildlife, bird, and waterfowl habitat, and maintaining the forested, bucolic nature of Hempstead Lake State Park.

32. In place of these shared social values and cultural and environmental treasures, Respondents have begun pushing ahead with a project that fails to address the deficiencies of dams,

¹⁴ 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 on July 6, 2020)..

clear-cuts forested areas serving as a carbon pollution sink, fragments wildlife habitat, eliminates wetlands serving toxin removal functions, creates hazardous conditions on trails and paves over large areas of the park. *See Stern Aff. at ¶¶ 14-17; Affidavit of James K. Dooley, sworn to July 30, 2020 (“Dooley Aff.”), a copy of which is annexed to the Petition as Exhibit “F” at ¶¶ 11-19.* The change is nothing short of drastic, from a verdant public space cherished merely for its presence amidst densely populated towns as well as its opportunities for bird-watching, hiking, and sitting in nature. *See Forgione Aff. at ¶ 4.*

33. Concerned with ensuring the continued flow of funding, Respondent GOSR, seeking to portray its Living with the Bay Resiliency Plan as progressing took shortcuts, ignoring not only the law, but expert opinions as well as those of coordinating agency officials. In fact, in the name of furthering its objective, GOSR decided to bypass SEQRA review of the LWTB Resiliency Plan altogether and concluded that the Plan did not have one single significant adverse impact prior to undertaking any environmental assessment! Indeed, Respondent GOSR went so far as to advise coordinating agencies in 2017, that even though the LWTB Resiliency Plan projects had not yet been designed, it had predetermined that the same would not have a significant impact on the environment. *See Forgione Aff. at ¶ 7.*

34. The altered LWTB Plan is not only considerably more circumscribed than the Mill River Watershed Resiliency Project proposed to HUD, it is also comprised of highly interdependent components, with slated actions likely to affect the feasibility of stormwater and surface water management both upstream—*i.e.*, at Hempstead Lake and north of the Park—and downstream—*i.e.*, all along the Mill River corridor and south of the Park to the Bay.

35. 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 bulkhead which will be at least two feet higher than the existing barrier 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, which will surely result in the flooding of east side communities. *See* Affidavit of Linda Marshall, sworn to July 28, 2020 (“Marshall Aff.”), Exhibit “C” to the Petition at ¶ 7.

36. 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, including members of Petitioner Concerned Citizens. There has been no consideration whatsoever of the cumulative impact of the two projects on these communities. *See* Marshall Aff. at ¶ 7.

37. Nevertheless, GOSR’s SEQRA analysis examines only the first component of the Plan—the Hempstead Lake State Park Project—which is slated to receive \$34.5 million of the \$125 million allotted for the LWTB Plan. *See* GOSR Website, Living with the Bay Resiliency Project, available at <https://stormrecovery.ny.gov/living-bay>, (last visited on June 22, 2020).

38. Hempstead Lake was established prior to 1873, when Hempstead Creek was dammed to create a drinking water reservoir for New York City. The Park today is a 521-acre, multi-use facility enjoyed by thousands of visitors a year, including many living within the Mill River Watershed. *See* Forgione Aff. at ¶ 4. For generations, the Park has served as a cherished green space used by the surrounding communities for the enjoyment of nature and as a critical

groundwater recharge and water filtration area. 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. *See Stern Aff.* at ¶ 33.

39. On May 19, 2017, Respondent GOSR publicly announced that it would be serving as the lead agency for purposes of SEQRA review of the HLSP Project. *See Stern Aff.* at ¶ 6.

40. Thereafter, GOSR issued a Project Information Document for the HLSP Project, which "consist[ed] of a portion of the Environmental Assessment of the Project." *See Matt Accardi, Assistant Attorney General, "Introduction to Appendix O,"* at 1, available at [https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/Appendix%20 N%20-%20Part %20-%20Comments%20-%26%20Responses%20and%20Coded%20Comments.pdf](https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/Appendix%20N%20-%20Part%20-%20Comments%20-%26%20Responses%20and%20Coded%20Comments.pdf).

41. The public was provided thirty days, from June 15, 2017 to July 17, 2017, in which to submit written comments on the Information Document. However, public hearings on the Information Document were held during the week of the July 4th holiday and had the effect of severely limiting public participation in the process. *See Stern Aff.* at ¶ 6.

42. Upon information and belief, despite the fact that GOSR had nearly completed its draft environmental assessment required under NEPA and SEQRA, the *only* document provided to the public prior to the July 2017 hearing was the Project Information Document which listed a four-part plan to: (1) repair dams; (2) install floatables catchers and sedimentation controls in the North Ponds; (3) expand trails; and (4) build an education center.

43. The HLSP Project Information Document states that the Living with the Bay Project and Resiliency Strategy is intended to "address flooding caused by storm surge and rainfall (flood defense), improve coastal habitat and water quality (ecological restoration), ease public access to the waterfront (access and urban quality), and educate the public on stormwater and

environmental management (social resiliency).”¹⁵ The Information Document noted that flooding problems within the LWTB Plan area are caused by “inadequate drainage collection and conveyance capacity, high tailwater conditions (the level of water downstream of hydraulic structures (*i.e.*, dams, culverts, outfalls, etc.) ... [rendering] the existing stormwater systems inadequate for critical storms and overtopping storm surge events.”¹⁶ Problems of sea level rise, habitat loss, shoreline degradation, and compromised water quality were also delineated as motivating factors for the adoption of the LWTB Plan.¹⁷

44. Petitioners Sierra Club and Concerned Citizens, along with other local groups, individual residents, and experts submitted written comments on the HLSP Project Information Document, raising issues including, among others, improper segmentation and the lack of resiliency benefits in flood mitigation for Hurricane Sandy victims. *See* Bevington Aff. at ¶ 3; Marshall Aff. at ¶ 14.

45. The Citizens Advisory Committee (the “CAC”) for the LWTB Plan, created and staffed by GOSR, and of which Petitioner Forgione is co-chair, also submitted comments on the Project Information Document. *See* Stern Aff. at ¶ 6.

46. Respondent GOSR defined the role of the CAC as follows: “The CAC functions in an advisory role; rather than a decision-making role. The CAC collaborates on potential

¹⁵ 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 on July 6, 2020).

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 on July 6, 2020).

¹⁷ 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 on July 6, 2020).

partnerships to leverage funds and implement long-term monitoring programs; advise on how projects can benefit local communities, ecosystems, economy and social resilience; reviews the project's conceptual development throughout the entire planning, design, and construction process; and serves as conduits to provide information to other local stakeholders and citizens to help build trust in the process and acceptance of selected projects." See GOSR, "Living with the Bay Resiliency Strategy: Final Community Outreach Plan (Objective #10), at 6, available at https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/Objective%2010_.pdf (last visited on July 14, 2020).

47. Upon information and belief, the CAC was intended to fulfill Respondents' public participation requirements set forth in NEPA, HUD, and SEQRA regulations as well as under federal and New York State Environmental Justice mandates. Respondent GOSR selected the members of the Citizens Advisory Committee by reviewing the applications of those individuals who identified and downloaded the application forms from GOSR's website.

48. Upon information and belief, in order to address deficiencies in its HLSP Project, GOSR began issuing plan amendments in 2016, which were submitted to HUD for approval prior to their public announcement.

49. On October 5, 2018, GOSR issued a draft Environmental Assessment. A copy of the October 5, 2018 Draft EA is available at <https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/Hempstead%20Lake%20State%20Park%20Environmental%20Assessment.pdf> (last visited on July 13, 2020).

50. Petitioners Sierra Club and Concerned Citizens, along with other local groups, individual residents, and experts, submitted written comments on the October 2018 Draft EA, raising issues including, among others, improper segmentation, failure to consider cumulative impacts and the lack of resiliency benefits in flood mitigation for Hurricane Sandy victims. For

example, Respondents failed to properly consider the impacts other projects (including the East Rockaway High School Bulkhead Project) would have on the residents of the Watershed, including those residing on the east side of the Mill River, especially in conjunction with what was occurring in Hempstead Lake State Park. *See* Bevington Aff. at ¶ 3; Marshall Aff. at ¶ 7.

51. A hearing to take public comments on the October 2018 Draft EA was held on October 17, 2018. Members of Petitioners Sierra Club and Concerned Citizens participated in the hearing (*see* Bevington Aff. at ¶ 3; Marshall Aff. at ¶¶ 4, 14,) as did the LWTB CAC.

52. From December 2018 to December 2019, GOSR refused to communicate in any way with the LWTB CAC despite monthly requests for information on the progress of the LWTB Plan. *See* Forgione Aff. at ¶ 8.

53. During this period, HUD, the U.S. Fish and Wildlife Service, and the U.S. Army Corps of Engineers raised objections to GOSR's October 2018 Draft EA. *See* comments to Draft EA.

54. On December 11, 2019, GOSR issued a Revised Draft Environmental Assessment. A copy of the December 11, 2019 Revised Draft EA is available at <https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/Hempstead%20Lake%20State%20Park%20EA%20FINAL.pdf> (last visited on July 14, 2020).

55. Respondent GOSR's Determination of Non-Significance (Negative Declaration) was issued on December 18, 2019. A true and complete copy of the December 18, 2019 Negative Declaration is attached to this Petition as Exhibit "A" and is available at: <https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/SEQORA%20-%20Negative%20Declaration%20December%202019.pdf>.

56. On January 21, 2020, GOSR issued its FEA. A true and complete copy of the January 21, 2020 Final Environmental Assessment is attached to this Petition as Exhibit "A" and

is available at: <https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/Hempstead%20Lake%20State%20Park%20Final%20Environmental%20Assessment%20%28EA%29.pdf>.

FIRST CAUSE OF ACTION
Failure to Comply with the
Procedural Requirements of SEQRA

57. Petitioners reassert the allegations contained in paragraphs 1 through 56 as though fully set forth here.

58. The primary purpose of SEQRA is to inject environmental considerations directly into the governmental decision-making process.

59. 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).

60. 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,” and are listed in 6 NYCRR § 617.4. Type II actions, which are listed at 6 N.Y.C.R.R. § 617.5(c), are those which “have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under [SEQRA].” *Id.* at § 617.5(a). Unlisted actions are all other actions not specifically designated in the SEQRA regulations as either Type I or Type II actions. *Id.* at § 617.2(ak).

61. In enacting SEQRA, New York made protection of the environment one of its foremost policy concerns and requires that social, economic, and environmental factors be considered together in reaching decisions on proposed activities.

62. The statute defines the “environment” as including “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).

63. A primary component of SEQRA is the environmental review process which sets forth the proposed action, its reasonably anticipated impacts on the environment, practicable measures to mitigate such impacts, unavoidable adverse impacts, and reasonable alternatives that would achieve the same objectives as the proposal. Upon completing this review, the agency makes a “determination of significance.” 6 N.Y.C.R.R. §§ 617.6(a)(1)(i), 617.7 (2016).

64. It is well-settled that SEQRA’s procedural mechanisms mandate strict, literal compliance, and that anything less requires annulment of the lead agency’s determination of significance.

65. An agency’s determination of environmental significance must be made *before* a decision is reached 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.

66. Respondent GOSR properly determined that the HLSP Project is a Type I action.

67. Despite GOSR’s classification of the HLSP Project as a Type I action, on August 1, 2017, GOSR issued Action Plan Amendment No. 16 (a copy of which is part of the return to be filed by Respondents herein)—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—which plainly states the agency’s position that even though the LWTB Plan projects had not yet been designed they would not have a significant impact on the environment:

*The LWTB Project 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 Project. 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 p. 38 (emphasis added).

68. Respondent GOSR’s conclusion that LWTB Plan actions—including those taken pursuant to its HLSP Type I Project—will have no significant impact on the environment prior to the design and/or delineation of those actions violates lawful procedure, was affected by an error of law, and was arbitrary, capricious and an abuse of discretion. Accordingly, this Court must annul the Finding of Non-significance and the Determinations pursuant to CPLR § 7803(3).

**SECOND CAUSE OF ACTION
Unlawful Segmentation in Violation of SEQRA**

69. Petitioners reassert the allegations contained in paragraphs 1 through 68 as though fully set forth here.

70. Respondent GOSR’s express strategy “to complete Environmental Assessments and issue Findings of No Significant Impact for multiple projects and groups of projects [within] focus areas” of the LWTB Project prior to even the completion of their design, (*see* Action Plan Amendment No. 16), constitutes the very definition of an unlawful segmentation of a project.

71. Segmentation is defined as “the division of the environmental review of an action so that various activities or stages are addressed as though they were independent, unrelated activities needing individual determinations of significance.” 6 N.Y.C.R.R. § 617.2(ah).

72. According to the courts, impermissible segmentation occurs in two situations: (1) “when a project which would have a significant effect on the environment is split into two or more smaller projects, with the result that each falls below the threshold requiring [SEQRA] review”; and (2) “when a project developer wrongly excludes certain activities from the definition of his project for the purpose of keeping to a minimum its environmentally harmful consequence, thereby making it more palatable to the reviewing agency and community.”

73. Respondent GOSR’s impermissible segmentation of the HLSP Project from its own restructured LWTB Plan is evident from the language of the EA and Appendices containing the analyses of the planned Hempstead Lake Dam renovations and the concerns raised by experts, government officials, and Mill River Watershed community members about the risks of flooding in the communities along the Mill River Corridor. This includes the communities served by Petitioners Sierra Club and Concerned Citizens and their members who reside on the east side of Mill River.

74. In its Hydrological and Hydraulic Assessment (“Assessment”), *see* Appendix O to the EA, Respondent GOSR notes that the Mill River Watershed extends far beyond the boundaries of the Park and therefore its study of necessity included feeder streams and brooks into Hempstead Lake and Park ponds as well as outflow downstream to ponds and the Mill River. Stern Aff. at ¶¶ 25-27.

75. The Assessment emphasizes the interconnected nature of the all of the water systems in the Mill River Watershed and their impact on Hempstead Lake and the ponds in the Park (Northeast, Northwest, South, and Schodack Ponds):

The Horse Brook/Mill Creek Systems flow [from outside the Park] into Northeast and Northwest Ponds. This flow then enters Hempstead Lake which flows into South Pond. In South Pond, the flow is combined with discharge from the Schodack Brook system. The flow then moves on to Smith Pond [outside and downstream from the Park] where it is also joined by the flow from the Pines Brook System. Where the flow exits Smith Pond downstream of the outlet weir it is joined by flow from two subwatersheds.... This combined flow then ... ultimately discharg[es] to the Mill River. Flow downstream of the Smith Pond weir is subject to tidal influence.

EA Appendix O.

76. The Assessment also notes that the area around Smith Pond—the second of the three components of the restructured LWTB Plan—is within the special flood hazard area, and that it and the segment of the Mill River downstream from Smith Pond—the third component of the restricted LWTB Plan—are both subject to inundation during a 100-year storm event. EA Appendix O.

77. In responding to comments from the DEC that the Hempstead Lake Dam is deficient in terms of meeting safety standards, the Assessment states that “[t]he difficulty with trying to make the dam meet current [safety] standards is that both the upstream and downstream ends of the watershed are flooded prior to the dam overtopping,” Stern Aff. at ¶ 12, essentially admitting that it will not be able to correct the deficiencies of Hempstead Lake Dam without addressing stormwater surges from the Watershed that place pressure on the Dam.

78. Furthermore, GOSR’s explanation for why it cannot address those Watershed storm surges defies belief. In the EA, it states that the Office of Parks, a state cooperating agency with GOSR, has jurisdiction over only one portion of the Watershed (the area within Hempstead Lake

State Park), and therefore—although this is not overtly stated—GOSR cannot address the storm surge, stormwater management, or flooding issues the LWTB Plan was created to address. *See Stern Aff.* at ¶ 12.

79. In fact, GOSR, as the sponsor of the LWTB Plan has jurisdiction over the entire Mill River Watershed.

80. Respondent GOSR similarly excised from the LWTB Plan seven of the ten sub-projects that it ranked of higher priority than the HLSP Project. These projects include: Horsebrook Drain West Branch Recharge Basin, Hempstead High School Creek Restoration, Malverne High School and Malverne Green Streets. *See Bevington Aff.* at ¶ 9.

81. Each of these sub-projects would have assisted in the recovery of and created resiliency in Environmental Justice Communities in the Mill River Watershed. Among these sub-projects are Horsebrook Drain West Branch Recharge Basin Project, Hempstead High School Creek Restoration Project, Malverne High School Project the Nichols Court Storm Bump-Outs Project and the Cooper Square Underground Detention Project. *See Bevington Aff.* at ¶¶ 6-8.

82. Respondent GOSR has determined that the funding that was to cover the costs of these sub-projects should instead be diverted and funneled to a plan to upgrade the Long Beach Sewage Treatment Facility. Indeed, by attempting to obtain approval for Substantial Amendment No. 26 GOSR has abandoned the objectives of the LWTB initiatives. *See Bevington Aff.* at ¶¶ 4-9. In fact, Amendment 26 seeks to move nearly \$90,000,000 from the sub-projects which had the highest-ranking prioritization to projects which were rated lower on the priority scale. Had a proper environmental review been conducted and an Environmental Impact Statement prepared, such financial maneuvering would not have occurred.

83. The elimination of these sub-projects evinces not only another aspect of the improper segmentation of the LWTB Plan, but also Respondent GOSR's deliberate flouting of state and federal Environmental Justice mandates.

84. While segmentation is not always prohibited, according to the DEC's SEQRA regulations, a lead agency may segment its review of a project *only* if: (a) the agency expressly states in its determination of environmental significance (and any subsequent environmental review) that "it believes that circumstances warrant a segmented review"; (b) sets forth the basis for its position; (c) demonstrates that "such review is clearly no less protective of the environment;" and (d) identifies and discusses "related actions to the fullest extent possible." 6 NYCRR § 617.3(g)(1).

85. Respondent GOSR made no such showing—in fact, it made no reference whatsoever to segmentation—not in the October 2018 Draft EA, not in the December 2019 Revised EA, and not in the January 2020 Final EA.

86. County residents and environmental groups learned of GOSR's admission to "segmenting" the HLSP Project from the Mill River Watershed restoration project embodied in the LWTB Plan from documents provided in response to Freedom of Information Law requests. Indeed, by letter dated December 4, 2019, Donna Mahon, HUD Field Environmental Officer-DR, Region 2 to Matt Accardi, GOSR's General Counsel, stated: "We are concerned that the lack of analysis of the potential direct impacts of the dam operations leaves the State's FONSI 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." A copy of the Mahon 12/4/19 email is attached to this Petition as Exhibit "I."

87. Respondent GOSR's segmentation of the LWTB Plan was affected by an error of law, and was arbitrary, capricious and an abuse of discretion. Accordingly, this Court should invalidate the Finding of Non-significance, and the Determinations pursuant to CPLR § 7803(3).

THIRD CAUSE OF ACTION
Failure to Take a Hard Look at Potential Significant
Adverse Environmental Impacts in Violation of SEQRA

88. Petitioners reassert the allegations contained in paragraphs 1 through 87 as though fully set forth here.

89. SEQRA's mandates are substantive and not merely procedural. The law requires agencies to take environmental concerns into account to the fullest extent possible as part of their decision-making.

90. Respondent GOSR has failed to investigate, evaluate, and weigh the risks and possible consequences of virtually every activity slated to be part of the Hempstead Lake State Park Project. In doing so, it has failed to fulfill SEQRA's substantive requirements that involved agencies identify all relevant areas of environmental concern, take a "hard look" at each of those areas, and provide a "reasoned elaboration" for its conclusion that the Project will have no significant environmental impact.

91. Respondent GOSR's Hydrologic and Hydraulic Assessment, proffered by the agency to support its decisions regarding the remediation of the Hempstead Lake Dam, relies upon extremely limited data which is outdated. See Affidavit of Paul Rubin, sworn to on August 21, 2020 ("Rubin Aff.") at ¶ 8, a copy of which is annexed to this Petition as Exhibit "G."

92. Respondent GOSR's Flood Risk Analysis and its resulting improvement plan for Hempstead Lake Dam and other flood control measures provide a vivid picture of the agency's failure to take a hard look at the environmental impacts of the HLSP Project.

93. The data utilized by Respondent GOSR in each part of its Flood Risk Analysis is deeply flawed, resulting in inaccurate flood frequency and magnitude predictions and gross under-evaluation of the risk of flood events. See Rubin Aff. at ¶¶ 4, 5, 8-9.

94. Respondent GOSR's model estimating probable maximum precipitation and probable maximum floods which were used in its design of the remediation plan for Hempstead Lake Dam, spillways and other flood controls to protect downstream populations was based on out-of-date precipitation data and stream flood data, the improper calibration of the model, insufficient data underlying the estimation of the frequency and magnitude of flood events, a failure to consider climate change effects of extreme storm events, precipitation quantities and flood frequencies, the lack of assessment of flooding risks stemming from channel inundation from Hewlett Bay storm surges.

95. Respondent GOSR relied on extremely limited data sets despite the fact that the same do not represent the current streamflow conditions and precipitation quantities in the Mill River Water shed and failed to take into account the increasing frequency and severity of extreme weather events.

96. Respondents GOSR's plan for the removal of certain wetlands and the creation of other wetlands also fails to consider the likely significant adverse environmental impacts of these actions. See Stern Aff. at ¶¶ 38-39.

97. The wetlands serve as an important buffer for stormwater flowing into the Park and as a filter for contaminants in that water and the sediment in the two North Ponds. See Stern Aff. at ¶ 33. The alteration of the current wetlands will undermine both of these critical functions, and the installation of floatable collectors will exacerbate the problem, especially given that none of

the LWTB Plan grant monies have been reserved for the hiring and training of staff to empty the collectors on a regular basis. Stern Aff. at ¶¶ 10, 33, 38.

98. The two North Ponds in the Park also provide valuable and rare wetland habitat of shallow open water and mudflats that are used by an abundance of diverse shorebirds, wading birds and dabbling ducks. Increasing the holding capacity of the Ponds will flood the habitat, possibly making it unusable by these species. The problem is that since GOSR improperly chose not to prepare an Environmental Impact Statement we will never know whether the altered wetlands will provide a suitable habitat for these species. See Dooley Aff. at ¶¶ 24, 26.

99. Respondent GOSR plans to dredge the Northwest Pond to minimize the loss of wet meadow area. However, DEC letters responding to GOSR's requests for permits has made clear that all such dredged material will be far too contaminated to reuse and cannot be stored in any place on Long Island. Upon information and belief, Respondent GOSR has provided no details regarding how the contaminated sediment will be handled or where it will be sent, stating only that it will not remain on Long Island.

100. The clear-cutting of hundreds of mature trees in the Park is also likely to have serious adverse effect bird habitats in the Park. Hempstead Park is the only designated New York State Important Bird Area of woodlands and freshwater wetlands in Nassau County. See Affidavit of Carolyn Bauer, sworn to on July 30, 2020 ("Bauer Aff."), at ¶ 8, attached to the Petition as Exhibit "H." The Park provides crucial habitat for nesting Great Horned Owls, resident Ospreys, Bald Eagles, and many other sensitive species, including migrating warblers, vireos, tanagers, and flycatchers. Bauer Aff. at ¶¶ 5-8. Species of concern seen in the Park during migration include the Red-headed Woodpecker and Cerulean Warbler. See U.S. Fish and Wildlife Report, EA,

Appendix H, at 32 (May 17, 2017), (identifying 26 species of migratory birds listed as birds of conservation concern).

101. Little attention appears to have been paid to the numerous comments from Park visitors and community members regarding their concerns about the Project's fundamental alteration of the character of the Park from a green space where people can enjoy the quiet of the nature, rest in the shade of the trees, hike, and engage in bird-watching to an over-built outdoor recreation area. See Comments of the Citizens Advisory Committee, South Shore Audubon Society and Sierra Club, which are part of the Record below.

102. Respondent GOSR's statements and actions regarding the creation and approval of its Hempstead Lake State Park Project show that the agency was far more concerned about meeting the federal expenditure deadline than with taking a "hard look" at crucial issues of environmental concern within the meaning of SEQRA. See *Forgione Aff.* at ¶¶ 7-8.

103. Respondent GOSR's motivation was revealed as early as July 2017, when, in response to public comment about the segmentation of the HLSP Project from the rest of the LWTB Project, the agency stated that "the Living with the Bay Project and Resiliency Strategy are configured such that projects can advance independently *subject to availability of funding.*" GOSR, "Comments and Responses," in Appendix O," at 3, available at available at <https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/Appendix%20N%20-%20Part%200%20Comments%20%26%20Responses%20and%20Coded%20Comments.pdf>, (last visited on July 14, 2020).

104. Respondents' reliance on a fatally flawed EA demonstrates that it has not provided a reasoned elaboration for their conclusion that the HLSP Project will have no significant environmental impact. 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 its ensuing application approvals.”)

105. For all of the above reasons, Respondent’s determination that the HLSP Project had no significant environmental impacts was affected by errors of law, arbitrary, capricious and an abuse of discretion.

106. This Court should therefore invalidate Respondents’ Negative Declaration Final Environmental Assessment, permits and plan amendments, and enjoin Respondent GOSR’s activities in Hempstead Lake State Park and East Rockaway until a proper assessment of the cumulative impacts of the same is conducted.

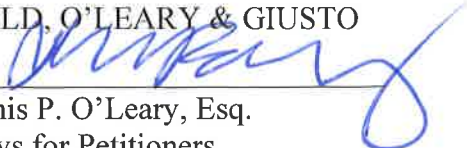
WHEREFORE, Petitioners respectfully request that this Court enter judgment against Respondents pursuant to CPLR §§ 7803(1), 7803(3), and 7806 as follows:

- A. Adjudging and declaring that the Determinations regarding the HLSP Project was in violation of lawful procedure, affected by error of law, arbitrary and capricious, and an abuse of discretion;
- B. Annulling and vacating Respondents’ Determinations in their entirety and all permits issued as a result of the same;
- C. Granting Petitioners reasonable attorneys’ fees and expenses incurred in this proceeding; and
- D. Granting such other and further relief in favor of Petitioners as the Court deems just and proper.

Dated: New York, New York
August 24, 2020

Yours, etc.,

NEUFELD, O’LEARY & GIUSTO

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