SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE CITY CLUB OF NEW YORK, INC., ROBERT BUCHANAN, AND TOM FOX	:	
Petitioners/Plaintiffs,	:	**MEMORANDUM IN SUPPORT OF VERIFIED PETITION**
- against -	:	Index No.
HUDSON RIVER PARK TRUST and PIER55, Inc.,	:	**ORAL ARGUMENT REQUESTED**
Respondents/Defendants.	:	

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

Statutes

Rules

Regulations

PRELIMINARY STATEMENT[1]

This case challenges Respondent Hudson River Park Trust's ("HRPT" or the "Trust") decision to approve a massive construction plan in the heart of the Hudson River Park's Estuarine Sanctuary in violation of the public trust doctrine, New York's environmental laws, and the Hudson River Park Act (the "Park Act"). On a vulnerable, never-before-disturbed stretch of the Hudson River that the New York Legislature has designated an Estuarine Sanctuary, Respondents HRPT and Pier55, Inc., are constructing a mammoth overwater entertainment venue that threatens to irrevocably impact a protected tidal habitat and deprive citizens' public access to the water.

The "Pier 55 Project" would feature a 117,000-square-foot manmade island—about the size of the average Home Depot—sitting on nearly 550 new pilings and towering as high as seven stories above the water. It includes a 700-seat outdoor theater to be equipped with an elaborate overwater lighting system, an additional secondary event space capable of accommodating thousands, a giant near-permanent barge moored on-site, and many more design elements at odds with the principles the HRPT was entrusted to uphold. So grandiose is the Pier 55 Project, the brainchild of media mogul Barry Diller, that it has already earned the nicknames "fantasy island," "billionaire's island," and simply "Diller's Island," with questions being raised regarding the HRPT's transparency in disclosing details of the project to elected officials when an amendment to the Hudson River Park Act was voted on in 2013 to facilitate the Project.[2]

---

[1] Unless otherwise indicated, citations to "Ex. __" are to exhibits, true and accurate copies of which are attached to the Affirmation of Jeffrey Kopczynski.

[2] Benjamin Snyder, *Barry Diller planning a fantasy island on New York's Hudson River*, FORTUNE (Nov. 17, 2014), http://fortune.com/2014/11/17/barry-diller-planning-a-fantasy-island-on-new-yorks-hudson-river/ (Ex. F); David Callahan, *The Billionaires' Park*, N.Y. TIMES (Nov. 30, 2014), http://www.nytimes.com/2014/12/01/opinion/the-billionaires-park.html (Ex. FF); Inga Saffron, *America's*

It would be logical to assume that a venture of this scale and ambition in a park designated for public use—aimed at a riparian habitat this sensitive and indispensable—could win the necessary approvals only after a thorough, public vetting of all the potential environmental impacts and the HRPT's own requisite "hard look" at the data, and ensuring that the general public would have appropriate access to the proposed manmade island. But that never happened. Instead, the HRPT alienated public parkland and presided over a rushed and secretive process, prejudiced by outdated analyses and false comparisons that failed to comport with the basic requirements of New York State and New York City environmental laws.

Moreover, the Pier 55 Project was the result of a secretive process designed to reach a preordained outcome that lacked the transparency required by law and was not designed to solicit meaningful public scrutiny. At every stage, the Trust utterly ignored its obligations to engage the public in consideration of a massive plan such as this. There was no request for proposals and no bidding process. Rather, the plan took shape via backdoor discussions between the HRPT and billionaire Barry Diller (the project's primary financier), beginning as early as February 2013. During this time, the HRPT privately hammered out and memorialized the details and terms of the plan, drafting the near-final versions of the lease with Diller's private organization (Pier55, Inc.), the environmental assessment form, and an amendment to the Hudson River Park's General Project Plan (the "GPP"). Thus, by the time the HRPT publicly disclosed the Pier 55 plan in November 2014, nearly everything about it had already been predetermined. The "public process" that ensued was flawed and illusory.

Billionaires Are Turning Public Parks Into Playgrounds for the Wealthy, NEW REPUBLIC (Feb. 2, 2015), http://www.newrepublic.com/article/120909/barry-dillers-pier-55-park-how-money-changing-city-parks (Ex. E); Lisa W. Foderaro, *How Diller and von Furstenberg Got Their Island in Hudson River Park*, N. Y. TIMES (Apr. 3, 2015), http://www.nytimes.com/2015/04/05/nyregion/how-diller-and-von-furstenberg-got-their-island-in-hudson-river-park.html (Ex. M).

Under the Park Act, where, as here, the HRPT is considering a proposed action that entails a lease in excess of 10 years and/or an amendment to the Hudson River Park's General Project Plan, the HRPT must provide the public with at least a 60-day comment period and hold a public hearing on the project before the HRPT's Board may vote on the project. Here, the HRPT provided the bare minimum process and offered no substantive changes to the plan as a result of comments received. The Boards's swift and unanimous approval of the plan shortly after the close of the 60-day comment period, the same day that the HRPT finalized the environmental form and lease, further confirms that the Pier 55 Project was a fait accompli, lacking in public scrutiny, and in derogation of the transparency and meaningful public process required under the Park Act—or, indeed, under the New York State Environmental Quality Review Act ("SEQRA"). By simply going through the motions of the Park Act's mandatory public process for "significant actions," and by circumventing entirely SEQRA's public review process, the Trust violated its obligations to the public as stewards of the Hudson River Park under both laws.

In short, the HRPT rubberstamped its own secretly designed project, without regard not only to tremendous risk that the proposed Pier 55 Project will not only create significant environmental impacts, but also that a publicly designated area of the Park will become an inner-city country club of sorts, excluding all but the wealthiest New Yorkers. Petitioners The City Club of New York ("City Club"), a member-supported non-profit advocacy organization dedicated to promoting thoughtful urban land use policy that responds to the needs of all New Yorkers, including issues directly related to the environment and government practices; Robert Buchanan, Co-Chair of the New York–New Jersey Harbor & Estuary Program and member of the City Club; and Tom Fox, member of the Hudson River Park Alliance and the City Club, a

Founding Board member of Friends of the Hudson River Park, and former President of the Hudson River Park Trust, bring this litigation to ensure the full and proper review and process that Respondents evaded. The Pier 55 Project should be enjoined until it appropriately protects the public's right to access the new pier and complies not only with all relevant environmental laws, but also coastal plans, the HRPT's governing regulations, and the HRPT's own enabling statute, the Hudson River Park Act.

The HRPT Alienated Public Parkland Without Authorization. Under the public trust doctrine, a common law principle, certain resources, such as parkland, are held in trust by the government for public use, and the government must maintain these resources for such use. The HRPT's Pier 55 Project constitutes an alienation of parkland: the lease approved by the HRPT allows a non-governmental entity to build and operate a privately funded, manmade entertainment island in the Hudson River Estuarine Sanctuary without proper legislative approval. As designed, the Pier 55 Project will allow for private memberships and significantly limit public access to an area of the Park specifically designated for water-dependent public uses, including boating and the docking of historic ships. The Pier 55 Project is better described as a private entertainment venue, rather than a public pier, as intended by the legislature. Without state legislative approval authorizing alienation of the entire Pier 55 Project site, including the relevant portions of the Hudson River Park's Estuarine Sanctuary, the Pier 55 Project may not go forward as approved; and this Court has no alternative but to reverse the Trust's action, starting the process anew, and enjoin construction from going forward until such state legislation authorization occurs.

The HRPT Failed to Conduct an Adequate Environmental Review. The Trust violated SEQRA[3] and the New York City Environmental Quality Review ("CEQR"),[4] when they failed to follow the required detailed and well-established environmental review process before proceeding with the Pier 55 Project. They stopped short of meaningful analysis. First, the HRPT was obligated to conduct a preliminary, exploratory-type assessment considering the potential for significant environmental impacts. Second, if it identified such potential impacts, the HRPT then needed to consider if they warranted a more probing and binding analysis: an environmental impact statement. To trigger that second, comprehensive study, the HRPT did not need to conclude that the Pier 55 Project would ***definitively*** impact the environment, only that there was some ***potential*** for at least one significant environmental impact—a low bar regularly met for projects with much smaller impacts than the Pier 55 Project. Even under that low threshold, the HRPT reached the incredible conclusion that erecting a 2.7-acre island in the Hudson River—and driving 547 concrete pilings[5] deep into the sediment-covered bedrock of an Estuarine Sanctuary protected for habitat preservation, water access and water-dependent use, and home to threatened and endangered species and their critical habitat—was free of potential environmental impacts. And in doing so, the HRPT relieved itself of any responsibility for conducting an environmental impact statement or considering appropriate mitigation measures.

To justify this cursory assessment and self-serving finding, the HRPT relies on an environmental review conducted by the HRPT's predecessor agency—***in 1998***. That 17-year-old study says nothing of the Pier 55 Project, which of course did not exist at the time, or even of the area in which it will be built, but instead focuses on the "renovation and reconstruction" of Pier 54. But the HRPT is not proposing today to renovate or reconstruct Pier 54; it is demolishing

[3] 6 NYCRR §§ 617.1 *et seq.* (Ex. QQ).
[4] 43 RCNY §6-01 *et seq.* (1997) (Ex. UU).
[5] EAF at F-22 (Ex. DDD).

what remains of Pier 54 to make way for the massive Pier 55 Project, whose environmental impacts could not possibly have been anticipated, much less measured, by the data the HRPT now cites. Even the portions of the analysis based on "current" data reveal internal contradictions, arbitrary assumptions, and unscientific methodologies. By using this irrelevant data analysis to sidestep the Pier 55 Project's environmental implications, the HRPT acted arbitrarily. The HRPT's poor conduct is particularly untenable given that only two years ago, the HRPT performed the full environmental impact statement required under SEQRA and CEQR for a project much smaller in scope and located only a few blocks north of the Pier 55 Project—the Pier 57 Project (defined below), where there was no increase in over-water coverage, let alone almost three acres of new coverage.

The HRPT Failed to Comply with the NYC Local Waterfront Revitalization Program.

By proceeding with the Pier 55 Project, the HRPT also runs afoul of the New York City Waterfront Revitalization Program ("NYC WRP"),[6] which has as one of its policy goals to "p[sic]rotect and restore the quality and function of ecological systems within the New York City coastal area."[7] The Pier 55 Project does not even pretend to satisfy that policy goal: there is no reasonable argument that driving nearly 550 new pilings (and creating significant new over-water coverage where none has existed) into an Estuarine Sanctuary protects and restores the Hudson River's ecological systems. The NYC WRP also has a policy goal of encouraging recreational boating. This policy goal will also be undermined if the Pier 55 Project is built in a previously-untouched water area, because as planned the project in no way encourages

[6] DEPARTMENT OF CITY PLANNING CITY OF NEW YORK, THE NEW YORK CITY WATERFRONT REVITALIZATION PROGRAM, PROPOSED REVISIONS PURSUANT TO SECTION197-A OF THE CITY CHARTER (2013) ("NYC WRP") (Ex. W).
[7] NYC WRP at 39 (Ex. W).

recreational boating. This, too, is an independent violation of SEQRA and CEQR, both of which require Respondents to comply with the NYC WRP.

The HRPT Violated Its Own Enabling Act. At a minimum, in designing the Pier 55 Project, Respondents were required to comply with the HRPT's own enabling statute, the Hudson River Park Act (the "Park Act").[8] The Park Act specifies that, at any proposed construction site within the Estuarine Sanctuary under the HRPT's jurisdiction, "only water dependent uses shall be permitted." This rule was designed to preserve the waterfront for structures that maximize the Hudson River's many benefits and prevent the construction of structures that could just as easily be built elsewhere in the city, in addition to promoting water access and water-dependent activities. Water-dependent uses under the Park Act include boating, fishing, swimming, and other recreational activities—none of which are contemplated by the Pier 55 Project, which is a novel but entirely non-aquatic outdoor theater venue. To be functional, the Pier 55 Project's theater could just as easily sit on land; it certainly does not have to be built atop an Estuarine Sanctuary. As this project proposes to evict existing water-dependent uses, cover and destroy existing habitat, and frustrate water access, the HRPT's Pier 55 Project does not align with the HRPT's own enabling act's express language calling for this part of the Park to be used to encourage these existing uses, preserve this habitat, and promote water access. Further, the HRPT ignored the requirement, put in place by their own 2013 Amendment to the Park Act, to keep the historical elements of the White Star Line in rebuilding Pier 54.

The HRPT Violated Its Own Leasing Regulations. By approving the Draft Lease with Respondent Pier55, Inc. without issuing any bid prospectus, and instead, unilaterally and secretly

[8] Hudson River Park Act (1998), N.Y. Sess. Laws 592 (McKinney) (the "Hudson River Park Act") (Ex. R).

awarding the project to Respondent Pier 55, Inc., the HRPT violated its own rules and regulations governing leases for the use of property within its jurisdiction ("Lease Regulations").[9] The HRPT is required to issue a bid prospectus for any lease that includes a total capital investment in the Hudson River Park of $1 million or more. The Form Lease (defined below) states that the maximum costs associated with the development of the proposed Pier 55 Project will be $130 million, the majority of which is a capital investment, [10] and thus an unequivocal violation of the HRPT's Lease Regulations.

* * *

In sum, Respondents' headlong pursuit of the Pier 55 Project violates multiple New York State and City law, and Petitioners respectfully submit this memorandum of law in support of their Verified Petition for a judgment under Article 78 of the Civil Practice Law and Rules to enjoin Respondents from proceeding with their proposed construction, annul the EAF and Negative Declaration, reject the HRPT-approved GPP Amendment, and hold implementation of the Lease in abeyance pending the outcome of this litigation and until Respondents comply with relief requested herein, including compliance with the public trust doctrine, SEQRA, CEQR, LWRP (defined below), Lease Regulations, and the Park Act.

When agencies ignore the public trust doctrine, they deprive citizens of public parkland that is rightfully theirs. When agencies disregard SEQRA's and CEQR's careful, well-established processes, the results can be disastrous for the fragile New York waterways and habitats that sustain hundreds of species, many of them endangered, and that together contribute to New Yorkers' quality of life. Fortunately, Article 78 empowers New York courts, including

[9] 21 NYCRR §§752.1 (Ex. SS), 752.4 (Ex. TT).
[10] Merriam-Webster defines "capital investment" as "the amount of money invested or required to be invested in an enterprise of undertaking."

this Court, to act as a necessary shield against an agency's arbitrary and irrational conduct and ensure the rational, transparent application of New York laws.

I. BACKGROUND AND FACTS

Petitioners refer the Court to the statement of facts and procedural history set forth in their Verified Petition dated June 11, 2015 ("Verified Petition"), which is incorporated here by reference. Additionally, Petitioners state the following.

1. Hudson River Park: A Cherished and Vulnerable Environment Protected by SEQRA and CEQR

The Hudson River Park (the "Park") is "an indispensable and cherished resource"[11] on the West Side of Manhattan, spanning from Battery Place to 59th Street. It is comprised of multiuse piers, upland green spaces, biking paths, marinas, and water-access areas in and along the Hudson River.[12] The Park provides critical recreation and entertainment opportunities for residents and visitors; equally important, it serves as a vital habitat for the Hudson River's many creatures—among them, fish (over 200 species), birds (85 identified species within the Park's boundaries),[13] mammals, crabs, and more—including those threatened or in danger of extinction.[14]

The Park is operated by Respondent HRPT. The HRPT was established under the Park Act as a "public benefit corporation" and charged specifically "to design, develop, operate, and maintain" the Park.[15] It is mandated to be a "proper and appropriate steward of the environment"

---

[11] Diana L. Taylor, *Message From the Chair*, HUDSON RIVER PARK, http://www.hudsonriverpark.org/about-us/hrpt/board-of-directors (last visited Mar. 10, 2015) ("Message from the Chair") (Ex. LL).
[12] Hudson River Park Act § 3(e) (Ex. R).
[13] *Events: Hudson River Park Wild!*, HUDSON RIVER PARK, http://www.hudsonriverpark.org/events/hudson-river-park-wild-2015(last visited Mar. 10, 2015) (Ex. S).
[14] *Habitat: Water*, Hudson River Park, http://www.hudsonriverpark.org/education-and-environment/hudson-river-ecosystem/habitat-water (last visited Mar. 10, 2015) ("Habitat") (Ex. L).
[15] Hudson River Park Act§ 2(e) (Ex. R).

and "to cooperate, and to coordinate matters relating to the park, with … [the] community, environmental, and civic groups."[16] The HRPT is operated by a 13-member Board of Directors, an autonomous entity that, in effect, decides the Park's fate without checks or balances (aside from this Court and others similarly positioned).[17]

The Park was originally conceived, and has been periodically further developed, under the guidelines and processes provided for by SEQRA and CEQR, New York State's and City's environmental regulations, designed to protect the natural environment, inform agency decision making, and require, where appropriate, that potentially significant impacts be mitigated or avoided. Those regulations specify a series of processes and duties that public agencies, such as the HRPT, are bound to when undertaking public projects (referred to under those regulations as "actions").[18] Neither party to this litigation disputes that the Pier 55 Project—the HRPT action underlying Petitioners' claims—is governed by SEQRA and CEQR.[19]

SEQRA's processes require any agency undertaking an action to work in tandem with the public to ensure that all relevant stakeholders are adequately involved in the project's development and that environmental concerns are appropriately considered and addressed. SEQRA requires that any development be balanced against the needs of New York's delicate natural resources. The regulations accomplish this by specifying that actions must progress

[16] Hudson River Park Act §§ 6(c), (d) (Ex. R).
[17] The 13-member Board of Directors consists of political appointees, including an investment bank manager, business lawyers, a risk manager, real estate managers, and a journalist. *See* Message from the Chair (Ex. LL).
[18] 6 NYCRR § 617.2 (Ex. OO).
[19] CEQR, New York City's process for implementing SEQRA, "can be no less stringent than its state counterpart." *See* New York City Mayor's Office of Environmental Coordination, *Frequently Asked Questions* (1) (Ex. V). CEQR differs from SEQRA in that its procedures pertain to proposed discretionary actions specifically taking place within the boundaries of New York City. Going forward, for ease of reference, we will refer to SEQRA and CEQR collectively as "SEQRA."

through multiple phases of environmental study, analysis, public review, and comment before the public agency decides whether and how the action should proceed.

Because SEQRA is at its core an environmental protection regulation, it provides a robust environmental-analysis framework, typically consisting of two distinct analyses. These analyses are designed to be integrated into a project's planning phase. The first analysis consists of completing a standardized environmental-related form, called an Environmental Assessment Form ("EAF"). Although relatively lengthy—sometimes consisting of hundreds of pages[20]—an EAF reflects a preliminary, relatively simple analysis that is typically drafted at the inception of any action. It is used by state agencies, such as the HRPT, as a factor in deciding whether additional environmental analysis is required.

In executing a decision on whether additional environmental analysis is required, agencies, such as the HRPT, are mandated by SEQRA to publish a declaration of environmental significance in the form of a "positive declaration" or "negative declaration" of significant impact. Those declarations, published online and elsewhere, signal to the public whether a proposed action, such as the Pier 55 Project, has the potential to have significant environmental impacts.[21]

If an agency issues a "positive declaration" of environmental significance, it indicates that the project has the ***potential*** to have at least one significant environmental and requires the agency to conduct additional environmental review. That additional review under SEQRA consists of an elaborate, detailed analysis known as an Environmental Impact Statement ("EIS").

[20] Although Respondents will likely argue that the length of the Pier 55 Project EAF is proof that they have complied with their SEQRA and CEQR obligations, a 200-page completed form carries little weight if based on unscientific, outdated analyses. *See* AKRF, INC., PIER 54 RESPONSE TO COMMENTS RECEIVED DURING PUBLIC REVIEW (Prepared for HRPT) (Feb. 10, 2015), Response to Comment 11 (Ex. C).

[21] 6 NYCRR § 617.3(a) (Ex. OO); *see also* Hudson River Park Act § 7-4 (Ex. R).

An EIS looks at all possible environmental impacts of a project and includes a process called "public scoping." Public scoping ensures participation by stakeholders in the drafting of an EIS by collectively identifying the issues that should be addressed in the EIS, including identification of mitigation measures and reasonable alternatives. Public scoping allows for open discussion of issues important to the public, community, other agencies, and elected officials.[22]

The additional analysis provided by an EIS is critical for large projects, such as the Pier 55 Project. Not only does the EIS reflect a far more robust and transparent analysis than an EAF (even a long-form EAF), ensuring that an agency's "hard look" is robust, thorough, and well-founded, but only the EIS generates "actions" which are binding on state agencies. If, for example, both an EAF and EIS identify five potential environmental impacts resulting from a proposed project—and five mitigation measures to address those impacts—an agency would be bound to carry out only those mitigating actions specified by the EIS.[23]

2. The Pier 55 Project Announcement

On November 16, 2014, Respondents and the Diller–von Furstenberg Family Foundation announced the Pier 55 Project, centered on a plan to build an extravagant 2.7-acre island in the Hudson River. Rising seven stories out of the water, the island will include two outdoor performance spaces, including a 700-seat theater, walking paths, hills, and extensive overwater lighting. Building it will be a years-long, herculean undertaking, including driving nearly 550

[22] Division of Environmental Permits New York State Department of Environmental Conservation, The SEQR Handbook 104 (3rd ed. 2003) (Ex. N); *see also* NYCRR 6 § 617.8 (Ex. OO).

[23] An EAF assists an agency "in determining the environmental significance or non-significance of actions." 6 NYCRR § 617.2(m) (Ex. OO). A short EAF is required for "Unlisted" actions, whereas a full EAF is required for Type I action, where the environmental impacts are likely to be more significant. *Id.* at § 617.6 (Ex. OO). An EIS is a more thorough environmental analysis, carried out if the EAF has found potential environmental significance. *Id.* at §§ 617.2(n), 617.9 (Ex. OO). The EIS must look at the irreparable aspects of an action and develop mitigation measures. *Id.* at § 617.9(b) (Ex. OO).

new piles possibly as deep as 250 feet[24] into the Hudson River bedrock. The Pier 55 Project will encroach on the remnants of two existing piers: the Pier 56 pile field, designated an "ecological pier" under the HRPT's park-governing set of regulations called the General Project Plan ("GPP"), and the Pier 54 pile field (after removal of the existing Pier 54 deck). The Pier 54 pile field will remain in the Hudson River, even after the new massive island is constructed with the new piles, leaving the 1.9 acres where the current Pier 54 is situated, an important part of protected navigable waters, inaccessible to water-dependent uses such as kayaking and swimming.[25] If allowed to proceed, the Pier 55 Project will be one of the largest overwater construction projects undertaken in Manhattan's Hudson River this century.

The Pier 55 Project is expected to cost a fortune—in excess of $130 million—living up to the HRPT's internal nickname for it: "Treasure Island."[26] It is intended to be constructed in conjunction with two other Park improvement projects, the Pier 54 Connector Project[27] and the Crosswalk Project,[28] and is adjacent to the HRPT's Pier 57 rebuilding project. Construction of the new Pier 55 structure is scheduled to begin in 2016, although some demolition work on Pier 54 appears to be already underway.[29]

Respondents plan to build this new island between Piers 54 and 57. Although reasonable minds can disagree on whether building a manmade island in the Hudson River makes sense in

---

[24] Brian Pape, *Mushrooms Too Pricy, Repair Pier 40 Instead*, WESTVIEW NEWS (Mar. 2015), *available at* http://westviewnews.org/2015/03/mushrooms-too-pricy-repair-pier-40-instead/ (Ex. MM).
[25] Buchanan Aff. ¶ 15.
[26] News and Updates, HUDSON RIVER PARK, http://www.hudsonriverpark.org/news-and-updates/exciting-news-about-pier-54 (last visited Mar. 10, 2015) (Ex. I).
[27] The project will also result in the widening of the pedestrian walkway between the Gansevoort Peninsula and Pier 57 (running from Bloomfield Street to 14th Street).
[28] The Crosswalk Project will create an at-grade pedestrian crossing across Route 9A at West 13th Street.
[29] As discussed *infra*, Respondent HRPT admits that the Pier 55 Project will include both the removal of the Pier 54 deck and construction of a new Pier 55, but fails to treat the Pier 54 demolition as part of the Pier 55 Project in the HRPT's Negative Declaration. *See* Negative Declaration (Feb. 11, 2015) (stating that "[t]he project is located at the existing Pier 54 and between the current Pier 54 footprint and the Pier 56 pile field to the north") (Ex. X).

any location, nearly everyone who has looked at this project, other than Respondents, recognizes that building an island in this particular area—defined in the Park Act as the "Estuarine Sanctuary"[30]—presents a wide range of complicated environmental issues.

As described by the HRPT itself, the proposed construction site, called the Estuarine Sanctuary, is an undisturbed, never-before-developed section of the Park that "is stopping point or home to more than 200 fish species," including the endangered short nose and Atlantic sturgeon and the American eel.[31] It also "hosts numerous plankton species that are an important food source for fish and other organisms,"[32] including the over 85 species of birds found within the Park's boundaries.[33] In 1992, the New York State Department of State designated the Park as part of the Lower Hudson River Significant Coastal Fish and Wildlife Habitat. In issuing that designation, the Department of State recognized that "most of the shoreline along this reach of habitat has been disturbed through historical filling, bulkheading, and development." Its preservation efforts were therefore specifically aimed at protecting the Park's fragile ecosystem, which "is considered one of only a few large tidal river systems in the northeastern United States and provides important ecological features."[34] In short, the HRPT's Treasure Island will intrude on one of the few remaining undisturbed tidal river habitats in the entire Northeast.

3. The Pier 55 Project Comment Period

Following the November 2014 announcement of the Pier 55 Project, Respondents opened a comment period, as required by the Park Act. Respondents sought public comment on three documents: a draft EAF ("Draft EAF"); a draft lease between the HRPT and Pier55, Inc., for the funding, operation, and maintenance of the Pier 55 Project ("Draft Lease" and, upon approval on

[30] Hudson River Park Act § 8 (Ex. R).
[31] Habitat, *supra* n. 14 (Ex. L).
[32] *Id*.
[33] *Id*.
[34] *Id*.

February 11, 2015 by the HRPT Board of Directors, the "Form Lease"); and a proposed amendment, recently passed by the HRPT's Board of Directors, to the GPP to justify the proposed development of the interpier area under the Draft Lease ("GPP Amendment").

During a public hearing held on January 12, 2015, and through written comments submitted to HRPT, various stakeholders, including elected officials, non-profit advocacy organizations, and other individual community members, expressed a wide range of concerns mirroring those underlying the litigation Petitioners bring here:

- ***Public Trust Doctrine***. The HRPT did not include meaningful community participation in developing the Pier 55 Project, instead choosing to create a plan behind closed doors, with private interests that limit public access to the Hudson River and the Hudson River Park. The result is that the HRPT is intending to spend ungodly amounts of money to create a privately funded concert venue — one that will exclude the public from around half of the events held there. Indeed, as noted by several prominent local officials, including New York State Assembly Member Deborah Glick and Manhattan Borough President Gale Brewer, the public should be alarmed by the access limitations approved by the HRPT.[35] For example, Diller's Pier 55, Inc. is permitted to charge $1000 per ticket to Fourth of July and Labor Day celebrations on the island if it wants to,[36] and is permitted to sell membership interests in Pier 55, a concept vaguely defined and poorly understood.[37]

[35] AKRF, INC., PIER 54 RESPONSE TO COMMENTS RECEIVED DURING PUBLIC REVIEW (Prepared for HRPT), Comments 55, 60 (Feb. 10, 2015) (Ex. C).
[36] Lease Agreement between Hudson River Park Trust, Landlord, and Pier55, Inc., Tenant, § 9.02 (Feb. 11, 2015) ("Lease") (Ex. BB).
[37] Lease § 4.02 (Ex. BB).

- ***Flawed EAF.*** The HRPT cannot reasonably rely on its Draft EAF[38] to determine whether an EIS is required because the Draft EAF is flawed. It inaccurately and self-servingly downplays the impacts of constructing a 2.7-acre island where none has previously existed, and to do so, it erroneously relies on an outdated and largely irrelevant discussion of Pier 54 in an EIS that the HRPT's predecessor drafted when the Park was first created in the 1990s (the "1998 EIS").[39] Throughout that outdated document, there is no mention of Pier 55, or even the interpier space in which the overwhelming majority of the Pier 55 Project will be constructed. The HRPT's Draft EAF attempts to piggyback the Pier 55 Project onto the 17-year-old Pier 54 discussion by describing the Pier 55 Project as "renovation and reconstruction activities at Pier 54." But no agency should reasonably believe that constructing a new 2.7-acre island (to say nothing of the two related construction projects that are significant in their own right) can be fairly characterized as "renovation and reconstruction activities" at Pier 54. Even elected officials who voted for the 2013 amendment to the Park Act have later stated that the Pier 55 Project involves "entirely new construction, not just a redevelopment…[of] a new pier with new environmental impacts from its construction to its use."[40] The HRPT intends to destroy Pier 54 and convert it into a pile field, not "renovate" it. The Draft EAF's characterization and analysis—on

[38] For ease of convenience, Petitioners refer the "Draft EAF" instead of the "EAF," although a final EAF was produced following the Negative Declaration. There were no substantial changes in the final EAF.
[39] Allee, King, Rosen and Fleming, Inc. (AKRF), 1998. Hudson River Park Final Environmental Impact Statement prepared for Empire State Development Corporation in cooperation with the Hudson River Park Conservancy (1998) ("EIS") (Ex. A).
[40] Letter from Deborah J. Glick, Assemblymember, 66th District, New York County, to Joe Martens, Commissioner, NYS Dept. of Environmental Conservation (Mar. 10, 2015) (Ex. T); Letter from Deborah J. Glick, Assemblymember, 66th District, New York County, to Lieutenant General Thomas P. Bostick, U.S. Army Corps of Engineers (Mar.19, 2015) (Ex. U).

which the HRPT's "negative declaration" of environmental impact is entirely based—is inaccurate and unreliable.[41]

- ***Demolished landmark.*** Although perhaps not as notorious as the Empire State Building or Central Park, Pier 54 has an enduring place in New York City's—and in America's—history. The Carpathia docked at Pier 54, for example, when delivering survivors of the *Titanic* disaster. Today, the White Star Line iconic arch still rests at the base of Pier 54. The EAF contains no plans for maintaining the iron arch of the White Star Line, as required by ther Park Act.
- ***Not a water-dependent use.*** The HRPT violated its own Act because the Pier 55 Project does not meet the criteria for "water dependent use."[42] Even the outdated 1998 EIS, on which the HRPT's EAF relies to make the claim that the Pier 55 Project is somehow related to Pier 54, acknowledged that Pier 54 was intended to have a water-dependent use—*i.e.*, docking historic ships . No Act, law, or documents have ever considered converting Pier 54 into a pile field, over which a small fraction of the island will sit,[43] or the construction of a brand new Pier 55 in the Estuarine Sanctuary between Pier 54 and Pier 57—let alone a new facility that is entirely severed from water-dependent uses.[44] The HRPT's Pier 55 Project is unprecedented, and no prior environmental study has ever contemplated its impact or the specific area in which it will sit.

[41] EAF at F-1 (Ex. H)
[42] Hudson River Park Act § 3(m) (Ex. R); N.Y. Exec. Law § 911(7) (Ex. XX).
[43] The HRPT states that "[t]he piles at the existing Pier 54 would be preserved and maintained as pile field habitat." *See* Negative Declaration (Feb. 11, 2015) (Ex. X).
[44] Even though the 1998 EIS indicates that historic ships were anticipated to dock at Pier 54, the new Pier 55 will not allow ships of any sort to dock. *See* 1998 EIS, at 6-4 (Ex A).

- ***No bid prospectus***. The HRPT violated its own Lease Regulations when it failed to issue a bid prospectus for the Draft Lease or Form Lease,[45] despite the large investment of approximately $130 million to be made in the construction and operation of Pier 55.
- ***Rushed process***. The timeline for submitting public comments on the Draft EAF, Draft Lease, and GPP Amendment (documents totaling over 500 pages) was unreasonable, as the comment period started one week before the Thanksgiving holiday and overlapped with the Hanukkah, Christmas, and New Year holidays. The limited comment period is particularly troubling in light of the serious economic concerns raised by other commenters that illustrate how Respondent HRPT abdicated its fiscal duties in rushing the structuring process, and failing to adequately consider the financial risks of the Pier 55 Project to taxpayers.

4. The HRPT Issues a Negative Declaration

On February 11, 2015, the HRPT published a negative declaration of environmental significance (the "Negative Declaration"),[46] thereby approving its own project without modification or further analysis and demonstrating that Respondents ignored the many potentially significant impacts that the Pier 55 Project might have on the environment. In its Negative Declaration, the HRPT relies on the Draft EAF to justify its decision. Notably, the Negative Declaration was issued only hours before the HRPT Board of Directors approved the Draft Lease and GPP Amendment—*i.e.*, likely at the same Board meeting.[47] The timing of these events strongly suggests that the HRPT's approval of the Pier 55 Project was a fait accompli. By

[45] 21 NYCRR § 752.1(a)(2) (Ex. SS).
[46] Negative Declaration (Feb. 11, 2015) (Ex. X).
[47] Announcement by Respondent HRPT regarding approval of the Draft Lease and Proposed Amendment, Pier 54 Public Review, available at http://www.hudsonriverpark.org/vision-and-progress/planning-and-construction/meatpacking-district/pier-54-public-review (Ex. KK).

entering into a deal with Pier55, Inc. in the same breath that it rejected even the potential for environmental impacts, the HRPT signaled that this privately sponsored project to construct a massive man-made island in the current footprint of a precious and protected Estuarine Sanctuary, would be pushed through before any voices could question the HRPT's conclusion, methodology, transparency, or motivation, including as to the scope of authorization provided by the amended Park Act.[48] This is the antithesis of what SEQRA contemplates.

II. STANDARD OF REVIEW

1. DECLARATORY JUDGMENT

Courts in New York "may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." C.P.L.R. § 3001. Therefore, "[a] declaratory judgment action . . . 'requires an actual controversy between genuine disputants with a stake in the outcome,' and may not be used as 'a vehicle for an advisory opinion.'" *Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, 35 A.D.3d 253, 253 (2006) (quoting Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3001:3).

[48] *The New York Times* reported that the Pier 55 Project "raises thorny questions about private control over public spaces, the secretive planning process behind it and the potential competition between it and other new cultural institutions hoping to make their mark on the city," especially given that the private involvement of the Diller–von Furstenberg Family Foundation was not disclosed when the Park Act was quietly amended in 2013, in what is now seen as an attempt to accelerate the Pier 55 Project forward. *See* Charles V. Bagli and Robin Pogrebin, *With Bold Park Plan, Mogul Hopes to Leave Mark on New York's West Side*, NEW YORK TIMES (Nov. 17, 2014), available at http://www.nytimes.com/2014/11/17/nyregion/with-bold-park-plan-mogul-hopes-to-leave-mark-on-citys-west-side.html?_r=0 (Ex. OO). The *New York Times* more recently reported that elected officials were kept in the dark in 2013 about the fact that the HRPT was "deep in talks" with Mr. Diller and that the 2013 amendment was "cast…as a redevelopment of the pier from narrow and long to short and wide…[and] [t]here was never any clarity that they were involved in negotiating a major new pier." *See* Lisa Foderaro, *How Diller and von Furstenberg Got Their Island in Hudson River Park*, THE NEW YORK TIMES (Apr. 3, 2015), http://www.newrepublic.com/article/120909/barry-dillers-pier-55-park-how-money-changing-city-parks (Ex. M).

2. ARTICLE 78

Article 78 of the New York Civil Practice Law and Rules allows courts to review administrative actions where "a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." C.P.L.R. § 7803(3).

If reviewing an agency's decision is based on an error of law, courts must determine whether the agency improperly applied or interpreted a statute or regulation. *Prand Corp. v. Town Bd. of Town of East Hampton,* 78 A.D.3d 1057, 1060 (2d Dep't 2010) (finding that agency's enactment of local law violated SEQRA) (citing *Akpan v. Koch*, 554 N.E.2d 53, 57 (N.Y. 1990)). While an agency's statutory interpretation is typically entitled to deference, "a determination by the agency that runs counter to the clear wording of a statutory provision is given little weight." *Excellus Health Plan, Inc. v. Serio*, 809 N.E.2d 651, 654 (2004) (quoting *Raritan Dev. Corp. v. Silva*, 689 N.E.2d 1373, 1375 (1997)).

Courts may also decide an agency's decision was arbitrary and capricious. *Prand,* 78 A.D.3d at 1060 (citing *Akpan*, 554 N.E.2d at 57). An action is arbitrary and capricious if it is taken "without a sound basis in in reason and generally without regard to the facts." *Nestle Waters N. Am., Inc v. City of New York,* 121 A.D.3d 124, 127 (1st Dep't 2014). A court's review of the agency's determination "must be 'meaningful.'" *Develop Don't Destroy (Brooklyn) v. Empire State Dev. Corp.*, 914 N.Y.S.2d 572, 584 (Sup. Ct., N.Y. Cnty. 2010) (quoting *Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 881 N.E.2d 172, 177 (N.Y. 2007)); *see also Price v. New York City Bd. of Educ.*, 837 N.Y.S.2d 507, 517 (Sup. Ct., N.Y. Cnty. 2007) ("[T]he principle of Article 78 review that a Court must defer to the expertise of an agency with

respect to matters within the agency's jurisdiction does not mean, as DOE contends, that the Court must capitulate to the agency's determination.").

The reviewing court must rely only on the "grounds invoked by the [administrative agency]." *King v. Kay*, 963 N.Y.S.2d 537, 544 (Sup. Ct., N.Y. Cnty. 2013) (quoting *Montauk Imp., Inc. v. Proccacino*, 363 N.E.2d 344, 345 (N.Y. 1977)). And "[i]f those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Id.* (quoting *Montauk Imp.*, 363 N.E.2d at 544).

When reviewing an agency decision for compliance with SEQRA, a court "must 'review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination.'" *Prand*, 78 A.D.3d at 1060 (citing *Akpan* 554 N.E.2d at 57); *see also Baker v. Village of Elmsford*, 70 A.D.3d 181, 190 (2d Dep't 2009) (Village failed to comply with SEQRA by issuing negative declaration based on Environmental Assessment Form because Village failed to take a hard look with reasoned elaboration of the adverse effects of proposed action). The court must ensure that the agency's decision is supported by "substantial evidence." *NYC New York Marina, LLC v. Town Bd. of East Hampton*, 842 N.Y.S.2d 899, 905 (Sup. Ct., N.Y. Cnty. 2007).

III. ARGUMENT

The Court must stop the Pier 55 Project from proceeding as-is, and either reject the project entirely, or at least force the HRPT to revisit its design and conduct a proper, thorough environmental review. At bottom, the HRPT's Pier 55 Project violates the public trust doctrine because the Project will improperly alienate without the proper legislative approval. For that reason alone, the entire Project should be enjoined from proceeding. But even if the Court finds

that the project, in concept alone, does not violate the public trust doctrine, the HRPT's design and environmental review violates at least two different regulations and should be rejected or modified on those bases. *First*, the HRPT violated SEQRA, and SEQRA's requirement to comply with the NYC WRP, by erroneously relying on flawed data and unscientific analysis to reject the possibility that the Pier 55 Project has the potential for even a single significant environmental impact. Second, the HRPT's design and process violates its own rules and regulations in numerous ways. For one, the design violates the HRPT's mandate under the Park Act to build only water-dependent use structures—such as public marinas, historic ship moorings, or kayaking and canoe centers—not theaters that could just as easily be built along Fifth Avenue. For another, the HRPT did not follow its own bidding process for projects of this magnitude. Finally, the design documents and EAF exclude a historical element, the White Star Line's iron arch, required by the Act to be a part of any redesign or modification of Pier 54 (including the Pier's removal, as the HRPT proposes here).

1. THE HRPT'S ACTION VIOLATES THE PUBLIC TRUST DOCTRINE

This Court should issue a declaratory judgment that the HRPT's action is a violation of the public trust doctrine because it improperly alienates parkland for a non-public use. The New York Court of Appeals has firmly established the public trust doctrine, which protects the integrity of parkland from conversion "absent the approval of the State Legislature." *Union Square Park Cmty. Coal., Inc. v. New York City Dep't of Parks and Recreation*, 22 N.Y.3d 648, 654 (2014) (citing *Friends of Van Cortland Park v. City of New York*, 95 N.Y.2d 623, 630 (2001)). In particular, leases of parkland constitute an alienation of parkland, and require legislative approval if executed for non-park purposes. *Friends of Van Cortlandt Park*, 95 N.Y.2d at 630. The purpose of the public trust doctrine is to ensure that the people, who are the

beneficiaries of the public trust, are not deprived of parkland except by their own consent clearly voiced through their elected representatives. Therefore, in order to find there was no alienation here, the Court must find that this project's description is the only meaning the Legislature could have intended.

New York courts have recognized the public trust's doctrine critical role in preserving parkland for the enjoyment of New York's citizens, and in preventing the intrusion of private interests in public space. *See, e.g.*, *Raritan Baykeeper, Inc. v. City of New York*, No. 31145/06, 42 Misc.3d 1208(A), at *4 (Sup. Ct., Kings Cnty. Dec, 20 2013) (citing the "formidable body of case law which stands for the proposition that any 'non-park use' of a park requires legislative approval"); *Williams v. Gallatin*, 229 N.Y. 248, 253-54 (1920) (explaining that a park is "a pleasure ground set apart for recreation of the public, to promote its health and enjoyment" and that any park improvements must "facilitate free public means of pleasure, recreation, and amusement, and thus provide for the welfare of the community"); *Union Square Park Cmty. Coal*, 22 N.Y.3d at 65 (citing *Friends of Van Cortlandt Park*, 95 N.Y.2d at 630 (2001) ("[O]ur courts have time and again reaffirmed the principle that park land is impressed with a public trust, requiring legislative approval before it can be alienated or used for an extended period for non-park purposes."). In 1913, the State Legislature codified the public trust doctrine in Section 20(2) of the General City Law, which declared that "the rights of a city in and to its water front, ferries, bridges, wharf property, land under water, public landings, wharves, docks, streets, avenues, parks, and all other public places, are hereby declared to be inalienable." N.Y. Gen. City Law § 20(2). Hence, under statute as well as under common law, alienation of municipal parkland is unlawful unless expressly authorized by the State Legislature.

Among the cases cited with approval in *Van Cortlandt Park*, 95 N.Y.2d at 630, is *Aldrich v. New York*, 208 Misc. 930 (1955), *aff'd*, 2 A.D.2d 760 (2d Dep't 1956), in which the court summarized the extensive case law that imposes a high bar on the government when it seeks to alienate parkland:

> [L]egislative authority permitting encroachment upon park purposes must be "plainly conferred." (*Williams v. Gallatin*, 229 N.Y. 248, 253 . . . .) When speaking of the legislative authority to alienate public parks, language varying only slightly has been used. Some have said that the legislative authority must be 'special' (*American Dock Co. v. City of New York*, 174 Misc. 813, 824, . . . *affd.* 261 A.D. 1063, *affd.* 286 N.Y. 658 . . . ; *Lake Co .Water & Light Co. v.Walsh*, 160 Ind. 32, 39 . . . ; 10 McQuillin on Municipal Corporations [3d ed.], pp. 77, 82); others, that such authority must be "specific" (*Buckhout v. City of Newport*, 68 R.I. 280, 287-288 . . .) or "direct" (*Sebring v. Quackenbush*, 120 Misc. 609, 613, 199 N.Y.S. 245, *affd.* 214 A.D. 758, . . .) or "express" (*State ex rel. Excelsior Springs v. Smith*, 336 Mo. 1104, 1113, . . .). Add to the foregoing the well-settled rule that "When there is a fair, reasonable and substantial doubt concerning the existence of an alleged power in a municipality, the power should be denied" (*Matter of City of New York [Piers Old Nos. 8-11]*, 228 N.Y. 140, 152), and it seems clear that the legislative authority required to enable a municipality to sell its public parks must be plain.

Id. at 939. The *Aldrich* court rejected the City's attempt to sell to private developers a former hospital building located in Jacob Riis Park. The City had argued, *inter alia*, that it was empowered to do so by Charter § 383, which allowed the Board of Estimate to dispose of parkland no longer needed as such. The court held that this provision was insufficiently specific to authorize the sale of the former hospital building. It being doubtful whether the Legislature had authorized alienation, "the power should be denied." *Id.* at 942.

The HRPT's actions constitute an alienation of parkland because the lease approved by the HRPT allows a non-governmental entity, Pier55, Inc., to build and operate a manmade entertainment-venue island in the Hudson River. The lease expressly gives Pier55, Inc., the ability to effectively exclude the general public from 49% of the events held there through

uncapped ticket prices.[49] This, standing alone, is enough to trigger a violation of the public trust doctrine, as no legislative approval has been given for the construction and operation of such a structure, and particularly in that manner. *See Union Square Park Cmty. Coal.*, 22 N.Y.3d at 656 ("[P]arkland cannot be leased, even for a park purpose, absent legislative approval."). As detailed below in Part III.3 of this memorandum, no reasonable reading of the Park Act allows the HRPT to undertake such a project. Further, the Park Act does not permit in any explicit terms the construction of a new structure in the Estuarine Sanctuary. Nor is the permission to rebuild Pier 54 outside of its current footprint, as carved out in the 2013 Amendment to the Park Act, an explicit legislative approval granting a run-around of the public trust doctrine by building a structure almost entirely in a new location (see overview image at page 51 below).[50]

This Court need only look at the plain meaning of the words used in the Park Act to see that the statute does not contemplate an entertainment-venue island in the Estuarine Sanctuary. *See Council of City of N.Y. v. Giuliani*, 93 N.Y.2d 60, 68-69 (1999) (courts interpret statutes by beginning with the "plain meaning of the words used in the statute" and looking at "the spirit and purpose of the act and the objects to be accomplished"); *Drew v. Schenectady Cnty.*, 88 N.Y.2d 242, 246 (1996) ("as with any statute, we apply the basic rule that '[w]ords of ordinary import in a statute are to be given their usual and commonly understood meaning, unless it is clear from the statutory language that a different meaning was intended.'"). As detailed in Part III.3(a) below, the Park Act specifically forbids any non-water dependent uses in the water section. The

[49] *See* Lease § 9.03 (Pier55, Inc. "may sell seats or tickets to, or otherwise charge for, [49% of Permitted Events] on such basis as it shall determine to be appropriate"). And while this provision of the Lease forces Pier55, Inc. to guarantee that 51% of permitted events will be available for at most a "low-cost" entry fee, the terms "low-cost" is not defined in the lease, granting Pier55, Inc. further latitude to profit excessively from this venture.
[50] *See* n. 86, *infra*.

Pier 55 Project is not a water-dependent use under any plain reading of the statute.[51] And the plain meaning of "reconstructing" Pier 54 out of its original footprint cannot be read to include constructing a new, standalone, seven-story tall structure of unrecognizable shape, size, orientation, and nature.[52] In fact, the proposed project cannot properly be called a "pier"—it is simply a large park-themed entertainment venue built on stilts over water. This does not fit within any recognizable definition of the word "pier," which typically involve boats or activities like fishing.[53]

In approving a construction that contravenes the specific provisions of the Park Act, the HRPT has ignored the requirement at the heart of the public trust doctrine that any new structure or use of parkland must be clearly, specifically, and unambiguously authorized by the legislature. There is good reason for this rule: allowing an unrestrained discretion to develop parkland dedicated by the legislature would usurp the power that the legislature alone may exercise on

---

[51] *See* pp. 50–53, *infra*.

[52] *See* n. 86, *infra*.

[53] The above-detailed violation of the public trust doctrine is compounded by the fact that operating a private concert venue does not qualify—as a threshold matter—as "park use" under the Act, and therefore serves as an additional form of alienation. Because the Act does not provide for any "park use" resembling the semi-privatized, non-public arrangement the HRPT has created. The closest definition of "park use" provided by the Act is one of "public recreation . . . and entertainment, including the arts and performing arts" on "open spaces" or "enclosed structures" that are built according the Act's restrictions. Hudson River Park Act § 1.3(h)(ii)–(iii) (Ex. R). But this definition is contingent on the first concept of "public" recreation, and does not include routine private recreation, as contemplated by Respondents (where by, as discussed above, the Lease guarantees only 51% of events will be priced with tickets the general public can afford).

In stark contrast, today the Estuarine Sanctuary is used frequently by local sailors and kayakers who enjoy the area for what it is—a protected, undisturbed, natural body of water. Buchanan Aff ¶ 14. Kayakers use the protected area between the Pier 56 pile field and Pier 54 to practice their technique when currents are too strong on the river, and sailors use the same area to practice sailhandling. (The Act defines "park use" as "small-scale boating for recreational and educational purposes that enhance park users' access to, and enjoyment of, the water," among other definitions. Hudson River Park Act § 1.3(h)(iv) (Ex.R).) Sailing and kayaking are easily recognized, proper park uses as defined under the Act, and more generally because they are open to the public and for the public's "health and enjoyment." *See Williams*, 229 N.Y. at 253. Taking away these public park uses from the sailors and kayakers is exactly the type of injustice the public trust doctrine is intended to prevent.

behalf of the people. The Court should therefore issue a declaratory judgment that the HRPT's actions violated the public trust doctrine, and enjoin the Pier 55 Project from moving forward.

2. THE HRPT HAS VIOLATED ITS LEGAL OBLIGATION TO FOLLOW SEQRA.

The HRPT violated SEQRA when it issued a negative declaration, using a flawed EAF, without considering the multitude of potential significant environmental impacts. In evaluating the Pier 55 Project, the HRPT had a legal obligation to adhere to the detailed, well-considered procedures spelled out by SEQRA, a process designed to ensure that proposals with environmental implications are properly and publicly evaluated. Instead, the HRPT relied on a deeply flawed Draft EAF to short-circuit a full and fair analysis. The Draft EAF: (a) ignores the multiple potential significant environmental impacts posed by the Pier 55 Project; (b) relies on an outdated EIS; (c) measures changes to the affected area using an improper Pier 54 baseline; and (d) cannot be reconciled with the Trust's environmental review process for the Pier 57 revitalization project. SEQRA demands more of the HRPT.

As a state agency, the HRPT "may not undertake, fund or approve" a project "until it has complied with the provisions of SEQRA." 6 NYCRR § 617.3(a) (Ex. QQ); *see also*, Hudson River Park Act, § 7-4 ("The trust shall be subject to article 8 of the environmental conservation law."). SEQRA mandates 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." N.Y. Envtl. Conserv. § 8-0103(8) (McKinney 2014) (Ex. ZZ). Regulations implementing SEQRA require state agencies to follow a two-step process: (1) determine through an EAF whether their proposed actions have the potential to cause significant environmental impacts, and if there is at least one potentially significant impact; and (2) complete a full, transparent EIS analyzing the

different environmental issues and making recommendations for mitigating any identified concerns. *See* 6 NYCRR § 617 (Ex. QQ). The Court of Appeals has "recognized the need for strict compliance with SEQRA requirements." *City Council of City of Watervliet v. Town Bd. of Town of Colonie*, 822 N.E.2d 339, 341 (2004) (citing *Merson v. McNally*, 90 N.Y.2d 742, 750 (1997)).

If, as here, the SEQRA lead agency (*i.e.*, the HRPT) is also the agency "directly undertaking the action, it must determine the significance of the action as early as possible in the design or formulation of the action." 6 NYCRR § 617.6(b)(1)(i) (Ex. QQ). State regulations require publication of a declaration of significance before an application can be considered complete and approved by the designated agency. *Id.* at § 617.3(c). The declaration of significance must be published "in a written form containing a reasoned elaboration and providing reference to any supporting documentation." *Id.* at § 617.7(b)(4).

Under SEQRA, actions "directly undertaken, funded or approved" by an agency are classified as Type I, Type II, or Unlisted. Type I actions are "those actions and projects that are more likely to require the preparation of an EIS than Unlisted actions." *Id.* at §§ 617.4(a), (b). Though Type I actions are not the only ones that may require an EIS, "the fact that an action or project has been listed as a Type I action carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS." *Id.* at § 617.4(a)(1). SEQRA regulations list several different actions under Type I, including actions that impact large areas of land. *See id.* at § 617.4(b). Courts have recognized that "one of the purposes of SEQRA is to assure the preparation and availability of an [EIS] at the time any significant authorization is granted that may generate significant environmental impact." *Riverhead*

Business Imp. Dist. Mgmt. Ass'n, Inc. v. Stark, 677 N.Y.S.2d 383, 385 (2d Dep't 1998) (citations omitted).

At minimum, the lead agency and project sponsor must prepare an EAF for all Type I actions before issuing a positive or negative declaration of potentially significant environmental impact. 6 NYCRR § 617.6(a)(2). The EAF requirement is only waived if the agency prepares or submits a draft EIS (which is the more comprehensive analysis Petitioners seek here). *Id.* at § 617.6(a)(4). An EIS is required where a proposed action "may include the potential for at least one significant adverse environmental impact." *Id.* at § 617.7(a)(1). Conversely, the only Type I actions that do not require an EIS are those where the agency determines "that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant." *Id.* § 617.7(a)(2).

Read together, §§ 617.4 and 617.7 strongly imply that when an action is classified as Type I—and here there is no dispute that the Pier 55 Project is a Type I action—it is highly likely to have at least one potential significant environmental impact. First, the threshold for any action to require an EIS, regardless of classification, is set purposefully low by SEQRA's statutory language. An agency need find only the ***possibility*** of a significant environmental impact for the action to require an EIS. *See Omni Partners, L.P. v. County of Nassau*, 654 N.Y.S.2d 824, 826 (2d Dep't 1997) ("Because the operative word triggering the requirement of an EIS is 'may,' there is a relatively low threshold for the preparation of an EIS.") (citing cases). Second, courts have held that Type I actions "carr[y] a presumption that [they are] likely to have a significant adverse effect on the environment and may require an EIS." *Friends of Port Chester Parks v. Logan*, 760 N.Y.S.2d 214, 215 (2d Dep't 2003) (citing § 617.4(a)(1); *S.P.A.C.E. v. Hurley*, 739 N.Y.S.2d 164, 166). An agency faced with a Type I action must start

from this presumption in evaluating the possibility of a significant environmental impact, making the low threshold for an EIS ***even lower***. The HRPT, in the following four ways, improperly ignored this presumption and, more importantly, reached the wrong conclusion that an EIS is unnecessary.

a. The HRPT was bound by the presumption of a significant adverse effect, yet purposefully ignored multiple potential adverse effects.

1. The HRPT failed to take a "hard look" at the many potential adverse effects of the Pier 55 Project.

The parties do not dispute that the Pier 55 Project is a Type I action under SEQRA. As such, the HRPT was bound by the presumption of a significant adverse effect on the environment. *Kogel v. Zoning Bd. of Appeals of Town of Huntington*, 871 N.Y.S.2d 638, 640 (2d Dep't 2009). While this presumption did not automatically require the HRPT to issue an EIS, the HRPT was still required to take a "hard look" at the possible environmental effects and determine that the Pier 55 Project would not have even the ***potential*** for a significant environmental impact before issuing a negative declaration. *Incorporated Village of Poquott v. Cahill*, 782 N.Y.S.2d 823, 828 (2d Dep't 2004).

Courts will invalidate negative declarations under SEQRA when the agency fails to take a "hard look" at a proposed Type I action's potential environmental impacts. *See, e.g.*, *Town of Dickinson*, 583 N.Y.S.2d at 638 (finding that the "highly significant environmental effects" of a proposed housing complex should have triggered respondents' duty to address them through an EIS). Though Article 78 proceedings apply the deferential "arbitrary and capricious" standard for reviewing agency decisions, courts have found that where review of an EAF "reveals several areas of possible significant environmental impact," a finding that the action was "arbitrary and capricious" is warranted. *See S.P.A.C.E.*, 739 N.Y.S.2d at 166; *Kogel*, 871 N.Y.S.2d at 640.

What qualifies as a "hard look" is not defined with a bright line. And yet courts often find that agencies failed to take a "hard look" when agencies advance reasons mirroring the tone and context of the HRPT's explanation for why it found—despite overwhelming evidence to the contrary—no ***potential*** significant environmental impact. *See, e.g.*, *Town of Dickinson v. County of Broome*, 583 N.Y.S.2d 637, 638 (3d Dep't 1992) (finding that the county had not taken a "hard look" where it ignored several significant environmental impacts that had been raised in its environmental assessment). For example, in *Kogel*, the EAF prepared by the town staff identified "several potential environmental impacts to [a] freshwater pond" that would be caused by the rezoning adopted by the town's Zoning Board of Appeals. 871 N.Y.S.2d at 640. The Second Department found that the Zoning Board had failed to take the requisite "hard look" when it issued a negative declaration despite the presence of these potential environmental impacts. *Id.* Likewise, in *Baker*, the court found that respondents had not taken a "hard look" where the EAF conclusory stated that there would be no significant adverse effects from discontinuing village roads, and repeated these conclusory statements in the negative declaration. 70 A.D.3d at 190.

Starting from the presumption of environmental significance, in determining the significance of a proposed Type I action, the lead agency must prepare a full EAF and "look at impacts which may be reasonably expected to result from the proposed action and compare them against an illustrative list of criteria provided in 6 NYCRR 617.11." *Farrington v. Incorporated Village of Southampton*, 205 A.D.2d 623, 625 (2d Dep't, 1994). This list contains "criteria" that "are considered indicators of significant adverse impacts on the environment," and includes, among others, the following relevant criteria:

- "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";
- "substantial adverse impacts on a threatened or endangered species of animal or plant, or the habitat of such a species";
- "other significant adverse impacts to natural resources";
- "the impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character";
- "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";
- "the encouraging or attracting of a large number of people to a place or places for more than a few days, compared to the number of people who would come to such place absent the action";
- "a substantial adverse change in existing air quality, ground or surface water quality or quantity, traffic or noise levels; a substantial increase in solid waste production; a substantial increase in potential for erosion, flooding, leaching or drainage problems";
- "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";
- "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"; and
- "impacts on a significant habitat area."

6 NYCRR § 617.7(c) (Ex. QQ). The last criteria is especially notable. Because the Hudson River in general and the Estuarine Sanctuary in particular is unquestionably a "significant habitat area." In fact, the Park Act expressly states that the Hudson River—"[t]he marine environment of the park"—"provide[s] critical habitat for striped bass and other aquatic species" and emphasizes that "[i]t is in the public interest to protect and conserve this habitat."[54] With respect to the river's Estuarine Sanctuary in particular, the Park Act provides that this

> area of the Hudson river within the Hudson river park is an important habitat or many marine and estuarine species including striped bass. Therefore, the water section is hereby designated as the Hudson river park estuarine sanctuary under and subject to the environmental conservation law including the Hudson river estuary management program established

[54] Hudson River Park Act § 2(d) (Ex. R).

> pursuant to section 11-0306 thereunder and shall be subject to the rules, regulations and guidelines of the state department of environmental conservation applicable to that program, as well as subject to the restrictions and limitations set forth in this act.[55]

The Park Act also describes the Hudson River as "one of the state's great natural resources."[56] That the Park Act affords the location of the Pier 55 Project this level of protection only further stresses how significant the potential environmental impacts from this new construction will be.

No reasonable agency could have given the HRPT's Draft EAF, and more generally the Pier 55 Project, a "hard look" and decided there is absolutely no ***potential*** significant environmental impact from: driving nearly 550 new piles into a protected Estuarine Sanctuary; adding nearly two acres of new water-facing lighting; mooring a large barge at the island half the year, causing new shading issues; compounding potentially significant environmental issues identified in the adjacent Pier 57 remodeling project, the Pier 54 Connector Project, and the Crosswalk Project; and attracting significant foot and vehicular traffic to an area of the river that was previously protected as a sanctuary—*i.e.*, unused, but for surface-level water dependent recreation.[57] In issuing the Negative Declaration, the HRPT seemingly rubberstamped a report ***it*** commissioned to support its ***own proposed project***, and one riddled with erroneous calculations, conclusory and outdated statements, and contradictory comparisons.[58]

Examples of the Pier 55 Project's potential significant environmental impacts can be found throughout the Draft EAF and beyond. For example, the Draft EAF acknowledges that

---

[55] *Id.* § 8.
[56] *Id.* § 2(a).
[57] *Id.* at B-12, F-21, F-22, F-28, F-29, F-30.
[58] Respondents, in the Negative Declaration and elsewhere also focus on the Draft EAF's length, as if it justifies an arbitrary outcome. But the length of an initial draft assessment has no bearing on whether there are any potential significant environmental impacts, nor does it factor into whether or not Respondent has satisfied the requirements of SEQRA. "An extensive record, in and of itself, does not satisfy the requirements of SEQRA." *Land Master Montg I, LLC v. Town of Montgomery*, 821 N.Y.S.2d 432, 441-42 (Sup. Ct., N.Y. Cnty. 2006) (rejecting respondents' argument that the extensiveness of the record was an indication that the town board had taken a "hard look" at environmental concerns).

"the proposed project ***may*** affect, but is ***unlikely*** to adversely affect shortnose and Atlantic sturgeon."[59] Setting aside the shortnose sturgeon's protected status as an endangered species,[60] this statement is, on its face, a recognition of a potential significant environmental impact. And yet despite that identification of a potential significant environmental impact, the Draft EAF later concludes without explanation that "[t]he construction activities associated with the proposed project would not cause any significant adverse environmental impacts on terrestrial or aquatic resources."[61] Had the HRPT truly taken a "hard look" at the Draft EAF, it would have identified this undeniable internal conflict. On this ground alone, the project should be stopped until an EIS is completed. *See Miller v. City of Lockport*, 210 A.D.2d 955, 957 (4th Dep't 1994) ("In Type I actions there is a relatively low threshold for requiring an EIS and one should be prepared when there is ***a*** potentially significant adverse effect on the environment." (emphasis added)).

There are other potential significant environmental effects that are not adequately considered by the Draft EAF, and that should have resulted in a Positive Declaration. For one, the Pier 55 Project will also create new shading impacts. The new island and adjoining structures will create an area of shading in the Estuarine Sanctuary ***where no shade has ever existed before***. The complete lack of sunlight underneath much of the pier will affect the flora and fauna currently living in that environment, killing most of it permanently.

Additional examples of potential environmental impacts are equally compelling: the "actors' barge" that will serve as a staging area for performers will create additional environmental impacts not assessed by the HRPT. This poses many problems because the barge will have its own shading and runoff effects, and, relatedly, will disturb the river with light and noise.

[59] EAF at F-2 (emphasis added).
[60] *Id.* at F-15.
[61] *Id.* at F-2.

All of these examples are magnified by a compounding effect between the construction activities taking place in connection with the Pier 54 Connector Project, the Crosswalk Project, the deconstruction of Pier 54, the Pier 57 Project—a project for which the HRPT conducted an EIS—and the Pier 55 proposal. For example, new shadowing, sediment disturbance during the staging of construction barges in shallow water, and noise generated by pile-driving may generate cumulative significant adverse impacts to aquatic ecosystem within the project areas,[62] including increased fish mortality, disruption of seasonal fish movements, and the diminishing of habitat available for foraging (thereby impacting the inhabitant species' life cycles).[63] The Draft EAF does not consider this compounding effect in any of its analysis, nor did the HRPT in any other context (despite the effect being a specified criteria they were instructed to review, as outlined above).[64]

The Pier 55 Project, in combination with the Pier 57 Project, which has been expanded to include 250,000 square feet of office space, will impact vehicular, pedestrian, and bicycle volumes in the area, including along Route 9A. The area adjacent to the proposed Pier 55 Project is the narrowest section of the Route 9A right-of-way, where traffic jams occurring daily.[65] The addition of a large entertainment venue is likely to result in a significant impact to the Park's bicycle and pedestrian path, which is the busiest in the nation, while creating safety concerns for vehicles and pedestrians in connection with Route 9A.[66]

The proposed Pier 55 Project, towering as high as seven stories, will block the scenic river views of the general public in the area of West 13th Street. The HRPT admits as much in the EAF, albeit while making an erroneous conclusory statement, where it states that "[w]hile the

[62] Fleischer Aff. ¶¶11-12.
[63] *Id.* ¶ 12.
[64] *Id.* ¶¶14-15.
[65] Fox. Aff. ¶¶ 24–25.
[66] *Id.* ¶¶ 26–27.

new pier would be located within the West 13th street visual corridor, that visual corridor does not provide unique view of the Hudson River vista."[67] The HRPT's claim is unsubstantiated, with the EAF stating only that there are similar views nearby. Tellingly, the HRPT rejected an alternative location for Pier 55 that would have utilized more of the current Pier 54 footprint because the alternative location would have obstructed Pier 55 patrons' views. The Trust is talking out of both sides of its mouth when it unilaterally dismisses view corridor concerns that will impact the general public—calling the view ordinary— while at the same arguing that view is important enough to justify building Pier 55 in the Estuarine Sanctuary, instead of on the existing Pier 54 piles.

The HRPT's reliance on the flawed Draft EAF is a fatal flaw, and grounds for this Court to reverse the its decision.

2. The HRPT considered no alternatives for the Pier 55 Project when several alternatives would have achieved the same central purpose.

Despite the HRPT's claims that it considered several alternatives for the location of the Pier 55 Project, including an option that would utilize parts of the current Pier 54 footprint,[68] no such alternatives are discussed in the Draft EAF or EAF, which is where such analysis should be conducted and presented for proper review as part of issuing a declaration of environmental significance.[69] Further, the Draft EAF neglects to adequately consider the potential

[67] EAF, at B-15.
[68] AKRF, INC., PIER 54 RESPONSE TO COMMENTS RECEIVED DURING PUBLIC REVIEW (PREPARED FOR HRPT) (Feb. 10, 2015), Response to Comment 12 (Ex. C).
[69] The HRPT and the Diller–von Furstenberg Family Foundation rejected this alternative "because it would have resulted in view corridor obstructions, because the future pier would have been closer to a possible future Gansevoort Peninsula Marine Transfer Station, and because locating the pier as proposed provides for a better connection to public transit from West 14th Street." *Id*. Because this alternative was not assessed in the Draft EAF, Petitioners were not provided the opportunity to comment on those statements. The HRPT's purported concerns, however, do not automatically outweigh the potential environmental impacts of a new pier to be constructed in an Estuarine Sanctuary, and should be evaluated as part of an Environmental Impact Statement—one cannot balance the benefit of, *e.g.*, better views,

environmental impacts related to the demolition of Pier 54,[70] or the extent to which the Pier 54 area can successfully be converted into a pile field that will result in a viable habitat for wildlife.[71] As discussed above, the 2013 Amendment to the Hudson River Park Act allows for Pier 54 to be rebuilt in its ***current location***. The Pier 55 Project's theater-island should, at best, be built in the area where Pier 54 currently sits, obviating the need to build inside the Estuarine Sanctuary. Yet the HRPT, who relied exclusively on the EAF in issuing its declaration of environmental significance, failed to even consider building the island in that location, or consider alternative approaches to re-building an actual Pier 54.[72]

3. The Draft EAF's discussion of mitigating measures shows that there are, in fact, potential significant impacts.

The fact that the Draft EAF discusses "mitigating measures" to offset the impact of certain activities reveals that the Pier 55 Project does, in fact, pose potential significant environmental effects requiring mitigation. *See S.P.A.C.E.*, 739 N.Y.S.2d at 166 ("In identifying various mitigation measures which would be undertaken to minimize the adverse effects to the environment posed by the project, the Town Board implicitly acknowledged that the effects were significant.") (citation omitted). Although mitigating measures alone do not always confirm the

---

against the harm to the environment, if one does not know the scale of the harm against which one is comparing.

[70] The HRPT's Negative Declaration, Response to Comments, and Draft EAF all state that the Pier 55 Project will not "involve building demolition, excavation, or superstructure construction activities," despite the fact that Pier 54 will be demolished and the Pier 55 Project will require the construction of the rectangular deck atop of pilings (*i.e.* a superstructure). *See* Negative Declaration (Feb. 11, 2015), at 3 (Ex. X).

[71] In assessing the financial implications of the Pier 55 Project, the HRPT relies on the same false baseline, dismissing legitimate public concerns regarding the cost, upkeep, and funding source of the Pier 55 Project by simply stating that building in the existing Pier 54 footprint would cost more. *See* AKRF, INC., PIER 54 RESPONSE TO COMMENTS RECEIVED DURING PUBLIC REVIEW (Prepared for HRPT) (Feb. 10, 2015) (Ex. C), Response to Comment 30. Further, as discussed in footnote 16 above, in the event that Pier 55, Inc. decides to withdraw its financial support for maintenance, an increase in trash, waste, and debris would likely occur, with environmental impacts to the Hudson River, an issue not addressed by Respondent HRPT.

[72] EAF at A-9 (alternative designs considered for the project did not include building it in the current Pier 54 location) (Ex. H).

potential for significant environmental impacts, they do signal that further careful analysis is warranted. In *Poquott,* the court found that an agency's consideration of mitigation measures was not improper in issuing its negative declaration, but only because "such mitigating measures [were] incorporated as part of an open and deliberative process and that the resulting negative declaration [was] not the product of closed-door negotiations or of the developer's compliance with conditions unilaterally imposed by the lead agency." 782 N.Y.S.2d at 828–29 (citations and quotation marks omitted). The *Poquott* court also found it notable that the proposal in question had been reviewed by another involved agency not responsible for approving the proposal. *Id.* at 829. Here, there was no such process, and the agency proposing and approving the project is one and the same. The Draft EAF was published during the holiday season after negotiations with Pier55, Inc., had been completed, and the mitigation measures were not incorporated as part of an "open and deliberative process," one that should have included public scoping and a proper review of the environmental impact analysis. Moreover, the HRPT did not consider ***any*** of the mitigation measures raised at the public hearing and issued its Negative Declaration mere ***hours*** before approving the Pier 55 Project itself. Had anyone from the public wanted to contact the HRPT about the Negative Declaration (or, to be fair, even read it), they would have had to do so within a few hours of it being published. The HRPT's process was executed so as to exclude the public, which is the exact opposite of what the rules and regulations are designed to promote (and require).

b. The HRPT relied on the Draft EAF's flawed methodologies for its finding of "no significant impact" and issuance of a Negative Declaration.

Any rational and unbiased agency would recognize that the Draft EAF that the HRPT relied on was plagued by flawed analytical methodology. Because of its flaws, a rational agency

would reject the Draft EAF as a reasonable basis for any decision. The Court should therefore find that the HRPT acted arbitrarily and capriciously in relying on the flawed Draft EAF.

The Draft EAF has two primary defects. First, the Draft EAF uses a baseless, erroneous comparative analysis. Specifically, in examining why certain identified[73] environmental impacts are "not significant," the Draft EAF compares the Pier 55 Project's predicted environmental impacts with the effects of a hypothetical "No Action"[74] Pier 54. In making the comparison, the Draft EAF explains that several of the Pier 55 Project's indisputable environmental impacts[75] are "not significant" because these impacts would be ***less significant*** than the impacts caused by the hypothetical "No Action" Pier 54, resulting in a "net" benefit to the environment. That illogical, arbitrary comparison does not establish that any of Pier 55's environmental effects are significant or insignificant or, for that matter, that any of the "No Action" Pier 54 effects are significant or insignificant.[76] It shows nothing more than the Pier 55 Project might have less environmental effect than a hypothetical project that ***no one has proposed or is pursuing***.

This baseline is even more erroneous when considering that the HRPT has acknowledged that it has no intention of rebuilding Pier 54, regardless of what happens with the Pier 55 Project.

---

[73] Notably, the impacts are not potential, but guaranteed if the project is built.

[74] The HRPT uses the term "No Build" interchangeably with the term "No Action" in its responses to comments on the Pier 55 Project. *See* AKRF, INC., PIER 54 RESPONSE TO COMMENTS RECEIVED DURING PUBLIC REVIEW (Prepared for HRPT) (Feb. 10, 2015) (Ex. C), Responses to Comments 12, 18, 30, 33, 35, and 70.

[75] The Draft EAF acknowledges that there will be potential significant environmental impacts, including shading issues, storm water runoff, and damage to marine life habitats. *See* EAF at F-1 (Attachment F) (Ex. H).

[76] The HRPT's argument is based on the fact that the Park Act allows for a rebuilding of Pier 54 in its current footprint. The 1998 EIS considered this in coming to its conclusions. Respondents mischaracterize this permission in the Park Act to conclude that "[t]he Act specifically allows Pier 54 to be reconstructed beyond its existing footprint; as described in the draft lease, the contribution calls for the donor to have naming rights; 'Pier 55' is the name that the donor has selected for the rebuilt pier. All of the potential environmental impacts associated with the proposed new pier were appropriately assessed in the [Draft EAF.]" *See* AKRF, INC., PIER 54 RESPONSE TO COMMENTS RECEIVED DURING PUBLIC REVIEW (PREPARED FOR HRPT) (Feb. 10, 2015) (Ex. C), Response to Comment 6. This conclusion is unsupported by the EAF, which clearly shows that only a sliver of the Pier 55 Project footprint will overlap with the Pier 54 footprint. *See, e.g.* Draft EAF, at Fig. A-2, C-12.

Therefore the "No Action" label is misleading and inappropriate because the "No Action" Pier 54 concept consists of removing the existing Pier 54 and rebuilding it.[77] Although it might sound unbelievable that the Draft EAF could rely on such a blatantly erroneous comparison, the HRPT has made this point very clear. In minutes from an HRPT board meeting on December 14, 2014, the HRPT stated that "[r]emoval of the Pier 54 is independent of the Pier 55 Project."[78] The HRPT then explained that the Pier 54 deck would be removed regardless of whether the Pier 55 Project was approved.[79] The proper baseline for comparison is therefore a "No Action" condition consisting of a removed Pier 54 deck (and its remaining pile field), not a rebuilt Pier 54, as was used in the Draft EAF.

Second, the Draft EAF is flawed because it relies on outdated, irrelevant data. Specifically, in reaching its conclusions, the Draft EAF relies on the nearly 20-year old 1998 EIS[80] and, to a certain extent, the more recent EIS prepared for the Pier 57 Revitalization

[77] The "No Action" Pier 54, according to the Draft EAF, would involve rebuilding Pier 54 where it currently stands, including driving new piles into the riverbed. There is no justification provided for why this is the correct comparison or why, for example, a different project could not be built that reuses the piles or riverbed already occupied by Pier 54—which is currently a fully built pier—or the Pier 56 pile field. Seemingly, the only reason the Draft EAF posits the "No Action" Pier 54 project is to soften the presentation of significant environmental impacts likely arising from the Pier 55 Project. *See also* AKRF, INC., PIER 54 RESPONSE TO COMMENTS RECEIVED DURING PUBLIC REVIEW (Prepared for HRPT) (Feb. 10, 2015) (Ex. C), Response to Comment 86 ("the proposed project would result in a reduction in the amount of aquatic habitat affected due to shading from overwater structure when compared to the No Action condition"), 89 ("because of the increased elevation and rolling topography of the pier, the area of aquatic habitat affected due to shading from the project's overwater structures would decrease substantially as compared to the No Action pier"); *see also* Negative Declaration (Feb. 11, 2015) (Ex. X) (discussion of obstructed views and changes in noise levels resulting from the new Pier 55 in comparison to the "No Action" Pier 54). The "No Action" hypothetical relies on permits that allow the HRPT to rebuild Pier 54. Yet no plans for a rebuilt Pier 54 have been circulated, and it is presumptuous to say that it will be rebuilt in exactly the same that it had been built previously.

[78] HRPT Board Meeting Minutes at 5, December 14, 2014 (Ex. N).

[79] *Id.* ("Whether or not the Pier 55 project is approved by the Board, removal of the Pier 54 deck must occur. Funding for the deck removal contract will come from capital budget funds provided by the City of New York.").

[80] *See* Draft EAF, Attachment A, Section E ("Environmental Analyses"), at A-7-A-8 ("Environmental impacts associated with the development of the Hudson River Park were analyzed by the Empire State Development Corporation (ESDC) pursuant to SEQRA and CEQR in the FEIS, which was certified as

Project.[81] This reliance is misplaced and unreasonable because the 1998 EIS is outdated and, even if it were more current, it still failed to consider any development in the interpier Estuarine Sanctuary where the Pier 55 Project will be constructed. Nor did it consider the environmental impacts of turning Pier 54 into a pile field. Likewise, the Pier 57 EIS, although conducted in 2013, does not address building in the protected habitat of Pier 56, *i.e.*, the interpier area, turning Pier 54 into a pile field, or the impacts of building a new island in the river—indeed, the Pier 57 EIS focuses exclusively on rebuilding Pier 57 on its existing footprint.

Courts routinely find agencies' reliance on outdated and irrelevant data inexcusable. In *Doremus v. Town of Oyster Bay*, petitioners brought an Article 78 proceeding to challenge a consent decree between respondent and a developer that sought to rezone an area that had been evaluated under an EIS dated ten years prior. 711 N.Y.S.2d 443 (2d Dep't 2000). The Second Department's Appellate Division upheld the Supreme Court's order vacating the consent decree and ordering the town board to require a supplemental EIS ("SEIS"). *Id.* at 446–47. The court focused on the fact that the town board had relied on a more than decade-old EIS—one that did not analyze the current circumstances of the to-be-developed area—in entering the consent decree. *Id.* The court instructed that while "the passage of time, standing alone, does not warrant the preparation of an SEIS, the applicable regulations permit the lead agency to require a SEIS in order to address specific significant adverse environmental impacts which were not addressed or were inadequately addressed in the prior environmental impact statements, where such adverse environmental impacts arise from changes in the proposed project, newly

---

complete in May 1998. The FEIS evaluated the full array of potential impacts resulting from the development of Hudson River Park, including traffic, noise, air quality, natural resources, and cultural resources. The 1998 FEIS considered the renovation of Pier 54 for public park use, but did not analyze any changes to the pier footprint.").

[81] *See* EAF, Attachment A, Table A-1 at A-14 (using the Pier 57 Redevelopment Project EIS to measure pedestrian traffic through the Pier 55 Project) (Ex. H).

discovered information, or a change in circumstances related to the project." *Id.* at 446–47 (citing *Jackson*, 494 N.E.2d at 441; 6 NYCRR § 617.9(a)(7)(i)).

Here, the outdated 1998 EIS did not contemplate anything resembling a new 2.7-acre island built in the interpier Estuarine Sanctuary.[82] Although the Draft EAF states that the 1998 EIS evaluated the environmental impacts of the "renovation of Pier 54 for public park use,"[83] the 1998 EIS contemplated only the restoration of Pier 54 in its current footprint.[84] And the only mention of Pier 56 was to explain that it was an "ecological pier" created for use as a "wildlife habitat[]."[85] The 1998 EIS did not contemplate a new theater-island built atop the wildlife habitat.[86]

To be crystal clear, the Court should understand that none of the environmental-study documents cited by the Draft EAF address building a pier in the Estuarine Sanctuary, despite the Draft EAF's carefully articulated suggestions otherwise. And Petitioners, having conducted a reasonable and diligent search, have been unable to find ***any*** EIS or other environmental study focusing on the interpier Estuarine Sanctuary. Said most succinctly, ***no one knows*** precisely what exists in the never-before disturbed, protected Estuarine Sanctuary, and yet the HRPT has

---

[82] Though *Doremus* involved a SEIS due to the location of the new project being exactly the same as the old one, the Pier 55 Project involves building a new structure in an area of the Park evaluated as an empty interpier space in the 1998 EIS, and the HRPT should therefore require a new EIS.
[83] EAF at A-8 (Ex. H).
[84] 1998 EIS at 6-4 (Ex. A).
[85] *Id.* at I-8 and S-6.
[86] Notably, the 1998 EIS also could not consider a pier outside of the Pier 54 footprint as such a pier was only approved in the 2013 Amendment to the Park Act. *See* 2013 Amendment to Hudson River Park Act at § 3(k)(iii)(1-a) ("the reconstruction of pier 54 shall not be subject to the historic footprint restriction") (Ex. B). The HRPT Corporation's President, Madelyn Wils, stated in a Board Meeting before the adoption of the 2013 Amendment that the Amendment would create "flexibility in the redevelopment of Pier 54 by allowing the Trust to redevelop Pier 54 outside of its historic footprint, which will enable the Trust to secure a significant private donation and facilitate a public/private partnership for redevelopment of the pier into a world class public open space and performance venue." HRPT Board Meeting Minutes, July 25, 2013 at 7–8 (Ex. P). This indicates that the HRPT had contemplated the building of a pier outside of the historic footprint *long before* the Pier 55 Project came to light. This fact is particularly salient here as it shows that the HRPT should have known that the Pier 55 Project would not have come under the ambit of the 1998 EIS as it was to be built in a brand new location.

decided that driving nearly 550 new pilings into it is inconsequential. The HRPT should be instructed to follow the law and study the interpier area before deciding it can destroy it.

Stopping the Pier 55 Project until the HRPT conducts an EIS aligns with public policy. Allowing the HRPT to piggyback the Pier 55 Project onto outdated and irrelevant EISs—and hide the impacts of the current project behind stale data—would encourage future developers to describe their actions merely as additions to existing projects. This would allow these developers to forgo the EISs required by SEQRA by relying on a general EIS for a designated area, without consideration of any new potential impacts created by these additions. This cannot be in line with the purpose of SEQRA and its regulations, which prohibit the masking of cumulative effects through practices such as segmentation.[87] Moreover, allowing the use of a "No Action" baseline that an agency has no intention of undertaking would open the door to other agencies flouting SEQRA's requirements by doing the same. These situations would hold the public interest hostage —an agency could simply create any project behind closed doors and find its impacts not significant under SEQRA by approving another project it has no intention of completing in order to paint their desired project in a positive light.

For all of these reasons, the HRPT's reliance on the 1998 EIS and Pier 57 EIS was misplaced and unreasonable, and their decision therefore arbitrary and capricious. *See Doremus*, 711 N.Y.S.2d at 446–47.

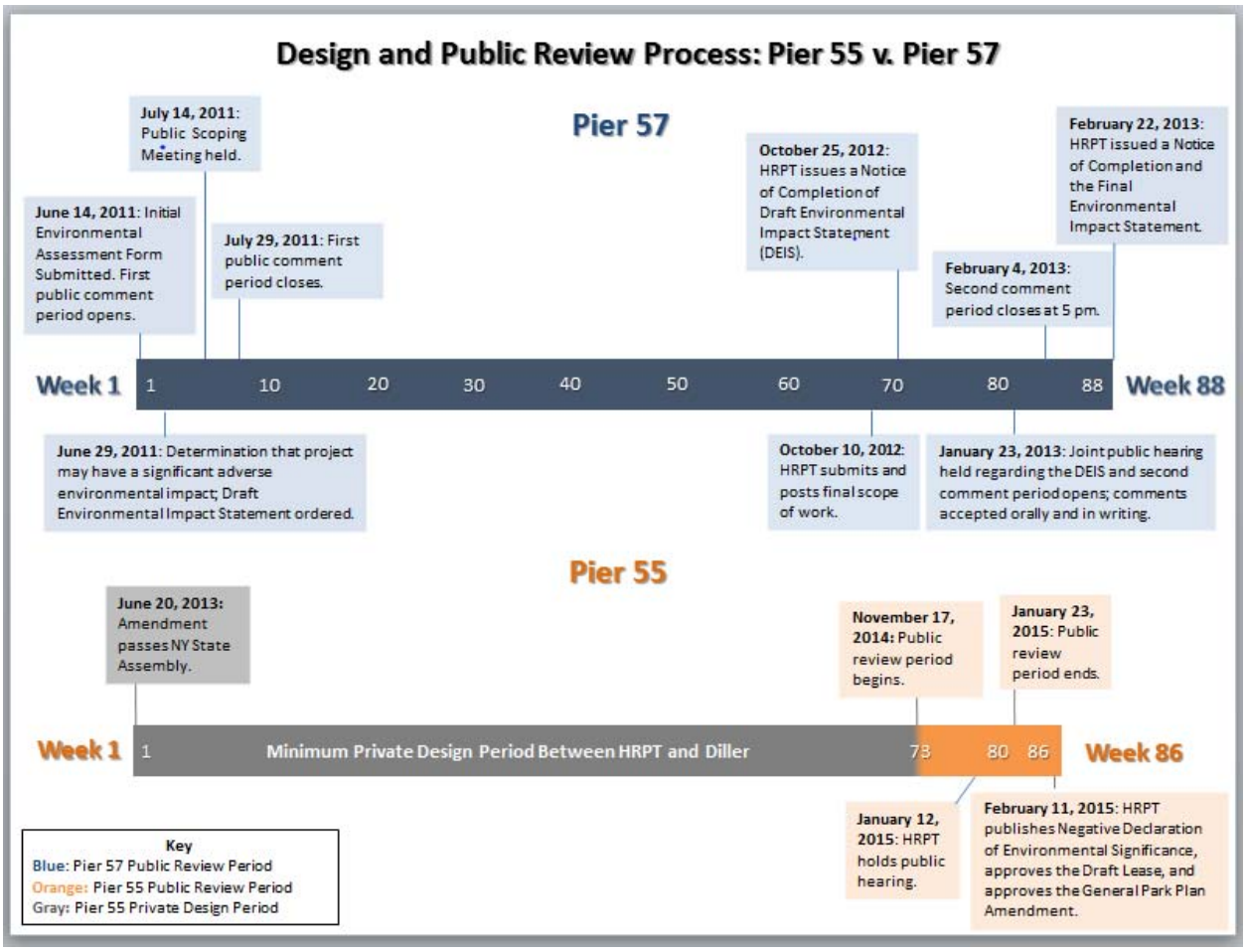
[87] 6 NYCRR § 617.3(g)(1) ("Considering only a part or segment of an action is contrary to the intent of SEQR. If a lead agency believes that circumstances warrant a segmented review, it must clearly state in its determination of significance, and any subsequent EIS, the supporting reasons and must demonstrate that such review is clearly no less protective of the environment. Related actions should be identified and discussed to the fullest extent possible.") (Ex. QQ).

c. The HRPT's finding of "no significant impact" is even more arbitrary given its opposite conclusion for the smaller Pier 57 Project just blocks away.

The HRPT's finding of "no significant impact" and the resulting Negative Declaration are particularly unjustified considering the HRPT's positive declaration of significant environmental impact for the far less ambitious Pier 57 Revitalization Project (the "Pier 57 Project"). The Pier 57 Project is located just a few blocks upriver from the Pier 55 Project's proposed site. It does not involve hundreds of new pilings, new overwater structures, or expansive overwater lighting. The Pier 57 Project consists of remodeling an already existing structure on the exact same footprint. And yet as illustrated by the below two analyses, the difference in the HRPT's process between the two projects is stunning. HRPT's Pier 57-related process was far more robust—consisting of 88 weeks of study, planning, and adjustments—included an EIS, multiple public comment periods, and reflects a careful, proper execution of SEQRA's process. Whereas the HRPT's Pier 55-related public process, lasting less than 12 weeks, consisted of the bare minimum and was flawed:

ENVIRONMENTAL IMPACT ASSESSMENT: PIER 55 v. PIER 57

Review Process Applied	Pier 57	Pier 55
Public Bidding Process (Under the Park Act)	Yes	No
"Significant Action" (Under the Park Act)	No	Yes
SEQRA Status	Type I Action	Type I Action
Environmental Assessment Form	Yes	Yes
Draft Scope of Work	Yes	No
Public Review of Draft Scope of Work (Public Scoping Meeting & Public Comment Period)	Yes	No
Final Scope of Work	Yes	No
Draft Environmental Impact Statement	Yes	No
Public Review of Draft EIS (Public Hearing & Public Comment Period)	Yes	No
Final Environmental Impact Statement	Yes	No



In the EAF drafted for the Pier 57 Project ("Pier 57 EAF"), the HRPT conceded without conducting much analysis that an EIS would be required to fully evaluate the potential environmental impacts of the Pier 57 remodel.[88] In particular, the Pier 57 EAF stated that the proposed project would "affect surface or ground water quality or quantity," would "alter drainage flow or patterns, or surface water runoff," and would "affect air quality."[89] In the accompanying Draft Scope of Work, the HRPT acknowledged that "[d]evelopment of the

[88] Appendix A to the State Environmental Quality Review, Full Environment Assessment Form, Part II - Project Impacts and Their Magnitude (June 14, 2011) ("Pier 57 EAF"), (Ex. AA).
[89] *Id.*

proposed project may result in potentially significant adverse environmental impacts, requiring that an Environmental Impact Statement (EIS) be prepared."[90]

Yet for the Pier 55 Project, involving far more complicated and expansive construction, the HRPT somehow could not find a single potentially significant environmental impact. And in reaching that conclusion, the HRPT felt it necessary to hide its lack of analysis behind outdated and irrelevant EISs, as discussed above. It is impossible to fathom how a manmade-island entertainment venue like the Pier 55 Project can have no potential significant environmental impacts, whereas the HRPT readily found the remodeling of a pier just a few blocks away, in which the pier's footprint will not expand or move, to have multiple potential significant environmental impacts. This behavior is the embodiment of "arbitrary and capricious," and defies any "rule of reason." *Akpan*, 554 N.E.2d at 57.

d. The Pier 55 Project runs counter to New York City's Waterfront Revitalization Program, and therefore violates SEQRA.

The Pier 55 Project further violates SEQRA by failing to comply with the NYC WRP, which is the local Waterfront Revitalization Program ("LWRP") governing the proposed construction site. LWRPs govern coastal areas and are established under the Waterfront Revitalization and Coastal Resources Act ("CRA").[91] SEQRA mandates that state agencies must comply with the CRA and therefore, derivatively, the NYC WRP.[92]

Where an agency determines that a proposed action will have no potential significant environmental impacts, and the action is located within a coastal area under the NYC WRP, the agency must submit "a certification that the action will not substantially hinder the achievement of any of the policies and purposes of [the NYC WRP] and whenever practicable will advance

[90] Pier 57: Draft Scope of Work for an Environmental Impact Statement at 1 (Ex. Y).
[91] The Draft EAF admits that the Pier 55 Project will be located in a coastal zone. *See* Draft EAF at B-5 (Ex. H).
[92] 6 NYCRR § 617.6(a)(5) (Ex. QQ).

one or more of such policies."[93] Where the action "will substantially hinder the achievement" of any of these policies, the agency must instead certify that three requirements are met: "(1) no reasonable alternatives exist which would permit the action to be taken in a manner which would not substantially hinder the achievement of such policy or purpose; (2) the action taken will minimize all adverse effects on the local policy and purpose to the maximum extent practicable; and (3) the action will result in an overriding regional or statewide public benefit."[94]

Here, the HRPT failed to properly address the ways in which the Pier 55 Project will hinder the NYC WRP's policy goals. One of the NYC WRP's policy goals, for example, is to "protect and restore the quality and function of ecological systems within the New York City coastal area."[95] In justifying that the Pier 55 Project is consistent with this policy goal, the Draft EAF cites the new pile field proposed for the Pier 54 site.[96] But it illogically ignores the obvious fact that the Project includes building an overwater island on nearly 550 ***brand new piles***, and that such new construction does not protect and restore the quality of the ecological system in the New York City coastal area, regardless of what the HRPT will do with other piles already in the water. Moreover, the new pile field at Pier 54 is not a part of the Pier 55 Project—as discussed above, the HRPT is creating that pile field regardless of what happens with the Pier 55 Project.

Another policy goal of the NYC WRP is to "promote use of New York City's waterways for commercial and recreational boating and water-dependent transportation."[97] By constructing a man-made island in an area that has previously been a haven for recreational boaters, the Pier 55 Project flouts that policy. The area between Pier 54 and Pier 57 has been used by kayakers between the Pier 56 pile field and Pier 54 to practice their technique when currents are too strong

[93] 19 NYCRR § 600.4(c) (Ex. RR).
[94] *Id.*
[95] NYC WRP at 39 (Ex. W).
[96] EAF at B-12 (Ex. H).
[97] NYC WRP (Ex. W).

on the river, and sailors use the same area to practice sailhandling.[98] These are recreational, educational, and public health activities that fit well within this policy goal of the NYC WRP. The building of the Pier 55 Project would eliminate these excellent opportunities for local boaters, flouting this policy goal.

Because the Pier 55 Project will have several significant environmental impacts, the HRPT should have properly certified (i) that no reasonable alternatives existed, (ii) that the proposed project would minimize all adverse effects on the environment; and (iii) that the Project will result in an overriding public benefit. But the HRPT failed to do any of those things, and this failure violated SEQRA.

Relatedly, under the NYC WRP,[99] the HRPT was obligated to fill out a Coastal Assessment Form.[100] Though the HRPT filled out and certified the form, its certification was based on its erroneous conclusion that there were no significant environmental impacts.[101] The form also contains several misstatements,[102] showing again that the HRPT has not given a "hard look" at the Pier 55 Project's potential environmental impacts. Again, because compliance with the NYC WRP is a requirement of SEQRA via the CRA, the HRPT violated SEQRA.

---

[98] Buchanan Aff. ¶14.

[99] New York City's WRP is based on *Vision 2020 New York City Comprehensive Waterfront Plan*, a document prepared in 2011 to address the future of the city's coastline. Nowhere in this document is the building of a new pier in the Estuarine Sanctuary considered. *See* DEP'T OF CITY PLANNING, CITY OF N.Y., VISION 2020 NEW YORK CITY COMPREHENSIVE WATERFRONT PLAN (Ex. GG).

[100] NYC WRP at 12 (Ex. W).

[101] EAF (Ex. H) (finding that the Pier 55 Project is consistent with Policy 4 of the WRP as it "would not have any significant adverse impacts on the ecological quality and component habitats and resources" in the relevant areas).

[102] For example, the HRPT states on the form that the project would not result in any direct or indirect discharges into any water body, which is plainly false, and which the HRPT has acknowledged would occur in the form of stormwater runoff elsewhere in the EAF. *See* HUDSON RIVER PARK TRUST, *supra* n. 95, at Appendix B (Ex. H).

3. THE HRPT HAS FAILED TO COMPLY WITH ITS OWN GOVERNING STATUTE AND REGULATIONS

a. The HRPT's Action Violates the Park Act's Ban on Projects Lacking a Water-Dependent Use.

In approving the Pier 55 Project, the HRPT also violated its own governing law—the Hudson River Park Act—which instructs that, within the Estuarine Sanctuary, "only water dependent uses shall be permitted."[103] Under Article 78 review, a court may find that an agency's action was arbitrary and capricious where an agency has acted inconsistently with its own applicable laws and regulations. *Universal Waste, Inc. v. N.Y. State Dep't of Envt'l Conservation*, 778 N.Y.S.2d 855, 861 (Sup. Ct., N.Y. Cnty. 2004) ("an agency acts arbitrarily and capriciously if it fails to follow its own rules") (citations omitted).

The Park Act requires that all uses of the "water section" of the Park be water dependent. The "water section" is defined in the Park Act as "all the area of the park west of the bulkhead line, including the water, lands under water and space above the water, but not including the piers and float bridge as they exist on the effective date of [the Park] Act."[104] The HRPT intends to construct the new island within the water section; all of the plans and renderings attached to the Draft EAF show that the new structure will lie in the Estuarine Sanctuary, with only a small piece overlapping with the current Pier 54 footprint.[105]

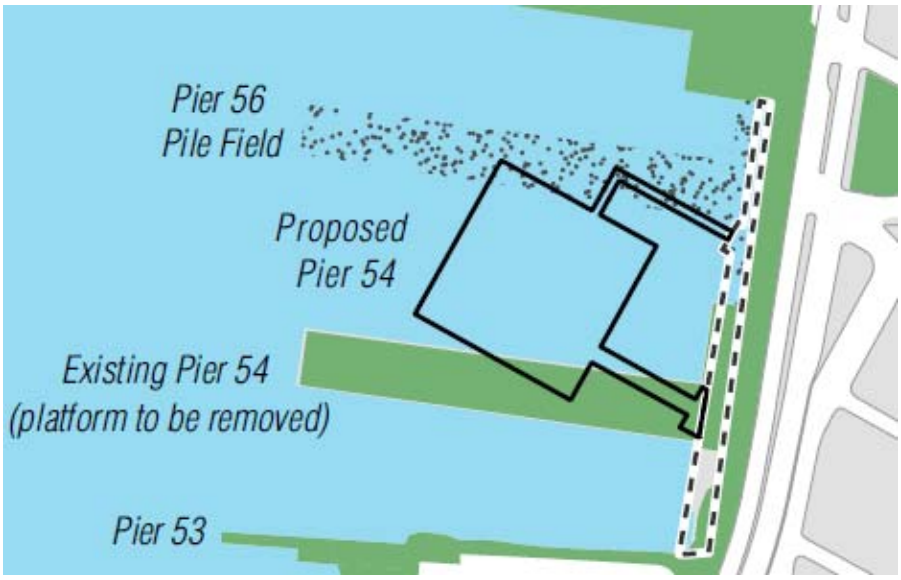
---

[103] Hudson River Park Act, § 8(3)(a) (Ex. R).

[104] Hudson River Park Act § 3(l), (m) (Ex.R).

[105] The HRPT has continually stated that this Pier 55 Project is intended to be a rebuilding of the current Pier 54 "outside of its original footprint," as permitted by the 2013 Amendment, and that 2013 Amendment was specifically written to allow building a pier in the water section as the Park Act's original language. *See* ALLEE, KING, ROSEN AND FLEMING, INC., PIER 54 RESPONSE TO COMMENTS RECEIVED DURING PUBLIC REVIEW (PREPARED FOR HRPT) (2015) (Ex. C); 2013 Amendment to Hudson River Park Act at § 3(k)(iii)(1-a) (Ex. B). But no reasonable reading of this amendment agrees with the HRPT's reading and conclusion that this new structure is anything like the rebuilding of Pier 54, in ***or*** out of its current footprint.

The Zoning Resolution for the City of New York defines a "pier" as "a pile-supported overwater structure, or a portion thereof, that projects from a 'shoreline', 'bulkhead' or 'platform'; or a solid-core structure, or a portion thereof, constructed for the docking of water-borne vessels, that projects from the



The above image illustrates the location of the Pier 55 Project, clearly well outside the existing Pier 54 footprint, overlapping as much with Pier 54 as it does with the Pier 56,and almost entirely within the estuarine sanctuary.[106]

There is no ambiguity that Pier 55 will lie in the "water section" between Pier 54 and Pier 56.

As the structure is being planned for the water section, it must have a "water dependent use."[107] Yet the Pier 55 Project does not qualify as a "water dependent use" of the Estuarine Sanctuary. Indeed, in stark contrast to the HRPT's original plan of utilizing Pier 54 as a location for docking historic ships,[108] which is unequivocally a water-dependent use, the Pier 55 Project consists of an entertainment venue that could be built ***anywhere***.

---

land or from a 'platform.'" CITY PLANNING COMMISSION, DEPARTMENT OF CITY PLANNING, ZONING RESOLUTION - ARTICLE VI: SPECIAL REGULATIONS APPLICABLE TO CERTAIN AREAS § 62-11 (2014) (Ex. [CCC]). It would defy the imagination to say that his manmade island "projects from the bulkhead" simply because it is connected by the Pier 54 Connector bridges, and the island was clearly not "constructed for the docking of water-borne vessels," even considering the non-permanent actor's barge. By calling this structure the "Pier 55" project and saying it is a rebuilding of Pier 54, the HPRT attempts to flout the act by subterfuge. But this is nothing more than sleight of hand, and the plain meaning of the Park Act's language shows that it is a new structure being built in the "water section," and not a permitted "pier."

[106] EAF at Fig. A-2 (Ex. H).

[107] Hudson River Park Act § 8.3(a) (Ex. R).

[108] GPP at 11 (Ex. J). *See also* 1998 EIS at S-11 (Ex. A) (The HRPT included Pier 54 as one of the three sites in the Park that "would be especially devoted to history.").

The Park Act defines "water dependent use" as " (i) any use that depends on utilization of resources found in the water section; (ii) recreational activities that depend on access to the water section, such as fishing, boating, swimming in such waters, passive enjoyment of the Hudson River and wildlife protection and viewing; (iii) facilities and incidental structures needed to dock and service boats; and (iv) scientific and educational activities that by their nature require access to marine reserve waters."[109] A concert venue and theater does not depend on resources found in the water section. It is not dependent on access to the water for its enjoyment and recreational activities (it is, after all, a facility that could just as easily be built on land), nor is it a facility for docking and servicing boats or for research that requires access to the Estuarine Sanctuary. The Draft EAF does not mention this limitation on the HRPT's actions and does not discuss whether the platform is a water-dependent use. The HRPT, in responding to public comments, stated that the Pier 55 Project is water dependent because the Park was built as a waterfront park with "specified uses."[110] But this explanation is baseless, circular, and unreasoned. The fact that the rest of the Park, built on dry land, enjoys a waterfront location and was deemed a suitable water-dependent use is not a license to build a ***new island***, or "park extension," onto the water itself. Being adjacent to water, by logic or law (especially considering the Park Act's clear language on

[109] Hudson River Park Act, at § 3(m) (Ex. R). The Park Act defines "water section" as "all the area of the park west of the bulkhead line, including the water, lands under water and space above the water, but not including the piers and float bridge as they exist on the effective date of [the] Act." *Id.* at § 3(l). *See also* N.Y. Exec. Law § 911(7) (where the New York Code section on Waterfront Revitalization Of Coastal Areas And Inland Waterways defines a "water dependent use" as "an activity which can only be conducted on, in, over or adjacent to a water body because such activity requires direct access to that water body, and which involves, as an integral part of such activity, the use of the water").

[110] *See* AKRF, INC., PIER 54 RESPONSE TO COMMENTS RECEIVED DURING PUBLIC REVIEW (PREPARED FOR HRPT) (Feb. 10, 2015) (Ex. C), Response to Comment 94 ("The New York State legislature has authorized the Hudson River Park as a waterfront park and has specified the uses permitted within that park. In addition to the uses, the size and location of the reconstructed Pier 54 have also been authorized by the State legislature. Accordingly, the proposed project is water dependent."). This Response shows the HRPT's cavalier attitude to the project. None of the reasons given in the Response indicate that the proposed water project is water dependent, yet, with a conclusory and circular flourish, the HRPT believes it has answered a community member's legitimate concern. The truth is that nothing in the Park Act allows any deviation from the restriction on water dependent uses.

this point), does not turn ***any*** use into a water-dependent use—such logic would defeat the legislature's requirement entirely.

Further, this lack of a water dependent use runs counter to the purpose of the Park Act. The legislative history of the Park Act reveals the importance of the water dependent use requirement. In a letter to the Governor urging him to sign the 2002 amendments to the Park Act, for example, Assembly Member Richard Gottfried, the Assembly sponsor of the bill that created the Park Act, stated that "[t]he special protections for the water section are a key feature of the [Park] Act."[111] Assembly Member Gottfried noted that the amendment was in part being proposed because "the prohibition against non-water-dependent uses overrides the provisions of any lease."[112] By creating a new structure in the Park's water section with no water dependent use, the HRPT's action not only violates the clear language of the Park Act, but also its underlying purpose.

b. The HRPT's Action Violates Its Own Regulations Governing Leases by Foregoing the Bidding Process Required for Leases Providing for a Capital Expenditure of Over One Million Dollars

Large-scale projects that use public resources must be planned and executed under the light of day. Here, the HRPT is planning to build a huge island concert venue, on public land, with a contribution of $17.5 million of public funds, with virtually no public input. Indeed, by the time the Pier 55 Project was presented for public comment, the design, funding, and timeline of the project were already finalized. This backroom process was a breach not only of the public trust, the Park Act, and the other codes and regulations discussed above, but also of the HRPT's own leasing regulations.

[111] New York Bill Jacket, 2002 A.B. 11807, Ch. 423 (Ex. JJ).
[112] *Id.*

The Pier 55 Lease is governed by Part 752 of Title 21 of the NYCRR because it is under the HRPT's jurisdiction and, costing an estimated $130 million to construct, includes "a total capital expenditure in excess of one million dollars over the proposed term of the agreement."[113] As such, the HRPT was required to "issue a bid prospectus" for the Project.[114] Yet no bid prospectus was ever issued.

In response to a comment from the public on this unmet requirement, the HRPT advanced two arguments. The first, which is absurd on its face, is that "[s]ince this is, in essence, a contribution rather than a standard commercial transaction, it is not a lease within the meaning of the Park Act and the requirement to issue a bid prospectus is not applicable."[115] There is no exception in the Park Act or the HRPT's leasing regulations that exempts certain transactions based on the source of funds (*i.e.* for "contributions"). To the contrary, the language in the regulation is broad, including any "[l]eases, licenses, concessions or other agreements for facilities or properties under the jurisdiction of the Hudson River Park Trust" that meet the requirements set forth later in the regulation.[116] And a cursory review of the lease itself reveals that it most certainly *is* a lease, and thus is governed by the HRPT's leasing regulations—most obviously, the HRPT's title for the document is "LEASE AGREEMENT," and the document defines the two parties as "Landlord" and "Tenant."[117]

The second, alternative argument selectively focuses on the term "capital investment," a term used interchangeably with the term "capital expenditure" in the HRPT's leasing regulations. Although these terms are not defined in the leasing regulations or Act, the HRPT has put forth a

[113] 21 NYCRR § 752.1(a)(2) (Ex. SS).
[114] N.Y. Comp. Codes R. & Regs. tit. 21, § 752.4(a) (Ex. TT).
[115] AKRF, INC., PIER 54 RESPONSE TO COMMENTS RECEIVED DURING PUBLIC REVIEW (PREPARED FOR HRPT) (Feb. 10, 2015), Response to Comment 4 (Ex. C).
[116] N.Y. Comp. Codes R. & Regs. tit. 21, § 752.1(a) (Ex. SS).
[117] Lease, Cover Page (Ex. BB).

self-serving argument that arbitrarily defines one of them without any basis. The HRPT argued in their response to comments that the funds used to build the new island would only be a "capital investment" if the money were deployed with the "hope that it will generate income or appreciate. . . ,"[118] apparently like an investment in a stock or bond. The HRPT's response goes on to state that Pier55, Inc. cannot generate income from this project and that therefore, the HRPT is not bound by the regulations requiring a bid prospectus.[119] In short, the HRPT is attempting to justify their pay-to-play approach by arguing semantics.

There are at least two problems with the HRPT's second position. ***First***, there is no distinction between a capital "expenditure" and a capital "investment." The term is used interchangeably in the HRPT's Leasing Regulation, and in everyday ordinary language.[120] In fact, Barron's Dictionary of Finance and Investment Terms defines "Capital Investment" by directing the reader to the definition for "Capital Expenditure,"—*i.e.*, "Capital Investment" is defined as "*see* Capital Expenditure."[121] "Capital Expenditure" in turn, is defined as the "outlay of money to acquire or improve capital assets, such as buildings and machinery." Surely the expenditure of funds to build a manmade structure qualifies as an "outlay of money" to "acquire or improve capital assets." ***Second***, even adopting the HRPT's false definition for the sake of argument, it is an unfounded presumption to assume that Pier55, Inc. will not be able to earn income from operating the entertainment-venue island. Although it is true that many of the potential revenues may be used only to cover "Permitted Costs," that does not mean that any revenues, after deducting costs, would not constitute "income." Moreover, "Permitted Costs" are

[118] AKRF, INC., PIER 54 RESPONSE TO COMMENTS RECEIVED DURING PUBLIC REVIEW (PREPARED FOR HRPT) (Feb. 10, 2015), Response to Comment 4 (Ex. C).
[119] *Id.*
[120] For example, the leasing regulations use the term "capital expenditure" to limit projects larger than $1 million in 21 NYCRR 752.1(a)(2) (Ex. SS), and "capital investment" to limit the same projects a few paragraphs later in 21 NYCRR 752.4(a) (Ex. TT).
[121] Barron's Dictionary at 94 (Ex. Q).

defined broadly and provide ample opportunity to enrich the island's operators and business partners.[122] As but one example, the Form Lease makes clear that Pier55, Inc. will retain "ninety-five percent (95%) of . . . Gross Broadcasting Revenues" and that it "may create or commission the creation of works and productions for the Premises, and . . . as between [the HRPT] and [Pier55, Inc.], [Pier55, Inc.] shall have the exclusive ownership and rights to any such productions or works and to any royalties or profits derived therefrom."[123] Mr. Diller, a media mogul with a lifetime of experience at the highest levels of the broadcast and film industries, could surely find a way to confer a benefit onto himself and his colleagues under such an arrangement. Particularly when, as discussed above, his operating entity will have the exclusive right to charge whatever ticket prices it pleases for 49% of the events hosted on the island each year —which Pier55, Inc. is also entitled to keep.[124]

The failure to conduct a bidding process resulted in a Form Lease that is highly suspect in its treatment of the parties. The Form Lease has no restrictions that would prevent the HRPT from doling out lavish salaries or performance contracts and allows for Respondent Pier 55, Inc. to benefit from the naming rights of the new island and to cash in on royalties and profits from the events held at the new venue. In stark contrast, under the Form Lease, the HRPT earns a pittance in the form of $1.00 per year in rent from Respondent Pier 55, Inc. and 5% of the revenue from broadcasting rights that is not guaranteed unless the HRPT contracts to actually broadcast events held on the island.

One comment and response section, in particular, best captures the true process from which the Pier 55 Project was born, and why it violates the HRPT's regulations and governing

[122] *See, e.g.*, Lease § 9.08(w) ("nothing in this Lease shall limit . . . the manner in which Tenant may compensate its staff, officers or directors. . . .") (Ex. BB).
[123] *Id.* § 4.03.
[124] *Id.* § 9.30; *see also* n.49, *supra* (explaining that "low-cost" events are not a defined term in the lease) for further evidence that this project will be a money-making venture for Pier55, Inc.

Act. In that comment section, stakeholders expressed concern that the public had been excluded from the development process. The HRPT responded that the project was finalized after "a long period of negotiations ***between the donor and Trust***" and that "[w]hat is now being considered ***is a specific proposed design concept that the donor is prepared to fund***."[125] Said more bluntly, the design concept was finalized during closed meetings between Barry Diller and the HRPT. There was no public input or process—this project represents a billionaire (many times over) building and operating a private playground in his backyard. This is precisely the scenario that the regulations and Act governing the HRPT were designed to prohibit.

c. The HRPT May Only Rebuild Pier 54 Outside of its Current Footprint if Includes the Historic Elements from the White Star Line.

The HRPT's action also violates the Park Act because the new structure does not incorporate any historic elements from the White Star Line. When the Park Act was amended in 2013 to allow for reconstruction of Pier 54 outside of its historic footprint, the amendments also mandated that any such reconstruction "complies with all applicable federal, state and local laws and provided further that the historic elements from the White Star Line, including the iron arch, ***must be incorporated in any reconstruction/redesign***."[126] Yet the Draft EAF does not include any plans for including historic elements from the White Star Line, including the iron arch. In fact, the EAF only mentions the iron arch and the White Star Line as a part of the "No Action" reconstruction of Pier 54 in its current location,[127] showing that the HRPT had no intention of incorporating these cherished historical elements into the design of the Pier 55 Project. While

[125] AKRF, INC., PIER 54 RESPONSE TO COMMENTS RECEIVED DURING PUBLIC REVIEW (Prepared for HRPT) (Feb. 10, 2015), Response to Comment 1 (emphasis added) (Ex. B).
[126] Hudson River Park Act, § 8.3(e) (2013) (Ex. R).
[127] EAF at H-6 ("Reconstruction of the pier would incorporate the historic elements from the White Star Line, including the iron arch.") (Ex. H).

Petitioners do not consider the Pier 55 Project to be a reconstruction of Pier 54 allowed by the Park Act, even if it were, the EAF shows that the reconstruction would ***still*** violate the Park Act.

4. PETITIONERS ARE ENTITLED TO DISCOVERY

Discovery is available in Article 78 proceedings where, as here, the information that proved the petitioner's claim is "within the exclusive possession and knowledge" of the respondents.[128] As such, expedited discovery is particularly appropriate here, where Respondents have concealed crucial information from the public and engaged in secretive, under-the-table negotiations that have undermined the public interest.[129] Thus, this Court should permit Petitioners targeted discovery under CPLR 408, in order to shed much-needed light on this Project and the process that reviewed and approved it.[130] Subject to, and without waiving any further discovery requests, Petitioners seek to obtain, at minimum, the following relevant documents from Respondents:

---

[128]*See Mooney v. Superintendent of New York State Police*, 117 A.D.2d 445, 448, (3d Dep't 1986) (granting discovery in an Article 78 proceeding because for "petitioner to have a viable opportunity to challenge" determination as arbitrary and capricious, "the information and documents upon which the determination was based must be available"); *Margolis v. New York City Transit Auth.*, 157 A.D.2d 238, 242 (1st Dep't 1990) (granting discovery in Article 78 proceeding because Petitioner had argued that Transit Authority's proffered reason for salary decision "may well be a sham position," and thus Petitioner was entitled to discovery to address actions taken by that body); *Town of Pleasant Valley v. New York State Bd. of Real Prop. Servs.*, 253 A.D.2d 8, 16 (2d Dep't 1999) (granting discovery of worksheets used by State equalization board where such worksheets were "centrally relevant to a determination of whether the . . . equalization rate was rational and supported by substantial evidence"); *Nespoli v. Doherty*, 2007 WL 3084870, at *3 (Sup. Ct. N. Y. Cnty. Sep. 28, 2007) (granting petitioners' application for discovery in Article 78 proceeding against DSNY); *Stop BHOD v. City of New York*, 2009 WL 692080, at *14 (Sup. Ct., Kings Cnty. Mar. 13, 2009) (granting expedited discovery in Article 78 proceeding); *Lally v. Johnson City Central School Dist.*, 105 A.D.3d 1129, 1132 (3d Dep't 2013) (affirming trial court's finding that further discovery was required before respondents' bad faith could be resolved in Article 78 proceeding); *Gerber Prods. Co. v. N.Y. State Dep't of Health*, No. 1628-14, 2014 WL 7745848, at *3 (Sup. Ct., Albany Cnty. Aug. 21, 2014) (granting discovery where decision removing petitioners' products from food subsidy program did not explain the cost criteria cited as grounds for determination).

a) All internal communications within the Trust, including those involving members of the Trust's Board, regarding Pier 54 and/or the Pier 55 Project (whether or not referred to as "Pier 55" at the time) since February 1, 2013 through February 12, 2015;

b) A copy of all documents in the Trust's possession relating to request (a) above, including all documents and information relating to the conception of the proposed Pier 55 Project, the Draft Lease, the Form Lease, the EAF (in draft or final form), the GPP Amendment, and the decision to award the proposed project to Respondent Pier 55, Inc.;

c) All communications with the Trust's environmental consultant AKRF, Inc. concerning any aspect of their engagement and work performed in connection with the Pier 55 Project;

d) All communications and all documents reflecting communications between the Trust on the one hand (including but not limited to all employees and representatives of the Trust), and Barry Diller, Diane von Furstenberg, The Diller – von Furstenberg Family Foundation, Pier55, Inc. (including, in addition to Mr. Diller, Vice-Chairman Scott Rudin, Director Stephen Daldry, and Director George C. Wolfe, who were involved in the Pier 55 Project before it was public and named in the Trust's November 16, 2014 press release first disclosing the Pier 55 Project), and/or anyone acting on their behalf regarding Pier 54 and/or the Pier 55 project (whether or not referred to as "Pier 55" at the time);

e) All records of any and all communications between the Trust (including but not limited to all employees and representatives of the Trust) and elected or appointed City/Local, State, and Federal officials (including their subordinates, staff, agencies and offices), in connection with: (i) the 2013 Amendment to the Hudson River Park Act (as it pertains to Pier 54 redevelopment, and (ii) the proposed redevelopment of Pier 54 and construction of what is to be called "Pier 55" (including the GPP Amendment and Form Lease approved at the February 11, 2015 Trust Board meeting); (iii) the application of the SEQRA and CEQR processes for the Pier 54 Project, (iii) the New York City Local Waterfront Revitalization Program, (iv) the Park Act Amendments of 2013, (v) the Pier 57 restoration project, (vi) the Pier 54 Connector Project, and (vii) the Crosswalk Project.

f) A copy of documents, including communications, sufficient to show what the Trust relied on in finalizing its EAF and in issuing its Negative Declaration for the project on February 11, 2015;

g) A copy of all materials provided to the Trust's Board in advance of their February 11, 2015 vote approving the Draft Lease and the GPP Amendment;

h) A copy of all materials the Trust relied on in concluding that a request for proposals or a bidding process in general was not required for the Pier 55 project (whether or not referred to as "Pier 55" at the time);

i) A copy of all internal communications within the Trust relating to a request for proposals or a bidding process in the context of the Pier 55 project (whether or not referred to as "Pier 55" at the time);

j) A copy of all documents, including communications, reflecting all drafts of and/or negotiations regarding the Draft Lease or Form Lease; and

k) A copy of all documents, including communications, relevant to the drafting of the HRPT's November 16, 2014 press release, including all documents and communications relating to the third-party quotes in that press release.

IV. PRELIMINARY INJUNCTION

This Court has broad discretion, under CPLR § 6301, to grant a preliminary injunction "in any actions where…the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which … would produce injury to the plaintiff." This discretion includes the power to grant affirmative, mandatory relief in the form of a preliminary injunction directing a government entity to fulfil its statutory responsibilities. *See, e.g., McCain v. Koch,* 70 N.Y.2d 109, 116–17 (1987); *Doe v. Dinkins,* 192 A.D.2d 270, 275–76 (1st Dep't 1993). In order to grant a preliminary injunction, the Court must evaluate whether plaintiffs have demonstrated: (i) a likelihood of success on the merits; (ii) danger of irreparable injury absent an injunction; and (iii) that the balance of equities tips in their favor. *Nobu Next Door LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 (2005).

As discussed above, Respondents' actions constitute violations of the public trust doctrine, SEQRA, CEQR, the Hudson River Park Act, and its accompanying regulations. Petitioners have demonstrated a likelihood of success on the merits because Respondents have committed numerous violations of environmental protection statutes, park governance statutes and regulations, and the public trust doctrine. Petitioners have demonstrated a danger of irreparable injury absent an injunction because the HRPT is preparing to drive hundreds of pilings into the Estuarine Sanctuary, causing significant, irreparable damage to protected wildlife and habitat. These pilings will also displace a navigable and protected area used by kayakers and boaters, including without limitation New York State citizens.

Finally, Petitioners have demonstrated that the balance of equities are in their favor. Respondents may still build their project in the future, but must do so through the proper governmental and statutory channels. They may seek governmental approval for their project in order not to run afoul of the public trust doctrine. They may produce an EIS in order not to run afoul of SEQRA. And they may take the appropriate steps to comply with their own governing statute and regulations. A short delay in a multi-year project will cause no apparent harm to Respondents. However, if they start driving pilings into the Estuarine Sanctuary, they will undoubtedly do serious and irreversible damage to the riverbed and the protected wildlife living in that area. The Court should therefore grant a preliminary injunction barring Respondents from proceeding with the construction of the Pier 55 Project until this Court otherwise orders.

V. CONCLUSION

For these reasons, as well as those set forth in the Verified Petition and all supporting papers, Petitioners respectfully request judgment and an order: (1) declaring that Respondents' actions violated the public trust doctrine and enjoining the Project from proceeding until the legislature expressly authorizes it; and/or (2) declaring that Respondents have acted arbitrarily, capriciously, and contrary to law by issuing the Negative Declaration under SEQRA, and approving the GPP Amendment and Form Lease with Pier55, Inc., and (a) instructing the HRPT to redesign the project to comply with SEQRA, the NYC WRP, and its own Park Act, and/or (b) reversing the HRPT's decision to issue a Negative Declaration and instructing it to complete and EIS; (3) granting Petitioners expedited discovery; (4) issuing a preliminary injunction barring Respondents from proceeding with construction of the Pier 55 Project; and (5) granting such other and further relief as this Court may deem just and proper, including awarding Petitioners their costs and attorneys' fees in this proceeding.

Dated: New York, New York
June 11, 2015

Respectfully submitted,

O'MELVENY & MYERS LLP

By: _____
Eric B. Rothenberg

Eric B. Rothenberg, Esq. (SBN 2058576)
Jeffrey A. N. Kopczynski, Esq. (SBN 4592267)
Jonathan G. Fombonne, Esq. (SBN 5293386)
Philip E. Legendy, Esq. (SBN 5192422)
7 Times Square
New York, New York 10036
Telephone: (212) 326-2000
Facsimile: (212) 326-2061

Jesse Glickstein, Esq. (SBN 5214689)
1625 Eye Street N.W.
Washington, D.C. 20006
Telephone: (202) 383-5300
Facsimile: (202) 383-5414

Attorneys for Petitioners