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November 19, 2015

U.S. Army Corps of Engineers
New York District
Jacob K. Javits Federal Building
New York, NY 10278-0090
Attn: Regulatory Branch

Re: The City Club of New York, Inc., Robert Buchanan, and Tom Fox Comments on the Hudson River Park Trust's Application for Modification of Permit NAN-1998-00290

I write on behalf of The City Club of New York, Inc. ("City Club") and Robert Buchanan and Tom Fox, who are City Club members and are independently interested in the project addressed in this letter. We request that the U.S. Army Corps of Engineers, New York District ("USACE") deny the application of the Hudson River Park Trust ("HRPT") to modify Permit NAN-1998-00290 (the "Permit").

City Club is a member-supported non-profit 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. Tom Fox had an instrumental role in creating the Hudson River Park (the "Park") and continues to play a crucial role in advocating for its responsible development, especially with regard to historic landmarks located in the Park. Robert Buchanan is an avid boater and environmentalist who teaches journalism and environmental studies at the New School. He uses and enjoys the Park to teach rowing, sailing, and boatbuilding and uses the area of the Park at issue to oversee his students' practice of rowing and sailing techniques.

HRPT seeks USACE authorization to build a new 118,461-square-foot island between the existing Pier 54 and Pier 56 pile fields (the "Island" or the "Proposed Project")[1] in an area of

[1] Although HRPT asserts that the Proposed Project is a replacement of Pier 54 that will be called Pier 55, the Proposed Project is more accurately described as an island connected to the shore by two access bridges. *See Pier*, Merriam-Webster, http://www.merriam-webster.com/dictionary/pier (defining "pier" as "a structure (as a

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the Hudson River designated as an Estuarine Sanctuary.[2] For the reasons explained below, and for those explained in our filings in a pending Article 78 action challenging the Proposed Project in New York Supreme Court,[3] the requested authorization should not be granted. Pier55, Inc. ("Pier55") should be required to submit a new application for a new individual permit or, in the alternative, HRPT's request for modification should be denied.

As a threshold matter, granting HRPT's application in its current form would be contrary to federal law because:

- HRPT's request must be processed as an application for a new permit and subjected to searching environmental scrutiny by USACE;
- HRPT has not clearly demonstrated that there is no practicable alternative to building the Island;
- HRPT alone is not the proper applicant for authorization to build the Island; and
- The public notice issued by USACE did not provide adequate notice of HRPT's proposal.

If USACE reaches the merits of HRPT's application, it will find that the Proposed Project is contrary to the public interest and poses a serious risk of environmental harm.[4] In evaluating the Proposed Project, USACE should disregard the findings in the Environmental Assessment Form ("EAF") prepared by HRPT. The EAF erroneously compared the Proposed Project to a No Action condition involving the reconstruction of Pier 54, inadequately analyzed other relevant factors, and did not comply with state law.[5] When USACE compares the Proposed Project to the correct No Action condition, which is no action at all, USACE will find that the Island would:

- Limit navigability by:
    - Foreclosing potential navigational use of the area; and
    - Eliminating opportunities for recreational boating;
- Have a significant negative impact on essential fish and wildlife habitats;
- Fail to properly preserve historic resources;
- Have a significant negative impact on visual resources; and
- Significantly preclude public access to this portion of the Park based upon ability to pay.

Finally, USACE should hold a public hearing before any final action on HRPT's application.

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breakwater) extending into navigable water for use as a landing place or promenade or to protect or form a harbor"); *see also infra* Ex. B, at 26.

[2] Hudson River Park Act § 8.

[3] Our Verified Petition and our Memorandum of Law in Support of the Verified Petition filed in the Article 78 action are attached as Exhibits A and B to this letter, respectively. The arguments contained in those filings are incorporated by reference herein.

[4] *See* 33 C.F.R. § 320.4 (general policies for evaluating permit applications).

[5] *See* Hudson River Park Trust, Environmental Assessment Form (Feb. 10, 2015), *available at* https://www.hudsonriverpark.org/assets/content/general/Pier_54_EA_2015-02-10_low-reswSign.pdf [hereinafter "EAF"].

I. Granting HRPT's application in its current form would be contrary to federal law.

As a threshold matter, an agency is obligated to follow federal statutory commands and the procedures set forth in its own regulations.[6] HRPT's application is deficient under applicable Department of the Army regulations, and USACE cannot grant HRPT's requested modification.

A. HRPT's request must be processed as an application for a new permit.

HRPT's request for a modification to the Permit must be processed as an application for a new permit because it proposes a "significant increase in [the] scope of a permitted activity."[7] The Proposed Project is a new project in a new location, not a reconstruction of Pier 54, and it should be evaluated on its own merits.

The Permit originally authorized HRPT to "[p]erform construction activities in and over waters of the United States to facilitate the development of the Hudson River Park," subject to various conditions and specifications.[8] The "activities . . . authorized within Sections 3 through 7 of the project"[9] included:

> **Work on Pier 54**: Repair a portion of Pier 54 measuring approximately 490 feet by 60 feet. Replace the remainder of the pier to its full size of approximately 100 feet by 875 feet. All construction or work on this pier shall take place within the footprint of the existing pier.[10]

In December 2005, USACE modified the Permit. The modification authorized HRPT to replace the entirety of Pier 54 with a new 84,292-square-foot platform in the existing footprint, rather than replace only part of the pier and repair the rest.[11]

By any measure, the Proposed Project constitutes a "significant increase in [the] scope" of this permitted activity.[12] The total Island structure, including the access bridges and the docking station for the actors' barge, will be 118,461 square feet instead of the previously permitted 84,292, representing more than a 40 percent increase in overwater coverage.[13] Instead of being flat, it will rise to a height of seven stories. Instead of being a long, narrow structure, it will be a larger square structure with greater impacts on the covered aquatic resources. Instead

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[6] *See, e.g.*, *Bergamo v. CFTC*, 192 F.3d 78, 79 (2d Cir. 1999).
[7] 33 C.F.R. § 325.7(a). Importantly, this provision requires that a modification request be processed as a new permit application if it significantly increases the scope of "a" singular proposed activity, not of the entire previously authorized project as a whole. *Id.*
[8] Department of the Army Permit No. 1998-00290, at 1 (May 31, 2000) [hereinafter "Permit"].
[9] *Id.*
[10] *Id.* at 3.
[11] Letter from Col. Richard J. Polo, Jr., U.S. Army District Engineer, to Laurie Silberfield, Hudson River Park Trust (Dec. 15, 2005).
[12] 33 C.F.R. § 325.7(a).
[13] Hudson River Park Trust, Joint Application: Pier 54 and Pier 54 Pile Field: Request for Modification of USACE Permit 1998-00290 and NYSDEC Permit 2-6299-00004/00001, Attachment 1, at 3 (Feb. 2015) [hereinafter "Application"].

of extending from the bulkhead, it will be "186 feet from shore."[14] And it will require driving hundreds of piles in the space between Piers 54 and 56, where USACE has never previously authorized HRPT to engage in any construction.[15] Independently and cumulatively, each of these modifications is significant.[16]

Accordingly, USACE must process HRPT's request for a modification as an application for a new permit. Pursuant to the National Environmental Policy Act ("NEPA"), USACE must carefully scrutinize the Proposed Project's environmental impact[17] and must, at a minimum, prepare its own independent Environmental Assessment and Statement of Findings.[18]

B. HRPT has not clearly demonstrated that there are no practicable alternatives to building the Island.

The Clean Water Act ("CWA") prohibits the discharge of fill material into the navigable waters of the United States without a permit.[19] Section 404 of the CWA authorizes USACE to issue permits for discharges at specific sites.[20] As HRPT acknowledges, the Proposed Project requires new authorization from USACE under section 404 because it would involve pouring flowable concrete into hollow piles in the Hudson River.[21]

In determining whether to issue a permit under section 404, USACE must follow[22] guidelines promulgated by the Environmental Protection Agency ("EPA"),[23] as well as its own regulations.[24] EPA guidelines provide heightened protection for "special aquatic site[s]," which include "[s]anctuaries and refuges . . . under State and Federal laws . . . to be managed principally for the preservation and use of fish and wildlife resources."[25] Because the segment of the River in the Park is an Estuarine Sanctuary under state law,[26] the site of the Proposed Project is a special aquatic site.

EPA guidelines forbid any discharge if there is a "practicable alternative" that would have less impact on the aquatic ecosystem without any other significant adverse environmental

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[14] Madelyn Wils, *Waterfront Park Is No Fantasy Island*, Crain's N.Y. Bus., Sept. 7, 2015, http://www.crainsnewyork.com/article/20150907/OPINION/150909917/waterfront-park-is-no-fantasy-island.
[15] *See* Permit, *supra* note 8.
[16] *See Significant*, Merriam-Webster, http://www.merriam-webster.com/dictionary/significant (last visited Oct. 26, 2015) (defining significant as "large enough to be noticed or have an effect").
[17] *See, e.g.*, *Natural Res. Def. Council, Inc. v. U.S. Army Corps of Engineers*, 457 F. Supp. 2d 198, 202 (S.D.N.Y. 2006).
[18] *See* 33 C.F.R. § 325.2(a)(4), (6); *id.* pt. 325, app. B.
[19] *June v. Town of Westfield*, 370 F.3d 255, 257 (2d Cir. 2004).
[20] 33 U.S.C. § 1344(b). The existing Permit authorizes the discharge of fill material at various points in the Park for various purposes, including that "associated with the authorized repairs to . . . part[] of" Pier 54. Permit, *supra* note 8, at 5.
[21] *See* Application, *supra* note 13, Attachment 1, at 23-24. Because of its size and dense pile placement, the Island itself also has "the effect of a discharge of fill material," thereby requiring a section 404 permit even if the project did not involve pouring concrete into hollow piles. 33 C.F.R. § 323.3(c)(1).
[22] 33 U.S.C. § 1344(b).
[23] *See* 40 C.F.R. pt. 230.
[24] *See* 33 C.F.R. pt. 323.
[25] 40 C.F.R. § 230.40(a).
[26] Hudson River Park Act § 8.

consequences.[27] "An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."[28] In a special aquatic site, *all* practicable alternatives are presumed to have less adverse impact on the environment unless "clearly demonstrated otherwise."[29] Furthermore, if the "activity" associated with a discharge in a special aquatic site "does not require access to or proximity to siting within the special aquatic site . . . to fulfill its *basic purpose* (i.e., is not 'water dependent')," practicable alternatives outside the special aquatic site are presumed to exist unless clearly demonstrated otherwise.[30]

The "basic purpose" of the Proposed Project does not "require" siting within the Estuarine Sanctuary and thus is not "water dependent" under EPA regulations.[31] According to the work description appended to USACE's public notice, HRPT has identified the Proposed Project's purpose as "to provide a vegetated pier platform with an amphitheater and public restrooms; and to continue to provide safe public access pier structures within Hudson River State Park."[32] The latter of these two statements is plainly not the purpose of the Proposed Project. There is no need to build anything, let alone the Island at a cost exceeding $100 million, to "continue" to provide safe, publicly accessible piers in the Park. Many such piers already exist. Nor can "provid[ing]" a "pier platform" be properly understood as part of the Island's basic purpose. It is tautological to assert that the purpose of building a pier is to create a pier platform. Moreover, because the Island would not be used as a working pier, there is no functional difference between this particular "pier platform" and any other parcel of naturally existing or artificially created land. The "pier platform" is simply a blank slate—a means to achieve whatever purposes HRPT intends to occur on the Island.

USACE should define the Proposed Project's basic purpose as the creation of a green space for the performing arts and passive recreation.[33] Regardless of the precise definition USACE adopts, the performing arts are the most essential component of the Island's purpose. In its application, HRPT identifies three "goals," or reasons, for undertaking the Proposed Project rather than rebuilding Pier 54.[34] All concern the staging of performances: (1) "providing for a secondary means of egress during event conditions especially"; (2) "allowing for multiple user

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[27] 40 C.F.R. § 230.10(a).
[28] *Id.* § 230.10(a)(2).
[29] *Id.* § 230.10(a)(3).
[30] *Id.* (emphasis added).
[31] *Id.*; *see Sierra Club v. Van Antwerp*, 362 F. App'x 100 (11th Cir. 2010) (USACE must determine a project's "basic purpose" and determine whether that purpose is "water dependent," and may not act arbitrarily in doing so).
[32] U.S. Army Corps of Engineers, Public Notice at 5 (Oct. 2, 2015), *available* at http://www.nan.usace.army.mil/Portals/37/docs/regulatory/publicnotices/2015/Oct15/199800290.pdf
[33] The Proposed Project's basic purpose must be defined at a high level of generality. The basic purpose of a housing development is to build housing, *see Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1367 (11th Cir. 2008), not to build a specific kind of housing with certain amenities in a specific location. The basic purpose of a limestone mine is to extract limestone, *see id.* at 1366, not to obtain a particular quantity of a particular kind of limestone for sale in certain markets. In its application materials, HRPT sometimes defines the Proposed Project's purpose so narrowly that it could not, by definition, be fulfilled anywhere else. *See* Application, *supra* note 13, Attachment 1, at 1-2 (identifying the Island's purpose as, among other things, "[p]roviding greater resiliency within this segment of [the Park] by elevating the pier"). The requirement to clearly demonstrate that practicable alternative sites do not exist would be rendered meaningless if HRPT could define the Proposed Project's basic purpose in such a narrow, gerrymandered fashion. USACE should reject any attempt to do so.
[34] Application, *supra* note 13, Attachment 1, at 8-9.

experiences within the pier at the same time (e.g., the separation of open space and programmed areas); and (3) "providing for a diversity of performance environments (rather than the in-line single rectangular stage and audience area required by [the] Park's typical rectangular pier configuration)."[35]

Creating a green space for the performing arts and passive recreation is not a water dependent purpose under EPA guidelines. Unlike boat access,[36] or storage for goods that are about to be shipped by boat,[37] performing arts and passive recreation do not depend upon access to a special aquatic site. The ability to stage a rock concert plainly does not *require* access to the Estuarine Sanctuary. Even if the Proposed Project's basic purpose includes "provid[ing] a vegetated pier platform,"[38] this purpose still does not depend upon access to the Estuarine Sanctuary. "[V]egetated pier platform[s]" can be built on other bodies of water or elsewhere along the River, and they do not require siting within this special aquatic site.[39]

Because the Proposed Project would be located in a special aquatic site and has a basic purpose that does not require access thereto, USACE must presume that practicable alternative sites outside the Estuarine Sanctuary exist unless HRPT clearly demonstrates otherwise.[40] Nothing in HRPT's application even attempts to meet this high burden. Although HRPT discusses several design alternatives,[41] the only alternative *site* HRPT considers is the existing Pier 54 pile field.[42] HRPT does not prove that the Proposed Project's basic purpose could not be fulfilled elsewhere in the Park's 550 acres,[43] including in areas entirely on land that are presently devoted to other uses. Nor does HRPT prove that it could not feasibly obtain other property or the right to use other property[44] where it could create a similarly sized space for performing arts and passive recreation with rolling topography and River views.[45]

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[35] *Id.*
[36] *See Nat'l Wildlife Fed. v. Whistler*, 27 F.3d 1341, 1345 (8th Cir. 1994).
[37] *See Friends of the Earth v. Hintz*, 800 F.2d 822, 831-32 (9th Cir. 1986).
[38] Public Notice, *supra* note 32, at 5.
[39] Of course, the Hudson River Park Act does not presently provide for HRPT jurisdiction farther up the River, but neither did the Act authorize the reconstruction of Pier 54 outside its historic footprint until the Legislature amended the Act in 2013 at HRPT's request. HRPT is fully capable of obtaining legislative authorization to expand the potential sites available to it when it wishes.
[40] *See* 40 C.F.R. § 230.10(a)(3); *see Utahns for Better Transp. v. U.S. Dep't of Transp*, 305 F.3d 1152, 1186 (10th Cir. 2002) ("[T]he burden is on the Applicant . . . , with independent verification by [USACE], to provide detailed, clear and convincing information *proving* impracticability." (emphasis in original)).
[41] This analysis is itself inadequate. For example, HRPT asserts that the discharge of flowable concrete is the only alternative that "would achieve the project's goals for the 36-inch diameter concrete piles supporting Pier 54." Application, *supra* note 13, Attachment A, at 24. In assessing the practicability of alternatives, however, it is HRPT's overall goals for the project that are relevant, not HRPT's goals for specific structural or design elements. *See* 40 C.F.R. § 230.10(a)(2).
[42] *See* Application, *supra* note 13, Attachment A, at 7-8.
[43] *See On the Water*, Hudson River Park, https://www.hudsonriverpark.org/explore-the-park/on-the-water (last visited Nov. 4, 2015). For example, Pier 40, Pier 76, and the Gansevoort Peninsula are all significantly larger than the Island and would be capable of accommodating similar amenities.
[44] *See* 40 C.F.R. § 230.10(a)(2) ("If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.").
[45] For instance, the 28-acre Riverbank State Park, *see Riverbank State Park*, N.Y. State Parks, Recreation & Historic Preservation, http://nysparks.com/parks/93/details.aspx (last visited Nov. 4, 2015), already provides panoramic River views from Manhattan and appears able to accommodate similar amenities to those on the Island at far less

Regardless of whether the Island's basic purpose is water dependent, in light of HRPT's failure to consider any alternative site except the existing Pier 54 footprint, USACE should independently consider whether practicable alternatives exist on existing parkland or outside the Estuarine Sanctuary. Any practicable alternative presumptively has less adverse environmental impact than the Island unless HRPT clearly proves otherwise.[46]

C. HRPT alone is not the proper applicant for authorization to build the Island.

By regulation, a USACE permit authorizes only "the applicant" or "any future transferee" to perform the specified work in accordance with the enumerated terms and conditions.[47] Furthermore, a permit application "must be signed by the person who desires to undertake the proposed activity (i.e., the applicant) or by a duly authorized agent."[48] USACE cannot properly authorize HRPT alone to build the Island under the Permit or under any new permit because the primary entity that desires to undertake the Proposed Project is Pier55, Inc.

Under the Lease approved by HRPT's Board of Directors, the entity that will build most of the Island is not HRPT, but rather Pier55, a Delaware nonstock corporation.[49] The Lease recites that Pier55, not HRPT, "agree[s] . . . to undertake responsibility for . . . managing the reconstruction of the Premises, following demolition of Pier 54 by [HRPT]."[50] Under the Lease, HRPT's role in the Proposed Project is limited to the removal of the existing Pier 54 platform; the construction of a new pedestrian esplanade and bus stop; and finishing work such as erecting signage, paving, and planting bushes.[51] *All other aspects* of the project—including driving piles, erecting the Island platform, and building the access bridges—are "Tenant Construction Components."[52] Pier55 will make "all construction decisions affecting the scope of the work, technical specifications, scheduling, means and methods and programming or Contracts" with respect to Tenant Construction Components.[53] Pier55 will also pay for all Tenant Construction Components.[54] HRPT will contribute $17 million toward the Proposed Project overall,[55]

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expense with no increase in overwater coverage. Potential sites on the opposite side of Route 9A could also accommodate green space with comparable views of the River.

[46] *See* 40 C.F.R. § 230.10(a)(3).

[47] 33 C.F.R. pt. 325, app. A.

[48] *Id.* § 325.1(d)(8); *see also id.* § 325.1(d)(2) ("All activities which *the applicant* plans to undertake which are reasonably related to the same project and for which a DA permit would be required should be included in the same permit application." (emphasis added)). HRPT is plainly not acting as the agent of Pier55, Inc. in the permitting process because HRPT and Pier55 have joint authority over the permit application. *See* Lease Agreement Between Hudson River Park Trust, Landlord, and Pier55, Inc., Tenant § 17.04, *available at* https://www.hudsonriverpark.org/assets/content/general/Pier_54_Lease_02.11.15.pdf [hereinafter "Lease"]; *cf.* Restatement (Third) of Agency § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf *and subject to the principal's control* . . . ." (emphasis added)).

[49] *See* Lease, *supra* note 48, at 1. The chair of Pier55, Inc., is media mogul Barry Diller, and its vice-chair is film producer Scott Rudin. *See* Steve Cuozzo, *Pier 55 Gets $130M Bid to Create an "Island Oasis"*, N.Y. Post, Nov. 17, 2014, http://nypost.com/2014/11/17/pier-55-gets-130m-bid-to-create-and-island-oasis.

[50] Lease, *supra* note 48, at 2.

[51] *Id.* § 1.01 (defining "Landlord Construction Components").

[52] *See id.*; *see also id.* § 2.02 (lease commences once Pier55 provides notice that it is prepared to begin construction).

[53] *Id.* § 17.01(b).

[54] *Id.* § 17.02(a).

compared with at least $113 million in private funding.[56] Therefore, with the exception of surface work and finishing touches, Pier55 will primarily fund and control the Proposed Project that USACE has been asked to approve.[57]

Curiously, however, Pier55 is not mentioned in HRPT's 496-page application. Because HRPT is the permittee, even a modified version of the Permit cannot authorize Pier55 to conduct the Proposed Project under the Rivers and Harbors Act and the CWA unless the Permit is transferred to Pier55.[58] Nor can HRPT properly submit any new application on Pier55's behalf. HRPT does not "desire[] to undertake"[59] the Proposed Project because it has disclaimed responsibility under the Lease for the portions of the project that require USACE authorization.[60]

Furthermore, USACE is required to consider "the extent of the permittee's compliance with the terms and conditions of the permit" in determining whether to modify an existing permit.[61] Here, because Pier55 will be responsible for the Proposed Project, it is Pier55's history of compliance that is relevant, and Pier55 has none. Pier55 is a newly created entity with no track record, let alone a track record of construction in an Estuarine Sanctuary in compliance with conditions imposed by USACE. HRPT has disclosed no information about Pier55 to USACE, and little is known about Pier55 except the identity of the individuals who control it.[62]

For all of these reasons, USACE should reject HRPT's request for modification and await a new permit application from Pier55, which would have primary responsibility for undertaking the Proposed Project.

D. The public notice issued by USACE was not adequate, and it should be reissued with a new public comment period to enable meaningful participation.

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[55] *Id.* § 17.02(d).

[56] *See* Lisa W. Foderaro, *How Diller and von Furtstenberg 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?_r=0.

[57] HRPT will also retain joint authority over change orders during the course of construction that have an effect on Landlord Construction Components. *See* Lease, *supra* note 48, § 1.01 (defining "Major Change Order"); *id.* § 17.01 (d) (requiring mutual approval of Major Change Orders). Because Pier55 will exercise primary control and fund the Proposed Project, the relationship between HRPT and Pier55 cannot be analogized to the relationship between a permittee and a general contractor hired to perform construction work on the permittee's behalf.

[58] *See* 33 C.F.R. pt. 325 app. A. As approved by the HRPT Board of Directors, the Lease does not appear to contain any provision transferring, or authorizing the transfer of, the Permit to Pier55. Nor is it clear how HRPT could transfer the Permit, which covers projects throughout the Park, to Pier55.

[59] 33 C.F.R. § 325.1(d)(8); *see Undertake*, Merriam-Webster, http://www.merriam-webster.com/dictionary /undertake (last visited October 27, 2015) (defining "undertake" as "to take upon oneself" or "to put oneself under obligation to perform").

[60] Lease, *supra* note 48, §§ 17.02(a), 17.13. HRPT is also not acting as the Pier55's agent in the permitting process because HRPT and Pier55 have joint authority over the permit application. *See id.* § 17.04; *cf.* Restatement (Third) of Agency § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf *and subject to the principal's control* . . . ." (emphasis added)).

[61] 33 C.F.R. § 325.7(a).

[62] *See supra* note 49.

HRPT's application to USACE is titled in part, "Request for Modification of USACE Permit 1998-00290."[63] The substance of the application makes clear that HRPT seeks a modification of its existing permit. However, the public notice issued by USACE (as opposed to HRPT's application) states only that HRPT seeks "authorization of the construction of a replacement pier under an existing Department of the Army permit issued on May 31, 2000 and subsequently modified."[64] The public notice does not disclose that USACE is considering whether to modify the terms of the permit itself.

We recognize that USACE may not be obligated by statute or regulation to provide a public comment period regarding a request to modify a permit. However, "[t]he adequacy of notice is a critical starting point which affects the integrity of an administrative proceeding."[65] Once it chose to provide notice to the public, USACE should have provided clear notice of the specific agency action under consideration: a modification to the terms and conditions of the Permit, not a mere request to engage in construction under the Permit as it exists.

Furthermore, the public notice does not provide all of the information required under Department of the Army regulations. The notice fails to advise members of the public that they can request a public hearing,[66] and it fails to meaningfully describe the Proposed Project's "purpose and intended use" as a performing arts venue.[67] The notice itself does not mention the existence of performance spaces or the hosting of concerts and theatrical events on the Island,[68] and the work description appended to the notice merely refers in passing to an "amphitheater" on the Island where "events" will take place.[69] The public notice must be sufficient to give the public a "clear understanding of the nature and magnitude of the activity to generate meaningful comment,"[70] enabling the public to present evidence of environmental impacts relating to the specific usage and to inform USACE's balancing of the Proposed Project's benefits and detriments.[71] Because the public has not been informed that one of the Island's principal intended benefits is the creation of new outdoor event spaces, the public cannot meaningfully address all of the factors on which USACE will base its decision.

Even if it does not process a new permit application, USACE should reissue the existing notice to provide "fair notice" of the contemplated agency action[72] and renew the comment period to enable meaningful public participation.

II. The Proposed Project would have significant negative environmental impacts and would be contrary to the public interest.

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[63] Application, *supra* note 13, at cover page.
[64] Public Notice, *supra* note 32, at 1.
[65] *Nat'l Black Media Coal. v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986).
[66] *See* 33 C.F.R. § 325.3(a)(15).
[67] *Id.* § 325.3(a)(5).
[68] *See* Public Notice, *supra* note 32, at 1-3.
[69] *Id.* at 4, 5.
[70] 33 C.F.R. § 325.3(a).
[71] *See id.* § 320.4(a)(1).
[72] *Long Island Health Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

If it reaches the merits of HRPT's application, USACE must determine whether to modify the Permit based upon "considerations of the public interest."[73] USACE must evaluate the Proposed Project's "probable impact" on the public interest by "careful[ly] weighing" all relevant factors, balancing the Proposed Project's reasonably expected benefits against its reasonably foreseeable detriments.[74] Relevant factors, which must be considered both separately and cumulatively, include "*conservation*, economics, *aesthetics*, *general environmental concerns*, wetlands, *historic properties*, *fish and wildlife values*, flood hazards, floodplain values, land use, *navigation*, shoreline erosion and accretion, *recreation*, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, *the needs and welfare of the people*."[75] These criteria apply regardless of whether HRPT seeks a modification or a new permit.[76]

As it carefully weighs the merits of the Proposed Project, USACE should disregard the erroneous findings of the EAF, which does not comply with state law. When it compares the Proposed Project to the proper No Action condition, which is no action at all, USACE will find that the Proposed Project does not merit authorization.

A. The EAF is flawed and noncompliant with state law, and USACE should disregard its findings.

In its application and supporting materials, HRPT characterizes the Proposed Project as a reconstruction of Pier 54 in a slightly different location and compares its environmental impact to the impact of rehabilitating the existing Pier 54.[77] As HRPT acknowledges by calling it Pier 55, however, the Island is in fact a new and distinct project. The environmental impact of building a new Island must be compared to that of leaving Pier 54 in its existing state as an open pile field. HRPT failed to do so. As a result of this error and others, HRPT issued an inaccurate EAF and violated the New York State Environmental Quality Review Act (SEQRA) by failing to prepare an Environmental Impact Statement (EIS).[78]

1. The correct No Action condition is no action.

The EAF "assume[s]" that, if the Island is not built, Pier 54 will be "rebuilt in its current location and reopened to the public for recreation and cultural events."[79] However, HRPT has already informed the public that, regardless of whether the Proposed Project proceeds, it has no intention of rebuilding Pier 54.[80] By using this erroneous "No Action" condition, HRPT understated the significant environmental impacts the Proposed Project will cause. The Proposed Project should be evaluated using the proper baseline.

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[73] 33 C.F.R. § 325.7(a).
[74] *Id.* § 320.4(a).
[75] *Id.* § 320.4(a) (emphasis added).
[76] *See id.* §§ 320.4(a), 325.7(a).
[77] *See, e.g.*, Application, *supra* note 13, at JAF-2.
[78] 6 NYCRR § 617.1 *et seq*.
[79] EAF, *supra* note 5, pt. 1 at 10.
[80] Hudson River Park Trust, Minutes of a Meeting of the Board of Directors, at 5 (Dec. 4, 2014), *available at* http://www.hudsonriverpark.org/assets/content/general/Board_Minutes_(12-4-14).pdf [hereinafter "Minutes"].

Since the issuance of the Permit in 2000, HRPT has been authorized to rehabilitate Pier 54 within its existing footprint.[81] It never did so and instead allowed Pier 54 to fall into further disrepair because it lacked funding to undertake the project. HRPT has acknowledged that, but for the "exceptional circumstance of a single private donor offering to provide a minimum of $100 million" to build the Island, it would not have "sufficient funding" to rehabilitate Pier 54.[82] According to HRPT, one benefit of the Proposed Project is that it would require only $17.5 million in public funding, as opposed to the $40 million needed to reconstruct Pier 54.[83]

HRPT has already taken measures inconsistent with the rehabilitation of Pier 54 in its current footprint. The HRPT Board of Directors has determined that "[r]emoval of . . . Pier 54 is independent of the Pier 55 Project."[84] HRPT decided last year that "[r]emoval of the Pier 54 deck must occur" regardless of whether the Island project proceeds,[85] and this removal work (or "de-decking") has already been completed.

In other words, HRPT has represented to the public that the Proposed Project is desirable because HRPT could not reconstruct Pier 54. HRPT lacks the necessary funding for reconstruction and has lacked it throughout the fifteen years it has held a USACE permit to perform the reconstruction. Instead, HRPT has elected to turn Pier 54 into an open pile field. It is therefore misleading and not rational to compare the impact of building the Island to the impact of reconstructing Pier 54 as a flat, rectangular pier in its current footprint. The proper baseline for any comparison is a No Action condition consisting of no action: leaving the existing de-decked Pier 54 pile field as is. When it engages in its own analysis under NEPA,[86] USACE should consider taking no action at all as one of the alternatives to the Proposed Project.

2. The EAF is erroneous and does not comply with SEQRA.

SEQRA "requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action *may* have a significant adverse impact, prepare or request an environmental impact statement."[87] SEQRA identifies certain "Type I" actions that carry a "presumption that [they are] likely to have a significant adverse impact on the environment and may require an EIS."[88] These include any project occurring wholly or partially within publicly owned parkland that involves the physical alteration of more than 2.5 acres or, if located in a city with more than 150,000 people, has a gross floor area of more than 60,000 square feet.[89]

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[81] *See* Permit, *supra* note 8, at 3.
[82] AKRF, Inc. on behalf of Hudson River Park Trust, Pier 54 Response to Comments Received During Public Review, at 6 (Feb. 10, 2015), *available at* https://www.hudsonriverpark.org/assets/content/general/Pier_54_RTC_2015-02-10.pdf [hereinafter "Comment Responses"].
[83] *See id.* at 18.
[84] Minutes, *supra* note 80, at 5.
[85] *Id.*
[86] *See* 42 U.S.C. § 4332(E); 33 C.F.R. § 230.10.
[87] 6 NYCRR § 617.1(c) (emphasis added).
[88] *Id.* § 617.4(a)(1).
[89] *Id.* §§ 617.4(b)(6)(i), (b)(6)(v), (b)(10).

HRPT has acknowledged[90] that the Proposed Project is a Type I action presumptively requiring a full EIS unless the agency demonstrates there is *no possibility* that the project can cause environmental harm.[91] Yet HRPT did not undertake an EIS and prepared only a more limited EAF.[92] In purporting to reach the definitive conclusion that the Proposed Project "will not result in any significant adverse impacts to the environment,"[93] HRPT made multiple errors.

First, as explained above, HRPT used the wrong No Action condition. As a result, the EAF's basic factual premises are incorrect. For example:

- The EAF asserts that the Island will result in an increase in overwater coverage of "less than one acre," when it will actually produce 2.7 acres of new overwater coverage.[94]

- The City Environmental Quality ("CEQR") Technical Manual requires a shadow assessment of the Proposed Project.[95] The EAF asserts that the Proposed Project would reduce shadow impacts, when in fact the construction of the Island would create new continuous shadows over approximately 39,000 square feet of the River.[96]

- The EAF acknowledges that the noise levels created by the Proposed Project would exceed the 55 dBA $L_{10(1)}$ recommended by CEQR noise exposure guidelines,[97] and would reach the "marginally unacceptable" level of 70 dBA at the waterfront esplanade.[98] Rather than analyze these noise impacts, the EAF dismisses them as insignificant "compared to the noise levels . . . at the rebuilt Pier 54."[99]

Second, the EAF seeks to bolster its conclusions by referencing findings contained in an EIS prepared by HRPT's predecessor at the time of the Park's creation (the "1998 EIS").[100] This 17-year-old document did not mention the Island or discuss the inter-pier space where the Proposed Project will be principally located; it focused instead on the "renovation" of Pier 54 in its existing footprint.[101] The 1998 EIS was also prepared in a different factual context and did

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[90] *See, e.g.*, Hudson River Park Trust, Minutes of a Meeting of the Board of Directors, at 9 (Feb. 10, 2015), *available at* https://www.hudsonriverpark.org/assets/content/general/BoardMinutes2-11-15.pdf; Comment Responses, *supra* note 82, at 8.
[91] *See infra* Ex. B, at 27-47 (discussing this issue in detail).
[92] *See generally* EAF, *supra* note 5.
[93] Letter from Noreen Doyle, Executive Vice President, Hudson River Park Trust, to Jodi McDonald et al., at 2 (Feb. 27, 2015).
[94] *See* Application, *supra* note 13, Attachment 5, at 2. This figure includes both the new island and the two new access bridges, as do all other numerical figures in this letter unless otherwise noted.
[95] EAF, *supra* note 5, at C-1.
[96] *Id*. at C-6.
[97] *Id*. at G-1.
[98] *Id*. at G-7, G-9.
[99] *Id*. at G-1.
[100] *See, e.g.*, *id.* at 6, A-8, D-2, F-1.
[101] AKRF, Inc., Hudson River Park Final Environmental Impact Statement Prepared for Empire State Development Corporation in Cooperation with the Hudson River Park Conservancy 10-36 (1998).

not account for such relevant factors as the listing of the Atlantic Sturgeon as an endangered species.[102]

Third, the EAF's analysis of the Proposed Project's impact on visual and aesthetic resources is inadequate. The EAF almost wholly ignores the effect of the Island on views of the River from the Hudson River Greenway, the esplanade, and Route 9A.[103] Without substantiation, the EAF also minimizes the importance of views from side streets. For example, the EAF states: "While the new pier would be located within the West 13th street visual corridor, that visual corridor does not provide unique views of the Hudson River vista . . . ."[104] However, the EAF provides no evidence for its essentially subjective determination that the views obstructed by the Proposed Project are not "unique." In fact, HRPT rejected an alternative location for the Proposed Project that would have used more of the current Pier 54 footprint because this alternative location "would have resulted in view corridor obstructions."[105] It is not rational for HRPT to assert that the Island cannot significantly impair views of the River because the side-street visual corridors are not "unique," while simultaneously claiming that the Island must be located farther from the existing Pier 54 footprint to preserve side-street visual corridors.

As a result of these analytical errors, HRPT erred in concluding that the Island would have no possibility of significant adverse environmental impacts and failed to rebut SEQRA's presumption that a full EIS is necessary.[106] The need for a comprehensive EIS is all the more apparent in light of the fact that, only two years ago, HRPT performed a full EIS for the Pier 57 Redevelopment Project—a more limited project just a few blocks away with a smaller footprint and no increase in overwater coverage.[107] Because the EAF is inaccurate and does not comply with SEQRA, USACE should disregard its findings in evaluating the Proposed Project.

B. The Proposed Project does not merit authorization.

1. The Island would limit navigability.

Department of the Army regulations emphasize that "[p]rotection of navigation in *all* navigable waters of the United States continues to be a primary concern of the federal government."[108] USACE must consider the impact of the Proposed Project on "recreational values," including as expressed in state laws and land use policies. The Hudson River Park Act (the "Act") designates the portion of the Hudson River in the Park as an Estuarine Sanctuary and provides that "[o]nly water dependent uses shall be permitted" therein.[109] The Act's definition of a "park use" also expressly includes "small-scale boating for recreational and educational purposes that enhance park users' access to, and enjoyment of, the water."[110]

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[102] *See* 50 C.F.R. § 223.102.
[103] *See infra* Section II.B.1.
[104] EAF, *supra* note 5, at B-15, E-9.
[105] *Id.* at A-9.
[106] 6 NYCRR § 617.4(a)(1).
[107] Hudson River Park Trust, State Environmental Quality Review, Full Environment Assessment Form (June 14, 2011).
[108] 33 C.F.R. § 320.4(o)(3) (emphasis added).
[109] Hudson River Park Act §§ 8(1), 8(3)(a).
[110] *Id.* § 3(h)(iv).

a. The Island would foreclose potential working navigational uses of the area.

The Proposed Project would prevent future working use of Pier 54 and the embayment between Piers 54 and 56. The original General Plan for the Hudson River Park designated Pier 54 as one of three historic piers in the Park and provided that historic vessels would dock there.[111] The Estuarine Sanctuary Management Plan required by the Act and prepared by HRPT similarly called for docking historic ships at Pier 54.[112] Many of these historic vessels, such as the fireboat *John J. Harvey*, are working commercial ships that host events and provide educational and scenic tours of the River.[113] These vessels could not dock at the Island because it is not a working pier, and they will never be able to dock at Pier 54 as intended if the Island is built next to it. A rebuilt Pier 54—but not the Island—could also host other vessels that serve both educational and commercial purposes, such as sailboats that promote regional sustainability by shipping farm-fresh produce to public markets in the Lower Hudson Valley.[114]

Building the Island would also prevent future use of the area for emergency evacuation or the staging of emergency vessels. Hundreds of thousands of people evacuated Manhattan by boat on September 11, 2001, and boats provided emergency transportation links while Hurricane Sandy disrupted rail service.[115] Emergency events resulting in system-wide mass transit shutdowns have become increasingly common,[116] and climate change is expected to cause more severe and more frequent extreme weather events in New York.[117] In the wake of the August 2003 blackout, the New York City Emergency Response Task Force recommended that the City "explore all avenues" to ease overcrowding at Manhattan piers during emergencies and provide supplemental emergency maritime transportation.[118] The area surrounding Pier 54 has become increasingly crowded with the opening of the High Line and Google's new campus, and it will become still more so when Pier 57 is redeveloped. In short, the existing supply of emergency evacuation services is inadequate, and the potential demand is growing.

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[111] Hudson River Park, General Park Plan, at 6 (July 16, 1998), *available at* https://www.hudsonriverpark.org/assets/content/general/HRP_General_Project_Plan_(7-16-98).pdf [hereinafter "General Plan"].

[112] Hudson River Park Trust, Hudson River Park Estuarine Sanctuary Management Plan, at 1-22 (Sept. 2002), *available at* https://www.hudsonriverpark.org/assets/content/general/EstuarineSanctuaryManagementPlan2002.pdf.

[113] *See, e.g.*, Fireboat *John J. Harvey*, http://www.fireboat.org (last visited Nov. 4, 2015); *Pioneer*, South Street Seaport Museum, https://www.southstreetseaportmuseum.org/visit/street-of-ships/pioneer (last visited Nov. 4, 2015).

[114] *See* The Vermont Sail Freight Project, https://vermontsailfreightproject.wordpress.com (last visited Nov. 12, 2015).

[115] *See* Jessica DuLong, *The Untold Story of Ground Zero Evacuations By Boat*, Huffington Post, Sept. 13, 2011, http://www.huffingtonpost.com/jessica-dulong/the-untold-story-of-groun_b_955893.html; Metropolitan Waterfront Alliance, Maximizing Ferries in New York City's Emergency Management Planning, at 9 (Apr. 2013), *available at* http://waterfrontalliance.org/wp-content/uploads/2015/07/Waterfront_Platform_Ferries_04_2013.pdf.

[116] *Id.* at 5 & app. A.

[117] *See id.* at 6, 18; Kevin E. Trenberth et al., *Attribution of Climate Extreme Events*, 5 Nature Climate Change 725 (2015).

[118] *See* N.Y.C. Emergency Response Task Force, Enhancing New York City's Emergency Preparedness: A Report to Mayor Michael R. Bloomberg, at 21 (Oct. 28, 2003), *available* at http://www.nyc.gov/html/om/pdf /em_task_force_final_10_28_03.pdf.

If Pier 54 were rehabilitated to serve its intended purpose as a historic pier, it would provide a long berthing line and the fenders and tie-up equipment necessary for emergency evacuation. The Island could not be used for evacuation because of its height and undulating platform. At present, emergency vessels can also reach the bulkhead in the space between Piers 54 and 56 if necessary. They could not do so if the Island were built. HRPT has never considered whether the Island would negatively affect emergency operations by closing off the interpier space and preventing any future use of Pier 54 as a working pier.

Finally, USACE should consider that building the Island would prevent any passenger transportation use of the area for decades. A rebuilt Pier 54 could accommodate small tourist vessels connecting the Park's historic piers, as well as larger commuter vessels. Existing Hudson River crossings are strained to the point of crisis,[119] and the City has prioritized expanding its ferry network.[120] Pier 54 is located approximately halfway between the existing West Side ferry terminals at the World Financial Center and Pier 79, and surrounding sites such as the Meatpacking District, Chelsea Market, and Pier 57 are beyond the market areas of both existing West Side terminals.[121] As the regional ferry network grows, Pier 54 could, in principle, be used to fill a substantial gap in existing coverage and meet growing transportation needs in the area. Building the Island would foreclose these potential long-term uses.

b. The Island would eliminate opportunities for recreational boating.

The Estuarine Sanctuary is used frequently by local sailors, rowers, and kayakers who enjoy the area for what it is—a protected natural body of water.[122] HRPT specifically designates the area between Piers 52 and 61 for use by non-motorized boats.[123] Rowers and kayakers use the protected area between Piers 54 and 56 to practice their technique when currents are too strong on the river, and sailors use the same area to practice sail handling in a location that is sheltered from the wind. In addition, the embayment between Gansevoort Peninsula and Pier 57 is an important 'stepping stone' for small boat mariners moving up or down the river along the New York City Water Trail, a network of launch sites for human-powered boats.[124] With the number of human-powered boaters in the harbor rapidly increasing,[125] it is essential to protect such stepping stones.

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[119] *See, e.g.*, Benjamin Mueller, *On Day 3 of Delays, New Jersey Transit's Shortfalls Are Painfully Clear*, N.Y. Times, July 22, 2015, http://www.nytimes.com/2015/07/23/nyregion/new-jersey-transit-service-again-disrupted-by-electrical-problems.html.

[120] N.Y.C. Econ. Dev. Corp., Citywide Ferry Study 2013: Final Report, *available at* http://www.nycedc.com/sites /default/files/filemanager/Resources/Studies/2013_Citywide_Ferry_Study/Citywide_Ferry_Study_-_Final_Report.pdf.

[121] *See id.* at 34 (defining primary market area as within a quarter-mile of the ferry pier and secondary market area as within a half-mile of the pier).

[122] Affidavit of Robert Buchanan ¶ 14 (Sept. 16, 2015). The Buchanan Affidavit filed in the Article 78 proceedings in New York Supreme Court is attached to this letter as Exhibit C.

[123] *Water Use Map*, Hudson River Park, *available at* http://www.hudsonriverpark.org/assets/content/general /boatingmap-w-key.jpg (last visited Oct. 27, 2015).

[124] *See generally* New York City Water Trail Association, http://www.nycwatertrail.org/index.html (last visited Oct. 28, 2015).

[125] *See, e.g.*, Downtown Boathouse, Downtown Boathouse: Free Kayaking – New York City, at 2 (Oct. 16, 2013), *available at* http://static1.squarespace.com/static/513dfc99e4b0df536894d1b7/t/5262fbade4b0c5267bb4696f

The Proposed Project would directly eliminate these recreational, educational, and public health activities and, in doing so, would be contrary to the public interest. The 2.7 acres of the Hudson River newly covered by the Island would become inaccessible to recreational boating. The uncovered area between the island and the bulkhead would also become effectively inaccessible for recreational use, as it would be separated from the rest of the River by the Island, the piles supporting the access bridges, and the Pier 54 and Pier 56 pile fields. The 1.25 acres of the Pier 54 pile field and the slightly larger Pier 56 pile field would also remain inaccessible to kayaking, sailing, and other water dependent uses, as it is dangerous to engage in such activities in a pile field. The seasonal docking of a 4,000-square-foot "actors' barge" along the west side of the Island will further impede navigation of the River.

HRPT proposes to replace these activities with a performing arts venue, which would not serve a "water dependent" purpose under the CWA. For the reasons explained in Exhibit B,[126] the Island also would not constitute a water dependent use of the Estuarine Sanctuary as required by state law.[127] If placing a performing arts venue in the River could transform performing arts into a water dependent use, the Act's limitation on permissible uses would be a nullity, as any use within the Estuarine Sanctuary would become water dependent simply by virtue of its location.

2. The Island would have a significant negative impact on essential fish and wildlife habitats.

USACE must consider the Proposed Project's impact on "fish and wildlife values," as well as "food . . . production."[128] USACE is also obligated to consult with relevant agencies—here, the National Marine Fisheries Service and the National Oceanic and Atmospheric Administration Fisheries Service—"with a view to the conservation of wildlife resources by prevention of their direct and indirect loss and damage due to the activity proposed in a permit application."[129]

The Proposed Project is located within the Estuarine Sanctuary, a 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.[130] The Estuarine Sanctuary also "hosts numerous plankton species that are an important food source for fish and other organisms,"[131] including the more than 85 species of birds found within the Park's boundaries.[132] In 1992, the New York State Department of State designated the Park as part of the Lower Hudson River Significant

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/1382218669803/2012_Waiver_counts_DTBH_10.pdf. The Water Trail had 28 launch sites when it was created, *see Parks Launches NYC Water Trail Map and Interactive Guide*, NYC Parks, Mar. 27, 2008, http://www.nycgovparks.org/parks/valentino-pier/pressrelease/20102, and it now has 50 launch sites, *see NYC Water Trail Map*, New York City Water Trail Association, http://www.nycwatertrail.org/map.html (last visited Nov. 17, 2015).

[126] *See infra* Ex. B, at 50-53.

[127] Hudson River Park Act § 3(m)(i), (ii).

[128] 33 C.F.R. § 320.4(a)(1).

[129] *Id.* § 320.4(c).

[130] *Habitat: Water*, Hudson River Park, http://www.hudsonriverpark.org/education-and-environment/hudson-river-ecosystem/habitat-water (last visited Oct. 27, 2015).

[131] *Id*.

[132] *Id*.

Coastal Fish and Wildlife Habitat. In doing so, 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 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."[133] In short, HRPT proposes to build the Island in one of the few remaining open-water tidal river habitats in the Northeast.

HRPT acknowledges that the increase in overwater coverage as a result of the Proposed Project has the potential to affect the aquatic environment and disrupt essential fish and wildlife habitats.[134] HRPT nonetheless asserts that the Proposed Project will actually reduce shading because the elevated Island would allow more light to reach the water than Pier 54 would if rebuilt in its existing footprint.[135] When USACE compares the Proposed Project to the correct No Action condition, it will find that the Proposed Project would create significant shading[136] where none would otherwise exist and therefore adversely affect fish and wildlife habitats.

3. The Island would fail to properly preserve historic resources.

USACE is required to give "due consideration" to the Island's effect on "historic properties and National Landmarks," and to assess the impact of the Proposed Project on "recognized historic . . . values."[137] Pier 54 has an enduring place in the maritime history of New York City, and its physical structure embodies the City's heritage as an American gateway. It was home to two of the greatest ocean liner companies, the White Star and Cunard Lines. The *Carpathia* docked at Pier 54 when delivering survivors of the *Titanic* disaster, and the *Lusitania* departed from Pier 54 on its final voyage. The Pier's historical importance has long been marked by presence of the iconic iron arch of the White Star Line and, later, the Cunard Line at the head of the pier (the "Arch"). The General Project Plan for the Park provided that Pier 54 would "become a public pier featuring arches and granite bases from the original pier facade," at which "[h]istoric ships *are* . . . expected to dock" and at which "*some* active recreation *may* also occur."[138] When USACE originally issued the Permit in 2000, HRPT agreed in consultation with USACE to create an "interpretive program" for the Park, pursuant to which "Pier 54 . . . would be especially devoted to historic documentation."[139]

The Proposed Project fails to properly recognize the historic significance of the area. The 2013 Amendment to the Act requires that the Arch be "incorporated into any reconstruction/redesign of Pier 54."[140] We vigorously dispute HRPT's assertion that the Island is a "reconstruction" of Pier 54, but, even if HRPT's position is accepted, the Arch's mere

[133] *Id*.
[134] *See* Application, *supra* note 13, Attachment 5, at 3.
[135] *See id.* at 6-7.
[136] *See* EAF, *supra* note 5, at C-1.
[137] 33 C.F.R. § 320.4(e); *see also id.* § 320.4(a)(1).
[138] General Plan, *supra* note 111, at 11 (emphasis added).
[139] Memorandum for the Record from Joseph J. Seebode, Chief, Regulatory Branch, at 61 (May 31, 2000).
[140] Hudson River Park Act § 8.3(e).

continued existence does not suffice to "incorporate" it into the reconstruction.[141] The Proposed Project eliminates the White Star pier itself and divorces the icon of the area's history from the working pier which was the instrument of that history. It also ignores the standard practice of interpreting historic elements in parks by explaining them through visual highlighting and visual interpretation.[142] Instead, the Arch would serve as an entrance to the historically unrelated Island and, even then, only for that portion of the public users who choose to enter the Island via the southern access bridge. The futuristic aesthetic[143] of the Proposed Project is at odds with that of the rusted industrial Arch, and the Proposed Project does not attempt to integrate the Arch into its design to form a cohesive whole. HRPT does not even understand the Arch to be part of the Proposed Project, but rather part of the purportedly "independent" Pier 54 Connector Project involving the widening of the pedestrian walkway along the bulkhead.[144]

Furthermore, the 2013 Amendment provides that "the historic *elements* from the White Star Line, *including* the iron arch, must be incorporated in any reconstruction/redesign."[145] Clearly, the Amendment contemplates the inclusion of more than one historic "element" from the White Star Line into any reconstruction of Pier 54. Preserving only the Arch does not satisfy this requirement. The docking of historic ships at Pier 54 is one of the ways that the Park, in its original design, preserved and celebrated the history of the White Star Line.[146] The Proposed Project is not a working pier and would prevent historic vessels from docking at Pier 54 or nearby by creating a new obstruction in the River.

4. The Island would have a significant negative impact on visual resources.

By regulation, USACE must give "due consideration" to the effect of the Proposed Project on "values . . . associated with . . . scenic rivers," including those "reflected by state . . . land use classifications."[147] The Hudson River Park Act mandates that "to the maximum extent practicable, [the Trust] maintain open view corridors to the Hudson River from streets running towards and away from the park."[148] The Park Plan recognizes that the New York City Comprehensive Waterfront Plan was revised to "protect public views of and access to the water" by requiring "visual corridors that offer unobstructed views of the water from the existing street and sidewalk system."[149] USACE must also, more generally, consider "aesthetics" in determining whether the Island would serve the public interest.[150]

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[141] *See Incorporate*, Merriam-Webster, http://www.merriam-webster.com/dictionary/incorporate (last visited Oct. 28, 2015) (defining incorporate as "to unite or work into something already existent so as to form an indistinguishable whole" or "to blend or combine thoroughly").
[142] *See generally* 54 U.S.C. § 300101; Kay D. Weeks & Anne E. Grimmer, The Secretary of the Interior's Standards for Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring & Reconstructing Historic Buildings (1995), *available at* http://www.nps.gov/tps/standards/four-treatments/treatment-guidelines.pdf.
[143] *See* Jeremiah Budin, *$130 Million 'Pier55' Park Looks Like Something Out of* Avatar, Curbed, Nov. 17, 2014, http://ny.curbed.com/archives/2014/11/17/130_million_pier55_park_looks_like_something_out_of_avatar.php (observing that the Proposed Project resembles the setting of the science fiction film *Avatar*).
[144] *See* Application, *supra* note 13, Attachment 4, at 8.
[145] Hudson River Park Act § 8.3(e) (emphasis added).
[146] *See* General Plan, *supra* note 111, at 11.
[147] 33 C.F.R. § 320.4(e).
[148] Hudson River Park Act § 9(a).
[149] General Plan, *supra* note 111, at 6.
[150] 33 C.F.R. § 320.4(a).

Reaching as high as seven stories, the Island would block the scenic river views now available to the general public from the esplanade and from side streets in the area of West 13th Street and will significantly impact the aesthetics of the Park. The Proposed Project is an in-river structure with a footprint similar to that of an average Home Depot store—but approximately five stories taller. It would eliminate views across the Hudson River from the esplanade, Route 9A, and the bikeway, replacing them with a view of the Island's concrete piles, which have the distinctive appearance of "pots" supporting the pier's platform.[151]

The following images illustrate the enormity of the impact. The first is a recent photograph of present conditions. It is taken from the bulkhead, at eye level, midway between Piers 54 and 56—that is, from the centerline the Island would straddle, facing into the water. The second is a rendering included as Figure F-14 to the EAF that shows how the Island would obstruct the view from West 13th Street. The third image below is a rendering prepared by Heatherwick Studio on behalf of HRPT and found in the public domain.

[151] EAF, *supra* note 5, at E-8.

HRPT asserts that there would be a net "positive effect" on visual resources despite this blockage because the Island would provide new "elevated vantage points."[152] However, because of the platform's undulating surface, the primary view from much of the Island would be of the rest of the Island, not of the Hudson River vista. The topography of the island makes a full 180-degree view of the Hudson River vista possible only from the island's western corner, which would accommodate a fraction of the number of people who now enjoy views from the

[152] Application, *supra* note 13, Attachment 4, at 6.

esplanade.[153] The Island's primary vantage point would also be inaccessible to persons who have difficulty ascending to a height of seven stories on foot. And it is doubtful that most pedestrians, runners, and cyclists using the Hudson River Greenway would choose to deviate from their course to access the view from the Island's highest point. For the tens of thousands of motorists who pass by the site each day, such a detour would be effectively impossible.[154]

In short, HRPT proposes to block existing visual corridors and viewsheds that can be readily enjoyed by all passers-by, including cyclists and motorists, with an elevated vantage point requiring a detour and a significant ascent. HRPT provides no public polling data, numerical estimates of diverted pedestrian traffic, or other evidence to support its subjective assertion that the latter is an improvement over the former. In accordance with the Park's General Project Plan and the New York City Comprehensive Waterfront Plan, we believe that "visual corridors that offer unobstructed views of the water from the existing street and sidewalk system" should be preserved.[155]

5. The Island would have a cumulative negative impact in combination with other projects in the area.

The negative impacts discussed above would be compounded by additional construction to improve access to the Island, including the Pier 54 Connector Project and the Crosswalk Project,[156] and by the current Pier 57 Redevelopment Project. At least some of these projects will entail sediment disturbance from the staging of construction barges in shallow water, noise generated by pile driving, and shadowing of previously open water. The multiple projects underway in the vicinity of the Proposed Project would also have cumulative effects on pedestrian and vehicular traffic in the area. The EAF and HRPT's application to USACE do not consider this compounding effect in their analysis.

6. The benefits of the Island would be limited and restricted based upon ability to pay.

As an initial matter, nothing in HRPT's application suggests that there is a significant need for another performing arts venue on the West Side of Manhattan. Outdoor concerts are currently held within Hudson River Park at Pier 84, thirty blocks from the site of the Proposed Project.[157] Film screenings and other events take place at Pier 63, just ten blocks north.[158]

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[153] The bicycle path along the River in the Park is the busiest bicycle path in the United States. *See Bicycling*, Hudson River Park, https://www.hudsonriverpark.org/explore-the-park/activities/bicycling (last visited Nov. 4, 2015).

[154] In 2011, in the EIS for the Pier 57 project, HRPT found that over 4,000 cars traveled on Route 9A at 14th Street *every hour* during peak weekday hours. *See* AKRF, Inc., Pier 57 Redevelopment Project: Draft Environmental Impact Statement, at 14-16 (Oct. 2012), *available at* https://www.hudsonriverpark.org/assets/content/general /11HRP001M_DEIS_14_Transportation.pdf.

[155] General Plan, *supra* note 149, at 6.

[156] The Crosswalk Project will create an at-grade pedestrian crossing across Route 9A at West 13th Street.

[157] *See Hudson Riverrocks*, Hudson River Park, https://www.hudsonriverpark.org/events/series/hudson-riverrocks (last visited Oct. 25, 2015).

[158] *See Pier 63*, Hudson River Park, https://www.hudsonriverpark.org/events/plan-your-event/pier-63 (last visited Oct. 25, 2015).

Central Park regularly hosts free outdoor concerts.[159] The new Culture Shed is under construction at Hudson Yards.[160] And legendary cultural institutions from Madison Square Garden to the Theater District to Lincoln Center are all a short subway ride away. HRPT provides no reason to believe that an additional performing arts space in this area will yield more than a marginal public benefit.

Any public benefit that does result would be disproportionately accessible to those with the ability to pay market price. Pursuant to the Lease approved by the HRPT Board of Directors,[161] Pier55 may charge an admission fee "as it shall determine to be appropriate" for 49 percent of the events held on the Island.[162] The Lease requires Pier55 to provide "free or low cost" admission to the other 51 percent of events, but it does not specify what "low cost" means or include any provision to ensure that the more accessible events and the more exclusive ones are of similar quality.[163] For example, nothing in the Lease prevents Pier55 from charging $1,000 per ticket to Independence Day and Labor Day celebrations on the Island if it so desires.[164] Several prominent local officials, including New York State Assembly Member Deborah Glick and Manhattan Borough President Gale Brewer, have explained that the public should be concerned by the access limitations approved by HRPT.[165] Pier55 is also authorized to sell membership interests in the Proposed Project, a concept that is not well defined or understood,[166] and to hold six annual fundraising events occupying the entirety of the Island.[167]

There is also substantial doubt as to whether the Proposed Project is lawful, as explained fully in Exhibit B to this letter. The Proposed Project does not comply with the Act because the 2013 Amendment to the Act proposed by HRPT was not intended to authorize, and does not in fact authorize, the construction of an entirely new Island or use of the Island for non-water-dependent activities such as concerts.[168]

Nor did HRPT enable meaningful public participation in planning the Proposed Project. According to Assembly Member Glick, HRPT did not disclose to the New York State Legislature that it was in negotiations to build the Island when it proposed the 2013 Amendment to the Act authorizing the reconstruction of Pier 54 outside its historic footprint.[169] When it first

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[159] *See Free Summer Concerts 2015, NYC: The Official Guide*, http://www.nycgo.com/articles/free-summer-concerts-2015 (last visited Oct. 25, 2015).
[160] *See* Robin Pogrebin, *Alex Poots to Be Culture Shed's Artistic Director*, N.Y. Times, Nov. 24, 2014, http://www.nytimes.com/2014/11/25/arts/alex-poots-to-be-culture-sheds-artistic-director.html?ref=arts.
[161] The Lease was approved by HRPT's Board on February 11, 2015. *See Pier 54 Public Review*, Hudson River Park, https://www.hudsonriverpark.org/vision-and-progress/planning-and-construction/meatpacking-district/pier-54-public-review (last visited Oct. 22, 2015).
[162] Lease, *supra* note 48, § 9.03.
[163] *See id.*
[164] *Cf. Save the Date: City Parks Foundation Gala*, City Parks Foundation, http://www.cityparksfoundation.org /event/gala/ (last visited Oct. 26, 2015) (advertising tickets ranging from $1,500 to $25,000 for a concert event at SummerStage in Central Park).
[165] Comment Responses, *supra* note 82, at 30, 32.
[166] Lease, *supra* note 48, § 4.02.
[167] *Id.* § 9.06; *cf. Union Sq. Park Cmty. Coal., Inc. v. N.Y.C. Dep't of Parks & Rec.*, 22 N.Y.3d 648 (2014) (relying in part on the City's retention of control over menu pricing at a restaurant in Union Square to conclude that the City had not improperly alienated parkland under state law).
[168] *See infra* Ex. B, at 50-53.
[169] *See* Foderaro, *supra* note 56.

announced the Proposed Project in November 2014, HRPT allowed the public only two weeks, including the Thanksgiving holiday, to review the lease, the project proposal, and the draft EAF before the first public hearing. These documents comprise over 450 pages. Because HRPT sought no public input until the EAF was substantially complete, stakeholders had no opportunity to identify relevant issues that should be addressed in HRPT's environmental analysis through a public scoping process.[170]

III. USACE should hold a public hearing concerning the Proposed Project.

Pursuant to pursuant to 33 C.F.R. § 327.4, we request a public hearing on HRPT's application. As stated in the public notice issued by USACE, "based upon the number of newspaper articles and unsolicited comments received," the Proposed Project is highly controversial and has attracted considerable public attention.[171] The construction of a new island by a private entity within a public park in the Hudson River is without precedent. As explained in this letter, the Proposed Project poses substantial risks to visual and historic resources, marine life, and the navigable waterways of the United States. It also raises substantial issues of compliance with state and federal law. Because the public notice issued by USACE did not adequately describe the Island's intended purpose, a public hearing would offer members of the public their first meaningful opportunity to address significant questions about the Proposed Project's expected public benefit. Especially in light of the minimal public input solicited and received by HRPT at earlier stages of the process, a public hearing is warranted.[172]

IV. Conclusion

For the reasons explained above, we respectfully request that USACE deny HRPT's request to modify Permit NAN-1998-00290 to build the Island. We appreciate the opportunity to comment on this matter of public importance and thank you for your consideration.

Sincerely,

Michael Gruen
President
The City Club of New York

Enclosures

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[170] *See* U.S. Army Corps of Engineers & City of Dallas, What is NEPA . . . and the Public Scoping Process? (2009), *available at* http://www.swf.usace.army.mil/Portals/47/docs/PAO/DF/PDF/What_is_NEPA_and_the_Scoping_Process_2009.pdf.

[171] Public Notice, *supra* note 32, at 1.

[172] This public hearing announcement should be included in the public notice for any individual permit application, in the event that HRPT, Pier55, Inc., or both apply for a new individual permit.

EXHIBIT A

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

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In the Matter of the Application of
City Club of New York, Robert Buchanan, and Tom Fox,

Petitioners,

- against -

Hudson Park River Trust, Inc. and Pier55, Inc.,

Respondents,

for a Preliminary Injunction, Judgment and Order Pursuant to Article 78 and CPLR § 6301, and Declaratory Judgment Pursuant CPLR § 3001.

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VERIFIED PETITION

Index No. 101068/2015

PRELIMINARY STATEMENT

1. In this combined proceeding, Petitioners seek (1) an injunction under Article 78 of the Civil Practice Law and Rules ("CPLR") and CPLR § 6301 directing the Respondents to stop construction of a new island-pier and connecting walkways in the area between Piers 54 and 57 (the "Pier 55 Project") until they comply with the New York State (the "State") and New York City (the "City") environmental and land-use laws and regulations that govern this proposed construction project in the Hudson River, specifically, the State Environmental Quality Review Act ("SEQRA") and regulations thereunder, the City Environmental Quality Review ("CEQR") and regulations thereunder, and the Hudson River Park Act (the "Park Act") and its accompanying regulations; and (2) declaratory judgment pursuant to § 3001 of the CPLR declaring that using City parkland for the non-park purpose of constructing a concert venue, without explicit statutory authorization, is a violation of the public trust doctrine.

PARTIES

2. Petitioner The City Club of New York, Inc. ("City Club") is a not-for-profit corporation with its offices located at 249 W. 34th Street, New York, NY 10001. The City Club was founded in 1892 to promote effective and honest government in New York City. Its mission today is to promote thoughtful urban land use policy that responds to the needs of all New Yorkers. Its advocacy has included promoting the protection of New York City parks from commercial development, notably in Flushing Meadows-Corona Park, where it opposed the construction of a mega-shopping mall.

3. Petitioner Robert Buchanan is a resident of New York and is employed by the New York Water Trail Association.

4. Petitioner Tom Fox is a resident of New York and is a member of the City Club.

5. Upon information and belief, Respondent Hudson River Park Trust (the "HRPT" or "Trust") is a partnership between the State and City charged with the design, construction, and operation of the five-mile Hudson River Park (the "Park") spanning the west side of Manhattan. Both the Trust and Park are governed by the Park Act, a 1998 state law that established both the Park and its governing requirements.

6. Upon information and belief, Respondent Pier 55, Inc. is a nonprofit corporation established by the Diller-von Furstenberg Family Foundation for the sole purpose of building and operating the Pier 55 Project.

JURISDICTION AND VENUE

7. The New York State Supreme Court has jurisdiction over Petitioners' declaratory judgment and injunctive relief causes of action pursuant to CPLR §§ 3001 and 6301.

8. The New York State Supreme Court has jurisdiction over Petitioners' Article 78 causes of action under CPLR Article 78 § 7804(b).

9. Under CPLR §§ 506(b) and 503(a), this proceeding is brought in New York County as the county in which Respondent HRPT's offices are located and where the material events occurred and are proposed to occur.

FACTS RELEVANT TO ALL CLAIMS

10. Petitioners repeat and reallege the allegations set forth in paragraphs 1 through 9 of this Verified Petition as if fully stated herein.[1]

History of The Hudson River Park and Trust

11. The Park spans approximately five miles[2] along Manhattan's west shore. The Park's southern boundary is Battery Place, and the Park's northern boundary is 59th Street. The Park's western boundary is the United States pierhead line, and the Park's eastern boundary varies from point-to-point, and includes West Street, Eleventh Avenue, and Twelfth Avenue (whichever boundary is more westerly at any point).[3] The Park consists of piers, upland, and water areas.

12. The Park was conceived and developed in concert with the State's and City's environmental protection statutes. In May 1998, in conjunction with the design and development of the Park, and pursuant to the above-referenced environmental statutes, the Empire State Development Corporation and Hudson River Park Conservancy (Respondent HRPT's predecessor) issued an Environmental Impact Statement consisting of more than 900 pages (the "1998 EIS"). The 1998 EIS analyzed many potential and actual environmental impacts resulting from the Park's planned development, and set out required mitigation measures. On July 16, 1998, the Hudson River Park Multi-Purpose Project General Park Plan (the "GPP") was adopted in accordance with the Park Act, which set out the specific projects and operation parameters for the Park.[4]

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[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] *What is the Hudson River Park Trust*, HUDSON RIVER PARK (last visited Mar. 22, 2015), http://www.hudsonriverpark.org/about-us/hrpt (Ex. II).

[3] Hudson River Park Act (1998), N.Y. Sess. Laws 592 (McKinney), §3(e). (the "Hudson River Park Act") (Ex. R).

[4] *See* Hudson River Park Multi-Purpose Project General Park Plan, dated July 19, 1998 ("GPP") (Ex. J).

13. The Park provides critical recreation and entertainment opportunities for City residents and visitors and, equally as important, serves as a vital habitat for the Hudson River's flora and fauna—including fish (over 200 species), birds (85 identified species within the Park's boundaries), mammals, crabs, and more. Many of the referenced indigenous species are threatened or in danger of extinction.[5]

14. The HRPT was established under the Park Act "to design, develop, operate, and maintain" the Park.[6] The HRPT is a thirteen member board charged with governing the Park. Five members are appointed by the Governor, five are appointed by the Mayor, and three by the Manhattan Borough President.

15. In 2013, the Hudson River Park Act was amended to allow the rebuilding of Pier 54 "outside of its historic footprint."[7] This amendment ostensibly allowed the HRPT to build Pier 54 in a slightly different shape, though the term "outside of its historic footprint" is not defined anywhere in the Park Act. In fact, the HRPT board meeting minutes from July 25, 2013 show that the HRPT pushed this amendment through in order "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."[8] This amendment began the HRPT's process of allowing Diller's project to be approved for building.

The Pier 55 Project

16. On November 16, 2014, the HRPT and the Diller-von Furstenberg Family Foundation "announced plans to build 'Pier55' – a river-side, public park and performance space rising seven stories above the water on Manhattan's lower west side," with construction

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[5] *See 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); *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).

[6] Hudson River Park Act §2(e) (Ex. R).

[7] 2013 Amendment to Hudson River Park Act § 9(e) (Ex. B).

[8] HRPT Board meeting minutes, July 25, 2013 at 7 (Ex. P).

"expected to commence in 2016 at a cost in excess of $130 million, to which the City of New York will contribute $17 million."[9] The project has received significant press coverage, with media outlets nicknaming the project Diller's "Fantasy Island"; "billionaire's island"; and "Diller's Island."[10]

17. The Pier 55 Project is to be constructed in conjunction with two other Park improvement projects. One project consists of widening the pedestrian walkway between the Gansevoort Peninsula and Pier 57 (running from Bloomfield Street to 14th Street) (the "Pier 54 Connector"). The widened walkway will "include a widened overwater pedestrian platform, improvements to the Route 9A bikeway alignment, new lay-by area for a future public bus stop, and landscaping."[11] The other related project will "create an at-grade pedestrian crossing across Route 9A at West 13th Street" (the "Crosswalk Project").[12]

18. As described in the HRPT's planning documents, the combined projects will result in 547 new pilings being driven into the Hudson River bed in an area where there have never been pilings before. In addition, the project will result in up to three acres of overwater shading (depending on the sun's position) where no such shading previously existed. Further, approximately 1.94 river acres will be subject to nighttime water-facing spotlights, in an area which has never been subject to such night illumination. For six months per year, the Pier 55 Project area will be home to a floating barge, adding to the overshadowed area, and adding

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[9] *See* Press Release, *Exciting News About Pier 54!*, (Nov. 16, 2014) http://www.hudsonriverpark.org/news-and-updates/exciting-news-about-pier-54 (Ex. I).
[10] *See* 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*, THE NEW YORK TIMES (Nov. 30, 2014), http://www.nytimes.com/2014/12/01/opinion/the-billionaires-park.html (Ex. FF); Inga Saffron, *America's 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 Foderaro, *How Diller and von Furstenberg Got Their Island in Hudson River Park*, THE NEW YORK 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).
[11] *Id.*
[12] *Id.*

moorings and other disturbances (this is slated to be an "actor's barge," which will be the size of some mansions).[13]

19. The Pier 55 Project's location will result in reduced water access to the interpier area between the current Pier 54 and Pier 57. Currently this area is used by recreational boaters, but the construction of this island well outside the footprint of the existing Pier 54 will drastically reduce access for the boaters.[14]

The Pier 55 Project Notice, Comment Period, and Hearing

20. The week before Thanksgiving, on November 17, 2014, the HRPT issued a notice of a public hearing and the opening of a comment period (the "Notice") regarding: (i) a draft lease between the HRPT and Pier55, Inc. (the "Draft Lease""', and upon approval on February 11, 2015 by the HRPT Board of Directors, the "Form Lease");[15] (ii) a proposed amendment to the GPP to reflect the proposed redevelopment under the Draft Lease (the "GPP Amendment"); and (iii) an Environmental Assessment Form prepared by the HRPT in connection with the Draft Lease (the "EAF").[16] During the comment period, the public was supposed to review, analyze, and comment on those three documents (consisting of, collectively, well over 500 pages). The comment period closed on January 23, 2015, having overlapped with the Thanksgiving, Hanukkah, Christmas, and New Year holidays.[17] In addition to affording limited comment time due to the noted holidays, the hearing was delayed from its initially scheduled date on

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[13] EAF at B-12, F-21, F-22, F-28, F-29, F-30 (Ex. H).
[14] Buchanan Aff. ¶¶ 14-16.
[15] *See* Proposed Lease Agreement Between Hudson River Park Trust and Pier55, Inc. http://www.hudsonriverpark.org/assets/content/general/Lease_Draft_11.17.14_(FINAL).pdf (Ex. CC).
[16] *See* Amended Notice of Public Hearing and Public Review and Comment Period regarding both a Proposed Lease Between Hudson River Park Trust and Pier55, Inc. and a Proposed Amendment to Hudson River Park's General Project Plan, Dec. 17, 2014, http://www.hudsonriverpark.org/assets/content/general/Public_Notice_for_Pier_54-11.17.14.pdf (Ex. D).
[17] *See* The City Record, Nov. 18, 2014, at 4240–41 http://www.nyc.gov/html/dcas/downloads/pdf/cityrecord/cityrecord-11-18-14.pdf (Ex. G); Amended Notice at 1 (Ex. D); the original deadline was extended from January 16, 2015 to January 23, 2015.

December 17. Finally occurring on January 12th, 2015, there were only eight business days provided to finalize any comments in consideration of information provided at the hearing.

21. The public hearing was held in the Eisner and Lubin Auditorium at New York University's Kimmel Center, located at 60 Washington Square South, New York, New York 10012 (the "Hearing").[18]

22. The November 17 Notice states that the Hearing was intended to satisfy "the requirements of the Hudson River Park Act regarding significant actions,"[19] which includes "timely and reasonable notification" to the public for any "significant plans or proposed actions with respect to the [P]ark."[20]

23. At the Hearing, which lasted several hours, various stakeholders (including individual community members) expressed a wide range of concerns, including without limitation concerns relating to: (i) responsible environmental impact management; (ii) preservation of the existing Pier 54 structure, including its historically significant landing arch and Pier 54's proposed use by historic ships; (iii) public access to piers in the Park as required under the GPP; (iv) foot traffic; (v) lack of a water dependent use for the project; and (vi) accessibility of the theater proposed to operate on Pier 55 by persons of all incomes.[21]

The Pier 55 Lease

24. The Form Lease includes a minimum 20-year term, with a renewal option making the maximum term 30 years. The leasing parties are the Respondents: Landlord HRPT and tenant Pier55, Inc. The Form Lease specifies the parties' intent in entering into the Lease as for "the redevelopment of Pier 54 and subsequent operation of a public open park space with cultural programming." The Notice more specifically states that the HRPT intends to construct a

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[18] *See* Amended Notice at 1 (Ex. D).
[19] *See Id.* at 3.
[20] *See* Hudson River Park Act §7(1)(f)(ii) (Ex. R).
[21] *See* Public Hearing Transcript, Jan. 12, 2015 (Ex. DD).

new pier "between the existing Pier 54 footprint and the Pier 56 pile field," with the existing Pier 54 to be converted into a pile field.[22]

Petitioners Submitted Comments in Person and in Writing

25. Both individual Petitioners raised concerns about the proposed Pier 55 Project. Tom Fox raised his concerns in person at the public hearing, and both he and Robert Buchanan submitted comments in writing.[23] Their concerns were never addressed.

The HRPT Issued a Negative Declaration, Approved the Draft Lease, and Approved the GPP Amendment The Same Day and Only One Day After Publishing Its Responses to Comments

26. On February 10, 2015, the HRPT published its responses to public comments.[24]

27. Late in the afternoon on February 11, 2015, only one day after issuing its response to public comments (totaling 85 pages), the HRPT published a negative declaration of environmental significance (the "Negative Declaration"). Only two hours later, the HRPT Board met and approved the Draft Lease and GPP Amendment. Incredibly, the Board meeting had previously been scheduled for February 12, the day ***after*** the publication of the Negative Declaration—which would have at least afforded a day for public review, instead of mere hours. The result was that the public was not afforded any opportunity to comment on (or even reasonably review) the Negative Declaration before the Board met to approve the Draft Lease and GPP Amendment.

28. At the February 11 Board meeting, the President of the Hudson River Park Trust Corporation, Madelyn Wils, presented an overview of the Lease for the Board's approval. Ms. Wils's presentation contained significant misstatements. For example, Ms. Wils stated that the

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[22] Amended Notice at 1–2 (Ex. D); *see also* EAF at F-21 (Ex. H).

[23] Hearing Transcript at 49:12 (Ex. DD); ALLEE, KING, ROSEN AND FLEMING, INC., PIER 54 RESPONSE TO COMMENTS RECEIVED DURING PUBLIC REVIEW (PREPARED FOR HRPT). 2-3 (Ex. C).

[24] *See* PIER 54 RESPONSE TO COMMENTS (Ex. C).

Lease would require the new pier to be built "at the site of the current Pier 54."[25] The plans for the Pier 55 Project already show that this is false (only a small fraction will overlap with the current Pier 54 site), and incredibly, the next sentence in the Board meeting minutes contradicts Ms. Wils's comments by specifying that "[t]he new pier would be built between the current Pier 54 and the Pier 56 pile field."[26]

29. Ms. Wils's presentation also did not specify that the Pier 55 Project would constitute a water-dependent use, as required by the Park Act. The minutes show that Ms. Wils stated that the project was being built in accordance with the Park Act, where Ms. Wils said that "[t]he uses permitted by the proposed lease are permitted and encouraged by the Park Act, which authorizes passive and active public open space uses and public recreation and entertainment, including the arts and performing arts."[27] However, Ms. Wils made no mention of whether the Pier 55 Project was a water-dependent use.

30. Ms. Wils stated that the GPP "expressly envisions renovation [of Pier 54] as park space."[28] But Ms. Wils did not explain why, if this were true, the GPP needed amending.

31. Ms. Wils stated that the building of the Pier 55 Project in its proposed location would be "[c]onsistent with the November 2013 amendment to the Park Act."[29] But that amendment allowed for the rebuilding of Pier 54 "outside of its historical footprint."[30] The amendment certainly did not allow building a new island on a new site only slightly overlapping with the current Pier 54's footprint.

32. Several voting Board members, including Directors Stern, Silver, and Pegues, arrived after Ms. Wils began her presentation, and thus voted based on incomplete information.[31]

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[25] HRPT Board Meeting Minutes, Feb. 11, 2015, at 4 (Ex. O).
[26] *Id.* at 5 (emphasis added).
[27] *Id.* at 11.
[28] *Id.*
[29] *Id.*
[30] 2013 Amendment to Hudson River Park Act § 9(e) (Ex. B).
[31] HRPT Board Meeting Minutes, Feb. 11, 2015, at. 6 (Ex. O).

33. The Hudson River Park Trust approved the Lease without issuing any bid prospectus or seeking competing bids for the design and operation of the new pier. All negotiations regarding the building of the Pier 55 Project were conducted behind closed doors with only one party.

The HRPT Violated the Public Trust Doctrine

34. State agencies in charge of public space are bound by the public trust doctrine, which requires state legislative approval before parkland can be alienated for private, non-park purposes.

35. The public trust doctrine is a common law principle, codified in New York State law,[32] that 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. These "public uses" include the provision of free, open areas for recreation and community activities.

36. The HRPT's actions violated the public trust doctrine by alienating public parkland to Pier55, Inc., a private entity. Pier55, Inc. retains tremendous discretion over the use of the new structure, including the power to charge whatever they may want to charge for tickets to 49% of events held in the structure's two event spaces. The Lease between the HRPT and Pier55, Inc. also potentially allows for private memberships to the "island" for permitted events and shows that the new structure is in fact a semi-private event space.

37. The HRPT's actions also violated the public trust doctrine by taking away an important part of protected navigable waters between Pier 54 and Pier 57, currently used by recreational boaters and kayakers.[33]

38. Nothing in the Park Act allows the HRPT to alienate parkland in this manner or to build a large structure such as this one in the Estuarine sanctuary.

39. Nothing in the Park Act construes this amphitheater, with private ticketing for half of its events, as a proper "park use."

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[32] N.Y. Gen. City Law § 20(2) (codifying the public trust doctrine).
[33] Buchanan Aff. ¶ 15.

The HRPT Violated SEQRA and CEQR[34]

40. As a state agency considering a project with a potential environmental impact, the HRPT was required to follow SEQRA and its regulations. The EAF acknowledges that the Pier 55 Project is subject to environmental review under SEQRA regulations and guidelines.[35]

41. Under SEQRA, a state agency must determine whether or not its proposed actions have the potential to cause a significant environmental impact. The agency must publish a declaration of significance in the form of a "positive declaration of significant impact" or "negative declaration of significant impact" before an application can be considered complete and approved by the designated agency.[36]

THE PIER 55 PROJECT IS A TYPE I ACTION UNDER SEQRA, AND THUS PRESUMPTIVELY REQUIRES AN EIS

42. Under SEQRA and its regulations, an agency must determine whether its proposed action is classified as Type I, Type II, or Unlisted. A Type I action is one that is "more likely to require the preparation of an EIS than Unlisted actions."[37] A Type II action is one that has "been determined not to have a significant impact on the environment or [is] otherwise precluded from environmental review under" SEQRA.[38] An action which is not of the type enumerated under NYCRR §§ 617.4 or 617.5 is deemed to be an Unlisted action.[39]

43. The HRPT acknowledges that the proposed Pier 55 Project is a Type I action.

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[34] CEQR is New York City's process for implementing SEQRA, and "can be no less stringent than its state counterpart." *See* New York City Mayor's Office of Environmental Coordination, Frequently Asked Questions, http://www.nyc.gov/html/oec/html/ceqr/faq_general.shtml (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."
[35] EAF at A-1 (Ex. H).
[36] 6 NYCRR § 617.3(a) (Ex. QQ); *see also* Hudson River Park Act § 7-4 (Ex. R).
[37] 6 NY CRR § 617.4(a)–(b) (Ex. QQ).
[38] *Id.* at § 617.5(a).
[39] *Id.* at § 617.2(ak).

44. Since the Pier 55 Project is a Type I action, it is likely to require the preparation of an environmental impact statement ("EIS") under applicable law.[40] In fact, SEQRA regulations state that "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."[41]

THE PIER 55 PROJECT WILL LIKELY CAUSE SIGNIFICANT ENVIRONMENTAL IMPACTS, AND THUS REQUIRES AN EIS

45. The HRPT's Negative Declaration was issued in error.[42] The Pier 55 Project will likely have multiple significant environmental impacts on the Hudson River and surrounding ecosystem.

46. The Project includes the construction of an enormous, new artificial island to be sited in an area of the Hudson River between existing Piers 54 and 57 defined in the Park Act as the "Estuarine Sanctuary."[43] The Estuarine Sanctuary is an undisturbed, never-before developed section of the Hudson River Park that is the stopping point or home to more than 200 fish species and over 85 species of birds found within the Park's boundaries. The Sanctuary also hosts numerous plankton species that are an important food source for fish and other organisms.[44]

47. In the face of the obvious incursion into the Sanctuary area that a project of this scale presents, the EAF states that there will be no loss of habitat, impact on species, or disturbance of natural areas.[45] It is not plausible that the loss of 2.7 acres of overwater area[46] could be neutral as to have no effect on indigenous species and the interpier habitat, which is a

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[40] *Id.* at § 617.4(a)-(b).
[41] *Id.* at § 617.4(a)(1) (emphasis added).
[42] Negative Declaration (Feb. 11, 2015), (Ex. X).
[43] *See* Hudson River Park Act § 8(1) (Ex. R).
[44] Habitat (Ex. L); "*Hudson River Park WILD!*", HUDSON RIVER PARK, http://www.hudsonriverpark.org/events/hudson-river-park-wild (last visited Mar. 10, 2015) (Ex. S).
[45] EAF at B-12 (Ex. H).
[46] *Id.* at F-21.

unique ecosystem.[47] Indeed the Park Act explicitly recognizes that overwater structures have an impact that should be minimized.[48]

48. In its analysis, the EAF states that the Pier 55 Project "may affect" the shortnose and Atlantic sturgeon.[49] The shortnose sturgeon is on the federal and state endangered species lists.[50] And yet the EAF concludes, without explanation or further study, that building a 2.7 acre structure in the middle of these creatures' habitat will have no potential significant impacts to the shortnose sturgeon population.[51]

49. 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 existed before. The complete lack of sunlight underneath much of the pier will affect the flora and fauna currently living in that environment, killing nearly all of it permanently.

50. The new pier will also require driving piles in the river bed, disrupting the sediment in that area and causing significant noise disturbance over the course of the project's multi-year construction. These effects must be studied, and mitigation measures must be developed.

51. 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 effect, will likely operate a water cooled air conditioning unit, which will discharge warm water into the Hudson and, relatedly, disturb the river with noise and artificial light at night.

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[47] (1998 EIS), at 10-36 (Ex. A).
[48] It does so by restricting the total amount of over- and in-water structures: "in the aggregate, no more than eight acres of the water section may be covered or altered by floating structures or minor improvements at any time." Hudson River Park Act §8(3)(c) (Ex. R). Though the project does not currently violate this limit, it is significant that projects of this size are generally considered to have a negative impact on the Park through their overwater coverage.
[49] EAF at F-12 (Ex. H).
[50] *Id.* at F-15.
[51] *Id.*

52. The Pier 55 Project, in combination with the Pier 57 Project that has been expanded to include 250,000 square feet of office space, will potentially 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, with traffic jams occurring daily.[52] The addition of a large amphitheater is likely to result in a significant impact to the Park's bicycle and pedestrian path, which is the busiest in the nation, along with creating safety concerns for vehicles and pedestrians in connection with Route 9A.[53]

53. 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, as set forth in the photo rendering below. The HRPT admits as much in the EAF, where it states that "[w]hile the 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."[54] HRPT's claim is unsubstantiated, with the EAF stating only that there are similar views nearby.

54. The EAF discusses mitigation measures, further acknowledging the potential for significant environmental impacts. Yet those mitigation measures were never fully developed or discussed with community members and stakeholders.

55. The Notice and EAF specify that some portion of the new island will encroach on both the existing Pier 56 pile field and the to-be converted pile field at Pier 54.[55] The HRPT has not studied what effect, if any, the Pier 55 Project will have on the to-be converted pile field at Pier 54.

56. The EAF is inaccurate, insufficient, and not a reasonable basis for issuing a negative declaration of significance.

57. The EAF states broadly that the "[e]nvironmental impacts associated with the development of the Hudson River Park were analyzed" in the 1998 EIS, including the

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[52] Fox Aff. ¶¶ 24–5.
[53] Fox Aff. ¶¶ 26–27.
[54] EAF at B-15 (Ex. H).
[55] Amended Notice at 1-2 (Ex. D); EAF at A-1 (Ex. H).

"renovation of Pier 54 for public park use."[56] That statement is incorrect because the 1998 EIS did not contemplate any changes to the Estuarine Sanctuary and footprint of Pier 54,[57] as currently proposed. The 1998 EIS states that Pier 54 was "to be fully restored for public access" in the *same location* as the previously vacant Pier 54, and would utilize the arches and granite bases from the original pier facade of Pier 54.[58] The 1998 EIS further states that limited maritime activities would be allowed at Pier 54; specifically, that historic ships were anticipated to dock there.[59]

58. Similarly, although the 1998 EIS referenced Pier 56 (an area that the proposed Pier 55 Project will encroach upon), it did not contemplate an artificial island being erected on top of it. Instead, the 1998 EIS described Pier 56 as an "ecological pier" created for use as a "wildlife habitat" with indigenous plants to attract birds and butterflies.[60]

59. The 1998 EIS makes no mention of Pier 55 or the interpier space in which the overwhelming majority of the new pier will be constructed. This demonstrates that the 1998 EIS never contemplated a project like the Pier 55 Project.[61] The HRPT's reliance on the 1998 EIS is therefore entirely misplaced.

60. The EAF is further flawed because it fails to adequately describe the total area impacted by the Pier 55 Project and its related projects, the Pier 54 Connector, and the Crosswalk Project. The EAF analyzes potential impacts based on the contention that the Pier 55 Project disturbs less than one river acre.[62] Yet the EAF also states that the new artificial island will create "approximately 2.7 acres of overwater structure consisting of a new 320-by-320-foot platform," and result "in the creation of approximately 1.9 acres of lighted pile field habitat."[63]

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[56] 1998 EIS at 1-16 (Ex. A).
[57] EAF at A-8 (Ex. H).
[58] 1998 EIS at 6-4 (Ex. A).
[59] *Id.*
[60] 1998 EIS at I-8 and S-6 (Ex. A); *see also* GPP at 11 (Ex. J), where the GPP designates the existing Pier 56 pile field as an "ecological pier."
[61] 1998 EIS (Ex. A)
[62] EAF at F-21 (Ex. H).
[63] *Id.*

And the Pier 55 Project includes the conversion of the existing Pier 54 into a pile field, which is not a part of the "1 acre" and was not examined or discussed in the 1998 EIS, GPP, or any Park permits.[64] Nowhere is this disparity explained.

61. The EAF is also flawed because it uses an erroneous "No Action" baseline to evaluate the potential effects of the Pier 55 Project.[65] The EAF examines the impacts of the Pier 55 Project by comparing the impact of a new Pier 55 against a reconstructed Pier 54 on its current pilings. This comparison is incorrect because there is currently no plan to reconstruct Pier 54. Instead, the HRPT intends to proceed with demolishing Pier 54 and leave it as a pile field, regardless of whether or not the Pier 55 Project proceeds.

62. Notably, in 2013, the HRPT issued a separate Environmental Impact Statement with regard to the repair and rehabilitation of Pier 57. Pier 57 is also located within the Hudson River Park and sits just a few blocks north of Pier 54.[66] The HRPT prepared an EIS for Pier 57 based on an EAF which stated that the Pier 57 revitalization project could result in potentially significant adverse environmental impacts.[67] There are no obvious reasons for treating the Pier 57 project differently from the Pier 55 Project. If anything, the potential environmental consequences of the Pier 55 Project are far more dire.

63. Other projects of similar or smaller size around the city received Positive Declarations, even though they presented fewer potential impacts.

64. In sum, an agency that approves an action "which may have a significant effect on the environment" must prepare or cause to be prepared an EIS.[68] The foregoing facts show that there are several potential significant environmental impacts resulting from the Pier 55 Project. As such, the HRPT violated SEQRA when it failed to prepare an EIS.

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[64] 1998 EIS (Ex. A); GPP (Ex. J).
[65] EAF at A-8 (Ex. H).
[66] *See* Pier 57 Redevelopment Project Final Environmental Impact Statement, February 2013, (Ex. PP).
[67] *Id.* at Part II; *see also* Pier 57: Draft Scope of Work for an Environmental Impact Statement, at 1 (Ex. Y).
[68] N.Y. Envtl. Conserv. § 8-0109.2.

THE HRPT FAILED TO COMPLY WITH THE NEW YORK CITY WATER REVITALIZATION PLAN, WHICH ALSO VIOLATES SEQRA

65. SEQRA also requires compliance with the New York City Water Revitalization Plan ("NYC WRP").[69] The Pier 55 Project is inconsistent with the NYC WRP's policy goal of "protect[ing] and restor[ing] the quality and function of ecological systems within the New York City coastal area."[70] Extensive driving of new pile systems, uncontrolled release of contaminated stormwater, and nighttime illumination and daytime shading of the Estuarine Sanctuary clearly do not comport with the goals of protecting and restoring the quality of the Hudson River's ecological system.

66. In addition, though the HRPT filled out and certified a Coastal Assessment Form, as required by the NYC WRP, the form contains several mischaracterizations and misstatements, including a representation that the project would not result in any direct or indirect discharge into any body of water.[71]

67. The Pier 55 Project is also inconsistent with the NYC WRP's policy goal of promoting "use of New York City's waterways for commercial and recreational boating and water-dependent transportation."[72] The proposed new pier will dramatically reduce access to the river for recreational boat users who currently enjoy boating activities in the interpier area.

68. The failure to comply with the NYC WRP constitutes an independent SEQRA violation.

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[69] 6 NYCRR § 617.6(a)(5) (Ex. QQ).
[70] NYC WRP, Part I (Policy 4) (Ex. W).
[71] *See* WRP Consistency Form, attached to EAF (Ex. H).
[72] NYC WRP, Part I (Policy 3) (Ex. W).

The Project Also Violates the Hudson River Park Act and Its Accompanying Regulations

THE HRPT VIOLATED THE PARK ACT BECAUSE THE PARK ACT BARS THE CONSTRUCTION OF ANY NON-WATER DEPENDENT USES WITHIN THE WATER SECTION OF THE HUDSON RIVER PARK

69. The Park Act requires that, within the Estuarine Sanctuary, "only water dependent uses shall be permitted."[73] The Pier 55 Project does not qualify as a "water dependent use" of the Estuarine Sanctuary.

70. The Park Act narrowly defines "water dependent use" as any use "that depends on utilization of resources found in the water section; 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; facilities and incidental structures needed to dock and service boats; and scientific and educational activities that by their nature require access to marine reserve waters."[74] 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."[75]

71. The Pier 55 Project does not fall within any of the permitted uses under the Park Act: it does not depend on resources found in the water section, does not depend on access to the water, is not a facility for docking and servicing boats, and is not being built for research that requires access to the Estuarine Sanctuary.[76]

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[73] *See* Hudson River Park Act § 3(m) (Ex. R); *see also* 1998 EIS at 24-115 (Ex. A), where in response to a comment expressing concern about the potential construction of floating platforms in the Park, the 1998 EIS specifically states that no platforms will be built in the Park for non-water-dependent uses.

[74] *Id.*; *see also* N.Y. Exc. 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." (Ex. XX).

[75] *See* Hudson River Park Act § 3(l) (Ex. R).

[76] EAF (Ex. H); Proposed Lease Agreement (Ex. CC).

72. The Pier 55 Project therefore does not meet the definition of "water dependent use" under the Park Act.[77]

THE HRPT VIOLATED ITS OWN REGULATIONS WHEN IT FAILED TO FOLLOW A PROPER BIDDING PROCESS FOR THE RIGHT TO BUILD AND MANAGE THE PIER 55 PROJECT

73. The HRPT's Regulations require any "capital expenditure in excess of one million dollars over the proposed term of the agreement" to go through a bidding process.[78] The HRPT was required to issue a bid prospectus for the Pier 55 Project.

74. No bid prospectus was issued for the Pier 55 Project, thereby violating another part of the HRPT's governing regulations.

THE HRPT VIOLATED THE PARK ACT, AS THE EAF CONTAINS NO PLANS TO RETAIN THE HISTORIC ELEMENTS FROM THE WHITE STAR LINE AS REQUIRED BY THE PARK ACT

75. The Park Act requires any reconstruction of Pier 54 outside of its historic footprint to incorporate the historic elements of the White Star Line, including the iron arch.[79]

76. The EAF does not contain any indications that the design of the Pier 55 Project will incorporate the iron arch or other historic elements of the White Star Line. In fact, the EAF only mentions the iron arch and the White Star Line as part of the "No Action" condition, indicating the HRPT has no intention of incorporating these elements into the design of the Pier 55 Project.

FIRST CAUSE OF ACTION

77. Petitioners repeat and reallege each and every allegation in paragraphs 1 through 76 as if fully stated therein.

78. The public trust doctrine bars the alienation of parkland without the explicit and unambiguous consent of the State Legislature.[80]

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[77] Hudson River Park Act § 3(m) (Ex. R).
[78] 21 NYCRR § 752.1(a)(2) (Ex. SS).
[79] *See* Hudson River Park Act § 8.3(e) (Ex. R).
[80] *See, e.g.*, *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623, 630 (2001).

79. The public trust doctrine has been codified in New York State statutes.[81]

80. The HRPT's actions constitute an alienation of parkland and were taken without any legislative approval. The alienation is also for a non-public use, compounding its alienating effects.

81. The HRPT's actions therefore violate the public trust doctrine.

82. An actual and justiciable controversy exists between Petitioners/Plaintiffs and Respondents/Defendants because Petitioners/Plaintiffs contend, and Respondents/Defendants dispute, that Defendants' actions as described above have violated the public use doctrine.

83. Petitioners/Plaintiffs seek a declaration that the HRPT's issuance of negative declaration, amendment to the GPP, and engaging into a Lease with Pier55, Inc. to build the Pier 55 Project violate the public trust doctrine.

SECOND CAUSE OF ACTION

84. Petitioners repeat and reallege each and every allegation in paragraphs 1 through 83 as if fully stated therein.

85. SEQRA is a New York state statute designed to protect the environment.

86. CEQR is a New York City law designed to protect the environment.

87. Under SEQRA, the "environment" is broadly defined as:

> the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character.[82]

88. SEQRA protects the environment by requiring "the responsible agency, as early as possible in the formulation of a proposal for an action, [to] make an initial determination whether an environmental impact statement need be prepared for the action."[83]

89. Under SEQRA, "agency" means "any state or local agency."[84]

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[81] N.Y. Gen. City Law § 20(2) (codifying the public trust doctrine).
[82] N.Y. Envtl. Conserv. § 8-0105.6 (Ex. AAA).
[83] N.Y. Envtl. Conserv. § 8-0109.4 (Ex. BBB).

90. The HRPT is an agency as defined by SEQRA.

91. Under SEQRA, an "action" is defined as:

> projects or activities directly undertaken by any agency; or projects or activities supported in whole or part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies; or projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies.[85]

92. The Pier 55 Project involves a project or activities "directly undertaken by" an agency, the HRPT.[86]

93. The Pier 55 Project is a "project[] or activit[y] involving the issuance to a person of a lease."[87]

94. The Pier 55 Project is a project or activity "supported...in part through contracts, grants, subsidies, loans or other forms of funding assistance from one or more agencies."[88]

95. The Pier 55 Project "involv[es]...the issuance of a permit."[89]

96. By reason of the foregoing, the Pier 55 Project constitutes an "action" within the meaning of SEQRA.[90]

97. The Pier 55 Project is a Type I action.

98. The Pier 55 Project has the potential for significant environmental impact.

99. The HRPT was required to follow SEQRA and issue a positive declaration of significant environmental impact requiring, among other things, the preparation of an EIS.

100. The HRPT's failure to prepare an EIS is a violation of SEQRA.

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[84] N.Y. Envtl. Conserv. § 8-0105.3 (Ex. AAA).
[85] *Id.* at § 8-0105.4(i).
[86] *Id.*
[87] Lease Agreement between Hudson River Park Trust, Landlord, and Pier55, Inc., Tenant (Feb. 11, 2015) ("Lease") (Ex. BB).
[88] EAF (Ex. H).
[89] *Id.*
[90] N.Y. Envtl. Conserv. § 8-0105.4.

101. By issuing a negative declaration on February 11, 2015, the HRPT indicated that it refuses to prepare an EIS.

102. Petitioners have no remedy at law.

103. This Article 78 Petition is the proper vehicle for this cause of action as the HRPT is a governmental entity, and the cause of action lies in its violation of lawful procedure, error of law, and arbitrariness and capriciousness.[91]

104. This Court has jurisdiction and is the proper venue for this Article 78 Petition.

105. By reason of the foregoing, Petitioners are entitled to an order:

i. Enjoining the start of construction of any aspect of the Pier 55 Project until such time as Respondents fully comply with the requirements of SEQRA/CEQR, including completing an EIS; and

ii. declaring that any approvals made by any government entity, without compliance with SEQRA/CEQR, are null and void *ab initio*.

THIRD CAUSE OF ACTION

106. Petitioners repeat and reallege each and every allegation of paragraphs 1 through 105 as if fully stated therein.

107. The Park Act requires that within the Estuarine Sanctuary, "only water dependent uses shall be permitted," for which water is integral to such use (*e.g.,* boating, swimming, sailing, or waterborne commerce).[92]

108. The EAF incorrectly states that the Pier 55 Project is a water-dependent use.[93] The Pier 55 Project does not depend on utilization of the resources found in the water section, does not involve any recreational activities that depend on access to the water section, is not a facility needed to dock and service boats, and does not involve scientific and educational activities that by their nature require access to marine reserve waters.

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[91] CPLR § 7803.
[92] *See* Hudson River Park Act § 3(m) (Ex. R).
[93] EAF at B-11 (Ex. H).

109. The Pier 55 Project is therefore not a water-dependent use under the Park Act, which governs the Park.

110. Accordingly, construction of the Pier 55 Project would violate the Park Act § 3(m).

111. The HRPT's regulations also require the HRPT to host a bidding process for capital expenditures in excess of one million dollars over the proposed term of the agreement.[94]

112. The HRPT did not host such a bidding process nor did it issue a bidding prospectus.

113. Accordingly, the HRPT violated its own regulations.

114. The Hudson River Park Act requires any rebuilding of Pier 54 outside of its current footprint to include historic elements of the White Star Lines.

115. The HRPT's plans for the Pier 55 Project do not include any historic elements of the White Star Lines.

116. Accordingly, the HRPT violated the Hudson River Park Act, § 8.3(e).

117. Petitioners have no remedy at law.

118. This Article 78 Petition is the proper vehicle for this cause of action as the HRPT is a governmental entity, and the cause of action lies in its violation of lawful procedure, error of law, and arbitrariness and capriciousness. CPLR § 7803.

119. This Court has jurisdiction and is the proper venue for this Article 78 Petition.

120. By reason of the foregoing, Petitioners are entitled to an order:

i. Enjoining the start of construction of any aspect of the Pier 55 Project until such time as Respondents fully comply with the requirements of the Hudson River Park Act and its accompanying regulations; and

ii. declaring that any approvals made by the Hudson River Park Trust, without compliance with the Hudson River Park Act, are null and void *ab initio*.

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[94] 21 NYCRR § 752.1(a)(2) (Ex. SS).

FOURTH CAUSE OF ACTION

121. Petitioners repeat and reallege each and every allegation of paragraphs 1 through 120 as if fully stated therein.

122. 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."

123. 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.

124. As discussed above, Respondents' actions constitute violations of the public trust doctrine, SEQRA, CEQR, the Hudson River Park Act, and its accompanying regulations.

125. 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.

126. Petitioners have demonstrated a danger of irreparable injury absent an injunction because the HRPT is preparing to drive numerous pilings into the Estuarine Sanctuary, causing significant damage to protected wildlife. These pilings will also displace a navigable and protected area used by kayakers and boaters.

127. 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. However, if they start driving pilings into the Estuarine Sanctuary, they will undoubtedly do serious and irreversible damage to the riverbed and the protected Estuarine Sanctuary.

128. Petitioners have no remedy at law.

129. This Article 78 Petition is the proper vehicle for this cause of action as the HRPT is a governmental entity, and the cause of action lies in its violation of lawful procedure, error of law, and arbitrariness and capriciousness.[95]

130. This Court has jurisdiction and is the proper venue for this Article 78 Petition.

131. By reason of the foregoing, Petitioners are entitled to an order enjoining the start of construction of any aspect of the Pier 55 Project, until such time as Respondents comply fully with the requirements of the public trust doctrine, SEQRA, CEQR, and the Hudson River Park Act and its accompanying regulations.

PRIOR APPLICATION

132. No prior application has been made for the relief requested herein.

RELIEF REQUESTED

WHEREFORE, for the reasons stated herein and in the accompanying papers, Petitioners demand judgment as follows:

As to the First Cause of Action:

i. Enjoining the start of construction of any aspect of the Pier 55 Project until such time as Defendants fully comply with the public trust doctrine; and

ii. declaring that any approvals made by the Hudson River Park Trust, without compliance with the public trust doctrine, are null and void *ab initio*.

As to the Second Cause of Action:

i. Enjoining the start of construction of any aspect of the Pier 55 Project until such time as Respondents fully comply with the requirements of SEQRA/CEQR; and

ii. declaring that any approvals made by the Hudson River Park Trust, without compliance with SEQRA/CEQR, are null and void *ab initio*.

As to the Third Cause of Action:

[95] CPLR § 7803.

i. Enjoining the start of construction of any aspect of the Pier 55 Project until such time as Respondents fully comply with the requirements of the Hudson River Park Act and its accompanying regulations; and

ii. declaring that any approvals made by the Hudson River Park Trust, without compliance with the Hudson River Park Act and its accompanying regulations, are null and void *ab initio*.

As to the Fourth Cause of Action:

i. Enjoining the start of construction of any aspect of the Pier 55 Project until such time as Respondents fully comply with the requirements of the public trust doctrine, SEQRA/CEQR, and the Hudson River Park Act.

As to All Causes of Action:

i. Affording such additional relief, including award of fees as the Court may deem just and proper.

Dated: New York, New York
June 11, 2015

Respectfully submitted,

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EXHIBIT B

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

---------- X

THE CITY CLUB OF NEW YORK, INC., ROBERT BUCHANAN, AND TOM FOX :

Petitioners/Plaintiffs, :

- against - :

HUDSON RIVER PARK TRUST and PIER55, Inc., :

Respondents/Defendants. :

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MEMORANDUM IN SUPPORT OF VERIFIED PETITION

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ORAL ARGUMENT REQUESTED

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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]

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[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"

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[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

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[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").

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[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

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[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).

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[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

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[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

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[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.

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[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

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[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

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[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

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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.

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[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

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[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

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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

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[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.

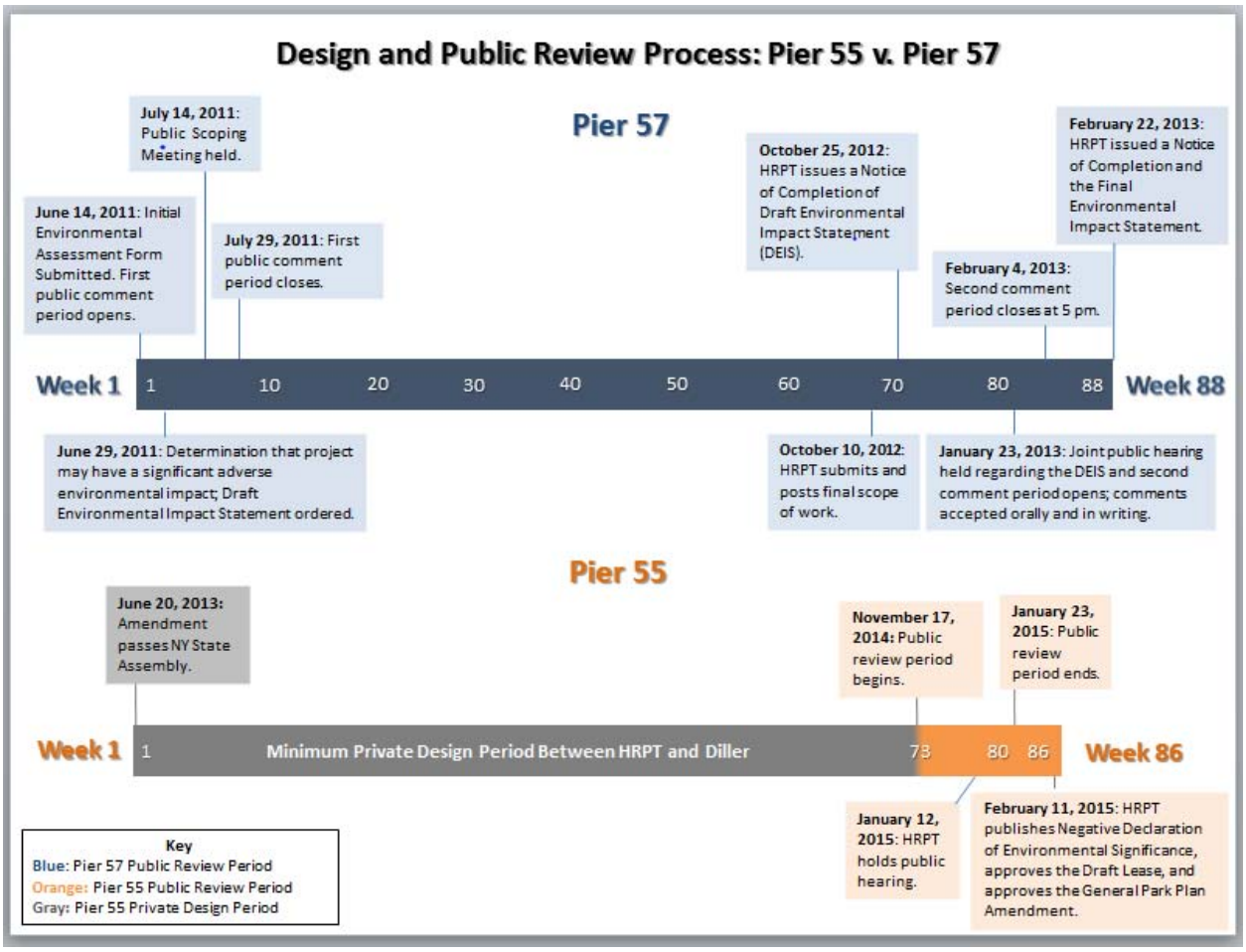
[87] 6 NYCRR § 617.3(g)(1) ("Considering only a part or segment of an action is contrary to the intent of SEQR. If a lead agency believes that circumstances warrant a segmented review, it must clearly state in its determination of significance, and any subsequent EIS, the supporting reasons and must 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.

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[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]

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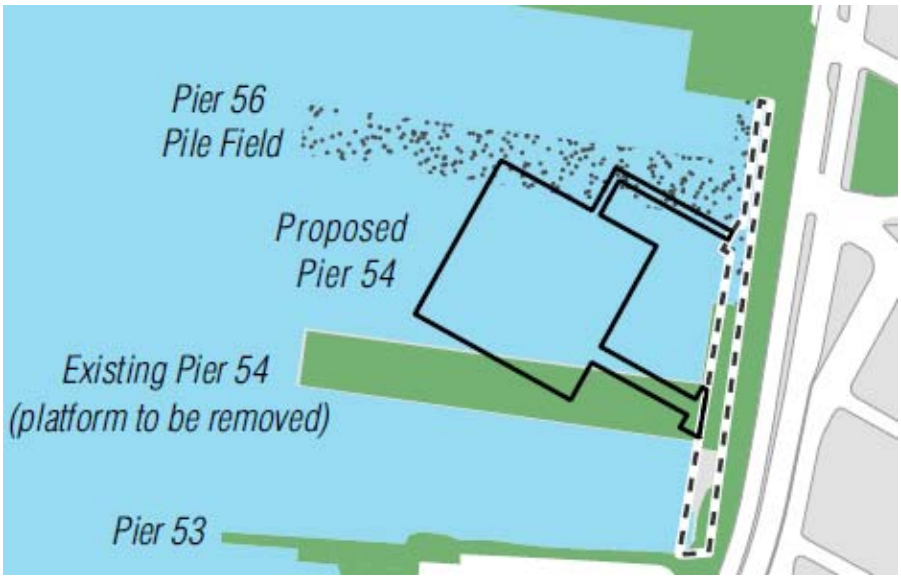
[103] Hudson River Park Act, § 8(3)(a) (Ex. R).
[104] Hudson River Park Act § 3(l), (m) (Ex.R).
[105] The HRPT has continually stated that this Pier 55 Project is intended to be a rebuilding of the current Pier 54 "outside of its original footprint," as permitted by the 2013 Amendment, and that 2013 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***.

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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

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[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

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[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

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[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:

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[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

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Attorneys for Petitioners

EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------x
IN THE MATTER OF THE APPLICATION OF
CITY CLUB OF NEW YORK, ROBERT
BUCHANNAN, AND TOM FOX

Petitioners/Plaintiffs,

-against-

HUDSON PARK RIVER TRUST, INC. AND
PIER55, INC.

Respondents/Defendants,

----------x

AFFIDAVIT OF ROBERT BUCHANAN

Index No. 101068-2015

IAS Part 6

Hon. Joan Lobis

Motion Sequence No. 3

STATE OF NEW YORK)
) s.s.:
COUNTY OF NEW YORK)

Robert Buchanan, being duly sworn; deposes and says:

1. My name is Robert Buchanan. I reside currently and have resided for the last nine years at 251 Clermont Avenue, Brooklyn, New York.

2. I submit this Affidavit in further support of Petitioners' Order to Show Cause, filed on August 24, 2015, in the above-captioned matter.

3. The facts stated in this Affidavit are true and of my own personal knowledge.

* * *

4. As stated in my previous affidavit, I regularly lead student and community rowing crews north from Pier 40 to the Pier 54–57 embayments, which I use as 'coves' where we can get out of the wind and tide to rest or to practice rowing and sail-handling techniques. These stretches of open but protected water—a land-based metaphor would be 'stepping stones'—are, to my mind, publicly-owned open spaces and crucial recreational resources. Placing a large island structure in their midst would represent a loss of usable water and thus significant injury, both for me in my capacity as an educator and for present and future generations of on-water paddlers, rowers, and sailors.

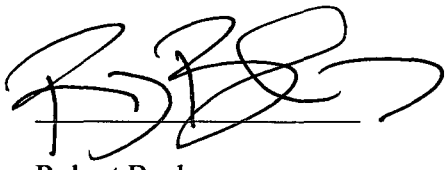
5. I frequently visit the Hudson River Park for recreation and to enjoy views of the Hudson, in addition to the water-dependent activities I discuss in my previous affidavit submitted in the above-captioned matter (Buchanan Aff. ¶¶ 10–14). I regularly ride my bicycle through the Park, including past the Pier 54–57 embayments when en-route to other boathouses, to take samples for the Citzens Water Quality Testing program (which I administer on behalf of the New York City Water Trail Association), and for recreational enjoyment.

6. The bulk of my teaching in the park naturally takes place during the school year, either at the end of the spring semester or the beginning and middle of the fall semester.

7. Respondents claim in their Answer that daily monitoring activities were put in place on July 1, 2015, in the area of Pier 54 and the proposed Pier 55 Project.

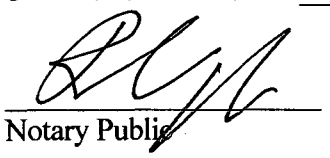
8. During much of the month of July 2015, I was out of the country due to a death in the family and therefore during that time did not lead any on-water excursions on the Hudson River Park. Moreover, because school is out during the summer, I do not lead groups of students through the area during the summer months, including the month of July.

Date: September 16, 2015



Robert Buchanan

Sworn to before me this 16th day of September, 2015.



Notary Public

ROSS ANDREW NEGLIA
Notary Public, State of New York
No. 01NE6254044
Qualified in Kings County
Commission Expires January 9, 2016

My commission expires January 9, 2016.