

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

----- X
DEVELOP DON'T DESTROY
(BROOKLYN), INC., ET AL.,

Petitioners-Plaintiffs,

For a Judgment pursuant to CPLR Article 78 of
the CPLR and Declaratory Judgment

- against -

URBAN DEVELOPMENT CORPORATION
d/b/a EMPIRE STATE DEVELOPMENT
CORPORATION, ET AL.,

Respondents-Defendants.
----- X

Index No. 104597/07
Justice Joan A. Madden

**MEMORANDUM OF LAW OF METROPOLITAN TRANSPORTATION
AUTHORITY IN OPPOSITION TO THE VERIFIED PETITION**

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	2
Introduction.....	2
MTA’s Negotiations With Forest City Ratner Companies to Redevelop the Vanderbilt Yard	5
The SEQRA Approval Process.....	9
ARGUMENT	12
I. MTA TOOK A HARD LOOK AT THE PROJECT’S POTENTIAL ENVIRONMENTAL IMPACTS.....	12
A. MTA Adopted Detailed SEQRA Findings	13
B. MTA Took an Especially Active Role in ESDC’s SEQRA Review	16
II. THE FEIS MORE THAN MET THE HARD LOOK STANDARD UNDER SEQRA	17
A. The Transit Ridership Projections in the FEIS Were Reasonable	18
B. The FEIS Provided a Reasonable Basis To Conclude That Coney Island Was Not a Preferable Location for the Arena.....	20
C. The FEIS Appropriately Considered Site Security	22
1. The FEIS’s Level of Detail Regarding Security Is Comparable to That of Other Post-9/11 Environmental Impact Statements.....	23
2. The Project Is Not a Facility That Is Prone to a Reasonably Foreseeable Catastrophe	25
D. Petitioners’ Remaining SEQRA Allegations Are Baseless	26
III. PETITIONERS’ UDC ACT CLAIMS ARE MERITLESS.....	28
IV. THE PACB WAS NOT REQUIRED TO ISSUE A SEQRA FINDINGS STATEMENT FOR THE PROJECT	28

A.	As a Financial Oversight Arm of the Governor and the Legislature, the PACB Is Not an “Agency” Subject to SEQRA	28
B.	Because the PACB Reviews and Approves Only Financial Plans for Public Authorities’ Projects and Does Not Undertake, Fund or Otherwise Approve Such Projects, It Is Not an “Involved Agency” Under SEQRA and Its Approval of an Application Is Not an “Action” Under SEQRA.....	31
1.	The PACB Is Not an “Involved Agency”	31
2.	The PACB Did Not Take an “Action” Under SEQRA.....	31
	CONCLUSION.....	35

PRELIMINARY STATEMENT

Respondent Metropolitan Transportation Authority (“MTA”) respectfully submits this Memorandum of Law in opposition to the Verified Petition and Complaint (the “Petition”) of petitioners Develop Don’t Destroy (Brooklyn), Inc., et al. (“Petitioners”), which seeks to annul certain actions and approvals related to the Atlantic Yards Project (the “Project”) by MTA, the New York State Urban Development Corporation d/b/a Empire State Development Corporation (“ESDC”), and the New York State Public Authorities Control Board (“PACB”).

The Project, a major undertaking to redevelop an approximately 22-acre area in Brooklyn, includes significant benefits to the MTA and the transit riding public, including major enhancements to the MTA Long Island Rail Road (“LIRR”) Vanderbilt Rail Yard and the MTA New York City Transit (“NYCT”) Atlantic Avenue/Pacific Street subway station complex. This important initiative also aims to provide a sports arena that will serve as the home of the NBA Nets team and significant new affordable and market-rate housing, office space, open space, local retail and community services, and possibly a hotel. A large portion of the Project will be built on a deck above a reconfigured and relocated Vanderbilt Yard.

Petitioners’ sole cause of action against the MTA is demonstrably incorrect and should be dismissed. Petitioners claim that the MTA violated the New York State Environmental Quality Review Act (“SEQRA”) because it allegedly failed to adopt a SEQRA “findings statement” or otherwise take a “hard look” at the Project’s environmental impacts. As set forth below, the record is clear that MTA (1) adopted its own detailed

SEQRA findings statement, and (2) took an exceptionally hard look at the Project's anticipated environmental impacts and benefits.

In addition to their mistaken claim against the MTA, Petitioners allege that ESDC violated SEQRA in a number of substantive and procedural respects, that the PACB violated SEQRA by not adopting SEQRA findings and that ESDC violated the Urban Development Corporation Act. All of these allegations are without merit. As set forth below and in the memoranda of law and supporting papers submitted by ESDC and the PACB, ESDC's Final Environmental Impact Statement ("FEIS") for the Project, its own SEQRA findings statement and the extensive opportunities it provided for public comment on the Project demonstrate an exceptionally "hard look" at the Project's environmental impacts, as well as adherence to all requirements of SEQRA and the Urban Development Corporation Act. Moreover, because the PACB's role is narrowly confined to approving the funding mechanisms of certain public authorities, the PACB is not required to adopt SEQRA findings, and has never done so in its 30-year existence.

While Petitioners may disagree with the determinations made by ESDC, MTA, and the PACB, there is absolutely no basis in the law to set these decisions aside. The Petition should therefore be dismissed in its entirety and the redevelopment of Atlantic Yards allowed to proceed.

STATEMENT OF FACTS

Introduction

The Project will redevelop and revitalize an approximately 22-acre area in Brooklyn, roughly bounded by Flatbush and 4th Avenues to the west, Vanderbilt Avenue to the east, Atlantic Avenue to the north, and Dean and Pacific Streets to the south, an area that includes

the LIRR Vanderbilt Rail Yard (“Yard”) and an NYCT Yard for retired buses. The Project will reconfigure, upgrade and partially relocate the Yard to meet current railroad standards and address the current and future needs of the LIRR. The upgraded Yard will expand storage and inspection capacity, create new employee facilities, provide a new signal system and improve Yard functionality, including equipment servicing. Currently, tracks in the Yard are built of conventional rail with wooden ties and switch timbers, and there is no direct connection between the Yard and the LIRR Atlantic Terminal. Trains entering the Yard from the LIRR Atlantic Terminal currently must travel east, past the Yard, switch, and reverse direction to enter the Yard. Tracks are spaced close together, allowing only narrow passageways between trains for inspections and limiting toilet servicing to the two outer tracks (requiring trains to be moved in and out of position until each train has had its turn on an outer track). The Yard lacks a “drill” track (to permit switching trains from one track to another within the Yard), and only one track can accommodate the LIRR’s 10-car trains. Most Yard switches must be operated manually.

The upgraded and relocated Yard will be built below street grade on the eastern end of the existing rail Yard footprint to allow for both the continuation of LIRR Yard operations and the operation of the arena. The upgraded Yard will include: (1) a “drill track” on the northern portion of Block 1119, which will be used for switching trains; (2) a new “West Portal,” which will provide a direct route from the LIRR Atlantic Terminal to the upgraded Yard and a second means of train egress from Atlantic Terminal, adding safety, security and flexibility in the event of an emergency on the main line; (3) extended tracks able to accommodate an additional 10-car train; (4) expanded spacing between tracks to facilitate inspections and toilet servicing; and (5) a new, modern indoor power substation. Above the

upgraded Yard, FCRC would build a platform, which would serve as both a protective roof for the LIRR operations and as a base for the new development to be built above.

In order to provide for the continued operation of the LIRR Atlantic Branch during construction of the arena, a temporary rail yard will be built prior to the completion of the upgraded Yard. Work on this temporary rail yard is now underway.

The Project also includes a major new entrance and other enhancements to the Atlantic Avenue/Pacific Street subway station complex at the southeast corner of Atlantic and Flatbush Avenues. Currently, pedestrians approaching the Atlantic Avenue/Pacific Street subway station from the south must cross the large and busy Atlantic Avenue to enter the subway station. As indicated in the FEIS, the intersection of Atlantic and Flatbush Avenues has the greatest number of pedestrian injuries in the FEIS study area. Record, Exhibit 15 at 12-15.

The new entrance to the Atlantic Avenue/Pacific Street subway station complex will enhance subway access and pedestrian safety by making it unnecessary for pedestrians approaching the subway station from the south to cross Atlantic Avenue. Instead, they will be able to use the new subway entrance in the "Urban Room" on the Project site, which will include new escalators, stairways and passageways leading to the subway, as well as an elevator affording access to disabled transit users. New stairways and ramps to the subway platforms will be constructed, existing but unused passages and shafts in the station will be rehabilitated, and new emergency exits will be provided.

All rail and subway infrastructure improvements are scheduled to be included in the first phase of the Project. In addition to the considerable transit improvements, the Project also includes the MTA's sale of air rights above the property and certain fee interests in

Block 1120 for \$100 million, which will provide significant support to MTA's capital program.

A full description of the balance of the Project, including the arena, residential and commercial buildings, and open space, is set forth in the FEIS and in the Verified Answer of Respondent ESDC.

MTA's Negotiations With Forest City Ratner Companies to Redevelop the Vanderbilt Yard

On February 18, 2005, ESDC, the City, the New York City Economic Development Corporation ("EDC"), and Forest City Ratner Companies ("FCRC") executed a memorandum of agreement concerning the Project. Record, Exhibit 1. The memorandum of agreement contemplated an arena and mixed-use development, partially constructed on certain properties owned by the MTA, including the Vanderbilt Yard, and discussed proposed Project financing, tax exemptions, design guidelines, property acquisition and disposition, anticipated reviews and approvals by public agencies, and other subjects related to the Project. Record, Exhibit 1.

At the same time, the MTA and FCRC were engaged in discussions concerning the use of portions of the Yard and air rights above it for the proposed Project. On February 24, 2005, MTA and FCRC executed a non-binding letter agreement. Record, Exhibit 2. Although the MTA agreed to cooperate with FCRC, MTA made clear that it was under no obligation to go forward with the Project. To this end, the letter agreement provided that "[n]othing in this letter shall obligate MTA to sell or lease MTA Properties to FCRC, EDC or ESDC or preclude MTA from determining, in its sole discretion, to use a competitive process, including, without limitation, competitive bidding, for determining the fair market

value of MTA Properties and/or to assist the MTA Board in determining to whom to sell or lease MTA Properties.” Record, Exhibit 2 at 1.

The February 24 letter agreement also set forth various conditions for any future agreements, including technical requirements for future design and operations, as well as planning, construction and operating costs. Record, Exhibit 2. Because the Yard is an active rail yard, it was of paramount importance to the MTA and LIRR that rail operations not be adversely affected during the Project’s planning, construction, or operation. The letter agreement specified requirements for a temporary rail yard to maintain railroad operations prior to completion of the Project, as well as the requirements for an enhanced permanent Yard. Record, Exhibit 2. The revitalized Yard will include enhanced capacity to store longer trains, a switching track to improve Yard functionality, and a fully interlocked configuration of switches and signals. Record, Exhibit 2.

On May 24, 2005, as contemplated by the February 24, 2005 letter agreement, the MTA issued a request for proposals (“RFP”) for the sale or lease of property interests in the Yard. Record, Exhibit 3. In addition to publishing advertisements for the RFP, the MTA also sent copies of the RFP to several developers.

The goal of the RFP was to dispose of land or air rights to “maximize the economic benefit to the MTA for improvement of the public transportation facilities and functions of the MTA and minimize the economic and environmental risk to MTA,” considering the “economic development, planning, and civic needs and desires of the City and the State; [c]onsideration of the interests of the surrounding community; [t]he selection of a developer... with the experience, reputation, and creditworthiness appropriate for the successful development of a project of this magnitude and importance[; and c]onsistency

with the Long Island Rail Road's need to continually operate critical transportation services within the Vanderbilt Yard and related support facilities." Record, Exhibit 3 at 3.

The RFP emphasized that the Vanderbilt Yard was essential at its current location for LIRR service on its Atlantic Branch, and set forth MTA's requirements for disposition of the site, which included, *inter alia*, that any development over the active rail Yard would be no less than 22 feet above the rails. Record, Exhibit 3 at 5. The RFP stated that the MTA would consider various dispositions and yard configurations, including proposals that contemplated a disposition of only a portion of the site, proposals that consolidated the Yard to the eastern end of the site, proposals including land not under MTA ownership, and proposals rebuilding the Yard in its current location. Record, Exhibit 3 at 6-7.

The RFP included selection criteria that the MTA would use to evaluate the proposals. The selection criteria included such considerations as the quantity and certainty of financial return to the MTA; financial viability; the overall economic development benefit; the developer's experience, financial qualifications, and previous record of performance with public agencies; the timeframe for commencement and completion; the overall quality of the proposal; the developer's commitment to ensure MTA/LIRR operating requirements with minimal impact to railroad operations; and other considerations. Record, Exhibit 3 at 18-19.

The RFP required that all responses be received by the MTA by July 6, 2005. Record, Exhibit 3 at 13. The RFP emphasized that MTA retained the right to reject all proposals and to dispose of the property outside of the RFP process. Record, Exhibit 3 at 21.

In response to the RFP, MTA received two proposals, one from FCRC and the other from Extell Development Company ("Extell"). MTA staff conducted extensive reviews of

each proposal and requested clarifications from both Extell and FCRC. MTA staff conducted at least three briefings for Board members on the proposals. Record, Exhibit 5.

On July 27, 2005, the MTA Board met and discussed the FCRC and Extell proposals. Following discussion, the Board adopted a resolution authorizing the MTA Chairman and Executive Director and their designees to negotiate with FCRC for a period of 45 days and to present the Board with the terms of the results of any successful negotiations. The resolution emphasized that if the MTA was not able to negotiate an acceptable agreement with FCRC, then the Chairman and Executive Director were authorized to terminate negotiations with FCRC. Record, Exhibit 7 at 6.

On September 14, 2005, the MTA Board held a Special Board Meeting, at which the MTA Chairman reported that, as a result of continued negotiations with FCRC, FCRC increased the cash portion of its bid from \$50 million to \$100 million. The Chairman also discussed the proposed infrastructure improvements and other items included in the FCRC proposal. Following discussion, the Board adopted a resolution authorizing continued negotiations with FCRC and stating that no further action should be taken with respect to the Extell proposal. Record, Exhibit 9.

On September 15, 2005, MTA, LIRR, and FCRC agreed to a non-binding term sheet for the proposed sale of property interests in the Yard to FCRC. Record, Exhibit 10. The term sheet made clear that MTA was not bound in any way to the FCRC proposal, stating that “[t]he parties acknowledge and agree that this term sheet does not bind either party to purchase or sell the [Vanderbilt Yard] Property or the Additional Property, and that the parties will not be bound until definitive documents are executed and delivered and until all required approvals have been completed.” Record, Exhibit 10 at 3. The term sheet also

stated that “the Closing of the purchase and sale shall be subject to the completion of all public approvals for the FCRC Atlantic Yards Project, of which the development of the VD Yard as set forth in the FCRC Proposal forms a part, including approval of an ESDC General Project Plan, Public Authorities Control Board approval, approval under the Eminent Domain Procedure Law, City and State funding approvals, and a final environmental impact statement.” Record, Exhibit 10 at 3.

The SEQRA Approval Process

MTA was well aware of its responsibilities as an “involved agency” under SEQRA and of the need for the completion of a final environmental impact statement before committing to go forward with the Project, as reflected in the term sheet, the RFP, the letter agreement with FCRC, and various MTA Board resolutions concerning the Project.

Although ESDC was the “lead agency” under SEQRA, the MTA played an active role in the SEQRA process. MTA staff, including members of LIRR and NYCT, as well as MTA’s own legal staff and special outside environmental counsel, participated extensively in the SEQRA environmental review process. MTA assisted in preparing the draft and final scoping documents and the Draft Environmental Impact Statement (“DEIS”) and Final Environmental Impact Statement (“FEIS”), and reviewed numerous drafts of those documents. MTA attended the DEIS hearing, as well as at least one of the public forums. MTA worked closely with ESDC and its consultants and counsel not only to ensure that the MTA was familiar with the Project’s overall environmental impacts, but also to lend its experience and expertise to the environmental review, particularly concerning subways, commuter rail, buses, pedestrians, traffic, and other areas of transportation analysis. See, e.g., Record, Exhibit 22.

On November 29, 2006, Katherine Lapp, MTA's Executive Director, sent a memorandum to all Board members enclosing a set of CD-ROMs containing the entire FEIS. Also enclosed was a printed copy of the FEIS Executive Summary, which is a 45-page document describing the Project, its anticipated environmental impacts, and proposed mitigation measures. The memorandum also stated that printed copies of the entire FEIS were available for review at the MTA offices at 347 Madison Avenue. Record, Exhibit 16.

On December 7, 2006, Ms. Lapp forwarded three additional documents for the Board's review: (1) a "staff summary" discussing the proposed MTA SEQRA findings statement and proposed resolution authorizing the MTA to enter into agreements to proceed with the Project; (2) a document entitled "Summary of MTA Environmental Findings for Atlantic Yards Arena and Redevelopment Project" ("Summary of Findings"); and (3) a draft Board resolution concerning the MTA SEQRA findings statement. Ms. Lapp further indicated in her cover memo that she expected that the full MTA SEQRA findings statement would be sent to Board members the following day. Record, Exhibit 17.

The seven-page Summary of Findings was prepared for the Board by MTA staff to provide a roadmap for the lengthy MTA SEQRA findings statement that the Board would be receiving. The Summary described the Project (with particular emphasis on the LIRR rail yard and subway station improvements), summarized the SEQRA review process, set forth all significant environmental impacts identified in the FEIS that could not be mitigated, summarized transportation-related impacts and mitigation measures, weighed and balanced the benefits and impacts of the Project with those of the alternatives, and set forth the statutory findings required by SEQRA. Record, Exhibit 21.

On December 8, 2006, Ms. Lapp sent all MTA Board members the full 91-page proposed “Findings Under the State Environmental Quality Review Act by the Metropolitan Transportation Authority, Long Island Rail Road, and New York City Transit In Connection With the Atlantic Yards Arena and Redevelopment Project” (“MTA Findings Statement”). Record, Exhibit 19.

The MTA Findings Statement described in considerable detail the Project, its purpose and need, its procedural history, the methodology for the DEIS and FEIS, the required discretionary actions by all involved public agencies, the Project’s benefits, the impacts disclosed in the FEIS, the proposed mitigation measures, unmitigated significant impacts, and alternatives to the Project. Record, Exhibit 23.

As required by SEQRA, the proposed MTA Findings Statement also weighed and balanced the Project’s impacts and benefits, compared the Project with the alternatives studied in the FEIS, and included the following proposed Board findings:

Having considered the DEIS and the FEIS, including the comments on the DEIS and responses thereto, and comments received on the FEIS, and the preceding written facts and conclusions, MTA, LIRR, and NYCT find and certify that:

- (1) the requirements of Article 8 of the New York Environmental Conservation Law and its implementing regulations, 6 N.Y.C.R.R. Part 617, have been met; and
- (2) consistent with social, economic and other essential considerations from among the reasonable alternatives available, the Project is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that the FEIS and this Findings Statement have identified as practicable.

Record, Exhibit 23.

On December 11, 2006, the MTA Board's Capital Construction, Planning & Real Estate Committee met and, *inter alia*, approved moving the proposed MTA Findings Statement to the full MTA Board. Record, Exhibit 20.

The full MTA Board met on December 13, 2006 and unanimously approved and adopted the MTA Findings Statement, thereby making the findings required by SEQRA. The Board also authorized the Chairman and Executive Director and their respective designees to proceed with the MTA's portion of the Project, thus completing the MTA's SEQRA process. Record, Exhibits 21-25.

On February 14, 2007, MTA and LIRR entered into a temporary license agreement with an FCRC affiliate granting that affiliate a temporary, non-exclusive license to enter upon the Vanderbilt Yard for the purpose of constructing the temporary rail yard. MTA continues to negotiate the terms of the remaining transactions with FCRC. It has yet to enter into binding agreements with FCRC to dispose of its property interest on or above the Project site.

ARGUMENT

POINT I. MTA TOOK A HARD LOOK AT THE PROJECT'S POTENTIAL ENVIRONMENTAL IMPACTS

Petitioners allege that the MTA did not adopt a findings statement as required by SEQRA or otherwise take a "hard look" at the Project's anticipated environmental impacts. See Verified Petition ¶¶ 425-29; Petitioners' Memorandum of Law at 10, 49-51. Petitioners simply are mistaken on both counts. The record is unambiguously clear that MTA not only adopted a detailed SEQRA findings statement, but also took an exceptionally hard look at the Project's anticipated environmental impacts.

A. MTA Adopted Detailed SEQRA Findings

Notwithstanding Petitioners' incorrect assertions to the contrary, the MTA Board approved and adopted a detailed MTA Findings Statement pursuant to SEQRA on December 13, 2006. Record, Exhibits 23-25. Petitioners are under the mistaken impression that "the only SEQRA-related document ever reviewed by MTA, its staff, or its committees prior to that agency's approval of the Project is a document entitled a "Summary of Environmental Findings." Petitioners' Memorandum of Law at 50.

Had Petitioners bothered to inquire,¹ they would have learned that the "Summary of Environmental Findings" was just that: a *summary* of MTA's detailed 91-page environmental findings statement. In fact, even a cursory reading of the first paragraph of the Summary of Environmental Findings makes clear that it was not the only document concerning environmental impacts being considered or adopted by the agency. The first paragraph of the summary, quoting the SEQRA statute and regulations, states that, before an involved agency takes action, it must "adopt a written findings statement that 'considers the relevant environmental impacts presented in an EIS, weighs and balances them with social, economic and other essential considerations, provides a rationale for the agency's decision and certifies that the SEQR requirements have been met.'" Record, Exhibit 21 at 1. The paragraph concludes:

The enclosed MTA Findings Statement, to be considered by the MTA, LIRR and NYCT trustees on December 13, 2006, is intended to satisfy these agencies' respective SEQRA obligations with respect to the proposed Atlantic Yards Project. The following is a summary of the MTA Findings Statement.

¹ We are not aware of any request by Petitioners or Petitioners' counsel for a copy of MTA's Atlantic Yards SEQRA Findings Statement.

Record, Exhibit 21 at 1 (emphasis added).

Without even asking the MTA for the full Findings Statement clearly referenced in the summary, Petitioners belittle the summary because it merely summarizes the Project's unmitigated environmental impacts and mitigation measures. Petitioners then baldly assert that the "severe significant and admittedly unmitigated adverse environmental impacts of the project were neither quantified nor further discussed, either in the Summary or in deliberations of the MTA Capital Construction, Planning and Real Estate Committee," and that the full MTA Board "did not even review the summary findings it adopted." Petitioners' Memorandum of Law at 50-51. To the contrary, the MTA Findings Statement described, in great detail, the Project, its purpose and need, its procedural history, the technical methodology employed in the DEIS and FEIS, the required discretionary actions by all public agencies, the Project's benefits, the impacts disclosed in the FEIS, the proposed mitigation measures, unmitigated significant impacts, and alternatives to the Project. Record, Exhibit 23.

After carefully and thoroughly discussing the Project's impacts, the Findings Statement then considers the Project's benefits and weighs and balances the Project's impacts and benefits with those of the alternatives considered in the FEIS. Record, Exhibit 23 at 89-91. The Findings Statement concludes:

On balance, after considering the benefits and impacts of the project disclosed in the FEIS, the MTA, LIRR, and NYCT conclude that the density of the project at the project site is appropriate and that the social, economic and environmental benefits of its density outweigh the reduction in traffic and other environmental impacts that could be achieved through a further reduction in density.

Record, Exhibit 23 at 91.

Finally, the Findings Statement sets forth the required statutory findings:

Having considered the DEIS and the FEIS, including the comments on the DEIS and responses thereto, and comments received on the FEIS, and the preceding written facts and conclusions, MTA, LIRR, and NYCT find and certify that:

(1) the requirements of Article 8 of the New York Environmental Conservation Law and its implementing regulations, 6 N.Y.C.R.R. Part 617, have been met; and

(2) consistent with social, economic and other essential considerations from among the reasonable alternatives available, the Project is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that the FEIS and this Findings Statement have identified as practicable.

Record, Exhibit 23 at 91.

Not only did MTA properly adopt a detailed environmental findings statement, but, as set forth in the record, the MTA Board was kept well informed about the SEQRA review and was provided with all relevant SEQRA documents in advance of its committee and full Board meetings. As set forth more fully above, each Board member was sent in advance of the December 13 Board meeting: (1) a full copy of the FEIS on CD-ROM, (2) a printed copy of the detailed FEIS Executive Summary, (3) a “staff summary” discussing the proposed findings statement and the proposed resolution adopting those findings; (4) the proposed Board resolution adopting findings and authorizing the MTA to proceed with its portion of the Project; (5) the Summary of Environmental Findings; and (6) the full MTA Findings Statement. In addition, a printed copy of the full FEIS was available for each Board member’s review at MTA’s offices. Record, Exhibits 16-19. Contrary to Petitioners’ misleading assertions, the MTA took a very hard look at the Project’s impacts, adopted a detailed findings statement, and more than satisfied its responsibilities under SEQRA.²

² Although Petitioners have not alleged a cause of action challenging MTA’s RFP process, paragraphs 151 through 172 of the Petition purport to describe the MTA RFP process. Even if a cause of action concerning the RFP process had been pleaded, however, Petitioners

B. MTA Took an Especially Active Role in ESDC's SEQRA Review

An involved agency can, and often does, satisfy its SEQRA responsibilities by reviewing a lead agency's FEIS and then issuing its findings statement on the basis of that document. In the Atlantic Yards Project, however, the MTA took an exceptionally active role throughout the entire SEQRA process and was thus able to make its findings on the basis of an environmental review with which MTA was already fully familiar.

MTA staff, including senior representatives from LIRR and NYCT, as well as MTA's own legal counsel and outside environmental counsel, participated extensively in the SEQRA environmental review process, from the earliest phases of environmental scoping in September 2005, preparation of the DEIS from October 2005 through July 2006, attendance at the DEIS hearing on August 23, 2006, preparation of the FEIS in response to public comments from September through November 2006, and the adoption of agency findings in December 2006. MTA staff and outside counsel worked side-by-side with ESDC and its consultants and counsel not only to ensure that the MTA was familiar with the Project's anticipated environmental impacts and benefits, but to lend their experience and expertise to the environmental review, particularly in areas concerning transportation. MTA staff and environmental counsel attended nearly every SEQRA meeting, including those concerning the preparation of the draft and final scoping documents, the DEIS, and the FEIS, and

would lack standing to challenge MTA's decision to negotiate exclusively with FCRC because none of the Petitioners submitted a bid. See, e.g., In re Madison Square Garden, L.P. v. New York Metropolitan Trans. Auth., 19 A.D.3d 284, 286, 799 N.Y.S.2d 186, 188 (1st Dep't 2005). Moreover, since MTA decided to negotiate exclusively with FCRC in 2005, any such challenge would be barred by the four-month statute of limitations for bringing an Article 78 proceeding. N.Y. CPLR § 207. The same statute of limitations would also bar any claim based on Paragraph 11 of the Petition, which incorrectly asserts that MTA effectively approved the Project before commencing the SEQRA process. We note that neither the Petition nor Petitioners' Memorandum of Law asserts any such causes of action.

carefully reviewed drafts of those documents as they were prepared by ESDC's technical consultants. See, e.g., Record, Exhibit 22. The MTA was thus familiar not only with the conclusions of the FEIS, but also with the analyses and methodologies behind those conclusions.

In short, MTA not only identified and took a "hard look" at the relevant areas of environmental concern, but also set forth in the MTA Findings Statement a "reasoned elaboration of the basis for its determination." Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 417, 494 N.E.2d 429, 436, 503 N.Y.S.2d 298, 306 (1986). Petitioners' SEQRA claims against the MTA are therefore entirely without merit and should be dismissed.

POINT II. THE FEIS MORE THAN MET THE HARD LOOK STANDARD UNDER SEQRA

As set forth in detail in ESDC's Memorandum of Law, the FEIS for the Project more than satisfied the Court of Appeals' standard in Jackson that the lead agency under SEQRA (1) identify the relevant areas of environmental concern for a proposed action; (2) take a "hard look" at each of those areas; and (3) provide a reasoned explanation for its decision. The extensive FEIS for the Project did precisely that and provided a fully rational basis for ESDC's and MTA's SEQRA findings with respect to both the significant environmental impacts of the Project and the comparative impacts and benefits of feasible alternatives. To avoid repetition, we respectfully refer the Court to ESDC's Memorandum of Law with respect to the Petitioners' claims that the FEIS failed to properly assess these matters. Several of Petitioners' SEQRA claims deserve mention by MTA, however, as discussed below.

A. The Transit Ridership Projections in the FEIS Were Reasonable

Petitioners assert that the FEIS contains inaccurate assumptions about the projected growth in transit ridership, and even go so far as to accuse ESDC of “purposefully” relying on faulty information. Petitioners’ Memorandum of Law at 61-62. Those assertions are nonsense. In fact, it is Petitioners’ characterization of the growth rate used in the FEIS that is inaccurate and misleading.

Background growth is one factor used in SEQRA transportation analyses, along with such other factors as existing traffic, transit and pedestrian conditions in a defined traffic study area, expected future projects in that study area, trip generation rates for the proposed new project’s various uses, “mode splits” (auto, subway, bus, walking, etc.) and temporal distributions (time of day) for such uses, traffic peak hours for weekdays and weekends, vehicle occupancy rates and other factors, all of which contribute to an overall assessment of expected traffic, transit and pedestrian impacts from a proposed action.

Petitioners, quoting from Response to Comment 13-6 in the FEIS (Chapter 24, page 24-378), have challenged the FEIS’s use of a 0.5 percent annual background growth rate. However, that is precisely the rate recommended by New York City’s 2001 CEQR Technical Manual.³ Moreover, Petitioners neglect to mention that in addition to the 0.5 percent growth rate, the FEIS also includes the demand generated by a large number of discrete development projects proposed to be built in downtown Brooklyn over the next ten years. Indeed, following the sentence quoted by Petitioners on page 62 of their Memorandum of Law, the very next sentence in FEIS Response 13-6, states:

³ The 2001 CEQR Technical Manual (“CEQR Manual”), published by the City of New York, is considered to contain the most appropriate technical analysis methods and guidelines for conducting environmental impact assessment of projects in the City.

However, it is important to note that in addition to this background growth, the transportation analyses in the DEIS also reflect the anticipated travel demand from a total of 33 discrete No Build developments in Brooklyn, comprising approximately 6,281 dwelling units, 5.19 million sf of office space, 1.14 million sf of retail space and 2.43 million sf of other space (community facility, academic, hotel, court, etc.). These developments were selected for inclusion as discrete No Build sites based on their size, completion date and proximity to the project site.... The estimates of future travel demand used for the DEIS transportation analyses therefore reflect not only a 0.5 percent per year background growth rate, but the demand that would be generated by much of the development reasonably likely to be developed in and around Downtown Brooklyn by 2016.

Record, Exhibit 15 at 24-378 (emphasis added). See also Record, Exhibit 15 at 2-8 (FEIS Chapter 2, “Procedural and Analytical Framework”); Record, Exhibit 15 at Appendix C (Memorandum: “Summary of No Build Sites Considered for the EIS Transportation Analyses”).

In short, the background growth rate for the transportation analyses in the FEIS includes all reasonably foreseeable developments in the area, plus an additional 0.5 percent per year. Petitioners’ assertions regarding transit ridership projections are simply incorrect.⁴

As noted above, MTA and NYCT staff and counsel worked closely with ESDC, particularly in matters concerning public transportation. MTA and NYCT looked closely at the projections of growth in transit ridership used in the FEIS because the capacity of the transit systems and their ability to serve the public in the future are of paramount importance to the MTA. In the view of the MTA and NYCT, the transit growth projections in the FEIS were eminently reasonable.

⁴ The background transit growth rates cited by Petitioners are for the 24-hour weekday period; in the past few years, however, peak growth has been slower than 24-hour weekday growth. Changes in subway ridership have occurred in recent years as a result of many factors, and predicting future changes in ridership based solely on current or recent data is simplistic; results would vary significantly depending on which time periods were chosen.

B. The FEIS Provided a Reasonable Basis to Conclude That Coney Island Was Not a Preferable Location for the Arena

Petitioners also argue that ESDC did not take a hard look at Coney Island as an alternative site for the arena. However, as Petitioners concede, ESDC was not required to prove empirically that the Atlantic Yards site was unequivocally superior to all other locations. Rather, ESDC had to take a hard look at this issue and make a reasoned decision, taking into account relevant environmental and other factors. That Petitioners disagree with ESDC's decision does not make that decision irrational or unreasoned. As the extensive discussion of Coney Island (and other potential alternative sites for the arena) in the FEIS demonstrates, ESDC clearly took a hard look and had a reasoned basis for its decision.

Petitioners argue that the FEIS ignored information suggesting that Coney Island is a superior arena location, and even go as far as to say that ESDC "purposefully excluded material information" about Coney Island. Petitioners' Memorandum of Law at 62-66. To the contrary, it is Petitioners who pick and choose information improperly.

Petitioners principally argue that ESDC acted irrationally because the FEIS concluded that Coney Island "is less transit-accessible" than the Atlantic Yards site. To this end, they focus on the relative capacities of the subway stations in Coney Island and at Atlantic Yards. Petitioners' Memorandum of Law at 64. That, however, tells less than half of the story. Petitioners mischaracterize the FEIS's discussion of Coney Island, selectively quoting phrases convenient to their arguments. For instance, the full sentence from which Petitioners plucked the phrase "is less transit-accessible" reads in full:

First, Coney Island is less transit-accessible and geographically central than the proposed project site, and could result in a higher share of automobile trips through Coney Island's limited number of access corridors."

Record, Exhibit 15 at 24-47 (FEIS Chapter 24, Response to Comment 1-9) (emphasis added). Petitioners simply chose to ignore two important reasons stated in that very sentence as to why the Coney Island location is not ideal for the arena: (1) that Coney Island is more remote than the centrally located Atlantic Yards, and (2) that, because of Coney Island's location and proximity to highways, etc., a greater share of people would likely travel by automobile to a Coney Island arena than to one located near Downtown Brooklyn. Petitioners also conveniently ignore the fact that the Atlantic Yard site is directly adjacent to the LIRR terminal and that 12 subway lines converge near Atlantic Yards, providing direct access, without the need to transfer, from nearly every point served by the New York City subway system, and a significant portion of Long Island. See Record, Exhibit 15 at 1-9 through 1-13 (FEIS Chapter 1, "Project Description").

Petitioners also fail to acknowledge the differences stated in the FEIS between the proposed arena and the facilities considered in the earlier studies cited by Petitioners. While the facilities considered in the earlier studies would have had a smaller capacity than the proposed arena and would principally host amateur sporting events, the Project's arena in contrast would host the Nets, a professional NBA basketball team; would have a seating capacity of approximately 18,000 people for basketball games; would host approximately 225 events per year; and would draw visitors from a wider geographic area than the facility proposed at Coney Island. Record, Exhibit 15 at 1-12 (FEIS Chapter 1, "Project Description").

Instead, Petitioners discuss only the physical capacities of the Coney Island and Atlantic Avenue subway stations. As demonstrated by the comprehensive analysis of transit facilities in the FEIS (in which MTA and NYCT staff actively participated), however, the

Atlantic Avenue/Pacific Street subway station and the other nearby transit facilities have sufficient capacity to safely accommodate arena patrons even at full-capacity events. See Record, Exhibit 15 at Chapter 13 (FEIS Chapter 13, “Transit and Pedestrians”).

In addition to the compelling arguments about transit access, the FEIS provides other reasons why the Atlantic Yards area is superior to Coney Island, including engineering considerations, reasons why a mixed-use project is desirable, and reasons why such a development should be located close to or within a central business district such as Downtown Brooklyn. For a fuller discussion of these issues, the MTA respectfully refers the Court to pages 1-9 through 1-13 of Chapter 1 of the FEIS (“Project Description”) and pages 24-46 through 24-48 and 24-525 through 24-526 of Chapter 24 of the FEIS (“Response to Comments”) (Record, Exhibit 15), as well as to ESDC’s Memorandum of Law and supporting papers.

In sum, the FEIS provides a thorough discussion of why the Atlantic Yards location is superior to Coney Island for the arena. ESDC’s decision rejecting a Coney Island site was rationally based, fully informed and in no sense arbitrary and capricious or an abuse of discretion.

C. The FEIS Appropriately Considered Site Security

Petitioners argue that ESDC failed to consider security and threats from terrorism, and even go as far as to say that ESDC “purposefully ignored” those concerns. Petitioners’ Memorandum of Law at 24. As demonstrated in the FEIS, that simply is not true. Moreover, the information presented in the FEIS is at an appropriate level of detail for an environmental disclosure document, and Petitioners have cited no authority to the contrary.

1. The FEIS's Level of Detail Regarding Security Is Comparable to That of Other Post-9/11 Environmental Impact Statements

Petitioners argue that, since September 11, 2001, environmental impact statements in New York of “potentially attractive terrorist targets” include detailed discussions of “the environmental impacts of terrorism.” Petitioners’ Memorandum of Law at 30. That simply is not the case. Petitioners have cited no relevant authority or example showing why ESDC should have analyzed, in an environmental impact statement, such threats as “forced entry, covert entry, ballistics, explosions, and chemical, biological and radiological weapons,” as alleged in the Affidavit of Norman Groner, sworn to March 12, 2007 (“Groner Aff.”).

Certainly, among New York’s recent large-scale redevelopment projects, the one with the greatest concern for potential terrorist activity is the redevelopment of the World Trade Center site in Lower Manhattan. Yet the Final Generic Environmental Impact Statement (“FGEIS”) for the World Trade Center Memorial and Redevelopment Plan, which Petitioners claim contains an “extensive discussion of life and safety measures planned for the building, as well as the plan for screening vehicles before they were allowed to enter the complex,” Petitioners’ Memorandum of Law at 30, describes only in broad terms (as in the Project’s FEIS) the safety and planned security measures at that site. See World Trade Center Memorial and Redevelopment Plan FGEIS at pp. S-11, S-14, S-17, 27-25, 27-28 through 27-30, 6-7, *available at* http://renewnyc.com/plan_des_dev/environmental_review.asp.

Likewise, the multi-volume Final Environmental Impact Statement prepared by the Port Authority of New York and New Jersey for its new PATH station at the World Trade Center contains a succinct four-pages on the safety and security measures to be implemented at the site. Although that chapter mentions terrorist attacks, it does so only to state that the

terrorist attacks of September 11, 2001 “have elevated national attention toward personal safety, and the security of the Preferred Alternative and the WTC site is of paramount concern to PANYNJ.” The PATH FEIS broadly discusses the safety and security measures to be implemented for that project, but does not specifically analyze the possibility of a terrorist attack on the facility. See Permanent WTC Path Terminal Final Environmental Impact Statement and Section 4(f) Evaluation, *available at* <http://www.panynj.gov/drp/wtctch/feis.php>.

Petitioners also state, incorrectly, that MTA’s Fulton Street Transit Center Final Environmental Impact Statement “included a detailed discussion of life safety measures, a ‘Smoke Purge Study,’ and a ‘Threat and Risk Assessment Study,’” and that the MTA/LIRR East Side Access Final Environmental Impact Statement “plainly stated that risk assessment methods were considered.” Petitioners’ Memorandum of Law at 30-31. While each of those documents contains a chapter entitled “Safety and Security,” neither chapter exceeds seven pages nor mentions the possibility of a terrorist attack. Moreover, the safety and security measures to be implemented are discussed using broad language similar to that used in the World Trade Center FGEIS. See Fulton Street Transit Center Final Environmental Impact Statement and Section 4(f) Evaluation, *available at* <http://www.mta.info/capconstr/fstc/feis.htm>; East Side Access Final Environmental Impact Statement, *available at* <http://www.mta.info/capconstr/esas/feis.htm>. Petitioners simply mischaracterize those documents.

The Project’s FEIS includes an appropriate discussion of security and safety plans similar to the discussions provided in the FEISs cited by Petitioners. As discussed in the Project’s FEIS, the project sponsors will coordinate their security and safety plans with the

New York City Police and Fire Departments. See Record, Exhibit 15 at 1-21 through 1-22, 1-31, 24-538 (Response G-11), 24-539 through 24-540 (Response G-16), 24-541 (Response G-20). Specifically, the FEIS states:

The proposed project would implement its own site security plan, which includes measures such as the deployment of security staff and monitoring and screening procedures. Private security staff and security systems would be provided for the project: additional security personnel at arena events, screening of office tenants and visitors, and private security for the residential and open space components of the proposed project. The project sponsors have consulted with the FDNY regarding access needs of emergency vehicles and other safety considerations, such as evacuation plans for places of public gathering and fire protection and security measures. The project sponsors also met with NYPD to review the overall project and public safety and security measures.

Record, Exhibit 15 at 1-31. As more fully set forth in the submissions by ESDC, security was carefully considered in the Project's design and planned operation. Contrary to Petitioners' suggestions, it would run contrary to common sense and to the protection of the public's safety and welfare to include a more detailed discussion of the security and safety measures being implemented for the Project in an FEIS that is required to be publicly distributed and posted on the internet for anyone with a computer and internet access to inspect. See Laws of New York, 2005, Chapter 641.

2. The Project Is Not a Facility That Is Prone to a Reasonably Foreseeable Catastrophe

As conceded by Petitioners, the SEQRA regulations require that an EIS evaluate the "reasonably foreseeable catastrophic impacts" of "facilities which in and of themselves could be prone to explosions or catastrophic failure." Petitioners' Memorandum of Law at 24-25 (emphasis supplied). The SEQRA regulations state that "[t]his analysis would likely occur in the review of such actions as an oil supertanker port, a liquid propane gas/liquid natural gas facility, or the siting of a hazardous waste treatment facility. It does not apply in the review

of such actions as shopping malls, residential subdivisions or office facilities.” 6 NYCRR § 617.9(b)(6). It is beyond dispute that the Project, a mixed-use urban development, does not contemplate construction of a facility that “in and of” itself is “prone to explosions or catastrophic failure.”

Tellingly, the only cases cited by Petitioners arise under the National Environmental Policy Act (“NEPA”) and consider unusually dangerous facilities “prone to explosions or catastrophic failure”: nuclear and biological weapons facilities. See Tri-Valley Cares v. Dep’t of Energy, 203 Fed. Appx. 105, 2006 U.S. App. LEXIS 25724 (9th Cir. Oct. 16, 2006) (threat of terrorist activity on the construction of a biological weapons research laboratory); San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n, 449 F.3d 1016, 2006 U.S. App. LEXIS 13617 (9th Cir. 2006) (consideration of terrorist attack on a nuclear facility); State of Washington v. Bodman, CV-03-5018-AAM, 2005 WL 1130294 (E.D. Wash. May 13, 2005) (transportation of radioactive and radioactive/hazardous mixed transuranic waste). None of those cases involved a commercial and residential development project.

As indicated above, and as more fully set forth in the papers submitted by ESDC, the FEIS clearly evidences that safety and security issues were discussed and that all efforts are being made to coordinate with the NYPD and FDNY to develop effective security and emergency evacuation plans. That is all that either SEQRA or common sense requires.

D. Petitioners’ Remaining SEQRA Allegations Are Baseless

In their Petition and Memorandum of Law, Petitioners set forth a laundry list of alleged additional infirmities in the SEQRA review, including allegations that:

- ESDC improperly delegated its hard look obligation to its consultant. Petitioners' Memorandum of Law at 51-55.
- ESDC used inaccurate project completion dates. Petitioners' Memorandum of Law at 56-59.
- ESDC miscalculated the Project's open space. Petitioners' Memorandum of Law at 59-60.
- ESDC improperly failed to analyze traffic conditions on the Brooklyn Queens Expressway and East River crossings. Petitioners' Memorandum of Law at 60-61.
- ESDC studied the wrong evening peak hour. Petitioners' Memorandum of Law at 61.
- ESDC improperly relied on the allegedly false assumption that the Project site would not redevelop without the Project. Petitioners' Memorandum of Law at 66-69.
- ESDC did not adequately consider the effects of wind. Petitioners' Memorandum of Law at 69-70.
- ESDC did not adequately consider the Project's effects on schools, fire protection, and police service. Petitioners' Memorandum of Law at 71-72.
- ESDC did not adequately consider the Project's effects on the Brooklyn Bears Community Garden. Petitioners' Memorandum of Law at 72-76.
- ESDC did not adequately consider myriad other issues such as the Project's compatibility with the goals of the Atlantic Terminal Urban Renewal Area, the Project's compatibility with the surrounding neighborhoods, secondary displacement, solid waste, the Project's impacts on Fort Greene Park, and the impact of the Project's shadows on the Fort Greene neighborhood. Petitioners' Memorandum of Law at 76.

MTA believes that each of these arguments is baseless and that the FEIS appropriately addresses each of these issues. However, in order not to burden the Court with a duplicative discussion of these numerous shotgun claims, MTA respectfully refers the Court to the FEIS and the Memorandum of Law of ESDC for a full discussion of these issues.

III. PETITIONERS' UDC ACT CLAIMS ARE MERITLESS

Petitioners also allege various substantive and procedural violations of the New York State Urban Development Corporation Act ("UDCA"). Petitioners' Memorandum of Law, Points II, IV, and V. As MTA took no action pursuant to the UDCA and Petitioners make no allegations against MTA concerning the UDCA, MTA, while disagreeing with Petitioners' allegations with respect to the Yard, respectfully refers the Court to ESDC's Verified Answer and ESDC's Memorandum of Law concerning those issues.

POINT IV. THE PACB WAS NOT REQUIRED TO ISSUE A SEQRA FINDINGS STATEMENT FOR THE PROJECT

A. As a Financial Oversight Arm of the Governor and the Legislature, the PACB Is Not an "Agency" Subject to SEQRA

Petitioners allege that the PACB failed to issue a SEQRA findings statement, as required of each "agency" taking an "action" in connection with the Project following completion of the FEIS. Petitioners' Memorandum of Law at 11-14. Petitioners' argument is premised entirely on the denomination of the PACB as a "board" in the PACB's enabling statute and SEQRA's definition of the term "state agency" as including "any state department, agency, board, public benefit corporation or commission." Petitioners' Memorandum of Law at 12, n. 2. However, the history of both the PACB act and SEQRA indicates that, despite its use of the term "board," the Legislature never intended the PACB to be an "agency" for purposes of SEQRA.

Pursuant to 6 NYCRR § 617.5(c)(37), actions of the Legislature, of the Governor and of any court are exempt from SEQRA as "Type II actions" -- actions that are either excluded from SEQRA review under ECL Article 8 or that have been determined by the New York State Department of Environmental Conservation not to have a significant impact on the

environment. 6 NYCRR § 617.5(a). In adopting this regulatory exemption, the Department of Environmental Conservation concluded that the term “state agency” in SEQRA encompasses “only traditional administrative entities,” not the activities of the State Legislature and the Judiciary or the Governor’s activities within the Executive Office/Chamber. See Final Generic Environmental Impact Statement on the Proposed Amendments to the SEQRA Regulations prepared by the New York State Department of Environmental Conservation, Sept. 6, 1996, at 43-44 (attached as Appendix A to this Memorandum of Law). This exemption was upheld in West Village Committee, Inc. v. Zagata, 242 A.D.2d 91, 98-99 (3d Dep’t 1998), leave to appeal denied, 92 N.Y.2d 802, 677 N.Y.S.2d 72 (1998).

The PACB is far from a traditional administrative agency. It was created in 1976 for the limited purpose of enabling the Governor and the Legislature to monitor public agency debt in response to a financial crisis that threatened the State’s ability to obtain financing for important public projects.⁵ It is administered by the Executive Department, has only one

⁵ In 1973, the financial stability of the Urban Development Corporation (“UDC”) came into question, and the threat of its financial collapse resulted in higher borrowing costs for all governmental entities in New York State. By 1975, UDC was on the verge of financial collapse with over \$1 billion in outstanding bonds, operating costs of \$1 million per day, and insufficient funds to meet its current obligations. The debt incurred by UDC and other public benefit corporations had reached a level that was adversely affecting the traditional markets for bonds and notes of the State to the point that capital markets were “virtually closed to all issues offered by these public benefit corporations.” Ch. 39, L. 1976, § 1. Governor Hugh Carey invoked the Moreland Act (see N.Y. Exec. Law § 6) to appoint a commission “to study these matters, and [to] recommend long-term solutions.” Id. In 1976, the commission issued a report recommending that “temporary legislation be enacted to provide immediate and effective control by a public authorities control board of those and other public benefit corporations whose activities have already had the aforementioned impact on the credit of the state.” Id. Finding that “unprecedented circumstances and conditions have adversely affected the traditional markets for bonds and notes of the State,” the Legislature and Governor accepted the commission’s recommendations, and, in March 1976, enacted legislation to limit the issuance of debt by the UDC and other public financing entities and to create the PACB on a temporary basis. Ch. 38, L. 1976, § 15; Ch. 39, L. 1976, §§ 1 & 2.

employee (who works full-time for the Division of the Budget) and receives no appropriation from the Legislature. The PACB is comprised only of five unpaid members: Assembly Speaker Sheldon Silver (Assembly majority); Senator Owen Johnson (Senate majority); Assemblyman Brian Kolb (Assembly minority); Senator Thomas Duane (Senate minority) and Paul E. Francis, Senior Advisor to the Governor and Director of the Budget (Chairperson), replacing John F. Cape, Governor Pataki's Budget Director. The PACB acts by unanimous vote of the three members representing the Governor, the Assembly Speaker and the Temporary President of the Senate. The representatives of the Assembly and Senate minorities do not vote.

Since its creation in 1976, the PACB has never, to the best of our knowledge, participated in the SEQRA process and has never issued a SEQRA findings statement for the approval of a project financing plan or other undertaking by a public authority subject to its financial oversight. Given the PACB's membership, the Legislature has undoubtedly been aware of this practice and has had ample opportunity, if it believed the PACB was acting contrary to its intention, to make PACB approvals subject to SEQRA, either when it created the PACB in 1976 or when it amended the PACB's enabling legislation in 1977, 1978, 1980, 1982, 1983, 1993, 1995 and 2004. In fact, SEQRA and the PACB's enabling legislation were both amended in 1977 when the applicability of SEQRA and the jurisdiction of the PACB were separately refined by the Legislature. See Chapter 252, Laws of 1977 (SEQRA) and Chapter 408, Laws of 1977 (PACB). This history and the PACB's unique role as a financial oversight entity whose determinations flow directly from members of the Legislature and the Executive Branch weigh decisively against treating the PACB as a

SEQRA “agency” and indicate that its determinations are, for SEQRA purposes, exempt actions of the Governor and Legislature pursuant to 6 NYCRR § 617.5(c)(37).

B. Because the PACB Reviews and Approves Only Financial Plans for Public Authorities’ Projects and Does Not Undertake, Fund or Otherwise Approve Such Projects, It Is Not an “Involved Agency” Under SEQRA and Its Approval of an Application Is Not an “Action” Under SEQRA

1. The PACB Is Not an “Involved Agency”

Even if it were treated as an “agency” under SEQRA, the PACB’s limited financial oversight role means that it would not qualify as an “involved agency” required to issue a SEQRA findings statement before acting. See 6 NYCRR § 617.11(c). An “involved agency” under SEQRA is an agency that “will ultimately make a discretionary decision to fund, approve or undertake an action....” 6 NYCRR § 617.2(s) (emphasis added). The PACB is certainly not undertaking the Project; nor is it providing the Project’s funding. Moreover, its only involvement with the Project is to approve ESDC’s financial plan for its implementation (which in this case has already been assisted by a direct appropriation from the Legislature). That type of limited approval is far too attenuated to constitute “approval” of the Project for SEQRA purposes and thus trigger the PACB’s need to issue a SEQRA findings statement before approving ESDC’s financial arrangements for the Project. See discussion of “action,” infra.

2. The PACB Did Not Take an “Action” Under SEQRA

The Legislature has recognized that mechanisms for financing public projects do not, by themselves, affect the environment so as to require compliance with SEQRA. When it established the revenue bond program that is being used to help fund this Project, the Legislature mandated that the “authorization, sale and issuance of revenue bonds” under the program “shall not be deemed an action as such term is defined in article eight of the

environmental conservation law [SEQRA] for the purposes of such article.” State Finance Law § 68-b(11). ESDC, as lead agency under SEQRA, nevertheless prepared an EIS because of its involvement in other aspects of the Project, including its adoption of a General Project Plan, acquisition of property by eminent domain and exercise of its zoning override authority. The PACB’s involvement, however, was purely for financial oversight of ESDC.

State Finance Law § 68-c is consistent with the SEQRA regulations and SEQRA case law. Although the types of agency activities that require review under SEQRA are broadly defined, they are limited to activities “that may affect the environment.” 6 NYCRR § 617.2(b)(1), (2) & (3). Conversely, if an agency’s discretionary activities do not touch upon environmental concerns, they do not qualify as “actions” that trigger SEQRA review. The Court of Appeals explained this distinction in Incorporated Village of Atlantic Beach v. Gavalas, 81 N.Y.2d 322, 326, 599 N.Y.S.2d 218, 219-20 (1993), in holding that a village’s determination on a building permit application, even if discretionary, is not an “action” requiring the preparation of an EIS. The Court stated:

[T]he pivotal inquiry...is whether the information contained in an EIS may form the basis for a decision whether or not to undertake or approve such action. In other words, when an agency has some discretion, but that discretion is circumscribed by a narrow set of criteria which do not bear any relationship to the environmental concerns that may be raised in an EIS, its decisions will not be considered “actions” for purposes of SEQRA’s EIS requirements.

81 N.Y.2d at 326 (internal quotes and citations omitted).

In this case, the responsibilities imposed by the Legislature on the PACB approval process relate only to financial issues, not to the environmental concerns required to be discussed in an EIS. Section 51 of the Public Authorities Law clearly contemplates that the PACB’s review in connection with public authority projects will be limited to financial

issues: “The board may approve applications only upon its determination that, with relation to any proposed project, there are commitments of funds sufficient to finance the acquisition and construction of such project.” Pub. Auth. Law § 51(3) (emphasis supplied).

The limited scope of PACB approval authority is evident in other provisions of Section 51 as well. Applications to the PACB must set forth “the terms, conditions and dates of the repayment of state appropriations authorized by law pursuant to a repayment agreement.” Pub. Auth. Law § 51(1). The application must be furnished to the State Comptroller for comment. Pub. Auth. Law § 51(2). No financing commitments can be made pending PACB review. In rendering its determination, the PACB may consider “commitments of funds, projections of fees or other revenues and security, which may, in the discretion of the board, include collateral security sufficient to retire a proposed indebtedness or protect or indemnify against potential liabilities proposed to be undertaken.” Pub. Auth. Law § 51(3).

Thus, while the Legislature has conferred great discretion on the PACB in determining whether the commitment of funds is sufficient to finance the construction of a project within its purview, environmental factors are irrelevant to that determination. Even if an EIS were submitted as part of the application process and considered by the PACB in rendering its determination, Section 51 confers no authority on the PACB to predicate its approval of an application on anything other than an applicant’s compliance with the statutory financing criteria set forth above. See Atlantic Beach, 81 N.Y.2d at 328. Accordingly, “the authority to consider these [EIS] reports, albeit discretionary, does not render a determination...an ‘action’ governed by the SEQRA requirements.” Id. Indeed,

such a review requirement could slow and even paralyze the PACB's essential financial review function.

Moreover, SEQRA does not “change the jurisdiction between agencies or among state agencies and public corporations,” but rather “is an overlay, supplementing the existing authority already possessed by these agencies or public corporations when acting as approving agencies for the purposes of SEQRA.” Town of Henrietta v. Dep't of Envtl. Conservation, 76 A.D.2d 215, 226, 430 N.Y.S.2d 440, 449 (4th Dep't 1980) (quoting SEQRA). Where an agency's discretionary approval is one “that may affect the environment,” the agency is authorized “to impose substantive conditions upon an action to ensure that the requirements of [SEQRA] have been satisfied.” 6 NYCRR § 617.3(b). In this case, however, the PACB's oversight and approval of ESDC's financing plans, although a prerequisite to commencement of the Project, are “too attenuated” from the Project's environmental impacts to be considered “an action within the meaning of SEQRA.” See Niagara Mohawk Power Corp. v. Public Serv. Comm'n, 138 A.D.2d 63, 69, 530 N.Y.S.2d 626, 630 (3d Dep't 1988). The PACB's role is more analogous to the regulatory oversight approval of the State Comptroller (e.g., approval of certain public authority contracts) that are required in connection with a multitude of public activities throughout New York State but do not constitute “actions” subject to SEQRA.

For more than 30 years, the PACB has reviewed and approved the financing for major development projects proposed in New York State -- projects with unquestionably significant environmental impacts -- but has never during this period been required to issue a SEQRA findings statement prior to acting. Nor should the PACB be required to do so in this case. As explained above, the PACB is not a SEQRA “agency”; it is not an “involved

agency” in this Project; and its approval here was not a SEQRA “action.” Any effort now to impose SEQRA’s requirements on the PACB would interfere with its raison d’etre to approve (or deny) applications based on public finance considerations and, by doing so, to protect the fiscal health of the State. Petitioners’ claim that the PACB was required to issue SEQRA findings is without merit and should therefore be dismissed.

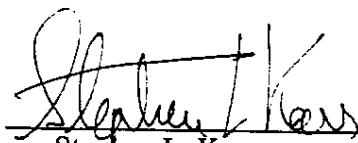
CONCLUSION

For the reasons explained above, the Petition should be dismissed in its entirety and Petitioners’ requests for declaratory and injunctive relief denied.

Dated: New York, New York
April 25, 2007

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EXHIBIT A

FINAL
Generic Environmental Impact Statement
on the
Proposed Amendments
to the
State Environmental Quality Review Act (SEQRA) Regulations

6 NYCRR - Part 617

PREPARED BY
THE NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
DIVISION OF REGULATORY SERVICES
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Date accepted: September 6, 1995

34. actions undertaken, funded or approved prior to the effective dates set forth in SEQR (see chapters 228 of the Laws of 1976, 253 of the Laws of 1977 and 460 of the Laws of 1978), except in the case of an action where it is still practicable either to modify the action in such a way as to mitigate potentially adverse environmental impacts, or to choose a feasible or less environmentally damaging alternative, the commissioner may, at the request of any person, or on his own motion, require the preparation of an environmental impact statement; or, in the case of an action where the responsible agency proposed a modification of the action and the modification may result in a significant adverse impact on the environment, an environmental impact statement must be prepared with respect to such modification; (formerly 617.2(p)(1)(i)(ii))
35. actions requiring a certificate of environmental compatibility and public need under Articles VII, VIII or X of the Public Service Law and the consideration of, granting or denial of any such certificate; (formerly 617.2(p)(2))
36. actions subject to the class A or class B regional project jurisdiction of the Adirondack Park Agency or a local government pursuant to section 807, 808 and 809 of the Executive Law, except class B regional projects subject to review by local government pursuant to section 807 of the Executive Law located within the Lake George Park as defined by subdivision one of section 43-0103 of the Environmental Conservation Law; (formerly 617.2(p)(3)) and

Comment: Regulatory language on the exclusions from SEQR for Public Service Commission and Adirondack Park Agency actions should track the statutory language.

Response: Agreed. The changes have been made in items 35 and 36.

37. actions of the Legislature and the Governor of the State of New York or of any court, but not actions of local legislative bodies except those local legislative decisions such as rezoning where the local legislative body determines the action will not be entertained (formerly 617.2(q) and 617.3(d))

Discussion: Until the recent lower court decision in Hudson River Sloop Clearwater et. al. v. Cuomo et. al. (NYLJ 1/12/95) the Department believed the conclusion that the Governor was exempt from SEQRA was so obvious that it did not need to be added to the regulations.

However, since that decision relied upon the absence of a specific exemption for the Governor in the regulations, the Department must now clarify that the Governor is not a state agency as defined in ECL §8-0105(1) or 617.2(c) and (hh) (1987 regulation) or new 617.2(c) and (ah).

Although no explicit statutory exemptions have existed for the State Legislature and the Judiciary, the regulations have always exempted these branches of government from compliance with SEQR (617.2(q)(5) 1987 regulation). Now DEC is explicitly excluding the Governor from SEQR's purview as well.

A review of the legislative history and the statement of purpose and legislative findings set forth at ECL §8-0101 and 8-0103 and the definitions indicates that the term "state agency" encompasses only traditional administrative entities. Clearly, the divisions within the Executive Department such as the Division of the Budget and the Office of General Services are subject to SEQR. However, in contrast, the Governor's activities within the Executive Office/Chamber are exempt from SEQRA. The Governor's Office has always been apprised of the Department's interpretation that the SEQRA statute and regulations do not apply to the Governor (compare, the broader definition of state agency and the specific exceptions in Public Officers Law §86 (FOIL)).

In addition, SEQRA must be read in such a manner as to render it constitutional (Statutes §150). Many of the Governor's acts are expressly authorized by Articles 4 and 7 of the New York State Constitution and they may not be limited by the Judiciary or the State Legislature.

Comment: The State Constitution enumerates those Governor's actions which are exempt from SEQR but these are limited. Section 30 of the Executive Law states that the Governor is head of the Executive Department and "department" is used within the definition of agency at ECL §8-0105(1). "Executive chamber" and "executive office" refer to physical location rather than a unit of government. The only capacity in which the Governor may act is as head of the Executive Department. Although the State Constitution confers "executive power" on the Governor, this power is what he exercises in his capacity as head of the Executive Department. Thus, the actions of the Governor should be subject to SEQR.

Response: The plain language meaning of the term "state department" in the definition of agency refers to traditional state departments within the Executive Branch of government e.g., the Department of Civil Service. The Executive Department is not one of those entities. It is a branch of government.

Comment: According to the Hudson River Sloop Clearwater et. al. v. Cuomo et. al. (NYLJ 1/12/95) opinion former Governor Cuomo's use of the MOU to transfer property "without SEQRA would enable any state agency to circumvent SEQRA by gubernatorial fiat and totally undermine its efficacy." The opinion also noted there exists "no regulatory exemption for the Governor."

Response: The issue of whether the Governor's actions are subject to SEQR has never before been discussed in a case during the twenty years since enactment of SEQR. There has been no abuse of the SEQR process by any Governor. The MOU in the Clearwater case required compliance with SEQR, and with New York City's Environmental Quality Review (CEQR) and the Uniform Land Use Review Procedures (ULURP); it was not self-executing. Part of the judicial reasoning for applying SEQR to the MOU is based upon the lack of a specific exemption for the Governor in the SEQR regulations. Now, in-response to this decision, the

Department is explicitly stating what it has always interpreted the SEQR statute to mean with respect to actions of the Governor.

The National Environmental Policy Act (NEPA) upon which SEQRA is modeled similarly does not include the President as an agency subject to its requirements (40 CFR §1508.12; Alaska v Carter, 462 F. Supp. 1155, 1159-60 (1978,

617.6 INITIAL REVIEW OF ACTIONS AND ESTABLISHMENT OF LEAD AGENCY

Determination of significance following a coordinated review is binding on all involved agencies.

Issue: The existing regulations implicitly state this, but several recent court cases have raised the need to make this statement explicit.

Revision: The statement "A determination of significance issued by the lead agency following coordinated review is binding on all other involved agencies" has been added to the regulation.

Comment: Several comments were received regarding this issue. Some felt that the explicit recognition of this fact would diminish the ability of involved agencies to influence or dispute a determination of the lead agency. Others wanted this provision removed and replaced with specific language that would allow an involved agency to act contrary to the lead agency when they disagreed with the lead agency's decision.

Response: This is a basic concept of coordinated review. Eliminating this provision would violate the statutory direction to carry out the terms of the statute with minimum procedural and administrative delay, to avoid unnecessary duplication and to establish a lead agency responsible for making the determination of whether or not the action may have a significant effect on the environment.

Comment: Whenever an agency is undertaking a direct action that agency should automatically become the lead agency. Experience has shown that the most appropriate lead agency is the one that is undertaking the action.

Response: § 8-0109(4) and §8-0111(6) contain the statutory authority for the establishment of lead agency in the SEQR process. This language clearly envisioned that the lead agency role would require discussion between the involved agencies.

The commentor is right in stating that in most cases the agency that is directly undertaking the action is the most appropriate lead agency. But there are situations, such as when an Industrial Development Agency is promoting a development, that the lead agency role may be assumed by one of the permitting agencies.

The provision in the regulations (617.14(d)) that allows agencies to enter into cooperative agreements can be used to streamline the designation of lead agency step of the SEQR process. An example of this is the memorandum of understanding between the Department of Environmental Conservation (DEC) and the Department of Transportation