



March 18, 2016

Brenda A. Prusinowski
AICP, Deputy Commissioner
Town of Brookhaven
Department of Planning, Environment & Land Management
One Independence Hill
Farmingville, NY 11738
(631) 451-6400

**Re: Draft Generic Environmental Impact Statement for the Greater Moriches
Comprehensive Zoning Re-Evaluation Study**

Dear Deputy Commissioner Prusinowski,

The Sabin Center for Climate Change Law at Columbia Law School submits these comments on the Draft Generic Environmental Impact Statement (“DGEIS”) for the Greater Moriches Comprehensive Zoning Re-Evaluation Study.

We understand that the primary goal of the study is to achieve an appropriate level of future commercial and industrial development within the study area, taking into account social, economic and environmental considerations. We commend the Town of Brookhaven’s Department of Planning, Environment & Land Management (“Department”) for undertaking this project, but are concerned that the study and DGEIS fail to address the effects of climate change on the study area. For the reasons discussed below, we believe that the consideration of sea level rise and other climate change-related phenomena is necessary in this context.

I. Effects of Climate Change on the Study Area

In 2014, Governor Cuomo signed into law the “Community Risk Reduction and Resiliency Act” (“CRRA”), a landmark adaptation bill which requires the state to adopt official projections of future sea level rise and to account for sea level rise and other climate-related events before approving certain types of projects. Consistent with the CRRA requirements, the New York Department of Environmental Conservation (“DEC”) has proposed a rule establishing sea level rise projections for different regions.¹ In the proposed rule, DEC presents a range of sea level rise projections for Long Island, which range from 2-10 inches in the 2020s and 8-30 inches in the 2050s, and even higher in later years (see table, next page).

¹ 6 NYCRR Part 490, Projected Sea-level Rise – Express Terms (Proposed Dec. 2015). For additional information about the proposed rule, see *Quality Services Proposed Regulations*, NEW YORK DEPT. OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/regulations/103870.html>.

DEC Proposed Rule: Sea Level Rise Projections for Long Island

Time Interval	Low Projection	Low-Medium Projection	Medium Projection	High-Medium Projection	High Projection
2020s	2 inches	4 inches	6 inches	8 inches	10 inches
2050s	8 inches	11 inches	16 inches	21 inches	30 inches
2080s	13 inches	18 inches	29 inches	39 inches	58 inches
2100	15 inches	21 inches	34 inches	47 inches	72 inches

Sea level rise of this magnitude would affect private property, public infrastructure, and natural resources (including watersheds and wetlands) in the study area, which is bounded on the south by Moriches Bay. To understand exactly what this means for the Greater Moriches area, you can refer to the sea level rise and flood risk maps developed by the National Oceanic and Atmospheric Administration (“NOAA”).² The following map from the NOAA Sea Level Rise Planning Tool shows future flood risk with 1.3 feet (15.6 inches) of sea level rise:



² *Sea Level Rise Planning Tool – New Jersey and New York State*, NOAA GEOPLATFORM, <http://geoplatform.maps.arcgis.com/home/item.html?id=2960f1e066544582ae0f0d988ccb3d27>; *Sea Level Rise and Coastal Flooding Maps*, NOAA OFFICE FOR COASTAL MANAGEMENT, <https://coast.noaa.gov/slr/>.

Climate change will also increase the probability of coastal storms and other extreme weather events, such as Hurricane Irene, Superstorm Sandy, and the August 2014 storm that dumped more than 13 ½ inches of rain on Long Island in a matter of hours, breaking the state’s rainfall record, and flooding over 1,000 homes and businesses.³ The combined effects of sea level rise and extreme weather events will pose a risk to the physical safety of residents as well as private property, public infrastructure, and natural resources in the study area. The Department should therefore account for these hazards when making decisions about zoning and land use changes in the study area.

In addition, experts predict that climate change will reduce groundwater capacity in the study area, because the coastal aquifers in Long Island are highly susceptible to sea level rise, saltwater intrusion and changes in precipitation and evapotranspiration.⁴ The Department should also consider this possibility in its study and DGEIS.

II. SEQRA and Climate Change

Although the New York State Environmental Quality Review Act (“SEQRA”) does not expressly require consideration of climate change effects, the statute and regulations provide a legal basis for conducting such analysis. Indeed, there are at least four legal reasons why the Department should include such analysis in its DGEIS.⁵

- First, SEQRA requires a description of the “environmental setting” of the proposed action,⁶ and for an action such as this—which will affect development patterns for years to come—it makes sense to evaluate the future environmental setting in which this development will take place. Climate change will affect the future environmental setting.
- Second, SEQRA requires an analysis of the “environmental impact of the proposed action including short-term and long-term effects.”⁷ Sea level rise, flooding, and other climate-related phenomena can alter the nature, magnitude and timing of environmental impacts from development projects, such as those that would be authorized or restricted as a result of the proposed zoning and land use changes in the study. Thus, the effects of climate change should be accounted for in order to facilitate a sound analysis of environmental impacts.

³ U.S. GLOBAL CHANGE RESEARCH PROGRAM, CLIMATE CHANGE IMPACTS IN THE UNITED STATES (2014); ENVIRONMENTAL PROTECTION BUREAU OF THE NEW YORK STATE ATTORNEY GENERAL’S OFFICE, CURRENT AND FUTURE TRENDS IN EXTREME RAINFALL ACROSS NEW YORK STATE (2014).

⁴ YURI GORKHOVICH & ELIZABETH CHESEBROUGH, NEW YORK STATE WATER RESOURCES INSTITUTE, THE EFFECT OF CLIMATE CHANGE ON THE UNCONFINED AQUIFERS OF LONG ISLAND, NEW YORK (2014).

⁵ For information on how similar requirements in the National Environmental Policy Act (NEPA) can also be interpreted as requiring an analysis of climate change impacts, as well as recommendations on how agencies can go about conducting this analysis and implementing adaptation and resiliency measures, see Jessica Wentz, *Assessing the Impacts of Climate Change on the Built Environment: A Framework for NEPA Reviews*, 45 ELR 11015 (2015).

⁶ See SEQRA, N.Y. Env’tl. Conserv. Law § 8-0109(2)(a) (requiring the agency to describe the proposed action and its environmental setting).

⁷ *Id.* at § 8-0109(2)(b).

- Third, SEQRA requires consideration of mitigation measures to minimize the environmental impact of the proposed action.⁸ It is not possible to assess the adequacy of mitigation measures without accounting for the environmental setting in which those measures would be deployed.
- Fourth, the regulations implementing SEQRA require agencies, when preparing a GEIS, to “discuss the important elements and constraints present in the natural and cultural environment that may bear on the conditions of an agency decision on the immediate project.”⁹ Sea level rise and other climate-related phenomena qualify as the types of “elements and constraints present in the natural...environment” that can and should influence how the Department decides to proceed with this action.

Recognizing the utility of accounting for climate change in planning and environmental review documents, the DEC and other agencies have begun to account for climate resiliency in reviews conducted under SEQRA and the New York City Environmental Quality Review (“CEQR”) process. A summary of such discussions is attached.¹⁰ The DEC has also adopted a policy stating that it will use the “best available scientific information of environmental conditions resulting from the impacts of climate change” when conducting analyses and decision-making, and “incorporate adaptive management into program planning and actions.”¹¹

Because the proposed action is located in an area that is highly vulnerable to sea level rise and other coastal impacts associated with climate change, we urge the Department to follow the lead of DEC and other agencies and evaluate the effects of climate change on the study area. Please feel free to contact me with any questions about these recommendations.

Sincerely,



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Attachment: Ethan I. Strell, *New York Environmental Impact Statements Beginning to Address Climate Resiliency*, 25(10) ENVIRONMENTAL LAW IN NEW YORK 205 (2014).

⁸ *Id.* at § 8-0109(2)(f).

⁹ N.Y. Comp. Codes R. & Regs. tit. 6, § 617.10(e).

¹⁰ Ethan I. Strell, *New York Environmental Impact Statements Beginning to Address Climate Resiliency*, 25(10) ENVIRONMENTAL LAW IN NEW YORK 205 (2014).

¹¹ DEC COMMISSIONER’S POLICY – CLIMATE CHANGE AND DEC ACTION (2010).

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NEW YORK ENVIRONMENTAL IMPACT STATEMENTS BEGINNING TO ADDRESS CLIMATE RESILIENCY

Ethan I. Strell

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In a subtle but meaningful shift, the environmental impact review process in New York is beginning to more systematically consider the potential effects of a changing climate on proposed projects, not just the effects that a project might have on the environment. In other words, rather than just considering the greenhouse gas emissions from individual projects, environmental impact statements (EISs) are now considering how a proposed project will be affected by anticipated sea level rise, increased storm surges, and the like. In the past year, most New York City environmental impact reviews for projects located in floodplains have explicitly addressed adaptation to climate

change, and several EISs in other parts of the state have also discussed how a changing climate may affect the proposed project.

Background

In 1970, the federal government enacted the National Environmental Policy Act (NEPA), which required federal agencies to evaluate the environmental effects of a wide variety of federal actions, including direct federal undertakings, funding and permitting. Many states followed suit with so-called “mini-NEPA” laws, requiring evaluation of the environmental impacts of state and often local actions. New York State enacted its mini-NEPA law, the State Environmental Quality Review Act (SEQRA), in 1975. New York City in turn implements SEQRA via its own environmental review procedures, the City Environmental Quality Review (CEQR).¹

The purpose of these laws is to ensure that government agencies are aware of and disclose to the public the potential impacts of their actions on the “environment.”² Although climate change has emerged as among the most important environmental issues, the environmental impact review process has been slow to meaningfully include climate change considerations, and methodologies for analyzing environmental impacts—including climate change—vary across jurisdictions.

The principal challenge in assessing a project in terms of climate change under the traditional methodology of environmental impact assessment is that greenhouse gas (GHG) emissions are a global

¹ NEPA, 42 U.S.C. §§ 4321–4370h; SEQRA, N.Y. ENVTL. CONSERV. LAW (ECL) art. 8; CEQR, Exec. Order 91 of 1977 (43 R.C.N.Y. ch. 6).

² The “environment” generally is broadly defined under the statutes. *See, e.g.*, *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 414, 494 N.E.2d 429, 434 (1986).

problem, and the emissions from one project—even a very large one—are not likely to be considered “significant.”

However, given the projected and observed changes to the climate, a more practical consideration for many projects is how that project will fare given what today’s best science can tell us about future climatic conditions. For instance, if a development is approved now, will rising seas and more frequent floods render that project uninhabitable within its anticipated lifetime? Or will more frequent and intense heat waves and changing rainfall patterns affect a water supply project, a gas drilling proposal or a forestry plan?

In a March 2012 *New York Law Journal* article,³ Professor Michael Gerrard noted that consideration of the impacts of climate change and adaptation to those impacts was “spotty at best” in NEPA EISs, and that only a “small handful” of SEQRA EISs addressed those issues. Slowly, the practice is changing.

Guidance on Climate Change Analysis

In recent years, various federal, state and local government agencies have proposed or issued guidance on how to conduct a climate change analysis.⁴

Back in 2010, the Council on Environmental Quality, the federal entity charged with overseeing the implementation of NEPA and adopting the government-wide NEPA regulations, issued draft guidance for public comment on consideration of the effects of climate change and greenhouse gas emissions

(Draft NEPA Guidance).⁵ Despite the passage of over four years, that 2010 draft has still not been finalized.⁶

The Draft NEPA Guidance is notable in that it not only addresses the direct greenhouse gas emissions of projects, but also explicitly includes adaptation and the effects of a changing climate on a proposed project as relevant considerations.⁷ Demonstrating the flexibility of NEPA to address emerging environmental issues, the Draft NEPA Guidance considers this assessment as part of the existing NEPA framework, not as a new legal requirement.⁸ Emphasizing NEPA’s “rule of reason,” the Draft NEPA Guidance reasonably indicates that the appropriateness of conducting such an analysis should be determined through the EIS scoping process, based on “the sensitivity, location, and timeframe of a proposed action.”⁹

New York State also issued a draft climate change policy document for SEQRA in 2008, which was finalized in 2009.¹⁰ However, that document is expressly limited in scope and does not address climate change adaptation.¹¹

In contrast to impact analysis under the federal NEPA and statewide under SEQRA, New York City has produced several versions of a comprehensive environmental impact review guidance document, the City’s *CEQR Technical Manual*.¹² The *Manual* covers most technical areas relevant to conducting an environmental assessment in New York City. Notably, it includes a chapter instructing City agencies regarding how and when to conduct a greenhouse gas analysis. In its latest revision, released in March 2014, the *Manual* includes the following

³ Michael B. Gerrard, *Reverse Environmental Impact Analysis: Effect of Climate Change on Projects*, N.Y.L.J., Mar. 8, 2012, at 3, available at http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=61833.

⁴ See, e.g., COUNCIL ON ENVTL. QUALITY (CEQ), DRAFT NEPA GUIDANCE ON CONSIDERATION OF THE EFFECTS OF CLIMATE CHANGE AND GREENHOUSE GAS EMISSIONS (Feb. 18, 2010) [hereinafter DRAFT NEPA GUIDANCE], available at <http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/ghg-guidance>; N.Y. STATE DEPT. OF ENVTL. CONSERV. (DEC), ASSESSING ENERGY USE AND GREENHOUSE GAS EMISSIONS IN ENVIRONMENTAL IMPACT STATEMENTS (July 15, 2009) [hereinafter DEC SEQRA GUIDANCE], available at <http://www.dec.ny.gov/regulations/56552.html>; DEC, COMM’R’S POLICY CP-49, CLIMATE CHANGE AND DEC ACTION (Oct. 22, 2010), http://www.dec.ny.gov/docs/administration_pdf/commissclimchpolicy.pdf; N.Y.C. MAYOR’S OFFICE OF ENVTL. COORDINATION, *Greenhouse Gas Emissions and Climate Change* (ch.18), in CEQR TECHNICAL MANUAL (Mar. 2014) [hereinafter CEQR TECHNICAL MANUAL], available at http://www.nyc.gov/html/oece/html/ceqr/technical_manual_2014.shtml; see also Katrina Fischer Kuh, *Impact Review, Disclosure, and Planning*, in THE LAW OF ADAPTATION TO CLIMATE CHANGE 543, 550–51 (Michael B. Gerrard & Katrina Fischer Kuh eds. 2012).

⁵ See DRAFT NEPA GUIDANCE, *supra* note 4.

⁶ In February 2008, two years before CEQ issued the Draft NEPA Guidance, the International Center for Technology Assessment (ICTA) and other organizations petitioned CEQ to amend its NEPA regulations and clarify that NEPA requires an assessment of climate change. Because the Draft NEPA Guidance was never finalized and CEQ did not amend its regulations, ICTA and its sister organization, the Center for Food Safety, filed a federal lawsuit last spring against CEQ seeking declarative and injunctive relief, asking the court to declare that CEQ violated the Administrative Procedures Act by failing to respond to the 2008 petition and to order CEQ to respond to the 2008 petition. Complaint for Declaratory and Injunctive Relief, Int’l Ctr. for Tech. Assessment v. CEQ, No 1:14-cv-549 (D.D.C. Apr. 2, 2014). On August 7, 2014, CEQ denied the 2008 rulemaking petition, but did so on the grounds that NEPA regulations already require assessment of climate impacts. CEQ also indicated that it was considering how to proceed as to the Draft NEPA Guidance in light of comments it has received. Letter from Michael J. Boots, CEQ, to Joseph Mendelson, III., et al., regarding CEQ’s Response to a Petition for Rulemaking and Issuance of Guidance to Require Inclusion of Climate Change Issues in NEPA Documents (Aug. 7, 2014). On August 20, ICTA and the Center for Food Safety filed a notice of voluntary dismissal without prejudice; the notice indicated that they were preserving their right to challenge the denial on its merits.

⁷ DRAFT NEPA GUIDANCE, *supra* note 4, at 6–8.

⁸ DRAFT NEPA GUIDANCE, *supra* note 4, at 11.

⁹ DRAFT NEPA GUIDANCE, *supra* note 4, at 6.

¹⁰ See DEC SEQRA GUIDANCE, *supra* note 4.

¹¹ See DEC SEQRA GUIDANCE, *supra* note 4, at 4 (“This policy focuses on how energy use and GHG emissions should be discussed in an EIS, but does not dictate whether or how climate change impacts, such as projected sea level rise, may be relevant to a proposed project. While impacts of climate change on a project may be important in some cases, this Policy is specifically focused on assessing and mitigating energy use and GHG emissions.”).

¹² See CEQR TECHNICAL MANUAL, *supra* note 4.

guidance on when to conduct an analysis of climate change's effect on a proposed project:

Although significant climate change impacts are unlikely to occur in the analysis year for most projects, depending on a project's sensitivity, location, and useful life, it may be appropriate to provide a qualitative discussion of the potential effects of climate change on a proposed project in environmental review. Such a discussion should focus on early integration of climate change considerations into the project and may include proposals to increase climate resilience and adaptive management strategies to allow for uncertainties in environmental conditions resulting from climate change.¹³

Consideration of Climate Adaptation and Resiliency Policies

Although specific climate change adaptation guidance is inconsistent among jurisdictions, adaptation has emerged as an important environmental policy, and is reflected in numerous official written government policies.¹⁴ Because an aspect of environmental impact review is considering official laws and policies,¹⁵ those adaptation policies are important elements in encouraging lead agencies to include an adaptation analysis.

In May 2014, the New York State Legislature passed a bill called the "Community Risk Reduction and Resiliency Act,"¹⁶ which would amend certain sections of the Environmental Conservation Law, Agriculture and Markets Law and Public Health Law to promote greater awareness of and preparedness for climate change-associated risks such as sea level rise and flooding. If signed into law, the bill would, among other

things, require the Department of Environmental Conservation (DEC) to adopt regulations establishing science-based state sea level rise projections.¹⁷ Although this bill would not specifically amend SEQRA, it would further evidence a strong environmental policy to consider how future climate risks affect discretionary state decisions.

Additionally, recently adopted revisions to the City's local waterfront revitalization program (LWRP) require consideration of climate change and sea level rise for projects located in the designated coastal zone.¹⁸

Consideration of Climate Resiliency in Recent CEQR and DEC Environmental Impact Statements

While there still is no definitive policy or guidance document setting forth how or when an EIS should consider adaptation to climate change, New York City has begun to routinely include an analysis of a project's resiliency to certain impacts of climate change in environmental impact statements over the last year or so, as have several DEC SEQRA EISs.

City CEQR environmental review documents for projects located in floodplains (or that will likely be located in future floodplains given projected sea level rise) now include discussions of adaptation and resilience, and also reference the City's LWRP. The following projects include such a discussion:

- **625 West 57th Street.** Rezoning of portion of a Manhattan block to permit 1.1 million gross square feet of residential, commercial, community facility and parking uses. Final Supplemental Environmental Impact Statement, December 7, 2012 (City Planning Commission).

¹³ CEQR TECHNICAL MANUAL, *supra* note 4, at 18-7.

¹⁴ See, e.g., Exec. Order 13653, Preparing the United States for the Impacts of Climate Change, 78 Fed. Reg. 66,819 (Nov. 6, 2013); EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN (June 2013), <http://www.whitehouse.gov/sites/default/files/image/president27climateactionplan.pdf>; U.S. ENVIRONMENTAL PROTECTION AGENCY POLICY STATEMENT ON CLIMATE CHANGE ADAPTATION (revised June 2014), <http://epa.gov/climatechange/Downloads/impacts-adaptation/adaptation-statement-2014.pdf>; U.S. ARMY CORPS OF ENG'RS, USACE CLIMATE CHANGE ADAPTATION POLICY STATEMENT (June 2011), <http://www.corpsclimate.us/docs/USACEAdaptationPolicy3June2011.pdf>. *Climate Change Adaptation Resources*, SABIN CTR. FOR CLIMATE CHANGE LAW, <http://web.law.columbia.edu/climate-change/resources/adaptation-resources> (last visited Sept. 3, 2014).

¹⁵ See, e.g., 40 C.F.R. § 1502.16(c) (An EIS "shall include discussions of . . . [p]ossible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned."); 40 C.F.R. § 1506.2(d) ("To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned)."); 6 N.Y.C.R.R. § 617.7(c)(1)(iv) ("These criteria are considered indicators of significant adverse impacts on the environment: . . . the creation of a material conflict with a community's current plans or goals as officially approved or adopted.").

¹⁶ A06558-B, 200th Leg., 2d Sess. (2014).

¹⁷ The bill also would amend the following specific statutory provisions or subject areas to require consideration of future climate change risk: State funding for agricultural land protection (Agric. & Markets § 325); Smart growth public infrastructure criteria (ECL art. 6); Petroleum bulk storage requirements (ECL art. 17, tit. 10); Water pollution revolving loan fund (ECL art. 17, tit. 19); Oil and gas well permits (ECL art. 23, tit. 3); Siting of hazardous waste facilities (ECL art. 27, tit. 11); Bulk storage of hazardous substances (ECL art. 40); Land acquisition for preservation of open space; recreation; and natural, cultural and historic resources (ECL art. 49, tit. 2 and art. 54, tit. 3); State assistance for closure of non-hazardous municipal landfills (ECL art. 54, tit. 5); State assistance for local waterfront revitalization programs and coastal rehabilitation projects (ECL art. 54, tit. 11); Uniform procedures for major permits (ECL art. 70); and Drinking water revolving fund (Pub. Health Law art. 11, tit. 4).

¹⁸ N.Y.C. DEPT. OF CITY PLANNING, THE NEW YORK CITY WATERFRONT REVITALIZATION PROGRAM 43 (Oct. 30, 2013) [hereinafter NEW YORK CITY LWRP], available at http://www.nyc.gov/html/dcp/html/wrp/wrp_revisions.shtml (Policy 6.2: "Integrate consideration of the latest New York City projections of climate change and sea level rise (as published by the NPCC, or any successor thereof) into the planning and design of projects in the city's Coastal Zone.").

- **Cornell USA Tech.** Various approvals to allow for the development of an applied science and engineering campus on Roosevelt Island. Final Environmental Impact Statement, March 8, 2013 (Mayor's Office of Environmental Coordination).
- **Governors Island.** Completion of Park Master Plan and the re-tenanting of approximately 1.2 million square feet of North Island historic structures by 2022, as well as expanded ferry service. Final Supplemental Generic Environmental Impact Statement, May 23, 2013 (Mayor's Office of Environmental Coordination).
- **Memorial Sloan-Kettering Cancer Center Ambulatory Care Center and CUNY/Hunter College Science and Health Professions Building.** Hospital and City university partnering to acquire an approximately 66,111-square-foot, City-owned site on the Upper East Side of Manhattan to build a new ambulatory care center and Science and Health Professions Building. Final Environmental Impact Statement, August 8, 2013 (Mayor's Office of Environmental Coordination).
- **Willetts Point Development Project.** Modifications to previously approved plan for 61-acre district in Queens. Overall project would comprise approximately 108.9 acres and up to 10.34 million square feet of development. Final Supplemental Environmental Impact Statement, August 9, 2013 (Mayor's Office of Environmental Coordination).
- **Halletts Point Rezoning.** Mixed-use development on eight parcels on the East River in Astoria, Queens, including publicly accessible waterfront open space, an esplanade and a supermarket. Final Environmental Impact Statement, August 9, 2013 (City Planning Commission).
- **Seaside Park and Community Arts Center.** Creation of a new recreational and entertainment destination on the Coney Island Boardwalk, including a 5,100-seat seasonal amphitheater for concerts and other events, the creation of approximately 2.41 acres of publicly accessible open space, and the reuse of the landmarked former Childs Restaurant Building as a restaurant and banquet facility. Draft Environmental Impact Statement, September 15, 2013 (Mayor's Office of Environmental Coordination).
- **Gun Hill Square.** Development of a pedestrian-oriented open-air urban shopping center and a single residential building containing senior housing, on an approximately 12.6-acre site in the Bronx. Draft Scope of Work, July 2, 2014 (Mayor's Office of Environmental Coordination).
- **Astoria Cove.** Various zoning and other approvals sought to facilitate mixed-use development on 8.7-acre site in

Astoria on the East River. Development will include approximately 1,689 dwelling units (295 affordable units), local retail space including a supermarket and a site for an elementary school. Draft Environmental Impact Statement, April 18, 2014 (City Planning Commission).¹⁹

Portions of each City project listed above are either located in the current 100-year floodplain, as designated by the Federal Emergency Management Agency (FEMA), or are projected to be located within a floodplain in the future based on projections of the New York City Panel on Climate Change (NPCC). Most of the documents reference the City's then-proposed revision to the LWRP, which was formally adopted by the City Council in October 2013. The Gun Hill Square and Astoria Cove documents were prepared after the City Council adopted the new waterfront program. Citing the NPCC's projections, which forecast a local sea level rise of 12 to 23 inches by the end of this century (up to 55 inches with rapid ice melt), the EISs generally consider whether the design of the proposed project would be able to withstand flooding if the 100-year flood level rose by two feet.

In the Gun Hill Square project, which is undergoing scoping, an early stage in the environmental review process, the Draft Scope of Work indicates that, because the project site is located within existing and future projected flood zones, the DEIS will include discussion of (1) projected future sea level rise and likely future flood zones for different years within the expected life of the development; (2) government initiatives to improve coastal resilience; and (3) an analysis of consistency with policy 6.2 of the City's revised waterfront revitalization plan, which provides for the integration of consideration of projections of climate change and sea level rise into the planning and design of projects in the City's coastal areas.²⁰

The Astoria Cove DEIS indicates that a small portion of one proposed building is located in a current floodplain, and that additional buildings would be located in the 100-year and 500-year floodplains based on NPCC projections for the 2020s and 2050s.²¹ For one building projected to fall within the 100-year floodplain by 2050, the DEIS states:

Should the base flood elevation rise to these projected elevations in the future, the Applicant anticipates retrofitting the perimeter of the building with flood prevention systems (either temporary or permanently installed flood gates/shutters), potentially in conjunction with an emergency flood protection plan. In addition, as a small portion of [that building] falls within the [current] 100-year flood zone, provisions to address potential flood risks have been developed in the building design.²²

¹⁹ New York City Planning Commission EISs can be found at http://www.nyc.gov/html/dcp/html/env_review/eis.shtml. EISs prepared by the New York City Mayor's Office of Environmental Coordination can be found at http://www.nyc.gov/html/oc/html/ceqr/dme_environmental_reviews.shtml.

²⁰ See NEW YORK CITY LWRP, *supra* note 18, at 43.

²¹ Astoria Cove DEIS fig. 2-9.

²² Astoria Cove DEIS at 2-24; *see also id.* at 15-10.

For buildings proposed in later phases of that project, the DEIS indicates that future building codes and other design requirements will address flood concerns.²³

The Hallets Point Rezoning FEIS considers another proposed mixed-use development along the East River in Astoria, Queens. The Hallets Point FEIS states that “[s]ince the proposed site is on the waterfront, the potential effects of global climate change on the proposed project are considered and measures that could be implemented as part of the project to improve its resilience to climate change are discussed.”²⁴

After discussing various federal, state and local resilience policies, the FEIS states that “the only issue for which the project can prepare, within its context and location, is potential future flooding, *i.e.*, designing the project to withstand and recover from flooding and to ensure that hazardous materials and other potentially dangerous items would not end up in floodwaters.”²⁵ The FEIS then analyzes the project-area flood elevations using the latest FEMA information, plus sea level rise as projected by the NPCC. The FEIS concludes that while the proposed project would be above the current 100-year flood level and projected mid-century flood levels, it “may be within the range of end-of-century 100-year flood levels.”²⁶ Although not formally called environmental “mitigation,” the FEIS states that proposed buildings “would be flood-proofed and would utilize flood barriers on an as needed basis (*i.e.*, before predicted severe storm events).”²⁷

In the Seaside Park project in Coney Island, the DEIS discloses that the basement areas of a renovated restaurant would be lower than current flood levels and future flood levels could reach the ground floor. However, the DEIS states that in addition to meeting all building code requirements, all mechanical equipment will be at roof level, and electrical switchgear will be on the first level, elevated two feet above the floodplain elevation.²⁸

The FEIS for the 625 West 57th Street project in Manhattan, which includes residential, commercial, community facility and parking uses, indicates that the western portion of the project would be subject to flood levels two feet higher than current levels. The FEIS states, however, that the portion of the

project site subject to future flooding would only include non-critical retail frontage, and that no residential areas, critical infrastructure or openings leading to lower-lying project areas would be in the areas subject to increased flooding.²⁹

The other EISs contain similar discussions of potential future flooding, and all discuss measures to make each project more energy efficient and sustainable. The adaptation analyses are limited to flooding and do not include discussion of other potential climate impacts, such as more intense heat waves.

Outside of New York City, several EISs where DEC is the lead agency also discuss the changing climate’s effect on the proposed project. For instance, the DEIS for the Haverstraw Water Supply Project, a proposal to build a desalinization plant for Hudson River water, includes a chapter on global climate change, which discusses projected increased precipitation, droughts and sea level rise, and how those changes would affect water quality (salinity, turbidity, water temperature, etc.) and water levels. The DEIS indicates that the design of the plant takes projected flood levels into account, and is being built to one foot above the current 500-year flood zone, and is designed so that if floods are higher, doors can be elevated to provide additional flood protection.³⁰

Another EIS considering future climate conditions is the Cumulative Impacts Analysis for the Belleayre Mountain Ski Center located in the Catskills.³¹ The Cumulative Impacts Analysis addresses rising temperatures and how they would affect a northeast ski area, water availability, increased runoff from more intense storms and changes in vegetation and pests due to rising temperatures.³²

Consideration of Climate Resiliency in California

In marked contrast to New York, it is up to the courts to decide whether California may affirmatively foreclose any discussion of the effects of climate change on a proposed project under the California Environmental Quality Act (CEQA). In a series of cases, a small number of California courts have held that the purpose of CEQA “is to identify the significant effects of a project on the environment, not the

²³ See Astoria Cove DEIS at 2-24, 15-10.

²⁴ Hallets Point FEIS at 17-9.

²⁵ Hallets Point FEIS at 17-13.

²⁶ Hallets Point FEIS at 17-14.

²⁷ Hallets Point FEIS at 17-14. Because the Hallets Point project would involve a property disposition by the New York City Housing Authority, federal approval is required, and, in accordance with Executive Order 19988, a federal floodplain analysis was also completed in accordance with the floodplain regulations of the U.S. Department of Housing and Urban Development, 24 C.F.R. part 55. See Hallets Point FEIS app. D.

²⁸ Seaside Park DEIS at 11-10.

²⁹ 625 West 57th Street FEIS at 12-13.

³⁰ Haverstraw Water Supply Project Draft Environmental Impact Statement, United Water New York Inc. (Jan. 13, 2012), available at <http://haverstrawwatersupplyproject.com/draft-environmental-impact-statement-deis.html>.

³¹ The Belleayre project involves two EISs, one prepared by a private developer for a resort development, and a separate one prepared by the State for its “Unit Management Plan” for the state-owned ski area. The Cumulative Impacts Analysis addresses the combined impacts of the two related projects. Environmental review documents for both actions are available at <http://www.dec.ny.gov/permits/54704.html>.

³² Cumulative Impact Analysis for: Belleayre Mountain Ski Center UMP-DEIS and Modified Belleayre Resort at Catskill Park Supplemental DEIS § 1.12, at 5.

significant effects of the environment on the project.”³³ In *Ballona Wetlands*, a California appellate court held that the environmental impact report for a proposed mixed-use residential development did not need to consider whether the project would be threatened by rising sea levels due to climate change.

Although the California Supreme Court declined to hear an appeal of *Ballona Wetlands*, it subsequently took the appeal in a case with a similar CEQA issue—*California Building Industry Association v. Bay Area Air Quality Management District*, which involves the promulgation of air quality standards in the San Francisco area. At issue are air quality standards affecting so-called “new receptors”—in other words, new people, such as those working or residing in a new residential or commercial development in an area with existing air pollution. A trade group representing the building industry challenged the threshold standards, arguing that the “purpose of CEQA is to protect the environment from proposed projects, not to protect proposed projects from the existing environment.”³⁴ The California appeals court rejected that argument, which it characterized as based on just a “quartet of cases concluding an EIR is not required for a proposed project based solely on the effect of the environment on people who will live and work at the site of the project.”³⁵ In November 2013, the California Supreme Court agreed to hear the trade group’s appeal, limiting its review to the following issue: “Under what circumstances, if any, does the California Environmental Quality Act . . . require an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project?”³⁶

The case was briefed in the spring of this year and has generated enormous interest in the environmental and building communities. Nineteen organizations, including building, business, housing, planning, environmental and municipal groups, have been granted *amicus* status. The California Supreme Court’s decision will have significant implications for whether CEQA (and possibly other environmental review statutes) can be used to prepare for and adapt to the effects of climate change.

Concluding Thoughts

Notwithstanding the California litigation, it seems clear that environmental impact review statutes such as NEPA, SEQRA and, yes, even California’s CEQA, are not only flexible enough to accommodate disclosure of the effects of climate on a proposed project, but likely to require it. There is no principled reason for excluding disclosure of environmental impacts on the proposed project site, as opposed to the wider environment at large. The definition of “environment” under each statute is broad, and neither the statutes, regulations nor caselaw

distinguish between the “environment” of the project site and the wider world. Moreover, it is well-established practice to analyze other environmental effects on the project site itself, such as hazardous contamination, flora and fauna, the presence of archaeological and historic resources, and the like. Omitting such areas from an environmental impact statement would be improper. Likewise, as is becoming accepted practice, discussing the impacts of the future environment due to a changing climate on a proposed project fulfills the purpose of the environmental review laws.

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LEGAL DEVELOPMENTS

AGRICULTURE & FOOD

Appellate Division Found That Occasional Foie Gras Consumer and Animal Legal Defense Fund Did Not Have Standing to Seek State Foie Gras Ban

The Appellate Division, Third Department, ruled that the Animal Legal Defense Fund (ALDF) and an individual petitioner lacked standing to seek a ban on force-fed foie gras in an action against New York’s Commissioner of Agriculture and Markets, the Department of Agriculture and Markets and New York producers of foie gras. Petitioners alleged that the force-feeding of geese or ducks to enlarge their livers caused the animals to be diseased and the food products created from them to be adulterated, and that such products should therefore be prohibited from entering the food supply. The Third Department ruled that the individual petitioner, who alleged that he occasionally consumed foie gras and was therefore at an increased risk of the medical condition secondary amyloidosis, could not benefit from “enhanced risk” standing because his “risk of exposure” was minimal (given his “occasional” consumption) and the “indication of harm” was uncertain (given that petitioners had identified no case of secondary amyloidosis being linked to foie gras). The individual’s alleged injury was therefore speculative and conjectural. The Third Department also declined to find that ALDF had standing

³³ *Ballona Wetlands Land Trust v. City of Los Angeles*, 201 Cal. App. 4th 455, 473, 134 Cal. Rptr. 3d 194, 206–07 (Cal. Ct. App. 2011).

³⁴ *Cal. Bldg. Indus. Ass’n v. Bay Area Air Quality Mgmt. Dist.*, 218 Cal. App. 4th 1171, 1192, 161 Cal. Rptr. 3d 128, 145 (Cal. Ct. App. 2013), *review granted & opinion superseded*, 312 P.3d 1070, 164 Cal. Rptr. 3d 552 (Cal. 2013).

³⁵ *Cal. Bldg. Indus. Ass’n v. Bay Area Air Quality Mgmt. Dist.*, 218 Cal. App. 4th 1171, 1193, 161 Cal. Rptr. 3d 128, 146 (Cal. Ct. App. 2013), *review granted & opinion superseded*, 312 P.3d 1070, 164 Cal. Rptr. 3d 552 (Cal. 2013).

³⁶ *Cal. Bldg. Indus. Ass’n v. Bay Area Air Quality Mgmt. Dist.*, 312 P.3d 1070, 164 Cal. Rptr. 3d 552 (Cal. 2013).

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