Motion #002

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

BATTERY PARK CITY NEIGHBORHOOD ASSOCIATION and J. KELLY McGOWAN,	:	
	:	Index No. 160624/2022
Petitioners,	:	(KRAUS, J.)
- against -	:	
BATTERY PARK CITY AUTHORITY,	:	
Respondent.	:	
For a Preliminary Injunction, Judgment, and Order Pursuant to Article 78 and CPLR 6301	:	

RESPONDENT'S MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Confronted with the imperative and escalating need to protect Battery Park City and adjacent areas of Lower Manhattan against storm surge and sea level rise, the Hugh L. Carey Battery Park City Authority ("BPCA" or the "Authority"), in conjunction with the City of New York, has spent almost six years planning, designing and evaluating the impacts of the South Battery Park City Resiliency ("SBPCR") Project. After four years of voluntary and proactive engagement with the community and Manhattan Community Board 1 ("CB1") regarding the planning and design of the SBPCR Project, BPCA formally commenced the environmental impact review process pursuant to the New York State Environmental Quality Review Act ("SEQRA") in September 2021 and afforded the public additional opportunities to comment on the potential environmental impacts of the Project.

Notably, Petitioners do not challenge any aspect of the environmental analyses contained in the Final Environmental Impact Statement ("FEIS") or adherence to the required SEQRA procedures. Rather, Petitioners attack the Project as being overly protective and, without offering a shred of expert support, suggest it is based on flawed data. Petitioners decry the Authority's reliance on data published by the Federal Emergency Management Agency ("FEMA") that they claim is "outdated," despite the fact that this is the most recent data available, and the use of such data is specifically required by the New York City Building Code. Petitioners assert that the assumptions as to the level of anticipated sea level rise utilized in the calculation of the design flood elevation ("DFE") are "wildly exaggerated," despite the fact that the data relied upon was the best available and has been used for the various projects that comprise the City's Lower Manhattan Coastal Resiliency ("LMCR") portfolio. And in casting such aspersions, Petitioners

utterly ignore the detailed coastal modeling undertaken to confirm that the Project would be sufficiently protective and allow for FEMA accreditation.

While Petitioners have proposed a concept plan that would leave the bulk of Wagner Park exposed to future storm activity, from the earliest days of the Project, BPCA has made clear its resolve to protect as much of the Park as practicable from future flooding and the associated damage resulting therefrom. Moreover, the Authority and its engineers have repeatedly explained the fundamental tenet underlying the design of the Project: that deployable flood protection measures should be utilized only when passive measures are infeasible. For these obvious and valid reasons, an inland alternative comprised of a series of deployable flood gates (referred to as Alternative 1) was eliminated from further consideration, a conclusion that was presented in the Draft EIS ("DEIS") for the Project.

After abstaining from participation in the SEQRA process, Petitioners unveiled their so-called "Alternative 1a" two weeks after BPCA's Board approved the Findings Statement that concludes the SEQRA process. Their concept, devoid of any engineering details or analyses, is comprised of a combination of floodwalls and deployable measures that Petitioners claim could be "threaded" through Wagner Park with minimal disruption and with reduced or equivalent costs and construction time as the extant Project. Given the paucity of details provided by Petitioners, their self-serving conclusions are unsubstantiated and impossible to verify.

Despite the fact that the Authority was under no legal obligation to consider this so-called "alternative" put forward after the completion of the SEQRA process, in keeping with its commitment to be responsive to community concerns, BPCA publicly addressed Petitioners' proposal, noting the myriad concerns, complexities and considerations that Petitioners had demonstrably overlooked and which render that proposal imprudent, inadvisable, and unworkable.

The Authority is now confronted with litigation by parties who did not participate in the SEQRA process and offer no expert support for either their baseless criticisms of the Authority's DFE calculations or their own conceptual plan, but nonetheless ask this Court to substitute their own judgments and risk-assessments for the Authority's. Centered on a concept that is undeveloped, unrefined, and undeniably and admittedly lacking in detail and study, Petitioners now seek to scuttle more than five years of intensive study and design and an unprecedented level of community engagement. There is utterly no basis in law or in fact for the Court to upend this critical resiliency project; accordingly, Petitioners' Motion for a Preliminary Injunction should be denied in its entirety.

STATEMENT OF FACTS

BPCA is a New York State public benefit corporation whose mission is to plan, create, coordinate and sustain Battery Park City, a 92-acre neighborhood on the west side of Lower Manhattan. Among the prominent and well-used parks and open spaces within Battery Park City is Wagner Park, comprised of 3.5 acres along the waterfront. (Affidavit of Gwen Dawson, BPCA Vice President of Real Property, sworn to Jan. 13, 2023 ("Dawson Aff.") ¶¶ 3, 4.)

Superstorm Sandy, which devastated New York in October 2012, significantly impacted Battery Park City, resulting in over $10M of damage for which the Authority was directly responsible. Although Wagner Park fared comparatively well in that storm due to its slope and relative elevation at its high point, coastal modeling demonstrates that the Park would not fare as well in the face of the projected severity of future storms over the coming decades. (*Id.* ¶ 5.)

In response to Superstorm Sandy, both the City of New York and the Authority began evaluating ways to improve Lower Manhattan's resilience to future storm events. BPCA began its resiliency planning in 2015 and advanced four independent projects (two of which have since

been consolidated into a single project) to protect Battery Park City and surrounding areas. (*Id.* ¶¶ 6–8.) New York City's plans for Lower Manhattan were developed through the LMCR Study, and all of the LMCR projects are currently in construction or design development. (Affidavit of Jordan Salinger, N.Y.C. Mayor's Office of Climate and Environmental Justice ("MOCEJ"), sworn to Jan. 12, 2023 ("Salinger Aff.") ¶¶ 22, 27.)

Planning and design for what would ultimately become the current SBPCR Project began in 2015. (Dawson Aff. ¶ 7.) From the outset of the planning process, the Authority has been committed to robust and transparent community engagement, having participated in more than 20 public meetings related to the SBPCR Project from November 2016 to date. (*Id.* ¶ 10.) CB1 has repeatedly praised the Authority's efforts in this regard, as did the then-Borough President. (*Id.* ¶¶ 11–12.)

After AECOM was engaged in 2018 to undertake a detailed design for the SBPCR Project, it identified three potential alignments for the section of the Project that runs through Wagner Park—one that ran along the water's edge, one that ran inland, and one that ran through the Park along the edge of the relieving platform that forms the waterfront esplanade. (*Id.* ¶¶ 17, 23; *see also* Affirmation of David Paget, sworn to Jan. 13, 2023 ("Paget Aff.") Ex. 4, FEIS, at 2-10–2-12.) The waterfront edge alignment (Alternative 2 in the FEIS) was rejected because it would physically separate the Park and the community from the waterfront and would present engineering challenges. The inland alignment (Alternative 1 in the FEIS) at issue in this litigation was dismissed for several reasons. First, this alignment would leave the majority of Wagner Park vulnerable to flooding in the 2050's 100-year storm. Second, the alignment would depend on a large number of mechanical gates to be deployed in advance of a storm, which presents significant operational and reliability concerns. Third, the existing Pavilion would have to be demolished and

rebuilt to incorporate a flood barrier into its design, which was undesirable for a variety of reasons. (*Id*. at 2-8; Paget Aff. Ex. 5, FEIS App'x A.3, at 2; Dawson Aff. ¶¶ 29, 33–36; Affidavit of Antoine AbiDargham, Chief Engineer for Metro New York at AECOM USA, sworn to Jan. 12, 2023 ("AbiDargham Aff.") ¶ 56.)

Accordingly, the Authority determined that Alternative 1 would not meet the purpose and need of the Project, which specifically calls for construction of a "reliable coastal flood control system" and preservation of open spaces "to the maximum extent practicable." (Paget Ex. 4, FEIS, at 1-7.) The concept of reliability is further explained in one of the specific project objectives as "provid[ing] a reliable coastal flood control system that minimizes risk and the need for operational interventions by relying primarily on passive flood control technology as opposed to mechanical 'deployable' flood control technology." (*Id*.)

The Authority thus advanced the design of the alignment that would bury a flood wall beneath the Park (Alternative 3 in the FEIS) and collaborated with the community on the design of the new park that would be constructed. (Dawson Aff. ¶ 28.) One of the critical aspects of the design was the calculation of the design flood elevation ("DFE") that must be achieved to provide the necessary flood risk reduction for the design storm. (AbiDargham Aff. ¶ 18.) As required by the New York City Building Code, the stillwater baseline was determined based on FEMA's 2013 Flood Insurance Study. (*Id.* ¶¶ 22–24.) Based on guidance from New York City and to conform to other LMCR projects, AECOM utilized the projections of the New York City Panel on Climate Change ("NPCC") to estimate the amount of sea level rise by 2050. (*Id*. ¶¶ 25–26.) The coastal analysis also considered the height of waves that would reach the Project area and how they would interact with the land before reaching the floodwall (i.e., the wave run-up), as well as the freeboard (i.e., the additional height over and above the calculated DFE) required by FEMA. (*Id.* ¶¶ 27–30.)

Finally, the coastal analysis also analyzed whether and to what extent overtopping (i.e., water flowing over the flood alignment and reaching the "dry" side) may occur. (*Id.* ¶ 31.) The coastal analysis ultimately confirmed that no overtopping would occur in the event of a 100-year storm in current day conditions. Although overtopping would occur in a 2050's 100-year storm, such overtopping would be below allowable levels set by the U.S. Army Corps of Engineers ("USACE") and would not undermine the structural integrity of the floodwall. (*Id.* ¶ 36.)

In September 2021, the Authority commenced its SEQRA review of the SBPCR Project. The DEIS issued in May 2022 sets forth the alternatives analysis undertaken by the Authority and provides comprehensive analyses of the potential environmental impacts of the Project. Where significant impacts were identified, the DEIS also explains the mitigation measures to be implemented by the Authority to minimize such impacts.[1] Petitioners have not challenged the sufficiency of those analyses in any respect.

After affording the public an opportunity to review and provide comments on the DEIS both in writing and during a public hearing, the Authority prepared written responses to the comments received and published the FEIS in September 2022. The SEQRA process culminated in the adoption of a SEQRA Findings Statement in October 2022. (Paget Aff. ¶ 46.)

Only after the SEQRA process was complete did Petitioners unveil their so-called "Alternative 1a." Despite the fact that the Authority has no legal obligation to do so, Petitioners now insist that the Authority consider what they claim to be a "new" inland alignment (seemingly in approximately the same location as the rationally rejected Alternative 1) that would combine floodwalls and deployable measures to be surgically "threaded" through the Park. (*See. e.g.*, Pet.

[1] *See generally* BPCA, SBPCR Project DEIS (May 4, 2022), https://bpca.ny.gov//wp-content/uploads/2022/05/SBPCR_rpt_deis_chapters_1_through_4_20220504_CLEAN.pdf.

(NYSCEF No. 1), ¶ 15; Pet'rs' Mem. of Law in Supp. of Art. 78 Pet. and Mot. for Prelim. Inj. ("Pet'rs' Br.") (NYSCEF No. 31) at 13.)[2] Petitioners' plan is utterly lacking in engineering details, thereby rendering any detailed assessment of its feasibility or the time, cost and construction impacts associated therewith impossible. (*See* AbiDargham Aff. ¶¶ 67–77.) What is fundamentally apparent, however, is Petitioners' willingness to both jeopardize the Park and the Pavilion in future storms and risk operation failure associated with the numerous additional deployable features in their design.

Both of these risks were explicitly rejected by the Authority as contrary to the articulated purpose and need of the Project, a determination that cannot be fairly portrayed as arbitrary or capricious in any respect. Indeed, the Authority's decision-making with respect to this Project is the result of extended coordination with and review by the community and a host of governmental agencies, meticulous design by a multitude of subject matter experts, and a fulsome and unchallenged assessment of the potential environmental impacts, and it must be upheld.

STANDARD OF REVIEW

"A party seeking a preliminary injunction must clearly demonstrate (1) the likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the injunction is not issued; and (3) a balance of the equities in the movant's favor." *U.S. Re Companies, Inc. v. Scheerer*, 41 A.D.3d 152, 154 (1st Dep't 2007). This "extraordinary" and "drastic" remedy, *1234 Broadway LLC v. W. Side SRO Law Project*, 86 A.D.3d 18, 23 (1st Dep't 2011), "should not be granted unless the right thereto is plain from the undisputed facts and there is a clear showing of necessity and justification," *O'Hara v. Corporate Audit Co., Inc.*, 161 A.D.2d 309, 310 (1st Dep't 1990). As the

[2] BPCNA, Alternative Resiliency Design for Robert F. Wagner Jr. Park, YouTube 27:00, 27:20 (Oct. 27, 2022) ("10/27 Presentation"), https://www.youtube.com/watch?v=QsBnuwzYq44&t=3870s.

moving party, Petitioners bear the "particularly high" burden of establishing each necessary element for injunctive relief. *Council of the City of N.Y. v. Giuliani*, 248 A.D.2d 1, 4 (1st Dep't 1998).

POINT I

PETITIONERS CANNOT ESTABLISH ANY LIKELIHOOD OF SUCCESS ON THE MERITS

To establish a likelihood of success on the merits, Petitioners "[a]re required to 'demonstrate a clear right to relief which is "plain from the undisputed facts."'" *Mosseri v. Fried*, 289 A.D.2d 545, 545–46 (2d Dep't 2001) (citations omitted); *O'Hara*, 161 A.D.2d at 310. Petitioners' failure to satisfy this requirement requires the denial of Petitioners' request for a preliminary injunction. *See Eljay Jrs., Inc. v. Rahda Exports*, 99 A.D.2d 408, 409 (1st Dep't 1984) (reversing grant of preliminary injunction because finding of no likelihood of success on the merits rendered "unnecessary any inquiry into the possible harm plaintiff would suffer"). By any appraisal of their likelihood of success, fulsome or reduced, Petitioners cannot demonstrate a likelihood of success on their causes of action. The only way Petitioners would be entitled to the extraordinary relief they seek would be if this fundamental prerequisite were eliminated in its entirety.

A. The Purpose Of SEQRA Is To Ensure That Agencies Engage In Informed Decision-Making.

"SEQRA insures that agency decision-makers—enlightened by public comment where appropriate—will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices." *In re Jackson v. N.Y.S. Urban Dev. Corp.*, 67 N.Y.2d 400, 414–15 (1986).

The heart of SEQRA is the Environmental Impact Statement (EIS) process. *In re Town of Henrietta v. Dep't of Envtl. Conservation*, 76 A.D.2d 215, 220 (4th Dep't 1980). SEQRA

prescribes both the procedure that must be followed for formulating an EIS, as well as its substantive content. However, SEQRA does not require an agency to act in a particular manner or to reach a particular result. *See, e.g.*, *Aldrich v. Pattison*, 107 A.D.2d 258, 266–67 (2d Dep't 1985).

B. An Agency Should Be Afforded Deference And Its Decision Overturned Only If It Is Arbitrary And Capricious.

The standard of review in a SEQRA challenge is both well-established and highly deferential. As recognized by the Court of Appeals, "it is not the role of the courts to weigh the desirability of an action or choose among alternatives but to assure that the agency itself has satisfied SEQRA, procedurally and substantively." *In re Jackson*, 67 N.Y.2d at 416. Judicial review of an agency's determination is therefore limited to an assessment of "'whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination.'" *In re Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan*, 30 N.Y.3d 416, 430 (2017) (quoting *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990) (citations omitted)). Because "[i]t is not the province of the courts to second-guess thoughtful agency decisionmaking . . . an agency decision should be annulled only if it is arbitrary, capricious or unsupported by the evidence." *In re Riverkeeper, Inc. v. Plan. Bd. of Town of Southeast*, 9 N.Y.3d 219, 232 (2007). Where an agency's action has a rational basis, it cannot be considered arbitrary or capricious. *See In re Save America's Clocks, Inc. v. City of N.Y.*, 33 N.Y.3d 198, 220 (2019); *In re Youngewirth v. Town of Ramapo Town Bd.*, 155 A.D.3d 755, 757 (2d Dep't 2017); *In re N.Y. Botanical Garden v. Bd. of Stds. & Appeals of City of N.Y.*, 91 N.Y.2d 413, 418–19 (1998). Judicial review under SEQRA is "supervisory only." *In re Jackson*, 67 N.Y.2d at 417. Therefore, the court may not substitute its own judgment or "weigh the desirability of any action

or choose among alternatives," but must "assure that the agency itself has satisfied SEQRA." *Id.* at 416.

In order to prove that an agency acted in an arbitrary and capricious manner, the challenging party must show, using "competent evidence," that any alleged error or omission in an agency's environmental review is of such significance that the agency's determination must be vacated. *See In re Valley Realty Dev. Co. v. Tully*, 187 A.D.2d 963, 964 (4th Dep't 1992). Generalized "community objections" to an agency's conclusions are insufficient to challenge an environmental review that is based on empirical data and analysis. *In re WEOK Broadcasting Corp. v. Plan. Bd. of Town of Lloyd*, 79 N.Y.2d 373, 385 (1992); *In re Veysey v. Zoning Bd. of Appeals of City of Glens Falls*, 154 A.D.2d 819 821 (3d Dep't 1989).

SEQRA requires agencies to consider reasonable alternatives to their actions. However, courts have acknowledged that SEQRA is subject to a "rule of reason," such that "[n]ot every . . . alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA." *In re Northern Manhattan is Not for Sale v. City of N.Y.*, 185 A.D.3d 515, 517–18 (1st Dep't 2020) (citing *Akpan*, 75 N.Y.2d at 570).

Similarly, it is not enough for the challenging party to contend that there was a better alternative that the agency should have chosen instead. *See In re Uptown Holdings, LLC v. City of N.Y.*, 77 A.D.3d 434, 436 (1st Dep't 2010) (petitioners' contention that there were better alternatives "is not a basis to invalidate the FEIS"), *lv. denied*, 16 N.Y.3d 764 (2011); *In re Coalition Against Lincoln W., Inc. v. Weinshall*, 21 A.D.3d 215, 222 (1st Dep't 2005) ("While petitioners contest the conclusions drawn from the studies, and contend there were better alternatives, this is not a basis to invalidate the [FEIS].").

C. The DFE For The SBPCR Project Was Calculated On The Basis Of The Best Available Data.

Each of the various factors in determining the DFE was appropriately determined, considered and accounted for in the coastal analysis performed by AECOM. (*See* AbiDargham Aff. ¶¶ 18–36.) Petitioners portray the stillwater elevations determined by FEMA as both outdated and overly conservative (*see, e.g.*, Affirmation of Alison Frick, sworn to Dec. 14, 2022 ("Frick Aff.") (NYSCEF No. 2) ¶ 16, 18), but these allegations are incorrect and ultimately irrelevant, as the New York City Building Code clearly dictates the use of the more restrictive elevation established by FEMA. (AbiDargham Aff. ¶ 23; Salinger Aff. ¶ 20.) FEMA is the federal agency tasked with assessing flood risk through the United States, and its Flood Insurance Studies ("FISs") and corresponding Flood Insurance Rate Maps ("FIRMs") serve as the basis for the National Flood Insurance Program and building codes across the country. It is inconceivable that the Authority would have utilized anything other than the most recent FEMA data as the starting point for this Project, and Petitioners do not proffer any alternative.

The Authority also exercised sound judgment in utilizing the same sea level rise projections that have been used by the City for the other LMCR projects that the SBPCR Project would eventually tie into—the 90th percentile projection of 30 inches of sea level rise by 2050 from NPCC's third and most recent Report. It would make no sense whatsoever for the Authority and the City to collectively invest billions of dollars in resiliency projects that did not ultimately provide a consistent level of protection for Lower Manhattan. As explained by MOCEJ:

> The City consistently designs coastal resiliency measures to account for both current risk and future risk as indicated by the NPCC projections. To achieve this highly protective standard, the City designs projects using the low-probability (90th percentile) sea level rise projections for the 2050s. This standard is equivalent to the projections considered likely (the mid-range estimates) by climate scientists by 2100, which aligns with the 100-year useful life of the

> Project. Because many of these coastal resiliency projects are interrelated, the projects must be as consistent with one another, and with the Study, as possible to maximize these benefits. It is important that the projects are designed to the same standard.

(Salinger Aff. ¶ 28.) The 2019 NPCC Report also notes "[a] growing awareness … [of] the need to consider high impact, low probability scenarios in coastal risk management, particularly when planning for long-lived infrastructure development." (Paget Aff. Ex. 1, NPCC3, § 3.7.1.) Even BPCNA's own affiant, Britni Erez, in direct contravention of Petitioners' claims that the DFE is overly conservative (*see, e.g.*, Pet. ¶¶ 107, 124), acknowledged the importance of a conservative design, cautioning that "[i]f they prove to be wrong by underestimating the flooding risk in the coming years or misstating it in some way, the Authority's design will be outdated and presumably the Park will need to be reconstructed again." (Affidavit of Britni Erez, sworn to Dec. 9, 2022 ("Erez Aff.") (NYSCEF No. 18) ¶ 97.)

Petitioners' assertion that the design of the SBPCR Project, which commenced in 2019, should have been premised on sea level rise projections published by NOAA in 2022 defies all logic and reason. (*See* Frick. Aff. ¶¶ 19–36.) While Petitioners claim that the NPCC projection is "wildly exaggerated relative to both NASA and NOAA's predictions" (Frick Aff. ¶ 23), they acknowledge that NOAA's "High Scenario" projects 2.33 feet of sea level rise by 2050, as compared to the 2.5 feet projected by NPCC. Given the inherent uncertainty associated with such predictions, a difference of 0.17 feet (i.e., approximately two inches) seems manifestly characterized as remarkably consistent. Regardless, courts have acknowledged that "unanimity of scientific opinion is not a prerequisite to a valid FEIS." *Congdon v. Washington Cnty.*, 512 N.Y.S.2d 970, 978 (Sup. Ct. Washington Cnty. 1986), *aff'd*, 130 A.D.2d 27 (3d Dep't 1987), *lv. denied*, 70 N.Y.2d 610 (1987); *see also In re Friends of P.S. 163, Inc.*, 146 A.D.3d at 578 ("The choice between conflicting expert testimony rests in the discretion of the administrative agency.");

Roosevelt Islanders for Responsible Southtown Dev. v. Roosevelt Island Operating Corp., 291 A.D.2d 40, 55 (1st Dep't 2001). Accordingly, this Court should defer to BPCA (and ultimately, the City of New York) in determining the appropriate design standards for coastal resiliency projects intended to provide flood protection for Lower Manhattan through the 2050's and beyond.

Contrary to Petitioners' assertions that the coastal analysis failed to assess wave run-up (*see, e.g.*, Frick Aff. ¶ 37), it in fact included detailed modeling of wave run-up (AbiDargham Aff. ¶¶ 27–29, 33). That analysis identifies that for a 2050's 100-year storm, the design DFE is in fact lower than the calculated DFE; indeed, the modeling shows that in a 2050's 100-year storm, a minimal amount of water will overtop the flood protection. (*Id*. ¶ 35.) Although the rate of such overtopping is within acceptable limits published by the USACE and thus the design meets the FEMA requirements for accreditation (*id*. ¶ 36), the coastal analysis conducted provides clear and compelling evidence that the Authority has not exaggerated the DFE.

Moreover, Petitioners appear to be laboring under the misunderstanding that the Authority's decision-making was a direct result of the DFE calculation for Wagner Park, and that the Authority would have selected Alternative 1 had they calculated a lower DFE for such alternative. (*See, e.g.*, Pet'rs' Br. at 15.) There was no reason to conduct a detailed coastal analysis for the alternatives that had been rejected for other reasons, as the purpose of such analysis is to confirm that the project as designed will be sufficiently protective. As discussed in detail below, aside from considerations of DFE, Alternative 1 was also eliminated from consideration due to its failure to meet the Project purpose and need (i.e., it would leave the bulk of the Park vulnerable to flooding in a 2050's 100-year storm and would involve reliance upon deployable measures in an area in which a passive solution was feasible)—reasons entirely unrelated to the DFE. Indeed, even if Petitioners' hypothesized lower DFE was correct, which it demonstrably is not, the

Authority would not have selected the Alternative 1, as the aforementioned fundamental flaws associated with this alternative would persist. (*See* Dawson Aff. ¶ 37.)

As courts have recognized, an agency is not required to consider alternatives it determines to be infeasible. *In re Coalition Against Lincoln W., Inc.*, 21 A.D.3d at 223, citing *In re South Bronx Clean Air Coalition v. N.Y.S. Dep't of Transp.*, 218 A.D.2d 520 (1st Dep't 1995), *lv. denied*, 87 N.Y.2d 803 (1995). Thus, the Authority was under no obligation to conduct detailed coastal modeling and analysis for an alternative that it had rejected for failing to meet the purpose and need of the Project.

D. BPCA Acted Rationally In Eliminating Alternative 1 (The Inland Alignment) From Further Consideration Because This Higher-Risk Option Did Not Meet The Project Purpose And Need.

In challenging the Authority's rejection of the Alternative 1 in the FEIS, Petitioners conflate the actual alternative presented in the FEIS with their own so-called "Alternative 1a," which was not, could not have been and need not have been considered in the FEIS. Accordingly, as discussed further in Point I.E below, the fifth allegation of arbitrary and capricious action by the Authority in Petitioners' Memorandum of Law—the purportedly "irrational reasons" for rejecting Alternative 1a's use of static flood walls (Pet'rs' Br. 17)—is beyond the scope of this action and should not be considered by the Court, given Petitioners' failure to exhaust their administrative remedies. *See Aldrich*, 107 A.D.2d at 269 (holding that since petitioners had "failed to comment upon these issues at the public hearing or during the period for submitting written comments, these issues are not now properly before this court for review"); *see also, e.g.*, *In re Save Harrison, Inc. v. Town/Vill. of Harrison*, 168 A.D.3d 949, 952 (2d Dep't 2019); *In re Miller v. Kozakiewicz*, 300 A.D.2d 399, 400 (2d Dep't 2002); *In re Vill. of Tarrytown v. Plan. Bd. of Vill. of Sleepy Hollow*, 292 A.D.2d 617, 620 (2d Dep't 2002).

As discussed above, Petitioners are mistaken in their claim that Alternative 1 was rejected on the basis of the DFE, stating that the previously assumed DFE in 2017 "is in fact sufficient, and the rejection of Alternative 1 on the basis that it did not conform to the Authority's 19.8-foot DFE was arbitrary and capricious." (Pet'rs' Br. 15.) As stated in the FEIS, the recognition that the DFE would be higher than the 16.5 feet previously assumed by Perkins Eastman led to the conclusion that "a new pavilion at the same elevation would not achieve a sufficient DFE to provide the necessary protection," and that use of larger deployable gates would pose other constructability concerns (Paget Aff. Ex. 5, FEIS App'x A.3, at 2), there were additional bases upon which Alternative 1 was eliminated that were entirely unrelated to the DFE (Paget Aff. Ex. 4, FEIS, at 2-8.) The failure to maximize the protection of Wagner Park from the 2050's 100-year storm and its unnecessary reliance on deployable measures would persist even had it been lower. (Dawson Aff. ¶ 37.)

Petitioners also question the determination that the current Pavilion could not serve as a part of the flood barrier (Pet'rs' Br. 15); however, based on the assessment performed by Perkins Eastman in 2015-2017, the retention of the existing Pavilion was not actually proposed in any of the alternatives considered in the FEIS (*see generally* Paget Aff. Ex. 4, FEIS, at 2-5–2-20). Once the determination was made to elevate the Park, the Authority did consider a series of alternatives specifically related to the Pavilion: elevating the existing Pavilion in-place, elevating the existing Pavilion and locating it further inland, and constructing a new pavilion further inland. (*Id.* at 2-20–2-22.)

Because Wagner Park was determined to be eligible for listing on the State/National Register by the State Historic Preservation Office ("SHPO") of the New York State Office of Parks, Recreation and Historic Preservation ("OPHRP"), the Authority engaged in consultation

with the SHPO pursuant to the New York State Historic Preservation Act. Although OPHRP concurred with the Authority's assessment that any of the alternatives evaluated in the FEIS would have an adverse impact on Wagner Park (including Alternative 1), it requested a further analysis of options to retain the existing Pavilion. (Paget Aff. Ex. 6, LOR, at 2.) The Authority presented a detailed engineering assessment that concluded that the existing Pavilion could not be retained and OPHRP ultimately concluded that there was no feasible and prudent alternative to the replacement of the existing Pavilion. (*Id.*)

Petitioners next contend that the Authority irrationally rejected Alternative 1 on the basis of its unnecessary reliance on deployable measures. (Pet'rs' Br. 15-16.) Yet the Authority's desire to minimize the risk and complexity associated with effectuating the flood risk reduction to be afforded by the SBPCR Project is entirely reasonable and responsible. While Petitioners correctly observe that deployable measures are proposed in other areas of the SBPCR Project, those measures were employed only when passive solutions were deemed to be technically infeasible or deployable measures were needed to afford access. (*See* Dawson Aff. ¶ 35; AbiDargham Aff. ¶ 64.)

Similarly, while Petitioners are apparently willing to leave the majority of Wagner Park exposed to future storm activity, BPCA has repeatedly made plain that it is not. Another New York City resiliency project, East Side Coastal Resiliency, proposed to demolish and reconstruct the 55-acre John A. Lindsay East River Park at a higher elevation. That project was challenged on the basis that it constituted parkland alienation that required state legislation. The Supreme Court upheld the City's plan, concluding that protection of a park is a park purpose, noting that

"the record supports that without this plan we will likely not even have a park at all."[3] Tr. of Aug. 20, 2020 Oral Argument at 39, *In re East River Park Action v. City of N.Y.*, Index No. 151491/2020 (Sup. Ct. N.Y. Cnty. Aug. 24, 2020) (NYSCEF No. 136). Similarly, the First Department noted that the project was advanced "with the intention of saving the Park from degradation due to surging salt water from the East River during storms that, over time, have increased in ferocity." *In re East River Park Action v. City of N.Y.*, 201 A.D.3d 73, 80 (1st Dep't 2021). While Petitioners are focused on the short-term impacts to them personally over the next two years, the City and the Authority are focused on protecting their Parks from the long-term impacts of climate change to ensure that they are available to the public for decades to come. Although Petitioners repeatedly lament the "loss" of the Park, the Park will be entirely reconstructed and protected, with a design that incorporates many of the important elements of the original design, along with various new elements specifically requested by the public. (Dawson Aff. ¶¶ 39–40.)

Petitioners ask this Court to substitute their priorities and risk tolerance for the Authority's, but it is simply not enough for the challenging party to contend that there was a better alternative that the agency should have chosen. *See In re Uptown Holdings, LLC*, 77 A.D.3d at 436 (petitioners' contention that there were better alternatives "is not a basis to invalidate" the FEIS); *In re Coalition Against Lincoln W., Inc.*, 21 A.D.3d at 222. In order to prove that an agency acted in an arbitrary and capricious manner, the challenging party must show, using "competent evidence," that any alleged error or omission in an agency's environmental review is of such significance that the agency's determination must be vacated, *see In re Valley Realty Dev. Co.*, 187 A.D.2d at 964, a demonstration Petitioners simply cannot make in this case.

[3] The ESCR project was designed utilizing the same FEMA and NPCC sources as were utilized for the SBPCR Project. (Salinger Aff. ¶ 29.)

E. BPCA Was Not Required To Reopen The SEQRA Process To Consider Petitioners' Inexcusably Belated "Alternative 1a."

Having abstained from participating in the SEQRA process, Petitioners waited until after the completion thereof to hold a virtual presentation of a "new alternative" that they claimed would "save" Wagner Park and minimize disruptions and closures during construction (Pet. ¶ 143), again waging their battle online and in the court of public opinion.

Petitioners apparently intend to evade their failure to have exhausted their administrative remedies by portraying their alternative as a variation of Alternative 1, which was analyzed and rejected in the FEIS. (*See, e.g.*, ¶¶ 171, 174.) Unfortunately for Petitioners, there is no "relation back" theory under SEQRA—long-established case law unequivocally requires Petitioners to have put their concept forward during the SEQRA process. In *Natural Resources Defense Council, Inc. v. City of New York*, the Court of Appeals rejected petitioners' claim that the SEQRA review conducted by the City was inadequate for failing to consider an alternative plan put forward by petitioners after the completion of the SEQRA process, specifically noting:

> This plan was presented only after the environmental administrative procedures had been concluded. Such a submission is untimely. All administrative procedures must come to an end at some point in time, or else no project would ever be built.

446 N.Y.S.2d 871, 873 (1982). *See also Natural Resources Defense Council, Inc. v. City of N.Y.*, 528 F. Supp. 1245 (S.D.N.Y. 1981); *Nichols Yacht Yard v. Bd. of Trustees of Mamaroneck*, No. 19599/84, slip op. at 8–9 (Sup. Ct. Westchester Cnty. Oct. 28, 1987); *Franklin Ave. Acquisition, LLC v. City of N.Y.*, No. 158502/2021, 2022 WL 1185999 (Sup. Ct. N.Y. Cnty. 2022).

Even if their concept had been timely presented, Petitioners have offered no engineering drawings or design details to allow for any meaningful analysis. (*See* AbiDargham Aff. ¶ 67.) While Lucinda Sanders of OLIN, one of the landscape architects who conceptualized "Alternative 1a," claimed in her presentation that some unidentified engineers were consulted with respect to

the concept,[4] it is quite clear that engineering and constructability concerns were deferred to a later date in the conceptualization of this proposal.

Petitioners' declaration that the design, environmental impact review and implementation of this concept could somehow be accomplished within or more quickly than the timeframe posited for the SBPCR Project[5] only dramatizes their failure to consider the complexity of the issues at hand. As was repeatedly acknowledged by Ms. Sanders during her presentation of this conceptual idea, "the devil is in the details,"[6] the dearth of which here is palpable.

For example, the notion that one could "thread" a floodwall of the size and to the depth required to achieve the necessary flood protection through the existing Park and landscaping with minimal disturbance is unsupported by any analysis.[7] These structures cannot just be dropped into place, but instead require significant excavation and heavy machinery to install. (*See* AbiDargham Aff. ¶¶ 72–74.) Any assumption that this level of reconstruction could be accomplished readily and quickly and with minimal disruption only provides further evidence that Petitioners did not engage with the appropriate consultants and engineers to fully understand the magnitude of what was being urged.

The hybrid nature of Petitioners' "new" and inexcusably belated proposal does nothing to address the risks that formed the basis of the rejection of Alternative 1. BPCA detailed its long-held concerns regarding various aspects of Petitioners' proposal in a November 2, 2022 letter to various elected officials and members of CB1. Notably, no elected official, nor CB1, has asked the Authority to revisit those objections or advocated for the advancement of "Alternative 1a"

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[4] 10/27 Presentation at 30:09, 52:15, 1:01:05, 1:18:45.
[5] *See also id.* at 42:05, 45:10.
[6] *Id.* at 25:22, 39:55, 1:24:09.
[7] *Id.* at 27:00, 27:20.

(Dawson Aff. ¶ 49), despite BPCNA's exhortation of its members to write to their elected officials on behalf of their conceptual proposal.[8]

Even if Petitioners' unfounded assumptions were correct, it would be of no legal consequence whatsoever. As noted above, Alternative 1a was not fairly before the Authority, given Petitioners' failure to exhaust their administrative remedies. And even had it been timely presented during the SEQRA process, as discussed in Point I(D), *supra*, it is not enough for the challenging party to contend that there was a better alternative that the agency should have chosen instead. *See In re Uptown Holdings, LLC*; *In re Coalition Against Lincoln W., Inc.* Petitioners cannot satisfy their burden to establish the merits of their claims with conclusory and unsupported allegations or substitute their own judgment for that of the lead agency. *In re Vesey*, 154 A.D.2d at 821; *Bahadur v. N.Y.S. Dep't of Corrections*, 88 A.D.3d 629, 630 (2d Dep't 2011); *In re WEOK Broadcasting Corp.*, 79 N.Y.2d at 385.

POINT II

THE BALANCE OF THE EQUITIES FAVORS BPCA

In balancing the equities of a requested injunction, a court may weigh the harm alleged by the movant against "the harm caused to defendant through the imposition of the injunction." *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., Inc*., 114 A.D.2d 165, 174 (2d Dep't 1986). In doing so, the court "must consider the 'enormous public interests involved.'" *Seitzman v. Hudson River Associates*, 126 A.D.2d 211, 239–40 (1st Dep't 1987) (quoting *Barney v. City of N.Y.*, 83 A.D. 237, 241 (1st Dep't 1903) (upholding the trial court's denial of plaintiff's motion for a preliminary injunction to halt the completion of part of the New York subway, noting the substantial public

[8] *Id.* at 1:26:18–1:28:40, 1:30:20.

cost and delay that would result from injunctive relief). *See also id.* at 241 ("The importance of this public improvement…should be considered in determining whether the court should interfere by an injunction which would prohibit the completion of the public improvement."); *Gendels v. Water Tunnel Contractors, Inc.*, 67 Misc. 2d 138, 139 (Sup. Ct. Westchester Cnty. 1971) (refusing to enjoin operations needed for the construction of a new New York City water tunnel); *Metro. Transp. Auth. v. Vill. of Tuckahoe*, 67 Misc. 2d 895, 900 (Sup. Ct. Westchester Cnty. 1971), *aff'd*, 38 A.D.2d 570 (2d Dep't 1971) ("The court must consider and attach paramount importance to the public interest aspects of the litigation.").

Here, the equities similarly favor BPCA in its pursuit of a critical flood risk reduction project that has that been the subject of years of community engagement, planning and design. The public interest here is incontestable. Residents, employees and visitors to southern Battery Park City and adjoining areas of Lower Manhattan should not be made to suffer further delay in the accomplishment of this Project. And, as discussed further in Point III, *infra*, the costs associated with delay are considerable.

Moreover, as noted above, even if the Petitioners were correct that the DFE for Wagner Park was too high, this does not dictate that an inland alternative (either as considered in the FEIS or as sketched by Petitioners) be advanced. The Authority would still elect to protect the majority of Wagner Park from future storms and to minimize the use of deployable measures. (Dawson Aff. ¶ 37.) Accordingly, the balance of the equities favors the Authority.

POINT III

PETITIONERS WILL NOT SUFFER IRREPARABLE HARM IF THEIR MOTION IS DENIED

While Petitioners hyperbolically assert that Wagner Park will be "destroyed" by the Project (Pet'rs' Br. at 3), the truth is that the Park will be preserved and protected. This is not the case of

a real estate developer usurping public parkland for private gain. The Project is in fact a public benefit project meant to protect Lower Manhattan from future storm surge and sea level rise. Indeed, one of the fundamental purposes of the Project is to ensure that the Park can be enjoyed by generations to come. The Park will be reconstructed to be more resilient, with a new pavilion building with a smaller footprint, and a design that increases universal accessibility while incorporating many of the important elements of the original design, along with various new elements specifically requested by the public. (Dawson Aff. ¶¶ 39–40.)

That Petitioners prefer the existing Park to the new design or would prefer that the Authority had selected a less protective alternative does not mean that they will be irreparably harmed by allowing this critically important Project to proceed. If anything, it is the Authority (and the public it serves) that will be harmed by further delay. *See Save Our Parks v. City of N.Y.*, 2006 N.Y. Misc. LEXIS 2365, at *26–27 (Sup. Ct. N.Y. Cnty. Aug. 15, 2006) (denying preliminary injunction to halt stadium construction, finding that removal of 377 trees and four-year temporary loss of parkland for four years did not constitute irreparable harm, but that the City would be irreparably harmed by further delay of the project);[9] *cf. N.Y.S. Thruway Authority v. Dufel*, 129 A.D.2d 44 (3d Dep't 1987) (granting preliminary injunction against property owner who was barricading detour route needed to handle traffic while collapsed bridge was replaced, finding that delaying completion of the bridge constituted irreparable injury to agency).

Petitioners focus on the loss of mature trees as constituting irreparable harm (Pet'rs' Br. at 19), yet in *Save Our Parks*, the Supreme Court rejected the argument that the cutting of trees

[9] In a later federal court litigation contesting the stadium project, Judge Buchwald of the Southern District of New York held that plaintiffs would have been barred from asserting irreparable harm on the basis of the loss of trees by the doctrine of collateral estoppel as this argument had been rejected by Judge Cahn in the prior state court litigation. *Save Our Parks v. Kempthorne*, 2006 U.S. Dist. LEXIS 85206, at *68 (S.D.N.Y. 2006).

constituted irreparable harm, because such trees were to be replaced by many more trees in the vicinity of the project. 2006 N.Y. Misc. LEXIS 2365, at *26-27. Here, the number of trees in the Project Area would similarly increase as a result of the Project: 114 trees would be removed and 240 planted, to achieve a net increase of 126 trees throughout the Project Area. (Paget Aff. Ex. 4, FEIS, at 3.7-24.) In accordance with the New York City Department of Parks and Recreation's Tree Restitution Policy, to compensate for the removal of approximately 77 trees in The Battery, which is under the jurisdiction of NYC Parks, and within the NYCDOT ROW, 86 new trees would be planted, and 3 trees would be transplanted. This tree restitution, which does not include the value of the trees to be planted on BPCA property, is valued at approximately $5.2 million. (*Id*.) Moreover, as noted in the FEIS, the Authority has been coordinating with NYC Parks and The Battery Conservancy regarding the salvage of plant material and trees. (*Id*.) Accordingly, Petitioners will not suffer any irreparable harm in the absence of injunctive relief.

POINT IV

PETITIONERS ARE REQUIRED TO POST A SIGNIFICANT UNDERTAKING IF THE PRELIMINARY INJUCTION MOTION IS GRANTED

Under New York law, a bond is "clearly and unequivocally require[d]" for a preliminary injunction under CPLR 6312(b), *Griffin v. 70 Portman Rd. Realty, Inc.*, 47 A.D.3d 883, 884 (2d Dep't 2008), and may, in the discretion of the Court, be required in respect of the issuance of any temporary restraining order ("TRO") that Petitioners may ultimately request in order to extend the currently stipulated pause on construction activities within Wagner Park. CPLR 6312(c). The purpose of the bond requirement is to "reimburse the [respondent] for damages sustained if it is later finally determined that the preliminary injunction [and any TRO] was erroneously granted." *Bldg. Serv. Loc. 32B-J Pension Fund v. 101 Ltd. P'ship*, 115 A.D.3d 469, 476 (1st Dep't 2014) (*quoting Margolies v. Encounter, Inc.*, 42 N.Y.2d 475, 477 (1977)) (emphasis added). Particular

damages that should be considered in setting the amount of an undertaking include "the cost of building due to higher prices for labor and materials." 13 New York Civil Practice: CPLR P 6312.05 (2022) (citations omitted).

As explained in the accompanying affidavit of Gwen Dawson, any injunctive relief restraining the Authority's work at Wagner Park would substantially increase the project costs and delay completion of the Project. (Dawson Aff. ¶¶ 66–69.) Based on very conservative estimates, the Authority is at risk of incurring $5,030 of increased construction, oversight, and delay costs each day that any injunctive relief were to remain in effect—and that is only with respect to one of several Authority contracts related to the construction of the SBPCR Project. (*Id.* ¶ 68.)

The Authority recognizes that it could take months to reach a final disposition of this proceeding, during which the Authority's costs will mount substantially. Moreover, significant time is required to mobilize workers and equipment and to commence work even after any injunctive relief is terminated. The Authority therefore asks this Court to impose a mandatory bond requirement of $459,000 to ensure that at least three months of potential construction cost increases and delay damages are available to the Authority in the event the Court determines that the injunctive relief should not have been imposed. (*Id.* ¶ 69.) As reflected in Ms. Dawson's affidavit, this amount is far below the actual damages the Authority would expect to suffer in the event of a longer-term prohibition on proceeding with work in Wagner Park.

As the Authority is a public benefit corporation working to advance a project that is unquestionably in the public interest (see Point II, *supra*), forcing the Authority to unilaterally bear the burden of such cost increases even after the successful defense of this litigation would be unjust and unwarranted. Accordingly, the minimal bond requested by the Authority should be granted.

CONCLUSION

For all of the reasons set forth above and in the accompanying affidavits and affirmation, Petitioners are not entitled to injunctive relief and their Motion should be denied in its entirety.

Dated: January 13, 2023
New York, NY

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Document Title:

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION

Pursuant to 22 NYCRR 202.8-b, I certify that the accompanying Memorandum of Law in Opposition to Petitioners' Motion for a Preliminary Injunction, which was prepared using Times New Roman 12-point typeface, contains 7,802 words, excluding the parts of the document that are exempted by 22 NYCRR 202.8-b, and complies with the word count limit. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word) used to prepare the document.

Dated: January 13, 2023
New York, New York

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