

Index No. 260287/08

**SUPREME COURT OF NEW YORK
COUNTY OF BRONX**

In the Matter of the Application of

**THE BRONX COUNCIL FOR ENVIRONMENTAL
QUALITY (BCEQ), et al.,**

Petitioners,

**For a Judgment Pursuant to Article 78 of the Civil Practice
Law and Rules**

- against -

**THE NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION (DEP), THE NEW
YORK CITY DEPARTMENT OF BUILDINGS, THE CITY
OF NEW YORK, and MICHAEL S. BLOOMBERG,
individually and in his official capacity as Mayor of the City of
New York,**

Respondents.

**RESPONDENTS' MEMORANDUM OF LAW IN
SUPPORT OF THEIR ANSWER AND IN OPPOSITION
TO THE REQUEST FOR INJUNCTIVE RELIEF**

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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In the Matter of the Application of

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Index No.: 260287/08

Petitioners/Plaintiffs,

IAS Part 8 (Stinson, J.)

-against-

THE NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION (DEP), THE NEW
YORK CITY DEPARTMENT OF BUILDINGS, THE
CITY OF NEW YORK, and MICHAEL S.
BLOOMBERG, individually and in his official capacity as
Mayor of the City of New York,

Respondents/Defendants.

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**RESPONDENTS' MEMORANDUM OF LAW IN
SUPPORT OF THEIR ANSWER AND IN
OPPOSITION TO THE REQUEST FOR
INJUNCTIVE RELIEF**

PRELIMINARY STATEMENT

Petitioners bring this special proceeding under Article 78 of the New York Civil Practice Law and Rules by Order to Show Cause, seeking a declaratory judgment (1) ordering the New York City Department of Environmental Protection ("DEP") to submit an environmental impact statement ("EIS") pursuant to the State Environmental Quality Review Act ("SEQRA") before beginning blasting at Jerome Park Reservoir, and (2) ordering DEP to submit an EIS before beginning the carting of materials from the Jerome Park Reservoir. Petitioners also object to the determination of the New York City Department of Buildings ("DOB") that DEP water tunnels and directly appurtenant structures, including the shafts at the

Jerome Park Reservoir and the Croton Water Treatment Plant, do not require building permits under the City Charter, and appear to argue that this determination should have been analyzed in an EIS.¹ On July 29, 2008, the Court issued a Temporary Restraining Order enjoining DEP from conducting any blasting at Jerome Park Reservoir, and from carting materials in or out of the Jerome Park Reservoir site in association with any blasting, pending a hearing and determination on the Order to Show Cause.

Respondents the New York City Department of Environmental Protection, the New York City Department of Buildings, the City of New York, and Michael Bloomberg, as Mayor of the City of New York (collectively "Respondents" or "the City") submit this memorandum of law in support of their Verified Answer and in opposition to the request for declaratory and injunctive relief.

As further explained below, petitioners' claims are without merit and should be denied in their entirety. First, petitioners' objections to surface blasting in connection with construction of the riser shafts and the footprint of the Shaft and Meter Chamber ("SMC") at the Jerome Park Reservoir site are moot because DEP has decided to proceed with mechanical excavation (*i.e.*, hoe ramming) for the limited excavation work at that site. Moreover, because the predicted noise, traffic and air quality impacts associated with hoe ramming are consistent with the impacts disclosed in the 2004 Final Supplemental Environmental Impact Statement ("FSEIS"), no additional environmental review is required prior to beginning this work. Next,

¹ Rather than submit a single Verified Petition with accompanying affidavits, as provided in CPLR § 7804(d), petitioners have inappropriately submitted 15 separate, non-identical papers, each captioned "Verified Petition and Affidavit in Support," which are signed by the 15 individual petitioners, as well as a separate Affirmation from their attorney, Ezra Glaser. Accordingly, it has been difficult to determine precisely what relief is requested with respect to various aspects of the project.

petitioners' objections to the SMC work planned for the Harris Park Annex site are premature, as the contract for that work has not yet been awarded and DEP is currently evaluating whether or not there are new potential significant environmental impacts, as compared to the impacts disclosed in the FSEIS, of a number of changes to the design and construction plans for this aspect of the project, including a possible change in the method of rock excavation for the remaining portion of the SMC.

Finally, Petitioners' challenge to DOB's conclusions as to the building permits required to construct the Croton Water Treatment Plant is clearly time barred. The Plant has been under active construction since late 2004, and DOB confirmed several years ago that, consistent with the City Charter, DEP did not need to obtain a building permit from DOB to construct the Croton Water Treatment Plant because the Plant is directly appurtenant to a water tunnel. In any event, this conclusion was reasonable as the City Charter does not require DEP to obtain building permits from DOB for underground water tunnels and directly appurtenant shafts and facilities.

STATEMENT OF FACTS

As set forth more fully in the accompanying affidavits of Gary Heath, sworn to on August 28, 2008 ("Heath Aff."), and Marshall A. Kaminer, sworn to on August 29, 2008 ("Kaminer Aff."), and their accompanying exhibits, the facts that form the basis of Petitioners' purported claims are as follows:

Project Background

The City obtains its drinking water from three upstate water supply systems. DEP operates those water supplies for the City and is charged by the City Charter with responsibility for ensuring that City residents receive safe and healthy drinking water. The Croton system, located in Westchester and Putnam counties, is the oldest and smallest of the City's three water

supply systems. On average, the Croton system provides ten percent of the City's daily water demand of approximately 1.1 billion gallons, but as needed, particularly during drought conditions, can provide up to thirty percent of the daily demand. Heath Aff. ¶ 5.

The City is currently constructing the Croton Water Treatment Plant in the Bronx, an enormous and complex project that is both integral to the future viability of the City's Croton water supply system and mandated under federal law and a federal consent decree with the United States Environmental Protection Agency and the New York State Department of Health. See *United States v. City of New York*, 30 F.Supp.2d 325 (E.D.N.Y. 1998). The main Treatment Plant structure is being constructed at the Mosholu Golf Course site in Van Cortlandt Park ("Mosholu"), and will have the capacity to treat 290 million gallons of drinking water per day. Heath Aff. ¶ 4; Findings Statement, submitted as City Exhibit 1, at 1. When completed, the Croton Water Treatment Plant will provide filtration and disinfection of the Croton system water provided to New York City residents and will ensure that the water from the Croton system will be able to meet state and federal drinking water quality standards. Heath Aff. ¶ 5.

DEP began construction work on the Water Treatment Plant in 2004, and work has been on-going since that time. Under the federal consent decree, which has been ordered by the United States District Court for the Eastern District of New York, DEP is required to complete construction of the Plant and all related facilities necessary to its operation by May 1, 2011, and to commence operation of the Plant by October 31, 2011. The Consent Decree sets forth milestones for completion of various elements of the Plant and failure to meet those milestones would result in the imposition of substantial penalties. Heath Aff. ¶ 6.

Off-Site Work at the Jerome Park Reservoir and Harris Park Annex

Petitioners' claims concern the construction of various off-site tunnels, shafts and chambers at the Jerome Park Reservoir and the Harris Park Annex sites in the Bronx. Jerome

Park Reservoir is located in the Bronx on a 110.5-acre site owned by the City and under the jurisdiction of DEP. City Exh. 2, FSEIS Section 8.2 at JPR 1. Before construction began for the Croton Water Treatment Plant, the site was used as an open finished water reservoir as part of the City's water supply system, storing chlorinated water just prior to its distribution to consumers. City Exh. 2, FSEIS Section 8.2 at JPR 1. Following construction of the Croton Water Treatment Plant, Jerome Park Reservoir will be used as a raw water reservoir, where untreated water will be stored prior to treatment at the Plant. The Harris Park Annex site lies between the Reservoir and Goulden Avenue. The Harris Park Annex is under the jurisdiction of the New York City Department of Parks and Recreation, but it is not mapped as parkland. Heath Aff. ¶ 9.

The work at the Jerome Park Reservoir and the adjacent Harris Park Annex is necessary for operation of the Croton Water Treatment Plant. It involves construction of new water distribution facilities and connections, including a new shaft and meter chamber to connect two new underground treated water tunnels. The new underground water tunnels will carry water from the Treatment Plant to the water distribution system. Heath Aff. ¶ 10. As concerns this proceeding, this work includes the construction of two treated water riser shafts adjacent to the Reservoir to enable connections from the Croton Water Treatment Plant to the water distribution system. Heath Aff. ¶ 11. The riser shafts and a portion of the SMC footprint are being constructed as part of the CRO-313 contract. Work under that contract commenced on August 23, 2006 and is currently on-going at the site, subject to the TRO issued on July 29, 2008. Heath Aff. ¶ 11.

Additional work related to the Shaft Meter Chamber is also planned under a separate contract, CRO-312OS. CRO-312OS has not yet been awarded, and work under that

contract is not expected to begin until approximately January 2009. The work under CRO-3120S includes construction of one consolidated SMC in the Harris Park Annex, and is expected to begin in January 2009 with the construction of a noise attenuation wall. DEP is currently evaluating whether or not there are new potential significant environmental impacts, as compared to the impacts disclosed in the FSEIS, from a number of changes to the design and construction plans for this aspect of the project, including a possible change in the method of rock excavation for the remaining portion of the SMC under CRO-3120S. DEP expects to finalize that analysis before the end of the year. Heath Aff. ¶ 12.²

The 2004 Environmental Review

Prior to construction, the entire Croton Water Treatment Plant project, including the off-site work, underwent a full environmental review under the State Environmental Quality Review Act ("SEQRA") and New York City Environmental Quality Review ("CEQR") procedures. After it was issued, four separate suits were brought to challenge the FSEIS, and all four suits were dismissed after each court found that the FSEIS complied with SEQRA and CEQR. See *Bronx Environmental Health and Justice Inc. v. New York City Department of Environmental Protection*, Index No. 25754/04 (Sup. Ct. Queens County 2005); *Croton Watershed Clean Water Coalition, Inc. v. New York City Department of Environmental Protection*, Index No. 21923/04 (Sup. Ct. Queens County 2005); *Town of Eastchester v. New York City Department of Environmental Protection*, Index No. 27956/04 (Sup. Ct. Queens

² DEP is currently evaluating possible changes to the SMC work under CRO-3120S. DEP will conduct a technical analysis of the proposed changes to the work under CRO-3120S before work begins in order to determine whether such changes may result in any new potentially significant adverse impacts that were not previously disclosed in the 2004 FSEIS. Heath Aff. ¶ 23.

County 2005); *Friends of Van Cortlandt Park v. City of New York*, Index No. 114036/04 (Sup. Ct. N.Y. County 2004).

As further explained in the Heath Affidavit, the 2004 FSEIS concluded that the construction of the water supply infrastructure (including the shafts and meter chambers) would not alter the existing water supply use and character of the Jerome Park Reservoir complex or adversely impact the character of the surrounding community. Heath Aff. ¶ 14. In particular, the construction assessed in the 2004 FSEIS did not result in a significant impact to traffic in the project area, while project-related emissions of particulate matter (PM), both from fugitive dust and mobile sources (*i.e.*, construction traffic), were also not significant. City Exh. 2, FSEIS at JPR 176; Heath Aff. ¶ 14. The noise levels predicted in the 2004 FSEIS during construction would be readily noticeable, but due to their short-term nature were considered to be temporary and not significant. In addition, DEP included noise attenuation measures such as noise barriers at the construction site boundaries, which were predicted to mitigate the predicted noise impact during construction and keep them below the increase threshold that is considered significant under CEQR. City Exh. 2, FSEIS at JPR 179; FSEIS Section. 9.4 at 18; Heath Aff. ¶ 14.

The 2004 FSEIS for the Croton Water Treatment Plant did not assess the use of blasting to excavate the shaft and meter chamber at Jerome Park Reservoir. Rather, the FSEIS assumed that the tunnels would be constructed using a mechanical excavation method known as raised bore drilling and that much of the excavated spoils from the tunnel shafts would be trucked through the tunnels and removed at the site of the Treatment Plant. Heath Aff. ¶ 15.

Additional Analysis in the August 2008 Technical Memorandum

In order to evaluate whether changes to the CRO-313 contract work for the SMC would alter the construction impact analysis and conclusions disclosed in the 2004 FSEIS for the Jerome Park Reservoir site, DEP prepared a Technical Memorandum. *See* City Exh. 3. Because

DEP has decided not to utilize blasting for the limited excavation needed under CRO-313, the Technical Memorandum does not evaluate the potential impacts of surface blasting for the Jerome Park Reservoir site excavation work under that contract. Rather, this Memorandum provides a summary of the analyses of potential impacts associated with the mechanical excavation work for the shafts and a portion of the SMC footprint under CRO-313 in the impact categories of noise, traffic and air quality, the environmental impact categories that warranted additional analysis to determine whether or not they could potentially result in new significant impacts from those presented in the FSEIS. Heath Aff. ¶ 16.

The Technical Memorandum analyzed the predicted noise levels from the proposed construction work at the nearest sensitive receptor, the Bronx High School of Science. Heath Aff. ¶ 17. The analysis reflects the updated equipment list and allowable noise levels from the New York City Construction Noise Rules for the various construction equipment. As explained in the Memorandum, DEP has now determined that, without noise attenuation (*i.e.*, the existing noise barrier at the site), resulting noise levels projected for mechanical excavation would be higher compared to those presented in the FSEIS. However, because the 20-foot high noise barrier will reduce the noise by at least 10 dBA, the updated noise levels associated with mechanical excavation are consistent with the values projected in the FSEIS. Therefore, the projected noise impact that would result from the proposed construction work is consistent with the impact disclosed in the 2004 FSEIS. Heath Aff. ¶ 18.

The Technical Memorandum also addresses the predicted traffic and air quality impacts of the CRO-313 SMC excavation work. The total number of automobile and truck trips during the construction traffic peak hour will be comparable to those reported in the FSEIS, and will remain below the traffic impact thresholds (50 vehicular trips) provided in the City's *CEQR*

Technical Manual. Thus, the analysis presented in the Technical Memorandum confirms the conclusion of the FSEIS that the total project-induced traffic would not significantly impact traffic or adversely affect any intersections. Heath Aff. ¶ 19. With respect to air quality, consistent with the conclusion of the FSEIS, no significant air quality impacts are anticipated from the CRO-313 SMC excavation work. The work at the Jerome Park Reservoir site will comply with the City's Local Law 77, which requires the use of ultra low sulfur diesel fuel and best available technology to control particulate emissions, and fugitive dust emissions will be controlled by spraying water on the affected surfaces. Heath Aff. ¶ 20.

Buildings Permits Are Not Required

The New York City Charter sets out the powers and jurisdiction of the Department of Buildings. Section 643(7) of the Charter provides, in part:

... that *the jurisdiction of the [DOB], except for the testing and approval of power-operated cranes and derricks used for construction, alteration, demolition, excavation and maintenance purposes and the licensing of the operators of such equipment, the regulation, inspection and testing of gas and electricity used for light, heat and power purposes, electric, gas and steam meters, electric wires and lights and the regulation, inspection and testing of wiring and appliances for electric light, heat and power, shall not extend to waterfront property owned by the city and under the jurisdiction of the department of ports, international trade and commerce or to the following structures on any such waterfront property; wharves, piers, docks, bulkheads, structures on any such waterfront property, wharves, piers, docks, bulkheads, structures wholly or partly thereon, or to such other structures used in conjunction with or in furtherance of waterfront commerce or navigation, or to bridges, tunnels or subways or structures appurtenant thereto.*"

(emphasis added).

Consistent with this language, DOB has long recognized that DEP's underground water tunnels that carry drinking water into and through the City, and the shafts directly appurtenant to those tunnels, do not require building permits. For example, almost 20 years ago, Deputy Commissioner Cornelius Dennis, P.E, wrote a memorandum to Bronx Borough

Superintendent Ernest Cocolicchio explaining that under section 643 of the Charter, DOB did not have jurisdiction over facilities located at DEP's Jerome Avenue Pumping Station that were appurtenant to and to be used in connection with the subsurface water tunnel on the site. Kaminer Aff. ¶ 5 & Exh. A.

More recently, in 2006 DOB confirmed that the Croton Water Treatment Plant itself also does not require a building permit, as it is directly appurtenant to the water tunnels that bring the raw untreated water to the Plant and carry the treated water from the Plant to City consumers. (See Exh. B to Kaminer Aff.) DOB concluded that the Plant is directly appurtenant to the water tunnels based on the functional relationship between the Plant and the tunnels – they are necessarily physically connected in order for the Plant to perform its function of treating the raw water flowing into the Plant and sending the treated water to City consumers. Thus, DOB determined that the Treatment Plant is not subject to its jurisdiction under section 643(7) of the Charter. Kaminer Aff. ¶ 6. After DOB clarified its jurisdiction, DEP withdrew its applications for a building permit for the water tunnels leading to and from the Croton Water Treatment Plant in October 2006 and for the Plant itself in July 2007. DOB's disapproval of DEP's applications for lack of jurisdiction and DEP's subsequent withdrawal of its applications are both available to the public on-line on DOB's Business Information System database. Kaminer Aff. ¶ 7.

Contrary to Petitioners' suggestion, the FSEIS disclosed that the project would not require permits from DOB. The FSEIS includes a section describing the permits and approvals necessary for the proposed work at the Jerome Park Reservoir, including those required from agencies within New York City. City Exh. 2, FSEIS Section 8.2.4 at JPR 192; Heath Aff. ¶ 24. DOB permits are not listed as required in this section.

Thus, Petitioners should have been aware of DOB's determination years ago.

ARGUMENT

POINT I

PETITIONERS' OBJECTION TO SURFACE BLASTING FOR THE RISER SHAFTS AND SMC FOOTPRINT AT THE JEROME PARK RESERVOIR, WHICH IS THE SUBJECT OF THE TEMPORARY RESTRAINING ORDER, IS MOOT BECAUSE DEP HAS DECIDED TO PROCEED WITH HOE RAMMING AT THAT SITE

Petitioners' Order to Show Cause and various "verified petitions" seek, in part, to enjoin DEP from conducting surface blasting at the Jerome Park Reservoir site for the excavation work that is part of the CRO-313 contract to construct the riser shafts and a portion of the SMC until DEP prepares a new environmental impact statement. As explained in the Heath Affidavit, DEP has decided not to use blasting for this limited excavation work.³ Instead, DEP will proceed with mechanical excavation—*i.e.*, hoe ramming—for that work. Heath Aff. at ¶ 21.

Although DEP continues to view blasting as a viable excavation method for projects associated with the construction of water supply infrastructure, in the interest of ensuring that the work at the Jerome Park Reservoir remains on schedule with the consent decree, DEP has decided not to use surface blasting for the limited excavation work associated with the SMC under CRO-313. The decision to go forward with hoe ramming for this limited excavation work, which involves the removal of approximately 1,800 cubic yards of soil and

³ Consistent with the work described in the FSEIS, the two new underground tunnels at the Jerome Park Reservoir site will be connected using deep rock blasting and tunnel boring machines. See FSEIS at JPR 184 (disclosing that "[v]ibrations could occur due to rock drilling and deep rock blasting activities, and from tunnel boring machines"). DEP still plans to conduct this blasting work to connect the two tunnels, as part of the work under CRO-313. It is the City's understanding that petitioners' request for injunctive relief only applies to surface
Continued...

only 375 cubic yards of rock and is estimated to last approximate 6 weeks using mechanical excavation, will allow the work to proceed with minimal disruption and delay to the contract schedule. Heath Aff. ¶ 22.

Hence, Petitioners' request for injunctive relief based on this claim, and the TRO that is currently enjoining DEP from conducting blasting at the Jerome Park Reservoir site, are moot and should be dismissed. *See Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preservation Commission*, 2 N.Y.3d 727, 728-29, 778 N.Y.S.2d 740, 742 (2004) (noting that the doctrine of mootness is typically invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy).

POINT II

NO SUPPLEMENTAL EIS IS REQUIRED BECAUSE DEP HAS DEMONSTRATED THAT NO NEW SIGNIFICANT ADVERSE IMPACTS ARE PREDICTED FOR THE EXCAVATION WORK UNDER CRO-313

Petitioners have requested an order declaring that blasting at the Jerome Park Reservoir site cannot proceed without a supplemental EIS. As noted above, this request is moot with respect to blasting for the excavation work to construct the riser shafts and a portion of the SMC under the CRO-313 contract. In addition, under well established law, an SEIS is not required where project changes do not result in any new significant adverse environmental impacts that were not addressed in the EIS. Here, the FSEIS issued in 2004 disclosed the potential impact associated with the off-site work planned for Jerome Park Reservoir and Harris

blasting, and not to this previously disclosed deep rock blasting activity, which will occur approximately 100 feet underground and is necessary to connect the two tunnels underground.

Park Annex. DEP has now reasonably concluded that the Jerome Park Reservoir site work at issue in this proceeding will not result in any new significant impacts that were not already disclosed, so no new SEIS is required.

Standard of Review of SEQRA Claims

A lead agency's determination whether to require an SEIS is discretionary. *Riverkeeper, Inc. v. Planning Board of Town of Southeast*, 9 N.Y.3d 219, 231, 851 N.Y.S.2d 76 (2007). Pursuant to the SEQRA regulations, "the lead agency *may* require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from: (a) changes proposed for the project; (b) newly discovered information; or (c) a change in circumstances related to the project." 6 N.Y.C.R.R. § 617.9(a)(7)(i) (emphasis added). Hence, a full Supplemental Environmental Impact Statement is required only when there are significant adverse environmental impacts not addressed or inadequately addressed during the environmental review process resulting from changes to the project, newly discovered information, or a change in circumstances. *Jackson*, 67 N.Y.2d at 429 (supplemental review is necessary when "environmentally significant modifications are made after issuance" of the final environmental review).

In reviewing an agency's environmental review of an action, a court may not substitute its judgment for that of an agency, weigh the desirability of an action, or choose from among alternatives. *Jackson v. New York State Urban Develop. Corp.*, 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298, 305 (1986). Where an agency's action has a rational basis, it cannot be considered arbitrary or capricious. *Matter of Halperin v. City of New Rochell*, 24 A.D.3d 768, 770, 809 N.Y.S.2d 98, 103 (2d Dep't 2005); *370 Manhattan Ave. Co., LLC, v. N.Y. State Div. of Housing & Cmty. Renewal*, 11 A.D.3d 370, 372 783 N.Y.S.2d 38, 40 (1st Dep't 2004).

Here, a new SEIS is simply not warranted. DEP has satisfied its obligation to take a hard look at the potential environmental impacts of the updated work under CRO-313, reasonably determined that no potentially significant undisclosed adverse impacts will result from that work, and appropriately exercised its discretion in concluding that an SEIS was not warranted. *See Riverkeeper*, 9 N.Y.3d at 4, (upholding decision not to prepare a second SEIS where Town Board, relying on prior environmental review documents and supplemental consultant reports, reviewed project changes and concluded that the changes did not present any new significant adverse impacts).

POINT III

PETITIONERS' CLAIMS REGARDING THE HARRIS PARK ANNEX SITE ARE NOT RIPE

Although the exact nature of the claims is unclear, Petitioners' papers purport to raise claims related to the Harris Park Annex site work, which is planned under CRO-312. *See* Affirmation of Ezra Glaser, dated July 30, 2008, at ¶¶ 20-21. As noted above, DEP is currently evaluating whether or not there are new potential significant environmental impacts associated a number of changes to the design and construction plans under CRO-312OS, which is not expected to begin until January 2009. Indeed, CRO-312OS has not yet been awarded. Therefore, to the extent petitioners are seeking injunctive relief in this proceeding based on the work contained in CRO-312, such relief would be entirely premature because the claim is not ripe.

Ripeness is a threshold requirement for a petitioner seeking to challenge a governmental action and is an appropriate basis for dismissal. CPLR § 7801(1); *Essex County v. Zagata*, 91 N.Y.2d 447, 452-53 (1998); *Modern Landfill, Inc. v. New York State Dept. of Environmental Conservation*, 21 A.D.3d 1381 (4th Dep't 2005). The doctrine of ripeness

requires that only “final” agency action be subject to judicial review. CPLR § 7801(1); *Essex County*, 91 N.Y.2d at 452-53. An agency action is final, or ripe for judicial review, when the decision-maker has come to a “definitive position” that has caused “an actual, concrete injury” to the petitioner. *Essex County*, 91 N.Y.2d at 453; *Ward v. Bennett*, 79 N.Y.2d 394, 400 (1992); *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 519 (1986).

The requirement of finality or ripeness, and the related requirement that an actual controversy exists, serve “to conserve judicial machinery for problems which are real and present or imminent, not to squander it on abstract or hypothetical or remote problems.” *Church of St. Paul*, 67 N.Y.2d at 518 (internal quotations and citations omitted); *accord New York Pub. Interest Research Gr. v. Carey*, 42 N.Y.2d 527, 530 (1977) (ripeness doctrine necessary since “courts should not perform useless or futile acts”); *see also Cuomo v. LILCO*, 71 N.Y.2d 349, 354 (1988) (New York courts do not issue advisory opinions because they are not a proper exercise of the judiciary). These requirements also protect the administrative process from premature and unnecessary judicial interference. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967); *Essex County*, 91 N.Y.2d at 456 (immediate Article 78 review of non-final disputes would interfere with agency process and waste judicial resources).

Finality hinges upon the “completeness of the administrative action.” *Essex County*, 91 N.Y.2d at 453. A final action is one that “impose[s] an obligation, den[ies] a right or fix[es] some legal relationship as a consummation of the administrative process.” *Id.* (internal quotations and citations omitted). Further, a challenge is not ripe unless the alleged harm caused by the agency “may not be ‘prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.’” *Essex County*, 91 N.Y.2d at 453 (quoting *Church of St. Paul*, 67 N.Y.2d at 520). Thus, “[i]f further agency proceedings might render the

disputed issue moot or academic, then the agency position cannot be considered 'definitive' or the injury 'actual' or 'concrete.'" *Essex County*, 91 N.Y.2d at 454.

As explained in the Heath Affidavit, DEP will conduct a technical analysis of the proposed changes to the work under CRO-312 before work begins in order to determine whether such changes may result in any new potentially significant adverse impacts that were not previously disclosed in the 2004 FSEIS. Heath Aff. ¶ 23. Until DEP makes a final determination on that issue, petitioners' claims related to that work are not ripe for review. Moreover, as with the Jerome Park Reservoir site, the FSEIS disclosed that work would occur in the Harris Park Annex and identified the potential impacts of that work. Thus, unless the anticipated changes to the CRO-312OS work will result in new significant adverse impacts that were not previously disclosed, no SEIS is required. *See Supra* Point II.

POINT IV

PETITIONERS' OBJECTIONS TO DOB'S DETERMINATION THAT NO BUILDINGS PERMIT IS REQUIRED FOR THE TREATMENT PLANT AND TUNNELS ARE TIME BARRED AND ENTIRELY WITHOUT MERIT

Petitioners object to DOB's determination that the Croton Water Treatment Plant and the shafts appurtenant to the water tunnels at the Jerome Park Reservoir site do not require a buildings permit and argue that this information was not disclosed during the environmental review. Not only are their objections to DOB's determinations clearly time barred, they are also entirely without merit.

An Article 78 proceeding seeking review of a governmental determination must be brought within four months after the determination becomes final and binding upon the petitioner. CPLR § 217(1). This four-month statute of limitations applies to all proceedings

seeking to review agency determinations, including specifically allegations that an agency did not comply with SEQRA/CEQR.⁴ See, e.g., *Metropolitan Museum Historic District Coalition v. Montebello*, 20 A.D.3d 28, 796 N.Y.S.2d 64 (1st Dep't 2005) [ADD PARENTHETICAL]; *Young v. Bd. of Trustees*, 89 N.Y.2d 846, 848, 652 N.Y.S.2d 729, 730 (1996); *Douglaston & Little Neck Coalition v. Sexton*, 145 A.D.2d 480, 480-81, 535 N.Y.S.2d 634, 635 (2d Dep't 1988). A determination is "final" when "the decisionmaker arrives at a 'definitive position on the issue that inflicts an actual, concrete injury.'" *Stop-The-Barge v. Cahill*, 1 N.Y.3d 218, 223, 771 40, 42 (2003) (quoting *Essex County v. Zagata*, 91 N.Y.2d 447, 453, 672 N.Y.S.2d 281, 284 (1998)).

As explained in the Heath Affidavit, the FSEIS includes a section describing the permits and approvals necessary for the proposed work at the Jerome Park Reservoir, including those required from agencies within New York City. Heath Aff. ¶ 24; City Exh. 2, FSEIS Section 8.2.4 at JPR 192. DOB permits are conspicuously absent from the list of required permits in this section. Moreover, DEP began construction in late 2004, almost four years ago. As explained in the Kaminer Affidavit, DOB denied DEP's applications for building permits for the Wastewater Treatment Plant and tunnels in June 2006 because DOB lacked jurisdiction under the City Charter. Finally, DEP actually withdrew its applications in October 2006 and

⁴ Although petitioners purport to bring this proceeding as a mixed Article 78-declaratory judgment proceeding, petitioners cannot avoid the Article 78 four month limitations period simply by denominating their challenge as one for a declaratory judgment. *Solnick v. Whalen*, 49 N.Y.2d 224, 230-31, 425 N.Y.S.2d 68 (1980) (holding that challenge was time barred by the four month statute of limitations found in CPLR § 217); *Walton v. New York State Dept. of Correctional Servs.*, 8 N.Y.3d 186, 194, 831 N.Y.S.2d 749 (2007) ("[w]hether petitioners' ... claims are subject to the four-month statute of limitations period under CPLR article 78 or the residuary six-year limitations period of CPLR 213(1) turns on whether the parties' rights could have been resolved in an article 78 proceeding"); *Fischer v. Biderman*, 154 A.D.2d 155, 160, 552 N.Y.S.2d 221 (1st Dep't 1990)

July 2007. This information about DEP's permit applications is publicly available. Kaminer Aff. ¶¶ 6-8. All of these events occurred more than four months before petitioners brought this proceeding.

Here, as petitioners are seeking to challenge DOB's determination that the Croton Water Treatment Plant (and perhaps, although it is not clear from the petitions, the related shafts that connect to the water tunnels leading to and from the Plant), the "definite course" of conduct that triggered the limitations period was DOB's denial of the permit applications for lack of jurisdiction. *See, e.g., Matter of Throggs Neck Resident Council, Inc. v. Cahill*, 290 A.D.2d 324 (1st Dep't 2002) (environmental issues were finally determined when the project was approved); *Lighthouse Hill Civic Ass'n v. City of New York*, 275 A.D.2d 322 (2d Dep't), *appeal denied*, 95 N.Y.2d 768 (2000) (statute of limitations began to run when City Planning Commission approved application to modify topography).

Even if Petitioners' claim were not time barred, it is entirely without merit. Section 643(7) of the City Charter clearly states "... that the jurisdiction of the [DOB], ... shall not extend to tunnels ... or structures appurtenant thereto." Consistent with this language, DOB explained in a 1989 memorandum from Deputy Buildings Commissioner Cornelius Dennis, P.E. to Bronx Borough Superintendent Ernest Cocolicchio that that under section 643 of the Charter, DOB did not have jurisdiction over facilities located at DEP's Jerome Avenue Pumping Station that were appurtenant to and to be used in connection with the subsurface water tunnel on the site. Thus, DOB has long recognized that DEP's underground water tunnels that carry drinking water into and through the City, and the shafts and other facilities directly appurtenant to those tunnels, do not require building permits.

Moreover, the DEP Commissioner has control of and is responsible for all functions in relation to an adequate supply of water under the City Charter. Therefore, DEP is empowered to enforce applicable provisions of the New York City Building Code and other codes that may be applicable to construction of water tunnels and will ensure that the public health and safety are protected. See Kaminer Aff. Exh. A, (citing Section 1403 of the City Charter).

CONCLUSION

For the foregoing reasons, the City Respondents respectfully request that the petition be dismissed in its entirety.

Dated: New York, New York
August 29, 2008

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<p>SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF THE BRONX</p>	<p>THE BRONX COUNCIL FOR ENVIRONMENTAL QUALITY (BCEQ), et al.,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">- against -</p> <p>THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE NEW YORK CITY DEPARTMENT OF BUILDINGS, THE CITY OF NEW YORK, and MAYOR MICHAEL BLOOMBERG,</p> <p style="text-align: center;">Respondents.</p>
<p>RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR ANSWER AND IN OPPOSITION TO THE REQUEST FOR INJUNCTIVE RELIEF</p>	<p>MICHAEL A. CARDOZO Corporation Counsel of the City of New York Attorney for Plaintiff the City of New York 100 Church Street New York, NY 10007</p> <p>Of Counsel: Carrie Noteboom Susan Amron Tel: (212) 788-0771 LM No. 2008-027667</p>
<p>Due and timely service is hereby admitted.</p> <p>New York, N.Y., 2007.</p> <p>..... Esq.</p> <p>Attorney for</p>	