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Reforming CEQR

Improving Mitigation under the City Environmental Quality Review Process

February 2020

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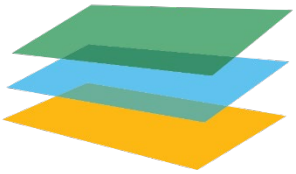
Frank J. Guarini Center on Environmental, Energy and Land Use Law



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ABBREVIATIONS

ACS	Administration for Children's Services
AUAR	Alternative Urban Areawide Review
CAA	Clean Air Act
CEQ	U.S. Council on Environmental Quality
CEQA	California Environmental Quality Act
CEQR	City Environmental Quality Review
CPC	New York City Planning Commission
CWA	Clean Water Act
DCP	New York City Department of City Planning
DEC	New York State Department of Environmental Conservation
DEP	New York City Department of Environmental Protection
DOE	New York City Department of Education
DOT	New York City Department of Transportation
DPR	New York City Department of Parks and Recreation
EAS	Environmental Assessment Statement
EAW	Environmental Assessment Worksheet
EEA	Massachusetts Executive Office of Energy and Environmental Affairs
EIR	Environmental Impact Report
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
EQB	Minnesota Environmental Quality Board
ESDC	Empire State Development Corporation
FDNY	Fire Department of the City of New York
GEIS	Generic Environmental Impact Statement
GHG	greenhouse gas
HABS	Historic American Buildings Survey
HAER	Historic American Engineering Record
HEET	High Entrance and Exit Turnstile
HPD	New York City Department of Housing Preservation and Development
LOR	letter of resolution
LPC	Landmarks Preservation Commission
MEPA	Massachusetts/Minnesota Environmental Policy Act
MIH	Mandatory Inclusionary Housing
MMRP	Mitigation Monitoring or Reporting Program
MND	Mitigated Negative Declaration
MOA	memorandum of agreement
MTA	Metropolitan Transit Authority
NEPA	National Environmental Policy Act
NYCT	New York City Transit Authority
NYPD	New York City Police Department
NYU	New York University
OEC	New York City Mayor's Office of Environmental Coordination
OER	New York City Mayor's Office of Environmental Remediation
OPRHP	New York State Office of Parks, Recreation and Historic Preservation
SCA	School Construction Authority
SEPA	State Environmental Policy Act
SEQRA	State Environmental Quality Review Act
SHPO	New York State Historic Preservation Office

CONTENTS

EXECUTIVE SUMMARY

The City Environmental Quality Review (CEQR) is the process by which agencies in the City of New York evaluate their discretionary actions for environmental effects. As an extension of SEQRA, it imposes a substantive mandate on agencies to "act and choose alternatives" which minimize or avoid significant adverse impacts "to the maximum extent practicable." The law also requires agencies to make a finding that the identified negative impacts will in fact be mitigated before they may proceed with a proposed action. Over the years, the City has refined and adapted this process to take into account its unique urban context. Despite these efforts, a variety of stakeholders have criticized the City's approach to mitigation under CEQR as being non-transparent, ineffective, inefficient, inadequate, and lacking in tools for holding the City accountable. To this end, various calls for reform have been made by a variety of stakeholders.

Drawing on existing literature, interviews with field experts, and case studies of six environmental impact statements stemming from discretionary actions taken in two community districts, this paper identifies a number of key criticisms and, in response, lays out four broad goals for reform:

(1) increase the comprehensiveness of the impacts analyzed and mitigation measures surveyed in order to better identify impacts and expand the range of mitigation options;

(2) improve the effectiveness of measures designed to mitigate the identified impacts;

(3) improve accountability for the implementation of mitigation measures including by improving transparency; and

(4) increase the efficiency of the review process in order to contain costs and avoid unduly burdening beneficial development.

With these goals for reform in mind, we surveyed federal, state, and local frameworks for practices other jurisdictions use in their own review processes that could be adopted locally to improve mitigation procedures under CEQR. From this survey, we presented seven potential reforms to stakeholders for feedback, five of which received broad, though not unanimous, consensus:

(1) establish a centralized unit to coordinate and review mitigation strategies to help ensure that proposals for mitigation across a range of actions are consistent with best practices, legal standards, and policy priorities;

(2) improve and expand the use of Generic EISs to allow for more meaningful consideration of impacts across a broader geographic scope and a streamlining of the review process for smaller-scale projects;

(3) adopt a mechanism for tracking and monitoring mitigation in order to improve the accountability of agencies for their mitigation commitments;

(4) adopt a public process for the retrospective evaluation of mitigation measures in order to advance knowledge of best practices for future projects; and

(5) require a regular periodic review of the City's guidance document—the CEQR Technical Manual—with opportunities for public comment to help ensure that its methodologies and recommendations reflect the best available knowledge.

In the pages that follow, we provide more detail on the criticisms of CEQR's mitigation requirement as it is currently applied, rationales for the five reform options with broad support and information on the two reform options on which stakeholders had divided opinions.

PART 1 – INTRODUCTION

City Environmental Quality Review (CEQR) is the process through which New York City agencies identify, disclose, and mitigate the significant adverse environmental impacts of their discretionary actions. CEQR implements the State Environmental Quality Review Act (SEQRA) which establishes mandatory minimum environmental review requirements that apply to local government decision-makers, as well as those of the State. In doing so, CEQR adapts and refines state law to take into account the special circumstances of New York City's urban environment, including its role in determining land use.

One of SEQRA's key requirements is that agencies "act and choose alternatives" that minimize or avoid adverse environmental impacts "to the maximum extent practicable." This substantive mandate, most frequently referred to as the "mitigation" requirement, is actually two-fold: SEQRA requires both that the acting agency take measures to mitigate significant adverse environmental effects to the maximum extent practicable *and* that it makes a finding that such harms will in fact be mitigated. State law further makes clear that in implementing SEQRA, CEQR cannot impose requirements that are less stringent than its state counterpart. Thus, facially, CEQR imposes a robust obligation on City agencies to mitigate impacts on the environment.

In this sense, CEQR—as an extension of SEQRA—goes beyond most other state environmental review statutes, as well as its federal counterpart, the National Environmental Policy Act (NEPA), which typically impose only procedural obligations on agencies. In recent years, however, the City's approach to environmental review has been criticized as non-transparent, ineffective, inefficient, and inadequate, and lacking in tools for holding agencies accountable; these critiques suggest that the CEQR process should be more robust than it currently is. Critics have been particularly forceful in opposing the City's approach to evaluating and mitigating the impacts of rezonings. From the other direction, there are concerns that CEQR incorporates redundant or inefficient procedures and imposes needless costs that impede desirable projects. Such concerns imply that the City should be looking to streamline the CEQR process to reduce obstacles to necessary development, especially given the City's growing housing crisis.

This paper identifies key critiques of the City's mitigation process and lays out recommendations for addressing these critiques that were considered by stakeholders at roundtable meetings held at the New York University (NYU) School of Law in December 2019 and February 2020. Experts at the roundtable meetings came from City government, the real estate industry, community organizations, non-profit advocacy groups, law firms and academia.

The paper proceeds as follows. We begin, in Part 2, with an overview of the legislative framework in which CEQR's mitigation requirement is situated. From here, in Part 3, we outline common critiques of the City's approach to mitigation under CEQR, drawing on existing literature and interviews with local field experts. We also provide suggestive evidence to flesh out these critiques from a case study of mitigation efforts stemming from discretionary actions in the Manhattan Community District 4 and Brooklyn Community District 1. Finally, in Part 4, we describe various proposals for improving mitigation under CEQR which draw on practices that other jurisdictions utilize in their own environmental review processes. We begin by describing five reform options that were broadly supported by stakeholders consulted in this research. Then we turn to two options over which stakeholders were more divided.

But before continuing, it is important to expressly acknowledge the limitations of the reform options outlined in this report: CEQR is only one component of a larger planning system in New York City which has been criticized from various angles. Reforming CEQR's approach to mitigation will not cure all these alleged defects and is not intended to be viewed as substitute for other reforms. It is but one step towards the larger goal of improving the City's approach to planning and decision-making.

PART 2 – MITIGATION UNDER CEQR

2.1 History and Theory of Environmental Review

Passed by Congress in 1969 and signed into law on January 1, 1970, NEPA broke new ground as the first major federal legislative effort to incorporate environmental considerations into government decision-making.[1] NEPA requires that federal agencies analyze the environmental impacts of all major federal actions significantly affecting the environment and formally document their findings.[2] This process is intended to inform the public of the environmental impacts of proposed actions and encourage government decision-makers to consider these impacts. Soon after NEPA's passage, many other jurisdictions took notice and adopted their own versions of this law.

In the United States, sixteen states have their own laws requiring environmental review.[3] Taking inspiration from their federal predecessor, these environmental review laws require that proposed actions of state agencies (and in some cases, private actions) be assessed for their potential impact on the environment. Among these jurisdictions, the law varies with regard to who is required to conduct an environmental review, which types of project must be reviewed, and which types of impacts must be identified. Some states' laws impose only minimal procedural requirements while others have developed more detailed procedures and impose substantive requirements on agencies. Generally speaking, however, where adverse impacts are found to be significant, agencies are required to prepare environmental impact statements that outline the potential consequences of proposed actions on the environment, alternatives to the proposed actions, and the steps which could be taken by state agencies to mitigate these environmental effects, as well as outline any adverse impacts which might be unavoidable.

2.2 SEQRA's Mitigation Requirement

While NEPA imposes an obligation on federal agencies to identify and disclose the environmental impacts of decisions to which the statute applies, it does not require that agencies choose the course of action that minimizes environmental harms. Nor does it require that agencies mitigate the environmental impacts of their actions. The U.S. Supreme Court has held that NEPA "does not contain a substantive requirement that, as part of an environmental impact statement (EIS), a complete plan to mitigate environmental harm must be actually formulated and adopted."[4] Although the U.S. Council on Environmental Quality (CEQ)

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[1] The stated purposes of NEPA are: "to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." National Environmental Policy Act of 1969, 42 U.S.C. § 4321 [hereinafter NEPA].

[2] *Id.* at § 4332.

[3] California, Connecticut, Georgia, Hawai'i, Indiana, Maryland, Massachusetts, Minnesota, Montana, New Jersey, New York, North Carolina, South Dakota, Virginia, Washington, and Wisconsin. *See* APPENDIX I. *See also* Daniel P. Selmi, *Themes in the Evolution of the State Environmental Policy Acts*, 38 URB. L. 949 (2006).

[4] Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989). The court reasoned, firstly, that there is a fundamental distinction between such a requirement and NEPA's requirement that the mitigation of environmental harm be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, and secondly, that it would be inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that would mitigate environmental harm before an agency can act. *See also* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 558 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially

has issued guidance on using mitigation measures and monitoring mitigation commitments under NEPA, CEQ acknowledges that "NEPA itself does not create a general substantive duty on federal agencies to mitigate adverse environmental effects."[5] Thus, NEPA imposes only procedural obligations on federal agencies. Strictly speaking then, so long as the federal agency sufficiently discloses the impact and potential alternatives, its obligations under NEPA are satisfied—the agency has no further obligation under the statute to select a more environmentally-friendly alternative before it can proceed with the proposed action.[6]

In contrast to its federal counterpart, and indeed many other state environmental review statutes,[7] SEQRA imposes substantive, as well as procedural, obligations on agencies. Specifically, it provides:

> Agencies … shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, *minimize or avoid adverse environmental effects*, including effects revealed in the environmental impact statement process.[8]

SEQRA further requires that:

> When an agency decides to carry out or approve an action which has been the subject of an environmental impact statement, *it shall make an explicit finding that* the requirements of this section have been met and that consistent with social, economic and other essential considerations, to the maximum extent practicable, *adverse environmental effects* revealed in the environmental impact statement process *will be minimized or avoided*.[9]

These provisions impose distinct, but related, mandates on agencies: the first is to *act to minimize or avoid* adverse environmental effects; the second is to *make an explicit finding* that adverse effects will be minimized or avoided when deciding to undertake an action.[10] Collectively, these distinct obligations make up SEQRA's mitigation requirements.

It is important to note, however, that these provisions contemplate a balancing by agencies of environmental concerns with "social, economic and other essential considerations."[11] SEQRA must be

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procedural."); Strykers Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980) (holding that NEPA does not impose substantive requirements on federal agencies to mitigate environmental harm).

[5] U.S. Council on Envtl. Quality, *Memorandum: Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact* (Jan. 14, 2011).

[6] It should be noted, however, that where a federal agency has established mitigation or other conditions in an EIS and committed to them as part of its decision, the CEQ regulations require that such mitigation "shall be implemented by the lead agency or other appropriate consenting agency." 40 C.F.R. § 1505.3 [hereinafter NEPA Rules].

[7] Notably, New York is one of a number of states with environmental impact review laws that are modeled after the U.S. National Environmental Policy Act of 1969 (NEPA). *See* APPENDIX I.

[88] N.Y. ENVTL. CONSERV. LAW § 8-0109(1) (emphasis added) [hereinafter SEQRA].

[9] *Id.* at § 8-0109(8) (emphasis added).

[10] See also GERRARD ET AL., ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 6.01 (2019) [hereinafter ENVIRONMENTAL IMPACT REVIEW IN NEW YORK] ("Although the mitigation and findings aspects of the statute are often collectively referred to as the 'mitigation' requirement, it should be kept in mind that SEQRA requires both that the agency take measures to mitigate *and* that it make a finding that adverse environmental effects have in fact been mitigated.") (emphasis in original).

[11] SEQRA § 8-0109(1), (8) (emphasis added).

construed "in light of reason"[12] and not every conceivable environmental impact or mitigation measure must be identified and addressed before an EIS will satisfy the substantive requirements of SEQRA.[13] SEQRA further makes it clear that adverse environmental impacts are only to be minimized or avoided "to the maximum extent *practicable*."[14]

Each agency is independently responsible for ensuring that its discretionary actions are consistent with the requirements of SEQRA.[15] SEQRA does not "change the existing jurisdiction of agencies."[16] To this end, SEQRA does not provide any agency with the authority to review SEQRA implementation or decisions by other agencies. Rather, the actual oversight and "enforcement" of SEQRA falls to the public.[17] In the case that the review is inadequate or fails to comply with the law, citizens who can demonstrate that they may be harmed by the action are entitled to bring a legal challenge against the agency under Article 78 of the New York State Civil Practice Law and Rules.[18] Historically, however, courts have been very deferential to agencies and have been mostly unreceptive to challenges to the contents of EISs.[19]

Moreover, there is no separate mechanism under SEQRA for enforcing mitigation commitments once the environmental review process has been completed. In the case of a private application, the mitigation conditions set out in the lead agency's[20] final decision document are subject to the same means of enforcement that the agency possesses in its underlying jurisdiction.[21] In other words, the enforcement of mitigation conditions against a private applicant by the lead agency would depend on the existing remedies available to that agency. Opportunities for the enforcement of mitigation against an agency by the public, however, are more limited. As SEQRA does not create a separate statute of limitations for legal challenges, the four-month statute of limitations period for Article 78 proceedings typically applies and begins to run once the lead agency has made its final decision.[22]

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[12] Jackson v. New York State Urban Development Corp., 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298, 305 (1986); Matter of Eadie v. Town Bd. of Town of N. Greenbush, 7 N.Y.3d 306, 821 N.Y.S.2d 142 (2006). *See also* Save the Pine Bush v. Albany (a "rule of reason … is applicable … to [an agency's] decisions about which matters require investigation.").

[13] Iowa Citizens for Environmental Quality v. Volpe, 487 F.2d 849, 852 (8th Cir. 1973).

[14] SEQRA § 8-0109 (emphasis added).

[15] N.Y. DEPT. OF ENVTL. CONSERVATION, THE SEQRA HANDBOOK 13 (4th ed., 2019) [hereinafter SEQRA HANDBOOK].

[16] SEQRA Rules at § 617.3(b).

[17] SEQRA HANDBOOK at 175.

[18] Article 78 provides a procedure for obtaining judicial review of agency decisions. The kinds of questions addressed by an Article 78 challenge may include whether the agency "failed to perform a duty enjoined upon it by law"; "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion"; or whether the determination was not supported by substantial evidence on the record. N.Y. C.P.L.R. § 7803.

[19] "[I]n a small but significant number of cases, almost entirely arising in New York City, trial courts have struck down EISs because of perceived deficiencies in their contents, only to be reversed on appeal." Michael B. Gerrard & Monica Jahan Bose, *Possible Ways to "Reform" SEQRA*, N.Y.L.J. (Jan. 23, 1998).

[20] The lead agency is that which is "principally responsible for undertaking, funding or approving an action, and therefore responsible for determining whether an environmental impact statement is required in connection with the action, and for the preparation and filing of the statement if one is required." SEQRA Rules § 617.2(v)

[21] For example, the agency might rescind a permit or approval, impose a fine, or withdraw funding. SEQRA HANDBOOK, *supra* note 15, at 102.

[22] ENVIRONMENTAL IMPACT REVIEW IN NEW YORK, *supra* note 10, at §7.02 (4)(b). In some cases, this period may be as short as thirty days. SEQRA HANDBOOK, *supra* note 15, at 176. Where there are multiple approvals required for a single action, the shortest statute of limitations has generally been held to apply. *Id.*

2.3 CEQR as an Extension of SEQRA

New York is one of seven states[23] that extends its environmental review requirements to local government action.[24] Yet, recognizing that each jurisdiction may have unique needs, SEQRA grants agencies and local governments the authority to promulgate rules of their own to supplement the N.Y.S. Department of Environmental Conservation's (DEC) general SEQRA regulations, provided, however, that they are "no less protective of environmental values, public participation and agency and judicial review" than is required by state law.[25] For cities that choose to do so, SEQRA acts as a baseline, setting forth the minimum legal standards that apply to that local environmental review process.[26]

In 1977, New York City exercised this prerogative through Executive Order No. 91, which established the CEQR process.[27] In order to expedite environmental reviews, the CEQR process was substantially modified in 1991 by the City Planning Commission's (CPC)[28] adoption of the City's first set of CEQR Rules of Procedure (CEQR Rules),[29] which were superimposed on Executive Order No. 91. The Mayor's Office of Environmental Coordination (OEC) was subsequently set up to complement and support lead agencies in their environmental review responsibilities.[30]

2.4 Mitigation Requirements under CEQR

CEQR is triggered in three circumstances: (1) where a project needs discretionary actions or approvals by one or more city agency; (2) where a project needs city funding; and (3) where a project is undertaken directly by the City.[31] An EIS must be completed if the lead agency determines that a project subject to CEQR may have a significant effect on the environment. The lead agency must consider the reasonably related "long-term, short-term, direct, indirect, and cumulative impacts, including other simultaneous or subsequent actions."[32] The SEQRA Rules set forth the minimum requirements for the EIS, which includes

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[23] California, Georgia, Hawai'i, Massachusetts, Minnesota, New York and Washington's environmental review statutes extend their requirements to local government actions. *See* APPENDIX I.

[24] SEQRA considers state and local agencies synonymously; the term "agency," as it is used in the statute, is broadly defined as "any state or local agency" and includes any "local agency, board, district, commission or governing body, including any city, county, and other political subdivision of the state." SEQRA § 8-0105. As such, the requirements under SEQRA, including the obligation to mitigate adverse environmental effects, apply equally to both state and local decision-makers. *Id*.

[25] SEQRA § 8-0113(1), (3). That authority also extends to the designation of specific categories of Type I and Type II actions. 6 N.Y. COMP. CODES R. & REGS. §§ 617.4(a)(2), 617.5(b), 617.14(e) [hereinafter SEQRA Rules].

[26] SEQRA Rules § 617.14(b). SEQRA supersedes any provisions promulgated or enacted by a City that are less protective of the environment. *Id.*

[27] 43 R.C.N.Y. 6 [hereinafter CEQR]. Interestingly, New York City's environmental review laws predate those of New York State by two years. The City first implemented environmental review in 1973 through Executive Order 87, before SEQRA was enacted in 1975. Executive Order No. 91 of 1977 was subsequently issued to ensure alignment between the City's existing environmental review process and SEQRA.

[28] The New York City Charter delegates the task of developing rules under CEQR to CPC. N.Y.C. CHARTER, § 192(e).

[29] 62 R.C.N.Y. 5 [hereinafter CEQR Rules]

[30] Its functions are to: maintain the CEQR Technical Manual; serve as a repository for environmental review documents; maintain the City's calendar of CEQR activities; support agencies in conducting CEQR review; and serve as the City's liaison to state and federal agencies on environmental matters and advises the Mayor on matters of environmental policy. CEQR Rules § 5.04.

[31] SEQRA § 8-0105(4)(i).

[32] SEQRA Rules § 617.7(2). This includes simultaneous or subsequent actions which are: "(i) included in any long-range plan of which the action under consideration is a part; (ii) likely to be undertaken as a result thereof, or (iii) dependent thereon." *Id*. at (2)(i)-(iii). The CEQR Technical Manual defines cumulative impacts as "two or more individual effects

a requirement that the lead agency describe the measures that will be carried out to mitigate significant adverse environmental impacts.[33] The lead agency must also make a finding that adverse impacts will be minimized.[34]

Notably, rezonings may trigger CEQR, and are therefore subject to the mitigation requirement. In these cases, the Department of City Planning (DCP) is frequently the lead agency with the obligation to prepare the EIS and to mitigate the adverse effects of a rezoning. However, private parties can also propose a rezoning for which City authorization is required; when this occurs, the private applicant typically prepares the EIS, although the legal obligation to make a determination of significance and issue a statement of findings falls on the lead agency approving the privately-initiated rezoning. As-of-right development projects, which constitute 80 percent of new development in New York City,[35] would not typically be subject to CEQR, and therefore its mitigation requirement, because such projects do not require discretionary approval by the City.[36] However, there could be circumstances where a private project within existing zoning regulations would be subject to CEQR, for example if it is receiving city funding.[37]

To assist "city agencies, project sponsors, [and] the public" in navigating and understanding the CEQR process, OEC has published the CEQR Technical Manual.[38] First published in 1993, the CEQR Technical Manual provides extensive guidance on legal procedures and analysis methodologies for nineteen technical areas,[39] including the geographic scope in which the potential for impacts should be analyzed.[40] For example, the CEQR Technical Manual recommends that when assessing land use impacts for small-scale, site-specific actions, the "study area" should generally include the project site plus 200 feet. When other, more indirect effects could also occur, the CEQR Technical Manual recommends expanding this radius to between one-quarter and one-half miles from the project site.[41] It further recommends a wealth of mitigation measures for addressing specific types of impacts within each of these technical areas.

It should be noted, however, that the analytical methodologies and mitigation measures recommended in the CEQR Technical Manual are not legally binding on agencies, who may thus choose to employ

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on the environment that, when taken together, are significant or that compound or increase other environmental effects," including the "long-term impacts of … a group of actions." N.Y.C. MAYOR'S OFF. OF ENVTL. COORDINATION, CEQR TECHNICAL MANUAl, 2014 Edition Revisions 1, ch. 2, §600 (2016) [hereinafter CEQR TECHNICAL MANUAL].

[33] SEQRA § 8-0109(2)(f). ("[The EIS] shall include a detailed statement setting forth … mitigation measures proposed to minimize the environmental impact").

[34] *Id.* at § 8-0109(8).

[35] Testimony of Susan Amron, General Counsel, Department of City Planning, given to the New York City Council, Committee on Land Use (May 7, 2019).

[36] Decisions taken by the City in the course of an as-of-right development project, for example the granting of a building permit, are considered "ministerial decisions." Ministerial decisions expressly are precluded from review requirements by state law. SEQRA Rules § 617.5(b)(25).

[37] "Actions include … projects or activities supported in whole or part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies" SEQRA § 8-0105(4)(i) (internal quotation marks omitted).

[38] CEQR TECHNICAL MANUAL, *supra* note 32.

[39] These categories are: (1) land use, zoning and public policy; (2) socioeconomic conditions; (3) community facilities and services; (4) open space; (5) shadows; (6) historic and cultural resources; (7) urban design and visual resources; (8) natural resources; (9) hazardous materials; (10) water and sewer infrastructure; (11) solid waste and sanitation services; (12) energy; (13) transportation; (14) air quality; (15) greenhouse gas emissions and climate change; (16) noise; (17) public health; (18) neighborhood character; and (19) construction.

[40] It should be noted that this paper does not analyze these recommended methodologies from a technical standpoint.

[41] CEQR Technical Manual, *supra* note 32, at ch. 4, § 310.

alternative approaches,[42] provided that these alternative approaches meet the required legal standards.[43] Private applicants may also elect to employ alternative approaches provided that there is lead agency oversight and input.

2.5 The Uncertainty Associated with the Mitigation Requirement

Moving away from the legal minutia of CEQR's mitigation requirement, it is useful to keep in mind the fundamental informational challenge associated with mitigation. Uncertainty is pervasive in forecasting the environmental consequences of an action and of devising measures to mitigate those consequences.[44] There is uncertainty about what the environmental impacts will be, when they will occur, and their scale, and therefore about what should be mitigated and when. There also may also be uncertainty around which measures will be optimal for mitigating predicted impacts. Uncertainties are likely to be especially high in the case of agency actions that set the stage for private activity over a large geographic scale and across an indefinite time horizon, such as area-wide rezonings. The ultimate impacts of such actions will depend on choices that will be made by many private actors, who will be influenced by a variety of societal conditions such as the state of the economy, technology, and state and federal policy, all of which are in a constant state of flux. Uncertainty lingers even long after an action has been completed, as it can be very difficult to determine whether a given action actually caused observed changes or whether those changes were induced by other independent variables.[45]

CEQR places the onus on agencies to predict the environmental consequences of decisions to which the statute applies before making decisions and to select mitigation measures that correspond to these predictions. CEQR does not, however, require that lead agencies periodically assess the accuracy of their predictive methodologies and update them following retrospective assessments, nor does it require them to adjust their mitigation plans in response to actual outcomes that differ from what was predicted. CEQR's focus on making agencies predict the environmental consequences of their decisions at a single point in time, and requiring that agencies identify measures to mitigate these predicted consequences at this decision point, may be the root of some of the criticisms of the City's implementation of the CEQR mitigation requirement. The focus on generating information to inform the initial agency decision may also help explain why CEQR has been assailed for failing to offer communities mechanisms to hold agencies accountable for the actual impacts of their decisions over time, or to require agencies to address those consequences as they arise.

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[42] Ordonez v. City of New York, 110 N.Y.S.3d 222 (2018).

[43] For example, in employing an alternative analysis methodology, the agency must be sure that to identify the relevant areas of environmental concern, take a "hard look" at them, and make a "reasoned elaboration" of the basis for its determination. Matter of Jackson v New York State Urban Dev. Corp., 67 N.Y.2d, at 417; *see also* Chinese Staff Workers Assn. v City of New York, 68 N.Y.2d 359, 363–64 (1986); Aldrich v Pattison, 107 A.D.2d 258, 265 (1985); H.O.M.E.S. v New York State Urban Dev. Corp., 69 A.D.2d 222, 232 (1979).

[44] *See* Bradley C. Karkkainen, *Toward A Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 930 (2002) ("CEQ regulations … explicitly acknowledg[e] that uncertainties pervade the predictive analyses required by NEPA"). Karkkainen describes NEPA as "predicated upon a 1960s-style faith in comprehensive bureaucratic rationality, and more specifically, the comprehensive-rational planning model associated with the large scale experiments in urban planning of that era." *Id*. at 925.

[45] In describing the challenges of attributing causation to zoning changes, one stakeholder gave the following example: "For instance: Long Island City was rezoned in 2000. In the years that followed, unforeseen changes occurred in the marketplace, in the financing of residential and commercial office space, and in State legislation, and housing took off. To what extent are the outcomes that occurred an impact specifically of the 2000 rezoning?"

PART 3 – CRITIQUES OF CEQR'S MITIGATION REQUIREMENT AND CASE STUDIES

3.1 Critiques of the Implementation of the Mitigation Requirement

While New York City's environmental review process is one of the most comprehensive in the country, it is not without its critics. To better understand the nature of the criticism, we conducted a literature review and interviews with field experts from the academic, non-profit, government, and private sectors. These sources revealed a number of common criticisms, including that the process too often results in inaccurate impact projections, unnecessary work for City agencies, cost and time overruns for private entities, and planning fatigue across communities.[46] Broadly speaking, we identified six critiques of CEQR's mitigation requirement. These critiques fall into three categories: three concern the way that mitigation is addressed in the preparation of an EIS; two concern the post-EIS implementation of the mitigation measures included in a final EIS; and one concerns the costs associated with the entire process. We review each of these criticisms below. Notably, roundtable participants echoed several of these concerns.

Mitigation in the Preparation of an EIS.

The first line of criticisms concerns the breadth of impacts and mitigation measures that are evaluated. Agencies are supposed to consider a broad spectrum of impacts—from short-term to long-term, direct and indirect, and cumulative. Yet, critics argue that **the geographic scope of analysis in an EIS is often too narrow** to adequately capture the true impacts of multiple independent but related initiatives.[47] Owing in part to this deficiency, critics argue that the City frequently **fails to properly identify impacts** that fall within the scope of analysis conducted, thus precluding the opportunity to develop appropriate mitigation in response.[48] For example, a recent study argued that the methodologies contained in the CEQR Technical Manual underestimate the extent of residential displacement following a rezoning.[49] Another recent study, which analyzed neighborhood changes following area-wide rezonings in Long Island City and Downtown Brooklyn, found that the scale of change grossly exceeded that which the City predicted, leaving some adverse effects without sufficient mitigation plans.[50] Notably, however, neither of these studies used econometric analysis to try to determine the extent to which the rezonings themselves, as opposed to independent variables, may have caused the observed changes.

A second strand of criticism contends that the public has little opportunity to participate in the development of mitigation measures because **draft EISs frequently contain little information about the mitigation measures** that will be proposed. The details of mitigation measures tend to be discussed mainly

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[46] Testimony of the Regional Plan Association, given to the New York City Council, Committee on Land Use (May 7, 2019).

[47] "A preliminary analysis suggests that the City has been relying more frequently on spot rezonings on a smaller scale—doubling the frequency of map amendments since 2016, compared to the prior 15 years, for areas that are on average six times smaller." *Id*. *See also* Municipal Art Society, *A Tale of Two Rezonings: Taking a Harder Look at CEQR*, 52–53 (2018); Abigail Savitch-Lew, *Skeptics Say City's Environmental Studies Understate Damage from Development*, CITY LIMITS (Sep. 26, 2016).

[48] This problem can cut both ways; while on the one hand, the CEQR process could underestimate impacts, on the other hand, it could also predict adverse impacts which do not materialize to the extent predicted.

[49] Pratt Center, *Flawed Findings: How NYC's Approach to Measuring Displacement Risk Fails Communities* (2018); Sadef Ali Kully, *City's Environmental Review Process Faulted for Ignoring Evidence of Development's Harm*, CITY LIMITS (Sep. 17, 2018).

[50] *See* Municipal Art Society, *supra* note 47. *See also* Eric L. Adams, *A Decade Later in Downtown Brooklyn: A Review of the 2000 Rezoning*, OFFICE OF THE BROOKLYN BOROUGH PRESIDENT (2015) (finding that "projected" and "potential" sites were grossly underestimated in the EIS for the Downtown Brooklyn rezoning as compared to actual development that has occurred over the course of a decade).

in the final EIS, by which time it is too late for the public to comment.[51] The limited ability of the public to participate in the development of mitigation measures incorporated into the final EIS likely makes these measures less responsive to public concerns. [52]

Critics find further fault with the way that mitigation measures are formulated in final EISs. In particular, they argue that **EISs frequently do not provide sufficient specificity about the timeline** for implementing the mitigation measures or **who is responsible**.[53] The absence of a timeline and other detailed information could be related to uncertainty on the part of those drafting EISs about the likely occurrence, the scale, or the timing of the environmental impacts that mitigation measures are intended to address.

Post-EIS Implementation of Mitigation Measures.

There are two major criticisms concerning the implementation of identified mitigation measures. First, as mentioned above, there is **no mechanism for holding agencies legally accountable** for failing to implement mitigation. For impacts that do not materialize until after the statute of limitations period has run, the public has no remedy for enforcing mitigation against an agency in the courts. Relatedly, there is **no mechanism for tracking or monitoring the implementation of measures**. The absence of a public tracking mechanism means that the public has no way to know whether agencies or applicants are executing the measures promised. Without this basic information, it is not possible for the public to follow up with agencies about the pace of the implementation of measures, and, when mitigation is delayed, to determine why.[54] Concerns with the absence of a mechanism for tracking or monitoring the implementation of mitigation measures prompted City Council members to propose Int. 252 of 2019, which calls for the creation of a "mitigation tracker." Notably, Int. 252 builds off Local Law 175 of 2016, which established a mechanism for tracking commitments the Administration makes to neighborhoods undergoing area-wide rezonings.[55]

Second, the City has **no mechanism for evaluating the effectiveness of mitigation measures** in addressing the impacts of agency actions, such as area-wide rezonings. For instance, the City does not have a database of mitigation measures that have been proven successful and thus could be used in similar contexts in the future.[56] Unfortunately, there are also **few published studies analyzing the effectiveness of CEQR's mitigation strategies**.

Costs of Developing and Implementing Mitigation Measures.

On the other side of the equation, CEQR's procedures have been blamed for privileging inaction over action, impeding beneficial housing development at a time when the City faces a severe housing crisis, and dense, transit-oriented development at a time when the City and global face a climate crisis.[57] For smaller

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[51] Testimony of Thomas Devaney, Senior Director of Land Use & Planning, Municipal Art Society, given to the New York City Council, Committee on Land Use (May 7, 2019).

[52] SEQRA was founded on the principles of public participation and awareness. It specifically provides that the "lead agency will make every reasonable effort to involve … the public in the SEQR process." 6 N.Y. C.R.R. § 617.3 (d).

[53] Testimony of Marcel Negret, Senior Planner, Regional Plan Association, given to the New York City Council, Committee on Land Use (May 7, 2019).

[54] For example, it might be the case that agencies do not have the requisite funding or that they do not believe that the predicted impacts have materialized.

[55] 2016 N.Y.C. Local Law No. 175.

[56] Testimony of Thomas Devaney, *supra* note 51.

[57] As one stakeholder observed, "As they are structured, SEQRA and CEQR penalize concentration by subjecting it to greater scrutiny, and encourage externalization of impacts from macro-scale crises such as housing supply and the

projects in particular, the high price tag and lengthy timelines associated with undertaking an environmental review risks ending projects before construction even begins. [58] Moreover, the development and implementation of mitigation programs can add significant costs to a project.[59] CEQR has also been criticized for interfering with the development of affordable housing; subsidized housing projects must go through review even if identical market-rate housing would not, which incentivizes developers to take the latter route.[60] Thus, any reform to the mitigation requirements must balance the need for transparent and comprehensive procedures against the competing need to reduce project development costs.

3.2 The Case Studies: Manhattan Community District 4 and Brooklyn Community District 1

This project sought to supplement the limited existing literature on CEQR's mitigation requirement to provide context for assessing critiques and making proposals for reform. To that end, we conducted case studies of mitigation proposals developed in connection with six discretionary actions in two communities in New York City—Manhattan Community District 4 (Hell's Kitchen, Chelsea, and Hudson Yards) and Brooklyn Community District 1 (Greenpoint and Williamsburg).[61] Our goal in this exercise was to evaluate the nature of the commitments made in the EISs and the extent to which they have been implemented. In each community, we reviewed the final EISs for an area-wide rezoning plus two subsequent discretionary actions (Table 1) and attempted to track implementation of mitigation measures that were identified in the final EIS.[62]

GHG emissions of a growing human population. To the extent that densification and concentration are central to addressing the climate and housing crises, this model of environmental review is misaligned with solutions."

[58] *See* Salama et al., *Reducing the Cost of New Housing Construction in New York City*, FURMAN CEN. FOR REAL ESTATE & URB. POL., 60 (1999) ("[I]n addition to contributing to higher costs for projects which require CEQR review, there is another social cost: projects are simply not developed because of the chilling effect of the review process.").

[59] For example, the GEIS for the No. 7 Subway Line Extension—Hudson Yards Rezoning and Development Program estimated the collective mitigation costs to be between $300 and $400 million, in addition to the capital expenditure of an estimated $23.5 billion. Metropolitan Transit Authority & N.Y.C. Planning Commission, Final Generic Envtl. Impact Statement: No. 7 Subway Extension—Hudson Yards Rezoning and Development Program, ch. 5 at 97–98 (2004) [hereinafter No. 7 GEIS].

[60] Salama et al., *Reducing the Cost of New Housing Construction in New York City: 2005 Update*, Furman Cen. for Real Estate & Urb. Pol., 49 (2005) ("The irony of the triggers for CEQR review is that the exact same housing project that could be built as-of-right will require CEQR review if subsidies are being provided to make the housing affordable. Market rate housing of the same size with the same environmental impact would have no CEQR review. This creates a disincentive to build affordable housing which has in fact caused some developers to switch affordable projects to market rate housing.")

[61] One of our goals in this exercise was to see if the trends identified in the report by the Municipal Art Society (MAS), *supra* note 47, were more widespread. As such, we selected area-wide rezonings that were not analyzed in the MAS report. Moreover, because one of our goals was to track implementation over time, we limited our selection to rezonings that were greater than ten years old to account for the time needed for impacts to materialize and for measures to be carried out.

[62] We grouped impacts identified in the EIS in sub-categories within nineteen technical areas outlined in the Technical Manual. For example, when reviewing impact findings and proposals within the technical area of "community facilities," we considered impacts on schools and impacts on publicly funded daycare facilities as distinct from one another. Our approach tracks the categories of impact analysis for each technical area as recommended by the CEQR Technical Manual.

MANHATTAN COMMUNITY DISTRICT 4	
No. 7 Subway Line Extension/Hudson Yard Rezoning and Development Program GEIS	2004
Special West Chelsea District Rezoning and High Line Open Space EIS	2005
Western Rail Yard Project EIS	2009
BROOKLYN COMMUNITY DISTRICT 1	
Greenpoint Williamsburg Rezoning EIS	2005
Broadway Triangle EIS	2009
Domino Sugar Rezoning EIS	2014

Table 1. Environmental review documents surveyed

Manhattan Community District 4. Located in the far west side of Midtown Manhattan, the Hudson Yards neighborhood was once home to a variety of manufacturing and industrial activities. At the time of its rezoning in 2005, the area was considered one of the last underdeveloped parts of Manhattan. The City's rezoning converted the area from West 28th to West 42nd Street, between Eighth and Twelfth Avenues, including the eastern part of the Caemmerer Rail Yard, from industrial to residential and commercial use. The rezoning allowed for an additional 24 million square feet of office space, and 13,000 residential units, and revenues this development generated were used to support the extension of the No. 7 subway line to the area. [63] While the development plan for this area is yet to be completed, the development of Hudson Yards is already the largest mixed-use private real estate venture in American history.[64]

In 2009, the City took action to facilitate the development of the western part of the Caemmerer Rail Yard (now known as the Western Yard), located between Eleventh and Twelfth Avenues, West 30th and West 33rd Streets, as well as to create permanently affordable residential housing at two adjacent City-owned sites, located near Tenth Avenue and West 48th Street and Ninth Avenue near West 54th Street. [65] In this second phase of development, the City aimed to convert the site, which had historically served as a rail

[63] *See* Michael Kimmelman, *Hudson Yards Is Manhattan's Biggest, Newest, Slickest Gated Community: Is This the Neighborhood New York Deserves?*, THE N.Y. TIMES (Mar. 14, 2019); *see also* Hamilton Nolan, *New York's Hudson Yards is an Ultra-Capitalist Forbidden City*, THE GUARDIAN (Mar. 13, 2019).

[64] In fact, "nearly eight-million square feet of new office space has been built and occupied to date, and another eight-million more square feet of space is under construction and largely pre-sold or pre-leased." In all, "Hudson Yards is providing nearly twice the amount of space built in the entire city in the 1990s." Michael Samuelian, *Where Did Hudson Yards Come From? This Little-Known Report Helped Start It All*, GOTHAM GAZETTE (Jan. 15, 2020).

[65] N.Y.C. Dept. of City Planning, Final Envtl. Impact Statement: Western Rail Yard Project, ch. 1 at 1 (2009).

yard, military fortification, and an offloading area for slaughterhouses, into a mixed-use development that would create new commercial and residential spaces, a public school, and open space.[66]

Just south of Hudson Yards, the Chelsea neighborhood had historically been an affluent residential area east of Tenth Avenue and an industrial district to the west, along the Hudson River, characterized by light manufacturing, storage, and auto-related uses. Beginning in the 1990s, however, this western portion began to experience a growth of galleries, restaurants, bars, and nightclubs. Seeking to encourage the development of West Chelsea as a mixed-use neighborhood and expand residential and arts-related uses, the City rezoned the area from 30th and 17th Street between Tenth and Eleventh Avenue to create a Special Purpose District. At the same time, the City sought to facilitate the restoration and reuse of the High Line elevated rail line as an accessible, public open space.[67]

Brooklyn Community District 1. Like Hudson Yards and Chelsea, the Greenpoint/Williamsburg waterfront was once filled with marine shipping and manufacturing sites, with significant garment manufacturing in adjoining upland areas. While these Brooklyn neighborhoods experienced rising demand for housing in the late 1990s, much of the waterfront remained underutilized as it had been for decades following the emergence of containerized freight, and adjacent areas lost employment as garment manufacturing and other manufacturing were affected by globalization. Developers and officials, seeing increasing demand for new housing, hoped to create more opportunities for residential development and public space on the waterfront. With this in mind, the City rezoned 175 blocks in 2005, converting 183 acres from industrial-use to mixed-use land (residential and commercial).[68]

Another remnant of the Brooklyn waterfront's industrial history, the Domino Sugar Refinery, located along the East River between Grand and South 5th Streets, has stood in Williamsburg since the late 19th century. After running for 148 years, the refinery shut down operation in 2004 and became a City landmark in 2007. In 2012, it was sold to a private developer[69] which sought to revitalize and redevelop the vacant waterfront site with publicly accessible open space, a restored and adaptively reused historic building, and new residential buildings. The proposal included 2,400 residential units, with 660 units allocated to affordable housing, 127,537 square feet of commercial space, 146,451 square feet of community facility space, and 98,738 square feet of commercial office space.[70]

Inland from the waterfront, Broadway Triangle has historically been a manufacturing area occupied primarily with industrial and commercial land uses. Located on the southeast corner of the Williamsburg and bordering Bushwick and Bedford-Stuyvesant, the area's manufacturing zoning precluded residential development, and with the decline of industry, many sites remained vacant and underutilized. Several City-owned pieces of property in the area were similarly vacant or underutilized. Thus, in 2009, the City proposed to rezone the area to increase the supply of housing, particularly affordable housing, and encourage the development of commercial and community spaces to serve the growing local population.[71]

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[66] *Id.*; Keith Williams, *The Evolution of Hudson Yards: from 'Death Avenue' to NYC's Most Advanced Neighborhood*, CURBED N.Y. (Mar. 12, 2019).

[67] N.Y.C. DEPARTMENT OF CITY PLANNING, STUDY FOR THE POTENTIAL EXPANSION OF THE SPECIAL WEST CHELSEA DISTRICT STUDY 3 (2013), https://www1.nyc.gov/site/planning/plans/special-west-chelsea/special-west-chelsea.page.

[68] *See* Diane Cardwell, *City Is Backing Makeover for Decaying Brooklyn Waterfront*, THE N.Y. TIMES (May 3, 2005).

[69] John del Signore, *Domino Sugar Refinery Sold To Two Trees For $185 Million, Affordable Housing Still A Question Mark*, GOTHAMIST (Oct. 15, 2012).

[70] N.Y.C. Dept. of City Planning, Final Envtl. Impact Statement: Domino Sugar Refinery, ch. 1 at 1 (2014). *See also Valeria Ricciulli, Domino Sugar Factory: A Guide to the Megaproject's Buildings*, CURBED N.Y. (Nov. 11, 2019).

[71] N.Y.C. Dept. of City Planning, Final Envtl. Impact Statement: Notice of Completion, 1–7 (2009).

3.3 Case Study: Methodology and Findings

As mentioned above, our case studies were intended to shed light on the way that the mitigation requirement has been implemented, and therefore to provide new context for understanding the criticisms raised and proposals for reform.

Our study proceeded as follows. For each of the six EISs, we reviewed the standalone chapter on mitigation and/or any sections on mitigation in each technical chapter. For impacts where mitigation was proposed, we then categorized these impacts based on individual areas of analysis identified in the CEQR Technical Manual.[72] Based on this method of categorization, we calculated 60 impacts across the six EISs.[73] We then recorded the mitigation measures proposed for each impact and any entities that were identified as being involved in implementation, noting also whether a timeline for implementation had been proposed and whether the impact was long-term or short-term.[74] We sought to characterize the mitigation measures in the six EISs along a number of dimensions:

- *Assignment of responsibility.* Does the EIS assign responsibility for a mitigation measure? If so, does it assign responsibility to a public or private actor? If an agency, which one? Do any measures require implementation by more than one entity?
- *Expected timing* of *implementation*. Does the mitigation measure seek to address a long-term or a short-term impact? We sought to characterize impacts as short- or long-term in light of the hypothesis that mitigation measures might not be implemented because they are for impacts expected to occur far into the future for which it is hard to design mitigation when the EIS is being prepared.
- *Rates of implementation*. How many measures have been implemented? How difficult is it to obtain this information, given that the City does not publicly report on whether mitigation measures identified in EISs are implemented?

Our research provides support for several of the criticisms outlined earlier, including that there is a lack of transparency as to whether mitigation measures have been implemented. We could not asses some of the other criticisms of the implementation of the mitigation requirement, such as the criticism that not enough detail is provided in draft EISs about mitigation measures, because we only examined final EISs.

In addition to speaking to several existing criticisms, our research underscores other problems with the mitigation process which have not been widely noted. For example, we found that the lead agency was rarely assigned responsibility for implementing the mitigation measures it included in the EISs. Instead, responsibility for implementation mostly fell to other agencies, diminishing accountability. Below, we highlight five key findings from our case studies.

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[72] For example, the CEQR Technical Manual identifies eight areas of analysis in the technical chapter on transportation: (1) traffic flow and operating conditions; (2) rail and subway facilities and services; (3) bus service; (4) pedestrian facilities; (5) pedestrian, bicycle and vehicular safety assessments; (6) parking conditions; (7) goods delivery; and (8) construction phase impacts. CEQR TECHNICAL MANUAL, *supra* note 32, at ch. 16. For the purposes of this study we therefore considered impacts on individual lines of bus service stemming from a single project as one impact.

[73] *See* APPENDIX IV.

[74] The law does not define the terms "long-term" or "short-term". The CEQR Technical Manual only defines "short-term" in the context of construction activities and as those lasting less than two years. CEQR TECHNICAL MANUAL, *supra* note 32, at ch. 22, § 100, 200. It should be noted that these terms refer to the *duration* of the impact, not *how soon* into the future the impact will be felt. For the purposes of this study we therefore consider long-term impacts as anything lasting more than two years.

1. *There is a lack of publicly available information on whether mitigation measures proposed in individual EISs have been implemented.*

We attempted to track proposed mitigation measures for individual categories of impacts in each of the surveyed EISs in an effort to determine rates of implementation. Our efforts included reviewing public maps and data, and contacting City agencies, community boards and members of City Council for verification. While in many cases proposed measures were outlined in great detail, there was an overall lack of publicly accessible information as to whether these measures were implemented, and we were only able to confirm implementation for a handful of the impacts we analyzed. As such, we could not conclusively determine what proportion of measures have in fact been implemented. Adding to this difficulty, only for 68% of identified impacts did the EISs state the entity that would be responsible for implementing proposed mitigation measures.[75] Nevertheless, this exercise highlighted critics' concern that there is a lack of transparency in the post-review process. The CEQR Rules provide that OEC must "work with appropriate city agencies to develop and implement a tracking system to ensure that mitigation measures are implemented in a timely manner, and to evaluate and report on the effectiveness of mitigation measures."[76] To what extent this "tracking system" has been realized is unclear. For example, it is unclear whether the City has standardized reporting and monitoring procedures or whether each agency is required to propose their own. Though there are references to a "Tracking Form" in the CEQR Technical Manual and on various municipal websites, virtually no publicly accessible information is available as to what this system looks like and how it operates.

2. *The vast majority of mitigation measures the lead agency proposed required implementation by another agency.*

The lead agency has the responsibility to prepare the environmental review document, including proposed mitigation measures.[77] In New York City, however, the lead agency often does not have the jurisdiction to implement these measures, which frequently lies within the purview of other agencies. In fact, SEQRA makes clear that it "does not change the existing jurisdiction of agencies nor the jurisdiction between or among state and local agencies."[78] Moreover, the lead agency has no authority to impose mitigation requirements on an outside agency or to enforce implementation against them.[79] Rather, implementation requires coordination among myriad different agencies. For example, in the rezoning of West Chelsea, where DCP prepared the EIS and is charged with implementing mitigation, the Department of Transportation (DOT) would need to make timing adjustments to traffic signals; the Administration for

[75] Where the EISs did not expressly identify the entity responsible for implementation, we were able to infer this information in many circumstances. Therefore, it should be noted that our calculations in Appendix IV, which this section relies on, are based on these extrapolations. See APPENDIX IV (# measures where responsible entities are identified).

[76] CEQR Rules, § 5.04 (c)(18).

[77] SEQRA Rules § 617.2 (v).

[78] *Id.* at §6 17.3(b).

[79] SEQRA provides agencies with the authority "to impose substantive conditions" upon a discretionary action to ensure that the legal requirements of the statute have been met. *Id.* The lead agency frequently exercises this authority upon private applicants for the purposes of mitigating anticipated impacts. Specifically, the assignment of responsibility to implement mitigation is often memorialized in documents other than the FEIS, for example through restrictive declarations, land disposition agreements, contract of sale agreements. However, the lead agency has no authority to impose such requirements on an outside agency.

Children's Services (ACS) would need to allocate funding for new child care facilities; the New York City Transit Authority (NYCT) would need to add a bus line; and so on.[80]

This creates a legal conundrum: the lead agency is legally required to mitigate the adverse impacts of its actions, and yet often lacks the jurisdiction to implement and the authority to compel other agencies to take action. Our study brought this problem into stark relief; indeed, we estimate that for 68% of the impacts identified in the EISs, the lead agency, which is the agency that prepared the EIS and developed the mitigation plans, was not the agency that had jurisdiction to implement the proposed mitigation measures.[81] Adding to this dilemma, of the impacts for which the lead agency is at least partially responsible for implementing mitigation, it was required to coordinate with another agency to mitigate the 84% of the time.[82] To illustrate this another way, the lead agency only had jurisdiction to implement the proposed measures for 5% of impacts on its own.[83]

3. *A majority of the impacts evaluated are long-term and mitigation measures lacked clear timelines for implementation.*

We estimate that the measures proposed for 83% of impacts in the EISs surveyed sought to redress long-term impacts, the majority of which were based on scenarios that modelling exercises predicted would come to pass.[84] For example, mitigation measures for traffic impacts resulting from the Greenpoint-Williamsburg rezoning were developed based on modelled traffic patterns that were predicted to occur in 2013, eight years after the final EIS was issued.[85]

Needless to say, there is tremendous uncertainty associated with modelling scenarios so far in the future as there can always be unforeseen circumstances and influences that can affect these projections. For example, while the No. 7 Subway Line Extension GEIS projected potential significant adverse impacts on daycare facilities in the project area within five to ten years, the agency noted that it was not possible to know exactly which type of mitigation would be most appropriate and when, because the demand for publicly funded day care depends not only on the amount of residential development in the area, but the proportion of new residents who are children of low-income families.[86]

To adequately respond to such uncertainty, continuous reevaluation of facts on the ground is necessary to determine if and when predicted impacts will materialize. For example, in the case of impacts on community facilities stemming from the West Chelsea rezoning, the lead agency acknowledged that

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[80] *See* APPENDIX III.

[81] Of the 60 total impacts identified, the lead agency is at least partially responsible for implementing mitigation measures proposed for 19 impacts. Inversely, the lead agency lacks any responsibility for implementing mitigation measures proposed for 41 of the 60 total impacts, which is 68%. *See* APPENDIX IV (# measures where the lead agency is responsible).

[82] The lead agency is at least partially responsible for implementing measures for 19 of the 60 total impacts identified, and the lead agency shares responsibility for implementing the measures for 16 of these 19 impacts, which is 84%. *See id.* (# measures where lead agency is responsible; # measures where lead agency shares responsibility).

[83] *Id.* (# measures where only lead agency is responsible).

[84] *Id.* (# long-term impacts). We defined "long-term impact" as an impact expected to last a duration of more than two years. *See supra* note 74.

[85] N.Y.C. Dept. of City Planning, Final Envtl. Impact Statement: Greenpoint-Williamsburg Rezoning, ch. 22 (2005)

[86] No. 7 GEIS at ch. 6, p. 30.

ongoing monitoring would be necessary to determine whether additional daycare facilities would be needed.[87]

It is important to note, however, that the first-step determination as to *whether an impact is likely to occur* is a separate inquiry than the determination as to *when measures must be taken* to reduce or avoid the predicted impact. Timelines for implementation not only help to set expectations for the public, particularly in cases where measures require extensive planning or large amounts of capital resources to implement on time, but also provide a point of reference for holding agencies accountable for their commitments. And yet, we estimate that mitigation measures proposed for 95% of impacts in the EISs did not propose timelines for implementation.[88]

4. *The universe of potential mitigation measures surveyed appears artificially constrained.*

Where an impact assessment is warranted, the CEQR Technical Manual sets out methodologies for defining the parameters of a study area for the purpose of analyzing specific categories of impacts.[89] While it seems logical for the City to offer generic guidelines regarding the geographic boundaries for a study area, rigid adherence to these guidelines can cause an agency to needlessly ignore available opportunities for mitigation options that lie just outside the area's boundaries. We saw evidence of this tendency in the EIS prepared for the West Chelsea rezoning. The EIS for this rezoning predicted that the initiative would produce a significant adverse impact on open space ratios, yet this impact was left unmitigated because creating additional open space or improving existing open space elsewhere in study area were considered unfeasible.[90] The agency did not indicate, however, whether it considered opportunities to expand open space just outside the study area, which might still be accessible to residents of the affected community.

5. *EISs are unnecessarily long and internally inconsistent.*

CEQR provides that environmental impact statements "should be clearly written in a brief and concise manner capable of being read and understood by the public."[91] And yet, it has been observed that agencies and developers frequently treat the review process as "litigation insurance, not a planning document."[92] As a result, environmental review documents are frequently unnecessarily long and difficult to digest, without necessarily setting forth the best proposals for planning.[93] Indeed, the average length of the EIS documents we surveyed was 2,534 pages, the longest being 6,221 pages.[94]

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[87] N.Y.C. Dept. of City Planning, Final Envtl. Impact Statement: Special West Chelsea District Rezoning and High Line Open Space, ch. 22 at 2–3 (2005) [hereinafter West Chelsea FEIS].

[88] Only 3 of the 60 total impacts identified included timelines for implementation. *See* Appendix IV (# measures with timelines for implementation).

[89] For example, the study area for impacts on open space resources is defined as one-half mile for residential users and one-quarter mile from commercial projects with a worker population. The CEQR Technical Manual bases these parameters on what it considers "a reasonable walking distance that users would travel to reach local open space and recreation areas." *See* CEQR TECHNICAL MANUAL, *supra* note 32, at ch. 7, § 310.

[90] West Chelsea FEIS, ch. 24, p. 1.

[91] CEQR, §6-09(a).

[92] Hope Cohen, *Rethinking Environmental Review: A Handbook on What Can be Done*, Manhattan Inst. for Pol'y Res., at 19 (2007).

[93] *Id.*

[94] No. 7 GEIS. It should be noted that these figures were calculated for final EISs, and are inclusive of appendices and exclusive of responses to public comments.

Moreover, in several instances we identified inconsistencies in the mitigation proposals contained within a document. For example, in a number of EISs, there were instances where the document identified potential significant impacts and proposed mitigation measures in the technical chapter, but no mitigation measures were articulated in the chapter on mitigation.[95] These inconsistencies suggest some form of quality control is warranted.

3.4. Goals for Reform

Based on our review of existing literature on CEQR, interviews with field experts, and our case studies of six EISs, we identified four potential objectives for reform:

(1) there is a need to **increase the comprehensiveness** of the impacts analyzed and mitigation measures surveyed in order to more sufficiently identify impacts and expand the range of mitigation options;

(2) there is a need to **improve the effectiveness** of measures designed to mitigate the identified impacts;

(3) there is a need to **improve accountability** for implementation of mitigation measures including by **improving transparency**; and

(4) finally, there is a need for **greater efficiency** throughout the environmental review process in order to **contain costs** and avoid unduly burdening beneficial development.

With these objectives in mind, we surveyed the procedures that have been implemented in other jurisdictions' environmental review processes in the hopes of identifying practices that could be adopted locally. Seven proposals for reforming CEQR's mitigation process, which were discussed during the roundtables, are outlined in Part 4.

In reviewing these options for reform, it is worth bearing in mind longstanding concerns that CEQR's burdensome requirements may impede beneficial development, including of affordable housing. Reforms should thus balance the need for transparent and comprehensive procedures against the competing pressure to reduce project development costs.

Moreover, it is important to note that these proposals reflect a deliberately narrow mandate to identify potential reforms to the City's procedures under CEQR. To this end, we acknowledge that the environmental review process does not exist in a vacuum, but rather must be considered within the broader context in which it operates. Relatedly, there may be alternative or supplemental reforms outside of this process that might more adequately respond to some of the underlying concerns that have been raised by stakeholders, particularly in light of CEQR's legal limitations. For example, concerns about the City's failure to account for cumulative impacts might be better addressed through changes to the planning process. Similarly, concerns about inadequate funding for needed mitigation may be best dealt with through adjustments to agencies' budgets. Thus, the proposals that follow should not be viewed as a "silver bullet," as even a perfect reform of CEQR could not cure every problem that has been raised—but they can serve as a step in the right direction.

[95] For example, the final EIS for Western Rail Yards identified a risk of significant harm from volatile contaminants in the soil and groundwater and proposed mitigation measures, including ventilation systems, in the technical chapter on hazardous materials. Yet, this information was entirely missing from the chapter on mitigation. Metropolitan Transit Authority & N.Y.C. Planning Commission, Final Generic Envtl. Impact Statement: Western Rail Yard Project, ch. 12 & 24 (2009) [hereinafter Western Rail Yard FEIS].

PART 4 – IMPROVING MITIGATION UNDER CEQR

4.1 Overview of Reform Proposals

The following section outlines six proposals for reforming CEQR's mitigation processes. In seeking options for reform, we looked to the five states (California, Massachusetts, Minnesota, New York, Washington) that have environmental review statutes that impose substantive mitigation requirements on local decision makers, as well as the major cities within these states.[96] We also looked at federal environmental statutes,[97] as well as agency policies under NEPA.[98]

After having surveyed the practices of the selected jurisdictions, we identified seven discrete options for reform, which we presented during the roundtables to groups of experts for review. Each option for reform addresses one or more of the goals for reform that we identified above.[99] Some of the proposals primarily concern the selection of the mitigation measures included in EISs; implementing these reforms might facilitate the development of more efficient and adaptable forms of mitigation. The others primarily concern what happens after the review process. They would promote more public accountability for implementation of mitigation measures proposed alongside agency actions, and evaluation of the effectiveness of measures selected. Most of these options likely could be implemented through changes to the CEQR Technical Manual or by agencies.[100] A few ideas might require City—and, in one instance, possibly state—legislation.[101] Because some of these options would require agencies to expend additional time and resources, it would also be necessary to ensure that sufficient funding is allocated.[102]

The roundtable participants were nearly unanimous in their support for five of the seven proposals presented. These proposals are described in more detail in Section 4.2. They were more divided, however, in their assessment of the two other proposals, which are described in Section 4.3. However, given the degree of support that they received, we have decided to include an overview of these proposals and some of the arguments raised for and against them.

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[96] *See* APPENDIX I. Notably, sixteen states have environmental review statutes in place, but only four of these states' laws impose a substantive mitigation obligation.

[97] Clean Water Act; Clean Air Act; Federal Insecticide, Fungicide, and Rodenticide Act.

[98] A study which analyzed 61 U.S. Army Corps of Engineers water projects in the Southern United States found that mitigation measures developed under NEPA had been effective for 54% of projects, partially effective for 30%, and ineffective for 16%. BM Young, *Implementation of Mitigation Measures at US Army Corps of Engineers Water Projects in the Southern United States, in* ENVIRONMENTAL ANALYSIS: THE NEPA EXPERIENCE (1993). This suggests that there may be lessons on mitigation which can be learned from practices developed at the federal level, even though NEPA does not impose a substantive obligation on federal agencies to mitigate environmental impacts. As such, in aiming to identify best practices from other jurisdictions, we include federal mitigation procedures in our survey.

[99] *See supra* Section 3.4 and *infra* Table 2.

[100] *See infra* Recommendations 2 (improve the GEIS process and expand its use); 3 (adopt a mechanism for tracking and monitoring mitigation); and 6 (expand the use of offsets, including offsite mitigation).

[101] *See infra* Recommendations 1 (establish a centralized unit with authority to review and evaluate the effectiveness of mitigation measures); 4 (adopt a public process for the retrospective evaluation of mitigation); 5 (require regular periodic reviews of the CEQR Technical Manual); and 7 (adopt a mitigation fee program).

[102] *See infra* Recommendations 1 (establish a centralized unit with authority to review and evaluate the effectiveness of mitigation measures), 3 (adopt a mechanism for tracking and monitoring mitigation), and 5 (require regular periodic reviews of the CEQR Technical Manual).

The table below summarizes the identified proposals for reform and goals that we believe each proposal would further. It presents the five proposals that the group broadly agreed were warranted, as well as the two proposals that were more controversial.

PROPOSALS	GOAL 1 Increased Comprehensive-ness of Analysis	GOAL 2 Increased Effectiveness of Mitigation	GOAL 3 Improved Accountability and Transparency	GOAL 4 Reduced Cost of Environmental Review
BROAD CONSENSUS				
Establish a centralized unit with authority to coordinate and review agency mitigation strategies		✓	✓	
Improve the GEIS process and expand its use	✓			✓
Adopt a public mechanism for tracking and monitoring mitigation		✓	✓	
Adopt a public process for the retrospective evaluation of mitigation strategies		✓	✓	
Require regular periodic reviews of the CEQR Technical Manual	✓	✓	✓	
DIVIDED OPINION				
Expand the use of offsets, including offsite measures	✓	✓		
Adopt a mitigation fee program (development impact fees and in-lieu mitigation fees)		✓		✓

Table 2. Summary of proposals and the goals that each proposal would further

4.2 Proposals with Broad Support

In the pages that follow we describe the five proposals for reform that garnered broad support among stakeholders. It should be noted, however, there was not complete consensus in support of these recommendations, and some stakeholders have expressed concerns as noted below.

Recommendation 1: Establish a centralized unit with authority to coordinate and review agency mitigation strategies

***Goals furthered**: Increased effectiveness of mitigation; improved accountability and transparency*

Problem. At present, myriad different agencies conduct environmental reviews.[103] In fact, at least forty-eight city agencies have served as the lead agency since 2005.[104] One consequence of this decentralized system of review is fragmentation. While all City agencies work under the same legal and regulatory framework and with the same guidance document, the review process itself is conducted by many different lead agencies, some of whom may not have the requisite sophistication or expertise to custom-tailor mitigation measures to the specific conditions of a site, location, or type of project. Further fragmentation lies in the process; EISs are routinely prepared by consultants hired by the agency or applicant, so that the final EIS is the product of an "extended negotiation" between a lead agency and these consultants, which risks inconsistencies in the application of CEQR rules, regulations, and review standards.[105]

A second problem relates to the conflict between the lead agency's interest in undertaking a city-sponsored action and their obligation to review that same action for its negative impacts—this is a classic case of "the fox guarding the hen house." While the notice and comment requirement ameliorates this conflict of interest to some extent, as some critics have observed, mitigation measures are often not fully articulated in the draft EIS and by the time the final EIS is released, the public lacks any further opportunity to voice any concerns about the proposed measures.[106]

These problems create particular challenges for mitigation. Inconsistencies in the quality of EISs creates a risk that impacts may not be properly identified or analyzed, potentially resulting in unmitigated adverse effects on the environment. Furthermore, where statutory standards are not uniformly applied by different lead agencies, there is a risk of inconsistency in the application of mitigation measures across different projects, potentially resulting in inequities across communities. Political pressures behind certain actions also might create an incentive for the lead agency to reduce the appearance of negative impacts.[107]

Option. One solution to the problem of fragmentation is to establish a centralized unit vested with the power to review CEQR documents and coordinate mitigation strategies among agencies. This centralized unit could be empowered to review CEQR documents and make recommendations to the lead agency for

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[103] Scholars have analyzed the problems associated with decentralization at the state level, however, these critiques could also be made of the process at the city level. Gerrard & Bose, *supra* note 19.

[104] *See* N.Y.C. Mayor's Off. Of Envtl. Coordination, *CEQR Access*, https://a002-ceqraccess.nyc.gov/ceqr/. A review of the City' CEQR database suggests that the agency taking on the largest number of environmental reviews was the NYC Board of Standards and Appeals, which was lead agency in 31.7% of actions, followed by DCP at 21.7% of actions. *See* APPENDIX V.

[105] Gerrard & Bose, *supra* note 19 (noting that "[I]f SEQRA's main problem lies in its fragmentation, the cure might involve some degree of centralized control or, at least, review").

[106] Testimony of Thomas Devaney, *supra* note 51.

[107] Several interviewees raised concerns that agencies might seek to downplay the quantified impact of a proposed project through data manipulations.

addressing any deficiencies or deviations from what are considered to be best practices; likewise, the unit could issue a certification where mitigation plans are deemed satisfactory.[108] Certifications issued by the unit on the adequacy of the agency's analysis and mitigation plan might also serve as additional evidence to support the action should it be legally challenged. The unit could also be empowered to investigate allegations of intentional misrepresentations or faulty analysis, thus providing the public with an administrative remedy and potentially helping to reduce the need for litigation. Moreover, this review could include some form of quality control aimed at addressing any textual inconsistencies or other oversights.

New York City currently lacks an agency with these functions. While OEC supports lead agencies in carrying out their responsibilities under CEQR, its role is fairly limited.[109] Nevertheless, OEC already plays a leading role in assisting agencies in carrying out their environmental review responsibilities and therefore likely has the requisite expertise to carry out these expanded functions. As such, it would likely be more appropriate to establish such a unit within OEC or to expand OEC's authority rather than create a new agency altogether.

One alternative to this proposal is vesting the authority to conduct environmental reviews in a single, dedicated agency. However, this may be impossible absent a change in state law. The determination as to which agency serves as lead is a *legal* determination: SEQRA is explicit that the "agency principally responsible for undertaking, funding or approving an action," is also the agency that is "responsible for determining whether an environmental impact statement is required in connection with the action, and for the preparation and filing of the statement if one is required."[110] As such, although the lead agency may not have sufficient expertise and may need to draw on others, under the law as it is today, it appears that the responsibility to prepare the EIS and issue a final determination on significance remains with the lead agency.[111]

Who can we learn from?

Massachusetts. At the state level, the Massachusetts Environmental Policy Act (MEPA) Office is housed within the Executive Office of Energy and Environmental Affairs (EEA), an agency of the Commonwealth of Massachusetts. The MEPA Office conducts reviews of environmental impacts of development projects and other activities that require one or more state agency action. Not only is the MEPA Office responsible for the day-to-day administration of the MEPA review process, they also serve to coordinate project review with proponents, consultants, and interested agencies and citizens, and to make recommendations to the Secretary of the EEA regarding the adequacy of

[108] So as to not run afoul of the law, it is important that this unit not have the authority to override underlying lead agency determinations of significance. Thus, the failure to obtain certification should not bar the lead agency from choosing to move forward with a proposal, even where the certifying unit identifies deficiencies. *See infra* note 111; *see also* CEQR Rules § 5.04(b).

[109] For a list of functions, see *supra* note 30.

[110] SEQRA Rules § 617.2(v).

[111] In fact, CEQR initially centralized most environmental review functions in two "co-lead agencies," the Department of Environmental Protection (DEP) and the Department of City Planning (DCP). Executive Order No. 91 of 1977. The Court in *Matter of Coca-Cola Bottling Co.* found that this violated SEQRA as the "determination of the significance of the environmental effect of a project is removed from the ambit of the agency principally responsible for approving the proposal." Matter of Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d 674 (1988). CEQR was subsequently amended to redefine "lead agency" as "the agency principally responsible for environmental review pursuant to [the CEQR] rules." CEQR Rules § 5-02(c)(3).

environmental documentation submitted for a project.[112] The Secretary is further empowered to issue certificates determining the need for an Environmental Impact Report.

Minnesota. The Minnesota Environmental Quality Board (EQB) functions as the coordinating body for Minnesota's environmental review process. The interest in creating the EQB grew out of a need to create a mechanism to coordinate the state's environmental efforts in light of their multi-jurisdictional and multi-dimensional nature, as well as to provide more opportunities for public access and engagement. The perception then was that environmental problem-solving in Minnesota was highly fragmented.[113] In its findings, the state's legislature argued that "problems related to the environment often encompass the responsibilities of several state agencies and that solutions to these problems require the interaction of these agencies."[114]

The EQB is made up of nine agency heads and eight citizen members. It exercises a rather unique authority under the state's environmental review process. Under law, the EQB may require an agency to prepare an environmental assessment worksheet before final approval of a proposed project.[115] Where an EIS is prepared, the lead agency is charged with determination its adequacy, however, the EQB is also permitted to supersede the lead agency with its own determination of adequacy.[116]

Recommendation 2: Improve the GEIS process and expand its use

***Goals furthered**: Increased comprehensiveness of analysis; reduced cost of environmental review*

Problem. Because the City relies in part on CEQR to inform its zoning decisions, it is important that the environmental process sufficiently captures the broad-scale and cumulative impacts of the City's actions. As noted earlier, project-level EISs often study areas that are relatively limited in geographic scope, which can make impacts that result from multiple, similarly situated projects less likely to be considered significant than if a larger area were studied. This problem is sometimes referred to as "segmentation."[117]

To this point, experts and other stakeholders have noted that while the review process should take into account cumulative impacts, segmented analysis creates a risk that the City overlooks the full extent of the harms resulting from its actions, thus precluding the discussion and application of mitigation measures aimed at addressing them. For example, following area-wide rezonings, there will often be additional project-level rezonings that will occur within that area; the impact of these subsequent rezonings will often be considered in isolation, which may underestimate the cumulative impact of these projects as a whole. For our purposes, one particularly noteworthy consequence of segmentation is that it can cause the agencies to overlook needed mitigation. The current reliance on geographically-narrow project-level EISs

[112] *See* Massachusetts Envtl. Pol. Act Office, https://www.mass.gov/orgs/massachusetts-environmental-policy-act-office
[113] Minnesota Legislative Reference Library, *Information on Minnesota State Agencies, Boards, Task Forces, and Commissions: Minnesota Environmental Quality Board*, https://www.leg.state.mn.us/lrl/agencies/detail?AgencyID=478.
[114] Minn. Stat. § 116C.01.
[115] *Id.* at § 116D.04, Subd. 2 (g).
[116] *Id.* at Subd. 2 (j).
[117] Segmentation is defined as the "division of the environmental review of an action such that various activities or stages are addressed … as though they were independent, unrelated activities, needing individual determinations of significance." SEQRA Rules § 617.2(ah). "Except in special circumstances, considering only a part, or segment, of an overall action is contrary to the intent of SEQRA" SEQRA HANDBOOK, *supra* note 15, at 59.

creates another problem too: it can cause project proponents to conduct redundant analyses, unnecessarily adding to the money and time spent preparing environmental review documents.

Option. Agencies could expand and improve their use of Generic EISs (GEIS).[118] Where there are a series of related projects in the same geography with similar relative construction periods or where a series of projects all relate to a common city goal,[119] review could be conducted through a "tiered" review process.[120] In these cases, agencies would undertake a review of common or program-wide impacts in a GEIS and set forth criteria for when supplemental EISs will be required for site-specific or project-specific actions that follow the approval of the initial program.[121] In the context of area-wide rezonings, for example, the GEIS could not only analyze the anticipated impacts from as-of-right development that would be permitted if the rezoning proposal went forward, but also take into account future scenarios where additional project-level zoning amendments are made that were not part of the original zoning application. When those subsequent rezoning applications do arise, they can be incorporated into the purview of the broader GEIS through supplemental EISs.

There are a number of reasons why this practice might be preferable. First, GEISs can help to avoid segmentation and allow for more meaningful consideration of cumulative impacts and for an evaluation of mitigation options at the earliest possible stage of the review process. The law articulates a number of scenarios where the preparation of a GEIS is appropriate.[122] Because GEISs may be based on "conceptual information,"[123] they would be particularly useful for area-wide rezonings where impacts are frequently long-term and uncertain. And yet, the City rarely makes use of GEISs in this context.[124]

Second, GEISs can provide a greater level of flexibility than standard EISs because they allow the implementing agency to choose among mitigation alternatives at a time when the impacts are better understood and when the effectiveness of different measures can be better assessed. This flexibility is

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[118] SEQRA Rules § 617.10.

[119] For example, projects aimed at increasing the supply of affordable housing.

[120] Different jurisdictions may use different names to refer to tiering. For example, tiered reviews may be referred to as "programmatic reviews," and broad-level and site-specific reviews referred to as "first tier" or "area-wide" and "second tier" reviews, respectively. In New York City, first-tier reviews are known as "Generic EISs." These terms are sometimes used interchangeably.

[121] SEQRA Rules § 617.10.

[122] These include where: (1) a number of separate actions in an area, if considered individually may have minor impacts, but if considered together may have significant impacts; (2) the agency action consists of "a sequence of actions" over time; (3) separate actions under consideration may have "generic or common impacts;" or (4) the action consists of an entire program of wide application or restricting the range of future alternative policies or projects. *Id.* § 617.10(a).

[123] "Generic EISs may be broader, and more general than site or project specific EISs[.] They may be based on conceptual information in some cases. … They may discuss in general terms the constraints and consequences of any narrowing of future options. They may present and analyze in general terms a few hypothetical scenarios that could and are likely to occur." *Id.*

[124] In ten of the largest rezonings since 2005 (affecting more than 50 blocks), a GEIS was prepared in only one case. *See* Inwood Rezoning FEIS (2018); Jerome Avenue Rezoning FEIS (2018); East Harlem Rezoning FEIS (2017); Greater East Midtown Rezoning FEIS (2017); East New York Rezoning FEIS (2016); East Midtown Rezoning FEIS (2013); West Harlem Rezoning FEIS (2012); East Village/Lower East Side Rezoning FEIS (2008); Greenpoint-Williamsburg Rezoning FEIS (2005); Hudson Yards Rezoning FGEIS (2005). Though agencies may recover the costs associated with preparing a GEIS from subsequent applicants, it has been observed at the state level that GEISs "are seldom used, largely because it leaves lead agencies without payment for potentially long periods." Gerrard & Bose, *supra* note 19. It has been suggested that this "could be remedied by creating a state revolving loan fund that would allow lead agencies to prepare [GEISs] and pay back the fund if and when actual projects came forward." *Id.*

particularly well-suited for reviews of multiple similarly-situated projects which have unknown long-term impacts. Notably, however, while this approach of deferring the specific choice of mitigation measure has been upheld by the courts as consistent with SEQRA,[125] it can only work if there is a process in place to monitor the impact of agency actions and follow up on them.[126]

Third, expanding the use of GEISs could also help to streamline procedures, thereby reducing costs. The procedures for producing GEISs permit agencies to lay out a menu of mitigation options and defer selection until a specific project is ready to be developed and when the environmental impacts can be more accurately measured.[127] In doing so, GEISs can help to streamline the review process for later agencies and developers by having pre-identified a range of appropriate mitigation options. As a result, GEISs typically result in a greater number of negative declarations issued and fewer total EISs over a period of time, helping project proponents to avoid the costs associated with conducting a full review.[128]

Some roundtable participants cautioned, however, that conducting a GEIS for too broad a geographic area could have the effect of overlooking the specific needs of individual communities and therefore neglecting to tailor mitigation to those most affected. To avoid this, some experts suggested that tiered reviews be conducted on a scale and in a manner that reflects each communities' distinct needs. For example, depending on the circumstances, it may be appropriate to conduct first-level reviews on a borough or a neighborhood level, rather than at the City level.

Who can we learn from?

National Environmental Policy Act. In regulations promulgated to implement NEPA, CEQ has encouraged agencies to tier their EISs.[129] It notes that when used appropriately, tiering can make the environmental review process more efficient by allowing parties to "eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review."[130] A tiered review under NEPA consists of two stages: a broad-level review and subsequent site-specific reviews. The broad-level review should identify and evaluate the issues that can be fully addressed and resolved, notwithstanding possible limited knowledge of

[125] For example, in Matter of Eadie v. Town Bd. of the N. Greenbush, in connection with a rezoning plan to allow retail development, the Appellate Division of the Supreme Court of New York held that a municipality could, in essence, defer to a later time the specific scope and timing of measures to mitigate traffic congestion. The town reasonably determined that the promulgation of a more precise plan for traffic mitigation would be impractical until the Town knew which parcels would be developed. 854 N.E.2d 464 (2006).

[126] *See also* Karkkainen, *supra* note 44, at 939 (arguing that increased use of "[p]ostdecision monitoring [under NEPA] would … facilitate the integration of 'adaptive management' techniques into agency decisionmaking"). Karkkainen says that under what he labels "adaptive mitigation," agencies would "specify [in advance an expected range of uncertainties and offer] a corresponding range of mitigation measures, to be triggered and adjusted in response to actual impacts subsequently revealed by monitoring data." *Id*. at 945. For example, "the agency would have the latitude to say: 'We predict the environmental impact will be A, but if it turns out that monitoring reveals it is above B, we will make the following adjustments; and if it is below C, we will make these alternative adjustments.'" *Id*. at 939.

[127] SEQRA Rules § 617.10(c).

[128] Though expanding the use of GEISs could help to shift the cost of environmental review from private applicants to the City, it should be noted that the City is permitted under law to create mechanisms for recovering the costs of preparing a GEIS from later applicants. SEQRA Rules § 617.13(a).

[129] NEPA Rules at § 1502.20.

[130] *Id*.

the project. In addition, it must establish the standards, constraints, and processes to be followed in the site-specific reviews.

As individual sites are selected for review, the site-specific reviews evaluate the remaining issues based on the policies established in the broad-level review. Together, the broad-level review and all site-specific reviews will collectively comprise a complete environmental review addressing all required elements. Moreover, funds cannot be spent or committed on a specific site or activity until the broad-level review and the site-specific review have been completed. A number of other federal agencies have adopted this practice too. For example, as part of its NEPA policies, the U.S. Department of Housing and Urban Development has developed guidance promoting the use of "tiered environmental reviews."[131]

California. The practice of "tiering" Environmental Impact Reports (EIRs) is widely used in California. Typically, a first-tier EIR is prepared and certified for the program, plan, policy, or ordinance, and a second-tier environmental document is prepared for a later, specific project that is consistent with the program, plan, policy, or ordinance. Compliance with the California Environmental Quality Act (CEQA) is streamlined by allowing lead agencies to broadly cover general matters in first-tier EIRs, and allowing subsequent second-tier review documents to incorporate by reference the general discussions in the broader EIRs and concentrate solely on the issues specific to the later environmental documents.[132] Moreover, the lead agency may defer mitigation decisions so long as it (1) conceptually defines the mitigation, (2) adopts realistic performance standards that will actually mitigate a significant effect, and (3) adopts one or several measures to be further developed in the future that are capable of effectively achieving the performance standard.[133]

The state legislature has directed that EIRs must be tiered whenever feasible.[134] It has also formally recognized some of the benefits, including streamlining regulatory procedures and helping to avoid repetitive discussions of the same issues in related EIRs.[135] For example, when a lead agency determines that a cumulative effect has been adequately addressed in the first-tier EIR, that effect is not considered significant for the second-tier environmental document and need not be discussed in detail.[136] Through this process, the agency can better can focus its attention on the issues that are ripe for decision at each level of EIR preparation.[137]

Minnesota. GEISs are also widely used throughout Minnesota for projects which require a broader scope of review and are required to consider "cumulative impacts."[138] Interestingly, Minnesota's

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[131] U.S. Dept. of Housing & Urban Development, *Tiered Environmental Reviews*, https://www.hudexchange.info/programs/environmental-review/tiered-environmental-reviews/.

[132] *See* KENNETH A. MANASTER & DANIEL P. SELMI, CALIFORNIA ENVIRONMENTAL LAW & LAND USE PRACTICE § 22.02 (2019).

[133] Deferred mitigation has been rejected by the courts when one or more of these elements is lacking. *See Id.* at § 22.04(c).

[134] Cal. Pub. Res. Code § 21093(b).

[135] *Id.* at § 21093(a).

[136] 14 Cal. Code Reg. § 15152(f)(1). When assessing whether there is a new significant cumulative effect, the lead agency must focus on whether the project's incremental impact is "cumulatively considerable" as defined in 14 Cal. Code Reg. § 15064(i).

[137] Cal. Pub. Res. Code § 21093(a); 14 Cal. Code Reg. § 15152(b).

[138] MINN. ENVTL. QUALITY BOARD, GUIDE TO MINNESOTA ENVIRONMENTAL REVIEW RULES, 16–17 (2010). SEQRA also requires consideration of cumulative impacts. SEQRA Rules § 617.7(2).

Environmental Quality Board (EQB)[139] has the authority to set the standards for environmental review of projects at varying scales and may order the preparation of a GEIS that considers regional or even statewide impacts of a particular action. Minnesota law also requires that even project-specific environmental reviews consider "cumulative potential effects," that is, the total effect on the environment resulting from the incremental effects of the project under review plus the similar effects from other projects in the same environmentally-relevant area, including past and future projects.[140]

State law further allows for "alternative forms of environmental review which will address the same issues and use similar procedures … in a more timely or more efficient manner to be used in lieu of an EIS."[141] The Alternative Urban Areawide Review (AUAR) process is one such alternative. Local governments in Minnesota can use an AUAR as a planning tool to understand how different development scenarios will affect the environment of their community before the development occurs. [142] The process is designed to look at the cumulative impacts of anticipated development scenarios within a given geographic area.[143] This information is then used to inform local planning and zoning decisions.[144] Moreover, regardless of any significant changes, the AUAR must be updated every five years until all of the development in the area has been approved. An AUAR is generally a faster process than relying on EISs as the AUAR document and mitigation plan must only be updated to the extent necessary to reflect the changes that have occurred in the area since the initial review.[145]

Recommendation 3: Adopt a public mechanism for tracking and monitoring mitigation

***Goals furthered**: Increased effectiveness of mitigation; improved accountability and transparency*

Problem. Our study highlighted the concern that there is a lack of publicly available information on the status of mitigation plans and, more narrowly, who is responsible for implementing them. While it may in fact be the case that some agencies have internal procedures for tracking and monitoring mitigation commitments, it is often difficult for the public to determine what steps have been taken towards implementing mitigation, which undermines public trust in the process. This lack of transparency, about which several numerous experts and stakeholders have voiced concern, is compounded by the fact that most measures require implementation by agencies other than the lead agency who do not have a legal obligation under CEQR to follow through with measures that have been disclosed by the lead agency.

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[139] Background on the Minnesota Environmental Quality Board (EQB) is discussed in further detail in Recommendation 1 above.

[140] MINN. ENVTL. QUALITY BOARD, GUIDE TO MINNESOTA ENVIRONMENTAL REVIEW RULES, 16–17 (2010). To be clear, Minnesota law distinguishes between a broader scope of review associated with the term "cumulative impacts" as it is used in conjunction with the GEIS process, and a narrower focus associated with the term "cumulative potential effects" as used in conjunction with review of specific projects. *Id.*

[141] *Id.* at 35. *See* Minn. R. §§ 4410.3600–4410.4000 for specific options for substitute forms of review.

[142] *Id.* at § 4410.3610.

[143] The AUAR is a hybrid review process: the AUAR document responds to a list of questions adapted from the Environmental Assessment Worksheet form about typical urban area impacts but provides a level of analysis of comparable to an EIS.

[144] Minn. Envtl. Quality Board, *Alternative Urban Areawide Review (AUAR) Process*, https://www.eqb.state.mn.us/content/auar-process.

[145] MINN. ENVTL. QUALITY BOARD, QUICK REFERENCE: ALTERNATIVE URBAN AREAWIDE REVIEW (AUAR) (2015).

Moreover, because so many impacts are not expected to occur until quite far into the future, and because there is such an enormous amount of uncertainty as to how those impacts will present themselves over time, what is needed to address an impact might change by the time a measure is implemented and even throughout the implementation phase. However, when the time comes that mitigation is needed, communities have little recourse against agencies for failure to implement planned measures as there is no mechanism under CEQR for holding agencies accountable.

Option. The City could create a publicly accessible mechanism for tracking the status of mitigation commitments and monitoring their implementation. The mechanism could collect and catalog a variety of information, including: the impacts and mitigation measures proposed; the agency responsible for implementation; timelines for implementing measures; budgets or costs associated with implementation; needs assessments; progress towards meeting mitigation goals; changes to mitigation strategies; and a public notice once mitigation is complete. This information could then be published in periodic reports and made available to the public. Notably, because of OEC's unique expertise in environmental review and because it is already tasked with "develop[ing] and implement[ing] a tracking system" under CEQR,[146] OEC is likely the most appropriate entity to be assigned the responsibility for developing this new public mechanism.[147]

Such a mechanism would serve at least three important purposes. First, making this information available to the public would make the post-review process more transparent and help keep communities apprised of the progress the City has made towards fulfilling mitigation commitments, as well as any obstacles to implementation. For example, by requiring agencies to disclose timetables and budgets, and identify which agency is responsible for implementation, a tracking and monitoring mechanism would allow communities to better hold agencies accountable for their commitments. Such disclosure also might help to establish public expectations about the time and resources required to implement specific measures.

Second, a public monitoring process which requires responsible agencies to periodically evaluate and report on their progress towards mitigation commitments may also help to reinforce internal compliance. For example, requiring agencies to consider and publish estimated costs and timetables can help to ensure that agencies allocate sufficient resources for implementation.

Lastly, monitoring can help to ensure that the measures identified during the review process are appropriate for addressing the targeted impact. If measures are shown to be ineffective during implementation, they could be adjusted in real time and the information could be inventoried and used for other projects. Relatedly, as some roundtable participants observed, it is also important that the City not spend resources implementing mitigation measures that are no longer necessary or appropriate because the impacts did not materialize as initially expected. In this sense, a tracking mechanism should not be viewed as a means of locking agencies into implementing every measure identified in an environmental review document. Rather, a tracking mechanism should be seen as a means for facilitating an understanding of actual impacts to allow agencies to tailor mitigation measures to reflect reality.

The City has made some headway in creating a more transparent process for tracking its commitments concerning some recent area-wide rezonings.[148] Pursuant to Local Law 175 of 2016, the City is responsible

[146] CEQR Rules at § 5-04.

[147] *See* Testimony of Hilary Semel, Director and General Counsel, Mayor's Office of Environmental Coordination, given to the New York City Council, Committee on Land Use (May 7, 2019).

[148] This initiative follows from efforts by organizations such as MAS who have advocated for a more transparent commitment tracking process.

for publishing a publically accessible list of capital and programmatic commitments associated with area-wide rezonings, and an annual progress report detailing the progress towards the fulfillment of each commitment.[149] Following a 2019 update, the "Rezoning Commitments Tracker" now includes seven area-wide rezonings, though implementation of commitments for these projects is still ongoing.[150] The tracker is limited, however, in that it remains disjointed from CEQR by excluding a variety of other agency actions, including small-scale rezonings and project-specific actions. Nevertheless, it can serve as a model for a future monitoring mechanism, such as that which has been recently contemplated by the New York City Council in Int. 252.[151] Developing a mechanism to track the status of mitigation commitments under CEQR would, however, impose new administrative costs and it would therefore be necessary that the City ensures that sufficient funding is allocated to agencies to take on this task.

Who can we learn from?

National Environmental Policy Act. The CEQ regulations promulgated under NEPA require that federal agencies, where applicable, adopt and summarize a monitoring and enforcement program for any mitigation to which the agencies commit as part of their decision.[152] Agency regulations promulgated under NEPA by the U.S. Dept. of Army require that mitigation monitoring plans and implementation programs be summarized in the environmental review document.[153] Conditions on implementation monitoring must also be written into any contracts.[154] The agency's rules also require that mitigation monitoring plans and implementation programs are monitored for their effectiveness. To this end, the agency utilizes an Environmental Management System for tracking and reporting both qualitative and quantitative measures of mitigation efforts. The agency has also developed guidelines on defining the parameters for monitoring effectiveness, including: identifying the source of expertise; using measurable and replicable technical methodologies; and completion of a baseline study prior to implementation.[155] In addition, a regular monitoring report assessing the accuracy of its predictions allows the agency to take corrective actions in a timely manner, if necessary.[156]

California. California state law requires agencies to ensure that required mitigation measures adopted through the CEQA process are complied with during the implementation of a project.[157] In particular, it requires the adoption of a Mitigation Monitoring or Reporting Program (MMRP) for all projects for which an Environmental Impact Report (EIR) or Mitigated Negative Declaration (MND) is prepared.[158] Like the Dept. of Army's monitoring procedures, the MMRP is also designed to provide feedback to decision-makers on the effectiveness of mitigation measures, which can

[149] 2016 N.Y.C. Local Law No. 175.

[150] These are: Bay Street, Inwood, Jerome Avenue, East Harlem, Downtown Far Rockaway, Greater East Midtown, and East New York rezonings. *See* Mayor's Off. of Operations, *NYC Rezoning Commitments Tracker*, https://www1.nyc.gov/site/operations/performance/neighborhood-rezoning-commitments-tracker.page.

[151] See, *supra*, Part III, § 3.1.

[152] NEPA Rules at § 1505.2(c).

[153] 32 C.F.R. § 651.15(h)(1)–(4). Army guidelines for the creation of a monitoring program provides further detail on the responsibilities of the lead agency and the role of cooperating agencies in this process. *Id.* at Appendix C.

[154] *Id.* at § 651.15(i)(1).

[155] *Id.* at Appendix C § (g).

[156] *Id*. at § 651.15(1).

[157] CAL. OFF. OF PLANNING AND RES., TRACKING CEQA MITIGATION MEASURES UNDER AB 3180 at 4 (1996) [hereinafter TRACKING CEQA].

[158] Cal. Pub. Res. Code § 21081.6; 14 Cal. Code Reg. § 15097.

both allow for adjustments to the current project to be made, as well as inform decision makers charged with designing future mitigation programs.[159] Specific reporting and/or monitoring requirements to be enforced during project implementation must be defined prior to final approval of the project. State guidance indicates that a program for monitoring and reporting on implementation should contain, at a minimum: a list of measures; standards for determining compliance; a schedule for implementation and monitoring frequency; an identification of the person or agency responsible for enforcement[160] and/or monitoring; and procedures for responding to a failure to comply with any specific measure.[161]

Minnesota. In the case of AUAR,[162] the EQB chair may ask the lead agency at any time for a status report on development progress in the area and on mitigation plan implementation. Failure to conform to the original assumptions or to implement the mitigation plan voids the status of the AUAR as a substitute form of review, which means that individual projects are then subject to formal environmental review requirements.[163]

Recommendation 4: Adopt a public process for the retrospective evaluation of mitigation

***Goal furthered**: Increased effectiveness of mitigation; improved transparency and accountability*

Problem. A large number of stakeholders have lamented that the City does not engage in any publicly reviewable retrospective evaluation of the effectiveness of mitigation measures that are implemented. The lack of retrospective evaluation, they argue, is a missed opportunity to determine whether some agencies have developed particularly effective means of mitigating impacts that could be replicated by others.[164] Notably, however, City representatives have cautioned that the retrospective evaluation of the effectiveness of mitigation measures should not be conflated with the retrospective evaluation of the accuracy of agency's initial impact projections. For example, there are numerous independent variables that affect a neighborhood's development after a rezoning and proposed mitigation measures cannot be expected to remediate conditions that were not foreseeable when the EIS was drafted. These cautions notwithstanding, roundtable participants were nearly, but not entirely, unanimous in their call for some sort of public retrospective review to evaluate the effectiveness of mitigation strategies. The purpose of this retrospective review would be to advance knowledge of best practices for future projects as well as signal to community groups that the City is committed to improving its approach to mitigation.

Option. OEC could be empowered to develop a program for retrospectively evaluating the effectiveness of mitigation measures that have been implemented. It would likely not be feasible—or desirable—to seek to retrospectively evaluate every mitigation measure included in an EIS. However, OEC might design an annual program to evaluate a select number of implemented mitigation measures to determine how successful they were in achieving their intended goals. The criteria for selecting mitigation measures to be evaluated might include the frequency of the use of the type of mitigation measure, with a view to measuring the effectiveness of frequently used mitigation measures; the agency implementing the

[159] TRACKING CEQA, *supra* note 157, at 5.
[160] "CEQA does not create any new authority for agencies to carry out or enforce mitigation measures. Agencies must instead rely on the authority conferred by other laws." *Id.* at 10.
[161] *Id.* at 8–9. *See, e.g.* LOS ANGELES CITY PLANNING, FINAL ENVIRONMENTAL IMPACT REPORT: SWAN HALL RENOVATION AND ADDITION Project, ch. 5 (2010), https://planning.lacity.org/eir/SwanHall/Feir/Swan_Hall_FEIR/5.0_Mitigation_Monitoring.pdf.
[162] *See supra* Recommendation 2 (improve the GEIS process and expand its use).
[163] GUIDE TO MINNESOTA ENVIRONMENTAL REVIEW RULES, *supra* note 140, at 40–41 (2010).
[164] Testimony of Thomas Devaney, *supra* note 51.

mitigation measure; and the cost of the mitigation measure. It might be worthwhile to evaluate costlier measures, at least in the early years of a retrospective evaluation program.

The goal of ex post evaluations, which could be made public along with comments from agencies and surveys of community perspectives, would be to learn from experience and thereby develop an evidence-based database of model mitigation practices for future use. OEC might be well-placed to disseminate these practices through the guidance that it provides agencies in preparing EISs. It would likely be necessary, however, that the agency is allocated additional funding to design and implement the proposed new program for retrospectively evaluating mitigation. Moreover, it bears repeating that the goal of this review would not be to evaluate whether the lead agency's projections of impacts in the environmental review document were accurate, given all the possible confounding factors that could affect actual outcomes; instead the goal would be to determine whether the mitigation measures selected adequately addressed the impacts that actually materialized.

Who can we learn from?

Minnesota. In addition to the role it serves in reviewing the adequacy of EISs, Minnesota's Environmental Quality Board (EQB) is also responsible for monitoring the effectiveness of environmental review, taking measures to improve its effectiveness, and providing assistance to all parties involved. To that end, EQB staff is charged with collecting data to better understand trends and identify areas for program improvement, the results of which are used to increase the understanding of environmental reviews being completed around the state.[165]

Recommendation 5: Require regular periodic reviews of CEQR Technical Manual

***Goals furthered**: Increased comprehensiveness of analysis; increased effectiveness of mitigation; improved accountability and transparency*

Problem. As noted in Part 3, critics have faulted the City for failing to assess the accuracy of its predictions in EISs and have questioned the appropriateness of the methodologies cited in the CEQR Technical Manual.[166] In response to these criticisms, members of City Council have recently introduced a package of bills and a resolution aimed at compelling CPC to reassess the standards contained in the Technical Manual for evaluating impacts on educational facilities, traffic, and displacement.[167] While the City does update the CEQR Technical Manual from time to time,[168] there is no defined cycle for when those updates are to occur. And while it has been updated several times since it was adopted in 1993, these updates were largely aimed

[165] *See* MINN. ENVTL. QUALITY BOARD, MINN. POLLUTION CONTROL AGENCY, MINN. DEPT. OF NAT. RESOURCES, & MINN. DEPT. OF TRANSPORTATION, MANDATORY ENVIRONMENTAL REVIEW CATEGORIES: LEGISLATIVE ASSESSMENT REPORT (2018).

[166] *See supra* notes 47–50.

[167] In particular, these bills proposed to amend the City charter to: (1) study the incidence of secondary displacement resulting from area-wide rezonings (Int. No. 1487); (2) study and report on transportation impacts of decisions of the CPC in connection with certain land use decisions (Int. No. 1523); and (3) study and report on the education capacity and overcrowding impacts of decisions of the CPC in connection with certain land use decisions (Int. No. 1531). Furthermore, a resolution was introduced calling on the Mayor and relevant City agencies to re-examine the standards in the CEQR Rules and Technical Manual for assessing when a possible impact on a neighborhood's character or socioeconomic status requires a detailed analysis and possible mitigation (Res. No. 9). *See* N.Y.C. COUNCIL, COMMITTEE REPORT OF THE LAND USE DIVISION (May 7, 2019).

[168] "MOEC reviews the CEQR Technical Manual periodically to determine whether updates or revisions are needed." CEQR TECHNICAL MANUAL, *supra* note 32, at Introduction, 2.

at accommodating changes to local, state, and federal law and policy.[169] Moreover, there are presently no formal avenues for the public to participate in the update process, which is when public perspectives and input could add value.

Option. An alternative or complementary practice to the Council's current proposal would be to mandate a regular periodic review of the CEQR Technical Manual for potential updates, with opportunities for public input.[170] Regular periodic reviews can help to ensure that the guidance reflects best knowledge and practices. This process could also serve as a form of "peer review" by including opportunities for agencies, experts, and the public to comment on the City's proposals or make recommendations for reform, helping not only to promote public participation, but also to improve the quality of the guidance. In this sense, regular periodic updates could be a vehicle for disseminating to agencies best practices about how to formulate and implement mitigation measures. For example, findings from the retrospective analyses of the effectiveness of mitigation measures proposed in Recommendation 4 might be incorporated into the CEQR Technical Manual through periodic updates. Though a timeframe for the cycle would need to be determined (for example, every five years), there is no reason why the CEQR Technical Manual could not be updated in the interim should it be required, allowing it to be adjusted as changes are needed.

Who can we learn from?

California. To prevent the Guidelines from becoming out-of-date, CEQA was amended in 1993 to require that they be periodically updated. At least once every two years the Governor's Office of Planning and Research must review the CEQA Guidelines and recommend changes to the Natural Resources Agency, which is responsible for adopting any amendments to them,[171] though in practice actually implementing these changes may take more time.[172]

Federal Environmental Law. Many federal environmental laws include built-in requirements for periodic review. The Clean Air Act, for example, requires the U.S. Environmental Protection Agency (EPA) to set National Ambient Air Quality Standards (NAAQS) for "criteria" air pollutants

[169] The first version of the CEQR Technical Manual, which was published in December 1993, underwent a review of its technical and scientific standards and was reissued in October 2001. The manual was revised and reissued again in May 2010. The 2010 version incorporated a new chapter on assessing GHG impacts. However, while this new guidance on GHGs was notable, it followed the issuance of DEC's 2009 policy on evaluating GHGs under SEQRA (NY.S. Dep't of Envt'l Conservation, Guide for Assessing Energy Use and Greenhouse Gas Emissions in an Environmental Impact Statement (2009)) and may have been drafted in response. A new version was issued in January 2012 to "[reflect] changes in laws and regulations and [correct] and clarify[y] portions of the CEQR Technical Manual," with minor revisions made in June 2012 to reflect DCP's amendments to the Zoning Resolution and updates to the regulations governing E-designations. *See* MAYOR'S OFF. OF ENVTL. COORDINATION, CEQR TECHNICAL MANUAL, Revisions Effective 6/18/12 (Jun. 2012 ed.). The manual was reissued once more in March 2014, again to reflect changes in laws and regulations. Other minor revisions were made in April 2016 to reflect changes to the City's Waterfront Revitalization Program. *See* CEQR TECHNICAL MANUAL, Revisions Effective 4/27/16.

[170] *See also* Testimony of Emily Goldstein, Director of Organizing and Advocacy, Association of Neighborhoods and Housing Development, given to the NYC Council, Committee on Land Use (May 7, 2019) ("ANHD believes … that we should mandate a regular and public review of the CEQR Technical Manual, with a process for genuine public input regarding revisions, and transparency in decision-making").

[171] It should be noted that two years is likely too frequent for the City to undertake a review of the CEQR Technical Manual.

[172] For example, while California passed legislation in 2013 (S.B. 743) requiring a transition from using *level of service* to *vehicles miles traveled* as the standard for assessing transportation impacts, the new guidelines were only released in January 2019, and implementation is not required until July 1, 2020.

and mandates a periodic review of both the standards and the science upon which they are based every five years.[173] Notably, the EPA may undertake this review more frequently than is required by statute.[174] The review itself is a multi-phased process, beginning with a planning phase, followed by a series of scientific, risk, and policy assessments, and ending with a rulemaking, if needed. There are opportunities for public participation throughout the review process; in addition to the rulemaking's notice and comment period, the planning phase begins with a workshop which is intended to "gather input from the scientific community and the public regarding policy-relevant issues and questions that will frame the review."[175] Similar requirements for regular, periodic review can also be found in the Clean Water Act[176] and the Federal Insecticide, Fungicide, and Rodenticide Act.[177]

More broadly, Executive Order 13563, issued by President Obama on January 18, 2011, directs agencies to develop and submit plans for periodically reviewing their regulations.[178] Its purpose was to compel agencies "to consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."[179] To promote transparency, the Order further requires that any retrospective analyses, including supporting data, be released online whenever possible.[180]

4.3 Proposals with Divided Support

In the following pages, we describe the two proposals for reform on which stakeholders had a greater difference of opinions.

Recommendation 6: Expand the use of offsets, including offsite measures

***Goals furthered**: Increased comprehensiveness of analysis; increased effectiveness of mitigation*

Problem. In some instances, an impact cannot practically be mitigated without jeopardizing a project that is otherwise deemed beneficial. In other instances, mitigation may be possible, however not within the geographic area studied. As described below, offsets and offsite mitigation can provide the needed flexibility to address both these situations.

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[173] 42 U.S.C. § 7409(d).

[174] *Id.* at § 7409(d)(1) ("The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.").

[175] U.S. Environmental Protection Agency, *Process of Reviewing the National Ambient Air Quality Standards*, https://www.epa.gov/criteria-air-pollutants/process-reviewing-national-ambient-air-quality-standards.

[176] The CWA requires EPA to publish an Effluent Guidelines Program Plan every two years to establish a schedule for the annual review and revision. 33 U.S.C.S. § 1314 (m)(1)(A).

[177] The Federal Insecticide, Fungicide, and Rodenticide Act, as amended by the Food Quality Protection Act of 1996 and the Pesticide Registration Improvement Act, mandates a periodic review of all registered pesticides at least once every fifteen years. EPA, *Why We Review Pesticides* https://www.epa.gov/pesticide-reevaluation/why-we-review-pesticides.

[178] U.S. White House, President Barack Obama, *Executive Order 13563 – Improving Regulation and Regulatory Review*, § 6(b) (Jan. 18, 2011).

[179] *Id.* at § 6 (a).

[180] *Id.*

Option. Agencies could satisfy their mitigation requirements by creating "offsets" that do not directly redress the identified impact but create alternative environmental benefits or improvements elsewhere within a project area. Agencies have contemplated such offset measures in the past. For example, in the Greenpoint-Williamsburg Rezoning EIS, the lead agency noted that in the event a proposed power plant was built, creating an unavoidable decrease in open space within the project area, possible mitigation measures could include the redevelopment of the McCarren Park pool site and the distribution of additional active open space resources throughout the Greenpoint sub-area. Relatedly, agencies could be allowed to pursue offsite mitigation where comparable environmental benefits can be produced by pursuing mitigation activities outside a particular project area. In the context of SEQRA, DEC has observed that "[i]n some cases, mitigation on the project site may not be feasible or would not adequately address an identified impact. In such circumstances, some form of off-site … mitigation may be offered."[181] However, "off-site mitigation should be explored only after all other reasonable means of reducing an impact have been considered."[182]

Roundtable participants were divided about the merits of allowing greater use of offsets and offsite mitigation. On the one hand, several participants noted that the geographic boundaries in the Technical Manual could create arbitrary cutoff points that do not reflect the perceived neighborhood boundaries and deprive communities of valuable mitigation efforts. Others, however, feared that broader use of offsets and offsite mitigation could diminish the benefits provided to the most affected communities and create challenges in ensuring that approved measures are commensurate with the harms. If offsets or offsite mitigation are allowed, participants cautioned, they should be a last resort and parameters should be set to constrain their use. For example, it may be appropriate to limit the use of offsets to alternative ways of addressing the same impact, or require that the benefits are returned to the affected community in a meaningful way. Proposals to use offsets or offsite mitigation should also be included in the draft EIS so that the affected community has an opportunity to comment on the proposals.

As one stakeholder noted, offsite mitigation might be well-suited for mitigating greenhouse gas (GHG) emission impacts, where the local climate impacts are not dependent on the geographic location of emissions sources. Offsite mitigation might also prove valuable in cases where the project impacts a collective resource, but no mitigation can be achieved onsite.[183] For example, if a project reduces parklands, but there are no options for creating alternative parks in the study area, the agency could be permitted to look outside this area to identify additional locations for the development of parks. Additionally, offsite mitigation could prove useful in the case of impacts on child care services; where onsite mitigation is not feasible, additional day care slots or facilities might be created elsewhere in the City, as individuals tend not to live and work in the same area.[184]

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[181] SEQRA HANDBOOK, *supra* note 15, at 131.

[182] *Id.* at 131–2. *See also* N.Y. Dept. of Envtl. Conservation, Final Generic Envtl. Impact Statement on the Proposed Amendments to the State. Envtl. Quality Review Act (SEQRA) Regulations 11 (1995) ("[DEC] agrees that … off-site mitigation should be considered only after all other reasonable methods of avoiding or reducing an impact have been considered.").

[183] DEC notes, "[o]ff-site mitigation may address a shared impact, or may be an environmental benefit not directly associated with the proposed project that serves as a trade-off for unavoidable impacts on-site." *Id.*

[184] Moreover, childcare facilities have specific spatial and security requirements and private development plans are often too far advanced at the time of review to accommodate necessary changes. Experts we have consulted have noted that there have been ongoing discussions over the years as to whether a developer should be allowed to provide funding for daycare slots elsewhere in the city in such circumstances.

However, moving too far geographically from the impacted area might raise questions of whether a measure unfairly benefits neighboring communities at the expense of the identified impacted community. Similarly, as described in our discussion of impact fees in Recommendation 7 below, the City's discretion to require offsets and offsite mitigation may be constrained by the Supreme Court's jurisprudence on exactions to the extent that such conditions are imposed on private applicants.[185] As such, one needs to be careful of the line between exactions and mitigation, and of the potential reaction of the impacted community if the proposed mitigation is not perceived to address the impacts of the project. This latter concern suggests the importance of considering community perspectives when designing mitigation measures.

Who can we learn from?

Clean Water Act. The Clean Water Act (CWA) prohibits the "discharge of dredged or fill material" into waters of the United States unless such discharge is authorized by permit.[186] For every authorized discharge, the adverse impacts to wetlands, streams, and other aquatic resources must be avoided or minimized to the maximum extent practicable.[187] For impacts which cannot otherwise be avoided, compensatory mitigation is required to replace the loss of aquatic resources.[188] Under this form of mitigation, wetlands, streams, or other aquatic resources are restored, established, enhanced, or preserved for the purpose of offsetting unavoidable adverse impacts.[189]

Compensatory mitigation may be accomplished through a number of distinct mechanisms, including what is known as 'mitigation banking'.[190] Here, a wetland area is restored, established, enhanced, or preserved, and then set aside to compensate for future conversions of wetlands for development activities. Mitigation banking is performed offsite in a location not on or immediately adjacent to the site of impacts, but within the same watershed. Upon approval by the appropriate agency, permittees can purchase credits from a mitigation bank to meet their mitigation requirements, which are valued based on a quantification of wetland functions or acres restored or created. As a form of third party compensation, liability for project success is transferred from the proponent to the mitigation bank or in-lieu fee sponsor.[191] Mitigation banking has been shown to increase efficiency; New York City's first mitigation bank, the Saw Creek Wetland Mitigation Bank, observed a 33% faster permit review time when using wetland mitigation credits.[192]

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[185] *See*, Nollan v. California Coastal Commission, 483 U.S. 825, 837 (1987).

[186] Federal Water Pollution Control Act § 404(e)(1) [hereinafter CWA].

[187] 40 C.F.R. § 230.91.

[188] 40 C.F.R. § 1508.20(e) (defining "mitigation" as including "[c]ompensating for the impact by replacing or providing substitute resources or environments"). *See also* Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency Concerning Mitigation under the Clean Water Act Section 404(b)(1) Guidelines, 4 (1990).

[189] U.S. Envtl. Protection Agency, Compensatory Wetlands Mitigation Factsheet, epa.gov/cwa-404/compensatory-mitigation-factsheet-under-cwa-section-404.

[190] 40 C.F.R. § 230.92. *See also* Recommendation 7 below for a discussion of in-lieu fee mitigation, a second mechanism utilized under the Clean Water Act.

[191] Compensatory Wetlands Mitigation Factsheet, *supra* note 189; U.S. Envtl. Protection Agency & U.S. Army Corps of Engineers, Compensatory Mitigation for Losses of Aquatic Resources, Final Rule (2008).

[192] N.Y.C. Econ. Dev. Corp., *Saw Mill Creek Wetland Mitigation Bank Credits*, https://edc.nyc/project/marshes-initiative.

California. The CEQA Guidelines broadly define mitigation as including "compensating for the impact by providing replacement or substitute resources or environments."[193] Offsite mitigation is a common form of compensatory mitigation in California and has been upheld by the courts when substitute resources are created[194] and, in some cases, even where the selection of mitigation sites is deferred.[195] At the local level, some jurisdictions in California have developed guidelines on the use of offsite mitigation to offset GHG impacts from projects as part of the CEQA process.[196] They recognize that while a lead agency may prefer local projects for GHG mitigation because of a desire to obtain associated co-benefits (such as reduced air pollution), mitigation could also take place not only outside the project area, but also outside the city and indeed the state.[197]

Recommendation 7: Adopt a mitigation fee program (development impact fees and in-lieu mitigation fees)

***Goals furthered**: Increased effectiveness of mitigation; reduced cost of environmental review*

Problem. As noted above, many of the impacts that EISs tend to identify are predicted to occur quite far in the future.[198] As a result of these long lag times, by the time a predicted impact materializes, the agencies charged with mitigating these impacts may lack the funding to do so. Development impact fees, which can create funding streams for mitigation as needs arise, could ameliorate this problem. Relatedly, CEQR's reliance on private applicants to design and implement mitigation plans can add to the costs of their proposed projects because private applicants may not be the party with the best information on how to tackle the problem or may lack the capacity to ensure the most appropriate outcome is achieved.[199] In these cases, developers might be allowed to pay an "in-lieu" fee to the City, which would then assume responsibility for mitigating the identified impact. As with offsets and offset mitigation, there was considerable division among the roundtable participants about whether New York City should adopt either kind of fee. Yet there was sufficient interest that we think it is appropriate to provide some detail on some potential options for impact fees and the participants' reactions to them.

[193] 14 Cal. Code Reg. § 15370(e).

[194] Mira Mar Mobile Community v. City of Oceanside (2004) 119 Cal. App. 4th 477, 495, 14 Cal. Rptr. 3d 308 (offsite preservation of coastal sage scrub habitat was feasible mitigation measure).

[195] California Native Plant Society v. City of Rancho Cordova (2009) 172 Cal. App. 4th 603, 622–625, 91 Cal. Rptr. 3d 571 (offsite vernal pool mitigation was adequate mitigation, even if selection of specific sites was deferred).

[196] See, e.g. SANTA BARBARA COUNTY AIR POLLUTION CONTROL DIST., GREENHOUSE GAS MITIGATION AND CEQA: A REVIEW OF MITIGATION STRATEGIES FOR PROJECTS SUBJECT TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 2–3 (2015).

[197] "The preferred approach is to implement GHG mitigation strategies locally, followed by regionally, state wide and then nationally in order to realize the co-benefits of GHG reductions and health benefits of strategies implemented in the areas where the GHG-emitting projects are proposed." *Id.*

[198] *See* APPENDIX IV.

[199] *See* Jeremiah Budin, *Neighbors Suspicious of One Vanderbilt's Transit Improvements*, Curbed New York (Sep. 12, 2014); Laura Kusisto, *Property: Residents Try to Get Details on New Midtown East Plan*, WALL STREET JOURNAl (Sep. 12, 2014).

Option 1: Development Impact Fees. Development impact fees[200] are utilized widely across numerous state and local jurisdictions, including many without environmental review laws in place.[201] A growth control and support mechanism, they are broadly based on the idea that new development projects should directly pay at least a portion of the cost of providing additional public services and infrastructure, the need for which would not have arisen without the development. In doing so, they can provide the government with a source of funding for meeting the demands of new development as it takes place. New York City, however, has yet to adopt such a fee program, though some have argued it stands to benefit from doing so.[202] Notably, the City has experimented with similar types of fees in the past on a limited scale. For example, under the City's now retired Industrial Retention and Relocation Program, fees were collected from landlords who converted commercial properties into residential spaces. These funds were collected by a quasi-public agency, known as the Business Relocation Assistance Corporation, for the purpose of providing relocation assistance to displaced businesses located on converted sites. [203]

New York City could potentially design a fee program to assist it in implementing its mitigation requirements under SEQRA. The program might take the following form. As now, the lead agency would predict the environmental impacts of a proposed action and outline potential mitigation measures in an environmental review document. In addition, the lead agency—potentially with the assistance of other city agencies—might monetize the costs of some or all of these measures and then devise a formula for allocating some or all of these costs among developers who build in the future pursuant to that action. The allocation formula might attempt to ensure that developers are allocated responsibility for costs commensurate with the harms that their development generates. Such an allocation formula might be helpful if the development impact fees were deemed to be subject to the "exactions" line of Supreme Court cases.[204] This line of cases requires that there be a nexus between conditions governments impose on development permission and the harm that the development is predicted to cause;[205] the relevant

[200] As a point of clarification, "development impact fees" should not be confused with fees paid by a private applicant for the filing or modification of a CEQR application. *See* DCP, Filing an Application & Paying Fees, https://www1.nyc.gov/site/planning/applicants/applicant-portal/step4-paying-fees.page.

[201] These include: Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawai'i, Idaho, Illinois, Indiana, Maine, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. In some states, local jurisdictions have relied on their land use authority to assess impact fees in the absence of state statutory schemes. Some scholarship proposes eliminating the application of SEQRA to local government actions, such as rezonings, and requiring developers to pay impact fees rather than paying for an EIS and undertaking mitigation. *See* Stewart E. Sterk, *Environmental Review in the Land Use Process: New York's Experience with SEQRA*, 13 CARDOZO L. REV. 2041 (1992) (proposing environmental impact fees replace the application of SEQRA to zoning decisions); *see also* Stewart E. Sterk, *Exploring Taxation as a Substitute for Overregulation In the Development Process*, 78 BROOKLYN L. REV. 417 (2013).

[202] An eight-month study by Manhattan Community Board 1 (CB1) concluded that the City's failure to utilize development impact fees cost Lower Manhattan $240 million over the course of eighteen years. Rajiv Kumar Myana & Sarita Rupan, *Developmental Impact Fees*, MANHATTAN COMMUNITY BOARD 1 (2018).

[203] The program was allowed to sunset in 1997 by the zoning resolution which established the program. *See* PRATT INSTITUTE FOR COMMUNITY DEVELOPMENT, MAKING IT IN NEW YORK: THE MANUFACTURING LAND USE AND ZONING INITIATIVE (2001).

[204] Koontz v. St. Johns River Water Mgmt. District, 133 S.Ct. 2586 (2013); Nollan, *supra* note 185; Dolan v. City of Tigard, 512 U.S. 374 (1994). *See also* Vicky Chau & Jessica Yager, *Zoning for Affordability: Using the Case of New York to explore whether Zoning Can Be Used to Achieve Income-Diverse Neighborhoods*, 25 NYU ENV. L. J. 27 (2017).

[205] Nollan, *supra* note 185, at 837.

jurisprudence also requires that the condition be roughly proportional to the harm caused.[206] Conditions that do not satisfy these requirements for individualized assessment can be held to be unconstitutional takings of private property.[207]

There is, however, legal uncertainty about the authority of New York City and other local governments in the State to impose mitigation fees for environmental effects analyzed in an EIS under existing law.[208] There is no New York State statute that explicitly authorizes the imposition of impact fees for the consequences of development. And yet, at least one local government in New York has implemented a fee program based on impacts from anticipated development identified in area-wide GEISs.[209] Further research would be necessary into whether such fees in general, or fees for particular impacts identified through the CEQR process, would be preempted by state legislation.[210]

Moreover, as experts have cautioned, care should be taken in considering a mitigation fee program to ensure that it does not constrain the development of affordable housing.[211] Critics in Minnesota, for example, have argued that impact fees are making housing in Minneapolis and Saint Paul unaffordable.[212] Similar criticisms have surfaced in California as well.[213] It is also important to consider the other ways in

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[206] Dollan, *supra* note 204, at 391. While "[n]o precise mathematical calculation is required, … the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* New York case law suggests that an environmental impact statement may satisfy the requirement for an individualized assessment as contemplated by Dolan. *See e.g.* Twin Lakes Dev. Corp. v. Town of Monroe, 1 NY3rd 98 (2003).

[207] Notably, the extent of the application of Koontz to fees is unsettled; some argue that legislative fees are not subject to Koontz, but the Supreme Court has not yet decided the issue. *Compare* Twin Lakes, *id. at* 106, (analyzing impact fees imposed on a developer in-lieu of a parkland dedication under the Nollan/Dollan standard) *with* Dartmond Cherk v. Cty. of Marin, 2018 Cal. App. Unpub. LEXIS 8454 (2018) (finding an in-lieu fee did not implicate the Koontz doctrine because the permitting authority offered the applicant a "constitutionally permissible alternative.") There is particular uncertainty as to whether Koontz applies to legislative fees. *See* Daniel R. Mandelker and Michael Allan Wolf, Land Use Law § 9.23 (6th ed.) ("If the fee is legislative, an individualized determination of rough proportionality is not required, and courts may apply a rational basis review[.]") (*citing* Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996)). However, even if Koontz does apply to legislative fees, it is important to recall that Koontz does not mean that a government cannot impose environmental mitigation requirements, merely that they must be related to the harm from the development, and roughly proportional to the harm from the particular development.

[208] ENVIRONMENTAL IMPACT REVIEW IN NEW YORK, *supra* note 10, at § 6.02 ("Whether a municipality may require a developer to pay for the mitigation of the impacts of a project as identified in the SEQRA process is not crystal clear."); Kelly L. Munkwitz, Does the SEQRA Authorize Mitigation Fees?, 61 Alb. L. Rev. 595 (1997).

[209] As of this year, the town of Colonie "has collected $12 million in mitigation fees from developers inside the town's three generic environmental impact statement zones, which cover 15,100 acres." Mallory Moench, *What Will Colonie's Development Look Like in a Decade?*, HOUSTON CHRONICLE (Aug. 3, 2019).

[210] *See supra* note 207.

[211] *See* Vicki Been, *Impact Fees and Housing Affordability*, CITYSCAPE (2005) ("Impact fees can be used to correct the myriad market failures that have allowed inefficient development to harm the natural and constructed environments of our communities, often at taxpayer expense. But impact fees also can be abused—to either exclude low- and moderate-income residents or people of color from communities[.]")

[212] *See, e.g.,* Jim Buchta, *For Minnesota Builders, Court Victory Could Mean Lower Fees*, THE STAR TRIBUNE (Aug. 20, 2018).

[213] California recently passed a bill directing the Dept. of Housing and Community Development to undertake a study examining "the reasonableness of local fees charged to new developments [and to] include findings and recommendations to … substantially reduce fees for residential development." California Assembly Bill 879 (2017); *see also* Haley Raetz et al., Terner Center for Housing Innovation, U.C. Berkeley, *Residential Impact Fees in California: Current Practices and Policy Considerations to Improve Implementation of Fees Governed by the Mitigation Fee Act* (2019) [hereinafter Terner Report].

which the City captures part of the value generated by new development, such as through Mandatory Inclusionary Housing (MIH) requirements,[214] to avoid imposing redundant or excessive costs.

Some roundtable participants have also questioned whether CEQR is the appropriate framework for developing an impact fee program and whether such a program should instead be adopted as a city-wide policy. Specifically, there are concerns that adopting an impact fee program on a project-by-project basis would lead to disproportionate burdens on developers in those areas, while simultaneously providing an asymmetrical distribution of benefits. Other experts, including community advocates, have voiced a preference for restricting the use of funds to addressing impacts within the geographic area in which they occur, as is done with funds generated under the City's MIH policy, with some urging community input in how that revenue is spent.

Who can we learn from?

Washington. Development impact fees are widely used as a form of mitigation in the state of Washington under its State Environmental Policy Act (SEPA). SEPA grants agencies broad authority to impose mitigating conditions relating to a project's adverse environmental effects.[215] A local government's authority under SEPA to mitigate environmental impacts includes the authority to impose impact fees on a particular developer to pay for the mitigation of impacts on public facilities and services, provided the municipality pursuing this course establishes a proper foundation. To survive legal scrutiny, the local municipality must adopt policies authorizing the exercise of SEPA substantive authority, and the fees imposed on developers must be rationally related to impacts identified in the environmental review documents.[216] Additionally, the municipality must be careful to avoid double-dipping: fees collected under SEPA may not duplicate fees collected under other sources of authority.[217]

California. The CEQA Guidelines recognize fee payments as a valid form of mitigation[218] and California courts have recognized that a payment of "fair share" of fees can constitute adequate CEQA mitigation for cumulative impacts.[219] One of a number of types of development impact fees in California, mitigation fees are widely used at the state and local levels to bring projects into compliance with CEQA.[220] To be legally sufficient, the fee must: be based on a reasonable

[214] Under the City's MIH policy, some developers have the option to pay into an affordable housing fund in lieu of creating rent-restricted units. This fund must be used in the community district in which the project is built. Funds are freed for use anywhere in any community district in the same borough if they are used within ten years. *N.Y.C. Mandatory Inclusionary Housing Policy*, http://council.nyc.gov/land-use/wp-content/uploads/sites/53/2016/05/MIH-text-Council-Modifications-1.pdf.

[215] RCW 43.21C.

[216] The Washington Supreme Court has indicated that SEPA does not provide the authority to craft an overall scheme of uniform fees. Instead, the fee calculation must be based on an individualized assessment of a development's direct impact on each system component. City of Olympia v. Drebick, 156 Wn.2d 289 (2006).

[217] Local governments cannot require an applicant to pay for system improvements under SEPA when they have paid a fee for the same system improvements under the Growth Management Act (GMA) or any other authority. RCW 43.21C.065. Similarly, an applicant cannot be required to pay GMA impact fees for system improvements that were subject to SEPA-based mitigation fees. RCW 82.02.100.

[218] "An EIR may determine that a project's contribution to a significant cumulative impact will be rendered less than cumulatively considerable [where the] project is required to implement or *fund* its fair share of a mitigation measure or measures designed to alleviate the cumulative impact." 14 Cal. Code Reg. § 15130(a)(3) (emphasis added).

[219] *See* City of Marina v. Board of Trustees of the California State University, 39 Cal.4th 341 (2006),

[220] CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, § 22.04.

mitigation plan that substantial evidence shows is likely to be implemented;[221] be adopted or reasonably likely to be adopted by the time the project subject to the fee is implemented; equitably allocate the costs of mitigation; and contain information about how the fee will be collected and spent.[222] Caution should be taken, however, when drawing comparisons between California and New York, as local jurisdictions operate under very different legal frameworks: state-imposed policies that restrict local taxes, such as Proposition 13, have left municipalities in California with relatively limited means of raising revenue. Consequently, they rely more heavily on the use of development impact fees, with new development projects shouldering the financial burden of infrastructure upgrades and services that benefit all residents.[223] Thus, such fees might both more necessary and more prone to manipulation in California.

Option 2: In-lieu mitigation fees. A second, more straight-forward option would allow the City to permit a private applicant to pay a fee in lieu of performing in-kind mitigation. In-lieu fees could help to eliminate the costs incurred by a developer associated with devising and carrying out specific mitigation measures. Moreover, where in-kind improvements are not within a developers' area of expertise or where developers have only a limited set of options within their control, it may be more appropriate to allow mitigation to be handled by the relevant City agency. Permitting a developer to pay a fee in these cases could help to ensure that the problem is tackled by the most capable entity, while also helping to ensure that the implementing agency has the requisite funds to do so.[224]

While there was strong support for this option from experts at the roundtables, a few experts have raised some concerns which should be taken into account. Firstly, fees may not account for cost overruns, which the developer would otherwise be responsible for. In the case that the City underestimates the in-lieu fee, it would bear the burden of making up for the difference in anticipated and actual costs of mitigation rather than the private developer. Second, there may be circumstances where specific in-kind measures may be more appropriate. For example, where a project impacts childcare services and where alternative sites are not readily available, it may be preferable to require a developer to make specific dedications of space on the developer's property to accommodate the creation of a new facility rather than allow the developer to pay an in-lieu fee.

Who can we learn from?

Clean Water Act. Under the CWA's compensatory mitigation policy,[225] mitigation for unavoidable impacts can be achieved through the use of an in-lieu fee mitigation mechanism. Here, mitigation occurs when a permittee provides funds to an in-lieu-fee sponsor, such as a public agency or non-profit organization, which then assumes liability for the mitigation project's success. By collecting funds from multiple permittees, the sponsor is able to pool the financial resources necessary to build and maintain the mitigation site. Like mitigation banking, in-lieu fee mitigation is also offsite, but unlike mitigation banking, it typically occurs after the permitted impacts. [226]

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[221] *See* Endangered Habitats League, Inc. v. County of Orange, 131 Cal. App. 4th 777 (2005); Anderson First Coalition v. City of Anderson, 130 Cal. App. 4th 1173, 1187 (2005).

[222] *See* Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors, 87 Cal. App. 4th 99, 141 (2001).

[223] Terner Report, *supra* note 213, at 4.

[224] In designing an in-lieu mitigation fee, it would likely be desirable to consider whether the exactions line of cases would apply.

[225] *See* Recommendation 6, *supra* (expand the use of offsets, including offsite mitigation).

[226] Compensatory Wetlands Mitigation Factsheet, *supra* note 189; U.S. Environmental Protection Agency & U.S. Army Corps of Engineers, Compensatory Mitigation for Losses of Aquatic Resources, Final Rule (2008).

PART 5 – CONCLUSION

Through a review of literature, interviews with field experts, and case studies of six environmental impact reviews conducted in New York City, we have identified a number of criticisms of the way the CEQR process currently handles mitigation. With an eye towards addressing these critiques, we looked to other frameworks at the federal, state, and local levels to find examples of best practices for mitigation which could be adopted locally. Based on our survey of other jurisdictions, we compiled a list of seven potential options for reforming CEQR's mitigation procedures. Five of these proposals received unanimous, or nearly unanimous, support from diverse experts and stakeholders who attended roundtable meetings at NYU School of Law in December 2019 and February 2020. Recalling that CEQR does not operate in a vacuum but rather exists as a single part of a larger process, we acknowledge that the proposals contained in this report would not address all the concerns that we heard from stakeholders. We do, however, believe that the endorsed proposals could substantially improve transparency, strengthen accountability, reduce costs, and increase the comprehensiveness of review and effectiveness of mitigation measures implemented. We therefore urge policymakers to seriously consider these changes.

APPENDIX I – U.S. STATES WITH ENVIRONMENTAL REVIEW LAWS

Within the United States, sixteen states have environmental review laws in place. Of these, seven states have environmental review requirements which extend to local actions and five states have "action-forcing" or substantive provisions that require a certain decision or outcome based on the impact information developed in the environmental review process.

		Applies to Local Actions	Substantive Requirements
California	California Environmental Quality Act (CEQA) Cal. Pub. Res. Code § 21000 et seq	✓	✓
Connecticut	Connecticut Environmental Protection Act (CEPA) Conn. Gen. Stat. Ann. §§ 22a-14 et seq.		
Georgia	Environmental Policy Act Ga. Code. Ann. § 12-16-1 et seq.	✓	
Hawai'i	Hawai'i Environmental Policy Act (HEPA) Haw. Rev. Stat. § 343-1 et seq.	✓	
Indiana	Indiana Environmental Policy Act (IEPA) Ind. Code Ann. § 13-12-4-1 et seq.		
Maryland	Maryland Environmental Policy Act (MEPA) Md. Nat. Res. Code Ann. § 1-301 et seq.		
Massachusetts	Massachusetts Environmental Policy Act (MEPA) Mass. Gen. Laws Ann. ch. 30, § 61 et seq.	✓	✓
Minnesota	Minnesota Environmental Policy Act (MEPA) Minn. Stat. Ann. § 116D.01 et seq.	✓	✓
Montana	Montana Environmental Policy Act (MEPA) Mont. Code Ann. § 75-1-101 et seq.		
New Jersey	Executive Order 215 (1989)[227]		
New York	State Environmental Quality Review Act (SEQRA) N.Y. Envtl. Conserv. Law § 8-0101 et seq.	✓	✓
North Carolina	State Environmental Policy Act (SEPA) N.C. Gen. Stat. § 113A-1 et seq.		
South Dakota	South Dakota Environmental Policy Act (SDEPA) S.D. Codified Laws Ann. § 34A-9-1 et seq.		

[227] Executive Order 215 serves as New Jersey's equivalent to other states' environmental review statutes.

		Applies to Local Actions	Substantive Requirements
Virginia	Virginia Environmental Impact Report Procedure (VAEIR), Va. Code Ann. §§ 10.1-1200 et seq.		
Washington	State Environmental Policy Act (SEPA) Wash. Rev. Code §§ 43-21C.010 et seq.	✓	✓
Wisconsin	Wisconsin Environmental Policy Act (WEPA) Wis. Stat. §§ 1.11 et seq.		

APPENDIX II – SUMMARY OF CASE STUDY EISS

Title	Date	Description	Lead Agency
No. 7 Subway Line Extension / Hudson Yard Rezoning GEIS	11/08/2004	A proposal for a transit-oriented redevelopment of the Hudson Yards Area of Far West Midtown Manhattan, including the construction and operation of an extension of the No. 7 Subway Line to serve the Hudson Yards area: adoption of zoning map and text amendments to the NYC ZR.	Metropolitan Transit Authority & City Planning Commission
Special West Chelsea District Rezoning and High Line Open Space EIS	10/27/2005	A proposal to rezone portions of several manufacturing districts in the West Chelsea Area which is intended to provide opportunities for new residential and commercial development as well as enhancement of proposed public park.	Department of City Planning
Western Rail Yard Project EIS	10/09/2009	A proposal for the redevelopment of three sites, comprising approximately 13 acres, with mixed-use development at the sites expected to include commercial space and residential units.	Metropolitan Transit Authority & City Planning Commission
Greenpoint-Williamsburg Rezoning EIS	10/31/2005	A proposal to rezone waterfront and upland portions of the Greenpoint-Williamsburg area of Brooklyn which is intended to facilitate new housing and commercial development on vacant and underutilized land and providing for redevelopment.	Department of City Planning
Domino Sugar Rezoning EIS	03/05/2014	An application by Refinery LLC for a zoning map to allow for the redevelopment of a waterfront parcel.	Department of City Planning
Broadway Triangle EIS	10/07/2009	Proposals for zoning map and text amendments, an amendment to the Broadway Triangle Urban Renewal Plan (URP), and the disposition of City-owned property.	Housing and Preservation Department

APPENDIX III – IMPACTS AND MITIGATION MEASURES IDENTIFIED IN CASE STUDY EISS

No. 7 Subway Line Extension / Hudson Yards Rezoning GEIS

Lead: MTA & CPC

Technical Area	Impact	Mitigation	Responsible Entity[228]	Timeline	Short- vs. Long-Term[229]	Reference
Community Facilities	*Fire Protection* - Impacts on fire protection services from residential and visitor population and anticipated street closings.	Monitor growth and development in the project area, responding first with administrative actions and then building a new firehouse when necessary.	**FDNY**	No	Long-term	Ch. 6, p. 29
Community Facilities	*Public Schools* - Increased shortfall in school seats from residential development.	Monitor trends in demand for school seats in the area and construct or lease a new 630-seat, K-8 elementary/intermediate school between 2010 and 2013 in addition to an enlargement of an existing school. Supplementary measures include adjusting catchment areas and/or reorganizing grade levels within schools. A second K-8 elementary/intermediate school would likely be required between 2010 and 2025.	**DOE**, SCA	Yes	Long-term	Ch. 6, p. 29
Community Facilities	*Child Care Centers* - Increased demand on publicly-funded day	Monitor development and respond as appropriate. Options include adding capacity to existing facilities or providing a new day care facility in or near the project area.	**ACS**	No	Long-term	Ch. 6, p. 30

[228] **BOLD** text denotes that the entity has been expressly identified in the EIS. Additional entities listed have been inferred as bearing some responsibility implementation, however these agencies were not explicitly named as responsible parties in the EIS.
[229] Long-term impacts are defined as those expected to last a duration of more than two years. *See supra* note 7484.

Technical Area	Impact	Mitigation	Responsible Entity[228]	Timeline	Short- vs. Long-Term[229]	Reference
	care centers in or near the project area.					
Transportation	*Traffic Flow and Operating Conditions* - Increased number of trips into and out of the project area.	Modify signal phasing and/or timing; lane channelization improvements; eliminate of on-street parking on intersection approaches; restrict on turn movements; eliminate of sidewalk bulbouts; and/or install new traffic signals.	**DOT** (NYC), **DOT** (NYS), **NYPD**	No	Long-term	Ch. 19, p. 79–118, 162–242; Tables 19-34 to 19-45, 19-63 to 19-76
Transportation	*Rail and Subway Facilities and Services* - Impacts on individual subway station elements.	Widen station staircases, passageways, and corridors; replace escalators with higher-speed models; install additional turnstiles or HEETs; and/or provide an alternative route (e.g., installing a new stairway).	NYCT, DOT	No	Long-term	Ch. 20, p. 89–92, 149–158; Tables 20-56, 20-107 to 20-111
Transportation	*Bus Service* - Impacts on bus routes.	Provide additional standard buses and articulated buses to affected routes.	**NYCT**	No	Long-term	Ch. 20, p. 92–97, 158–164; Tables 20-57 to 20-61, 20-112 to 20-117
Transportation	*Pedestrian facilities* - Impacts on pedestrian elements.	Widen sidewalks, corners, and crosswalks; close portions of through streets to vehicular traffic and using the lane space for pedestrian volumes; change signal timings; and/or construct pedestrian bridges.	DOT	No	Long-term	Ch. 20, p. 98–110, 164–180; Tables 20-62 to 20-76, 20-118 to 20-133
Construction / Air Quality	*Air Quality* - Increased PM2.5 concentrations from construction activities.	Create requirements for contractors to use construction equipment that will comply with EPA's Tier 2 emission standards (post model year 2001/2003); retrofit equipment with diesel particulate filters (or, where that is not feasible, diesel oxidation catalysts or equivalent	MTA, Contractor	No	Short-term	Ch. 23, p. 62–63

Technical Area	Impact	Mitigation	Responsible Entity[228]	Timeline	Short- vs. Long-Term[229]	Reference
		technology); and electrify compressors, pumps, and welders.				
Construction / Noise	*Noise* - Increased noise and vibration levels from construction activities.	Contractors would be required to strictly adhere to the applicable provisions of the New York City Noise Control Code and good engineering practices. NYCT would develop mitigation measures that would reduce and/or eliminate significant construction noise impacts. For construction at sites where there are fragile structures or vibration-sensitive uses, measures including blasting regulations and contract specification, site- and structure-specific vibration monitoring, programs responding to community feedback and concerns, and other site-specific control measures would be implemented.	**Contractor**, **NYCT**	No	Short-term	Ch. 23, p. 74-75
Construction / Transportation	*Traffic Flow and Operating Conditions* - Impacts on roadways and intersections from reduced roadway capacity and increased construction vehicle traffic.	Shift timing signals; daylight an existing parking lane for use as a travel lane; and/or adjust lane configuration/utilization.	DOT	No	Short-term	Ch. 23, p. 3, 60–61
Construction / Transportation	*Rail and Subway Facilities and Services* - Disruptions in No. 7 Subway service to Times Square station.	Periodic outages on the Nos. 2 and 3 express tracks on selected nights and weekends for a period of approximately two years.	NYCT	No	Short-term	Ch. 23, p. 62

Technical Area	Impact	Mitigation	Responsible Entity[228]	Timeline	Short- vs. Long-Term[229]	Reference
Construction / Transportation	*Bus Service* - Interfere with bus transit operations from construction activities.	Temporary relocation of bus routes and stops.	NYCT	No	Short-term	Ch. 23, p. 62
Construction / Historic and Cultural Resources	*Architectural Resources* - Potential adverse physical impacts on architectural resources, including the U.S. General Post Office and the McGraw-Hill Building, from adjacent construction activities.	Protection measures include consultation with the LPC and the OPRHP and the development and implementation of construction protection plans. Implementation of construction protection measures for the No. 7 Subway Extension is stipulated in the MTA LOR. Plans would follow DOB TPPN #10/88, regarding procedures for the avoidance of damage to historic structures from adjacent construction, and be approved by the LPC and OPRHP before any work commences. A New York State-licensed engineering firm would develop the construction protection plans. Demolition and construction procedures would include: inspect adjacent architectural resources to ascertain pre-existing damage, existing structural distresses, and potential weakness in the structure; establish protection procedures for architectural resources during project construction; establish methods and materials to be used to repair or replace any elements of the architectural resources that might be damaged in spite of the precautions of the construction protection plan; establish a monitoring program to measure vertical and lateral movement and vibration of the architectural resources within 90 feet of the project site; and establish and monitor construction methods to limit vibrations to levels that would not cause structural damage to the	**MTA**, **OPRHP**, **LPC,** Contractor	No	Short-term	Ch. 9, p. 75–76

Technical Area	Impact	Mitigation	Responsible Entity[228]	Timeline	Short- vs. Long-Term[229]	Reference
		nearby architectural resources. Engineers would be empowered to issue "stop work" orders as required to prevent damage to adjacent architectural resources. Construction would not recommence until the OPRHP or LPC approves the steps taken to stabilize or prevent further damage to the structures.				
Construction / Historic and Cultural Resources	*Archaeological Resources* - Potential damage to subsurface archeological resources from construction activities.	A mitigation plan would follow the 2000 New York Archaeological Council (NYAC) standards. Measures could include: (1) subsurface archaeological testing to investigate sensitive areas that could be affected by proposed construction; (2) for archaeological resources that are identified as present, further research to determine whether the archaeological resources identified are eligible for the S/NR; (3) for resources identified as eligible for the S/NR, development of a mitigation program in consultation with LPC and SHPO which could include full-scale excavation or avoidance; and (4) archaeological monitoring at the time of project construction.	**LPC**, **SHPO**, MTA, Contractor	No	Short-term	Ch. 10, p. 13
Historic and Cultural Resources	*Architectural Resources* - Demolition of the S/NR-eligible former Gledhill Wall Paper Company factory (#95) at 541-545 West 34th Street.	Possible mitigation measures could include documenting the building according to HABS standards, including photographic and written documentation. Significant architectural features of the building could be salvaged and donated to a museum or other cultural facility, incorporated into the design of the open space corridor, or included in a special museum or exhibit area which could document its history.	MTA	No	Long-term	Ch. 9, p. 74

Technical Area	Impact	Mitigation	Responsible Entity[228]	Timeline	Short- vs. Long-Term[229]	Reference
Historic and Cultural Resources	*Architectural Resources* - Partial removal of the High Line.	As stipulated in the ESDC LOR and in the MTA LOR, mitigation would include HABS/HAER Level 2 documentation to salvage and create an historical exhibit on the High Line. In addition, pedestrian entrance to the Multi-Use Facility would be built along West 30th Street and connect to the High Line south of West 30th Street.	**ESDC**, **MTA**	No	Long-term	Ch. 9, p. 74–75
Historic and Cultural Resources	*Architectural Resources* - Modification of the terminus of the No. 7 Train at the S/NR-eligible Times Square Station.	NYCT will consult with the OPRHP to preserve and avoid impacts to the significant historic features of the Times Square Subway Station. For unavoidable impacts, possible mitigation measures could include HABS documentation and/or the salvage of significant architectural features. An exhibit could be created with the prepared documentation and any salvaged features.	**NYCT**, **OPRHP**	No	Long-term	Ch. 9, p. 75
Noise	*Noise-Sensitive Land Uses* - Increased noise from new residents and other noise-sensitive land uses.	Application of (E) designations.	OER	No	Long-term	Ch. 22, p. 30-31
Noise / Transportation	*Traffic-Related Noise* - Increased noise from traffic and intersection delays.	Implementation of a city-sponsored window-replacement programs.	unclear who is responsible	No	Long-term	Ch. 22, p. 31
Air Quality / Transportation	*Carbon Monoxide* - Increase in CO concentration from traffic.	Impacts would be mitigated by the proposed traffic mitigation measures.	**DOT** (NYC), **DOT** (NYS), **NYPD**	No	Long-term	Ch. 21, p. 17–33; Tables 21-8 to 21-20

Technical Area	Impact	Mitigation	Responsible Entity[228]	Timeline	Short- vs. Long-Term[229]	Reference
Air Quality / Transportation	*Respirable Particulate Matter* - Increase in PM2.5 and PM10 concentrations from traffic.	Impacts would be mitigated by the proposed traffic mitigation measures.	**DOT** (NYC), **DOT** (NYS), **NYPD**	No	Long-term	Ch. 21, p. 17–33; Tables 21-8 to 21-20
Air Quality / Transportation	*Sulfur Dioxide* - Increase in SO2 levels from Quill Bus Depot HVAC emissions.	Reduce the sulfur content of fuel-oil, exclusively use natural gas, and/or limit the quantity of fuel oil used in the operating cycles of the boiler system.	NYCT	No	Long-term	Ch. 21, p.47–48; Tables 21-25 to 21–26

Special West Chelsea District Rezoning and High Line Open Space EIS

Lead: DCP

Technical Area	Impact	Mitigation	Responsible Entity	Timeline	Short- vs. Long-Term	Reference
Community Facilities	*Public Schools* - An expected shortfall of 1,133 seats for elementary schools in Region 3 of CSD 2; 1,818 seats for CSD 2 elementary schools as a whole; and 1,265 seats for CSD 2 intermediate schools.	Enlarge an existing school by 2010, build a new K-8 elementary intermediate school by 2013 and build an additional school by 2025. DOE would monitor trends in demand for school seats in the area. DOE responses to identified demand could take place in stages and include administrative actions and/or enlargement of existing schools, followed by the later construction or lease of new school facilities at an appropriate time.	**DOE**, SCA	Yes	Long-term	Ch. 22, p. 1–2
Community Facilities	*Child Care Centers* - Increased demand on publicly-funded day care centers (200 unmet day care slots).	Mitigation options include adding capacity to existing facilities or providing a new day care facility in or near the proposed action area. ACS will monitor development of the proposed action area and respond as appropriate to provide the capacity needed.	**ACS**	No	Long-term	Ch. 22, p. 2–3
Transportation	*Traffic Flow and Operating Conditions* - Increased congestion at 24 intersections in one or more peak hours.	Measures include parking regulation changes on cross streets and timing or phasing adjustments to signals.	**DOT**	No	Long-term	Ch. 22, p. 6–13
Transportation	*Bus Service* - Increased demand on westbound combined M16/M34 service in PM peak hour.	Add one additional westbound bus per hour during the PM peak hour.	**NYCT**	No	Long-term	Ch. 22, p. 13–14

Western Rail Yard Project EIS

Lead: MTA & CPC

Developer: RG WRY, LLC

Technical Area	Impact	Mitigation	Responsible Entity	Timeline	Short- vs. Long-Term	Reference
Community Facilities	*Public Schools* - Increase in the elementary school utilization rate from 196 to 211 percent.	Build a school by 2017. The Restrictive Declaration will include provisions for the developer to work with SCA upon completion of a threshold number of residential units in order to pursue action on the new school in the early phase of build-out of the project.	**Developer, SCA**	Yes	Long-term	Ch. 24, p. 1
Community Facilities	*Child Care Centers* - Increase in demand on publicly-funded childcare centers by 24 and 33 percent in 2017 and 2019, respectively.	As partial mitigation, ACS will monitor the demand and need for additional capacity and implement change to the extent practicable. The Restrictive Declaration will require the Developer to offer ACS 10,000 ft^2 of space for use as a day care facility, at a rate affordable to ACS providers, if ACS determines that additional day care capacity is needed. If ACS declines the offer of space, ACS may request implementation of alternative measures to make program or physical improvements that would support additional day care capacity for the Developer to consider.	**Developer, ACS**	No	Long-term	Ch. 24, p. 1–2
Transportation	*Traffic Flow and Operating Conditions* - Increased congestion from peak hour traffic.	Mitigation measures include carrying out an ongoing traffic monitoring program, signal timing changes, elimination of on-street parking to add a limited travel lane, enforcement of parking restrictions, channelization and lane	**DOT** (NYC), **DOT** (NYS), **NYPD**	No	Long-term	Ch. 24, p. 3–6; Tables 24-1, 24-2, and 24-3

Technical Area	Impact	Mitigation	Responsible Entity	Timeline	Short- vs. Long-Term	Reference
		designation changes, and the installation of traffic signals.				
Transportation	*Rail and Subway Facilities and Services* - Increase in A train demand during the weekday PM peak hour.	Relocate or widen the southernmost stairway serving the express (A train) platform at the 34th Street-Penn Eighth Avenue subway station by a minimum of approximately seven inches.	NYCT	No	Long-term	Ch. 24, p. 6
Transportation	*Bus Service* - Increased demand for bus service.	Add additional bus service on a number of routes.	**NYCT**	No	Long-term	Ch. 24, p. 6, Table 24-15.
Transportation	*Pedestrian Facilities* - Increased pedestrian traffic impacting sidewalks, crosswalks, and corners.	Mitigation measures include relocating planters or street vendors at two sidewalk locations on West 33rd Street, creating corner bulb outs on the avenue side of five intersections, and widening the crosswalks at 17 impacted crosswalk locations.	DOT	No	Long-term	Ch. 24, p. 7; Figures 24-12.1 through 24-15.2
Construction / Transportation	*Traffic Flow and Operating Conditions* - Increased congestion from construction activities during the build year.	Mitigation measures include carrying out an ongoing traffic monitoring program, signal timing changes, elimination of on-street parking to add a limited travel lane, enforcement of parking restrictions, and channelization and lane designation changes.	**DOT** (NYC), **DOT** (NYS), **NYPD**	No	Short-term	Ch. 24, p. 5; Tables 24-1, 24-2, and 24-3
Open Space	*Open Space Ratio* - Reduction in total open space and active open space ratios.	Potential mitigation measures for the proposed action could include: creating additional open space programming on the development site or within the study area; funding for improvements, renovation, or maintenance at existing local parks; adding amenities to existing parks to increase park usage year-round or at night; and	**DPR**, Developer, MTA	No	Long-term	Ch. 24, p. 2–3

Technical Area	Impact	Mitigation	Responsible Entity	Timeline	Short- vs. Long-Term	Reference
		opening schoolyards to the public outside of school hours. A Restrictive Declaration will include provisions to establish an Open Space Fund, with contributions made by the developer at appropriate intervals as development occurs on the site. The proceeds of the Open Space Fund would be utilized by DPR, in consultation with CB4 and the local City Council Member, to fund programs or improvements which would improve or increase capacity for active recreation within CB4.				
Shadows / Open Space	*Shadows on Open Space Resources* - Direct shadows from the development site on two open space resources (Eastern Rail Yard and Tenth Avenue Additional Housing Site).	As partial mitigation, measures could include the use of shade-tolerant vegetation, the placement of features that may require sunlight in areas of the open space with greater direct sun, and include the programming of active recreation features. For Eastern Rail Yard, these requirements would be set forth in a Restrictive Declaration.	**DPR**, **DEP**, Developer, MTA	No	Long-term	Ch. 24, p. 2–3

Greenpoint-Williamsburg Rezoning EIS

Lead: DCP

Technical Area	Impact	Mitigation	Responsible Entity	Timeline	Short- vs. Long-Term	Reference
Socioeconomic Conditions	*Indirect Residential Displacement* - Displacement of an estimated 2,510 residents.	Incentive packages provided through the Revised Affordable Housing Bonus and Incentives (RAHBI) Alternative would provide approximately 1,398 affordable housing units. Eligible residents of Brooklyn Community District 1 would receive preference for half of the affordable units in any given development, if built under city-sponsored programs.	HPD, CPC	No	Long-term	Ch. 22, p. 1–2
Community Facilities	*Public Schools* - Elementary schools to operate at 135% capacity (shortfall of 778 seats) in Greenpoint sub-area and at 105% capacity (shortfall of 409 seats) in the half-mile study area.	Construct or lease a new elementary or K-8 school in the project area. Planning will be provided for in DOE's Five Year Capital Plan for 2005-2009. Supplemental administrative actions include adjusting catchment areas, reorganizing grade levels within schools, and monitoring trends in demand for school seats. Responses to identified demand could take place in stages and include administrative actions and/or enlargement of existing schools, followed by the later construction or lease of new school facilities.	**DOE**, SCA	Partial	Long-term	Ch. 22, p. 2
Open Space	*Open Space Ratio* - If the power plant is constructed (as proposed by TransGas Energy Company) on the former Bayside Fuel site, the proposed Inlet Park would be smaller in size, with none of the	Possible mitigation measures include the redevelopment of McCarren Park pool site (closed since 1984) and the distribution of approximately 1.5 acres of additional active open space resources on vacant or underutilized sites throughout the Greenpoint sub-area.	**DPR**	No	Long-term	Ch. 22, p. 3–4

Technical Area	Impact	Mitigation	Responsible Entity	Timeline	Short- vs. Long-Term	Reference
	new park located within the Greenpoint sub-area.					
Transportation	*Traffic Flow and Operating Conditions* - Traffic congestion at 10 signalized and 3 unsignalized intersections in one or more peak periods by 2013.	Measures include adjustments to signal phases and timing and installing new traffic signals.	**DOT**	No	Long-term	Ch. 22, p. 4–12; Tables 22-1 to 22-4
Transportation	*Rail and Subway Facilities and Services* - Increased subway demand to cause one staircase (Stair S3) at the Bedford Avenue L station to deteriorate and add 1,013 new subway trips to Manhattan-bound L trains in the AM peak hour (volume-to-capacity ratio increase from 0.97 to 1.02).	Widen staircase by two to three feet. Add one additional Manhattan-bound L train during the AM peak hour.	**NYCT, DOT**	No	Long-term	Ch. 22, p. 12–14; Tables 22-5 to 22-6
Transportation	*Bus Service* - Capacity shortfall of 26 spaces on eastbound B61 buses in the PM peak period.	Add one additional northbound bus per hour during the PM peak period.	**NYCT**	No	Long-term	Ch. 22, p. 15

Technical Area	Impact	Mitigation	Responsible Entity	Timeline	Short- vs. Long-Term	Reference
Transportation	*Pedestrian Facilities* - Increase in pedestrian activity along the Kent Avenue/Franklin Street corridor and at the intersection of Kent Avenue and North 11th Street.	Install a new traffic signal with a 60-second cycle length, with a 38-second phase for Kent Avenue and a 22-second phase for North 11th Street.	DOT	No	Long-term	Ch. 22, p. 15
Air Quality / Transportation	*Carbon monoxide* - Increase in CO concentrations from traffic.	Impacts would be mitigated by the proposed traffic mitigation measures.	**DOT**	No	Long-term	Ch. 22, p. 15–16; Table 22-7

Domino Sugar Rezoning EIS

Lead: DCP
Applicant: Refinery LLC

Technical Area	Impact	Mitigation	Responsible Entity	Timeline	Short- vs. Long-Term	Reference
Community Facilities	*Public Schools* - Shortage of school seats from residential development.	Applicant will enter into an agreement with SCA to provide an option to locate an approximately 100,000-square-foot public elementary and intermediate school within the community facility space in the Refinery complex. Applicant will provide the SCA with an opportunity to determine whether a school is needed within the Refinery complex at different phases of the proposed project.	**Applicant, SCA**	No	Long-term	Ch. 23, p. 1–2
Community Facilities	*Child Care Facilities* - Increased demand on publicly-funded child care facilities creating a deficiency of available child care slots by 5% or more.	Possible mitigation measures include adding capacity to existing facilities if determined feasible through consultation with ACS, or providing a new child care facility within or near the project site.	**Applicant, ACS**	No	Long-term	Ch. 23, p. 2–3
Transportation	*Traffic Flow and Operating Conditions* - Congestion at 24, 11, 31, and 6 intersections during the weekday AM, midday, and PM, and Saturday midday peak hours, respectively.	Mitigation for the primary and secondary study area intersections include signal timing modifications and geometric improvements/traffic control measures. Applicant has also committed to conduct a traffic monitoring program (TMP).	**Applicant, DOT**	No	Long-term	Ch. 23, p. 5–26; Tables 23-1 to 23-7

Technical Area	Impact	Mitigation	Responsible Entity	Timeline	Short- vs. Long-Term	Reference
Transportation	*Rail and Subway Facilities and Services* - Decline in service levels at the Marcy Avenue J/M/Z subway station at the Manhattan-bound control area during the AM peak period and at the Queens-bound control area during the PM peak period.	Replace existing High Entrance and Exit Turnstiles (HEET) with low-turnstiles.	**NYCT**	No	Long-term	Ch. 23, p. 27
Transportation	*Bus Service* - Increased demand on northbound and southbound B62 bus routes during both the AM and PM peak periods. Increased demand on the eastbound and westbound Q59 bus routes during both the AM and PM peak periods.	Add additional buses across both lines in both directions during AM and PM peak periods.	**NYCT**	No	Long-term	Ch. 23, p. 28–30; Table 23-8
Transportation	*Pedestrian Facilities* - Impacts to the south crosswalk at the Bedford Avenue and North 7th Street intersection during the weekday AM peak period.	Restripe the crosswalk from 12.0 feet wide to 12.3 feet wide.	DOT	No	Long-term	Ch. 23, p. 31–31

Technical Area	Impact	Mitigation	Responsible Entity	Timeline	Short- vs. Long-Term	Reference
Construction / Transportation	*Traffic Flow and Operating Conditions* - Impacts on intersections from reduced roadway capacity and increased construction vehicle traffic.	Mitigation measures include making minor signal timing adjustments, restriping and/or daylighting to provide more roadway capacity, converting two-way stop controls to four-way stop controls, or converting stop controls to signal controls.	DOT	No	Short-term	Ch. 23, p. 31–33; Tables 23-9 to 23-10
Construction / Noise	*Construction Noise* - Increased noise levels from construction activities.	Applicant would make attenuation measures (i.e., upgraded windows and/or an alternate means of ventilation) available to any impacted residences.	**Applicant**	No	Short-term	Ch. 23, p. 33–34; Table 23-11
Historic and Cultural Resources	*Architectural Resources* - Demolition of S/NR eligible buildings.	Applicant to enter into an MOA or LOR with SHPO, and other involved agencies. Mitigation measures include preparation of HAER documentation of the buildings on the site, including photographic documentation, historic plans, and an accompanying historical narrative; and consultation with SHPO with respect to the adaptive reuse design of the Refinery at the pre-final and final design stages. Industrial artifacts (including machinery, crane rails, syrup tanks, elements of larger structures, and historic signage) would be included as part of an interpretive display as part of the proposed open space design. Applicant will salvage three sets of original wood doors on the Refinery's Kent Avenue façade and seek to incorporate them into the project's design.	**Applicant, SHPO, other agencies**	No	Long-term	Ch. 23, p. 5

Technical Area	Impact	Mitigation	Responsible Entity	Timeline	Short- vs. Long-Term	Reference
Shadows	*Shadows on Open Space* - A shadow on the 1.8-acre Grand Ferry Park would impact sun-sensitive features used by park visitors (i.e. benches, picnic tables) and vegetation.	Applicant would consult with DPR and DCP to develop a mitigation program. Applicant would be required to provide funding for monitoring and maintenance of affected plantings within Grand Ferry Park and replacement, as necessary, with shade-tolerant species.	**Applicant, DPR, DCP**	No	Long-term	Ch. 23, p. 4–5
Air Quality	*Carbon monoxide* - Increased CO concentrations from traffic.	Impacts would be mitigated by the proposed traffic mitigation measures.	DOT		Long-term	Ch. 23, p. 31
Air Quality	*Respirable Particulate Matter* - Increased PM2.5 and PM10 concentrations from traffic.	Impacts would be mitigated by the proposed traffic mitigation measures.	DOT		Long-term	Ch. 23, p. 31

Broadway Triangle EIS

Lead: HPD

Technical Area	Impact	Mitigation	Responsible Entity	Timeline	Short- vs. Long-Term	Reference
Socioeconomic Conditions	*Indirect Residential Displacement* - Displacement of as many as 3,543 residents from increased rents.	Partial mitigation includes the provision of 1,214 affordable housing units through the redevelopment of city-owned property, utilization of the Inclusionary Housing program, or both.	HPD, DCP	No	Long-term	Notice of Completion, p. 34–35
Open Space	*Open Space Ratio* - Decrease in passive open space ratios.	Potential measures include the creation of new open space or the enhancement and improvement of existing open spaces within the area (including school yards). As partial mitigation, a site would be set aside at the junction of Beaver Street and Bushwick Avenue within the West Bushwick URA (an additional 0.39 acres of passive open space would be required to mitigate the impact).	**HPD, DPR, DOE**	No	Long-term	Notice of Completion, p. 35–37
Transportation	*Traffic Flow and Operating Conditions* - Congestion at nine signalized intersections in the project area in one or more peak hours by 2018.	Mitigation measures include changes to curb-side parking regulations and signal timing and phasing.	DOT	No	Long-term	Notice of Completion, p. 39–42
Transportation	*Bus Service* - Increased busload levels to above maximum capacity on southbound bus service during peak PM hours in 2018.	Add additional bus service along affected routes. Conduct ridership counts and adjusts bus service frequency to meet increased demand.	**NYCT**	No	Long-term	Notice of Completion, p. 42–43

Technical Area	Impact	Mitigation	Responsible Entity	Timeline	Short- vs. Long-Term	Reference
Construction / Historic and Cultural Resources	*Historic Resources* - Potential adverse physical impacts on two S/NR-eligible historical resources (Lincoln Savings Bank and All Saints Church) from adjacent construction activities.	Mitigation could include a Construction Protection Plan (CPP) submitted to LPC for review and approval prior to construction, with measures	**LPC,** HPD, Contractor	No	Short-term	Notice of Completion, p. 43

APPENDIX IV – CASE STUDY FINDINGS

Title of EIS	# impacts	# long-term impacts	# measures with timelines for implementation	# measures where responsible entities are identified[230]	# measures where lead agency is responsible	# measures where lead agency shares responsibility	# measures where only lead agency is responsible	# measures where more than one entity is responsible
No. 7 Subway Line Extension / Hudson Yards Rezoning	22	15	1	12	5	3	2	9
Special West Chelsea Rezoning and High Line Open Space	4	4	1	4	0	0	0	1
Western Rail Yard Project	9	8	1	7	4	4	0	6
Greenpoint-Williamsburg Rezoning	8	8	0	6	1	1	0	3
Domino Sugar Rezoning	12	11	0	9	6	5	1	5
Broadway Triangle	5	4	0	3	3	3	0	3
TOTAL (#)	60	50	3	41	19	16	3	27
TOTAL (%)	100%	83%	5%	68%	32%	27%	5%	45%

[230] This figure includes measures where agencies are *at least partially* identified.

APPENDIX V – LEAD AGENCIES IN ACTIONS SUBJECT TO CEQR

The following data was compiled from New York City's CEQR Access database. The database contains records of CEQR projects which were filed with OEC from January 1, 2005 to the present, though some older records are available. Numbers are based on results yielded from the search function when filtered by agency.

AGENCY	YIELD
Administration for Children's Services	10
Board of Standards and Appeals	2817
Brooklyn Public Library	4
BuildNYC Resource Cooperation	1
Dept. for Aging	8
Dept. of Buildings	4
Dept. of City Planning	1930
Dept. of Citywide Administrative Services	35
Dept. of Consumer Affairs	1
Dept. of Correction	4
Dept. of Cultural Affairs	18
Dept. of Design and Construction	3
Dept. of Education	1
Dept. of Environmental Protection	1257
Dept. of Finance	0
Dept. of General Services	3
Dept. of Health and Mental Hygiene	12
Dept. of Homeless Services	214

AGENCY	YIELD
Dept. of Housing Preservation and Development	789
Dept. of Information Technology and Telecommunications	12
Dept. of Investigation	1
Dept. of Juvenile Justice	2
Dept. of Parks And Recreation	168
Dept. of Probation	3
Dept. of Records and Information Services	0
Dept. of Sanitation	208
Dept. of Small Business Services	175
Dept. of Transportation	197
Dept. of Youth and Community Development	0
Deputy Mayor For Housing And Economic Development	289
Deputy Mayor for Operations	2
Human Resources Administration	18
Industrial Business Zone Boundary Commission	4
Landmarks Preservation Committee	0

AGENCY	YIELD
New York City Board Of Elections	10
New York Public Library	4
NYC Business Integrity Commission	1
NYC Comptroller's Office	0
NYC Council	31
NYC Department Of Real Property	0
NYC Education Construction Fund	4
NYC Fire Department	65
NYC Off-Track Betting Corp.	1
NYC Police Department	64
NYC Transit Authority	1
Office Of Bronx Borough President	2
Office Of Bronx County District Attorney	1
Office Of Brooklyn Borough President	0
Office Of Brooklyn County District Attorney	0
Office Of Emergency Management	8
Office Of Management And Budget	2

AGENCY	YIELD
Office Of Manhattan Borough President	0
Office Of Manhattan County District Attorney	1
Office Of Queens Borough President	0
Office Of Queens County District Attorney	0
Office Of Staten Island Borough President	0
Office Of Staten Island County District Attorney	0
Office Of The Mayor	38
Queens Borough Public Library	6
Taxi And Limousine Commission	661

Total (adjusted)[231]	**8884**
% BSA	31.7%
% DCP	21.7%
% DEP	14.2%
% HPD	8.9%

[231] 206 actions were co-led by DCP and DEP.

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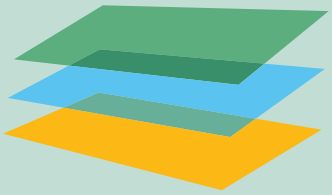

Guarini Center

Frank J. Guarini Center
on Environmental, Energy and Land Use Law

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