SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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In the Matter of the Application of

CARL E. PERSON, Index No. 100484/15

Petitioner,

For Judgment Pursuant to CPLR Article 78

-against-

NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Respondent.

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RESPONDENT'S MEMORANDUM OF LAW IN SUPPORT OF CROSS-MOTION TO DISMISS

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PRELIMINARY STATEMENT

Petitioner, Carl E. Person, *pro se*, brings this Article 78 Petition in a groundless attempt to essentially halt the operations of Respondent New York City Department of Transportation ("NYCDOT"), apparently because Petitioner personally disagrees with NYCDOT's policies from the past eight years, spanning the last two mayoral administrations. NYCDOT submits this memorandum of law in support of its cross-motion to dismiss the Petition.

Although Petitioner attempts to frame this case as an environmental lawsuit, Petitioner's conspiracy theory—that NYCDOT has been purposefully but secretly causing congestion for years, in order to nefariously build an impetus for congestion pricing—fails to assert a cognizable challenge to any of NYCDOT's actual activities or policies. To begin with, Petitioner lacks standing to bring his claims. The generalized, mostly economic harms that Petitioner alleges do not satisfy the well-established requirement that a petitioner raising a claim under the New York State Environmental Quality Review Act ("SEQRA") must demonstrate a specific injury, distinct from the general public, that is within the zone of interests of the statute. Moreover, any challenge to the varied assortment of NYCDOT policies and initiatives that Petitioner references have long been time-barred by the applicable four-month statute of limitations. Furthermore, the Petition must be dismissed as Petitioner fails to state a legal claim. Factual allegations that do not fit into any cognizable legal theory, or that consist of bare legal conclusions, cannot support a cause of action. For these reasons, the Petition should be dismissed.

STATEMENT OF FACTS

The Petition challenging DOT implicates several long-term planning initiatives that began more than eight years ago, in the prior administration of former Mayor Michael Bloomberg. This Statement of Facts addresses these initiatives.

A. PlaNYC: A Greener, Greater New York

On April 22, 2007, New York City ("City") released *PlaNYC: A Greener, Greater New York*. PlanNYC, was a comprehensive sustainability plan that sought to address the City's long-term challenges, including an expected increase in residents by 2030, changing climate conditions, an evolving economy, and aging infrastructure. *See* "About PlaNYC," *http://www.nyc.gov/html/planyc/html/about/about.shtml* (last accessed May 8, 2015), attached to the Affirmation of Amy McCamphill ("McCamphill Aff.") dated May 13, as Exhibit A. PlanNYC was a joint effort between over twenty-five City agencies and outside partners in academic, business, civic, and community roles. *Id.* The original, 2007 PlaNYC included sixteen transportation initiatives, including to "pilot congestion pricing" in the Manhattan Central Business District and to "promote cycling" by accelerating the implementation of the City's 1,800-mile bike lane master plan. *See* "Transportation" Chapter, *PlanNYC: A Greener, Greater New York*, at 87-91, attached to the McCamphill Aff. as Exhibit B; full 2007 PlaNYC report *available at http://www.nyc.gov/html/planyc/downloads/pdf/publications/full_report_2007.pdf*; *see also* Petition ("Pet.") ¶ 4.

SEQRA requires state, regional, and local agencies to assess the potential for significant adverse environmental impacts of certain discretionary actions before undertaking, funding, or approving such actions. 6 N.Y. Code of Rules & Regulations ("NYCRR") § 617.1(c).

Thus, specific agency actions undertaken to achieve PlaNYC's aims through individual City agency actions may be subject to environmental review.

In 2007, the United States Department of Transportation awarded the City a $354.5 million grant to implement the City's transportation plan; this grant included $10.4 million to support congestion pricing and $2.0 million to collect and analyze transit data. *See* Pet. ¶ 5. However, because the New York State Assembly failed to enact the transportation plan due to opposition to congestion pricing, the entire $354.5 million grant was forfeited. Pet. ¶ 7.

B. Sustainable Streets

NYCDOT issued its own strategic plan, Sustainable Streets, in 2008. Pet. ¶ 2. One of the main goals of Sustainable Streets is to improve mobility through policies that include: implementing bus rapid transit; improving streets for the existing bus network through signal improvements, bus signal priority, and other measures; managing parking to control congestion, by expanding commercial parking pricing districts, completing the conversion of all multi-space meters to accept credit cards, and other measures; making bicycling more convenient and safer; expanding the high-occupancy vehicle network; improving mobility and access for all transit modes in congested corridors; improving the quality and expanding the availability of ferry services; and improving truck routes. *See* Sustainable Street excerpts ("Mobility" and "Benchmarks" chapters), attached as Exhibit C to the McCamphill Aff., and also *available at* *http://www.nyc.gov/html/dot/downloads/pdf/stratplan_mobility.pdf;* and *http://www.nyc.gov/html/dot/downloads/pdf/stratplan_benchmarks.pdf.*

Sustainable Streets, like PlaNYC, was a broad planning document that set forth major goals and outlined policies to achieve these goals. Specific actions taken by NYCDOT to implement these policies may be subject to environmental review.

In 2013, NYCDOT issued a progress report, *Sustainable Street: 2013 and Beyond*, attached as Exhibit D to the McCamphill Aff. and *available at* http://www.nyc.gov/html/dot/downloads/pdf/2013-dot-sustainable-streets-lowres.pdf. This progress report tracked NYCDOT's progress in implementing the policies contemplated in the 2007 Sustainable Streets strategic plan, including the policies aimed at improving mobility. For example, NYCDOT's new Select Bus Service, which began in 2008, has been found to save each rider fifty hours a year annually, and has improved traffic flow at congested intersections. *Id.* at 66-70. As another example, transit signal priority along Victory Boulevard in Staten Island reduced bus travel time by 16% during morning rush hour. *Id.* at 72. The progress report also discusses in detail the extensive bicycle and pedestrian improvements made by NYCDOT, *see id.* at 83-102, and then notes:

> All of the bicycle and pedestrian improvements mentioned above haven't come at the expense of drivers. *Traffic volumes are down and traffic speeds are up in the Manhattan central business district*, a reflection of a growing trend toward other forms of transportation.
>
> In fact, the economic and population growth in New York City over the past decade has largely been accommodated on the city's transit system, not via private automobile. While use of our transit system into the central business district grew by 11% since 2003, traffic growth has declined. There has been a 6.5% decline in traffic entering the central business district since 2003. This trend has even accelerated in recent years—in 2011, there was a 1.8% decrease in citywide weekday traffic volumes and a growth of transit use by 2.5% in 2011 and 1.8% in 2012.

Id. at 105 (emphasis added).

The progress reports tracks NYCDOT's continued focus on reducing congestion. For example, in 2011 NYCDOT implemented a congestion management program called Midtown in Motion to reduce congestion by adjusting traffic signals in real time, using 100 microwave sensors, 32 traffic video cameras, and E-Z Pass readers at 23 intersections;

preliminary results of the first phases showed a 10% improvement in travel times along the avenues of the 110-block service area. *Id.* at 106. NYCDOT also widened access ramps to the Brooklyn Bridge, easing traffic bottlenecks, and made improvements to the RFK Bridge that resulted in a 51% improvement in travel times northbound and 26% southbound. *Id.*

C. Sam Schwartz's Bridge Toll Plan

In February 2015, news outlets reported that the former City Traffic Commissioner Sam Schwartz proposed a plan to impose tolls on the City's four East River bridges, while cutting tolls on other bridges managed by the New York State Metropolitan Transit Authority. *See* Ross Barkan, "Bill de Blasio Says New Congestion Pricing Plan 'Has to Be Taken Seriously,'" *Observer* (February 19, 2015), attached as Exhibit E to the McCamphill Affirmation and *available at* http://observer.com/2015/02/bill-de-blasio-says-new-congestion-pricing-plan-has-to-be-taken-seriously/; *see also* Pet. ¶ 18.

This proposal is not a City initiative, nor has it been formally endorsed by NYCDOT or the City. *See id.* (quoting Mayor de Blasio as saying at an unrelated event "I have not seen the details of the new proposal but . . . I think it has to be taken seriously . . . . [W]e should look at a range of options."). Indeed, on April 22, 2015, the City released an updated planning paradigm for New York City, titled *One New York: The Plan for a Strong and Just City*, excerpts ("Transportation" chapter) attached to the McCamphill Aff. as Exhibit F, full report *available at* http://www.nyc.gov/html/onenyc/downloads/pdf/publications/OneNYC.pdf; congestion pricing is not mentioned as a policy goal anywhere in the 300+ page report.

ARGUMENT

The Petition should be dismissed under CPLR sections 3211(a)(3), (5), and (7) for lack of standing, failure to comply with the statute of limitations, and failure to state a claim.

POINT I

PETITIONER LACKS STANDING TO BRING HIS CLAIMS

Standing to sue "requires injury in fact which is distinct from the general public"; mere "personal disagreement" is not sufficient to confer standing. *Roulan v. Cnty. of Onondaga*, 21 N.Y.3d 902, 905 (2013). Thus, a party bringing a claim under SEQRA must demonstrate that "it would suffer direct harm, injury that is in some way different from that of the public at large." *Soc'y of Plastics Indus. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 774 (1991). Generalized environmental concerns will not suffice. *See id.*; *see also Rent Stabilization Ass'n of N.Y.C., Inc. v. Miller*, 15 A.D.3d 194, 194-95 (1st Dep't 2005) (petitioners' claim "of environmental harm—that the local ordinance will lead to a reduction in affordable housing and an increase in cases of lead poisoning . . . would be shared by the public at large, and is thus insufficient to confer individual standing on petitioners"); *Cmty. Pres. Corp. v. Miller*, 15 A.D.3d 193 (1st Dep't 2005) (same).

Moreover, a party asserting that SEQRA has been violated must assert an injury in fact that is within the zone of interests of the statute—that is, the party must demonstrate that it "will suffer an injury that is environmental and not solely economic in nature." *Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 76 N.Y.2d 428, 433 (1990); *see also Soc'y of Plastics Indus.*, 77 N.Y.2d at 777; *Vill. of Canajoharie v. Planning Bd. of Town of Fla.*, 63 A.D.3d 1498, 1501 (3d Dep't 2009) (finding that petitioner failed to show "a specific or direct environmental harm" because the "petition contains nothing more than allegations of potential economic harm,

ranging from the loss of employment, commercial activity and sales tax revenue, to negative impacts on population, housing values and resources"); *Chatham Towers, Inc. v. Bloomberg*, 18 A.D.3d 395, 396 (1st Dep't 2005).

Additionally, allegations of only "tenuous and ephemeral harm . . . [are] insufficient to trigger judicial intervention." *N.Y. State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 214 (2004) (internal citation and quotation marks omitted); *see also Rudder v. Pataki*, 93 N.Y.2d 273, 279 (1999); *Rent Stabilization Ass'n of N.Y.C., Inc.*, 15 A.D.3d at 194-195 (petitioners lack standing when their claim of environmental harm "is speculative and insufficient to establish 'injury in fact'" (internal citation omitted)).

The burden of establishing standing to challenge an administrative action, including establishing the requirements outlined above, lies with the party seeking review. *Soc'y of Plastics Indus.*, 77 N.Y.2d at 769.

In *Society of Plastics Industries*, the New York Court of Appeals directly rejected the contention that broad allegations of increased traffic and air pollution could give rise to standing to assert a SEQRA claim. In explaining the requirement of special harm, the Court stated:

> The doctrine grew out of a recognition that, while directly impacting particular sites, governmental action affecting land use in another sense may aggrieve a much broader community. The location of a gas station may, for example, directly affect its immediate neighbors but indirectly affect traffic patterns, noise levels, air quality and aesthetics throughout a wide area. The concept of a plaintiff's aggrievement, generally necessary to secure judicial review, was therefore refined and restricted by the courts in such matters to require that plaintiffs have a *direct interest in the administrative action being challenged, different in kind or degree from that of the public at large.*

77 N.Y.2d at 774-75 (emphasis added) (internal citation and footnote omitted).

The plaintiffs in *Society of Plastics Industries* alleged that Suffolk County's ban on certain plastic products would cause, among other things, "more trucking traffic, causing damage to Suffolk County roads and additional air and noise pollution." *Id.* at 767. The Court of Appeals rightly held that the plaintiffs "having failed to allege any threat of cognizable injury [they] would suffer, different in kind or degree from the public at large—lack[] standing to maintain this SEQRA challenge." *Id.* at 778; *see also Sierra Club v. Vill. of Painted Post*, 115 A.D.3d 1310, 1312-13 (4th Dep't 2014) ("Inasmuch as we are dealing with the noise of a train that moves throughout the entire Village, as opposed to the stationary noise of the transloading facility, we conclude that [petitioner] Marvin will not suffer noise impacts 'different in kind or degree from the public at large.'" (quoting *Soc'y of Plastics Indus.*, 77 N.Y.2d at 775)); *Gallahan v. Planning Bd.*, 307 A.D.2d 684, 685 (3d Dep't 2003), *appeal denied*, 1 N.Y.3d 501 (2003) ("Many of petitioner's allegations regarding the project relate to indirect effects upon 'traffic patterns, noise levels, air quality and aesthetics throughout a wide area,' which generally are insufficient to establish standing" (citing *Soc'y of Plastics Indus.*)).

Here, like in *Society of Plastics Industries*, almost all of the harms that Petitioner alleges are generalized harms to the broader public. *See, e.g.*, Pet. ¶¶ 10A ("[t]he effect of these activities has been to *create more congestion in New York County*"(emphasis added)); 15(M) (referring to the "congestion problem"); 16 (referring to an overall plan "to create additional traffic congestion in NYC"); 18 ("[NYCDOT's] Congested-Related Activities have resulted in increased congestion in New York County"); 20(K) (referring to "unnecessary emission of about 11,376,000,000 pounds of carbon dioxide and other global-warming gases" without alleging any specific harm). And almost all of the damages that Petitioner alleges are similarly broad and generalized, including "[i]njuries caused by unnecessary emission of pollutants into the air

causing an adverse physical and sometimes mental condition not obvious for an extended period of time but injurious nonetheless," Pet. ¶ 27(B), "[d]enial to Petitioner of use of public property (i.e., parts of the sidewalks and streets in New York County) put to illegal use by Respondent," *Id.* ¶ 27(E), and "[s]ubjecting Petitioner to increased hazard while driving, and other risks while Petitioner is a pedestrian and if should ever become a cyclist." *Id.* ¶ 27(F). In Petitioner's own words: "The adverse, congestion effect . . . is felt upon all 508.38 miles of streets and avenues in Manhattan (with a total of 6,718 blocks)." Pet. ¶ 23.

County-wide "congestion" and concomitant air pollution is *exactly* the alleged generalized harm to the broader public that the Court of Appeals rejected as insufficient to give rise to SEQRA standing in *Society of Plastic Industries.* Petitioner's claims clearly do not allege direct harms different from those facing the community at large, and therefore fail to establish standing. *Soc'y of Plastics Indus.*, 77 N.Y.2d at 773-75

To the extent that Petitioner alleges any harms that *are* connected with a particular location, Petitioner fails to allege that he is specifically harmed. Instead, Petitioner simply mentions several alleged harms to Eighth and Ninth Avenues. Pet. ¶¶ 20(A) ("[t]hese activities have had the following effect in New York County . . . [c]onverting 9th Avenue from being the fastest road downtown to the slowest"); 20(B)(". . . [r]educing the number of moving vehicle lanes from a maximum of 5 to a maximum of 3 on 8th, 9th, and other avenues"); 20(N) (". . . [e]limination of the space used for public access to the main United States Post Office (on 8th Avenue, between 32nd and 33rd Streets) and the mail boxes placed outside for use by drivers").

Petitioner also alleges economic harms which are not cognizable under SEQRA. *See, e.g.*:

- Pet. ¶¶ 19 (referring to "a substantial threat to impose $2,000,000 per business day or $520,000,000 per year in added costs on motorists driving in and out of Manhattan");
- 20(G), (L) (referring to lost sales and profits at retail stores);
- 20(H) (referring to "a decline in average weekly revenue" for cab drivers "sending substantially more time in reduced-fair waiting");
- 20(I) (referring to cab drivers "spending substantially more in gasoline each week . . . at an annual cost of $1.5 billion");
- 20(J) (referring to "[m]otorists, their passengers and users of green and yellow taxicabs and black-car limousines . . . spending substantially more of their valuable time getting from one place to another in Manhattan at a cost of approximately $6 billion per year, assuming the incoming-producing value of the rider's time is $50/hour");
- 20(M) (referring to "[a]dditional fines for violation of additional restrictions on parking and moving vehicles, amounting to an estimated $3,000,000");
- 20(R) (referring to "increase[d] prices to consumers" and declines in consumer "standard of living, which will have an adverse impact on local businesses and tax revenue of NYC");
- 20(S) (referring to "increase in transportation expenses for drivers in NYC amounting to several $ billion per year");
- 20(V) (referring to "additional costs of insurers, medical facilities and providers or social services . . . increased transportation costs. . . additional gas, oil and repairs, increased insurance . . . increased parking costs . . . increased insurance costs associated with increased risk").

In fact, almost all of the damages that Petitioner alleges are wholly economic and thus not cognizable in a SEQRA challenge. *See* Pet. ¶¶ 27 (A) ("[t]he loss of Petitioner's valuable professional time caused by transportation delays, at the rate of $400/hour for an estimated 100 hours per year"); (C) ("[i]ncreased transportation costs resulting from delays,

additional gas, oil and repairs, and increased automobile insurance"); (D) ("[i]ncreased parking costs"); (G) ("[i]ncreased insurance costs associated with various increased risks").

Finally, the key theory underlying the Petition—that NYCDOT's allegedly traffic-causing activities are part of an "overall plan" so "that the goal of congestion pricing will be accepted by voters and by the New York State Legislature," thus allowing the City raise "approximately $2 billion per year in additional tolls," Pet. ¶ 16—aside from failing to assert an individualized injury or an injury that lies within the zone of interest of the SEQRA statute, is also speculative and thereby insufficient to establish an "injury in fact." *N.Y. State Ass'n of Nurse Anesthetists*, 2 N.Y.3d at 214; *Rudder*, 93 N.Y.2d at 279; *Rent Stabilization Ass'n of N.Y.C.*, 15 A.D.3d at 194-95.

Petitioner's theory is entirely based on speculation. Petitioner fails to assert that NYCDOT has continued to actively promote congestion pricing since the failure of the congestion pricing initiative in early 2008. *See* Pet. ¶ 7. Indeed, the City's recently released comprehensive planning initiative for New York City does not even mention congestion pricing as a policy goal. *See One New York: The Plan for a Strong and Just City*, excerpts ("Transportation" chapter) attached to the McCamphill Aff. as Exhibit F, full report *available at* http://www.nyc.gov/html/onenyc/downloads/pdf/publications/OneNYC.pdf. And Petitioner's claim that NYCDOT's activities actually promote traffic is contradicted by the evidence in the public record. *See Sustainable Street: 2013 and Beyond*, attached as Exhibit D to the McCamphill Aff. and *available at* http://www.nyc.gov/html/dot/downloads/pdf/2013-dot-sustainable-streets-lowres.pdf, at 105 (discussing recent decreases in traffic). Plaintiff's allegations of a secretive NYCDOT plot stretching through two Mayoral administrations, *see* Pet. ¶ 8, are entirely speculative.

In sum, Petitioner has wholly failed to establish standing to bring his claims. The Petition should accordingly be dismissed.

POINT II

PETITIONER'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

In Article 78 proceedings, CPLR section 217(1) requires a petitioner to commence his or her action "within four months after the determination to be reviewed becomes final and binding upon the petitioner." An administrative action is final, and the running of the statute of limitations is thus triggered, when the decision maker arrives at a "definitive position on the issue that inflicts an actual, concrete injury." *Essex Cnty. v. Zagata*, 672 N.Y.S.2d 281, 284 (1998) (internal citation and quotation marks omitted). Thus, a petitioner seeking review of an agency's discretionary action must commence the proceeding no later than four months from when the action "'has its impact' upon the petitioner who is thereby aggrieved." *Edmead v. McGuire*, 67 N.Y.2d 714, 716 (1986) (citation omitted).

The reason for the short statute of limitations in these proceedings is "the strong policy, vital to the conduct of certain kinds of governmental affairs, that the operation of government not be trammeled by stale litigation and stale determinations." *Solnick v. Whalen*, 49 N.Y.2d 224, 232 (1980) (internal citation and quotation marks omitted).

Any challenge to any of NYCDOT's policies and activities that are referenced by Petitioner has long since been barred by the statute of limitations. Many of these programs are ongoing programs; however, it is undisputable that they all commenced well over four months ago, and Petitioner fails to challenge any particular actions that have occurred within the last four months. The statute of limitations begins to run when "no subsequent events need take place for

the petitioner to be affected by the decision." *Edmead*, 114 A.D.2d at 759. Petitioner has failed to identify any such event within the four months prior to the date of his Petition.

Below is a list of all the NYCDOT policies and activities that Petitioner challenges. Some of these activities have already been subject to environmental review in particular instances.[1] *See* Pet. ¶ 21 (summarizing environmental review documents); *see also Cambridge Owners Corp. v. New York City Dep't of Transp.*, 118 A.D.3d 634 (1st Dep't 2014) (affirming denial of an Article 78 petition based in part on NYCDOT's "sufficient environmental review of the bike share program"). But regardless of the lack of merit of Petitioners' substantive claims, the Petition must be dismissed under CPLR section 3211(a), because Petitioner's broad, general challenge is time-barred as to all of these NYCDOT activities.

- The "floating parking space" that Petitioner challenges on Eight and Ninth Avenues, Pet. ¶ 15(A), serve to protect bicycle lanes; *see* Exhibit D to the McCamphill Aff. at 84-85; this program was first implemented in **2007** on Ninth Avenue (winning the Institute of Transportation Engineers' Transportation Planning Council's Best Program Award in 2008) and was expanded to First Avenue, Second Avenue, Eighth Avenue, and other streets **by 2013**. *Id.*
- The expansion of bicycling lanes that Petitioner challenges, Pet. ¶ 15(B), was a goal of 2007's PlaNYC, *see* excerpts from *PlanNYC: A Greener, Greater New York*, attached to the McCamphill Aff. as Exhibit B; *see also* Pet. ¶ 4, and also began in **2007**; NYCDOT added over 350 miles of new and enhanced bicycle routes **from 2007 to 2013**. Exhibit D to the McCamphill Aff. at 83; *see also Seniors for Safety v. New York City Dep't of Transp.*, 101 A.D.3d 1029, 1032-33 (2d Dep't 2012) ("[T]he statute of limitations for SEQRA . . . challenges was triggered, at the latest, in June 2010 when the

[1] And some of these activities, in some or all instances, are exempt from environmental review, either as "installation of traffic control devices on existing streets, roads and highway," 6 NYCRR § 617.5(c)(16); as "routine or continuing agency administration and management," *id.* § 617.5(c)(20); or as "preliminary planning and budgetary processes necessary to the formulation of a proposal for action" which "do not commit the agency to commence, engage in or approve such action," *id.* § 617.5(c)(21).

bicycle path was installed, since the NYCDOT had by then committed itself to a definite course of future decisions.").

- NYCDOT's pedestrian plaza program, Pet. ¶ 15(C), was launched in **2008**. *See* NYCDOT, *Sustainable Street 2009 Progress Report*, attached as Exhibit G to the McCamphill Aff., at 26, *available at http://www.nyc.gov/html/dot/downloads/pdf/ss09_update_lowres.pdf.*
- The addition of landscaped safety refuge islands to Eighth and Ninth Avenues, Pet. ¶15(D), were subject to environmental review which was completed several years ago, as Petitioner himself acknowledges, *see* Pet. ¶ 21(A) (referencing "Type II Memo filings for redesign for five Manhattan avenues filed **between May 2012 and April 2013**" including "8th Avenue complete Street Design 34th Street to Columbus Circle" and "9th Avenue Complete Street Design (West 33rd Street to West 58th Street)."
- The change in speed limit, Pet. ¶ 15(E), enacted via New York City Council legislation, was effective **November 7, 2014**, as the Petition itself states, Pet. ¶ 15(E).
- The installation of 10,000+ bicycling racks, Pet. ¶¶ 15(G)-(H), (M) had been completed by NYCDOT by the time of the **2013** Sustainable Streets update, *see* Exhibit D to the McCamphill Aff. at 85.
- The CitiBike program, *see* Pet. ¶¶ 15(I)-(J), (M) opened to the public in **May 2013**, *see* Exhibit D to the McCamphill Aff. at 93.
- NYCDOT's Red Light Camera program, Petition ¶ 15(K), has been operating since **December 1993.** *See* NYCDOT, "Traffic Signals," *at* http://www.nyc.gov/html/dot/html/infrastructure/signals.shtml (lasted visited May 8, 2015), attached as Exhibit H to the McCamphill Aff.

The only NYCDOT activity that Petitioner cites that is even facially within the statute of limitations is NYCDOT's alleged "January, 2015 [sic]" changing of "the timed lights on various one-way avenues in New York County so that vehicles had to stop every 3-8 blocks and were no longer able to travel at a constant speed without stopping." Pet. ¶ 15(F). However, NYCDOT has had the capacity to change timed lights in New York County—and has been

exercising that capacity—for years. *See, e.g.*, "NYC DOT Announces Expansion of Midtown Congestion Management System, Receives National Transportation Award," June 5, 2012, *at* *http://www.nyc.gov/html/dot/html/pr2012/pr12_25.shtml* (last visited May 8, 2015), attached as Exhibit I to the McCamphill Aff. (explaining, "[o]n avenues, the [advanced solid state traffic controllers] allow engineers adjust signal timing plans, giving them the ability to choose a simultaneous signal progression, where all signals change concurrently, or a traffic signal progression, with which drivers travelling a constant speed encounter green lights as they move along a corridor"). This longstanding implementation of "simultaneous signal progression" appears to be exactly what Petitioner is now belatedly challenging.

In sum, because Petitioner has failed to challenge any final agency determinations that have actually occurred within the four-month statute of limitations for an Article 78 challenge, the Petition is time-barred and must be dismissed.

POINT III

PETITIONER HAS FAILED TO STATE A CLAIM

The Petition must also be dismissed because Petitioner has failed to state a cause of action. "On a motion to dismiss pursuant to CPLR 3211(a)(7), a court is obliged 'to accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory.'" *Mill Fin., LLC v. Gillett*, 122 A.D.3d 98, 103 (1st Dep't 2014) (internal citations omitted). As the First Department has explained, "[w]hile it is true that in considering a motion to dismiss brought pursuant to CPLR 3211(a)(7), the court must presume the facts pleaded to be true and must accord them every favorable inference, it is also axiomatic that factual allegations

that consist of bare legal conclusions are not entitled to such consideration." *Hispanic Aids Forum v. Estate of Bruno*, 16 A.D.3d 294, 295 (1st Dep't 2005) (internal citations omitted); *see also Gamiel v. Curtis & Riess-Curtis, P.C.*, 16 A.D.3d 140 (1st Dep't 2005). Therefore, Petitioner's facts must fit within a cognizable legal theory to survive a section 3211(a)(7) motion to dismiss, and Petitioner's legal conclusions are not assumed and need not be accepted as true simply because Petitioner has raised these claims.

Petitioner's legal theory underpinning his Petition—that a plethora of seemingly unrelated NYCDOT activities undertaken throughout the last two Mayoral administrations are really part of a related and coordinated plan to increase traffic, *see* Pet. ¶¶ 10A, 15-17, and thereby must be analyzed in a unified environmental review, *see* Pet. ¶¶ 21, 24, 28—is directly contrary to controlling New York law; thus Petitioner has failed to state a cause of action, and the Petition must be dismissed.

Although Petitioner's claims are not clear, he apparently challenges NYCDOT's environmental review of the activities he references as an improper segmentation. Segmentation is the division of the environmental review of an action such that various activities or stages are addressed as though they were independent, unrelated activities. 6 NYCRR § 617.2(ag). SEQRA's regulations instruct that when conducting environmental review of an agency action, the agency " must consider reasonably related long-term, short-term and cumulative effects, including other 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." 6 NYCRR § 617.7(c)(2).

Petitioner disregards controlling precedent which makes clear that when an agency action is independent of other activities—even if those activities are somehow related

geographically or through a general policy—a separate environmental review of the action does not constitute improper segmented review. In declining to require cumulative review of development projects in a localized area, the New York Court of Appeals held that "the existence of a broadly conceived policy regarding land use in a particular locale is simply not a sufficiently unifying ground for tying otherwise unrelated projects together and requiring them to be considered in tandem as 'related' proposals." *Long Island Pine Barrens Soc'y v. Planning Bd. of the Town of Brookhaven*, 80 N.Y.2d 500, 513 (1992).

Long Island Pine Barrens Society has been widely followed. *See Saratoga Lake Prot. & Improvement Dist. v. Dep't of Pub. Works of City of Saratoga Springs*, 46 A.D.3d 979, 986 (3d Dep't 2007) (holding that the lower court erred in ruling against respondent "based on the lack of a cumulative impact analysis with regard to other *unrelated projects* in the Saratoga Lake watershed" (emphasis added)); *Forman v. Trs. of State Univ. of N.Y.*, 303 A.D.2d 1019, 1020 (4th Dep't 2003) (denying claim of improper segmentation when the five projects at issue "were planned separately, have unique sources of funding, and are in no way interdependent"); *North Fork Envtl. Council v. Janoski*, 196 A.D.2d 590, 591 (2d Dep't 1993) (where development projects at issue all occur in the same designated Critical Environmental Area but appear otherwise unrelated, segmentation claim fails); *Stewart Park & Reserve Coal. v. N.Y. State Dep't of Transp.*, 157 A.D.2d 1, 11 (3d Dep't 1990), *aff'd*, 77 N.Y.2d 970 (1991) ("[b]eing part of the same over-all master plan . . . is not in and of itself conclusive" for cumulative impact analysis); *cf. Sun Co. v. City of Syracuse Indus. Dev. Agency*, 209 A.D.2d 34, 48 (4th Dep't 1995) (environmental review was improperly segmented when it failed to include review of a component that project developer had described as a "major integral component" of the development plan).

Thus, *assuming arguendo* that the NYCDOT activities that Petitioner identifies *are truly all part of a master plan* to secretly increase congestion and thereby build the impetus for congestion pricing (and they are not), *Petitioner's segmentation claim still fails* as these activities are *otherwise unrelated.* These NYCDOT actions are simply not interdependent or part of a "sufficiently cohesive framework for mandatory cumulative impact review," *Long Island Pine Barrens Soc'y, Inc.*, 80 N.Y.2d at 514, nor has Petitioner alleged as much. Being part of a broad, general agency policy—whether it be NYCDOT's Sustainable Streets or NYCDOT's alleged secret plan to increase traffic to spur congestion pricing—is not enough to require cumulative environmental review under SEQRA case law. For this reason, Petitioner fails to state a cause of action, and his Petition must be dismissed.

CONCLUSION

For the foregoing reasons, Respondent NYCDOT respectfully requests that its cross-motion to dismiss be granted, together with such other and further relief as this Court deems just and proper.

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New York, New York

Respectfully submitted,

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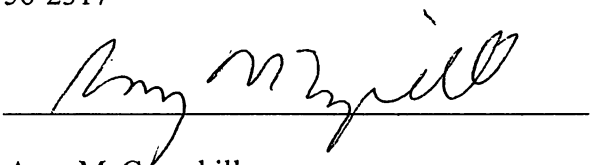
By: 

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