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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF BRONX COMMITTEE FOR  
TOXIC FREE SCHOOLS,

Respondent,

-against-

No. 171

NEW YORK CITY SCHOOL CONSTRUCTION  
AUTHORITY,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
September 11, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Matter of Bronx  
2 Committee for Toxic Free Schools.

3 Counselor, I think you could start. Do you  
4 want any rebuttal time?

5 MS. ZALEON: Yes, two minutes, Your Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes. Sure,  
7 go ahead.

8 MS. ZALEON: Good afternoon, Your Honors.  
9 The Appellate Division applied the incorrect standard  
10 here. The regulations regard - - -

11 CHIEF JUDGE LIPPMAN: Why is it that at the  
12 heart of the SEQRA process and up-front review, why  
13 isn't that important in terms of what you did or  
14 didn't do?

15 MS. ZALEON: Well, it is. But the standard  
16 for a supplemental EIS is different. In the final -  
17 - -

18 CHIEF JUDGE LIPPMAN: Yes, but SEQRA is  
19 strictly followed. I mean, that's what the case law  
20 is in general - - -

21 MS. ZALEON: Well, it's strictly - - -

22 CHIEF JUDGE LIPPMAN: Did you strictly  
23 follow SEQRA here?

24 MS. ZALEON: Well, it's strictly followed.  
25 But here the regulation is a discretionary

1 regulation. So the - - -

2 JUDGE READ: You mean the decision to do an  
3 SEIS is a discretionary - - -

4 MS. ZALEON: The SEIS provision is a  
5 discretionary matter.

6 CHIEF JUDGE LIPPMAN: Yes, but once it said  
7 that you have to do it, after that discretion is  
8 executed - - -

9 MS. ZALEON: Yes. What it says - - -

10 CHIEF JUDGE LIPPMAN: Yes.

11 MS. ZALEON: - - - is that you exercise  
12 this discretion based on whether information in the  
13 final EIS was not - - - did not address an issue.

14 CHIEF JUDGE LIPPMAN: And your argument is  
15 that it did?

16 MS. ZALEON: Yes. Here's what it said.

17 CHIEF JUDGE LIPPMAN: Even though  
18 brownfield is only such a small amount of the  
19 property here?

20 MS. ZALEON: No, it's not a small amount of  
21 the property in the sense that that's where most of  
22 the - - - the Brownfield Cleanup Program is where  
23 most of the contamination is located.

24 CHIEF JUDGE LIPPMAN: Right. But how much  
25 of this property was brownfield - - - was accepted

1 into the Brownfield Program?

2 MS. ZALEON: I don't have the square  
3 footage off - - -

4 CHIEF JUDGE LIPPMAN: But a relatively  
5 small amount, no?

6 MS. ZALEON: It - - - but the - - -

7 JUDGE SMITH: A sixth or a seventh,  
8 something like that?

9 MS. ZALEON: But the issues to be developed  
10 in a long-term management plan, which did deal with  
11 both the brownfield and the non-brownfield areas and  
12 the adjacent area, under the pre-existing public  
13 schools, the matters - - - the plan to address the  
14 contamination was disclosed in the final EIS as being  
15 under the Brownfield Program.

16 JUDGE PIGOTT: I thought this might have  
17 been a timing issue, where you've got the brownfield  
18 findings, and you've got your final EIS and until  
19 these findings are totally within the final EIS,  
20 you're going to need a supplemental. Am I misreading  
21 it?

22 MS. ZALEON: That's not precisely what it  
23 is. What it is, is that as in any final EIS  
24 situation, the project is not being done yet. The  
25 construction project, which is the action reviewed

1 under SEQRA, is being analyzed for the potential  
2 environmental impacts. Soil and groundwater are  
3 identified because they're being addressed under the  
4 Brownfield Program, which includes a site management  
5 plan.

6 But the - - - and the Brownfield documents  
7 are underway at the time that the EIS is being  
8 prepared, to explain how this is going to be done.  
9 And that's why, at page 916 of the record, there's  
10 such a long list of remedial steps that are being  
11 taken. However, you don't know the scope of your  
12 site management activities until the remediation is  
13 done. The remediation is done, of course, after the  
14 project is going to go forward.

15 JUDGE PIGOTT: But if the remediation isn't  
16 competently done - - -

17 MS. ZALEON: Isn't - - - I'm sorry.

18 JUDGE PIGOTT: Isn't competently done, it  
19 does not achieve what you had hoped - - - I mean,  
20 whoever's doing the Brownfield Cleanup leaves  
21 something, leaves lead, doesn't that impact your  
22 final EIS?

23 MS. ZALEON: That would be true if that had  
24 happened in a case. Yes, there can be a situation  
25 where you are doing your remediation and something

1 totally unexpected happens that would affect the  
2 action being reviewed under SEQRA, which the action  
3 would be the construction project. And everybody  
4 would say whoa, hold on a minute. Let's decide  
5 whether we're going to build this project, because  
6 such and such a contaminant that was never found - -  
7 - never expected was found.

8 JUDGE JONES: What about - - - what about  
9 the - - -

10 MS. ZALEON: But that didn't happen here.

11 JUDGE JONES: What about the long-term  
12 monitoring add-on? Can't that create a new need for  
13 a supplemental EIS?

14 MS. ZALEON: It could, if something that  
15 was not anticipated occurred. And that could happen.  
16 But in this case, you can see all of the studies, the  
17 lengthy soil and groundwater sampling here, that led  
18 to the plans, that led to the DEC approval of the  
19 remediation plans, that also were subjected to public  
20 comment - - -

21 JUDGE GRAFFEO: Maybe you can clarify.  
22 Were the long-term site monitoring aspect of this,  
23 was it addressed in the final EIS, or only in the  
24 Brownfield DEC permit?

25 MS. ZALEON: It was addressed in the

1 Brownfield Cleanup Program process. But the FEIS  
2 explained that the Brownfield Cleanup process was  
3 being followed.

4 JUDGE GRAFFEO: Well, how can that - - -  
5 how can long-term monitoring not be part of the site  
6 management plans addressed in the final EIS?

7 MS. ZALEON: Because it does depend on the  
8 conditions existing after the remediation is actually  
9 done. And the EIS - - -

10 JUDGE GRAFFEO: And that doesn't mean you  
11 need a supplemental then?

12 MS. ZALEON: No. Because the remediation  
13 in this case did not develop some information that  
14 would change the project.

15 JUDGE CIPARICK: Well, did it demonstrate  
16 compliance with the Brownfield Cleanup Program?

17 MS. ZALEON: Yes. And in fact - - -

18 JUDGE CIPARICK: How did it demonstrate the  
19 compliance?

20 MS. ZALEON: Well, in fact, what happened  
21 is, there was lengthy discussion and public comment  
22 on not just an outline of the site management plan,  
23 but on the draft of the plan that led to the final  
24 plan approved by DEC. And therefore, in this  
25 litigation, the concept of complying with SEQRA is



1           that - - -

2                         JUDGE SMITH:   - - - complied here but  
3           you're worried about future cases.

4                         MS. ZALEON:   Yes.   Because the Brownfield  
5           Cleanup Program was thoroughly disclosed.  There is  
6           nothing now - - -

7                         JUDGE SMITH:   Okay.  But wasn't - - - I  
8           mean, I guess I'm asking a question Judge Jones was  
9           asking before.  You say something has to happen to  
10          make you do a supplemental EIS.  Didn't something  
11          happen in the sense that you sent your application in  
12          to DEC and they said hey, we're conditioning our  
13          approval on your doing a monitoring?  Why - - - and  
14          your - - - the statute says that when you do an  
15          environmental impact statement you've got to put in  
16          it mitigation measures proposed to minimize the  
17          environmental impact.

18                         MS. ZALEON:   No - - -

19                         JUDGE SMITH:   Why isn't your monitoring a  
20          mitigation measure to minimize the impact?

21                         MS. ZALEON:   Because those are two  
22          different things.  The July 5th, 2006 letter at page  
23          2330 of the record that the Appellate Division was  
24          discussing at that point was from the DEC, and it was  
25          about the Brownfield Program.  It was not about SEQRA

1 at all. What it did - - -

2 JUDGE SMITH: But it was about mitigation  
3 measures to - - -

4 MS. ZALEON: Right. Well, it was - - -

5 JUDGE SMITH: - - - minimize impact.

6 MS. ZALEON: Right. Because what it said  
7 was it discussed a number of the next steps after  
8 this remedial action plan is approved. It discussed  
9 issuing a pre-construction fact sheet. It discussed  
10 developing a site management plan. And the reason it  
11 discussed it is because those are all next steps.  
12 And the site management plan is in the final  
13 engineering report.

14 JUDGE SMITH: So you're saying you don't  
15 have to - - - when you know what your next steps are,  
16 you don't have to put them in - - - or when you  
17 change your plan as to next steps, you don't have to  
18 put them in the impact statement? And if you - - -  
19 it looks to me as though you had - - - to simplify  
20 it, you have five mitigation measures in place.  
21 Somebody said you needed a sixth one. You said okay.  
22 But then you - - - and you fought to the Court of  
23 Appeals over not doing another piece of paper to put  
24 it in your environmental impact statement.

25 MS. ZALEON: The DEC did not have anything

1 to say about SEQRA. And they're discussing a plan  
2 that they know according to their - - -

3 JUDGE SMITH: But they have to say  
4 something about mitigation.

5 MS. ZALEON: But they're - - -

6 JUDGE SMITH: And mitiga - - - and SEQRA  
7 has something to say about mitigation.

8 MS. ZALEON: Right. But they're talking  
9 about something that under their own regulations,  
10 occurs after the mitiga - - - after the remediation  
11 is done and the long-term - - - and the environmental  
12 conditions are assessed at that time.

13 JUDGE SMITH: What is the rule you're  
14 suggesting? Is it that monitoring measures never go  
15 into an impact statement?

16 MS. ZALEON: No. But that a monitoring - -  
17 - but the fact that the Brownfield Program, a  
18 different program, has a site management component,  
19 which is done after the remediation is done, which  
20 is, of course, after - - -

21 JUDGE JONES: But the problem is that the  
22 Brownfield Program only accounted for a small  
23 percentage of this site development.

24 MS. ZALEON: But the measures that are  
25 being addressed and the engineering controls are

1 mostly located in that area.

2 JUDGE READ: Well, they're only required  
3 because of that area, aren't they?

4 MS. ZALEON: Right. And they're mostly  
5 located in that area. Most of the things that you're  
6 interested in about monitoring are in that area,  
7 because that's where - - -

8 CHIEF JUDGE LIPPMAN: Okay, counsel.

9 MS. ZALEON: - - - the - - -

10 CHIEF JUDGE LIPPMAN: Okay. You'll have  
11 your rebuttal.

12 MS. ZALEON: Thank you very much.

13 CHIEF JUDGE LIPPMAN: Thanks.

14 Counsel, why's it so important to have the  
15 supplemental?

16 MR. SILBERT: Well, for a number of  
17 reasons, Your Honor.

18 CHIEF JUDGE LIPPMAN: Does this go to the  
19 heart of the SEQRA process?

20 MR. SILBERT: Absolutely. The - - -

21 CHIEF JUDGE LIPPMAN: Why? Tell us.

22 MR. SILBERT: - - - the environmental  
23 impact statement is the heart of the SEQRA review  
24 process, as this court has previously stated. And  
25 what SEQRA itself expressly provides - - - and this

1 goes to Judge Smith's questions - - - what SEQRA says  
2 is that all of the environmental impacts, including  
3 the long-term effects, have to be set out in an  
4 environmental impact statement. And the lead agency  
5 has to certify that it has mitigated those  
6 environmental effects to the maximum extent possible.

7 JUDGE SMITH: Are we right in thinking that  
8 essentially both of you have been fighting all these  
9 years over whether this goes on a blue piece of paper  
10 or a pink piece of paper?

11 MR. SILBERT: Not exactly, Your Honor. And  
12 I - - -

13 JUDGE SMITH: You don't quarrel  
14 substantively with their plan at this point, do you?

15 MR. SILBERT: We don't. This is a  
16 procedural challenge, Your Honor, as it has to be.

17 JUDGE SMITH: So you're both fighting about  
18 a principle?

19 MR. SILBERT: Well, no. I wouldn't say  
20 that, Your Honor. Because if you say that there's no  
21 remedy required in this case because years after they  
22 completed the SEQRA review process, after we brought  
23 an Article 78 petition, after the Supreme Court  
24 issued an order saying that they had not complied  
25 with SEQRA and that a supplemental EIS is needed,

1 they issued the SMP under a different statutory  
2 program - - - if you say because of that, there's no  
3 remedy needed in this case, what you're basically  
4 saying is years of precedents that require strict  
5 compliance to SEQRA - - -

6 JUDGE SMITH: It sounds to me like you're  
7 fighting over a principle. Isn't that what I said?

8 MR. SILBERT: Well, not to the future  
9 parties, Your Honor, because - - -

10 CHIEF JUDGE LIPPMAN: Are you saying it's a  
11 blow to the SEQRA program? What are you saying?  
12 It's the question I asked at the beginning. Why is  
13 it important?

14 MR. SILBERT: Because if - - - because the  
15 future parties will look at this decision and say  
16 when we do a SEQRA review, we do not need to include  
17 long-term maintenance and monitoring - - -

18 JUDGE PIGOTT: Are you - - -

19 MR. SILBERT: - - - of the engineering  
20 controls in the EIS. Yes, sir?

21 JUDGE PIGOTT: So you're arguing that at  
22 least in your view, what they're doing is saying that  
23 the brownfields issue does not fall under SEQRA?

24 MR. SILBERT: They're say - - - yes, Your  
25 Honor. They're saying that because they chose

1 voluntarily to participate in the BCP program that,  
2 therefore, they don't have to include in the EIS what  
3 SEQRA expressly says has to be in the EIS, which is  
4 the long-term effects of the proposed - - -

5 JUDGE CIPARICK: The SEQRA review moves  
6 independently of the brownfield review and you can't  
7 substitute the brownfield review as an element of the  
8 SEQRA review?

9 MR. SILBERT: Absolutely, Your Honor.

10 JUDGE CIPARICK: That's what - - - that's  
11 your argument.

12 MR. SILBERT: That's what we're saying.  
13 We're saying the whole - - -

14 CHIEF JUDGE LIPPMAN: And in this case,  
15 your argument is also that the brownfield property is  
16 very small in terms of the total site development?

17 MR. SILBERT: The brownfield property is  
18 approximately one acre out of the seven-acre site.

19 JUDGE SMITH: But isn't she right that  
20 that's the polluted acre, that's the one we're  
21 worrying about?

22 JUDGE READ: You wouldn't have a  
23 brownfields - - - it wouldn't be an issue if it  
24 weren't for the polluted area. I mean, you wouldn't  
25 have institutional controls and groundwater

1 monitoring, all these other things, if it weren't for  
2 the polluted area.

3 MR. SILBERT: Well, the brownfield area is  
4 the most polluted area. There's pollution in the  
5 rest of the site as well. But look; even if the BCP  
6 area covered the entire site in this process, I think  
7 Judge Ciparick's point is the one that you should not  
8 lose sight of, which is that - - -

9 JUDGE SMITH: So you would acknowledge that  
10 if it were - - - did cover the whole site, that  
11 wouldn't greatly change the case?

12 MR. SILBERT: That's right. It doesn't  
13 help them that it doesn't cover the whole site.

14 JUDGE GRAFFEO: What's the status of the  
15 parcel now?

16 MR. SILBERT: The school has been up and  
17 running for approximately two years.

18 JUDGE GRAFFEO: Is there still monitoring  
19 going on?

20 MR. SILBERT: There is now monitoring.  
21 Because if you look at the monitoring that they  
22 eventually acknowledged was needed, you'll see  
23 exactly why it's the kind of thing that had to be  
24 included in the environmental impact statement.

25 JUDGE GRAFFEO: So if we agree with you,

1 and we were to order that there has to be a  
2 supplemental, what, practically, occurs now?

3 MR. SILBERT: They would go through a  
4 notice-and-comment rulemaking within the SEQRA  
5 process. But more important than that - - -

6 JUDGE SMITH: And - - -

7 JUDGE GRAFFEO: And what happens to the  
8 school or the land around it?

9 MR. SILBERT: The school continues to  
10 function as-is. But future parties - - -

11 JUDGE SMITH: Isn't it theoretically  
12 possible - - -

13 JUDGE GRAFFEO: So is that a - - - is that  
14 just an advisory opinion by us, then?

15 MR. SILBERT: No, it's not, Your Honor.

16 JUDGE GRAFFEO: And we don't issue those.  
17 So what actually happens if we say there has to be a  
18 supplemental?

19 MR. SILBERT: Two things, Your Honor.  
20 First of all, they engage in the SEQRA SEIS process,  
21 which they have never done. That's not advisory.  
22 It's telling the agency to do something. But the  
23 more - - -

24 JUDGE GRAFFEO: Okay. And what's the  
25 benefit of that? Do they have to put more monitors

1 on more of the acreage, or - - -

2 MR. SILBERT: Well, we are not, and we  
3 really cannot quibble with the substance of their  
4 review. We're quibbling with the - - -

5 CHIEF JUDGE LIPPMAN: What's the practical  
6 effect of it? The judge is asking you.

7 MR. SILBERT: The practical effect - - -  
8 and this is important, because the court has asked it  
9 several times. The practical effect is that future  
10 parties who are doing a SEQRA review for a project  
11 that is also subject to the BCP program understand  
12 that they cannot simply defer consideration of long-  
13 term maintenance and monitoring - - -

14 JUDGE SMITH: Is there any practical effect  
15 on - - -

16 MR. SILBERT: - - - for years.

17 JUDGE SMITH: - - - this project?

18 MR. SILBERT: Well, there is, Your Honor.  
19 But look, they - - -

20 CHIEF JUDGE LIPPMAN: Well, there would  
21 have to be for this not to be an advisory opinion,  
22 right?

23 MR. SILBERT: Well, it can't be an advisory  
24 opinion, Your Honor. The agency - - -

25 CHIEF JUDGE LIPPMAN: Well, what is it

1 that's not advisory - - -

2 MR. SILBERT: - - - the agency would have -

3 - -

4 CHIEF JUDGE LIPPMAN: - - - about it?

5 JUDGE READ: They have to do notice-and-  
6 comment rulemaking.

7 MR. SILBERT: The agency would have to - -  
8 - yes. The agency has to engage in notice-and-  
9 comment rulemaking.

10 CHIEF JUDGE LIPPMAN: It's going to go  
11 through that process. That's why it's not - - - it's  
12 not advisory.

13 MR. SILBERT: It's the public - - -  
14 exactly. The public has the opportunity to comment.

15 JUDGE SMITH: This - - -

16 MR. SILBERT: The agency has to consider  
17 the comments - - - yes.

18 JUDGE SMITH: This may be a ridiculous  
19 suggestion, but isn't it possible that in the notice-  
20 and-comment rulemaking it would actually perform a  
21 useful function, and somebody would make a comment  
22 and somebody would say hey, that's a good comment.  
23 We've been making a big mistake here. Too bad, the  
24 school's been built and up and running for years.

25 MR. SILBERT: Yes, I don't think it's - - -

1 I don't think it's ridiculous at all for long-term  
2 maintenance and monitoring. And you - - - think for  
3 a second if this was your house, and think if you  
4 found - - - you were informed that there was benzene,  
5 cadmium, mercury - - -

6 JUDGE READ: They knew that going in,  
7 though, right?

8 MR. SILBERT: - - - in your - - - they knew  
9 it going in. But think of the members of the  
10 community, Judge Read. If you were told that these  
11 toxic substances are going to remain - - -

12 CHIEF JUDGE LIPPMAN: Yes, but - - -

13 MR. SILBERT: - - - in your house - - -

14 CHIEF JUDGE LIPPMAN: - - - what's the  
15 answer to what Judge Smith is saying to you, that  
16 there could be some change that happens because the  
17 community comes out or somebody comes out with  
18 something that's meaningful.

19 JUDGE GRAFFEO: Could they increase the  
20 monitoring or do some other periodic testing that  
21 they're not doing now?

22 CHIEF JUDGE LIPPMAN: Is that conceivable,  
23 is what we're asking?

24 MR. SILBERT: Absolutely, Your Honor. As  
25 with any notice-and-comment rulemaking, the affected

1 members of the community would have the opportunity  
2 to review the SEIS, submit their comments. The  
3 agency would consider them and respond. We can't say  
4 ultimately what they would do.

5 JUDGE SMITH: So isn't it - - -

6 MR. SILBERT: But notice-and-comment  
7 rulemaking serves a purpose in itself.

8 JUDGE READ: Are you arguing that in every  
9 case where there - - - well, there's always going to  
10 be, I guess, a SEQRA review, if the project is going  
11 up, and if it's a project that's going up that's  
12 involved with brownfields. Are you saying in every  
13 instance or in every case there has to be an SEIS of  
14 the SMP - - -

15 MR. SILBERT: Absolutely - - -

16 JUDGE READ: - - - or just in this case?

17 MR. SILBERT: - - - absolutely not, Your  
18 Honor. What we're saying is in every case where the  
19 agency relies on engineering controls to contain  
20 contaminants that remain at the site, they have to  
21 consider long-term maintenance and monitoring as part  
22 of the SEQRA process. And the way they're supposed  
23 to do it - - -

24 JUDGE READ: In what detail, though? Isn't  
25 that part of the problem that - - -

1 MR. SILBERT: The detail is the standard  
2 this court set out in Jackson and other cases. They  
3 have to take a hard look at it. But in this case,  
4 they didn't take any look during the SEQRA review  
5 process, so they clearly need - - -

6 JUDGE SMITH: Do we - - - I mean, do we, to  
7 decide in your favor, even have to go that far? What  
8 if we decide that in this case it looks to us as  
9 though there's a significant mitigation measure  
10 that's not in the impact statement, so the courts  
11 below were right to say put it in. What's so  
12 unprecedented about the - - - what's so important  
13 about the precedent we've set?

14 MR. SILBERT: Because future parties  
15 understand that when they do the SEQRA review and a  
16 project with engineering controls, they cannot say we  
17 are not going to include in the FEIS, in the  
18 environmental impact statement, any consideration of  
19 long-term maintenance and monitoring.

20 JUDGE SMITH: Well, shouldn't future  
21 parties understand what present parties are already  
22 supposed to understand: if it's important enough,  
23 you put it in there, and if it's not, you don't?

24 MR. SILBERT: Well, Your Honor, they  
25 should, but I fear that they won't. If you reverse

1 in this case, I think future parties would say the  
2 Court of Appeals has given us license to defer any  
3 consideration of such critical components - - -

4 JUDGE SMITH: It sounds to me that both of  
5 you are asking us to make a rule about things that I,  
6 at least, do not even understand what they mean,  
7 which is what long-term - - - the impact of long-term  
8 monitoring on brownfields process and its  
9 relationship to mitigation measures generally.

10 But why shouldn't we just follow the rule  
11 we've got which is, if it's a significant mitigation  
12 measure, put it in the statement, and if it's not - -  
13 - and if you reasonably conclude it's not, you don't  
14 have to put it in?

15 MR. SILBERT: Well, I think that is the  
16 rule you follow, with one caveat, Your Honor, which  
17 is that if the - - - where SEQRA itself expressly  
18 provides that the agency has to take a hard look at  
19 the long-term effects, and where the agency has not  
20 taken any look at all at the long-term maintenance  
21 and monitoring of the engineering controls - - -

22 JUDGE SMITH: Well, it has taken a look.  
23 It just didn't put its look in its impact statement.

24 MR. SILBERT: It didn't do it in the  
25 environmental impact statement, which is what SEQRA

1 covers. And if it does not take any look, then the  
2 agency has to include, in the environmental impact  
3 statement, a consideration of long-term maintenance  
4 and monitoring.

5 JUDGE READ: There's no - - -

6 MR. SILBERT: It's not an onerous burden.

7 JUDGE READ: - - - there's no chicken and  
8 egg problem, in your view, here?

9 MR. SILBERT: Absolutely not, Judge Read.  
10 Because the agency knew, at the time it issued the  
11 draft EIS, what these engineering controls were going  
12 to be. And again, I urge you to take a look at what  
13 the long-term maintenance and monitoring actually  
14 means. Because the sub-slab depressurization system  
15 that the agency relies on - - -

16 JUDGE READ: So they knew - - - they knew  
17 at that point, but they didn't include it?

18 MR. SILBERT: They knew that the SSDS  
19 required routine maintenance. They knew that it's  
20 based on a fan and a suction system that can fail.  
21 They knew that it needs a 24/7 monitoring system.

22 JUDGE JONES: Are you asking us to conclude  
23 that the agency's finding was arbitrary?

24 MR. SILBERT: Yes, Your Honor. We're  
25 asking you to agree with both courts below that when

1 the agency certified its own compliance with SEQRA by  
2 saying that it had mitigated even the long-term  
3 effects to the maximum extent practicable, that was  
4 an arbitrary and capricious decision, because it did  
5 not consider long-term maintenance and monitoring,  
6 and, therefore, it should issue the SEIS to complete  
7 the SEQRA review.

8 JUDGE SMITH: I have a philosophical  
9 question.

10 MR. SILBERT: Yes, Judge Smith.

11 JUDGE SMITH: Isn't it troublesome that  
12 this much energy and all these years of litigation,  
13 all this expense have been spent on whether to file -  
14 - - whether or not they have to file a piece of paper  
15 that no one thinks is going to have any practical  
16 impact on the project?

17 MR. SILBERT: It may seem that way, Judge  
18 Smith. But the answer to the conundrum, again, is  
19 future parties. Because what the - - - if you  
20 reverse in this case, the agencies in the future that  
21 are in this situation are going to say we don't need  
22 to deal with long-term maintenance and monitoring in  
23 SEQRA. We'll get to that years later in the BCP  
24 program. And what SEQRA says is, got to be done now,  
25 at the earliest stage possible.

1 CHIEF JUDGE LIPPMAN: Okay, counsel.

2 MR. SILBERT: Thank you.

3 CHIEF JUDGE LIPPMAN: Thanks.

4 Counselor, rebuttal?

5 MS. ZALEON: Briefly. Judge Smith's point  
6 is right. The rule that the petitioners are looking  
7 for is to say that you always need an SEIS.

8 JUDGE SMITH: And aren't you saying that  
9 you never do?

10 MS. ZALEON: No. What I'm saying is that  
11 there - - - if there is a significantly new thing  
12 that changes the remediation and the project that  
13 wasn't addressed in the SEIS, then you would need - -  
14 - in the final EIS.

15 CHIEF JUDGE LIPPMAN: So what's in the - -  
16 - what's the message that we're sending? Your  
17 adversary is very concerned that if we reverse we're  
18 going to send a terrible message in the future. What  
19 do you think?

20 MS. ZALEON: I think that the - - - what  
21 we're asking the court to do is twofold. To restate  
22 the rule from the Riverkeeper case that if there's a  
23 significant impact that's resulting from the  
24 development of this plan under the DEC's approval for  
25 long-term monitoring that you'd need a supplemental

1 EIS. If there's a new - - -

2 JUDGE SMITH: I mean, I guess I would ask -  
3 - - I keep going back to the statute, which nobody  
4 else seems to want to read. It says you've got to  
5 put in mitigation measures proposed to minimize the  
6 environmental impact. I don't quite understand how  
7 this long-term monitoring doesn't fit within that?

8 MS. ZALEON: Because it doesn't occur until  
9 after the remedi - - - because it's the - - -

10 JUDGE PIGOTT: But, you know, that - - -

11 MS. ZALEON: - - - intersection - - -

12 JUDGE SMITH: It doesn't say anything about  
13 when it occurs.

14 MS. ZALEON: - - - because it's the  
15 intersection between the two programs. And - - -

16 JUDGE READ: It doesn't occur, or you don't  
17 know exactly what it is?

18 MS. ZALEON: Right. And concep - - - and  
19 the Jackson case - - -

20 JUDGE READ: When you say, right, you mean  
21 you don't know - - -

22 MS. ZALEON: You don't know at that time.

23 JUDGE READ: You know you're going to have  
24 to do long-term monitoring, but you don't have - - -

25 MS. ZALEON: We don't have the details.

1 JUDGE READ: Because you haven't done - - -

2 JUDGE SMITH: But isn't that what

3 supplementals are for?

4 JUDGE READ: Isn't that the purpose?

5 MS. ZALEON: In the Jackson case, I think  
6 it's 67 N.Y.2d 422, says that you may not - - - there  
7 may be some details that you don't know.

8 JUDGE PIGOTT: A concern, I think - - -

9 MS. ZALEON: But that does not make  
10 something not a mitigation measure.

11 JUDGE PIGOTT: The concern, I think, is, to  
12 put it in weird terms, is that if you're doing  
13 something that's going to take marsh land, for  
14 example, and you say well, the Army Corps of  
15 Engineers is going to be working on the other side of  
16 the street, so we don't have to look at that, that's  
17 their concern; that you're going to say somebody  
18 else, in this case the Brownfield Program, is taking  
19 care of what we ought to be doing, so we won't do it.  
20 We don't have to do it because they did it. Now, you  
21 would agree, that's not the right way to look at it?

22 MS. ZALEON: Well, that's also not the - -  
23 - that's not a relevant example in the sense that  
24 it's SCA's participation in the brownfields and it's  
25 SCA's participation in SEQRA. It's just that

1           conceptually, we've said all over the FEIS's that  
2           this comes to the Brownfield Program; under the  
3           Brownfield Program system, the site management plan  
4           follows the remediation and goes into the final  
5           engineering report. And that's what that letter  
6           means from the - - -

7                         JUDGE SMITH: You said a few minutes ago,  
8           in answer to Judge Read, that there were - - - that  
9           you couldn't have put it in the EIS because you  
10          didn't know all the details.

11                        MS. ZALEON: Right.

12                        JUDGE SMITH: Isn't that exactly what  
13          supplement statements are for, when there are things  
14          you don't know when you do the EIS, you find out the  
15          details, you supplement it.

16                        MS. ZALEON: But that's not what the  
17          regulations say. The regulations say, if it's a  
18          significant impact not addressed in the FEIS, that  
19          is, if it's a significant impact that involves a  
20          change in the project. We're not going to build  
21          schools, we're going to do something else. Where  
22          there's - - -

23                        JUDGE SMITH: So if at the time you prepare  
24          your EIS there's one particular problem which for  
25          good reason you haven't decided how you're going to

1 deal with yet, and you explain in the EIS that you  
2 don't know - - - this is the problem, and we don't  
3 know how we're going to deal with it, and we're going  
4 to decide; you're saying that you don't, at some  
5 point, have to, when you make a decision, put it out  
6 there for notice and comment?

7 MS. ZALEON: Well, the long-term plan - - -  
8 first of all, the long-term plan in this case did  
9 have notice and comment. And in this par - - -  
10 whatever rule you make in the future - - - just for  
11 this case, it would be superfluous, only because  
12 there's been ample notice and comment on the site  
13 management plan in this case.

14 But in future cases the question is, should  
15 this particular program, out of all the things that  
16 happen subject to SEQRA, be treated differently than  
17 every other thing subject to this SEIS - - -

18 CHIEF JUDGE LIPPMAN: Okay, counsel.

19 MS. ZALEON: - - - regulation?

20 CHIEF JUDGE LIPPMAN: Okay. Thanks,  
21 counsel.

22 MS. ZALEON: Thank you, Your Honor.

23 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Bronx Committee for Toxic Free Schools v. New York City School Construction Authority, No. 171 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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Date: September 16, 2012