STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

WILDLIFE PRESERVATION COALITION OF EASTERN LONG ISLAND, by its president WENDY CHAMBERLIN, ANIMAL WELFARE INSTITUTE, HUNTERS FOR DEER, LLC, LONG ISLAND ORCHESTRATING FOR NATURE, THE EVELYN ALEXANDER WILDLIFE RESCUE CENTER, INC., ISABELLE KANZ, BARBARA McADAM, PATRICK McBRIDE and MICHAEL TESSITORE, Petitioners-Plaintiffs, - against - NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, JOE MARTENS, in his capacity as Commissioner of NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, THE LONG ISLAND FARM BUREAU, THE VILLAGE OF NORTH HAVEN, and JOHN DOES, Respondents-Defendants.	Index No.:

PETITIONERS-PLAINTIFF'S MEMORANDUM OF LAW

YOUNG/SOMMER LLC
Executive Woods
5 Palisades Drive
Albany, New York 12205
Tel (518) 438-9907
Fax (518) 438-9914

Of counsel:
Jeffrey S. Baker, Esq.
Jessica R. Vigars, Esq.
March 6, 2014

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

CASES — PAGE(S)

STATUTES

PRELIMINARY STATEMENT

This is a combined proceeding/action brought pursuant to CPLR Article 78 and CPLR §3001 seeking to annul Deer Damage Permits (DDPs, also known as nuisance permits) issued by Respondent New York State Department of Environmental Conservation (DEC) in 2014 for Eastern Suffolk County as being issued in violation of the State Environmental Quality Review Act (SEQRA), ECL Article 8; DEC's obligations under ECL Articles 3 and 11; and declaring that DEC may not issue any DDPs that are part of a deer culling program that is being promoted and sponsored by Respondent Long Island Farm Bureau (LIFB) and Respondent Village of North Haven without first complying with SEQRA and preparing an environmental assessment and an environmental impact statement.

Beginning in or around July 2013, LIFB in conjunction with the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Wildlife Services Program (hereinafter "USDA-WS"), has been promoting a major and unprecedented program to kill upwards of 5,000 deer in the towns and villages of eastern Long Island. The DEC has been aware of and has cooperated with the LIFB program but has not undertaken any public evaluation of the need for and scale of the program and has not considered the environmental impacts of such a massive culling program in the limited area under consideration.

On Friday, February 28, 2014 a DEC spokesperson announced that 12 DDPs had been issued for the LIFB program and another 6 permit applications were pending.[1] It is expected that many more applications, perhaps hundreds, will be submitted in the near future. Subsequent information indicates that DEC is issuing at least 740 more DDP deer tags than in 2013. Baker Affirmation, dated March 5, 2014 ("Baker Aff."), ¶90. DEC is reviewing and approving the DDP

[1] *Southold Victorious in Court; East End Deer Cull Begins*, Brendan J. O'Reilly, Dan's Papers (Feb. 28, 2014) is attached hereto as **Exhibit "R"** to the Affirmation of Jeffrey S. Baker, Esq., dated March 5, 2014 ("Baker Aff.").

applications without considering the overall scale of the LIFB/USDA-WS program or establishing a limit on the number of permits that will be issued. DEC is proceeding in issuing the permits without complying with SEQRA.

Petitioners strongly believe that DEC and LIFB have significantly overestimated the current deer population in the area and overstated the amount of damage to agricultural resources to justify the program and have ignored the available empirical data demonstrating a far lower deer population in eastern Suffolk County.

DEC's approval of DDPs not only contravenes SEQRA but is also arbitrary and capricious and violates ECL §11-0521 in that the issuance of DDPs is inconsistent with DEC's own management plan for white-tailed deer and guidelines. DEC, as a state agency, is also required to comply with SEQRA. DEC has illegally and arbitrarily and capriciously failed to conduct a SEQRA analysis or an environmental assessment to determine the environmental impact before issuing DDPs for a large-scale, comprehensive cull of white-tailed deer planned and implemented by LIFB and USDA-WS. This large-scale cull is a significant increase over any cull conducted in New York State, Suffolk County or in eastern Suffolk County.

This action is necessary to preserve the status quo and to require DEC, as steward of the wildlife in the state, to undertake the mandatory environmental review of the impacts of the deer cull before it authorizes an action which will have a significant adverse environmental impact by reducing local deer populations below a sustainable level and in a manner that will preclude the use and enjoyment of the deer resource by others on eastern Long Island, including hunters and people who enjoy wildlife. This proceeding seeks to enjoin Respondents from issuing DDPs to any applicant in or for any property in Suffolk County, to suspend any DDPs issued to applicants in or for any properties located in Suffolk County, and to enjoin Respondents from taking any

action in furtherance of the proposed large-scale deer cull until DEC complies with SEQRA by preparing an Environmental Assessment Form and determining whether an environmental impact statement ("EIS") is required.

STATEMENT OF FACTS

The relevant facts for this action are set forth in the accompanying Affirmation of Jeffrey S. Baker, Esq. and the Affidavits of Laura Simon, Wendy Chamberlin, Marilyn Flynn, Barbara McAdam, and Michael Tessitore.

ARGUMENT

POINT I

THE DEC HAS ACTED CONTRARY TO ITS LEGISLATIVE MANDATE AND ITS OWN ADOPTED MANAGEMENT PLANS AND GUIDANCE BY APPROVING THE LARGE-SCALE CULL IN SUFFOLK COUNTY.

The State of New York owns all of the wildlife in the state, except those legally acquired and held in private ownership. ECL §11-0105. The DEC is charged with the management and propagation of the state's wildlife resources and is required to develop programs to that end, which consider a variety of factors, including "the compatibility of production and harvesting of fish and wildlife crops with other necessary or desirable land uses". ECL §11-0303.

In New York State, Deer Damage Permits ("DDPs" or "Nuisance Permits") are used as a means of deer management outside of normal hunting permits (Deer Management Permits or DMPs) which are the primary means of population control. These permits are authorized pursuant to ECL § 11-0521 and are issued at DEC's discretion. ECL § 1-0521 states in relevant part:

> § 11-0521. Destructive wildlife; taking pursuant to permit.
> 1. The department may direct any environmental conservation officer, or issue a permit to any person, to take any wildlife at any time whenever it becomes a nuisance, destructive to

> public or private property or a threat to public health or welfare . . . Wildlife so taken shall be disposed of as the department may direct...

As demonstrated below, DEC has violated ECL Articles 3 and 11 by failing to evaluate and plan for the deer management issues in eastern Suffolk County, by failing to consider the cumulative impact of DDPs as part of a comprehensive deer cull in issuing DDPs, and by failing to follow its own guidelines and the New York State Deer Management Plan in issuing DDPs.

A. DEC is Obligated to Evaluate and Manage the White-tailed Deer Population for the Specific Region of Eastern Suffolk County and Consider the Cumulative Impacts of Issuing DDPs for a Comprehensive Large-Scale Deer Cull.

DEC is responsible for the care, protection and management of all wildlife within the state. *See* ECL §§11-0105, 11-0107, 11-0303. Despite this, in eastern Suffolk County, the LIFB and USDA-WS have drafted and implemented a comprehensive deer management plan that covers private and public lands in rural and urban/suburban areas and identified target number of deer to kill and methods to be implemented. *See* Baker Aff., at ¶43-70, Ex. H, *July 2013 letter*, Ex. J, *January 2014 letter*, Ex. L, *Cooperative Service Agreement.*

DEC is obligated to develop and consider programs both on a state-wide basis and a region-specific basis. DEC, through its commissioner, has the express power to "[c]oordinate and develop policies, planning and programs related to the environment of the state and *regions* thereof." ECL §3-0301 (1)(a) (emphasis added). Further, DEC is authorized to "[p]rovide for the propagation, protection, *and management* of fish and other aquatic life and wildlife and the preservation of endangered species." ECL §3-0301 (1)(c) (emphasis added). "This statute plainly gives authority to DEC to provide a voice for regional and statewide consideration of environmental goals." *See* ECL §3-0301, Philip Weinberg, *Practice Commentaries*. Thus, DEC is authorized to plan for management of wildlife species, such as the white-tailed deer, on both a

state-wide basis and region-specific basis, namely the management of white-tailed deer in Suffolk County, or in eastern Suffolk County, or on Long Island. Here, because DEC considers deer management on eastern Long Island to be a serious issue, DEC should be obligated to exercise this authority and develop a management plan for white-tailed deer in Suffolk County. *See* Baker Aff., ¶79, Ex. O, *Batcheller letter.*

DEC has divided up New York State into various regions and wildlife management units (WMUs) for administration on a regional basis. DEC – Region 1 covers all of Long Island, namely Nassau and Suffolk County. *See* Baker Aff., at ¶13-18. In addition, WUMs are areas defined "for the purpose of wildlife hunting and trapping seasons *and management programs*." 6 NYCRR §4.1 (a) (emphasis added). WMU 1C expressly covers all of Suffolk County. 6 NYCRR §4.1 (a)(2). Based on its existing administrative structure, DEC could easily collect data and plan for the management of white-tailed deer in DEC – Region 1 (Long Island) or in WMU 1C (Suffolk County).

Further, DEC is expressly granted the power to "[p]romote and coordinate management of water, land, fish, wildlife and air resources to assure their protection, [enhancement], provision, allocation, and balanced utilization consistent with the environmental policy of the state and *take into account the cumulative impact upon all of such resources in making any determination in connection with any* license, order, *permit*, certification or other similar action or promulgating any rule or regulation, standard or criterion." ECL §3-0301 (1)(b) (emphasis added). Thus, DEC should take into account the cumulative impact of issuing a DDP.

Here, DEC is well aware of the large-scale culls in place for eastern Suffolk County. *See* Baker Aff., at ¶81, 83, 91. Notably, the current cull programs range anywhere from 1,000-5,000 in 2014 and 9,000 deer over several years; these culls are larger than any single previous cull in

eastern Suffolk County. *See* Baker Aff., at ¶44, 53-56, 59-61. Although DEC considers deer management on eastern Long Island to be "quite serious," DEC does not have an accurate population estimate of the deer in Suffolk County and has not studied or evaluated the environmental impact of the planned culls. *See* Baker Aff., at ¶71, 78, 79, 80, Ex. O, *Batcheller letter*. Regardless, DEC is issuing DDPs for the large-scale cull on an individual basis and without considering the cumulative impact of the DDPs. *See* Baker Aff., at ¶81, 82, 85, 90, 91. DEC is also issuing DDPs without any type of cap or limitation on the number of DDPs or tags that are issued. *See* Baker Aff., at ¶86-89, 94-97. In addition, DEC is issuing DDPs without an accurate estimate of the deer population in Suffolk County. *See* Affidavit of Laura Simon ("Simon Aff."), at ¶11, 12, 15, 19; Baker Aff., at ¶11, 104. In issuing these permits, DEC cannot evaluate the applications in a vacuum and in a haphazard post-hoc manner when, clearly, the permit applications are part of a grand deer cull program. Instead, DEC must consider the permit applications in light of the large-scale cull program by LIFB and USDA-WS and assess the cumulative impact of the permits (and the program) on the environment of eastern Suffolk County.

Based on the foregoing, DEC must evaluate the population of white-tailed deer in eastern Suffolk County, appropriate management methods and the cumulative impact of a large-scale cull, and draft a management plan for white-tailed deer in Suffolk County (or in eastern Suffolk County, or the entirety of Long Island). *See* Simon Aff., at 11-13, 15-18, 20-34. DEC has violated ECL Article 3, evaded its obligations, improperly delegated its authority to LIFB and USDA-WS and acted arbitrarily and capriciously by failing to evaluate and plan for the management of white-tailed deer in eastern Suffolk County and by failing to consider the DDP applications as part of the large-scale cull and the cumulative impact. *See* Baker Aff., at ¶71, 79-

98, 101, 103. As a result of DEC's failures and violations of ECL Article 3, all DDPs issued in 2014 in the Towns of Shelter Island, Southampton, Southold, East Hampton, Riverhead and Brookhaven, and the Village of North Haven must be annulled.

B. DEC acted arbitrarily and capriciously and in violation of ECL § 11-0521 by Issuing DDPs in Violation of its Guidelines and the New York Deer Management Plan.

As noted above, DEC is charged with the management and propagation of the state's wildlife resources and is required to develop programs to that end. ECL §11-0303. Deer management is implemented through various programs and permits, including through the use of DDPs. *See* ECL § 11-0521. DDPs are required for any cull or taking of so-called "nuisance animals."

DEC has adopted specific guidance documents for issuing DDPs. *See* Baker Aff., Ex. B, *Guidelines for Handling Deer Damage Complaints and Issuing Deer Kill Permits*, *Deer Damage Mitigation – Decision Making Flowchart* and Ex. C *Guidelines for Responsible Nuisance Wildlife Management*. Those guidelines specifically provide that DEC personnel must "[d]etermine whether damage is real or perceived" and "[b]e cautious about misidentifying damage from verbal reports." Baker Aff., Ex. C, *Guidelines for Responsible Nuisance Wildlife Management*, at p. 1. DEC is proceeding with the large-scale deer cull and issuing DDPs without following its own guidelines for issuing such permits and without considering whether the applications are based upon repeat complaints, without conducting field visits, without determining the extent of the damage, and without attempting to resolve the damage issues by alternative methods. *See* Baker Aff., at ¶25, 31, 32, 85-93, 100-103, Ex. B, *Guidelines for Handling Deer Damage Complaints and Issuing Deer Kill Permits*. DEC is obligated to consider all of these factors in issuing each DDP, regardless of whether it is a historic DDP (a permit issued to an applicant in prior years) or a new applicant. In addition, DEC is obligated to attempt

to resolve the damage by alternative methods. *See* Baker Aff., at ¶25. As the comprehensive cull by LIFB/USDA-WS is proceeding and both new and historic DDPs have been issued, there is absolutely no evidence DEC has compiled with these guidelines before issuing the 2014 DDPs in eastern Suffolk County. *See* Baker Aff., at ¶40, 90, 91.

Petitioners-Plaintiffs are still awaiting a response to their FOIL requests. *See* Baker Aff., at ¶36, 39, 90. In the meantime DEC has presented some figures demonstrating that it has increased the number of DDP deer tags by 740 tags over the amount issued in 2013.[2] *See* Baker Aff., at ¶90. DEC has not identified how many of the new permits allow the use of bait to attract deer nor has DEC considered the increased killing efficiency of the deer in the 2014 program. *See* Baker Aff., at ¶92. DEC has stated that of the 1869 DDP tags issued in 2013, approximately 660 resulted in killed deer. *See* Baker Aff., at ¶90. DEC has not considered the likelihood that this year's kill will be greatly more efficient due to the use of professional sharpshooters and bait. *See* Baker Aff., at ¶93. In addition, based on the guidelines and DEC guidance, DDPs are clearly intended for specific identified nuisance and damage problems and were never intended to be issued in large numbers to cover a large geographical area. *See* Baker Aff., at ¶24, 25, Ex. B, *Guidelines for Handling Deer Damage Complaints and Issuing Deer Kill Permits, Deer Damage Mitigation – Decision Making Flowchart* and Ex. C, *Guidelines for Responsible Nuisance Wildlife Management.* DEC's issuance of DDPs as part of a comprehensive large-scale cull is contrary to their purpose and historical use. Use of the DDPs by LIFB/USDA-WS in a large-scale comprehensive cull in eastern Suffolk County is a novel use of DDPs and, because DDPs are now being used for this broader program, DEC must evaluate the issuance of DDPs cumulatively and in regard to the larger program they are a part of.

[2] Based upon Petitioners-Plaintiffs' review of the same data, it appears that 985 DDP Deer Tags have been issued to USDA-WS for Suffolk County in 2014, Baker Aff ¶91.

In addition, DEC is issuing DDPs for the LIFB/USDA-WS large-scale cull without a reliable estimate of the current deer population in eastern Long Island. Although an estimate of 30,000 deer is attributed to DEC, this figure is wholly unsupported and is not based on any known surveys or studies. *See* Simon Aff., at ¶11, 15. A reliable current population estimate is critical. Without a credible population estimate, DEC's issuance of DDPs for a cull is reckless and the impacts of the cull are entirely uncertain. *See* Simon Aff., at ¶12. Contrary to representations by DEC and LIFB/USDA-WS, the evidence suggests that the population of deer in eastern Long Island is far less than 30,000 and that eastern Long Island can support a carrying capacity above an arbitrary evaluation of 10-15 deer per square mile. *See* Simon Aff., at ¶¶15-19. DEC's haphazard issuance of DDPs without a reliable population estimate and by relying upon a "one-size-fits-all" carrying capacity is arbitrary and capricious and without support.

Finally, the DEC Guidelines provide that DDPs are issued only as a last resort after alternative non-lethal methods have been employed and are determined to be unsuccessful. *See* Baker Aff., ¶25, Ex. B, *Guidelines for Handling Deer Damage Complaints and Issuing Deer Kill Permits*, at p. 4-5, and *Deer Damage Mitigation – Decision Making Flowchart*. Further, DDPs have a very limited purpose, specifically, "[t]o reduce damage problems on individual properties, WHILE damage is occurring." *See* Baker Aff., at ¶24. Thus, pursuant to DEC's own guidelines and representations, an applicant must demonstrate that alternative non-lethal methods have been employed and were unsuccessful and that deer damage is occurring at the time of the application. It is unclear whether the applicants have made this showing for applications processed and approved in 2014 and for the LIFB/USDA-WS cull. Nor is it clear whether the DDPs issued by DEC in 2014 are constrained to the limited purpose of reducing damage while damage is occurring. Given that DEC is currently issuing DDPs in February 2014 – during the winter

season when crops are not yet planted – deer damage cannot be occurring currently and, thus, DDPs are being issued beyond their intended scope and purpose. *See* Baker Aff., at ¶91-92. Petitioner-Plaintiffs have attempted to seek information on the permitting process and historic DDPs, to no avail. *See* Baker Aff., at ¶39, Ex. F, *FOIL Requests and Acknowledgments*.

Based on the foregoing, DEC's issuance of DDPs in 2014 for large-scale deer culls in Suffolk County is arbitrary and capricious and all DDPs issued in Suffolk County in 2014 must be annulled, or otherwise declared invalid.

POINT II

DEC HAS VIOLATED SEQRA BY FAILING TO COMPLY WITH SEQRA'S PROCEDURAL REQUIREMENTS AND FAILING TO TAKE A HARD LOOK AT THE LIKELY ENVIRONMENTAL IMPACTS OF SUPPORTING THE LIFB PROGRAM.

The New York State Environmental Quality Review Act (SEQRA), directs all state and local agencies to act as a steward of the environment and that, in their actions, "due consideration is given to preventing environmental damage". *See* ECL §8-0103 (9).

Implementation of SEQRA is governed by the New York State Department of Environmental Conservation's SEQRA regulations which are applicable to all agencies. 6 NYCRR § 617.3(a) provides:

> No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQR. A project sponsor may not commence any physical alteration related to an action until the provisions of SEQR have been complied with. The only exception to this is provided under paragraphs 617.5(c)(18), (21) and (28) of this Part.

Agencies must comply with both procedural and substantive requirements of SEQRA. *See Matter of East End Prop. Co. #1, LLC v. Kessel*, 46 A.D.3d 817, 820 (2d Dept 2007), *lv denied* 10 N.Y.3d 926 (2008). Under SEQRA, "agencies" include any state or local agency. *See* 6 NYCRR § 617.2 (c).

The SEQRA regulations also divide "actions" which are potentially subject to SEQRA into three types: Type I, Type II, and Unlisted Actions. Type I actions are major actions with a legal presumption that they are more likely to have a significant impact on the environment and thus require the preparation of an environmental impact statement. Type II actions are those actions which individually or cumulatively are so small that they have been determined, as a matter of law as to not have the potential for a significant impact on the environment and are exempt from jurisdiction under SEQRA. Unlisted Actions are all actions that are neither Type I nor Type II.

An agency "must undertake an initial review to '[d]etermine whether the action is subject to SEQRA'" and conduct an assessment of whether the action is a Type I or unlisted action, or a Type II action. *Matter of London v. Art Commn. of City of N.Y.*, 190 A.D.2d 557, 559 (1st Dept 1993), *lv denied* 82 N.Y.2d 652 (1993); *see* 6 NYCRR § 617.6 (a). "'In view of the fact that SEQRA entrusts some initial classifications of Type II actions to agencies, it is imperative this trust not be taken lightly and that the reason for the classification be documented.'" *Matter of London v. Art Commn. of City of N.Y.*, 190 A.D.2d at 559, *quoting Town of Bedford v. White*, 155 Misc.2d 68, 72 (Sup. Ct. Westchester County 1992), *aff'd* 204 A.D.2d 557 (2d Dept 1994). "An agency's SEQRA decision which...is unsupported by empirical or experimental data, scientific authority or other explanatory basis, is unacceptable." *Town of Bedford v. White*, 155 Misc.2d at 72.

The large-scale cull proposed (and currently being implemented) by LIFB and USDA-WS is the largest cull conducted in a concentrated area in New York State. *See* Baker Aff., at ¶53-55, 59, 69, 71. The large-scale cull will take a minimum of 1,000 deer in 2014 and up to 9,000 deer in a multi-year cull. *See* Baker Aff., ¶61, Ex. H, *July 2013 Letter*, Ex. J, *January 2014*

Letter, Ex. L, *Cooperative Service Agreement*. Quite frankly, the limits of the large-scale cull (particularly the portions proposed and implemented by LIFB and/or USDA-WS) are unknown and, presumably, no limits in number of deer or length of cull are in place. In fact, the executed Cooperative Service Agreement between LIFB and USDA-WS does not identify a target number of deer to kill, and no apparent limits are agreed-to. *See* Baker Aff., at ¶67-68, Ex. L, *Cooperative Service Agreement*. Further, the Cooperative Service Agreement sets out that the cull will have far-reaching effects and extend to private lands, agricultural lands, and public lands in both rural and suburban/urban areas in eastern Suffolk County. *See* Baker Aff., at ¶3-64, Ex. L, *Cooperative Service Agreement*, at Attachment A, p. 9-10, Ex. H, *July 2013 Letter*, at 4. The large-scale cull has an estimated cost of $200,000. *See* Baker Aff., Ex. L, *Cooperative Service Agreement*, at Attachment B. Clearly, the large-scale cull proposed by LIFB and/or USDA-WS is a significant project aimed to kill a significant number of white-tailed deer in a concentrated area.

The deer management issues in eastern Suffolk County are well recognized by DEC. *See* Baker Aff., at ¶79-83. DEC has stated: "[w]e consider the deer management problem on the east end of Long Island to be quite serious." *See* Baker Aff., Ex. O, *Batcheller letter*. At the present, DEC is participating in the large-scale deer cull by LIFB and/or USDA-WS by issuing DDPs. *See* Baker Aff., Ex. S, *Murray Article*, Ex. R, *O'Reilly Article*. In addition, DEC has represented that its involvement in the large-scale cull is greater than simply issuing permits, stating "[o]ur staff on Long Island have been working very closely with officials from the east end to develop a comprehensive program tailored to meet the various needs of each municipality and to provide immediate relief relating to the damage they are experiencing...action is needed to provide greater and more immediate relief and a culling operation appears to be the most effective and

safe way of doing this." *See* Baker Aff., Ex. O, *Batcheller letter*. Quite notably, in the February 19, 2014 letter, DEC notes that "greater and more immediate relief" is needed, thus indicating that the instant large-scale cull is greater than previous culls in prior years. *See* Baker Aff., Ex. O, *Batcheller letter*.

It cannot be reasonably argued that the large-scale deer cull constitutes a Type II action under SEQRA. The Project does not fit into any of the articulated Type II actions in the SEQRA regulations. *See* 6 NYCRR § 617.5 (c)(1)-(37). Further, it is illogical that a problem that considered "quite serious" by DEC would result in a solution that constitutes a "minor action." *See* Baker Aff., Ex. O, *Batcheller letter*, Ex. E, *Declaratory Ruling*.

While, presumably, DEC will argue that the issuance of DDPs is a minor action that falls within the ambit of Type II actions, DEC has not evaluated a cull of the magnitude currently proposed and underway by LIFB and/or USDA-WS, nor has DEC evaluated a cull of this magnitude in a concentrated area. *See* Baker Aff., at ¶69, 71, 80, 85, 101-103. Presumably, the only time DEC has evaluated issuance of DDPs was in 1980 when it prepared an EIS.[3] *See* Baker Aff., at ¶35-38. Almost by definition, the 1980 EIS is woefully insufficient as it is 34 years out-of-date, the data and/or wildlife population count is stale, and the EIS cannot possibly reflect the current environmental impact that would result for a deer cull, of any size, in any portion of New York State. It cannot be reasonably argued that a 34-year old EIS projected and evaluated a cull of this size in a portion of Suffolk County. Even the DEC admits that the deer population has fluctuated in distribution and density throughout the 20th century, access to land for hunting has changed over the last 20 years, and significant changes have occurred in the

[3] The terms and analysis of the 1980 EIS are unknown as the 1980 EIS is not available on-line and has not been provided pursuant to Plaintiffs-Petitioners' FOIL request. It is possible that the 1980 EIS is no longer in existence. *See* Baker Aff., at ¶36-38. If this is the case, it is impossible to determine whether the current large-scale deer cull falls within the ambit of the 1980 EIS.

permit system and in the number of hunters in New York State. *See* Baker Aff., Ex. A, *New York Deer Management Plan*, at 11, 18. If, in fact, the 1980 EIS cannot be produced for review or is no longer in existence, it cannot serve as the basis to allow DEC to avoid any SEQRA compliance for its deer management practices and thus a new EIS must be drafted.

Given the age of the 1980 EIS, even if it can be produced, given the vast changes to our knowledge about deer biology, ecology, and management over 34 years, SEQRA requires that a new EIS be drafted. At a minimum a supplemental EIS is required to address the changed environment and deer population since 1980 and to evaluate the comprehensive large-scale deer cull and its cumulative effect in eastern Suffolk County. *See Matter of Doremus v. Town of Oyster Bay*, 274 A.D.2d 390, 393-394 (2d Dept 2000) (an EIS that was more than 10 years old did not sufficiently address potential environmental impacts, particularly those that had changed since the EIS was first drafted and a supplemental EIS was required); *Matter of Riverso v. Rockland County Solid Waste Mgt. Auth.*, 96 A.D.3d 764, 765 (2d Dept 2012) ("the passage of more than 10 years since that investigation has been conducted necessitates further review under SEQRA to ensure that no new environmental concerns exist").

For similar reasons, it cannot be argued that the large-scale deer cull constitute a "minor" or Type II action pursuant to the SEQRA regulations which govern actions directly undertaken by DEC. 6 NYCRR § 618.2 (d)(5) provides some of the Type II actions for DEC activities and provides:

> "[S]ite specific and individual fish and wildlife activities shall be considered 'minor' if they do not involve significant departures from established and accepted practices and if such actions are described in and are a part of general fish and wildlife management programs for which an EIS has been prepared: fish and wildlife habitat improvement, planting of native or naturalized fish and wildlife, harvesting or thinning of fish or wildlife surpluses, setting of hunting, trapping and fishing seasons"

First, the large-scale deer cull is not site specific as it is not limited to one particular site and, instead, encompasses rural and suburban/urban lands and private and public lands in the Towns of Shelter Island, Southampton, Southold, East Hampton, Riverhead and Brookhaven and the Village of North Haven. *See* Baker Aff., Ex. L, *Cooperative Service Agreement*, at 1, at Attachment A, p. 9, Ex. M, *Quinn Article*. In addition, it is not an "individual" action as hundreds of permits and tags will be issued. *See* Baker Aff., at ¶90-91. Collectively, DEC is issuing 740 more deer tags under DDPs in 2014 than it did in 2013, representing a nearly 40% increase in the total permitted take. *See* Baker Aff., at ¶90.Informal data from DEC indicates that as many as 985 tags are being issued in Suffolk County in 2014 for use by USDA-WS. *See* Baker Aff., at ¶91. Considering the increased lethality of the LIFB program that is clearly a significant increase. *See* Baker Aff., at ¶45, 65, 92. Further, it is impossible to ascertain whether the current deer cull program falls within the ambit of the 1980 EIS, as the 1980 EIS is not available for review and is, possibly, no longer in existence. *See* Baker Aff., at ¶35-37. Finally, the current deer cull program does not constitute harvesting or thinning of deer surpluses as the current deer population in eastern Suffolk County is vastly overestimated and an accurate count of deer has not been compiled; thus, it is unclear whether a surplus of deer actually exists in eastern Suffolk County. *See* Baker Aff., at ¶103-107; Simon., at ¶11-13, 15, 19. In addition, because there is no accurate count of deer in eastern Suffolk County, the large-scale cull has the potential to dramatically reduce the population of deer in eastern Suffolk County. *See* Simon Aff., at ¶12.

DEC cannot view the permits individually and in isolation so as to avoid a substantive SEQRA review. To do so would constitute an illegal segmentation of the action to avoid preparing an environmental impact statement. An agency is prohibited from segmenting its

SEQRA review and must review the entirety of a planned action or program. *See* 6 NYCRR §617.2 (ag); 6 NYCRR §617.3 (g). "It is clear that segmentation, which is the dividing for environmental review of an action in such a way that the various segments are addressed as though they were independent and unrelated activities, is contrary to the intent of SEQRA and is disfavored." *Matter of Concerned Citizens for Envt. v. Zagata*, 243 A.D.2d 20, 22 (3d Dept 1998), *lv denied* 92 N.Y.2d 808 (1998). The danger of segmentation is that "a project that would have a significant effect on the environment is broken up into two or more component parts that, individually, would not have as significant an environmental impact as the entire project or, indeed, where one or more aspects of the project might fall below the threshold requiring any review." *See Matter of Concerned Citizens for the Envt. v. Zagata*, 243 A.D.2d at 22. The DDPs issued in 2014 for towns and villages in eastern Suffolk County are, clearly, part of a larger comprehensive deer cull program implemented by LIFB and USDA-WS. *See* Baker Aff., Ex. L, *Cooperative Service Agreement*. DEC has admitted as much. *See* Baker Aff., Ex. O, *Batcheller letter*, Ex. R, *O'Reilly Article*. DEC's consideration and approval of DDP applications on an individual basis constitutes segmentation under SEQRA. *See* Baker Aff., at ¶81-83, 85. If DEC were considering the full scope of LIFB's project, it would have to recognize the cumulative impacts of the DDPs and the large-scale deer cull in eastern Suffolk County have not been properly evaluated and an EIS must be prepared. *See Matter of Defreestville Area Neighborhood Assn. v. Town Bd. of Town of N. Greenbush*, 299 A.D.2d 631, 634-635 (3d Dept 2002).

The Project should properly be classified as an Unlisted action under SEQRA. As an Unlisted action, a determination of significance must be made to determine whether an EIS is required. *See* 6 NYCRR § 617.7 (a). The lead agency must consider the Environmental Assessment Form ("EAF") and criteria for determining significance of an action. *See* 6 NYCRR

§617.7 (b); *see also* 6 NYCRR §617.6 (a)(3). One of the criteria that is considered an indicator of significant adverse impacts on the environment is:

> "the removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory wildlife species."

6 NYCRR §617.7 (c)(1)(ii). On its face, the proposed large-scale deer cull constitutes the removal or destruction of large quantities of fauna and a substantial interference with the movement of white-tailed deer. In addition, the proposed large-scale cull may meet a second indicator of significant adverse impact on the environment, namely, as

> "two or more related actions undertaken, funded or approved by an agency, none of which has or would have a significant impact on the environment, but when considered cumulatively would meet one or more of the criteria in this subdivision."

6 NYCRR §617.7 (c)(1)(xii). Clearly, the DEC is issuing DDPs to landowners, municipalities and LIFB. *See* Baker Aff., at ¶90-91. The issuance of these individual permits, while potentially small on an individual basis, have a much larger cumulative effect in the number of deer that will be killed and the scope of land across which the large-scale cull will be conducted. Thus, these actions by DEC, LIFB and USDA-WS and any participating municipalities constitute, when considered cumulatively, a significant adverse impact on the environment. The large-scale cull clearly meets at least one indicator of significant adverse impact on the environment and therefore a full EIS is necessary to determine the full environmental impact of the cull.

Thus, DEC violated SEQRA and its obligation to give the necessary "hard look" and, instead, began issuing DDPs for the large-scale cull without considering the cumulative impacts and without conducting a regional analysis. In addition, DEC's failure to conduct an independent analysis and delegation of its authority to LIFB and USDA-WS for deer management decisions was unreasonable and arbitrary and capricious and constitutes a violation of ECL Article 11 and

SEQRA. The issuance of DDPs for a large-scale cull should be classified as an Unlisted action and the EAF should be prepared and considered in determining the significance of the adverse impact to the environment. DEC has completely shirked its duty to "conduct [its] affairs with an awareness that [it is] the steward[] of the air, water, land, and *living resources*, and that [it has] an obligation to protect the environment for the use and enjoyment of this and all future generations." 6 NYCRR §617.1 (b) (emphasis added). DEC's actions and issuance of DDPs for the large-scale cull in eastern Suffolk County was and is unreasonable, arbitrary and capricious, and in violation of SEQRA. As such, the DDPs issued in 2014 in Suffolk County, including in the Towns of Shelter Island, Southampton, Southold, East Hampton, Riverhead and Brookhaven and the Village of North Haven must be annulled and DEC must be enjoined from issuing additional DDPs for Suffolk County.

POINT III

PETITIONERS HAVE SATISFIED THE ELEMENTS FOR GRANTING A TEMPORARY RETRAINING ORDER AND PRELIMINARY INJUNCTION PENDING THE OUTCOME OF THEIR PETITION TO THIS COURT.

In order to be entitled to a temporary restraining order, Petitioners must show that immediate and irreparable injury, loss or damage will result unless the Respondent-Defendant DEC is restrained from receiving or processing any applications and issuing any DDPs to applicants and/or for properties located in eastern Suffolk County until information on DEC's historic issuance of DDPs furnished to Petitioners-Plaintiffs and until Respondent-Defendant DEC has complied with SEQRA and conducted an environmental assessment on the effects of the proposed large-scale cull in eastern Suffolk County. Further, Respondents-Defendants John Does, or their agents, employees or designees, and North Haven, or its agents, employees or designees, must be enjoined from acting pursuant to or in accordance with DDPs in effect for

2014 before a hearing can be had on the motion for a preliminary injunction and a decision on the motion is rendered by this Court. CPLR §6313(a).

A preliminary injunction is appropriate where the moving party shows (1) a likelihood of success on the merits; (2) the prospect of irreparable injury if the injunction is not granted; and (3) the balance of equities is in the moving party's favor. *See Aetna Ins. Co. v. Capasso*, 75 N.Y. 2d 860 (1990); *Volunteer Fire Ass'n of Tappan, Inc. v. County of Rockland*, 60 A.D.3d 666, 667 (2d Dept 2009). As demonstrated below, Petitioners have met their burden.

A. Because the Respondent-Defendant DEC has Violated SEQRA and ECL Articles 3 and 11, Has Not Taken the Requisite Hard Look or Evaluated the Cumulative Environmental Impacts of the DDPs, Petitioners are Likely to Prevail on the Merits of Their Petition.

As noted above in Points I and II, DEC has erred by failing to evaluate and plan for deer management in eastern Suffolk County and failing to consider the cumulative impact of the DDPs as part of a comprehensive deer cull, and has violated SEQRA by failing to prepare an EAF, failing to make a Determination of Significance and prepare an EIS prior to issuing DDPs in the Towns of Shelter Island, Southampton, Southold, East Hampton, Riverhead and Brookhaven, and the Village of North Haven and improperly segmented its review of the DDPs and large-scale cull. As demonstrated above, issuance of the DDPs and the large-scale cull should be considered cumulatively and classified as an Unlisted action and DEC should make a finding of significance of the Project. The DEC's actions are illegal, arbitrary and capricious and in violation of ECL and SEQRA.

B. The Petitioners Will be Irreparably Injured if an Injunction is not Issued.

If the court does not stay DEC from issuing DDPs and annul the DDPs already issued, the continuation of the large-scale deer cull by LIFB and USDA-WS will result in irreparable harm to the Petitioners and the residents of eastern Suffolk County. Should the deer cull continue

and increase through the issuance of additional DDPs, the killing of deer would result in a permanent change in the landscape, the wildlife present in eastern Suffolk County and the environment of eastern Suffolk County. The Petitioners are concerned that the large-scale cull will adversely impact the environment and character of the community by inappropriately and unreasonably diminishing the population of white-tail deer. *See* Affidavit of Wendy Chamberlin ("Chamberlin Aff."), at ¶13-15, 18, 23; Affidavit of Marilyn Flynn ("Flynn Aff."), at ¶5, 8, 9; Affidavit of Barbara McAdam ("McAdam Aff."), at ¶5-6, 10, 13. In addition, Petitioners are concerned that the large-scale cull will employ inhumane methods to kill the deer and, thus, cause unreasonable stress and harm to the deer to which they have a special connection, causing Petitioners to suffer aesthetic and emotional harm. *See* Chamberlin Aff., at ¶15, 17, 22, 23; Flynn Aff., at ¶8; McAdam Aff., at ¶13. Petitioners are also in fear for their own safety and that of their friends and family, given the high-powered weapons used in the cull, and have experienced physical and emotional harm because of the cull's proximity to their homes and communities. *See* Chamberlin Aff., at ¶16, 21, 22; Flynn Aff., at ¶8, 9; McAdam Aff., at ¶10, 14-15. Further, Petitioners are concerned that the Project, given its magnitude, will irreparably harm hunting opportunities and use and enjoyment of private and public lands. *See* Chamberlin Aff., at ¶19; Affidavit of Michael Tessitore ("Tessitore Aff."), at ¶15. Once the cull is put into full effect and deer are killed, those actions cannot be undone, thereby leading to permanent injury to those Petitioners who benefit from and enjoy the presence of the deer. Such an extreme remedy should not be taken so lightly and could have devastating permanent effects.

C. The Equities Weigh in Favor of the Petitioners

Given the irreparable injury that will result if this illegal large-scale deer cull is permitted to go forward, the balance of equities weigh in the Petitioners' favor. Any additional delay in

staying Project or deer cull will not prejudice the Respondents. The Petitioners simply request that DEC comply with SEQRA and fulfill its SEQRA obligations and conduct an independent and full environmental review and consider the cumulative environmental impacts. Compliance with SEQRA and such an assessment may take place at any time without any further delay. In addition, Petitioners have attempted to obtain historical records of DDPs, information relating to the 1980 EIS and environmental review process, and to discuss the permitting process with DEC, to no avail. *See* Baker Aff., at ¶36, 39, Ex. F, *FOIL Requests*.

There can be no claim that these towns are experiencing a sudden and unforeseen explosion in deer damage. To the extent there is an overabundance of deer resulting in deer-human conflicts, those problems have existed for a long time and should have been dealt with in a comprehensive manner as required by SEQRA. There is no emergency that warrants ignoring the legal requirement for DEC to consider the consequences of its action before issuing hundreds of DDPs.

In any event, the minimal prejudice that may result from a delay is minor compared to the irreparable injury that will result pending the Court's decision on Petitioners' motion for an injunction. As noted above, if the Court does not grant an injunction and the Respondents move forward with the large-scale cull, there is a risk that the population of white-tailed deer, the environment, and the community of eastern Suffolk County will be forever changed, thus rendering Petitioners' petition moot.

CONCLUSION

For the above stated reasons, DDPs issued in eastern Suffolk County should be annulled and the actions thereon suspended and DEC be directed to prepare an appropriate deer management plan for eastern Suffolk County and comply with SEQRA before adopting that plan and issuing DDP deer tags in excess of those issued in prior years.

Dated: March 6, 2014
Albany, New York

YOUNG, SOMMER, WARD, RITZENBERG, BAKER & MOORE, LLC

By: _____

Jeffrey S. Baker, Esq.
Jessica R. Vigars, Esq.
Attorneys for Petitioners
5 Palisades Drive
Albany, New York, 1220
Tel: (518) 438-9907