STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

TOWN OF PITTSFORD, TOWN OF BRIGHTON, and TOWN OF PERINTON,

Petitioners,

Index No. 2018-945

vs.

POWER AUTHORITY OF THE STATE OF NEW YORK and NEW YORK STATE CANAL CORPORATION,

Respondents.

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF ARTICLE 78 PROCEEDING RELIEF

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PRELIMINARY STATEMENT

This is an Article 78 proceeding to enjoin the clear-cutting of trees along the Erie Canal within the Towns of Pittsford, Brighton, and Perinton unless and until respondents comply with the provisions of the New York State Environmental Quality Review Act ("SEQRA"), ECL §8-0101 *et seq.*

The Erie Canal runs through the lands of petitioners Town of Pittsford, Town of Brighton, and Town of Perinton. Respondent New York State Canal Corporation ("Canal Corporation"), acting in concert with its parent corporation, respondent Power Authority of the State of New York ("Power Authority"), is proposing to conduct embankment vegetation removal at 56 different sites, totaling about 155 acres, along portions of the Erie Canal in Monroe, Orleans, Seneca, and Saratoga Counties, including sites within the Towns of Pittsford, Brighton, and Perinton (the "Project"). Actual clear-cutting in Orleans County and western Monroe County has taken place. Respondents have temporarily interrupted their clear-cutting, but pledge to resume it imminently without further constraint.

Respondents classify their Project as a SEQRA Type II action which requires no further environmental review. Petitioners maintain that the Project should be classified as a SEQRA Type I action, which carries the presumption that it is likely to have a significant adverse impact on the environment and may require the preparation of an environmental impact statement ("EIS").

This memorandum of law is respectfully submitted in support of the petition to enjoin the Project until respondents have complied with SEQRA as determined by this court.

FACTS

This is a brief summary of the relevant facts of this case. A more complete recitation of the relevant facts is set forth in the petition, the affirmation of petitioners' counsel, and the affidavits of petitioners' supervisors, all of which are submitted herewith in support of the relief requested in the petition.

With the publication of a local newspaper story on or about October 27, 2017, the supervisors of all three petitioners learned for the first time of respondents' plans, in broad brush fashion, to clear-cut all vegetation along the embankments of the Erie Canal at selected sites in or near their towns. Through a public information session sponsored by the Canal Corporation in the Town of Brighton on or about November 20, 2017 and a meeting set up by a state senator between representatives of respondents and petitioners Town of Pittsford and Town of Perinton on or about December 15, 2017, as well as through energized residents vocalizing serious concerns about the Project, petitioners learned a little more about respondents' clear-cutting plans, but respondents turned a cold shoulder to petitioners expressed desire to have the Project studied more before proceeding with it. Readily-available public information about the Project was hard to find; indeed, the Canal Corporation did not make any information about the Project available on its website until sometime after December 9, 2017, and the Power Authority's website still does not cover the Project. In particular, petitioners' inquiries to respondents for the SEQRA status of the Project and how determinations under SEQRA were made went unanswered.

Within the last week or so, the New York State Department of Environmental Conservation ("DEC") released records concerning the Project in response to a request under the New York Freedom of Information Law ("FOIL") by a private resident, who made those records

available to petitioners. Through those records just received, petitioners have learned that DEC first requested the Canal Corporation to prepare Part 1 of a short Environmental Assessment Form ("EAF") in connection with the Canal Corporation's application for a DEC freshwater wetlands permit for the Project on or about May 30, 2017. Under DEC regulations, a short EAF is used to determine the significance of Unlisted actions, which are neither Type I nor Type II listed actions and may or may not affect the environment. 6 NYCRR 617.4, 617.2. The Canal Corporation completed Part 1 of the short EAF on or about August 24, 2017.

However, on or about September 21, 2017, DEC, without explanation, reversed itself and advised the Canal Corporation that it concurred with the Canal Corporation's determination that the Project was a Type II action under SEQRA as per 6 NYCRR 617.5(c)(1)&(6). DEC also advised the Canal Corporation that because the Project exceeded the minor project thresholds of the UPA (Uniform Procedures Act), a notice of complete application ("NOCA") for the wetlands permit would have to be published.

On or about September 26, 2017, the Canal Corporation, acting in concert with the Power Authority, passed a resolution authorizing the Canal Corporation to award a contract to Mohawk Valley Materials, Inc. to carry out the Project for the sum of $2,386,381.73. The resolution failed to recognize SEQRA in any way.

On or about October 12, 2017, the Canal Corporation published in the Democrat and Chronicle newspaper a NOCA for the wetlands permit for the Project. The NOCA also stated that the "Project is not subject to SEQR because it is a Type II action," without any explanation as to how that determination was made. Petitioners' supervisors did not see the NOCA, which was not reasonably calculated to reach them.

As it turns out, the law requires better notice than petitioners received. Under the UPA regulations promulgated by DEC, DEC was required to provide notice of the complete application to the chief executive officer of the municipality in which the proposed action was to be located. 6 NYCRR 621.7(a)(1). Petitioners' supervisors were not given notice of the Canal Corporation's completed wetlands permit application and the SEQRA Type II classification for the project that the published NOCA contained. Accordingly, DEC failed to comply with its own UPA regulations concerning the Project.

ARGUMENT

POINT I

BECAUSE RESPONDENTS FAILED TO COMPLY WITH SEQRA, THE PROJECT MUST BE ENJOINED

1. Basic SEQRA Rules

The New York State Legislature adopted SEQRA with the express intent that "all agencies conduct their affairs with an awareness that they are the stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of of this and all future generations." ECL § 8-0103(8); 6 NYCRR 617.1(b). The term "environment" expressly "means the physical conditions which will be affected by a proposed action, including land,...flora, fauna,...objects of historic or aesthetic significance,...and existing community or neighborhood character." ECL § 8-0105(6); 6 NYCRR 617.2(l).

As early as possible in an agency's formulation of an action it proposes to undertake, it must determine whether the action is a Type I action, an Unlisted action, or a Type II action. 6 NYCRR 617.6(a)(1). A Type I action is an action listed in the DEC SEQRA regulations as such

and is more likely to require the preparation of an EIS than an Unlisted action. 6 NYCRR 617.1,4. A Type II action is an action listed in the DEC SEQRA regulations as such and is not subject to any further SEQRA review. 6 NYCRR 617.1,5. An Unlisted action means all actions which are neither Type I nor Type II actions. 6 NYCRR 617.1. A project sponsor may not commence any physical alteration related to an action until the provisions of SEQRA have been complied with. 6 NYCRR 617.3(a).

Strict compliance with SEQRA's review procedures is mandated. *City Council of the City of Watervliet v. Town of Colonie,* 3 NY3d 508, 515 (2004); *New York City Coalition to End Lead Poisoning, Inc. v. Vallone,* 100 NY2d 337, 348 (2003). Where a lead agency, such as the Canal Corporation here, fails to comply with SEQRA's mandate, its determinations must be nullified. *Vallone,* 100 NY3d at 348; *Chinese Staff & Workers Assn. v. City of New York,* 68 NY2d 359, 369 (1986). Moreover, where an action is misclassified as a Type II action, work on the action is properly enjoined. *Williamsburg Around the Bridge Block Assn. v. Giuliani,* 223 AD2d 64, 74 (1st Dep't 1996); *Town of Bedford v. White,* 204 AD2d 557, 559 (2d Dep't 1994).

2. The Project is not a Type II action.

Providing no rationale, the Canal Corporation has classified the Project as a Type II action under DEC SEQRA regulations published at 6 NYCRR 617.5(c)(1)&(6). Each of these classifications is arbitrary and capricious.

The Type II action under 6 NYCRR 617.5(c)(1) covers "maintenance or repair involving no substantial changes in an existing structure or facility." This particular Type II action was analyzed carefully in the *Giuliani* case. There, the New York City Department of Transportation classified the sandblasting of lead paint from City-owned bridges to be a Type II action under this subparagraph. The court disagreed with the agency's interpretation of the regulation,

explaining that this definition "must be read to be applied to routine and ordinary maintenance on existing structures." 223 AD2d at 72. Emphasizing its point, the court observed that the proposed sandblasting, with its attendant environmental hazards, "could not, even under the most lax of standards, be classified as routine maintenance or repair." 223 AD2d at 73.

Here, the clear-cutting of all vegetation on 155 acres of selected embankments of the Erie Canal which has been left alone for a century cannot reasonably be seen as "routine" or "ordinary" maintenance. Accordingly, the Canal Corporation's classification of the Project as a Type II action under this particular provision cannot stand.

The Type II action under 6 NYCRR 617.5(c)(6) covers "maintenance of existing landscaping or natural growth." The DEC's own "SEQR Handbook," touted by DEC as a standard reference book for government officials, environmental consultants, attorneys, permit applicants, and the public at large, provides guidance on this particular Type II action. The hypothetical example provided in the guidance is as follows: "In a municipal park, routine trimming of trees or replacement of shrubbery that has died would be a Type II under this section. In contrast, clear-cutting of a forested area of the park would not fit under the heading of maintenance."

Whether or not the Erie Canal and its trail is a dedicated "park," it is a public National Historic Landmark used by countless people for recreation and enjoyment of its historic, cultural, and aesthetic resources. The Project's clear-cutting of trees along the Erie Canal cannot be reasonably distinguished from the clear-cutting of trees in a park, and is a far cry from routine trimming of trees and replacement of dead shrubbery. Thus, the Canal Corporation's classification of the Project as a Type II action under this section is meritless.

Another Type II action set forth the DEC SEQRA regulations on which the Canal Corporation did not rely further demonstrates why the Project is not a Type II action. That section is 6 NYCRR 617.5(c)(14), which covers "public or private best forest management (silvicultural) practices on less than 10 acres of land, but not including waste disposal, land clearing not directly related to forest management, clear-cutting or the application of herbicides or pesticides." Since clear-cutting on a mere 10 acres of land for forest management practices does not qualify as a Type II action, it is irrational to conclude that the Project, involving the clear-cutting of about 155 acres, qualifies as a Type II action.

2. The Project is a Type I action.

While the Project clearly does not fit into any definition of a Type II action, it naturally fits into at least one category of Type I actions. That category is set forth at 6 NYCRR 617.4(b)(6), and states, in pertinent part, as follows: "activities, other than the construction of residential facilities, that meet or exceed any of the following thresholds;...a project or action that involves the physical alteration of 10 acres." Notably, the definition of "physical alteration" includes such activities as "vegetation removal," "stockpiling materials," and "grading and other forms of earthwork," all of which are involved with the Project.

In *Fleck v. Town of Colden,* 16 AD3d 1052, 1054 (4th Dep't 2005), the court found that it was "evident" that a proposed deer farm would involve the physical alteration of at least 10 acres and constituted a Type I action under SEQRA. Because the lead agency which granted site plan approval for the project had used a short Environmental Assessment Form ("EAF"), which is applicable to Unlisted actions, to evaluate the project, the court annulled the site plan and remitted the matter to the lead agency for further proceedings. *See also, Farrington Close Condominium Bd of Managers v. Inc. Village of Southampton,* 205 AD2d 623 (2d Dep't 1994)

(finding that the Village's plan to develop a park on an unimproved 17-acre parcel of land involved the physical alteration of more than 10 acres of land and thus constituted a Type I action).

Here, the Project involves the physical alteration of about 155 acres along the Erie Canal, more than fifteen times higher than 10-acre regulatory threshold. The Project is a Type I action. Accordingly, respondents should be enjoined from performing any work in furtherance of the Project until they comply with SEQRA.

POINT II

PETITIONERS ARE ENTITLED TO PRELIMINARY INJUCTIVE RELIEF TO PREVENT CLEAR-CUTTING BEFORE THIS CASE CAN BE HEARD

In order to obtain preliminary injunctive relief, petitioners must show a probability of success on the merits, a danger of irreparable harm in the absence of an injunction, and a balance of equities in their favor. *Green Harbour Homeowners' Assn. v. Ermiger,* 67 AD3d 1116 (3d Dep't 2009) (injunction granted after 26 trees were cut down on plaintiff's property); *Gramercy Co. v. Benenson,* 223 AD2d 497 (1st Dep't 1996) (injunction granted to prevent cutting down or pruning trees in a park); *Walsh v. St. Mary's Church,* 248 AD2d 792 (3d Dep't 1998) (injunction granted to prevent defendant from removing several trees on a disputed parcel); *STS Steel, Inc. v. Maxon Alco Holdings, LLC,* 122 AD3d 1260 (3d Dep't 2014) (injunction granted to allow plaintiff's continued use of a disputed right-of-way).

Where, as here, the denial of injunctive relief would render the final judgment ineffectual, since the trees once cut down, cannot be replaced, the degree of proof to establish the element of success on the merits should be reduced. *Gramercy Co.,* 223 AD2d at 498; *State of New York v.*

City of New York, 275 AD2d 740 (2d Dep't 2000) (although plaintiff might not ultimately prevail on the merits, equities lay in its favor to temporarily enjoin the sale of community gardens pending SEQRA review).

Here, petitioners have demonstrated a probability of success on the merits. *See, Giuliani,* 223 AD2d at 74 (injunction granted where petitioners asserted that the sandblasting protocol was not Type II maintenance or repair). The certain loss of myriad trees, in the absence of injunctive relief, constitutes irreparable harm. *Gramercy Co.,* 223 AD2d at 498; *Ermiger,* 67 AD3d at 1117; *Walsh,* 248 AD2d at 794. The equities lie in favor of preserving the status quo, while the legal issues are determined in a deliberate and judicious manner. *City of New York,* 275 AD2d at 741 (sale of community gardens enjoined while SEQRA compliance was determined); *Giuliani,* 223 AD2d at 74-75 (it was in petitioners' interest that the City, having failed to initially follow SEQRA, must strictly adhere to it later). Here, respondents, having failed to comply with the clear directives of SEQRA, must strictly adhere to them in order to protect petitioners' interests guaranteed by SEQRA.

CONCLUSION

Based on the foregoing, it is respectfully requested that this court grant the relief requested in the petition herein.

Dated: Rochester, New York
January 17, 2018

Respectfully submitted,

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