

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

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

Petitioners,

vs.

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

Respondents.

PETITION

Index No. 2018-945

Assigned to:
Hon.

MONROE COUNTY CLERK
7/18 FEB - 6 AM 10:59

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TO: The Supreme Court of the State of New York, County of Monroe:

The Petition of the Town of Pittsford, the Town of Brighton, and the Town of Perinton, respectfully shows this court as follows:

1. 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 New York State Environmental Quality Review Act ("SEQRA"), ECL §8-0101 *et seq.*

THE PARTIES

2. Petitioner Town of Pittsford is a domestic municipal corporation existing within the County of Monroe, State of New York, with offices located at 11 South Main Street, Pittsford, New York 14534.

3. Petitioner Town of Brighton is a domestic municipal corporation existing within the County of Monroe, State of New York, with offices located at 2300 Elmwood Avenue, Rochester, New York 14618.

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4. Petitioner Town of Perinton is a domestic municipal corporation existing within the County of Monroe, State of New York, with offices located at 1350 Turk Hill Road, Fairport, New York 14450.

5. Upon information and belief, respondent Power Authority of the State of New York ("Power Authority") is a domestic municipal corporation and/or public authority, with offices located at 123 Main Street, White Plains, New York 10601.

6. Upon information and belief, respondent New York State Canal Corporation ("Canal Corporation") is a domestic municipal corporation, with offices located at 30 South Pearl Street, Albany, New York 12207, and is a subsidiary of the Power Authority.

THE PROJECT

7. Upon information and belief, respondent Canal Corporation, with the knowledge and either explicit or tacit approval of the Power Authority, is proposing to conduct embankment vegetation removal at 56 different sites, totaling approximately 155 acres, along portions of the Erie Canal in Monroe, Orleans, Seneca, and Saratoga Counties (the "Project").

8. Upon information and belief, the Project is planned to take place in two phases, with Phase 1 including the cutting and removal of trees and shrubs along the embankments, and Phase 2 involving the stripping and stockpiling of topsoil, the removal of stumps and root balls, final grading, seeding, mulching, and the establishment of a permanent turf cover.

9. Upon information and belief, Phase 1 cutting and removal of trees and shrubs along the embankments at sites in Orleans County and western Monroe County has already taken place.

PETITIONERS' INTEREST IN THE PROJECT

10. Upon information and belief, approximately 10 acres of the Project clear-cutting is on a site located within the Town of Pittsford.

11. The Town of Pittsford operates a public park known as Great Embankment Park which is contiguous, or substantially contiguous, to a site scheduled for clear-cutting.

12. The Town of Pittsford is directly harmed by the proposed loss of its trees, an aesthetic and visual resource, and because the Town of Pittsford seeks to preserve its trees through its Comprehensive Plan, their proposed removal threatens the community character of the Town of Pittsford.

13. The Town of Pittsford also represents the interests of those residents living on Marsh Road, Cottonwood Lane, and Forestwood Lane whose properties are contiguous, or substantially contiguous, to a site scheduled for clear-cutting, and who are concerned about the loss of an aesthetic resource and erosion upon or near their properties.

14. Upon information and belief, approximately 15 acres of the Project clear-cutting is on two sites along about 1.5 miles of the Erie Canal located within the Town of Brighton.

15. The Town of Brighton owns and operates a public park known as Meridian Centre Park which is contiguous, or substantially contiguous, to a site scheduled for clear-cutting.

16. The Town of Brighton is directly harmed by the proposed loss of its trees, an aesthetic and visual resource, and because the Town of Brighton seeks to preserve its trees through its local tree ordinance and promote active transportation along the Erie Canal through

its Comprehensive Plan, their proposed removal threatens the community character of the Town of Brighton.

17. The Town of Brighton also represents the interests of those residents living on Brightwoods Lane whose properties are contiguous, or substantially contiguous, to a site scheduled for clear-cutting, and are concerned about the loss of an aesthetic resource of their properties.

18. Upon information and belief, approximately 23 acres of the Project clear-cutting is on three sites along more than 2 miles of the Erie Canal located within the Town of Perinton.

19. The Town of Perinton owns three parcels on Garden Drive which are contiguous to a site scheduled for clear-cutting and owns and operates a public boat launch which is contiguous, or substantially contiguous, to a site scheduled for clear-cutting.

20. The Town of Perinton is directly harmed by the proposed loss of its trees, an aesthetic and visual resource, and because the Erie Canal, including the trees on its embankments, is vital to the identity of the Town of Perinton, the proposed clear-cutting threatens the community character of the Town of Perinton.

21. The Town of Perinton also represents the interests of those residents living on Blandford Lane, Garden Drive, and Garden Circle whose properties are contiguous, or substantially contiguous, to a site scheduled for clear-cutting, and are concerned about the loss of an aesthetic resource of their properties.

FIRST CAUSE OF ACTION

RESPONDENTS HAVE FAILED TO COMPLY WITH SEQRA

22. Petitioners repeat and reallege the allegations set forth in paragraphs “1” through “21” of this petition as if set forth at length herein.

23. In adopting SEQRA, it was the State Legislature’s intention 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 this and all future generations.

24. Respondents are included within the definition of an “agency” under SEQRA.

25. The basic purpose of SEQRA is to incorporate the consideration of environmental factors into the existing planning, review, and decisionmaking processes of state, regional, and local government agencies at the earliest possible time.

26. 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.

27. Type I actions are listed in the regulations promulgated by the New York State Department of Environmental Conservation (“DEC”) for SEQRA compliance and are more likely to require the preparation of an environmental impact statement (“EIS”) than Unlisted actions.

28. Type II actions are also listed in the DEC SEQRA regulations and do not require any further SEQRA compliance.

29. An agency may adopt its own list of Type II actions to supplement the Type II list in the DEC SEQRA regulations, but no action on an agency's own Type II list may be a Type I action under the DEC SEQRA regulations.

30. No agency may undertake, fund, or approve an action until it has complied with SEQRA, and a project sponsor may not commence any physical alteration related to an action until SEQRA has been complied with.

31. Upon information and belief, on or about September 26, 2017, the Canal Corporation, acting with the knowledge and either explicit or tacit approval of 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.

32. Upon information and belief, the Canal Corporation did not determine whether the Project was a Type I action, an Unlisted action, or a Type II action before it authorized the award of a contract to carry out the Project, and accordingly, violated SEQRA.

33. No petitioner had notice of this contract award by the Canal Corporation, and no petitioner was aware of this contract award until well after clear-cutting work on the Project had been publicized and review of public records was undertaken.

34. Upon information and belief, on or about October 12, 2017, the Canal Corporation, upon DEC direction, published a notice in the Democrat and Chronicle, a newspaper of local circulation, of the completion of an application for a freshwater wetlands permit for the Project, which stated, among other things, that the Project was not subject to SEQRA because it is a Type II action.

35. No petitioner saw this notice at or near the time it was published, no petitioner received personal notice from the Canal Corporation that it considered the Project to

be a Type II action, and no petitioner was aware of the Project at all until slightly before or after a newspaper story appeared in the Democrat and Chronicle on October 27, 2017.

36. The Canal Corporation's determination that the Project is a Type II action is arbitrary and capricious and an abuse of discretion.

37. Under DEC SEQRA regulations, a project, other than the construction of residential facilities, that involves the physical alteration of 10 acres is a Type I action, which carries the presumption that an EIS be prepared.

38. Under DEC SEQRA regulations, the term "physical alteration" is defined to include vegetation removal, stockpiling materials, grading, and other forms of earthwork.

39. Because the Project involves the physical alteration of about 155 acres, it is a Type I action.

40. Because the Project is a Type I action, the Canal Corporation must complete a full environmental assessment form ("EAF") and determine whether or not an EIS must be prepared.

41. Upon information and belief, the Canal Corporation has failed to complete a full EAF for the Project, and accordingly, is in violation of SEQRA.

42. Upon information and belief, in or about mid-October 2017, the Canal Corporation commenced clear-cutting under the Project in violation of SEQRA.

43. Upon information and belief, in or about December 2017, the Canal Corporation interrupted its clear-cutting activities in response to public controversy over the Project, but has announced plans to resume clear-cutting imminently, if such clear-cutting has not already resumed.

44. The threatened removal of all trees and shrubs on about 155 acres along the Erie Canal constitutes irreparable harm.

45. Where, as here, the denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits is reduced, and has been met by petitioners.

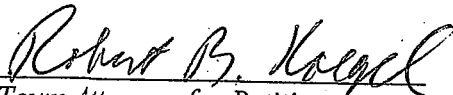
46. Whether or not petitioners ultimately prevail on the merits, the equities lie in favor of preserving the status quo while the legal issues are determined in a deliberate and judicious manner.

47. There is no adequate remedy at law.

WHEREFORE, Petitioners respectfully request judgment (1) annulling and vacating any and all determinations made by respondents that the removal of vegetation from the embankments of the Erie Canal as proposed and partially implemented by the Project is a Type II action under SEQRA; (2) enjoining respondents, and any and all persons or entities acting in their behalf, from taking any further actions to remove vegetation from the embankments of the Erie Canal as contemplated under the Project unless and until respondents have complied with SEQRA as determined by this court; and (3) granting such other and further relief as this court deems just and proper, together with the costs and disbursements of this proceeding.

Dated: Rochester, New York
January 17, 2018

ROBERT B. KOEGEL, ESQ.

By: 
Town Attorney for Petitioners
Town of Pittsford
11 South Main Street
Pittsford, New York 14534.
(585) 248-6216

VERIFICATION

STATE OF NEW YORK)
COUNTY OF MONROE) ss:

William A. Smith, Jr., being duly sworn, deposes and says that he is the Supervisor of the Town of Pittsford, a petitioner united in interest with the other petitioners in the within proceeding; that he has read the foregoing verified petition and knows the contents thereof; that the same is true to his own knowledge or on his information and belief, and as to as to those matters of information and belief, he believes it to be true.

William A. Smith, Jr.

Sworn to before me this

17th day of January, 2018.

Karen S. Ward
Notary Public

KAREN S. WARD
NOTARY PUBLIC - STATE OF NEW YORK
NO. 01WAS18687
QUALIFIED IN MONROE COUNTY
MY COMMISSION EXPIRES 08-30-2019