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.

Index No. 2018-945

Assigned to:

Hon. Daniel G. Barrett

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

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PRELIMINARY STATEMENT

This is an Article 78 proceeding to enjoin respondents from clear-cutting the trees along selected embankment sites on the Erie Canal within jurisdiction of petitioning 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.*

In or about August 2017, respondent New York State Canal Corporation ("Canal Corporation'), under circumstances which remain mysterious, classified its project to conduct vegetation removal at 56 different sites, totaling about 155 acres, on designated embankment sites in Monroe, Orleans, Seneca, and Saratoga Counties, including sites within the petitioning Towns (the "Project"), as a Type II action under two specific regulations which exempt any further SEQRA review of actions involving "maintenance" of a structure or "maintenance" of natural growth. See 6 NYCRR § 617.5(c) (1) & (6).

Alarmed by this SEQRA action misclassification which enabled the Canal Corporation to evade all environmental review of the Project and unable to convince respondents to re-classify the Project as a Type I action requiring further environmental review, petitioners commenced this proceeding on February 6, 2018, asserting that the Project is a Type I action under 6 NYCRR § 617.4(b) (6), which covers projects involving the "physical alteration" of 10 or more acres. The SEQRA regulations define "physical alteration" to include such activities as "vegetation removal," "stockpiling materials, and "grading and other forms of earthwork," all of which are involved with the Project. 6 NYCRR § 617.2(ab).

Hunkering down in their defense, respondents employed two different tactics through their answering papers served on February 20, 2018. First, they altered the facts to try to fit the Project into the regulatory exempt status of "maintenance." For the first time in their answering

papers, the Project, which had always been referred to as either the "Vegetation Removal Project" or the "Vegetation Management Project," was renamed the "Embankment Maintenance Project," as if changing the name would change the nature of the Project. They also began mischaracterizing the work as "deferred maintenance," required because the embankments had become overgrown "in recent years," as if anyone who is familiar with the canal embankments over the years would not know that the trees have been left unchecked to grow and become part of the canal embankment scenery. See affidavit of Howard M. Goebel, P.E., sworn to February 20, 2018 ("Goebel Aff." at 3).

Apparently worried that this "maintenance" defense would be unconvincing, respondents resorted to a far more cynical abuse of power. For the first time in their answering papers, respondents dredged up a single report of an inspection at one designated clear cutting site in the Town of Perinton conducted on August 30, 2017, right about the time the Canal Corporation was misclassifying the Project as a Type II maintenance action, appended it to an engineering letter report of January 19, 2018, and misused that report to declare a state of emergency affecting not only that site within the Town of Perinton but also the sites within the Towns of Pittsford and Brighton. See Goebel Aff. Exhibits H & I. Neglecting themselves to make a new SEQRA classification for the Project based on this emergency finding, respondents then relied on their counsel's memorandum of law to argue that the Project is exempt from SEQRA review as an emergency action under 6 NYCRR § 617.5(c) (33). See respondents' memorandum of law in opposition to verified petition, dated February 20, 2018 ("Respondents' Opp. Brief" at 10, 20-22).

All of this rash behavior by respondents apparently derives from two federal guidance documents, applying to "dams," which have been extrapolated to the canal embankments and

used to justify the complete removal of all woody vegetation from the Erie Canal for safety reasons, even though respondents do not cite one example of a flood caused by trees on the embankments of the canal over its century-long history. Goebel Aff. at 3-4. Respondents chide petitioners for not submitting any evidence indicating that this clear-cutting Project is not necessary, and practically goad petitioners into an engineering contest on the subject. See Respondents' Opp. Brief at 1.

Just so this court is not misled into thinking that the presence of trees on canal embankments is not universally scorned, petitioners submit with their reply papers the affidavit of a highly-qualified and distinguished geotechnical engineer who opines that trees growing on the canal embankments enhance structural stability and public safety, and the removal of those trees will reduce embankment stability and integrity. See affidavit of Donald H. Gray, P.E., sworn to February 21, 2018 ("Dr. Gray Aff." at ¶ 21).

But make no mistake about it: this case is not about engineering. That case may arise if and when respondents comply with SEQRA and provide the engineering evidence to support their choice of alternative ways to promote embankment stability and protect the environmental benefits of the trees. This case is about legal process under SEQRA. This case is about respondents' adamant refusal to see this Project as the Type I action it plainly is and respondents' fabrication of a phony emergency exemption days before the petition is returnable just to suit its purposes. Respondents' conduct has been arbitrary, capricious, and most certainly, an abuse of discretion.

This reply 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 recitation of the facts in this reply memorandum of law is based primarily on selected parts of the administrative record furnished by respondents with their answering papers served on February 20, 2018. References to "R.__" are references to the administrative record and a page number of it. Other relevant facts are set forth in the petition, the affirmation of petitioners' counsel, the affidavits of petitioners' supervisors, and petitioners' memorandum of law, all of which have previously been submitted in support of the relief requested in the petition, and the affidavits of Dr. Gray, Lucinda M. Enriot, Eric J. Norsen, and Peter J. Schroth submitted herewith.

On May 30, 2017, James Candiloro, the Canal Corporation's Director of Environmental Affairs, wrote an email to Karen M. Gaidasz, an Environmental Analyst 2 in the Division of Environmental Permits of the New York State Department of Environmental Conservation ("DEC"), on the subject of "Vegetation Management," requesting a path forward for permitting for "embankment clearing." R.1162. She responded to his email on May 30, 2018, indicating that, among other items, a "Short Environmental Assessment Form-Part1" would need to be completed for the Project. R.1160. (A Short Environmental Assessment Form is designed to address an Unlisted Action under SEQRA, which is an action which is neither a Type I action nor a Type II action). 6 NYCRR § 617.4, 617.2.

On August 9, 2017, Mr. Candiloro wrote a letter to the New York State Division for Historic Preservation, regarding the "Vegetation Management Project," describing the condition of the canal embankments, in part, as follows: "*Over the years,* many of the stated embankments have become overgrown with trees and brush. The overgrown vegetation

potentially compromises the integrity of the embankments…." *Emphasis added.* Mr. Candiloro went on to describe the work of the Project, in part, as follows: "Work included in this Project will consist of clearing the embankments of trees and woody shrubs, followed by grubbing, and lastly establishment of turf along the canal embankments for 56 separate locations covering approximately 155 acres." R.1287.

On or about August 24, 2017, the Canal Corporation's consultant, WSP USA Corp., prepared a report entitled "Freshwater Wetlands Article 24 Permit Report Embankment Vegetation Removal Project Phases 1 & 2" for submission to the DEC. R.1811. The report included in Appendix F a Short Environmental Assessment Form-Part 1 completed by Mr. Candiloro. R.1887-1891. The report also observed as follows: "Initial review of this action, by the NYS Canal Corporation, indicates the Project *likely qualifies* as a Type II Action, as it involves maintenance or repair involving no substantial changes in an existing structure. This is consistent with 6 CRR-NY 617.5(c)(1) maintenance or repair involving no substantial changes in an existing structure or facility and (6) maintenance of existing landscaping or natural growth." *Emphasis added.* R.1821.

In his affidavit submitted with respondents' answering papers, Mr. Candiloro states that he "determined" that the Project was exempt from SEQRA review. Affidavit of James Candiloro, P.E., sworn to February 20, 2018 ("Candiloro Aff."¶34). However, Mr. Candiloro does not state how or when he made that determination, or identify any document recording any such determination. Mr. Candiloro also states that his determination was "straight forward." Candiloro Aff. ¶35. He does not explain why he completed a Short Environmental Assessment Form-Part 1 for the Project if the determination that the Project was exempt from SEQRA

review was "straight forward." Even the Canal Corporation's consultant would only say that the Project "likely qualifies" as a Type II action.

On August 30, 2018, six days after the consultant ventured that the Project "likely qualifies" as a Type II action related to "maintenance," the Canal Corporation's engineering consultant, Paul C. Rizzo Engineering - New York, PLLC ("Rizzo"), completed an inspection of one of the designated clear-cutting sites within the Town of Perinton. Goebel Aff. Exh. H. The inspection revealed "Wet areas," "Cattails," "A minor inboard slope failure," "Toe of the embankment not visible," and an "Existing seep/leak." Id. There is no evidence in the record that these reported conditions influenced the Canal Corporation to alter the basis of its SEQRA Type II classification in any way, or more specifically, to consider the Project, or any portion of it, an exempt action under the emergency provision of 6 NYCRR § 617.5(c)(33), until these conditions were reported to the Canal Corporation by Rizzo on January 19, 2018 and cited by the Canal Corporation in its emergency directive of February 19, 2018, almost 6 months after the inspection. Goebel Aff. Exh. I.

On September 21, 2017, Kristen Cady-Poulin, DEC Environmental Analyst in the Division of Environmental Permits, wrote an email to Mr. Candiloro, regarding the proposed "Embankment Vegetation Removal Project," that the "application states that the project is a Type II action under SEQR (NYCRR 617.5©(1) and (6)" and that the "Department agrees with this determination." R.1907-8. There is no discussion as to how Ms. Gaidasz and Ms. Cady-Poulin, both Environmental Analysts in the DEC Division of Environmental Permits, resolved their difference of opinion on the status of the Project as an Unlisted Action or Type II action.

On September 26, 2017, the Canal Corporation passed a resolution authorizing the capital expenditure of $2,386,381.73 for the Project. As part of resolution, the Canal Corporation described the background of the Project, in part, as follows:

> The western embankments of the Barge Canal were constructed in the 1900's and 1910's. At the time of their construction the embankments of the Canal were cleared of trees and heavy vegetation. *Over the past 50-75 years vegetation on the Canal has grown unchecked and in many places mature trees and heavy vegetation cover the embankments from the toe to crest to water's edge.* The overgrown vegetation *potentially* compromises the integrity of the embankments....
>
> R.2012. *Emphasis added.*

On or about October 4, 2018, the DEC published a notice of complete application for the Project wetlands permit in the DEC Environmental Notice Bulletin. The Project was described as "embankment vegetation removal" at 56 sites, totaling approximately 155 acres, along portions of the Erie Canal, which would take place in two phases. R.2622-23.

On January 19, 2018, well after the clearcutting had begun in Orleans and western Monroe Counties, Rizzo prepared its letter report based on one report on an inspection that was done on one site in the Town of Perinton on August 30, 2017. Goebel Aff. Exh. H. The Rizzo letter report gave the embankment at this location a NYSDOT *condition* rating of "2." A condition rating of 2 is "Very Poor," as opposed to a condition rating of "1," which is "Serious/Emergency." Goebel Aff. ¶32. The Rizzo letter report also assigned this section of the canal a DEC *hazard* classification rating of "Apparent Class C." The hazard classification scale is not set forth either by the Rizzo letter report or in the Goebel affidavit, but the Goebel affidavit describes a DEC hazard classification of Class C as "High Hazard." Id. at ¶35. The Rizzo letter report also recommended that this section of the embankment be given a FEMA *risk* category of "III," which indicates "Moderate Urgency." Goebel Aff. Exh. H. Again,

neither the Rizzo letter report nor the Goebel affidavit sets forth the entire risk classification scale.

The Rizzo letter report recommended that the wet areas and cattails be further investigated where they were found and that overgrown vegetation be removed, presumably from those identified wet areas. The Rizzo letter report did not even hint at any emergency. It is noteworthy that the 2017 – Risk Assessment System sheet completed as part of the August 30, 2017 inspection report appended to the Rizzo letter report gave a risk assessment of "2," meaning "Begin monitoring system and schedule repairs soon," as opposed to a risk assessment of "1," which means "Immediate emergency contract recommended."

On February 19, 2018, Mr. Goebel issued an interoffice memorandum declaring an "emergency to facilitate the timely restoration of the Canal System to operational condition." Goebel Aff. Exh. I. The Goebel memorandum identifies six designated clearcutting sites that have a NYSDOT *condition* rating of 1 or 2, including sites A057 and A058 within the Town of Perinton, but it does not point out whether any of the six sites has a condition rating of 1, meaning "Serious/Emergency," or 2, meaning "Very Poor." The Goebel memorandum also does not identify the DEC *hazard* classification and the FEMA *risk* category for any of these sites, which were referenced in the Rizzo letter report for the purpose of safety management. The Goebel memorandum goes on to state as follows: "Rizzo Engineering recommends that immediate action be undertaken at the embankments with a condition rating of either a 1 or 2." The Rizzo letter report makes no such recommendation at all. As noted above, it only recommended further investigation of the wet areas where they found on one site in Perinton and the removal of vegetation at those wet areas to facilitate investigation there. Certainly, no emergency classification is recommended in the Rizzo letter report.

On February 20, 2018, one day after he issued his memorandum, Mr. Goebel signed his affidavit submitted in this case. He concluded, in his engineering judgment, that the *condition* of sites A057 and A058 within the Town of Perinton constitute an emergency. Goebel Aff. ¶37. He did so even though the Rizzo report gave portions of these sites a NYSDOT *condition* rating of 2 ("Very Poor"), not 1 ("Serious/Emergency"), a FEMA *risk* category of III ("Moderate Urgency"), and a risk assessment of 2 ("Begin monitoring system and schedule repairs soon"), not 1 ("Immediate emergency contract recommended"). He also stated that "in my judgment all of the areas identified for maintenance in the Embankment Maintenance Project should be addressed as soon as possible, and preferably prior to the filling of the Canal in May."

In short, Mr. Goebel took a few wet spots identified on August 30, 2017 in Perinton which Rizzo recommended for investigation and limited vegetation removal but not emergency treatment, and applying his engineering judgment, transformed those wet spots on February 19 and 20, 2018 not only into an emergency on both designated sites in Perinton, but also into an emergency across all of the other designated sites within the Towns of Pittsford and Brighton. Such an action can only be seen as arbitrary, capricious, and an abuse of discretion.

ARGUMENT

POINT I

BECAUSE THE PROJECT IS NOT A TYPE II ACTION AND INSTEAD IS A TYPE I ACTION, RESPONDENTS MUST COMPLY WITH SEQRA

Latching on to DEC guidance that once an action is classified as Type II, review under SEQRA is complete, respondents put on blinders, try to hammer the vegetation removal Project into the Type II maintenance exemption, and completely ignore the Type I category for the physical alteration of 10 or more acres, which includes vegetation removal. Such conduct is arbitrary and capricious and will be overturned. *Sierra Club v. Village of Painted Post,* 134 AD3d 1475 (4th Dept. 2015) (Village determination that its agreement to sell one million gallons per day of water from its water supply was a Type II action was arbitrary and capricious, when the action was either an Unlisted action or a Type I action depending on the circumstances.)

1. <u>The Project is not a Type II action under the "maintenance" provisions.</u>

The Type II classification which was made by respondents and is the subject of this lawsuit relied upon 6 NYCRR § 617.5(c)(1), which covers "maintenance or repair involving no substantial changes in an existing structure or facility," and 6 NYCRR § 617.5(c)(6), which covers "maintenance of existing landscaping or natural growth." Respondents' Type II classification of the Project under either or both of these regulations is arbitrary and capricious.

In their answering papers, respondents argue that the Project amounts to "maintenance" because the embankments were supposedly "intended" to be "grassy slopes" and the clear-cutting imposed now is supposedly to make up for "recent" growth and is really "deferred maintenance." Goebel Aff.¶s 42, 11. Respondents have submitted no proof as to the intentional design of the embankments with or without trees. As for "recent" growth on the embankments, respondents' own submissions show that the trees have allowed to grow unchecked for 50 to 75 years. See also Reply Affidavit of Lucinda M. Enriot, sworn to February 22, 2018 ("Enriot Aff." ¶60) (memories of trees on the Great Embankment for 60 years). Indeed, the undisputed

fact that the trees have been allowed to grow unchecked for so many years implies that they were intended to be a part of the canal structure.

Respondents argue that the dictionary definition of "maintenance" as being "the labor of keeping something in a state of repair" means that clear-cutting the trees from the embankment "structure" (the "something") is keeping it in a state of repair. Respondents' Opp. Brief at 16. But respondents ignore the fact the trees, intentionally or not, are a part of the embankment structure, the "something," and to destroy the trees is to harm the structure.

Moreover, respondents ignore the definitions of the words "maintenance" and "clearing" in the FEMA guidance document they hold so high. Goebel Aff. Exh. C at v-vi. The word "maintenance" there means "routine upkeep.... " The word "clearing" there means "the removal of trees and woody vegetation by cutting without removal of stumps, rootballs, and root systems." Clearly, the Phase 1 clear-cutting portion of the Project fits within the FEMA definition of "clearing" and not "maintenance."

More importantly, the word "maintenance" in 6 NYCRR § 617.5(c)(1) has been interpreted to mean "routine and ordinary" maintenance in the only case cited by both petitioners and respondents on the subject, *Williamsburg Around the Bridge Block Ass'n v. Giuliani,* 223 AD2d 64, 72 (1st Dept. 1996). Respondents' expenditure of over $2.3 million on clearcutting 155 acres of land cannot rationally be seen as "routine and ordinary" under the circumstances here. Respondents seek to distinguish the *Giuliani* case from the instant case by focusing of different types or magnitudes of environmental harm, but the point of the case is its instructive limiting of the term "maintenance" to "routine" maintenance.

Respondents warn that petitioners face a heavy burden in showing that the Canal Corporation's classification of the Project as a Type II maintenance action was arbitrary and

capricious or an abuse of discretion. Respondents' Opp. Brief at 14. However, not one of the cases they cite involve either of the two maintenance exemptions. Only the *Giuliani* case cited so far deals with the meaning of the maintenance exemptions. One other case might be *Town of Goshen v. Serdarevic,* 17 AD3d 576, 579 (2d Dept. 2005) (the addition of a drainage pipe under the road, the replacement of another with a pipe three times larger and the extension of the drainage ditches for an additional 800 to 1,200 feet along defendant's property does not constitute "routine maintenance" so as to make the proposed measures a Type II action under SEQRA).

Respondents note that one of DEC's environmental analysts "agreed" with the Canal Corporation's Type II determination for the Project, and attempt to bootstrap that meaningless gesture to the rule that interpretations of statutes and regulations by agencies charged with administering them must be accorded great weight and judicial deference. Respondents' Opp. Brief at 17. To begin with, DEC did not make, and cannot make, the Type I action, Type II action, or Unlisted action classification made by the Canal Corporation in this case. See 6 NYCRR § 617.6(a)(1) (As early as possible in an agency's formulation of an action it proposes to undertake, it must...determine whether the action is subject to SEQRA and if so, make a preliminary classification of an action as Type I or Unlisted.) The DEC employee's opinion is mere surplusage and cannot alter the Canal Corporation's own determination in any way. Moreover, DEC is not a party to this lawsuit and its own regulations are not being challenged in any way.

Cases cited by respondents on this point are distinguishable. In *Flacke v. Onondaga Landfill Sys., Inc.,* 69 NY2d 355 (1987) and *Zahav Enters., Inc. v. Martens,* 45 Misc.3d 12221(A) (Sup. Ct. 2014), the DEC was a party in those actions, and in *Town of Lysander v.*

Hafner, 96 NY2d 558 (2001), the involved agency submitted an *amicus curiae* brief. In *Matter of City Council of the City of Watervliet v. Town Board of the Town of Colonie,* 3 NY3d 508 (2004), DEC's amended SEQRA regulation was being challenged, so its interpretation of the meaning of the regulation in general, rather than how it was being applied in a case where it had no procedural posture, was entitled to deference.

In short, respondents' determination that the Project is SEQRA-exempt maintenance was arbitrary and capricious.

2. <u>The Project is a Type I action.</u>

Once the focus is shifted from the list of Type II actions to the list of Type I actions, it becomes abundantly clear that the Project is a Type I action. The Project is "to conduct embankment vegetation removal" on approximately 155 acres, 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." R.2622. One of the Type I categories is set forth at 6 NYCRR § 617.4(b) (6), and includes, 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." 6 NYCRR § 617.2(ab). When the regulatory definitions are applied to the actual Project work, it is clear beyond any doubt that the Project is a Type I action.

Respondents refuse to recognize the actual physical elements of the Project they are proposing and undertaking. Respondents refuse to consider the terms of the list of Type I

actions that could be applied to their Project. Respondents refuse to apply the terms of the list of Type I actions to the actual physical elements of their Project to determine whether or not their Project is a Type I action. Respondents refuse to recognize the legal authority cited in petitioners' main brief demonstrating that the Project is a Type I action. The arbitrary and capricious standard protecting governmental bodies from claims against their discretionary decisions does not go so far as to countenance this kind of bureaucratic arrogance.

3. <u>The Project is not a Type II action under the emergency provisions.</u>

Unable to craft a convincing argument that their classification of the Project as a Type II "maintenance" action was not arbitrary and capricious and that the Type I action list should not even have been consulted, respondents resort to their ultimate Hail Mary pass in their answering papers to this court: Call the Project an emergency!

This is an Article 78 proceeding to determine whether the determination by the Canal Corporation to classify the Project as a Type II action under the maintenance provisions of the SEQRA was arbitrary and capricious. That determination was made sometime around August 2017. The Canal Corporation's attempt to label the Project as an emergency was not presented until February 19, 2018, when Mr. Goebel issued his emergency declaration. The Canal Corporation's attempt to classify the Project as a Type II action under the emergency provisions of 6 NYCRR § 617.5(c)(33) was not made until February 20, 2018, and even then, it was done not by the Canal Corporation but rather by its counsel through its opposing memorandum of law. Obviously, the Canal Corporation's attempted new determination, made about 6 months after the determination which is the subject of this proceeding, is not part of the record of this proceeding.

"Judicial review of an administrative action in a CPLR Article 78 proceeding is *limited* to the facts and record adduced before the agency when the determination was made." *Emphasis original. Scott v. City of Buffalo,* 20 Misc.3d 1135A *3 (Sup. Ct. 2008), relying on *Kelly v. Safir,* 96 NY2d 32, 39 (2001); *see also, Welch v. N.Y.S. Div. of Housing and Community Renewal,* 287 AD2d 725, 726 (2d Dept. 2001); *City of Saratoga Springs v. Town of Wilton,* 279 AD2d 756, 760 (3d Dept. 2001); *Carpenter v. City of Ithaca Planning Board,* 190 AD2d 934, 935 (3d Dept. 1993). Accordingly, the Canal Corporation's emergency proclamation is not a part of this case.

Even if this court were to consider the Project as a Type II emergency action, the court should reject this classification under the facts of this case. The Type II emergency action is set forth in 6 NYCRR § 617.5(c)(33) and provides in pertinent part as follows: "emergency actions that are immediately necessary on a limited and temporary basis for the protection or preservation of life, health, property or natural resources, provided that such actions are directly related to the emergency and are performed to cause the least change or disturbance, practical under the circumstances, to the environment."

Picking through this definition, one can readily see that the Project does not meet the requirements for a Type II emergency action. First, the Project is not "immediately necessary." The supposed emergency is based on the single report of an inspection at one site taking place on August 30, 2017, some 6 months before the Canal Corporation declared an emergency. On that ground alone, the classification of the Project as a Type II emergency action is arbitrary and capricious. See Dr. Gray Aff. ¶20.

Next, the Project is not "on a limited and temporary basis." The Project is not "limited" geographically to precise locations of wet areas and other questionable concerns identified in

the inspection report, but rather extends the clear-cutting across all of the designated sites in all three petitioning Towns, many miles from the identified wet areas. The Project is not "limited" methodologically to addressing only those areas which are of the greatest concern, based on a rational assessment of condition, hazard, and risk, which the Canal Corporation failed to undertake. The Project is not "temporary;" rather it is swift and permanent. Once the trees come down, they cannot be put back up. Thus, the Canal Corporation fails to meet this important criterion as well.

Moreover, the Project is not "directly related to the emergency." The so-called emergency is the questionable condition of several small areas on one site in one Town. The Project is to clear-cut all the trees on all the designated sites in all three Towns. The relationship between the Project and the supposed emergency is tenuous at best and unnecessary in any case.

Finally, the Project is not being "performed to cause the least change or disturbance…to the environment." Respondents argue that the removal of all of the vegetation from all of the designated sites is necessary to fully inspect the embankments and correct any discovered defects. Goebel Aff. ¶31. Yet, the inspection that was conducted on August 30, 2017 and led to the emergency declaration was done on a site which had not been clear-cut. Id. ¶32. Thus, the Canal Corporation does not have to clear-cut the sites to inspect them for defects. Instead, they can inspect the sites and fix any discovered defects, removing the trees as necessary to fix the defects.

Decisions cited by respondents to support their use of the Type II emergency action classification are readily distinguishable. In *Matter of Board of Visitors – Marcy Psychiatric Center v. Coughlin,* 60 NY2d 14 (1983), the State Commissioner of Correctional Services

wanted to convert an unused portion of a State mental institution into a correctional facility. He recognized that the project might have an impact on the environment and agreed to prepare an environmental impact statement ("EIS") under SEQRA. All he wanted to do, on an emergency basis, was to refurbish several of the buildings before the EIS was complete, but no irrevocable action to complete the conversion, or any transfer of the inmates to the facility, would be done before the environmental review was complete. That limited, harmless work which was allowed on an emergency basis is a far cry from permanently removing all of the trees without any environmental review.

In *Develop Don't Destroy Brooklyn v. Empire State Dev. Corp.,* 31 AD3d 144 (1st Dept. 2006), the developer who was undertaking a large redevelopment project and preparing an EIS wanted emergency authorization to demolish certain vacant, boarded-up, and deteriorated buildings that had no historical significance and posed a great risk to public health and safety for a variety of reasons. The court sustained this limited emergency demolition as a Type II action, noting that the developer had sustained his burden of showing that the demolition was necessary to remove a great risk. Here, again, respondents seek to clear-cut the embankments without any environmental review, and respondents have not shown that there is any emergency at all.

In *Greentree at Murray Hill Condo v. Good Shepard Episcopal Church,* 146 Misc.2d 500 (Sup. Ct. 1989), the court upheld the use of a church as a *temporary* emergency activity exempt from SEQRA review, a situation differentiating it from the permanent removal of trees. In *Matter of Hart Island Committee v. Koch,* 137 Misc.2d 521 (Sup. Ct. 1987), the court allowed the construction of a correctional facility to begin in the face of an emergency shortage

of prison beds, but as in the *Marcy Psychiatric Center* case, SEQRA was being followed, unlike here.

In contrast to these cases is the decision in *East Thirteenth St. Community Ass'n v. N.Y.S. Urban Dev. Corp.*, 189 AD2d 352 (1st Dept. 1993). There, a non-profit sponsor of housing for the homeless wanted to construct a 14-story building and fit within the "limited and temporary basis" provisions of the SEQRA emergency action regulation. The court rejected this approach, observing that "the project herein does not qualify as one necessary on a 'limited and temporary basis' within the meaning of the implementing regulations." Id. at 365. The same is true in this case.

POINT II

PETITIONERS ARE ENTITLED TO PRELIMINARY INJUCTIVE RELIEF

At the outset, respondents argue that this court should not have entered a temporary restraining order in this proceeding, relying on CPLR 6313(a), which provides in part as follows: "No temporary restraining order may be granted ... against a public officer, board or municipal corporation of the state to restrain the performance of statutory duties." Although petitioners do not doubt that the Canal Corporation has a statutory duty to maintain the Canal, the way it does so is a matter of discretion. Since the Canal Corporation's decisions are discretionary in nature, its decisions are not statutorily compelled and thus do not constitute "the performance of statutory duties" under CPLR 6313(a). *Fortuna v. Prusinowski,* 22 Misc.3d 974 (Sup. Ct. 2008) (applying to zoning decisions of local municipal officials).

Respondents do not dispute any of the authority cited in petitioners' main brief supporting their request for preliminary injunctive relief. Instead, they cite the case of *Eastman Kodak Co. v. Carmosino,* 77 AD3d 1434 (4th Dept. 2010), which denied a preliminary

injunction in an action to enforce the restrictive covenants in an employment agreement, in part because plaintiff failed to demonstrate by clear and convincing evidence that there was a likelihood of success on the merits.

Petitioners do not disagree with this rule, but have previously cited cases far more applicable to the case at hand. *See, Williamsburg Around the Bridge Block Assn v. Giuliani,* 223 AD2d 64, 74 (1st Dept. 1996) (in case challenging City's classification of sand-blasting lead paint from City's bridges as a SEQRA Type II maintenance action, court found petitioners had demonstrated that they would succeed on the merits and upheld the issuance of a preliminary injunction); *State of New York v. City of New York,* 275 AD2d 740 (2d Dept. 2000) (in action to enjoin sale of community gardens without full SEQRA review, court upheld the granting of a preliminary injunction, even if plaintiff might not ultimately prevail on the merits, as the equities lay in favor of preserving the status quo while the legal issues were being determined in a deliberate and judicious manner).

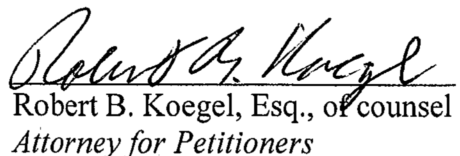
Here, petitioners maintain that they have demonstrated that the Project is not a Type II action exempt from SEQRA review as a maintenance or emergency matter and instead is a Type I action requiring full SEQRA compliance.

CONCLUSION

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

Dated: Rochester, New York
February 26, 2018

Respectfully submitted,



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