At a Term of the Supreme Court held in and for the County of Wayne at the Hall of Justice in the Town of Lyons, New York on the 28th of February, 2018.

PRESENT: Honorable Daniel G. Barrett
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

TOWN OF PITTSFORD, TOWN OF BRIGHTON, AND TOWN OF PERINTON,

Petitioners

DECISION
Index No. 2018-945

-vs-

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

Respondents

The Petitioners brought this Article 78 proceeding to annul the classification of the vegetation removal project from the Erie Canal as a Type II action and to restrain the Respondents from clear cutting until they have complied with SEQRA as this is a Type I action.

The Respondents embarked on an endeavor to remove trees and brush and replace those types of vegetation with various types of grasses to be in compliance with various recommendations of FEMA, the Army Corps of Engineers, and the Directive of the Canal Corp. Issued in 1998.

The essential issue is whether the Respondents took the appropriate steps to comply with SEQRA to achieve this goal of changing the landscape of the Erie Canal.

Respondent Canal Corporation classified this project as a Type II action which requires no further environmental review. Petitioners assert that the Project is a 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.

On September 21, 2017, the DEC agreed with the Respondent Canal Corporation's determination that the Project was a Type II action under SEQRA pursuant to 6 NYCRR 617.5(c)(1) & (6).

Despite this concurrence the Petitioners dispute that this is a Type II action. They assert that it is a Type I action which requires further activity to satisfy SEQRA.

Judicial review of an agency's SEQRA determination is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination was affected by errors of law or was arbitrary and capricious or an abuse of discretion. Wellsville Citizens ex rel. Responsible Development, Inc. v Wal-Mart Stores, Inc., 140 A.D. 3d 1767, 33 N.Y.S. 3d 653 (4th Dep't 2016).

6 NYCRR 617.4 Type I actions-(b)(6) activities... that meet or exceed any of the following thresholds; (i) a project that involves the physical alterations of 10 acres. (The affidavit of Mr. Goebel indicates in Perinton alone 11.8 acres are involved)

The Rizzo WSP Team in its report dated October 10, 2017, indicates that the proposed work will disturb approximately 155.3 acres of land (R.2637) which clearly exceeds the 10 acre requirement of this section.

The definition of physical alteration is set forth in 6 NYCRR 617.2 (ab)-"Physical alterations" includes, but not limited to, the following activities: vegetation removal, demolition, stock piling materials, grading and other forms of earthwork, dumping, filling, or depositing. Discharges to air or water, excavation or trenching, application of pesticides, herbicides, or other chemicals.

Clearly this project involves vegetation removal - clear cutting of trees.

Stock piling of materials is planned. It is mentioned in the materials provided by Rizzo Engineers and a project drawing of stockpiled top soil can be found at R.2119.

Attached to the Affidavit of William A. Smith, Jr. dated January17, 2018, is a photograph of the clear cutting activity that has already taken place in Holley. This photo is outside the geographic area of this application but it shows the size of the trees and the results of clear cutting.

The Affidavit of Lucinda M. Enriot indicates she owns property in the Town of Perinton and has personal knowledge of the Great Embankment. She knows the trees were there for 60 years and they were not cut down for maintenance purposes.

Clearly the stump removal of these 60 plus year old trees will require excavation.

The October 2017 Rizzo Report mentions mechanized equipment such as tractors and excavators fitted with various blades, rakes and skids can be anticipated (R.2641).

Activities anticipated in this project clearly fall within the definition of physical alteration - acreage in excess of 10 acres, vegetation removal, stock piling of materials, grading and excavation.

The Respondents argue that the clear cutting of trees is a maintenance activity pursuant to 6 NYCRR 617.5(c) 1 "Maintenance of repair involving no substantial change in a structure of facility." It is clear no maintenance relative to trees has been done in excess of 60 years. They also argue under subdivision 6 of this section that it is maintenance of existing landscape or growth. This project is not maintaining the existing landscape and growth. The existing landscape is being completely altered by the clear cutting of trees.

Based in the foregoing analysis the Court finds that it was arbitrary and capricious to classify this Project as Type II. The Court has searched the record and finds that this is a Type I project.

After this application consisting of the Order to Show Cause and the initial supporting papers were served electronically on the counsel for the Respondents on February 9, 2018, the Canal Corporation declared the work to be done in Perinton an emergency situation by a declaration signed on February 19, 2018. Under the Type II emergency action is set forth in 6 NYCRR § 617.5 (c)(33) and provides in 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 an emergency and are performed to cause the least change or disturbance, practical under the circumstances, to the environment."

Procedurally, without addressing the safety consideration, the Respondents are abandoning their reliance on 6 NYCRR 617.5(c)(1) and (6) classifications of a Type II action. If it were a Type II action under (1) and (6) there is no need at all to have the project declared an emergency. The Project would be allowed to proceed unimpeded without any further SEQRA involvement. The emergency provision provides that emergency actions may be undertaken prior to filing the reviews of an EIS, but the emergency only delays the timing of the SEQRA requirements, necessitating compliance with them when practical (see Board of Visitors - Marcy Psychiatric Center v Coughlin, 60 N.Y. 2d 14, 466 N.Y.S. 2d 668.) The strategy of utilizing the emergency exception diminishes the persuasiveness of Respondents' argument with respect to a Type II action under 6 NYCRR 617.5 (c)(1) and (6).

An examination of the facts is necessary to determine if the project, as it pertains to Perinton, qualifies under the emergency provision of 6 NYCRR 617.5(c)(33).

The Canal Director and the Deputy Director declared an emergency relative to the

canal in the Town of Perinton. It was confirmed by counsel at oral argument that this emergency declaration does not pertain to the towns of Pittsford or Brighton. This declaration was declared in large part relying on a letter dated January 19, 2018, issued by the Canal Corporation's Safety Contractor, Paul C. Rizzo Engineering - New York PLLC. (Rizzo Engineering).

A. Hans Hasnay, Vice President of Rizzo Engineers authored that letter. The letter refers to an inspection that took place on August 30, 2017, in the Town of Perinton. A wet area was observed at three points. Cattails were observed at three points. A minor inboard slope failure where riprap collapsed was found at one point. An existing seep/leak was observed at one point. Based on the rating of 2 (Begin monitoring system and schedule repairs soon). The letter goes on to note that the embankment has several wet areas and may have active seeps that have not been identified. However, the embankment crest is generally wide making a seepage failure less of a concern.

In the letter there was no reference to any changes in conditions that have occurred from August 30, 2017, until present time.

Based on the January 19, 2018, letter of Rizzo Engineers the Court does not find that an emergency situation that would enable the Project to be rated Type II under 6 NYCRR 617.5 (33).

The Court finds that this Project is a Type I project and that the injunction will remain effective pending the Respondents' compliance with SEQRA.

Counsel for Petitioners to prepare an Order consistent with this Decision.

Dated: March 8, 2018
Lyons, New York

Daniel G. Barrett
Acting Supreme Court Justice