STATE OF NEW YORK
SUPREME COURT : COUNTY OF TOMPKINS

In the Matter of the Application of THE CITY OF ITHACA, THE TOWN OF ITHACA, THE TOWN OF ULYSSES, THE VILLAGE OF UNION SPRINGS, JOHN V. DENNIS, Individually and as President of CAYUGA LAKE ENVIRONMENTAL ACTION NOW (CLEAN), an unincorporated association, ALFRED THOMAS VAWTER, JOSHUA J. and JENNIFER L. LAPENNA, RODNEY and CYNTHIA HOWELL, KENT AND HEATHER STRUCK, JUDITH R. SCOTT, WILLIAM HECHT,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

vs.

THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and CARGILL, INCORPORATED

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Index No. EF2017-0285

Hon. John C. Rowley, Acting J.S.C.

PRELIMINARY STATEMENT

Cargill, Incorporated respectfully submits this memorandum of law in support of a motion, brought on by an order to show cause, to dismiss this CPLR article 78 proceeding on the grounds that: (1) the Court lacks personal jurisdiction over Cargill; (2) to the extent that the Verified Petition challenges the adequacy of the environmental review conducted in connection with Cargill's underground mining operations, including that conducted in connection with permits issued in 2015, 2003 and earlier, it is time-barred; and (3) any challenge to the 150-acre modification permitted in 2015 is also moot, because the project is substantially complete. The order to show cause and motion are also supported by the accompanying Affirmation of

Kevin G. Roe, dated April 6, 2018, with annexed exhibits ("Roe Affirmation"), the Affidavit of Shawn Wilczynski, sworn to April 10, 2018, with annexed exhibits ("Wilczynski Affidavit"), and the Affidavit of Brian Hickman sworn to April 6, 2018, with its annexed exhibit ("Hickman Affidavit").

As explained in more detail in the Roe Affirmation, we are proceeding by order to show cause so that this motion can be heard separately and in advance of the return date for the Petition. This will allow the Court to address the threshold jurisdictional issue at the outset. Because Cargill has not been properly served, the Court does not have personal jurisdiction over Cargill, requiring dismissal of the proceeding.

In addition, the other issues raised in this motion (timeliness and mootness) should also be addressed before the parties and the Court have to address the merits, because resolution of those issues will define what can properly be reviewed in this proceeding. As set forth more fully below, many of the allegations in the Petition concern issues that were reviewed in connection with permits issued in 2015, 2003 and earlier. Because the four-month Statute of Limitations to challenge those permits expired long ago, many of the issues raised in the Petition are beyond the scope of permissible review in this proceeding. Furthermore, the additional mining permitted by the 2015 permit is substantially complete. Under well-established case-law, any challenge to that permit is moot.

While resolution of the jurisdictional issue may make it unnecessary to address these additional grounds for dismissal, we are compelled to raise them as part of this motion because CPLR 3211 (e) permits only one pre-answer motion to dismiss. In the event that the proceeding somehow survives the jurisdictional obstacle, this motion will provide the Court with an

opportunity to eliminate the time-barred and moot issues in the case before the parties and the Court will have to address the merits of any remaining claims.

STATEMENT OF FACTS

The facts on which this motion is based are set forth in the accompanying Roe Affirmation and Wilczynski and Hickman Affidavits. In consideration of the Court's time, they will not be repeated here. Factual matters recited in the arguments derive from these supporting documents and their exhibits, as noted below.

ARGUMENT

Point I

THE COURT LACKS PERSONAL JURISDICTION OVER CARGILL BECAUSE PETITIONERS FAILED TO EFFECTUATE PROPER SERVICE; ACCORDINGLY THIS PROCEEDING SHOULD BE DISMISSED

Cargill is Delaware corporation, authorized to do business in New York pursuant to Business Corporations Law ("BCL") Sections 1304 and 1305 (Roe Affirmation at ¶ 6). In New York, apart from CPLR provisions not relevant here,[1] there are two statutory provisions that prescribe the allowable methods for service of process on corporate entities – CPLR 311(a), governing service upon corporations generally, and BCL § 306, setting forth additional methods for service on domestic corporations and foreign corporations authorized to do business in New York.[2] As set forth below, Petitioners failed to comply with either statute because they never personally delivered the Notice of Petition and Petition. As a result of this fatal error, this Court lacks personal jurisdiction over Cargill.

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[1] *See e.g.* CPLR 312-a (service by mail with statement of service by mail and acknowledgment of receipt); CPLR 316 (service by publication).

[2] The rules for effectuating service of process are the same for special proceedings as they are for plenary actions (*see* CPLR 403[c] ["A notice of petition shall be served in the same manner as a summons in an action."]).

Under CPLR 311(a)(1), personal service on foreign and domestic corporations "shall be made by *delivering the summons*. . . to an officer, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service" (CPLR 311[a][1] [emphasis added]). BCL 306 similarly requires some form of personal delivery, either "on a registered agent . . . in the manner provided by law for the service of a summons, as if the registered agent was a defendant" (BCL § 306[a]) or on "the secretary of state" (BCL § 306[b]).

As set forth more fully in the Hickman Affidavit and Roe Affirmation, Petitioners failed to effectuate service under any allowable method. Instead, on January 4, 2018, Petitioners' attorney sent the Notice of Petition, Petition and Exhibits by overnight delivery service to CT Corporation System ("CT"), Cargill's agent for service of process in New York City. CT received the package on Monday, January 8, 2018 (Hickman Affidavit at ¶ 3; *see also* Exhibit 1 thereto).[3] No other service was attempted or accomplished, either upon the Secretary of State or any designated agent or officer of Cargill (Roe Affirmation at ¶ 8).

It is axiomatic that service by overnight delivery on a corporation's registered agent is ineffective to confer personal jurisdiction under the CPLR. The Practice Commentaries to CPLR 311 could not be clearer on this point: "CPLR 311(a)(1)'s requirement of 'delivery' to a statutorily specified representative of a corporate defendant means in-hand tender of process by a process server. Service by means of an overnight courier, such as Federal Express, does not meet this standard" (Vincent C. Alexander, Supplementary Practice Commentaries, McKinney's

[3] To date, Petitioners have not filed an Affidavit of Service of the Petition with this Court, and therefore the facts upon which this motion are based are set forth in the Hickman Affidavit. It is noteworthy, however, that once a motion is made contesting personal jurisdiction on the grounds of improper service, the plaintiff has the burden to demonstrate that service was proper (*Stewart v Volkswagen of Am., Inc.*, 81 NY2d 203, 207 [1993] ["[O]nce jurisdiction and service of process are questioned, plaintiffs have the burden of proving satisfaction of statutory and due process prerequisites."]).

Cons Law of NY, Book 7B, CPLR C311:1; *see also Strong v Bi-Lo Wholesalers*, 265 AD2d 745 [3d Dept 1999] [because "process under [CPLR 311(a)] must be *personally delivered* to an authorized person, the mailing of the summons and complaint to the defendant [corporation] was ineffective"] [emphasis added]; *Kenna v. New York Mut. Underwriters,* 188 AD2d 586 [2d Dept 1992]).

This service defect is fatal, requiring dismissal of this proceeding as against Cargill for lack of personal jurisdiction (*see* CPLR 3211[a][8]; *see also Raschel v Rish,* 69 NY2d 694 [1986] ["When the requirements for service of process have not been met, it is irrelevant that the defendant may have actually received the documents."]; *Steuhl v CRD Metalworks, LLC,* – AD3d – [3d Dept 2018], 2018 NY Slip Op 01529; *Woods v M.B.D. Community Hous. Corp.,* 90 AD3d 430, 430 [3d Dept 2011]).

Point II

PETITIONERS' CLAIMS THAT DEC IMPROPERLY SEGMENTED THE ENVIRONMENTAL REVIEW OF SHAFT NO. 4 FROM THE ENVIRONMENTAL REVIEW OF BOTH THE 150-ACRE EXPANSION AND THE MINE ITSELF ARE BARRED BY THE STATUTE OF LIMITATIONS

A. Introduction

Petitioners advance two principal claims in this proceeding, both of which are grounded in the State Environmental Quality Review Act ("SEQRA"). One such claim, set forth in the Petition at paragraph 65, posits that DEC failed substantively to comply with SEQRA. Petitioner alleges the familiar touchstones of such a claim – that the agency did not take the requisite "hard look" at the environmental impacts of the project, did not "identify potential environmental concerns," and/or did not give a "reasoned elaboration" as to why an environmental impact statement was not required (*see* Pet. ¶ 65; *see also Matter of Riverkeeper, Inc. v Planning Bd. of*

Town of Southeast, 9 NY3d 219, 231 [2007] [judicial review of an agency's SEQRA determination "is limited to whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis of its determination." [internal citations and quotations omitted]).

In the event that this Petition proceeds to an adjudication on the merits, the record will overwhelmingly refute Petitioners' claim that the environmental review was inadequate under the appropriate application of the "hard look" standard (*id.* ["It is not the province of the reviewing court to second-guess thoughtful agency decisionmaking and, accordingly, an agency decision should be annulled only if it is arbitrary, capricious or unsupported by the evidence."]). To the extent the Petition is focused solely on the environmental impacts associated with the construction of Shaft 4, it is not untimely because it was filed within the applicable four-month statute of limitations period,[4] and Respondent Cargill does not challenge it as untimely on this motion.

Petitioners' claims regarding the previously permitted underground reserves, however, are entirely time-barred. The thrust of these claims – cast by Petitioners as segmentation – is two-fold: first, that DEC violated SEQRA by failing to revisit the environmental impacts associated with all prior permits granted to Cargill during its SEQRA review of Shaft 4; and, second, that DEC violated SEQRA by failing to consider the environmental impacts of Shaft 4 in conjunction with Cargill's 2015 Expansion application. While allegations in support of these segmentation theories are spread throughout the Petition (*see e.g.* Pet. ¶¶ 32-43, 53-63), they are both captured in Paragraph 66 of the Petition's "Cause of Action" section (*see* Pet. ¶ 66 ["The

[4] SEQRA does not have its own statute of limitations, and therefore the four-month limitations period of CPLR 217 applies (*see* CPLR 217 ["Unless a shorter time period is prescribed in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding . . . ."]; *see also Save the Pine Bush, Inc. v City of Albany,* 70 NY2d 193, 200 [1987]; *Mule v Hawthorne Cedar Knolls Union Free School Dist.,* 290 AD2d 698, 699 [3d Dept 2002]).

DEC also improperly segmented the review of Shaft No. 4 from the new tunnel and ongoing mining under Cayuga Lake."]).

These claims are also bereft as a matter of law, but they suffer from a more immediate problem: they have been brought years after the applicable statutes of limitations have expired. A brief overview of the permitting history of the Cayuga Mine demonstrates just how late the Petitioners are.

B. To the extent that the Petition seeks to relitigate the environmental impacts associated with any mining permit issued to Cargill before the 2017 Shaft 4 Permit, it is time-barred.

Salt mining at the Cargill facility in Lansing began in the early 20th century, with the rights to mine under the lake first acquired from the State by Cargill's predecessor, the Cayuga Rock Salt Company, in 1938 (Wilczynski Affidavit at ¶ 9). Since the advent of the Mined Land Reclamation Law ("MLRL"), (L 1974, ch 1043 [codified at ECL § 23-2701 *et seq.*]), and SEQRA (L 1975, ch 612 [codified at ECL §8-0101 *et seq.*]), a number of renewals and modifications have been issued by DEC, in each case only after strict compliance with both the MLRL and SEQRA.

One such modification has particular implications for this motion. By the year 2000, DEC had already reviewed approximately 8,361 acres of mining under Cayuga Lake with associated upland facilities totaling 260.04 acres (Wilczynski Affidavit at ¶ 17). At that time, Cargill applied for a modification to its MLRL permit, seeking to add 5,056 of underground reserves to its mining permit. A permit to mine this additional acreage, extending the existing mine limits both to the north and to the south for a total of approximately 13,417 underground acres, was approved by DEC, effective January 6, 2003 ("2003 Permit" [*see* Exhibit E to Roe Affirmation]), but not until after an extensive environmental review of the impacts of mining in

those areas (*see* Roe Affirmation at ¶¶ 17-20). It is worth noting, because Petitioners pay so much attention to this issue in their papers, that prior to issuance of the 2003 Permit, DEC examined the mine stability issues at Cayuga Lake specifically in light of the Retsof collapse and what had been learned from that event (*see* Roe Affirmation at ¶ 18; Wilczynski Affidavit at ¶ 18-21).

In its environmental review of Cargill's proposed expansion, DEC evaluated the detailed expert reports – from renowned geologic consultants to DEC's own in-house technical experts and independently retained scientists – before it determined that the mining of these additional reserves would not have a significant adverse impact on the environment and issued the 2003 Permit. An overview of those expert analyses is set forth in the Roe Affirmation (¶¶ 17-18) and the Wilczynski Affidavit (*see* ¶¶ 20-22) and will not be repeated here.

Two points bear emphasis, however. First, contrary to the implication Petitioners strive to create in their pleadings (*see e.g.* Pet. ¶ 35), the public was by no means excluded from the 2003 Permit process. In fact, not only did DEC publish notice of the permit application and the negative declaration in both the Environmental Notice Bulletin and the Ithaca Journal, it solicited comments from the public on those documents and went so far as to hold a public hearing (*see* Roe Affirmation ¶¶ 19-20). None of the Petitioners in this lawsuit provided comments during the comment period or attended the hearing (*id.*).

The second point is that neither the 2003 Permit nor its underlying SEQRA review was challenged, either by Petitioners or anyone else, within the applicable statute of limitations. Under CPLR 217, the time to have challenged the 2003 Permit expired on May 6, 2003, four months after permit issuance (*see Matter of Town of Riverhead v New York State Dept. of Envtl. Conservation,* 50 AD3d 811, 813 [2d Dept 2008] [challenge to issuance of MLRL permit must

be brought within four-month time frame provided by CPLR 217(1)]; *see also Patterson Materials Corp. v Zagata,* 237 AD2d 366, 368 [2d Dept 1997] [challenge is timely when brought within four months of issuance of permit]).

Critically, after May 6, 2003, four months from the date of permit issuance, all procedural and substantive issues arising from the issuance of the 2003 Permit, its authorization to mine "northward" to the full extent of the mine boundaries, and all potential environmental impacts associated with such mining were no longer subject to judicial review – not on May 7, 2003, and certainly not fifteen years later in 2018. The Second Department's decision in *Matter of Town of Riverhead, supra,* (50 AD3d at 813) is directly on point. There, the Court held that a petitioner could not use a challenge to a recent DEC decision (also concerning an MLRL permit) as a vehicle for challenging earlier determinations that were time-barred. The Court stated that "to the extent the petition seeks in effect," not simply to commence a permit revocation proceeding, but "to review the determination to grant the permit initially, it is barred by the applicable statute of limitations" (*id.*).

Much of the present lawsuit focuses on the alleged environmental impacts of the continued northerly progression of mining under the lake (*see e.g.* Pet ¶¶ 25, 27, 28, 31, 54(a), 54(b), 54(c), 54(d), 54(e), 54(f), 54(g), 54(h), 54(i), 55, 56, 57, 58, 62 and 66). Indeed, in this article 78 proceeding (ostensibly challenging a discrete modification permit authorizing the construction of an upland air shaft), Petitioners have launched a broad-based attack on mining under Cayuga Lake, a process that has been ongoing for over 80 years, as well as on DEC's historic and repeated determinations to permit that activity. But the Petitioners' attempt to inveigle this Court into a full-scale review of the wisdom of these historic decisions fails at the outset, since those determinations are now settled, beyond the reach of litigants and courts – and

for good reason. As the Court of Appeals explained in its seminal decision in *Solnick v Whalen* (49 NY2d 224 [1980]), "particularly where the action sought to be reviewed is that of a regulatory governmental agency, [there is] the strong policy, vital to the conduct of certain kinds of governmental affairs, that the operation of government not be trammeled by stale litigation and stale determinations" (*id.* at 232 [internal quotations and citations omitted]).

Of equal import, over the last 15 years, Cargill has invested in excess of $600 million in the Cayuga Mine (Wilczynski Affidavit at ¶ 33). This considerable expenditure, undertaken in full reliance on the finality of the 2003 Permit, has enabled Cargill to refine its mining methods so that its de-icing salt may be extracted both efficiently and safely, and to enhance and employ technology to ensure mine stability (*id.* at ¶¶ 24-25). The injustice to Cargill, should this investment be placed at risk now in this proceeding purportedly challenging the Shaft 4 Permit, is as palpable as it is extreme.

In short, Petitioners' purported segmentation claim, urging this Court to find that DEC violated SEQRA by failing to re-examine the environmental impacts associated with ongoing mining under Cayuga Lake – impacts that were studied in connected with the 2003 Permit issuance – is barred by the statute of limitations.

C. Petitioners' Claim that DEC Improperly Segmented the SEQRA Review of Shaft No.4 from the 150-Acre Expansion Permit is Barred by the Statute of Limitations.

Petitioners' efforts to roll the 2015 Expansion Permit into this lawsuit through its segmentation claims are equally infirm. As set forth more fully in the Roe Affirmation, since 2003, the only additional underground acreage that has been approved for mining consists of privately-held uplands east of the lake. This permit modification, approved in 2015, added approximately 150 acres of permitted underground reserves, bringing the total permitted area of

the Cayuga Mine to approximately 13,567 acres (the "2015 Expansion Permit") (*see* Roe Affirmation at ¶ 21; Wilczynski Affidavit at ¶ 26).

In full compliance with SEQRA, DEC conducted a thorough environmental review of the potential environmental impacts associated with mining the 150-acre expansion area, analyzing relevant geotechnical factors, including mine stability and surface subsidence, and potential environmental impacts, including air quality, noise, ground vibration, and impacts to surface and ground waters. Such impacts were found to be negligible given the depth below ground surface (2000+ ft.) at which all mining activity would occur. After a lengthy review process, including an in-house technical review and a further analysis by DEC's selected outside consultant, DEC determined that the application was complete and published notice of that fact and the opportunity for public comment in the Environmental Notice Bulletin and the Ithaca Journal (Roe Affirmation at ¶¶ 22-23). DEC received no comments whatsoever, from Petitioners or anyone else.

Significantly, as part of its SEQRA review, DEC explicitly considered whether it should review the potential impacts associated with the possible later construction of an air shaft contiguous to the 2015 Expansion area, but concluded that it was permissible to separate that review under SEQRA (*id.* at 25; Wilczynski Affidavit at ¶¶ 27-28). In the Determination of Non-Significance adopted by DEC related to the 2015 Expansion, DEC made an affirmative determination to that effect, one that is specifically authorized by the SEQRA regulations themselves (*see* 6 NYCRR 617.3[g] [authorizing lead agency to segment environmental review if it "believes that circumstances warrant" it and makes a clear statement to that effect in its determination of significance]). The relevant passage from the Negative Declaration reads as follows:

> There is the potential that a new air shaft may be constructed to increase ventilation and improve emergency evacuation capabilities at the mine at some time in the future. Segmentation is generally not acceptable in the SEQR consideration of all activities and impacts from related projects. In this case, however, the Department agrees with the separation of the potential future air shaft project from the proposed addition of 150.3 acres of underground mineral reserves. Cargill has provided a justification for not considering the potential future air shaft as a part of this review and subsequent approval. DEC accepts the circumstances that warrant this approach and the justification provided as being in compliance with SEQR regulations at Part 617.3(g).

(*See* Roe Affirmation, Exh. H at 2).

DEC issued the 2015 Expansion permit on June 2, 2015. Neither the Petitioners nor anyone else challenged the permit or the underlying SEQRA review (with its explicit segmentation determination) prior to the expiration of the four-month statute of limitations on October 2, 2015. Had Petitioners wished to challenge DEC's determination to segment its review of the environmental impacts of the 150-acre expansion from the construction of the air shaft, they needed to have done so within the four-month statute of limitations mandated by CPLR 217 (*see Matter of Town of Riverhead v New York State Dept. of Envtl. Conservation,* 50 AD3d 811, 813 [2d Dept 2008]; *see also McCaffrey v Planning Bd. of the Town of E. Hampton,* 2012 NY Slip Op 31681[U] [Sup Ct Suffolk County 2012] [proceeding claiming that the planning board had illegally segmented site plan review was time-barred when not brought within statute of limitations applicable to challenging planning board determinations]).

The present proceeding, filed on December 13, 2017, and hence more than two years beyond the expiration of the statute of limitations, seeks to reignite claims that have long since expired. The Petition's segmentation claims are time-barred.

Point III

ANY CHALLENGE TO THE 2015 EXPANSION PERMIT AND ASSOCIATED SEQRA REVIEW IS MOOT BECAUSE MINING WITHIN THE EXPANSION AREA IS SUBSTANTIALLY COMPLETE

The mootness doctrine is designed to prevent a waste of both judicial and litigant resources. It is invoked "where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy" (*Matter of Dreikausen v Zoning Bd. of Appeals of the City of Long Beach,* 98 NY2d 165, 172 [2002]). In SEQRA cases, the most common cause of mootness is that the "project sought to be blocked has already been built" prior to, or during the course of, litigation (*see* Gerrard, Weinberg & Ruzow, ENVIRONMENTAL IMPACT REVIEW IN NEW YORK, § 7.02[3][a] and cases cited therein). This is precisely the situation at bar.

Since receiving its permit on June 2, 2015, Cargill has completed 96% of the planned mining of the 150-acre area, and has extracted and produced the salt to support regional de-icing needs (Wilczynski Affidavit at ¶ 29). Its capital investment in the extraction and production of this resource exceeds $26 million (*id.*). New York law is well-settled that cases such as these are barred by the doctrine of mootness (*see e.g. Citineighbors Coalition of Historic Carnegie Hill v N.Y. City Landmarks Pres. Comm'n*, 2 NY3d 727 [2004] [where project is substantially complete, SEQRA challenge is moot]; *Save the Pine Bush, Inc. v City of Albany,* 281 AD2d 832 [3d Dept 2001] [SEQRA challenge to rezoning of parcel mooted by completion of larger of two buildings to be constructed]; *Many v Village of Sharon Springs Bd. of Trustees,* 234 AD2d 643 [1996] [SEQRA challenge to construction of warehouse mooted by substantial completion of warehouse facility]).

Petitioners' attempt to revisit the 2015 Expansion Permit and its underlying SEQRA review process is similarly moot. New York law does not provide redress for individuals who sit on their rights, allow limitation periods to expire, and then seek to resuscitate stale challenges particularly where, as here, the court's determination will have no effect on the outcome.

CONCLUSION

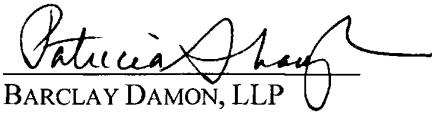
For the reasons set forth above, Cargill respectfully requests the Court to grant its motion to dismiss the article 78 proceeding as against Cargill pursuant to CPLR 3211(a)(8) because Petitioners have failed to properly serve Cargill. Accordingly, the Court lacks personal jurisdiction over Cargill.

In the alternative, should the proceeding survive the jurisdictional barrier, Cargill requests that the Petition be dismissed, in part, pursuant to CPLR 3211(a)(5) to the extent that it challenges the adequacy of DEC's environmental review of Cargill's environmental review of Cargill's underground mining operations. The environmental impacts of those operations were reviewed in connection with permits issued in 2015, 2003 and earlier. Any challenge to the adequacy of those reviews (and any claim of segmentation based on that) is barred by the four-month Statute of Limitations set forth in CPLR 217.

Finally, to the extent that the Petition challenges the adequacy (or segmentation) of the environmental review of mining the 150-acre expansion permitted in 2015, Petitioners' claims

are moot and must be dismissed because the contemplated mining of those reserves is 96% complete.

Dated: April 11, 2018

By: 

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