SUPREME COURT OF NEW YORK
COUNTY OF TOMPKINS

In the Matter of

CAYUGA LAKE ENVIRONMENTAL ACTION NOW (CLEAN), an Unincorporated Association by its President JOHN V. DENNIS; LOUISE BUCK; BURKE CARSON; JOHN V. DENNIS; WILLIAM HECHT; HILARY LAMBERT; ELIZABETH and ROBERT THOMAS; and KEN ZESERSON,

Petitioners,

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

Index No. EF2021-0422

-vs-

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

Respondents.

DEC MEMORANDUM OF LAW IN OPPOSITION TO THE AMENDED PETITION

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PRELIMINARY STATEMENT

This CPLR Article 78 proceeding is the latest in a series of lawsuits brought by a collective of petitioners who seek to close a Tompkins County salt mine that has been operating for approximately a century. Having failed in previous litigation efforts, petitioners now attempt to leverage a challenge to a minor mining permit modification made by respondent New York State Department of Environmental Conservation ("DEC" or "the Department") into a collateral attack on DEC mining authorizations that were afforded years, if not decades, ago. Petitioners' lawsuit must be dismissed because the statute of limitations has run on these challenges.

Petitioners' lawsuit is also barred by petitioners' failure to exhaust administrative remedies. Petitioners' sole cause of action is a State Environmental Quality Review Act (SEQRA) argument alleging that DEC failed to take a hard look at where topographic features of concern in the mine's existing footprint—generally referred to as "anomalies"—should be mapped. Petitioners never raised this argument during the public comment process on the draft permit. Petitioners' silence on the issue they now wish to litigate improperly deprived DEC of an opportunity to create a meaningful administrative record. This forecloses judicial review of petitioners' sole cause of action in this proceeding.

Finally, on the merits, petitioners' hard-look claim is belied by the limited scope of the permit modifications made in the challenged DEC decision. DEC's 2021 permit modification did not expand mining rights. DEC could not have incidentally expanded Cargill's mining by changing its position on the locations of the anomalies because DEC made no such change; DEC relied on the same map of the anomalies that it had approved in 2019. Because the 2021 permit modification did not change the scope of permitted activities, DEC's negative declaration under SEQRA should be upheld as rational.

DEC complied with SEQRA and acted rationally and within the bounds of its authority in issuing the 2021 permit modification. As a result, the Court should dismiss the amended petition.

LEGAL BACKGROUND

The New York State Legislature has afforded DEC broad powers to regulate the mining of mineral resources that exceeds certain threshold quantities (*see* ECL Title 27). DEC is tasked with "foster[ing] and encourag[ing] the development of an economically sound and stable mining industry, and the orderly development of domestic mineral resources and reserves necessary to assure satisfaction of economic needs compatible with sound environmental management practices" (ECL 23-2703 [1]).

Before an entity can engage in regulated mining activities, it must receive a permit from DEC (ECL 23-2711 [1]). A permit can last up to five years (*see id.*, at [2]), at which time the permittee is required to apply for a renewal to continue mining (*see id.*, at [11]).

Every DEC mining permit, permit renewal, or permit modification is issued based, in part, upon approval of a map illustrating both a mining plan and relevant topographic features in or near the subject mine. On this point, "[a]ll mining and reclamation activities on the affected land shall be conducted in accordance with an approved mined land-use plan" (ECL 23-2713 [1]). The required mining plan consists of a "written and graphic description for the proposed mining operation" (*see id.*, at [1] [a]), and the graphic description must be presented as a map (*see* ECL 23-2705 [9]; 6

NYCRR § 422.1 [c]). The mining-plan map required for a permit must include the areas intended to be mined during the permit term and "the location and description of topographic . . . features within and adjacent to the affected land" (6 NYCRR § 422.2 [a]; *see* ECL 23-2713 [1] [a]).

REGULATORY BACKGROUND

A. The Cayuga Salt Mine

The Cayuga Salt Mine (or the mine) is located in the Town of Lansing, New York (R13).[1] The mine extends underneath Cayuga Lake—approximately 1,500 to 2,000 feet below the floor of the lakebed depending on the location—and draws on a salt reserve that has been mined for approximately a century (R434-435). As sovereign, New York State owns the mineral rights under Cayuga Lake, and the State began leasing those mineral rights in 1938 (*see generally* Public Lands Law §§ 81 [1] [b], [2]) (R434). Cargill purchased the mine in 1970 and received its initial mining permit from DEC in 1979. The salt Cargill extracts is sold in the road and residential deicing market (R434).

[1] References to "R" refer to the consecutively-paginated volumes filed by DEC entitled "Corrected Certified Administrative Record."

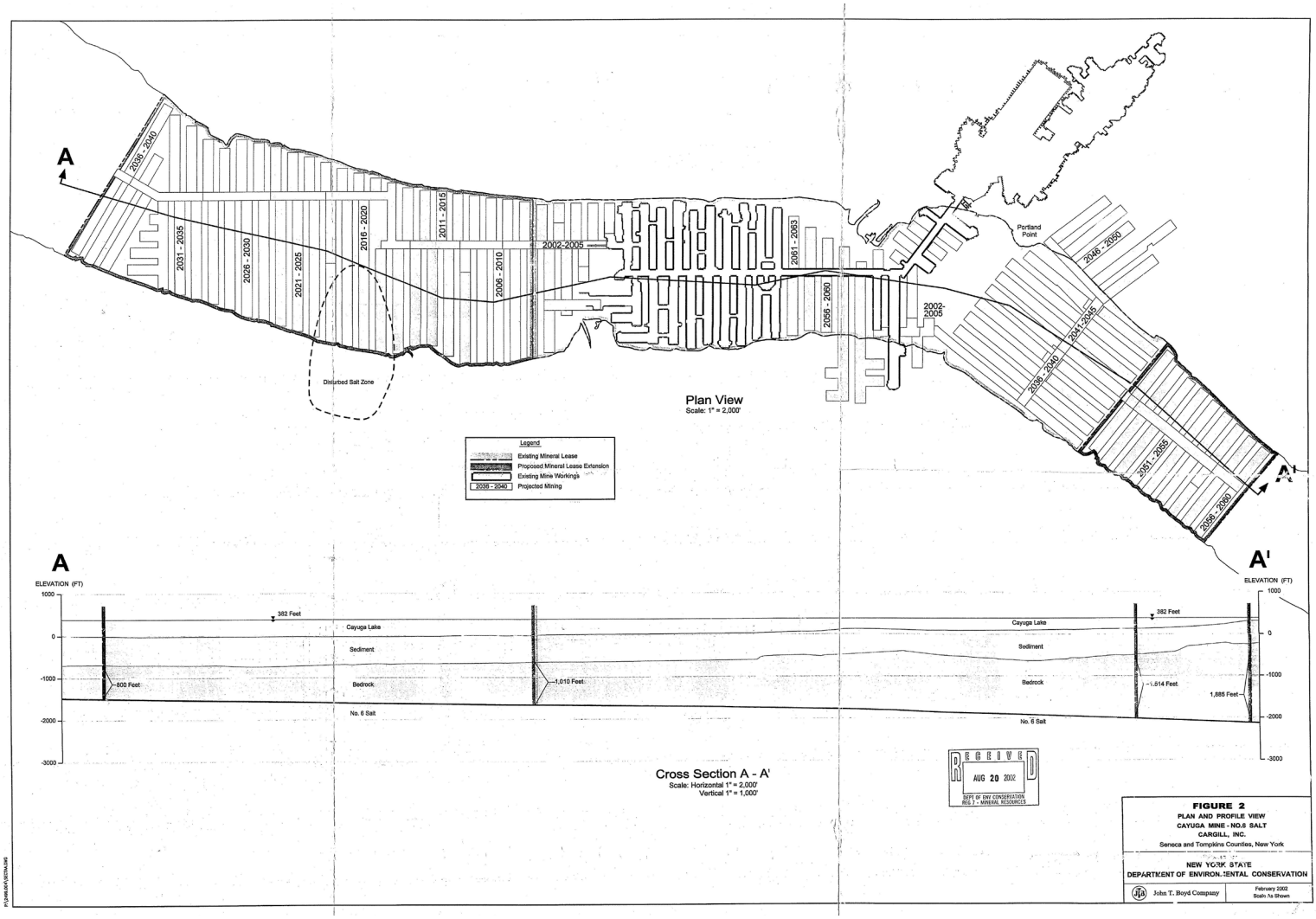
B. The 2003 Cayuga Salt Mine Expansion

The area of the mine that is subject to dispute in this litigation was permitted for mining by DEC in 2003 (R280-289). In 1997, Cargill applied for a permit to renew and expand the then-existing mine, which was approximately 8,000 acres (R285. 434). This proposed expansion area, which comprised approximately 5,000 acres, came to be commonly referred to as the northern reserves (R434; *see* Rigley Aff. at ¶ 16). In 2003, after detailed review of Cargill's proposal, including the potential for environmental impacts, DEC granted the application and issued a permit that included mining authorization for the northern reserves (R280-289, 302-307).

The 2003 permit identified certain topographic areas of concern within the mine that limited Cargill's mining rights absent further study and DEC authorization. The 2003 permit ordered Cargill to "conduct further investigations" of both a "disturbed salt zone" that "may exist near the west shore of [Cayuga L]ake" and "the adequacy of the thin rock overburden at the northern extent of the mineral lease area where the solid rock overburden becomes thinner" (R288). The geographic locations of these prohibitions were generally established by a map that DEC relied on in the 2003 permit (the 2002 Boyd Map), which identified areas in the northern reserve based on

Cargill's projection for when they would be mined (R299, 303). The 2002 Boyd map is shown below in Figure 1.

Figure 1: The 2002 Boyd Map



(R299).

The 2003 permit explained that the prohibited disturbed salt zone was projected to be mined from "2016 to 2020" and the prohibited thin-rock-

overburden area was projected to be mined "after 2030" (R288).[2] These facts establish, in two ways, that the thin-rock-overburden prohibition applies to an area to the north of the disturbed salt zone. First, Cargill's mining progresses northward over time in the northern reserve, and the 2003 permit describes Cargill reaching the disturbed salt zone area (2016-2020) before the thin-overburden area (after 2030). Second, the 2002 Boyd Map identifies areas in the northern reserve based on Cargill's mining projection timelines, and the 2030 projection is shown to be well to the north of the 2016-2020 projection (R299).[3]

C. Ongoing Compliance Proceedings

Cargill has continued to study and report on areas of concern in the northern reserve that were identified in the 2003 permit. The "disturbed salt zone" was near a land feature on the west shore of the lake known as Frontenac Point, and over time the feature has come to be known as the Frontenac Point Anomaly (or "FPA") (*see* Rigley Aff. at ¶ 18). Further

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[2] These timeline projections were not binding and, decades later, Cargill's mining does not closely match the projections.

[3] The 2002 Boyd Map does not display a compass that establishes cardinal directions. The maps of the mine displayed in Figures 2 and 3, *infra*, do establish the cardinal-direction orientation of the mine and therefore are helpful references.

investigation related to the "the thin rock overburden" led to the discovery of five distinct areas of bedrock scouring. Those five areas have been labeled as anomalies A through E (R77, 102). Relative to one another the anomalies generally run in a southeasterly direction from A to E (R77, 102).

To date, the mining authorizations as to four out of the six areas originally identified as anomalous have been conclusively settled. Two anomalies have been successfully undermined and two other anomalies have been prohibited from being undermined.

Cargill has completed mining under anomalies E and C. Cargill undermined Anomaly E approximately a decade ago (R76). Although Anomaly E was identified as an area of bedrock erosion, as compared to other anomalies, it did not fall within the prohibition from the 2003 permit. The 2003 permit prohibition related to overburden thinning in an area north of the Frontenac Point Anomaly, and Anomaly E is south of the Frontenac Point Anomaly (R288, 299). In any event, DEC has since determined that anomaly E had minimal overburden thinning that did not raise material concerns (*see* Rigley Aff. at ¶ 40). Ongoing monitoring has established that undermining Anomaly E has had no adverse impacts on global mine stability (R76; *see* Rigley Aff. at ¶ 40).

Mining under Anomaly C took place in accordance with the compliance process laid out in the 2003 permit. In a request submitted pursuant to those terms, Cargill sought DEC approval to undermine the feature (R74-83). After a thorough review of Cargill's request, in April 2018, DEC provided Cargill authorization to mine under Anomaly C (R73). According to ongoing compliance reporting, Cargill has completed mining under Anomaly C (*see* Rigley Aff. Exhibit B). Monitoring has shown no adverse impacts on global mine stability from Cargill's undermining of Anomaly C (*see id.* at ¶ 43).

Mining under the Frontenac Point Anomaly is prohibited. Cargill's investigations of the mine confirmed that, within the formerly identified disturbed salt zone, the Frontenac Point Anomaly was a fracture in the bedrock overlying the mine (*see id.* at ¶ 41). Mining activity under this type of fracture could potentially compromise global stability of the mine or could possibly expose a conduit for groundwater to enter the underground workings (*see id.*). For these reasons, DEC and Cargill reached a consensus in 2010 that Cargill would not mine under the Frontenac Point Anomaly or within a 1,000-foot setback around that feature (R269). The 1,000 foot-setback requirement that solely applies to the Frontenac Point Anomaly (as opposed to the other anomalies) accounted for the difference in risk between mining near a bedrock fracture and mining near areas of overburden thinning (*see*

Rigley Aff. at ¶ 41). The 2021 permit modification that is challenged in this proceeding simply added permit language memorializing the 2010 Frontenac Point Anomaly mining prohibition.

Anomaly D falls almost entirely within the 1,000-foot setback around the Frontenac Point Anomaly (R102). As a result, DEC has prohibited mining under Anomaly D (R73).

Cargill has not yet proposed to mine under either of anomalies A or B. Cargill's most recent 5-year mining projection shows that mining is only beginning to approach the edge of Anomaly B and has not yet reached Anomaly A (R102). Mining under Anomalies A and B remains conditioned upon further study in accordance with the original permit conditions from the 2003 permit, which were incorporated into every subsequent renewal permit, including the 2021 permit modification (R4).

D. 2019 DEC Approval of a Definitive Map of the Anomalies.

Since the expansion of the mine to include the northern reserves, Cargill has continued to renew its permit at periodic intervals. As Cargill's mining progressed, mapping the anomalies began to become relevant to DEC permitting determinations based on near-term mining projections. As a result, a 2019 permit renewal issued by DEC expressly approved a map of the

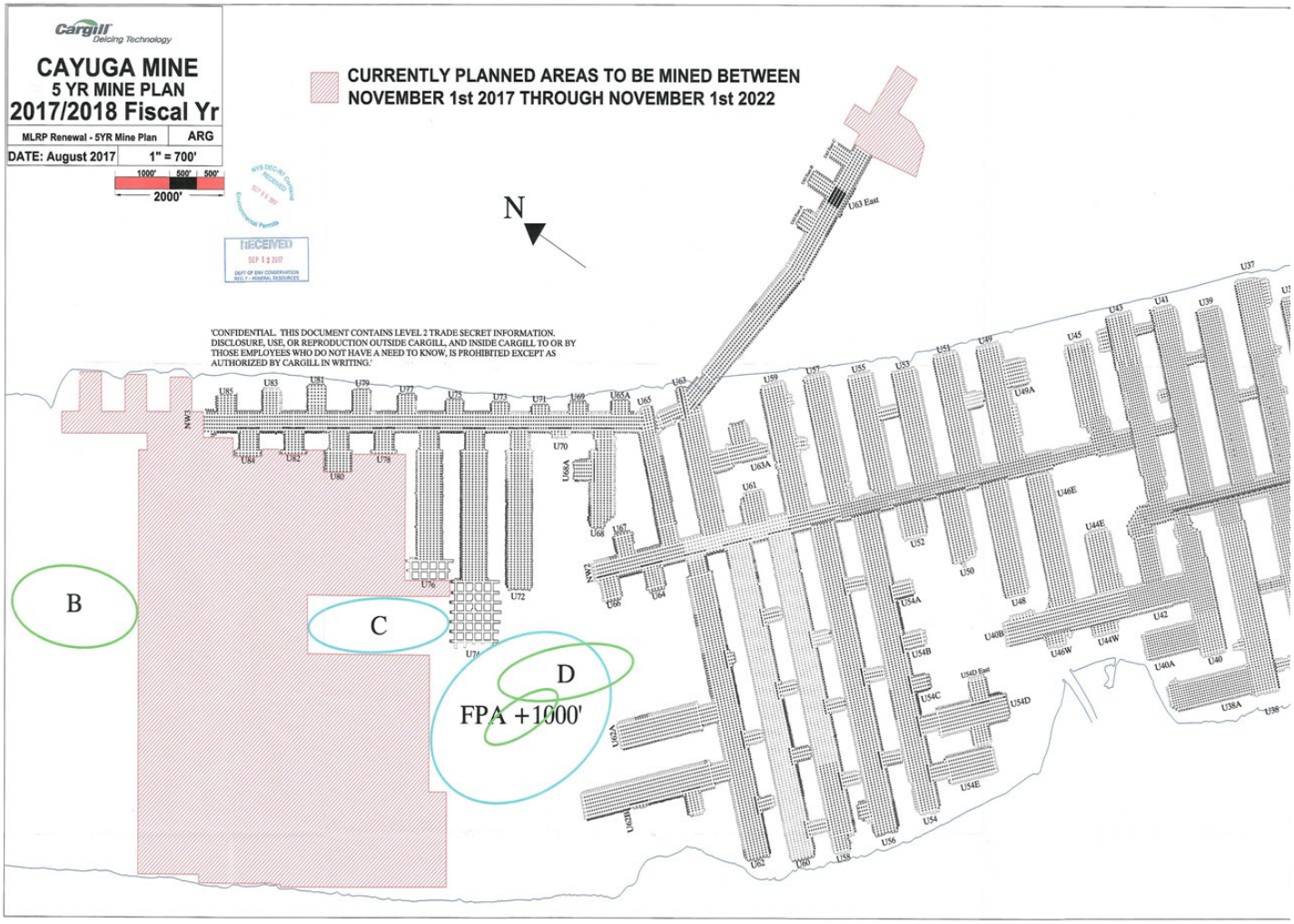
mine that depicted the relevant anomalies as well as the areas where Cargill was approved to mine in relationship to the anomalies.

The 2019 permit renewal was the result of a 2017 permit renewal application by Cargill (R99-102). In its application, Cargill projected that, over a five-year permit term, it would mine in the vicinity of anomalies that included anomalies D, C, B, and the Frontenac Point Anomaly (R102). Along with other application materials, Cargill submitted a mined-land use plan map that was required by both statute and regulation (*see* ECL 23-2705 [6], [9]; 23-2713 [1], [1] [a]; 6 NYCRR § 422.1 [c]). The August 2017 map Cargill submitted for this requirement was titled "Cayuga Mine 5 YR Mine Plan 2017/2018 Fiscal Yr" (the Five-Year Plan Map) (R102).

The locations of the anomalies as depicted on the Five-Year Plan Map were generally based on decades of study by Cargill and were particularly influenced by Cargill's latest geophysical seismic survey of the mine, which occurred in 2016 (R85; *see* Rigley Aff. at ¶ 48).

The Five-Year Plan Map, and its depiction of the anomalies and Cargill's mining plans, is shown below in Figure 2.

Figure 2: The Five-Year Plan Map



(R102).

On April 24, 2019, DEC issued the 2019 permit renewal. The 2019 permit renewal explained in plain, unambiguous terms that DEC's permit "approved" the Five-Year Plan Map (R63, 102). This approval of the Five-Year Plan Map satisfied DEC's statutory duty to approve a mined land-use plan that included a "graphic description of the proposed mining operation"

(ECL 23-2713 [1] [a]). The 2019 permit renewal further set forth that "activities authorized by th[e] permit must be in strict conformance" with a list of DEC-approved plans, one of which was the Five-Year Plan Map (R63). Thus, DEC approved a map that definitively located anomalies B, C, D and the Frontenac Point Anomaly in 2019. Practical reality required DEC to take these definitive positions, because, unlike earlier permitting proceedings, Cargill's mining had reached the areas of these anomalies.

E. Lack of Challenge to the 2019 Permit Renewal

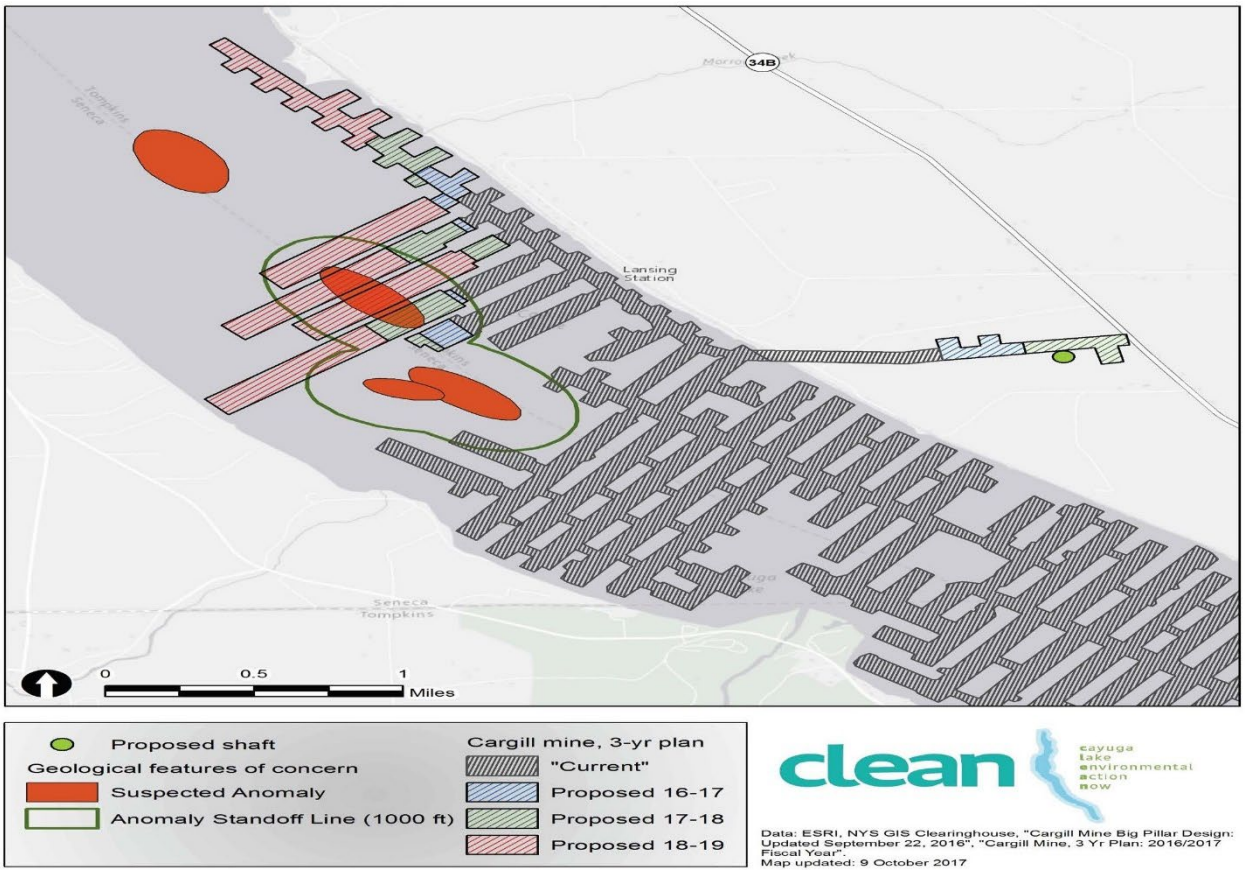
A subset of petitioners were engaged in the permitting process that led to the 2019 permit renewal, but none brought a timely challenge to DEC's approval of the Five-Year Plan Map and its depiction of the anomalies. Records establish that, in 2017, some petitioners created a map that locates the anomalies in a manner materially indistinguishable from the locations of the same anomalies on the map DEC adopted in the 2019 permit renewal.

Before they took a different position in this litigation, petitioners Cayuga Lake Environmental Action Now ("CLEAN") and John V. Dennis appeared to agree with the 5-Year Plan Map's depiction of the anomalies. In 2017, and in the midst of the aforementioned permit renewal process, Dennis wrote to DEC on behalf of CLEAN to request that the Department treat

Cargill's then-pending permit renewal application "as a new application" for a mining permit for the Cayuga Lake Mine.

In relationship to this and other requests, CLEAN and Dennis provided DEC a map that CLEAN had created ("the 2017 CLEAN Map") and explained that CLEAN's "cartographer ha[d] produced a clearer map of the 'suspected anomalies'" (R93, 98). As shown in Figure 3, below, the 2017 CLEAN Map depicted the anomalies in substantially the same shape and location as did the 5-Year Map Plan.

Figure 3: CLEAN's 2017 Map of the Anomalies



(R98). There is no record that, prior to commencing this litigation, petitioners informed DEC that they had disavowed CLEAN's 2017 depiction of the anomalies (*see* Rigley Aff. at ¶ 56).

If petitioners disagreed with the representation of the anomalies on the Five-Year Plan Map that DEC approved in April 2019, CPLR 217 provided them four months to commence a judicial challenge.

Petitioners were well-positioned to bring such a challenge, because DEC had provided CLEAN and Dennis personalized notice that the 2019 permit renewal would update DEC's position on the location of the anomalies. In January 2018, DEC wrote to CLEAN and Dennis in response to their 2017 letter (R84-87). DEC's letter provided, among other things, a general explanation of the role recent seismic survey data would play in establishing the location of anomalies in the upcoming permit determination:

> "The latest geophysical seismic survey conducted by Cargill has better defined the location and orientation of the F[rontenac Point Anomaly] and the other anomalies. Accordingly, the locations of the anomalies have been revised on recently submitted maps. As a part of the renewal application, 6 NYCRR Section 421.1 does require an approved mined land use plan, which includes an updated mining plan map. Cargill has provided an updated mining plan map as a part of the renewal application titled "[the 5-Year Plan Map]" dated August 2017. The map will be included in the approved document list made part of the Conformance with Plans permit condition" (R86 [emphasis added]).

Despite DEC's clear notice of its plan to approve a mining plan map geographically depicting the anomalies, no petitioner brought a timely judicial challenge to the 2019 permit renewal.

F. The Permit Modification Proceeding.

The proceeding that led to the challenged 2021 permit modification was commenced by DEC in August 2020, when DEC proposed a department-initiated modification to Cargill's mining permit. DEC publicly noticed its proposal and included a link to the full text of the proposed permit modification (R47-51). In its notice, DEC explained that it was proposing a number of modifications to the 2019 permit renewal. DEC noted, however, that "[t]h[e] modification does not propose to authorize changes in the operations and mining methods utilized at the mine" (R47). Among other modifications, DEC proposed to textually "memorialize" Cargill's 2010 agreement to "not mine under the F[rontenac Point Anomaly] and to maintain a minimum 1000-foot setback" from that anomaly (R47). DEC also proposed to clarify a provision regarding Cargill's use of a technical consultant that had specific reporting obligations to DEC. Among other changes, DEC proposed to include new professional experience requirements for the technical consultant to better ensure the consultant's competence (R48, 16).

Petitioners did not use DEC's public-comment period to make the SEQRA argument they raise in this litigation. DEC's notice explained that the proposed modification "w[ould] not have a significant impact on the environment" and that, as a result, DEC had issued a negative declaration pursuant to SEQRA (R49, 56-61). The notice also provided a period for the public to comment on the proposed permit modification and SEQRA determination (R49).

Only CLEAN and Dennis filed comments. The pair submitted separate letters outlining numerous complaints they had with Cargill, the mine, and DEC's regulatory efforts (R19-28, 34-46). Neither letter alleged that DEC had failed to take a hard look at the range or locations of the anomalies. Likewise, neither CLEAN nor Dennis endorsed—or even referenced—any maps of the anomalies that could serve as an alternative to the Five-Year Plan Map (R19-28, 34-46). Finally, neither CLEAN nor Dennis used their public comments to repudiate their 2017 position on the anomalies (R19-28, 34-46). Only one complaint that CLEAN and Dennis made was directed at a proposed modification to the permit: CLEAN and Dennis expressed disagreement with the proposal to modify the technical consultant provision of the permit (R22-23, 37).

G. The 2021 Permit Modification

After publishing its response to public comments, DEC issued the 2021 permit modification as proposed (R1-11, 16). Because no public comments had alleged that DEC should have taken a hard look at the location of the anomalies, DEC's response to public comments did not make any reference to DEC's position on the anomalies (R11-14).

Nonetheless, the face of the 2021 permit modification established that DEC's position remained unchanged. The 2021 permit again "approved" the 5-Year Plan Map and required Cargill to act in "strict conformance" with that map (R2, 102).

THIS PROCEEDING

Petitioners are a collective of anti-Cayuga Salt Mine advocates, a subset of whom have engaged in previous unsuccessful litigation against DEC and Cargill. Most notably, those previous efforts included a failed attempt to leverage a challenge to Cargill's construction of a mine shaft for miner safety into an opportunity to require wholesale environmental review for the northern reserves (*see Matter of City of Ithaca v New York State Dept. of Envtl. Conservation*, [Sup Ct Tompkins County June 13, 2018] [Rowley, J.] [Granting so much of Cargill's motion to dismiss as was directed at the petitioners' challenges to DEC's 2003 permit]], [Sup Ct Tompkins County

April 22, 2019] [Rowley, J.]] [Dismissing the petition after upholding DEC's SEQRA determination as rational], *appeal dismissed as moot by* 188 AD3d 1322, 1322 [3d Dept 2020], *lv denied* 37 NY3d 906 [2020]; *see also Dennis v New York State Dept. of Envtl. Conservation* [Sup Ct Tompkins County 2019] [Rowley, J] [holding that Dennis' challenges to previous DEC FOIL determinations were time barred]. (*see* July 26, 2021 Buttino Affirmation Exhibit E, F [NYSCEF Doc Nos. 31 & 32]). The judges assigned to these suits uniformly rejected the challenges to DEC's determinations. Now, petitioners commence this single-cause-of-action CPLR Article 78 proceeding challenging DEC's 2021 permit modification.

Petitioners state that the "bases of [their] challenge is the failure of the DEC to take a hard look at the full range and location of the FPA and anomalies A-E in violation of [SEQRA]" (NYSCEF Doc. No. 86, Petitioners' MOL at 2). In support of their position, petitioners file a host of new fact and opinion affidavits from alleged experts that did not participate in DEC's public comment process. Petitioners also point to a number of maps that they argue are preferable to the 5-Year Plan Map in terms of locating the anomalies, but, again, petitioners had never mentioned these maps during the permitting process. Petitioners "seek to void the grant of the modified

mining permit and enjoin any further mining under the FPA and other anomalies, and also under the 1,000-foot setback from such anomalies" (*id.*).

In December 2021, Supreme Court (Cassidy, J) issued an order that, after examining petitioners' allegations in the light most favorable to them, denied respondents' respective motions to dismiss the amended petition based on untimely service (*see* NYSCEF Doc. No. 83). Now, DEC answers and seeks an order and judgment from this Court dismissing the amended petition in its entirety.

ARGUMENT

POINT I

PETITIONERS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES

Petitioners' sole cause of action is improperly based on a factual argument that petitioners never raised to DEC during the permit modification process. DEC provided an opportunity for the public to comment on its proposed permit modification and accompanying negative declaration, and petitioners failed to argue that DEC needed to take a hard look at the location of the anomalies. Relatedly, the alleged experts who submit affidavits on behalf of petitioners in this proceeding did not submit comments

on behalf of petitioners before DEC.[4] Petitioners' failure to raise their anomaly arguments at the administrative level is fatal to their sole cause of action in this proceeding.

It is "well settled that an argument may not be raised for the first time before the courts in an article 78 proceeding" (*Matter of Peckham v Calogero*, 12 NY3d 424, 430 [2009]; *see Matter of Bais Sarah Sch. for Girls v New York State Educ. Dept*, 99 AD3d 1148, 1151 [3d Dept 2012], *lv denied*, 20 NY3d 857 [2013]). The exhaustion doctrine "requires litigants to address their complaints initially to administrative tribunals, rather than to the courts, and to exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts" (*Young Men's Christian Assn. v Rochester Pure Waters Dist.*, 37 NY2d 371, 375 [1975] [internal quotation marks and citations omitted]). In imposing this rule, courts "afford[an]

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[4] This Court should disregard the affidavits that petitioners filed that contain information and allegations that petitioners did not provide during the administrative process. Judicial review of administrative determinations in CPLR Article 78 proceedings is "confined to the facts and record adduced before the agency" (*Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000] [internal quotation marks and citation omitted]). "[P]etitioners impermissibly rely on documents and reports that were generated well after the DEC made its determinations," and therefore, this Court should not consider the newly created affidavits (*Matter of Fichera v New York State Dept. of Envtl. Conservation*, 159 AD3d 1493, 1497 [4th Dept 2018]).

agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its expertise and judgment" (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). "Where environmental matters are involved . . . it is particularly important to allow the administrative agency possessing the requisite expertise to exercise its authority to . . . make findings and state the reasons for its action on the record prior to judicial review of the determination" (*Aldrich v Pattison*, 107 AD2d 258, 268 [2d Dept 1985]). Moreover, an issue that requires "resolution of factual, not purely legal, issues . . . must be determined by the administrative agency in the first instance" (*Matter of Hudson Riv. Val., LLC v Empire Zone Designation Bd.*, 115 AD3d 1035, 1038 [3d Dept 2014]). A party that attempts to litigate a SEQRA challenge that was never raised in public comments at the administrative level fails to exhaust administrative remedies (*Matter of Pilot Travel Ctrs., LLC v Town Bd. of Town of Bath*, 163 AD3d 1409, 1411 [4th Dept 2018], *lv denied* 32 NY3d 914 [2019]; *see Aldrich v Pattison*, 107 AD2d at 268).

The only parties that commented on DEC's proposed permit modification and negative declaration were petitioners CLEAN and Dennis. They did not raise the argument made by petitioners in this litigation, *i.e.*, that DEC had failed to take a hard look at the location of the anomalies (R19-

28, 34-46).[5] By waiting to raise this argument for the first time in this proceeding, petitioners improperly deprived DEC of an opportunity to create an administrative record on the issue or to consider clarifying the language it used in the 2021 permit modification to more clearly state that it was not changing its position on the location of the anomalies. Because petitioners' sole cause of action is a factual argument never raised before DEC, the petition must be dismissed for failure to exhaust administrative remedies (*see Matter of Peckham*, 12 NY3d at 430; *Matter of Pilot*, 163 AD3d at 1411 [affirming dismissal of a petition challenging a town's negative declaration based on an argument that the petitioner had failed to raise during a public planning board meeting]; *Matter of Preservation Assn. of Cent. N.Y. v Marcoccia,* 284 AD2d 948, 948 [4th Dept 2001]; *Matter of Long Is. Pine Barrens Soc., Inc. v Plan. Bd. of Town of Brookhaven*, 204 AD2d 548, 550 [2d Dept 1994], *lv dismissed* 85 NY2d 854 [1995]; *Matter of Jonas v Town of*

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[5] In their public comments, CLEAN and Dennis made a different SEQRA argument than the one petitioners now raise. CLEAN and Dennis both "called for a positive declaration and a full Environmental Impact Statement" for the entire Cayuga Salt Mine (R19-28, 34-46). Thus, CLEAN and Dennis devoted their public comments to collaterally attacking mining authorizations that were established decades ago, most notably in 1979 and 2003.

Colonie, 110 AD2d 945, 946-947 [3d Dept 1985] [holding that the failure to exhaust administrative remedies precluded a CPLR Article 78 challenge to the "issuance of a negative declaration of environmental impact" pursuant to SEQRA]; *Aldrich v Pattison*, 107 AD2d at 268 [holding that challenges to a SEQRA determination that were "never voiced" during administrative proceedings were "not . . . properly before th(e) court for review"]; *Matter of Town of Candor v Flacke*, 82 AD2d 951, 952 [3d Dept 1981]).

POINT II

PETITIONERS' MINING-RIGHTS ARGUMENTS ARE EITHER MOOT OR UNRIPE FOR JUDICIAL REVIEW

The vast majority of petitioners' mining-rights arguments are not based on live controversies. The arguments are either moot due to Cargill's mining progress or are premature attacks on hypothetical DEC determinations.

"'[T]he doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy'" (*Matter of City of Ithaca v New York State Dept. of Envtl. Conservation*, 188 AD3d 1322, 1323 [3d Dept 2021], *lv denied* 37 NY3d 906 [2020], *quoting Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 172 [2002]).

There is no actual controversy regarding petitioners' requests for mining prohibitions related to anomalies E, C, and D. Cargill has already undermined anomalies E and C without incident (R268; *see* Rigley Aff. Exhibit B). Mining within 1,000 feet of the Frontenac Point Anomaly is definitively prohibited, as is mining under Anomaly D because it falls within the 1,000-foot setback (R6, 73). Petitioners argue that mining should be prohibited within 1,000 feet of the Frontenac Point Anomaly according to their preferred linear representation of that feature, but that argument is also largely academic. In the contested area near the Frontenac Point Anomaly where DEC has authorized Cargill to mine but where petitioners wish it was prohibited (*i.e.*, the difference in prohibited acreage between the "oval" and "linear" representation of the Frontenac Point Anomaly), Cargill has completed the vast majority of the mining authorized to take place.

Any arguments regarding anomalies A and B are unripe for judicial review. An administrative decision is ripe for judicial review pursuant to CPLR Article 78 only when the challenged action is final (*see* CPLR 7801 [1]) "[I]f the anticipated harm is insignificant, remote or contingent . . . the controversy is not ripe" (*Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 520 [1986]).

Petitioners' assumption that DEC will approve mining under A and B at some future point is speculative and unripe for judicial review. Permitting conditions in place since 2003 have prevented Cargill from mining under anomalies A and B absent further study, and the 2021 permit modification continues to establish this condition (R4). Cargill continues to study mining under these anomalies but has not submitted additional studies nor received the approval required by the permit conditions to undermine anomalies A or B. Therefore, any controversy over undermining anomalies A and B is not ripe for judicial review.

Due to the fact that petitioners' arguments are all either moot or unripe, the amended petition should be dismissed.

POINT III

DEC'S PERMIT DETERMINATIONS WERE RATIONAL

A. DEC'S SEQRA Determination was rational

Setting aside the infirmities that petitioners failed to exhaust administrative remedies and failed to present live controversies to the Court, petitioners' SEQRA contention lacks merit. Petitioners argue that DEC did not take a hard look at the proposed action because it did not appreciate "the potential significant adverse environmental consequences of mining under all the anomalies" and by "not properly determining the geographic area of the

anomalies" (Petitioners' MOL at 15-16). Both of petitioners' arguments are incorrect because the 2021 permit modification did not authorize any new mining and did not involve DEC taking any new position on the geographic location of the anomalies.

DEC's position on the location of the anomalies in the 2021 permit modification remained unchanged from its position in the 2019 permit renewal. The 2019 permit renewal finally determined the geographic location of the relevant anomalies because it had to. Cargill's mining had progressed to the point where its five-year plan for mining included mining in the immediate vicinity of anomalies D, C, B and the Frontenac Point Anomaly (R102). For this reason, the Five-Year Plan Map definitively locates these anomalies as well illustrates Cargill's plans to mine up to the edge of the anomalies in various areas (R102). Petitioners' collateral attack on DEC's 2019 determination regarding the anomalies is time barred.

Judicial review of a 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 for its determination" (*Matter of Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan*, 30 NY3d 416, 430 [2017]). "Nothing in [SEQRA] requires an agency to reach a particular result on any issue, or permits the courts to

second-guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]). "An environmental impact statement is only required if the proposed action included the potential for at least one significant adverse environmental impact" (*Matter of Village of Chestnut Ridge v Town of Ramapo*, 99 AD3d 918, 925 [2d Dept 2012], *lv dismissed* 20 NY3d 1034 [2013]; *see* 6 NYCRR § 617.7 [a] [2]).

"A degree of finality and stability is properly created once a permitted activity has successfully met the initial SEQRA requirements" (*Matter of Village of Hudson Falls v NewYork State Dept. of Envtl. Conservation*, 158 AD2d 24, 30 [3d Dept 1990], *affirmed on opinion below* 77 NY2d 983 [1991]). For this reason, additional environmental review of a permit renewal or modification is unnecessary "absent a material change in conditions" (*Matter of Plante v New York State Dept. of Envtl. Conservation*, 277 AD2d 639, 642 [3d Dept 2000]). "SEQRA review of later additions or modifications involving the same project cannot be used as a pretext for the correction of perceived problems which existed and should have been addressed earlier in the environmental review process" (*Matter of Schulz v State of New York*, 274 AD2d 615, 618 [3d Dept 2000] [internal quotation marks and citations omitted], *lv denied* 96 NY2d 701 [2000]).

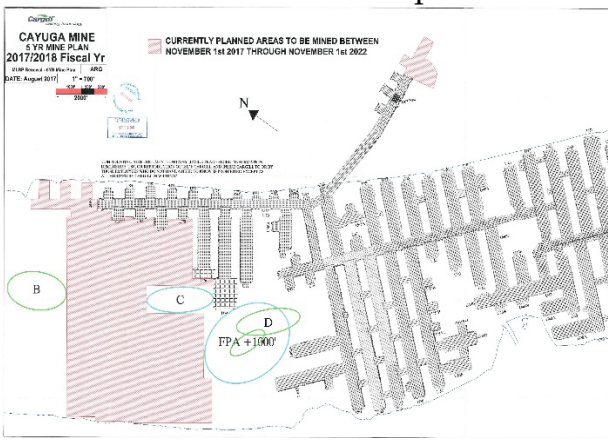
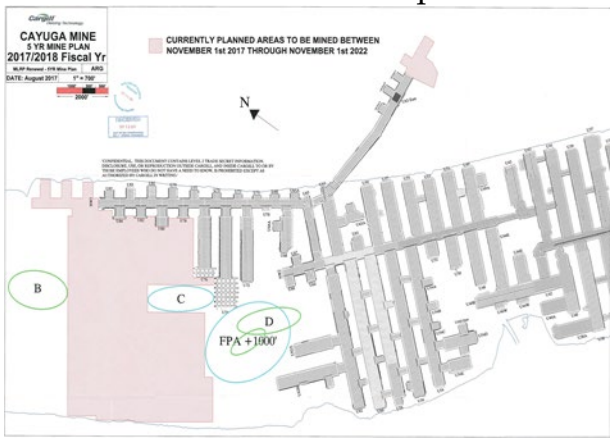
DEC's SEQRA regulations and *SEQRA Handbook* also confirm that SEQRA does not require repeat environmental review for already permitted activities. 6 NYCRR § 617.5 (c) (32) establishes the presumption that permit renewals do not require an environmental impact statement where "there will be no change in . . . the scope of permitted activities" (*see* 6 NYCRR § 617.5 [a]). The *SEQRA Handbook* advises that, "[w]here the action involves the expansion of an existing facility, . . . [o]nly the expansion should be considered and analyzed as the proposed action under SEQR" (4th Ed. [2020], p 117 [Item 19], *available at* https://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf, last accessed May 12, 2020).

DEC rationally concluded that the 2021 permit modification did not change the scope of permitted activities by providing any new mining authorizations (R47, 61). Other than clarifying the *prohibition* on mining near the Frontenac Point Anomaly in the text of Cargill's permit, the 2021 permit modification made no changes to DEC's position on anomalies whatsoever (R1-11). The "Conformance with Plans" condition of the 2021 permit modification required Cargill to act in "strict conformance" with the 5-Year Plan Map (R2, 102). The 2019 permit renewal had an identical provision also requiring Cargill's strict conformance with the 5-Year Plan Map (R63,

102). Figure 4, below, shows how DEC made no changes to its position on the anomalies in the 2021 permit modification by showing that mined-land use plan maps that DEC approved were identical in both DEC determinations.[6]

[6] On the motion dismiss, and upon viewing the evidence before the Court in the light most favorable to petitioners, Supreme Court concluded from the text of the permits, without consideration of the Five Year Plan Map and its express incorporation into both the 2019 permit renewal and the 2021 permit modification, that "DEC's decision as to the configuration of the FPA and the[other] anomalies was not finalized until the issuance of the 2021 permit modification" (*but see* R2, R63, 102). With the benefit of a full record and upon a neutral consideration of the merits, this Court should recognize that the law and the record unequivocally support a contrary conclusion. Statutory law establishes that mining permits incorporate mined land-use plan maps. By approving Cargill's Five-Year Plan Map in 2019, DEC necessarily approved the location of the anomalies and Cargill's plan for mining around those anomalies (R63, 102). DEC did not change its position when it approved the same 5-Year Plan Map in the 2021 permit modification (R2, 102).

Figure 4: Comparison of Approved Mined-Land Use Plan Maps

2019 Permit Renewal Approved Mined Land Use Plan Map:	2021 Permit Modification Approved Mined Land Use Plan Map:
	
(R63, 102).	(R2, 102).

DEC rationally recognized that the action subject to SEQRA review was the proposed modifications to Cargill's existing permit, as Cargill had "previously satisfied SEQRA and any other environmental concerns . . . in order to secure the [previous] permit[s]" (*Matter of Plante,* 277 AD2d at 642). The proposed modifications did not alter the geographic locations of anomalies or authorize any new mining or mining techniques. As a result, DEC's conclusion that the modifications would not have any significant adverse impact on the environment should be upheld as rational (*see* 6 NYCRR § 617.2 [z]; *Matter of Plante*, 277 AD2d at 642).

The 2021 permit modification is not the source of the mining authorizations petitioners complain of, and therefore petitioners' lawsuit is

actually an improper collateral attack on DEC's 2019 permit renewal, as well as even earlier DEC permitting determinations.

Each of petitioners' challenges to mining authorizations are time barred. In their prayer for relief, petitioners demand that Cargill be enjoined from mining within a 1,000 feet of Anomalies A through E,[7] the Frontenac Point Anomaly mapped both as a "linear" and "oval" feature, and within the "continuous trough of thinning bedrock that encompasses each of anomalies A through E" (NYSCEF Doc. No. 6, Amended Petition at 10). To the extent petitioners' prayer for relief relates to areas where mining is currently authorized, petitioners' requests contravene mining authorizations provided in either DEC's 2019 permit renewal or even earlier DEC authorizations.

The 2019 permit renewal approved the Five-Year Plan Map (*see* ECL 23-2705 [9]; 23-2713 [1], [1] [a]; 6 NYCRR § 422.1 [c]) (R63, 102). The Five-Year Plan Map shows that, absent a more specific applicable prohibition, Cargill has the right to mine within 1,000 feet of all anomalies except for the Frontenac Point Anomaly, has the right to mine in areas that would be prohibited if the Frontenac Point Anomaly was thought of as a longer,

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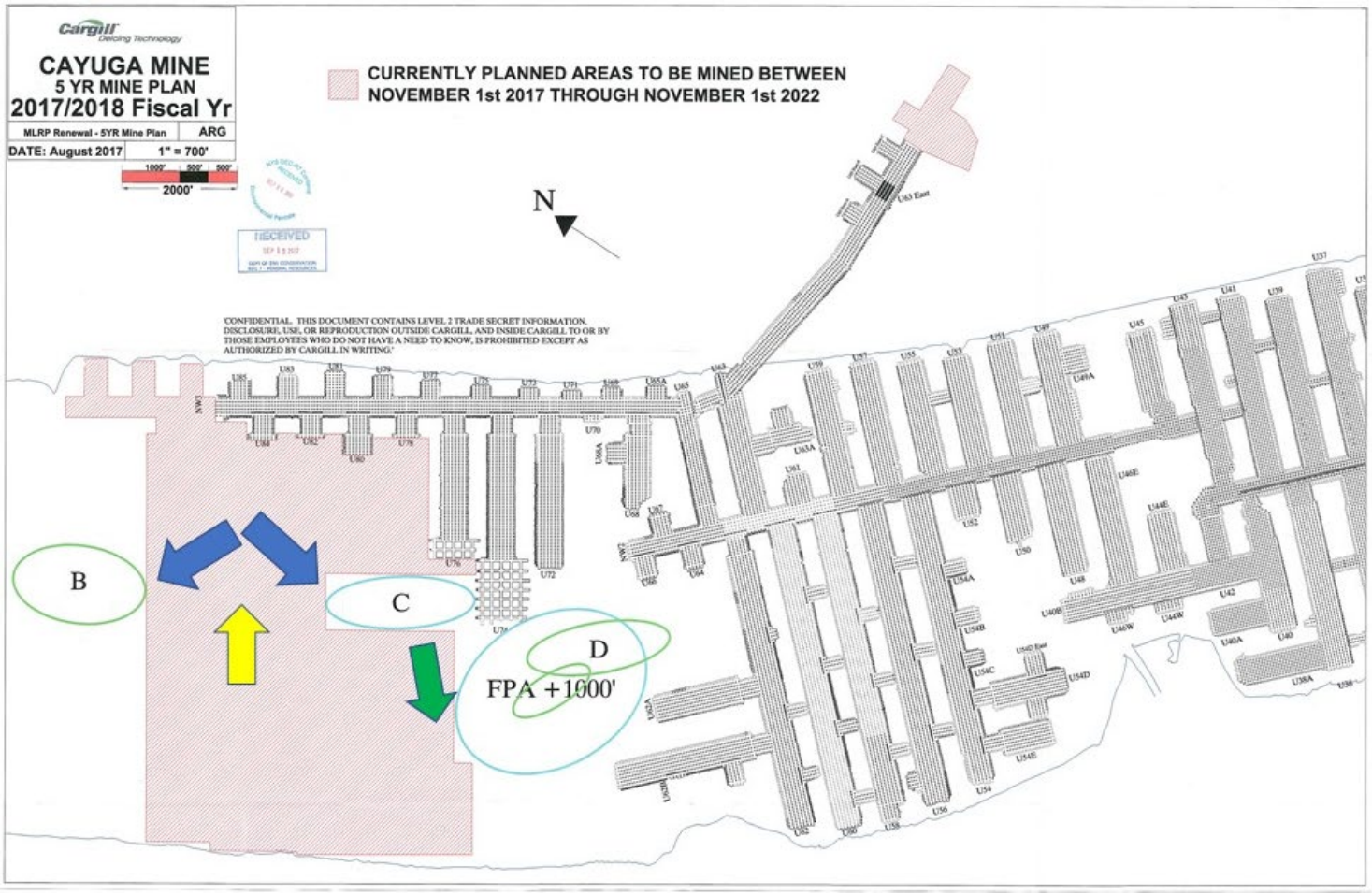
[7] In requesting this relief, petitioners inexplicably ignore the fact that Cargill has already completed undermining anomalies E and C.

"linear" feature, and has the right to mine within the "trough" petitioners identify as running between anomalies A through E (R102). Figure 5, below, uses colored arrows to point out the numerous conflicts between the mining authorizations afforded in the 2019 permit renewal and the prohibitions petitioners request in this lawsuit.

Figure 5: Conflicts Between the 2019 Permit Renewal Authorizations and Petitioners' Requests for Mining Prohibitions

KEY to Figure 4:

- Mining within 1,000 feet of an anomaly
- Mining within the "trough" between anomalies
- Mining within 1,000 foot setback of the Frontenac Point Anomaly represented as a linear feature



(R63, 102).

In addition, DEC separately authorized mining under anomaly C in an April 2018 determination (R73). This 2018 determination conflicts with petitioners' request that mining should be prohibited under that anomaly and an associated 1000-foot setback. Thus, if petitioners were aggrieved by DEC

determinations regarding the anomalies, they were aggrieved by the 2019 permit renewal and the 2018 DEC Anomaly C mining approval.

Pursuant to CPLR 217 (1), the statute of limitations for judicially challenging these prior DEC decisions ran four months after the respective determinations. Petitioners cannot now, years later, collaterally attack prior mining authorizations through a lawsuit aimed at a minor permit modification that did not authorize any new mining (*see* CPLR 217 [1]; *Matter of Plante*, 277 AD2d at 642; *Matter of Schulz v State of New York*, 274 AD2d at 618 [rejecting the petitioners' argument that a timely challenge to one SEQRA determination "resurrect(ed) their long since time-barred claims to" other, older SEQRA determinations]; *Cahill v Harter*, 277 AD2d 655, 656 [3d Dept 2000]; *see also Matter of Plaza Realty Invs. v Aponte*, 198 AD2d 164, 164 [1st Dept 1993]).[8]

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[8] Petitioners' prayer for relief is itself proof that petitioners' challenges are thinly-veiled attacks on time-barred DEC determinations. Petitioners seek a permanent injunction as to specific forms of mining. If the mining rights petitioners seek to enjoin actually flowed from the 2021 permit modification, rather than from earlier DEC determinations, the CPLR Article 78 remedy of annulment of an administrative determination would provide an adequate remedy at law for any cause of action that had merit. The "extraordinary" remedy of a permanent injunction, in contrast, is only available where the party seeking the equitable relief establishes "the

Petitioners' SEQRA argument lacks merit because DEC rationally issued a negative declaration after taking a hard look at the limited scope of the permit modification at issue and recognizing that the permit modifications did not change the scope of permitted activities. Otherwise, petitioners' challenges are untimely attacks on the 2019 permit renewal and even earlier DEC determinations, all of which are beyond the statute of limitations. Thus, petitioners' SEQRA cause of action must be dismissed.

B. DEC'S Technical Consultant Provision Modification was Rational

As a final matter, petitioners ask this court to "restor[e] . . . the previous permit language which allows DEC to manage their own consultant" (Petitioners' MOL at 16). In support of this request, petitioners assert their belief that the modification of the technical consultant provision will render mine-related documents less accessible through FOIL (*see id.* at 5).

FOIL does not provide a basis to invalidate the modification to the technical consultant provision in the 2021 permit. FOIL promotes government transparency; it does not empower private parties to direct

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absence of an adequate remedy at law" (*Caren Ee. v Alan Ee.*, 124 AD3d 1102, 1105 [3d Dept 2015]). Petitioners have made no showing that they lack an adequate remedy at law if the 2021 permit modification imposed harm on them.

government regulation or investigations. The plain language of FOIL provides certain "[a]ccess to agency records" and defines a "[r]ecord" as "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature" (Public Officers Law §§ 86 [4], 87). A record for the purposes of FOIL does not include materials that a private party wants an administrative agency to create or obtain from a regulated entity. Thus, DEC did not violate FOIL when it modified Cargill's permit without giving weight to petitioners' FOIL aspirations.

Otherwise, DEC's modification of the technical consulting provision is rational. Courts provide "great weight and judicial deference" to DEC permitting determinations that "entail[] technical and specialized expertise" (*Matter of Preble v Zagata*, 263 AD2d 833, 835 [3d Dept 1999], *lv denied* 94 NY2d 760 [1999]).

Contrary to petitioners' apparent assumption, the prior permit language did not require DEC to employ the technical consultant. DEC has never hired or employed the technical consultant under any previous permit terms (R68, 238). The 2021 permit modification rationally ensures that DEC has the needed access to an expert consultant's opinions regarding the mine and, particularly, the mine's safety. The modified provision establishes substantive qualifications for the consultant relevant to the required

technical expertise and guarantees that the expert does not have a conflict of interest in the form of a separate business relationship with Cargill (R6). The provision further ensures that the consultant and its expertise will be available to DEC in regard to Cargill's annual reports, permit modifications requiring technical expertise, the annual site inspection and associated underground tour (R6). The modified provision also removes the previously existing cap that limited Cargill's annual financial responsibility for the consultant services to $15,000 a year, which also ensures that DEC has the necessary access to the consultant's expertise (R6). Because the modification to the technical consultant provision in the 2021 permit modification has a sound basis in reason, petitioners' request to invalidate that modification lacks merit (*see Matter of Regional Action Group for Envt. v Zagata*, 245 AD2d 798, 800 [1997], *lvs denied* 91 NY2d 811 [1998]).

CONCLUSION

The amended petition should be dismissed in its entirety.

Dated: May 12, 2021
Albany, New York

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