STATE OF NEW YORK
SUPREME COURT : COUNTY OF TOMPKINS

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 Laws and Rules

-vs-

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

Respondents.

Index No. EF2021-0422

Hon. Elizabeth Aherne

MEMORANDUM OF LAW IN SUPPORT OF PETITION

I. INTRODUCTION

This Memorandum of Law is submitted in support of the Petition. As the Court is aware, a Motion to Dismiss was denied by Judge Joseph R. Cassidy. Much of what will be contained in this Memorandum of Law had already been submitted to Judge Cassidy in response to Respondents' Motion to Dismiss this proceeding. However, for the convenience of the Court, and at the expense of cutting down some more trees, Petitioners will repeat much of material previously submitted.

Petitioners commenced this special proceeding challenging the February 12, 2021, modified mining permit issued to Cargill Incorporated (hereinafter cited as "Cargill") for its Cayuga Salt Mine, issued by Respondent New York State Department of Environmental Conservation (hereinafter cited as "DEC"), which properly precludes Cargill from mining under

the Frontenac Point Anomaly (hereinafter cited as "FPA"), and a 1,000-foot setback or buffer from the anomaly, and precludes mining under anomalies A and B until further study is undertaken, as will be more fully explained in this Memorandum of Law and its attached Affidavits.

The bases of Petitioners' 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 the New York State Environmental Quality Review Act, Environmental Conservation Law § 8-0101, et. seq. (hereinafter cited as "SEQRA"). Therefore, due to the violation of SEQRA, 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, until a hard look is taken of the location, and condition of all of the anomalies so that SEQRA will be fully complied with.

II. FACTS

Cargill has a permit to mine salt under about 9,000 acres of land under Cayuga Lake of which Cargill has already mined about 4,300 acres.

As mining continues northward under Cayuga Lake, the strata between the roof of the mine and lake continually thins. Based on information and belief, as little as 80 feet of geological section remains above the comparatively weak unit termed "evaporite section" in certain sections of the Cayuga Lake glacial valley, which means that the mechanically strong "carbonate beam" layer has been thinned or glacially-gouged out at the center of the lake. Therefore, the excavation of mine cavities in the zones which may have water penetration and weakened strata jeopardizes global mine stability and degrades the capacity of the evaporite section to resist water intrusion and ceiling collapse in the mine itself.

The DEC has now recognized that hazardous conditions exist in various areas within Cargill's permitted reserves where this thinning bedrock presents a hazard of potential mine collapse. Cargill's consultants have referred to areas already identified as Anomalies A through E, and the FPA (collectively the "Anomalies").

It is because of the hazards presented at the Anomalies that the DEC has modified Cargill's permit, prohibiting mining under the FPA and within a 1000-foot buffer around the FPA, and mining under Anomalies A and B until further study can be completed concerning the potential hazards under these two Anomalies. The DEC has not modified the permit as it relates to Anomalies C, D and E.

While Petitioners applaud DEC's finally recognizing the hazards presented under FPA and Anomalies A and B, the DEC failed to take a hard look at the actual configuration of the anomalies, and particularly at Anomalies C, D, and E, where similar conditions exist.

Moreover, in geographically determining the extent of the FPA, the DEC has accepted a generalized oval area utilized by Cargill in their mine map included in their 2017 Annual Report to DEC, and in a similar map included in a February 2018 letter sent to DEC by their consultant Boyd, to indicate the geographic area where the FPA exists.

However, neither Cargill nor the DEC has explained why a 2016 map of the FPA produced by Cargill consultant, RESPEC, is not the more accurate map of the FPA. Nor do they appear to have taken a hard look at the extent to which mining within 1000 feet of the glacial scour anomaly running from Anomaly A to Anomaly E, consisting of a continuous "trough" of thin bedrock, does not pose an unwarranted risk to global mine stability.

This issue has been fully explained by Dr. Raymond Vaughan in his three affidavits, attached hereto as Exhibit "A". Dr. Vaughan has provided the disputed maps as Exhibits B, C,

and D, to his Affidavit, indicating why the maps at Exhibits B and C are more likely to show the actual geographical area of the FPA fault line and adjacent anomalies, and why the generalized oval does not properly depict the hazardous areas that should be protected.

Cartographer Karen Edelstein describes her methodology for layering the anomalies and their putative 1000-foot setbacks over Cargill's 3-year mining plan map in her Affidavit of June 8, 2021. Ms. Edelstein provides her maps in her affidavit as Exhibits A, B, C, and D. Ms. Edelstein's affidavit is attached hereto as Exhibit "B".

In his affidavit attached hereto as Exhibit C, CLEAN president John V. Dennis explains the extent to which Cargill has reaped economic benefits of as much as $173M as a result of the DEC not learning of the existence of Anomaly E until after Cargill had mined under it. He also provides the figure of as much as an additional $34M that would accrue to Cargill if DEC allows Cargill's preferred "representative oval" map of the FPA to trump RESPEC's linear version of the FPA. The RESPEC map version of FPA is 5.3 times longer than Cargill's preferred "representation oval."

The nature and extent of the hazards posed by mining under and near anomalies are explained by world salt mining expert, Dr. John K. Warren in his Affirmation of June 7, 2021, attached hereto as Exhibit "D". In his Affirmation, Dr. Warren describes how the slow, ongoing distortion of bedrock above a mine, known as subsidence, affects both leakage through bedrock and its mechanical strength. Thus, while water leakage into a mine may be currently manageable, such leakage tends to worsen over time. Dr. Warren warns that most active salt mines are lost to flooding, as detailed in his 2017 paper titled *Salt usually seals, but sometimes leaks*. Such mine failure risks are aggravated by thinning bedrock and faulting, and he therefore emphasizes the

need for a protective buffer around the FPA and recommends that further mining beneath the trough of thin bedrock between Anomalies A and E be halted until the risks are fully evaluated.

By not properly investigating the proper geographic extent of the FPA and Anomalies A through E, including the continuous trough of thinning bedrock that runs from Anomaly A through Anomaly E, and by not recognizing the associated hazards and the need to provide protective requirements for all of the Anomalies and a 1000-foot buffer around them, the DEC has failed to take a hard look at this important safety issue.

During the comment period on DEC's proposal to modify the mining permit, John Dennis objected in a letter dated September 25, 2020, that the proposal would give Cargill control over the independent consultant advising the DEC on mining at Cayuga Salt Mine. See https://www.dec.ny.gov/docs/permits_ej_operations_pdf/cayugasmdimcmmnts.pdf at page 3.

In part, Mr. Dennis expressed concern that access to mine-related documents under FOIL--- already excessively restricted---would become even more limited. DEC responded by repeating portions of his comment without directly addressing it. Id. It is true that Cargill has paid for DEC's consultant since about 2002, but this consultant has always—until February of 2021—reported directly to the DEC.

III. ARGUMENT

A. THE STATUTORY SCHEME OF SEQRA.

In 1976, New York State enacted the New York State Environment Quality Review Act. While SEQRA was patterned after its Federal counterpart, the National Environmental Policy Act (42 U.S.C. § 4332, et. seq.), SEQRA is broader concerning when an Environmental Impact Statement needs to be drafted, and imposes greater duties insofar as substantive requirements are

placed on the decision-maker to chose environmentally sound projects, and to mitigate and identify any adverse environmental consequences to the greatest extent practicable.

The Legislature declared that the purpose of SEQRA was to:

> "Declare a State policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the State."

ECL, Section 8-0101.

As New York State courts have repeatedly held, "a principal goal of SEQRA is to 'incorporate environmental considerations in the decision-making process at the earliest opportunity.'" See, *Matter of City Council of the City of Watervliet v. Town Board of the Town of Colonie*, 3 N.Y.3d 508, 789 N.Y.S.2d 88, 822 N.E.2d 339, (2004), citing *Matter of Neville v. Koch*, 79 N.Y.2d 416, 593 N.E.2d 256, 583 N.Y.S.2d 802 (1992) and 6 NYCRR 617.1(c).

The heart of SEQRA lies in its provisions regarding environmental impact statements ("EIS"). The law provides that whenever an action may have a significant impact on the environment, an EIS shall be prepared. ECL § 8-0109(2). The National Environmental Policy Act, after which SEQRA was patterned, only required Environmental Impact Statements when the action under consideration would in fact be a major federal action which would have significant adverse environmental affects. However, the New York State Legislature decided that the requirement of an environmental impact statement should be applied to a much broader category of circumstances, and therefore determined that environmental impact statements are necessary not only when there will be substantial adverse environmental effects, but when there "***may***" be such effects. This document is to contain all the information necessary to assure that

the decision-making body can ultimately determine to go forward or not with any project in a manner that would create the least negative impact to the environment.

As explained by the court *In the matter of Shawangunk v. Planning Board of Town of Gardener*, 157 A.D.2d 273, 557 N.Y.S.2d 495 (3rd Dept. 1990):

> "The heart of SEQRA is the Environmental Impact Statement (EIS) process (*Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 415)…The EIS process is especially designed to insure the injection of full, open and deliberative consideration of environmental issues into governmental decision-making. (*Akpan v. Koch*, 75 N.Y.2d 561, 569). The EIS process guarantees comprehensive review of a project's adverse environmental effects, consideration of less intrusive alternatives to the proposed action, including 'no-action', and consideration of mitigation measures. (ECL 8-0109[2]; 6 NYCRR 617.14[f]; *Matter of Jackson v. New York State Urban Dev. Corp*., *supra*, at 416). To assure accountability of the lead agency and avoidance of any oversight in that agency's assessments, the regulatory scheme ***requires public access to the information*** by making the draft and final EIS available with sufficient lead time to afford interested persons an opportunity to study the project, its environmental effects and proposed mitigation measures, and then comment thereon (ECL 8-0109[4]; 6 NYCRR § 617.8[c]; 617.9[a]; *Matter of Jackson v. New York State Urban Dev. Corp.*, *supra* at 415-416). Additional safeguards are found in the substantive requirements that the lead agency must act and choose among alternatives so as to minimize adverse environmental consequences, consistent with other social, economic and policy considerations, and must then make appropriate written findings to that effect (ECL 8-0109[1][8]; 6 NYCRR 617.9[2][c]; *Matter of Jackson v. New York State Urban Dev. Corp.*, *supra* at 416, See *Akpan v. Koch*, *supra* at 570)"

157 A.D.2d at 275-276 [emphasis added]

The first step under the SEQRA regulations is the appointment of a "lead agency", or that agency principally responsible for carrying out or approving the project or activity, and who is charged with the responsibility for determining whether the project under consideration may have significant adverse environmental effects, and if so, to prepare an environmental impact statement or have it prepared. The "lead agency" is also the entity that is charged with carrying

out the procedures mandated by SEQRA. Therefore, the lead agency "shall act and choose alternatives which, consistent with social, economic and other essential considerations, and to the maximum extent practicable, minimize or avoid environmental effects…." ECL Section 8-1019(1). (Emphasis added)

Once a lead agency is designated, that lead agency is then required to engage in the environmental review required by SEQRA, including determining whether or not there may be significant adverse environmental effects, and if there may be significant adverse environmental effects, require the preparation of a draft environmental impact statement.

In making this decision, the next step in this process is for the lead agency to determine whether or not the action under consideration is considered a "Type I" action, "Type II" action, or an "unlisted action". Type I actions are those actions under consideration that because of their size, scope, or type "are more likely to require the preparation of an EIS than unlisted actions". 6 NYCRR § 617.4(a). As further indicated in the regulations, "the fact that an action or project has been listed as a Type I action carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS." 6 NYCRR § 617.4(a)(1). The regulations then set out a road map for determining what type of action would be considered Type I actions. In the instant proceeding the DEC improperly determined that the project was a Type II action. Type II actions are those actions that are specifically listed in the regulations, and that are of such minor impact, that no further action under SEQRA needs to be undertaken. For example, maintenance or repair involving no substantial changes in an existing structure or facility would be considered a Type II action. As will be seen, the action in question is actually a Type I action. Finally, those actions that do not fall within the regulatory requirements listed for Type I actions or Type II actions are considered "unlisted actions". The importance of the

designation is two-fold, First, it creates a presumption of adverse environmental effects if an action is considered a Type I action; and, Second, there are heightened regulatory requirements for Type I actions as opposed to unlisted actions.

Once the type of the action is determined, the lead agency must then determine whether or not the action may have any significant adverse effects which would require the drafting of an environmental impact statement.

In following the sequential steps to determine whether or not an environmental impact statement needs to be drafted as outlined in the regulations, the next step after a lead agency is established and if the project is determined to be a Type II action, no further environmental review is necessary, and all SEQRA obligations end at that point. However, if the project is determined to be Type I or unlisted, the lead agency must compare the proposed project and its affects with a list of potential adverse environmental consequences contained in Section 617.7 of the regulations. As indicated in the regulations, "to determine whether a proposed Type I or unlisted action may have a significant adverse impact on the environment, the impacts that may be reasonably expected to result from the proposed action must be compared against the criteria in this subdivision. The following list is illustrative, not exhaustive. These criteria are considered indicators of significant adverse impacts on the environment: …." 617.7(c)(1). The regulations then go on to list a number of potential areas where adverse environmental consequences may occur, for example, substantial adverse changes in existing air quality, water quality, traffic or noise levels, a substantial increase in the potential for erosion, flooding, leaching or drainage problems, removal or destruction of large quantities of vegetation or fauna, effects on wildlife or their habitat, or effects on natural resources

The regulations also indicate that an environmental impact statement must be prepared if the proposed action "***may include the potential for at least one significant adverse environmental impact***." 6 NYCRR § 617.7(a)(1) [emphasis added].

Stated another way, the regulations indicate that "***the lead agency must determine either there will be no adverse environmental impacts or the identified adverse environmental impacts will not be significant***." 6 NYCRR § 617.7(7)(a)(2). [emphasis added].

Therefore, as can be seen, and as previously recognized by the Courts, the bar to determining when an environmental impact statement must be drafted, particularly in a Type I action, is very low. For example, as stated in *City of Buffalo v. New York State Department of Environmental Conservation*, 184 Misc.2d 243, 707 N.Y.S.2d 606 (Sup. Ct. 2000):

> "The substantive mandate of SEQRA is much broader than that of the National Environmental Policy Act (NEPA). 42 USCA Section 4332 requires federal agencies to prepare an EIS for "any major federal action significantly affecting the quality of the human environment." This should be contrasted with Section 8-0109 of SEQRA which is more expansive it its terms. Subdivision 2 of this Section requires an EIS for "any action which is proposed or approved which may have a significant effect on the environment." Only a "low threshold" is required to trigger SEQRA review." Onondaga Landfill Systems, Inc. v. Flack, 81 A.D. 2d 1022, 440 N.Y.S. 2d 788 (4th Dept., 1981)."

707 N.Y.S. 2d at 611.

As previously indicated, our review of SEQRA indicates that DEC improperly determined that the mine permit renewal was Type II and exempt from further environmental review.

While the reviewing court is required to apply a strict and literal standard of compliance concerning the procedural requirements of SEQRA, the reviewing court is not to substitute its judgment for that of the lead agency in reviewing the substantive decision made by the lead

agency. However, a reviewing court must not slavishly adopt those findings either. As indicated by the Court of Appeals in *Akpan v. Koch*, 75 N.Y.2d 561, 555 N.Y.S.2d 16 (1990),

> "Nevertheless, an agency, acting as a rational decision-maker, must have conducted an investigation and reasonably exercised its discretion so as to make a reasoned elaboration as to the effect of a proposed action on a particular environmental concern. Thus, while a court is not free to substitute its judgment for that of the agency on substantive matters, the court must insure that, in light of the circumstances of a particular case, the agency has given due consideration to pertinent environmental factors."

(Citations omitted) 555 N.Y. 2d at 21.

Similarly, a lead agency's SEQRA judgments would never be overturned if a reviewing court was not able to determine whether or not a decision that there will be no adverse environmental affects so that an environmental impact statement need not be drafted was arbitrary, capricious, or otherwise in violation of law.

In determining whether or not there has been full compliance with the procedures of SEQRA, SEQRA requires strict compliance with its procedural requirements and some courts have indicated a literal compliance standard. Therefore, as opposed to most other statutes, courts early on recognized that because of the importance placed on SEQRA responsibilities by the legislature, substantial compliance with SEQRA would not suffice, and the courts require that SEQRA be strictly and literally construed, along with the procedural requirements indicated in the regulations. *Matter of Rye Town/King Civic Association v. Town of Rye*, 82 A.D. 2d 474, 442 N.Y.S.2d 67 (2nd Dept., 1981), app. dism. 56 N.Y.S. 2d 985, 453 N.Y.S.2d 682 (1982); *Schenectady Chemicals v. Flacke*, 83 A.D. 2d 460, 446 N.Y.S.2d 418 (3rd Dept., 1991).

In the oft-quoted citation from *Schenectady Chemicals*, the court indicated:

> "By enacting SEQRA, the Legislature created a procedural framework which was specifically designed to protect the environment by requiring parties to identify possible environmental

> changes 'before they have reached ecological points of no return.' At the core of this framework is the EIS, which acts as an environmental 'alarm bell'. It is our view that the substance of SEQRA cannot be achieved without its procedure, and that any attempt to deviate from its provisions will undermine the law's express purposes. Accordingly, we hold that an agency must comply with both the letter and spirit of SEQRA before it will be found to have discharged its responsibility thereunder."

(Emphasis Added) (Citations Omitted), 446 N.Y.S. 2d at 420.

The courts in New York State continue to adhere to this strict and literal compliance standard as necessary to fulfill the goals of SEQRA, and not just because the Legislature mandated that the act be carried out "to the fullest extent practicable," E.C.L., Section 8-0103(6), but also to ensure that both the spirit and letter of SEQRA are followed, the court could not allow a lead agency to invoke the rubric of "substantial compliance" as a device to escape the rigorous environmental goals of the Act. See, e.g. *Coalition for Future of Stony Brook Vill. v. Reilly*, 299 A.D.2d 481, 750 N.Y.S.2d 126 (2nd Dept. 2002).

At this point, it might be helpful to point out that Petitioners' challenge to the determination that the action is a Type II action is not a mere academic exercise. The management of American Rock Salt's Hampton Corners Salt Mine has already conducted two EISs so far during the 20-year life of that mine. It is likely that the higher levels of safety created by the EIS process has resulted in there having been zero fatalities at this Mine. By contrast, the DEC has required zero EISs at the Cayuga Salt Mine during Cargill's 52-year management of the mine and there have been seven mine-related fatalities. It is only through the environmental impact statement process that the lead agency, and just as surely the public, will have the opportunity to review whether or not proposed mine permit modifications trigger a need for the environmental impact statement process. Therefore, if an environmental impact statement was drafted, both the lead agency and the public would be able to assess how mine permit

modifications would affect the safety of Cargill's miners, the invaluable repository of fresh water in Cayuga Lake, and all of the riparian communities as well as the historic sites located within them. Without doing an environmental impact statement, neither the lead agency, nor the public, has been given the opportunity to review and analyze risks and rewards associated with the permit modifications and to comment thereon.

For all of these reasons, the courts have determined that even a procedural violation of SEQRA requires that the action taken by the lead agency be voided, so that the lead agency could not treat the new work as a mere post-hoc rationalization of what has gone on before. The Court of Appeals decision in *Tri-County Taxpayers Association v. Town Board*, etc., 55 N.Y.2d 41, 447 N.Y.S. 2d 699 (N.Y., 1987) is instructive. In that case, the Appellate Division, with two judges dissenting on the issue of remedy, determined that nullifying a vote of the electorate that took place prior to SEQRA compliance "would serve no useful purpose to undo what has already been accomplished...." 437 N.Y.S. 2d at 984. However, the Court of Appeals adopted the position of the dissenters, holding that in order to properly insure that the goals of SEQRA would be met, that the vote had to be nullified. The Court stated:

> "It is accurate to say, of course, that by actions of rescission later adopted the Town Board could have reversed the action authorizing the establishment of the sewer district. As a practical matter, for several reasons, however, the dynamics and freedom of decision-making with respect to a proposal to rescind a prior action are significantly more constrained than when the action is first under consideration for adoption. "

55 N.Y. 2d, at 64.

More recently however, the New York Court of Appeals has had further occasions to provide guidance concerning the strict compliance standard for SEQRA violations. Therefore, in

the case of *New York City Coalition to End Lead Poisoning, Inc. v. Vallone,* 100 N.Y.S.2d 337 (2003), the court indicated:

> "SEQRA's policy of injecting environmental considerations into governmental decision making, (see *Matter of Coca-Cola Bottling Co. v. Board of Estimate of City of New York*, 72 N.Y.2d 674, 679, 536 N.Y.S.2d 33, 532 N.E.2d 126 [1998] is 'effectuated, in part, through strict compliance with the review procedures outlined in the environmental laws and regulations' (*Matters of Merson*, 90 N.Y.2d at 750, 665 N.Y.S.2d 605, 688 N.E.2d 479). Strict compliance for SEQRA is not a meaningless hurdle. Rather, the requirement of strict compliance and the attendant spectre of *de novo* environmental review insure that agencies will err on the side of meticulous care in their environmental review. ***Anything less than strict compliance, moreover, offers an incentive to cut corners and then cure defects only after protracted litigation, all at the ultimate expense of the environment.*** (*Matter of King*, 89 N.Y.2d at 348, 653 N.Y.S.2d 233, 675 N.E.2d 1185; see *Matter of E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359, 371 526 N.Y.S.2d 56, 520 N.E.2d 1345 [1988]). Accordingly, ***where a lead agency has failed to comply with SEQRA's mandates, the negative declaration must be nullified*** (see, e.g., *Chinese Staff and Workers Assn. v. City of New York*, 68 N.Y.2d 359, 368-369, 509 N.Y.S.2d 499, 502 N.E.2d 176 [1986]). 100 N.Y.2d at 348." [emphasis added].

With this statutory scheme in mind, it is respectfully submitted that DEC violated both the procedural requirements and the substantive requirements of SEQRA.

B. THE DEC VIOLATED SEQRA

Therefore, prior to issuing the modified permit, DEC, as the lead agency for SEQRA compliance was required to apply a "hard look standard" in fulfilling its SEQRA responsibilities, which requires an agency to:

> "(1) Identify all areas of environmental concerns; and
>
> (2) Take a hard look at the environmental issues identified; and
>
> (3) Provide a reasoned elaboration for the decisions that are made, including whether or not to do an Environmental Impact Statement."

In issuing the Negative Declaration indicating that there will be no significant adverse environmental consequences and amending the permit, the DEC failed to meet the requirements of SEQRA. The DEC has not met the hard look standard by identifying relevant areas of environmental concern, including the potential significant adverse environmental consequences of mining under all the anomalies, taking a hard look at the multiple Anomalies and the extent to which they are part of a single "trough" of thin bedrock running down the center of Cayuga Lake. Moreover, the DEC has not made the required reasoned elaboration of the basis for its treatment of the Anomalies.

Furthermore, in issuing the modified permit, the DEC failed to specify a definitive shape and orientation of the FPA Anomaly. Similarly, the DEC has failed to provide a reasoned basis for drawing a 1000-foot buffer around only the short oval version of the FPA as opposed to drawing a buffer drawn around both versions of the FPA. As a result, DEC has not performed an independent analysis, as required by SEQRA and its regulations, of the potential adverse environmental consequences that may occur when mining takes place under anomalies associated with thinning bedrock and faulting. The areas at risk include not only the FPA and Anomalies A through E and their respective 1000-foot setbacks, but also the intervening portions of the trough of thinning bedrock that extends from Anomaly A through Anomaly E. The modified permit ignores both the RESPEC map of the FPA and the Boyd map that shows Anomalies A through E as one long continuous trough-like anomaly rather than five discrete "islands" of thin bedrock.

Due to the foregoing, the DEC should immediately halt any further mining under the areas known to be affected by thinning bedrock and faulting, including areas within 1000-foot

setbacks around both versions of the FPA and around the continuous trough of thinning bedrock extending from Anomaly A to Anomaly E.

This Proceeding also seeks restoration of the previous permit language which allows DEC to manage their own consultant. No previous proceeding concerning these issues has been brought in this or any other court concerning DEC's modified permit.

As recognized by Justice Cassidy, Petitioners' position in this proceeding is supported by evidence from experts. Particularly, Exhibits A and D explain the anomalies, how they occurred, and what effect not properly determining the geographic area of the anomalies create a significant safety hazard and effects that will be felt by the Petitioners.

As such, it is clear that DEC failed the hard look standard in issuing a Negative Declaration which does not indicate the manner in which DEC took a hard look at the geographic areas of the anomalies, or provided a reasoned elaboration why mining should not occur under all of the anomalies.

IV. CONCLUSION

For the foregoing reasons, it is respectfully submitted that this matter be remanded to the DEC to properly study the geographic and extent of the anomalies and the areas where mining should not occur. Moreover, it is respectfully submitted that the Court issue an injunction assuring that no mining will occur under all of the A-E anomaly areas as well as the FPA, until such time as the areas of the anomalies are properly determined geographically, and SEQRA is properly complied with.

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Respectfully submitted,

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