To be Argued by:
KEVIN G. ROE
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

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, and WILLIAM HECHT,

Petitioners-Appellants,

– against –

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

Respondents-Respondents.

Case No.: 529392

BRIEF FOR RESPONDENT-RESPONDENT CARGILL INCORPORATED

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COUNTERSTATEMENT OF QUESTIONS INVOLVED

Question No. 1:

Should the appeal be dismissed as moot because the project that is the subject of the litigation – an additional shaft to access an existing underground mine – is substantially complete and Appellants failed to seek timely injunctive relief?

Answer of the court below: The court below was not confronted with the mootness issue.

Question No. 2:

When a permitting agency conducts the environmental review of an expansion or modification of a previously-permitted facility, does the State Environmental Quality Review Act (SEQRA) require the agency to conduct a second (or third, or fourth) environmental review of the existing facility in addition to considering the impacts of the expansion or modification?

Answer of the court below: The court below rejected Appellants' contention that such a duplicative review of the existing facility was required.

Question No. 3:

(A) Have Appellants abandoned any claims that the Department of Environmental Conservation (DEC) did not adequately review the potential impacts of the shaft itself by not including those claims in their appellate brief?

(B) If the argument has not been abandoned, did the DEC adequately consider and appropriately reject Appellants' theory that there was a potential for the shaft to intersect a significant water-bearing zone in the subsurface geology by analyzing and relying on the results of a test corehole that demonstrated there is no such water-bearing zone?

Answer of the court below: The court below was not confronted with the appellate issue regarding abandonment. The court properly concluded that the DEC complied with the substantive requirements of SEQRA because it took a hard look at potential environmental impacts, including the theoretical potential for the shaft to encounter water, and provided a reasoned elaboration for its determination that there would be no significant adverse environmental impacts.

Question No. 4:

(A) Is the interlocutory order of the court below denying Appellants' motion for discovery reviewable in the context of this appeal from the final judgment?

(B) If the discovery order is reviewable, did the court below abuse its discretion in denying Appellants' motion for discovery of documents that were not part of the record on which the DEC made its determination to permit the additional shaft?

Answer of the court below: The court below was not confronted with the reviewability issue. The court properly denied the motion for discovery.

Preliminary Statement

This is an appeal from a judgment of Supreme Court, Tompkins County, denying the Appellants' article 78 petition on the merits.[1] The Appellants challenge a permit issued to Respondent Cargill, Incorporated ("Cargill") by Respondent New York State Department of Environmental Conservation ("DEC"), contending that DEC did not perform an adequate review of the potential impacts of the then-proposed project under the State Environmental Quality Review Act (ECL article 8, commonly known as "SEQRA" or "SEQR"). This brief is submitted on behalf of Cargill.

Cargill respectfully submits that this appeal should be dismissed as moot because the project authorized by the permit at issue in this litigation is substantially complete, and the Appellants failed to take timely steps to preserve the status quo during the more than two years that this proceeding has been pending (*see* Point I below).

In the event that the appeal is not dismissed, the judgment appealed from should be affirmed. The Appellants' primary argument on the merits is that, in the context of Cargill's application to construct an additional shaft for access to an

[1] Supreme Court's determination is denominated a "Decision and Order" (R 7) but, because it is a final determination denying the Petition on the merits, it has the effect of a judgment (*see* CPLR 411; CPLR 7806) and is appealable to this Court as of right under CPLR 5701.

existing underground mine, DEC was required to conduct a duplicative environmental review of the previously-permitted underground mine.

This Court and the Court of Appeals rejected just such an argument in *Matter of Stewart Park & Reserve Coalition v New York State Department of Transportation* (157 AD2d 1, 10 [3d Dept 1990], Levine, J. ["petitioners may not use the present environmental proceeding as a pretext to force the reopening and reweighing of the environmental effects of (the prior action)"], *affd on App Div op,* 77 NY2d 970; *see also Matter of Schulz v State of New York,* 274 AD2d 615 [3d Dept 2000]). These decisions are in accord with guidance published by DEC in its SEQR Handbook: "Where the action involves the expansion of an existing facility . . . [o]nly the expansion should be considered and analyzed as the proposed action under SEQR" (SEQR Handbook, 3d Ed. [2010], p 123 [R 1391]). Accordingly, if the Court retains the appeal despite the mootness issue, Appellants' primary issue on the merits must be rejected (*see* Point II below).

With the cumulative impacts/segmentation issue aside, the remaining issue on the merits is whether the DEC took the requisite "hard look" at the potential impacts of constructing the shaft itself. But Appellants have abandoned this argument on appeal. Other than a conclusory statement that a number of issues "were either simply not considered by DEC, or the issues were considered inadequately" (Appellants' Brief at p 24), there is nothing in Appellants' Brief that

addresses how DEC reviewed any issues specific to the shaft or in what way that review was inadequate or improper. In fact, DEC thoroughly reviewed all potential issues related to construction of the shaft, as Supreme Court correctly concluded (*see* Point III below).

Appellants' remaining argument, that Supreme Court erred in denying their motion for discovery, is not reviewable in the context of this appeal from the final judgment, because the order denying the motion does not necessarily affect the final judgment (CPLR 5501 [a][1]; *see e.g. Matter of Ruhle*, 173 AD3d 1389, 1392 [3d Dept 2019] [interlocutory order denying motion to compel discovery not reviewable on appeal from final order]). In any event, Supreme Court properly exercised its discretion in denying the motion, because the requested documents were not part of the administrative record on which DEC made the determination at issue in this proceeding and were not otherwise relevant to the proceeding (*see* Point IV below).

Counterstatement of Facts

This article 78 proceeding challenges an August 16, 2017 decision by DEC to approve a requested modification to the mining permit for Cargill's underground salt mining facility, which is headquartered in the Town of Lansing and lies mostly under Cayuga Lake (the "Cayuga Mine"). That permit modification simply

allowed Cargill to construct an additional shaft ("Shaft No. 4") to access the mine from the surface near the eastern shore of the lake.

The mine has been operated by Cargill and its predecessors for almost a century (R 800). Historically the mine has been accessed from shafts on the uplands near Portland Point, approximately 4.5 miles south of the location of Shaft No. 4 (*id.*). As mining has progressed northward, the travel time from the Portland Point access to the work area (now about 50 minutes) has increased and it has become more difficult to provide adequate ventilation to the work area (R 792).

The federal Mine Safety and Health Administration (MSHA) requires that a method of refuge be provided for employees underground who cannot reach the surface from their work location within one hour (*id.*). Although Cargill has already constructed a refuge chamber so that it could meet this requirement without the new shaft, it prefers to provide a means for its employees to exit the mine quickly in the event of mine emergency or an individual family or medical emergency (*id.*). The new shaft, closer to the work area, will allow workers to reach the surface within 20 minutes (*id.*; *see also* R 680, R 832).

Shaft No. 4 will also provide better air quality for Cargill's workers. Currently, the facility operates numerous ventilation fans to bring in air from the surface to sustain healthy air quality and stay below MSHA gas exposure limits (R 792). The high travel distance, resistance and leakage makes the ventilation

system inefficient (*id.*). The new shaft will improve internal air flow, while reducing reliance on fan-based ventilation and its concomitant electric energy demands (*id.*). Accordingly, Shaft No. 4 will contribute to worker health and safety, improve operational efficiency and reduce energy consumption (*id.*; R 832).

Although the permit modification challenged by Appellants only approved the construction of the new shaft, most of their arguments have been devoted to allegations that are unrelated to that project. Instead, Appellants' primary claim is that DEC did not conduct an environmental review of the previously-permitted underground mine in connection with the review of the permit for the shaft. As will become clear, however, DEC conducted environmental reviews of the underground mine in connection with permits and permit modifications issued in 2015, 2003, and earlier.

A. Cayuga Mine Permitting History

Salt mining has been conducted at the Cayuga Mine since 1919 (R 838). Rights to mine under Cayuga Lake were first acquired from the State in 1938 (*id.*), and Cargill acquired the facility from the Cayuga Rock Salt Company in 1970 (R 800).

Since April 1975, the effective date of the New York State Mined Land Reclamation Law ("MLRL") (L 1974, ch 1043; Environmental Conservation Law ["ECL"] Article 23, Title 27), the Cayuga Mine has been subject to DEC's

regulation and oversight and has been governed by a mining permit issued under the MLRL (among other DEC-issued permits). A number of renewals and modifications have been issued by DEC since that time. Each has been issued only after strict compliance with both MLRL regulations and SEQRA (R 647; Supplemental Record [SR] 7-8).[2]

Some of the modifications have been associated with increases in the areal extent of the mineral rights under Cayuga Lake leased to Cargill by the State. The latest of those was issued more than 17 years ago – in January 2003 – following a multi-year environmental review process (the "2003 Expansion"). A later expansion, approved in 2015, permitted mining under approximately 150 acres of privately-owned uplands east of the lake, but contiguous to the previously-permitted lands under the lake (the "2015 Expansion").

1. The 2003 Expansion

At the time the mine was first subjected to review under SEQRA (following its 1975 enactment), the permitted area encompassed 8,361 acres, most of it under Cayuga Lake. In conjunction with an application for renewal of the MLRL permit in 1997, Cargill sought a modification of the permit to expand the permitted area

[2] The Supplemental Record (SR) includes the parties' submissions on two motions decided in the court below: (1) Cargill's pre-answer motion to dismiss the Petition (SR 1 – SR 323); and (2) Appellants' motion for discovery (SR 327 - SR 433). These submissions were omitted from the Record on Appeal, although Appellants' Appendix includes selected affidavits that they submitted on the discovery motion. With respect to both motions, we have included not only the affidavits and exhibits, but also the parties' legal memoranda, in keeping with the practice followed by Appellants in compiling the Record on Appeal.

by an additional 5,056 acres of State-owned reserves under the lake, bringing the total permitted area to 13,417 acres. The map appearing at page 154 of the Supplemental Record depicts the mining limits that had been approved prior to that application (labelled "Existing Mining Limits") and the areas to the north and south of those limits that comprised the 2003 Expansion (labelled "Proposed Mining Limits").

The 2003 Expansion was supported by a series of reports and a comprehensive environmental assessment prepared by respected consultants (SR 20). These reports were reviewed by DEC's own technical experts, as well as an outside consultant – John T. Boyd Company ("JT Boyd") – selected by DEC (*id.*). The approval was also informed by the actual historical experience of Cargill's operations over many decades and over thousands of acres of previously-permitted reserves (*id.*). At the conclusion of the SEQRA review, DEC concluded that mine stability issues and any other environmental impacts had been thoroughly reviewed and analyzed, and that Cargill's mine design minimized all potential environmental effects (SR 23-24).

On January 6, 2003, DEC issued the permit (SR 27-35), authorizing Cargill to mine to the "Proposed Mining Limits" of the 2003 Expansion. Most importantly, that permit and the associated environmental review encompassed

what the Appellants have referred to in this litigation as the "Northern Reserves" (R 784-785, 795).

2. The 2015 Expansion

Since the 2003 Expansion, no additional acreage has been approved for mining under Cayuga Lake itself (SR 11). The only additional underground acreage that has been approved for mining is under 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 to approximately 13,567 acres (*id.*). A map submitted as part of the application for the 2015 Expansion depicts both the mining limits that had been approved prior to that application (labelled "Limits of Current Mining Permit") and the then-proposed 150-acre expansion area extending under the uplands on the eastern shore of the lake (labeled "Amended Area [Approx.]") (SR 155).

The review associated with the 2015 Expansion included submissions that addressed the mining method and mine stability, evaluated all potential environmental impacts, including air quality, vegetation and wildlife, noise, ground vibration and impacts to surface and ground water, and evaluated the potential for any surface subsidence that might result from mining the 150-acre expansion area (SR 12). These submissions were reviewed by DEC's in-house technical experts and the outside independent consultant, JT Boyd (*id.*).

By permit dated June 2, 2015, DEC approved the modification (SR 38-48). In conjunction with that approval, and in accordance with SEQRA, DEC concluded that mining the additional acreage would not have a significant impact on the environment, stating, in part:

> The environmental and technical issues surrounding the existing Cargill operation have been previously reviewed and approved, and will remain unchanged by this proposal. These were specific to mine design, mining methods, rock mechanics, mine stability, and geology of overlying bedrock. These issues have been previously evaluated and summarized in the 2000-2002 review, and were included in the comprehensive Mined Land Use Plan, and an Expanded Environmental Assessment, which were all based on data and studies covering a 30 year period.

(SR 49-51).

At the time of the 2015 Expansion, DEC was aware that Cargill was considering the construction of a new air/access shaft on the uplands somewhere north of Portland Point, and that the 2015 Expansion area could serve as a connection between such a shaft and the previously-permitted mining area under the lake. DEC considered whether the environmental review of the 2015 Expansion should also include review of the potential shaft. In the end, as part of its SEQRA determination, DEC made a determination of "permissible segmentation" – a determination explicitly authorized by the SEQRA regulations. In accordance with 6 NYCRR 617.3 (g), DEC concluded that, although there was the potential for a new air shaft to be constructed at some time in the future, it was

appropriate in these circumstances to separate the environmental review of the 150-acre expansion from the environmental review of the potential future air shaft (*id*.).

Accordingly, as of June 2, 2015, when it issued the permit for the 2015 Expansion, DEC had completed all required reviews under SEQRA and the MLRL for mining the 13,567 acres outlined in red on the map appearing at page 156 of the Supplemental Record, including the so-called Northern Reserves.

Neither the 2003 Expansion nor the 2015 Expansion (including the determination of permissible segmentation) was challenged by the present Appellants or anyone else; these approvals were preceded by notice and opportunity for public comment; and none of the present Appellants offered any comments during the comment period (SR 14).

3. The 2017 Air Shaft Permit

The most recent modification to Cargill's mining permit – the one purportedly challenged in this article 78 proceeding – did not add any underground acreage and will not otherwise affect what was permitted by the prior approvals. This modification simply permits the construction of an additional shaft that will provide for better ventilation and an additional means of ingress and egress to already permitted underground workings of the mine. The shaft's primary function is to protect the health and safety of Cargill's employees as the mine workings

advance into the previously-permitted acreage, but farther from the current access and ventilation shafts located several miles south at the Portland Point headquarters. As shown on the map appearing at page 156 of the Supplemental Record, the air shaft and all related facilities are located within a small portion of surface above the 150-acre expansion area permitted in 2015. The new shaft will intersect the 2015 Expansion area, which has already been mined and which will provide a connection between the new shaft and the mining area under the lake. For this reason, the 2015 Expansion area is sometimes referred to in the Appellants' submissions as the "tunnel".

Once operational, the shaft will include a hoist to deliver personnel and materials to and from the underground mine, ventilation to supply fresh air to the underground mine, and associated support facilities (surface parking, office space, maintenance and storage facilities, electrical substation, employee facilities, stormwater ponds, etc.) (R 1464, 1473).

Shaft construction is following industry standard techniques. A concrete collar foundation has been excavated, formed, keyed into bedrock, and poured. Next, a pilot hole was advanced from the surface to the mine below, intersecting with the 2015 Expansion area. The shaft itself is now being constructed by the "raisebore" method, using the pilot hole to pull a larger diameter bit from the bottom up to the surface (R 1474). Once the raisebore is complete, the shaft will

be lined from the top down with an engineered concrete liner to stabilize the surrounding geology and isolate the shaft from groundwater (*id.*).

The permitting and environmental review process associated with the Shaft No. 4 permit is reflected in the 2100+ page administrative record (R 1446-3581); it is summarized in detail in the affidavits of the DEC personnel primarily responsible for that review (R 644-657 and R 1428-1439 [Affidavits of Mined Land Reclamation Specialist Christopher M. Lucidi]; R 658-671 [Affidavit of Deputy Regional Permit Administrator Joseph M. Dlugolenski]; R 672-702 and R 1405-1427 [Affidavits of Mined Land Reclamation Specialist Steven Army]), and in the affidavits of Cargill's personnel and consultants (R 781-797 [Affidavit of Cayuga Mine Manager Shawn Wilczynski]; R 825-836 [Affidavit of Robert C. LaFleur]). The affidavits of DEC personnel, in particular, also detail how the Department responded to comments raised by the Appellants and others.

Most of the comments submitted by or on behalf of the Appellants during the administrative process (and repeated in this litigation) concerned the alleged impacts of continued mining into the reserves permitted in 2003 and 2015, including issues about the thickness of bedrock above the so-called Northern Reserves permitted in 2003 (R 679). The Appellants contended that it would constitute impermissible "segmentation" under SEQRA if the review of Shaft No. 4 did not also include review of continued underground mining. In its formal

Response to Comments issued upon completion of the review process, the DEC responded, in part, as follows:

> **10. Bedrock mine depth insufficient for stability.** Response: The bedrock thickness above the previously reviewed and approved mineable reserves is not relevant to this Shaft #4 modification application. However, a thorough evaluation of the geology of the mine, coupled with geo-mechanical evaluation of mine design and practices, has been previously evaluated as part of the 2000 Expanded Environmental Assessment. Further, special conditions were added to the mining permit in 2003 requiring the submission of additional investigations of a disturbed salt zone and thin rock overburden before the Department authorizes mining to proceed into these areas.
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> **15. SEQR segmentation.** Response: SEQR has been done on the previously approved mine and the 2015 expansion of 150 acres. The current SEQR review for this action covers the Shaft #4 project only, which includes a single additional access shaft and associated surface infrastructure. SEQR does not get re-applied to previously approved actions.
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> * * *
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> **20. Additional comments unrelated to the Shaft No. 4 modification.** This permitting action under review by the Department concerns the construction of Shaft No. 4 and the associated surface facilities. The current review is not for the existing, permitted mining operation. However, DEC has received comments expressing concern over the stability and safety of the existing, permitted mine operating under Cayuga Lake. The information presented by the comments is not new, but has been extensively considered by the Department over the last 20 years . . . .

(R 3552-3555 [bold print in original]). Response No. 20 went on to explain in depth why the comments did not provide any new information, how the proffered

theories had been considered in the prior reviews and why the assertions by the commenters were not credible (R 3555-3556).

Only a few of the issues raised during the comment period were related to the impacts of constructing Shaft No. 4. To the extent that they are relevant to this litigation, they all relate to a single hypothesis: that the new shaft may intersect a significant water-bearing zone during construction. [3] If so, the Appellants argued, the amount of water may be more than Cargill can manage; it could inundate the mine, dissolve the salt formation and lead to a collapse. They also argued that drilling through a water-bearing zone could adversely affect neighboring water wells.

The possibility of encountering significant water during the drilling process was thoroughly examined during the permitting process. In fact, among the environmental investigations conducted by Cargill was the drilling of an exploratory corehole (designated Corehole No. 18) in close proximity to the proposed shaft to determine the subsurface geology (R 649, 834). Corehole No. 18 was drilled to assess the feasibility of constructing the shaft at that location, including determining whether there were any water bearing zones in the subsurface geology that would produce a significant volume of water during the

[3] Other comments concerned potential visual impacts, noise impacts, truck traffic and similar issues. These were all fully addressed in DEC's Response to Comments (R 3550-3556), and were not raised in this or any other litigation.

drilling process, and whether drilling the shaft could have an impact on nearby residential wells (R 678, 834). The drilling was monitored by Cargill personnel, Cargill's consultants and DEC staff (R 679, 834). DEC staff conducted approximately 29 inspections of the corehole drilling (R 679).

The only water-bearing zone of any significance was encountered at approximately 1,490 feet below grade (R 834). A pump test was conducted to determine how much water this zone produced. The results (less than 3 gallons per minute [gpm] in the corehole) were analyzed and modeled to estimate the amount of groundwater inflow that could be expected during the drilling of the larger pilot hole and shaft (R 1684-1687).

Based upon these results, the amount of inflow that could be expected during different phases of the construction was estimated (R 1603). The maximum amount (about 40 gpm) was estimated to occur over just three days (days 36-38) of the shaft construction, when the bore will be upreaming through the water-bearing zone (*id.*). The rest of the time, the studies determined that the inflow would be much less. For about 200 of the 247 anticipated days of drilling and lining the shaft, the studies indicated an inflow of 15 gpm or less (*id.*). Cargill is equipped to handle up to 75 gpm and has storage capacity for more than twice the total amount of anticipated inflow (*id.; see generally* R 834-835). Once the shaft is lined, virtually no groundwater will be able to enter (R 833).

DEC staff, together with the outside independent consultant designated by DEC (JT Boyd Company), reviewed the information collected from the drilling of the corehole and other environmental studies, made several requests for additional information from Cargill, solicited public comment over two public comment periods, and fully responded to the comments (R 648-652, 662-671, 678-679).

The DEC's response to comments addressed the issue of water intrusion as follows:

> **5. Drilling through the aquifer will cause leakage into the mine and flood the mine.** Response: Site-specific empirical data has been collected from corehole #18 which accurately characterizes the geology where the shaft will be constructed, as well as defines the water-bearing zones encountered and their characteristics. . . . The inflow rates have been accurately determined, and the shaft construction plans are designed to handle almost double the anticipated inflow. There is no coring evidence that would suggest fractured conditions capable of producing high flow rates that could potentially become uncontrollable. Even though not plausible or probable, if unforeseen conditions were encountered at the shaft location, they would be discovered during the drilling of the pilot hole prior to accessing the mine and reaming the shaft and would be properly addressed.

(R 3551 [bold print in original]).

Similarly, the DEC's SEQRA determination addressed water intrusion and potential impacts to neighboring wells as follows:

> Operation of the proposed shaft will have no impact on local or regional groundwater resources during shaft construction and after the completion of construction. The shaft 4 will be isolated from the local groundwater system by a cast-in-place concrete lining. There is a potential to temporarily impact groundwater during construction by

> depressing levels in the immediate vicinity of the shaft. However, the exploratory Corehole #18 did not encounter significant groundwater producing zones in the shallow geology, where nearby residential water supply wells are completed. Therefore, the potential for the shaft construction project to depress groundwater levels at the nearest residential water supply well, located 1100 feet to the south, or any other residential water supply well is improbable.

(R 2539).

In a determination dated August 16, 2017, DEC approved the permit modification to allow the construction of the new shaft (R 3529). The following day, all members of the public who had participated in the comment periods were notified by email of the determination and provided a copy of the permit and DEC's Response to Comments (R 3541-3559).

B. Procedural History of Litigation

This proceeding was commenced by the filing of the Verified Petition on December 13, 2017 (R 17). The Petition contained a single cause of action, consisting of two claims: (1) that DEC violated the "hard look" standard of SEQRA because it "failed to consider the many relevant issues brought to their attention by Petitioners and others"; and (2) that "DEC also improperly segmented the review of Shaft No. 4 from the new tunnel [i.e., the 2015 Expansion] and ongoing mining under Cayuga Lake" (R 40-41 [Petition ¶¶ 65-66]).

The Petition and supporting affidavits contained some allegations related to the potential for water intrusion during construction of Shaft No. 4, but most of the

allegations were addressed to continued mining in the areas permitted in 2003 and 2015. Thus, in support of their "segmentation" claim, Appellants complained that "[t]he DEC SEQRA review only considered whether or not there would be significant adverse environmental consequences from the digging and use of Shaft No. 4, without considering the potential adverse environmental consequences of the one-mile tunnel and ongoing mining under Cayuga Lake" (R 38-39 [Petition ¶ 58]). The relief sought in the Petition included not only voiding the modified permit that authorized the construction of Shaft No. 4, but also enjoining any further mining in the 2015 Expansion area and in the Northern Reserves that had been permitted in 2003 (R 41 [Petition, Wherefore Clause]).

1. Motion to Dismiss

By pre-answer motion, Cargill moved, *inter alia*, to dismiss – as time-barred – those aspects of the Petition that alleged that the DEC had not adequately reviewed (or had improperly segmented the review of) mining the areas permitted by the 2003 Expansion and the 2015 Expansion. The DEC, having raised the same objection in its Verified Answer (R 628 [first Objection in Point of Law]), joined in that aspect of Cargill's motion.

At the conclusion of oral argument on the motion to dismiss, Supreme Court – while otherwise reserving decision – ruled that "[s]egmentation is not part of the claim, cannot be part of the claim" (R 780). In its subsequent written decision,

Supreme Court granted Cargill's motion to the extent that it sought "to dismiss any challenge as may have been set forth in the Petition to the permits issued in 2015 and earlier" (SR 323).

The court established a schedule for further submissions and oral argument on the merits (SR 326) and, in accordance with that schedule, Cargill filed and served its Verified Answer with Objections in Point of Law, together with affidavits in opposition to the Petition (R 725-861).

2. Motion for Discovery

Three days before the deadline for submitting their reply papers, Appellants moved for an order compelling Cargill to produce certain documents that had been referenced in a letter from the JT Boyd Company to DEC in February 2018 – six months after the Shaft No. 4 permit had been issued (SR 327-375). The JT Boyd letter was an exhibit to one of the affidavits submitted on behalf of Cargill.

Supreme Court denied the motion for discovery, stating, "the [JT Boyd] letter was drafted after the issuance of the Shaft 4 permit and therefore was not reviewed in connection with that permit, and the Petitioners have not demonstrated that the documents cited in that letter are material and necessary to this proceeding" (SR 419; *see also* SR 428 [amended Decision and Order adding scheduling provision]).

3. Decision on the Merits

Despite Supreme Court's ruling on the motion to dismiss, including dismissal of their segmentation claims, Appellants continued to argue that the alleged environmental impacts associated with the previously-permitted mining under the lake should have been reviewed as part of the Shaft No. 4 permit process. Indeed, this was the focus of their reply papers. Appellants insisted that, in doing so, they were not trying to revive their dismissed segmentation claim (R 864 ["Petitioners are not pursuing any claim that the DEC improperly segmented the consideration of granting the Shaft No. 4 permit from either (sic) the grant to build the tunnel, or that DEC segmented a review of Shaft No. 4 from mining the northern reserves under Cayuga Lake"]). They further insisted that they were "not asking the Court to look at what already has been done in granting the mining permits in 2003 and 2015", but only "to look forward" (*id.*). But the arguments they made were identical to those previously made under the "segmentation" label – that the DEC was required to review the impacts of previously-permitted mining in connection with the Shaft No. 4 application.

In a Decision and Order dated April 22, 2019 (R 7-14), Supreme Court denied the Petition on the merits. The court reasoned that, in light of its prior decision that Appellants' challenges related to the earlier permits under the guise of segmentation were time-barred, only two issues remained: (1) whether, apart

from Appellants' dismissed segmentation claim, the SEQRA regulations required inclusion of the previously-permitted reserves in the environmental review for Shaft No. 4; and (2) whether DEC failed to take a hard look at the potential impacts of Shaft No. 4 itself (R 8). The court properly answered both questions in the negative.

In rejecting the notion that the environmental review for a permit modification must include consideration of the impacts of previously-permitted activities, the court used the 2015 Expansion as an example. The court noted that the DEC had employed "permissible segmentation" in the course of reviewing that permit modification, thus legally separating the environmental review of the 2015 Expansion from the review of a potential future shaft. If, as Appellants argued, environmental review of a subsequent modification (Shaft No. 4) required that previously-permitted activities – such as the 2015 Expansion – had to be reviewed again, the concept of permissible segmentation would be rendered meaningless (R10-11). Thus, the court rejected Appellants' interpretation of the SEQRA regulations (R 11).[4]

[4] The court apparently believed that the "Northern Reserves" were the reserves within the 150-acre expansion area permitted in 2015 (R 8). The Northern Reserves referred to by the parties were actually part of the 2003 Expansion. The apparent confusion about this one factual issue did not affect the court's reasoning that the DEC did not have to revisit the prior environmental reviews in connection with the Shaft No. 4 permit. If anything, the court's reasoning would apply with more force where the prior review was even farther removed from the current permitting process.

As for the adequacy of the environmental review of Shaft No. 4 itself, the court reviewed the record and concluded that DEC identified all areas of environmental concern, took a "hard look" at the environmental issues identified, and provided a reasoned elaboration for its determination that the project would not result in adverse environmental impacts (R 11-14). Appellants filed a timely notice of appeal.

4. Preliminary Injunction Motion and Cross-Motion to Dismiss Appeal in this Court

Between August 2017, when the Appellants were notified that the permit modification for Shaft No. 4 was approved, and April 2019, when the court issued the decision on the merits, Appellants made no application to enjoin the Shaft No. 4 project. They did not seek injunctive relief when the permit was issued; they did not seek injunctive relief when they commenced this proceeding on the eve of the expiration of the Statute of Limitations; and they did not seek injunctive relief in the 16 months that the proceeding was pending in Supreme Court (Affirmation of Kevin G. Roe dated August 28, 2019 [NYSCEF Document No. 20], ¶ 41).[5]

And even after the lower court denied the Petition, they waited an additional three months before seeking injunctive relief in this Court. That motion was made July 26, 2019, almost two years after the permit was issued (Notice of Motion

[5] References to NYSCEF Documents are to those filed in this Court in connection with Appellants' motion for a preliminary injunction and Cargill's cross-motion to dismiss the appeal as moot.

[NYSCEF Document No. 5]). By that time, Cargill had already completed significant aspects of the Shaft No. 4 project, having spent over $15 million and incurred almost $12 million more in contractual commitments (Affidavit of William Gracon, sworn to August 28, 2019 [NYSCEF Document Number 27], ¶¶ 12-13 ["Initial Affidavit"]). The total of more than $27 million in expended or committed costs constitutes more than 60 percent of the $45.6 million total project cost (*id.*, ¶ 9). Accordingly, in addition to opposing the motion for a preliminary injunction, Cargill cross-moved to dismiss the appeal as moot (Notice of Cross-Motion [NYSCEF Document No. 19]).

In an order dated October 4, 2019 (NYSCEF Document No. 45), this Court denied the motion for a preliminary injunction and also denied the cross-motion to dismiss the appeal as moot "without prejudice to the issue involved being raised upon argument of the appeal" (October 2019 Decision).

5. Subsequent Developments Affecting Mootness

Since the October 2019 Decision, Cargill has made continued progress toward completion of the Shaft No. 4 project. As set forth in the Supplemental Affidavit of William Gracon, sworn to March 9, 2020, and submitted herewith ("Supplemental Gracon Affidavit"),[6] as of February 26, 2020, Cargill had spent an

[6] Cargill submits the Supplemental Gracon Affidavit pursuant to this Court's October 2019 Decision denying the cross-motion "without prejudice to the issue being raised upon argument of the appeal" (NYSCEF Document No. 45). Cargill further submits the Supplement Gracon

additional $13.2 million and incurred an additional $1.6 million in contractual commitments beyond the amounts reported in Mr. Gracon's Initial Affidavit. This brings the total amount spent ($28.4 million) or incurred ($13.5 million) to nearly $42 million, or 92% of the total Shaft No. 4 project cost (*see* Supplemental Affidavit, ¶ 12).

When the preliminary injunction motion was made, Cargill had several contractors on-site as well as contractual commitments for additional work (*id.,* ¶ 11). Cargill would have sustained considerable financial losses if the project had been shut down at that time, including nearly $2 million in demobilization costs for on-site contractors. Additional damages resulting from any work stoppage included those related to raisebore equipment rental costs ($324,000 per month), the storage of hoist and cage components ($38,000 per month), project staff and salaries ($10,000 per month), and lost productivity ($93,867 per month) (*id.*).

Cargill thus proceeded with the project to avoid such losses. In the six months since this Court's October 2019 Decision, Cargill has advanced the construction of the shaft and related project elements, including the hoist house, hoist, substation, maintenance building, and administrative building. As set forth

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Affidavit pursuant to 22 NYCRR 1250.2(c) and the well-established doctrine that "mootness is an issue that can be raised at any time and, 'in fact, it is incumbent upon counsel to inform the court of changed circumstances which may render a matter moot'" (*Gabriel v Prime,* 30 AD3d 955, 956 [3d Dept 2006], *quoting Matter of Cerniglia v Ambach,* 145 AD2d 893, 894 [3d Dept 1988], *lv denied* 74 NY2d 603 [1989]).

in detail in the Supplemental Gracon Affidavit, many of these elements are complete or nearing completion (*see* Supplemental Gracon Affidavit ¶ 13; *see also id.,* Exhibits 2 through 7 [photographs depicting status of construction in February 2020]).

Shaft construction, in particular, has progressed beyond the point where it is feasible to stop. The raisebore drilling began on February 6, 2020 at 2370 ft. bgs and had drilled vertically upwards 545 ft. to a depth of 1,825 ft. bgs as of February 25, 2020. Each day, the raisebore drills upward through 10-50 feet of rock, depending on rock density. The raisebore is expected to break through at ground surface by the end of March 2020, completing the drilling of a shaft 16 ft. in diameter and 2,370 ft. in depth (*see* Supplemental Gracon Affidavit, ¶ 14).

The shaft walls created by the raisebore are bare rock; they will be lined with 12 inches of concrete starting from the top down to stabilize the walls and seal off any groundwater (*id.* ¶ 14). It is not possible to line the walls of a partially-completed shaft if drilling were to be interrupted. Installation of the concrete liner needs to occur in a timely manner to ensure both the stability of the shaft and the control of water inflow (*id.*). If the rock face is left exposed, it will eventually deform and crumble, creating a risk that water inflow to the mine will increase and become difficult to control over time. For this reason, the upreaming of the shaft

can no longer be discontinued, either from a safety or an environmental standpoint (*id.*).

The drilling activities to date have also mooted a central theory posited by Appellants below – that drilling might intersect a water-bearing formation in the rock formation, causing water to flow into the shaft at rates beyond Cargill's ability to manage. If this were to happen, Appellants speculated, water might flood the mine with catastrophic consequences. Appellants claimed further environmental studies were warranted. As it turns out, the actual rates of water inflow experienced during drilling have been at the lower end of the estimates reached by Cargill's experts: approximately 15 gallons per minute (gpm) for nearly the entire construction period (*id.*, ¶ 18). Current water make is averaging 4.5 gpm; by contrast, Cargill is equipped to handle 75 gpm, nearly 20 times as much (*id.*).

ARGUMENT

Point I

THE APPEAL SHOULD BE DISMISSED AS MOOT

A. Introduction

This appeal, already moot at the time Appellants brought their first and only preliminary injunction motion, has certainly not grown less moot with the passage of time. To the contrary, in the intervening several months, Cargill has moved

forward with the project in good faith, spending or incurring an additional $14.6 million, with several project elements at or nearing completion. In particular, as set forth above, the construction of the shaft itself – the very focus of this litigation – has passed the point where it can be safely discontinued (Supplemental Gracon Affidavit, ¶¶ 14-15).

The mootness doctrine is invoked in precisely these circumstances – when the progress of a construction project constitutes a "change in circumstances that would prevent a court from rendering a decision that would effectively determine an actual controversy" (*Dreikhausen v Zoning Bd. of Appeals of the City of Long Beach,* 98 NY2d 165, 172 [2002]). In deciding mootness in construction cases, the Court examines several factors, including whether the work was undertaken without authority or in bad faith, and whether substantially completed work is readily undone without substantial hardship (*id.* at 173). "Chief among the factors," weighing in favor of mootness, "is a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent the construction from commencing or continuing during the pendency of the litigation" (*id.*). All relevant factors support a determination that this appeal is moot and should be dismissed.

B. Cargill Proceeded in Good Faith and Under Color of Law

Cargill waited until it had received all necessary permits, both state and local, and thus did not begin work on the Shaft No. 4 project "without authority or in bad faith" (*id.*). Appellants concede as much on this appeal (*see* Appellants' Brief at p 46 [Cargill did not commence construction until the issuance of the DEC permit, local site plan approval and a special use permit]). Cargill acted at all times with great transparency about the project, providing regular project updates on its Shaft No. 4 public information webpage. The public, and the Appellants, were thus fully apprised of the status of construction, another fact made plainly evident by Appellants' recital of the Shaft No. 4 project construction timeline (*id*, pp. 46-50) (*see also* Supplemental Gracon Affidavit, ¶ 17).[7]

C. Substantial Construction Cannot Be Undone

Appellants also do not dispute that the substantial construction completed to date cannot be readily undone without causing substantial hardship. The reality, in fact, is that the shaft construction cannot be undone at all. As set forth above and in the Supplemental Gracon Affidavit, the upward drilling of the shaft, underway since early February 2020, is steadily making progress toward the surface and is expected to have completed the 2370 ft. vertical raisebore by the end of March

[7] Appellants do not cite to the website or to any other source as the basis for their outline of the construction sequence, but the website is the only plausible source of the construction information as it is not contained in the record or in any prior submittal to this Court in connection with the motion for preliminary injunction.

2020. As it stands, this progress cannot safely be halted even now, since the cast in-place concrete liner that is necessary to stabilize the rock face and isolate it from the surrounding geology cannot be installed until the raisebore is complete (Supplemental Gracon Affidavit, ¶¶ 14-15).

Cargill respectfully submits that this changed circumstance alone compels a finding of mootness. Even were the Court to agree with Appellants' assertions under SEQRA – assertions that Cargill vigorously disputes – any judicial invalidation of the permit would resolve nothing. Construction of the shaft, as authorized by the DEC permit under challenge, has already passed the point of no return. By the time of oral argument, moreover, the drilling of the shaft will be complete.

It bears noting that construction was already substantially underway when Appellants first sought preliminary injunctive relief, some two years after permit issuance. Project construction was extensive as of that point in time, as evidenced by the $24.3 million that Cargill had spent or incurred in contractual commitments in the two years that elapsed since issuance of the DEC permit and the motion. Total expenditures as of August 2019 – over $27.1 million including contractual commitments – represented nearly 60 percent of total project costs (*see* Supplemental Gracon Affidavit, ¶ 9). And construction had already advanced to the point where it could not be readily undone without substantial hardship (*see*

Initial Gracon Affidavit [NYSCEF Document No. 27], at ¶ 13 and Exhibit 2 thereto [photographs depicting status of construction]).

Further, Cargill could not have halted construction work when Appellants first sought to enjoin the project without incurring tremendous costs, including nearly $2 million in the demobilization of existing on-site contractors and another $466,000 per month in related stoppage costs (*see* Supplemental Gracon Affidavit, ¶ 11). Cargill moved forward with construction to avoid suffering these losses (*id.,* ¶ 12). In the intervening several months, even apart from any consideration of the status of shaft construction, the remaining project elements (substation, hoist and hoist house, administrative and maintenance buildings) have been substantially advanced such that they cannot be undone without inflicting serious losses in the magnitude of tens of millions of dollars.

There is no more powerful proof of this fact than the photographs attached to the Supplemental Gracon Affidavit (Exhibits 2 through 7). These clearly depict a construction project in its final stages, as one would reasonably expect with 92% of total project costs incurred or committed (*id.,* ¶ 18; *see also Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Pres*., 2 NY3d 727, 729 [appeal dismissed as moot where property owner and developer had expended $25.7 million]; *Save the Pine Bush Inc. v New York State Dept. of Envtl. Conservation,* 289 AD2d 636 [3d Dept 2001], *lv denied* 97 NY2d

611 [appeal dismissed as moot where permittee had expended or committed 70% of entire project cost]).

D. Appellants Failed to Preserve Status Quo at Each Stage of Litigation

The final factor in the mootness analysis – indeed, the "primary" consideration – is whether a challenger has failed to seek injunctive relief to preserve the status quo during the pendency of the litigation (*Matter of Sierra Club v New York State Dept. of Envtl. Conservation,* 169 AD3d 1485, 1486-1487 [4th Dept 2019]; *see also Dreikhausen, supra,* 98 NY2d at 173). To protect against a claim of mootness, a challenger must seek this relief at every stage of the proceeding (*see Matter of Sierra Club, supra,* 169 AD3d at 1487; *see also Matter of Weeks Woodlands Assn., Inc. v Dormitory Auth. of the State of N.Y.,* 95 AD3d 747, 750 [1st Dept 2012], *affd* 20 NY3d 919).

Appellants have not done so here and thus simply cannot overcome this bar to the viability of their appeal. They concededly sat on their rights for nearly two years – after permit issuance before commencement of the proceeding below, during the lengthy article 78 proceeding, and in the three months following Supreme Court's decision – with full and now fully avowed knowledge of the extensive construction activities underway on the project site without once seeking to enjoin construction (*see* Appellants' Brief at pp 46-50). Their only counterargument – that they did not move earlier because they feared their motion

would be unsuccessful (*id.* at p 46) – was explicitly rejected by the Court of Appeals in *Citineighbors Coalition* when it dismissed an appeal on mootness grounds:

> Importantly, petitioners did not try to enjoin construction during this litigation's pendency, nonfeasance that they chalk up to "monetary constraints" and the unlikelihood of success. In short, petitioners simply assumed that Supreme Court would not grant them injunctive relief . . . . Having pursued a strategy that foisted all financial risks (other than their own legal fees and related expenses) onto the property owner and developer, petitioners may not expect us to overlook the substantial completion of the construction project.

Citineighbors Coalition, supra, 2 NY3d at 729-730.

E. Appellants' Remaining Arguments Have No Merit

Appellants urge this Court to retain jurisdiction notwithstanding Cargill's significant investment in, and substantial completion of, the Shaft No. 4 project because, in their view, this case presents "novel issues or public interests such as environmental concerns [which] warrant continuing review" (*see* Appellants' Brief at pp 51-52; *see also Dreikhausen, supra,* 98 NY2d at 173). Appellants are mistaken. There are no novel issues presented on this appeal. As set forth more fully below (*see* Points II and III, *infra*), the only issues raised by Appellants concern the scope and execution of DEC's substantive review obligation under SEQRA. Resolution of these issues, if they were to be reached, would turn on settled principles of SEQRA jurisprudence.

That this case arises under SEQRA, moreover, does not give Appellants the *per se* protection they seek from the application of the mootness doctrine. As this Court is well aware, New York case law is replete with decisions dismissing SEQRA challenges on mootness grounds, particularly when construction projects are completed, or substantially so, in the interim (*see Citineighbors Coalition, supra,* 2 NY3d 727 ["[T]hose objecting to a [New York City Landmark Preservation Commission determination] on SEQRA grounds may safeguard their challenge against mootness by promptly requesting injunctive relief"]; *see also Citizens for St. Patrick's v City of Watervliet City Council,* 126 AD3d 1159 [3d Dept 2015]; *Save the Pine Bush Inc., supra,* 289 AD2d 636 [3d Dept 2001]; *Armstrong v Town of Hoosick Housing Auth.,* 84 AD2d 886 [3d Dept 1981]; *Matter of Vil. of S. Blooming Grove v Vil. of Kiryas Joel Bd. of Trustees*, 175 AD3d 1413 [2d Dept 2019]; *Matter of Sierra Club, supra,* 169 AD3d 1485; *Matter of Weeks Woodlands Assn., Inc., supra,* 95 AD3d 747, 750).[8]

Appellants cite *Matter of 101Co, LLC v New York State Dept. of Envtl. Conservation* (169 AD3d 1307 [3d Dept 2019]) for the proposition that the

[8] In this case in particular, when the drilling activities have disproven Appellants' only voiced concern as to the environmental impacts associated with shaft construction – the potential for uncontrollable water inflow into the mine (and resulting impacts to surrounding well users) – environmental concerns should pose no bar to the application of the mootness doctrine (*see* Supplemental Gracon Affidavit, ¶ 18 [actual drilling through the alleged water-bearing rock formation has since supported the conclusions of Cargill's consultants and the DEC that water inflow during construction would be well within Cargill's ability to manage and would pose no threat to the stability of the mine or neighboring wells]).

mootness doctrine should not apply here, notwithstanding their failure to seek injunctive relief until two years after permit issuance, because Cargill should have been aware of their claims all along. *Matter of 101Co,* however, offers no comfort to Appellants, as it arises on radically and relevantly distinct facts – notably, a motion to dismiss on mootness grounds brought at the outset of the article 78 proceeding (not after years of litigation); parties with an established history of litigation, including pending parallel proceedings (no such history exists here); no evidence whatsoever of the financial investment in the construction activity (a remediation plan addressing on-going violations); and most importantly, no evidence that the substantially completed remediation plan (a one-month exercise) could not be undone without causing substantial hardship.[9]

In short, Appellants' argument that "Cargill proceeded at its own risk, precluding any claim of mootness" (Appellants' Brief, at p 52) turns *Dreikhausen* and its progeny on their head, attempting to palm off Appellants' "chief" obligation to timely seek injunctive relief onto Cargill as if it were Cargill's obligation in the first instance to impose an injunction against itself. Such a perversion of the mootness doctrine is particularly insupportable here – where

[9] Appellants also cite, without discussing, *Matter of In Defense of Animals v Vassar Coll.,* (121 AD3d 991 [2d Dept 2014]) for the familiar proposition that a Court will retain jurisdiction to decide a matter of public interest in those cases presenting substantial and novel issues which are likely to recur and evade appellate review. *Matter of In Defense of Animals* concerned the very short-lived period of a deer cull permit and the deer cull season. This is not such a case.

Appellants failed not only to move for injunctive relief for two years, but made a half-hearted motion when they finally did move, omitting from their motion papers the administrative record on which a decision as to the likelihood of success necessarily depends, and asking to be relieved of any obligation to post an undertaking. And once their motion was denied, Appellants made no effort to expedite their appeal but waited an additional two months to perfect.

In the final analysis, this case is controlled in all respects by the Court of Appeals decision in *Dreikhausen,* which dismissed an appeal as moot under identical circumstances:

> Acting in accordance with the use variance and the unchallenged building permits, Bay Club proceeded to demolish the marina and repair the bulkhead . . . and make other improvements to and arrangements for the property. Petitioners' half-hearted request for injunctive relief was made only after Supreme Court's decision upholding the variance and now there has been substantial completion of the project. Under these circumstances, we dismiss the appeal as moot.

(*Dreikhausen, supra,* 98 NY2d at 174). Accordingly, Cargill respectfully requests that this Court dismiss the present appeal as moot.

Point II

DEC WAS NOT REQUIRED TO REVIEW THE IMPACTS OF ONGOING UNDERGROUND MINING AS PART OF THE SEQRA REVIEW CONDUCTED IN CONNECTION WITH SHAFT NO. 4

Cargill's mining under Cayuga Lake was permitted many years ago, and any challenge to the environmental review conducted in connection with those permits is barred by the four month statute of limitations applicable to article 78 proceedings (CPLR 217). Appellants nevertheless insist that they are entitled to raise issues about supposed environmental impacts associated with that activity in this proceeding. Their theory seems to be that, whenever an agency is reviewing a proposed change to an existing facility that has already been approved and subjected to environmental impact review, the environmental review of the new proposal must not only consider the incremental environmental impacts of the proposed change but must also consider the impacts of the continuation of the previously permitted activity. Thus, under Appellants' theory, any change in an existing facility will trigger a second (or third, or fourth) SEQRA review of the existing facility – at least if (as petitioners contend here) the new proposal will somehow enable the continuation of the previously permitted activity.

Appellants' argument rests on a strained and erroneous interpretation of a SEQRA regulation that requires consideration of impacts reasonably related to the

proposed action (Appellants' Brief at p 31, citing 6 NYCRR 617.7 [c][2]). That regulation provides that the permitting agency must consider:

> reasonably related long-term, short-term, direct, indirect and cumulative impacts, including other simultaneous or subsequent actions which are:
>
> (i) included in any long-range plan of which the action under consideration is a part;
> (ii) likely to be undertaken as a result thereof; or
> (iii) dependent thereon.

Appellants contend that Cargill will not be able to mine farther northward without Shaft No. 4, making such mining "dependent" on Shaft No. 4 and therefore within the scope of required review. Contrary to Appellants' argument, however, this provision does not require the lead agency to reconsider the impacts of actions that were previously approved.

As an initial matter, the factual premise of Appellants' argument is erroneous. While Shaft No. 4 will enhance worker health and safety and improve operational efficiency as mining progresses northward, mining of the Northern Reserves is not dependent on Shaft No. 4. The current access and ventilation shaft at Portland Point (Shaft No. 3) can continue to be used to mine the permitted Northern Reserves, while still meeting all legal requirements (R 679-680 [Affidavit of DEC Mined Land Reclamation Specialist Steven Army, ¶¶ 40-44]; *see also* R 791-792; R 832). The Federal Mine Safety and Health Administration (MSHA)

requires that a method of refuge – reachable within 30 minutes – be provided for all underground workers who cannot reach the surface from their work location within one hour (30 CFR § 57.11050 [b]). Cargill is approaching that one-hour time limit, but has already constructed a refuge chamber, so that it could have met the MSHA requirements while mining the Northern Reserves even without Shaft No. 4 (R 680; R 792; R 832). Thus, while Shaft No. 4 is preferable in terms of worker health, safety and efficiency, the previously-permitted reserves could be mined in compliance with all legal requirements without it.

But even if Shaft No. 4 were necessary to continue mining northward, duplicative review of that activity would not be required. Appellants' position is contrary to the plain language of the cited regulation, the SEQRA statute, DEC guidance, settled case law and common sense.

The regulation cited by Appellants – 6 NYCRR 617.7 (c)(2) – does not, by its plain language, require the lead agency to revisit previously approved actions that have already been reviewed under SEQRA, even if continuation of the permitted activity may be dependent on or facilitated by the proposed modification. The language of the regulation is forward looking, only requiring consideration of "simultaneous or subsequent actions," not past actions. Importantly, the term "action" as used in the regulation has a very specific meaning under SEQRA. As relevant here, it is defined as a project or physical

activity that "require[s] one or more new or modified approvals from an agency or agencies" (6 NYCRR 617.2 [b][1][iii]). Previously permitted activities require no new approval to continue and are, therefore, not simultaneous or subsequent "actions."

Thus, in reviewing the Shaft No. 4 application in 2017, DEC was not required to reconsider the impacts of mining under the lake, which had been reviewed and approved in 2003 and earlier. Nor was it required to reconsider the impacts of mining the 150 acres of upland permitted in 2015. Neither was a "simultaneous or subsequent action."

This comports with common sense. In the absence of some material change in the nature of the previously-approved activity (not present here), there is no reason for an activity that has already been reviewed under SEQRA to undergo that process again. And, while Appellants claim that they are not challenging the approvals granted in 2003 and 2015 (Appellants' Brief, p. 35), their argument unavoidably involves a time-barred attack on those approvals. There is no point to their insistence on revisiting the environmental review of underground mining other than the hope that it would result in a revocation of the approvals granted earlier or the imposition of additional conditions on those approvals. Either of those results would be an impermissible assault on permits that are immune from

challenge. Thus, an untimely and impermissible challenge to the permits issued in 2003 and 2015 is inherent in Appellants' argument, despite their disclaimer.

In this regard, the court below was correct in noting that Appellants' interpretation of 6 NYCRR 617.7 (c)(2) would nullify the regulatory authorization of "permissible segmentation" (*see* 6 NYCRR 617.3 [g][1]) that was implemented in connection with the 2015 Expansion. The SEQRA regulations expressly permit the environmental review of one part of a project to be separated from the review of a later phase if the lead agency determines that such "segmentation" is no less protective of the environment (*id.*). DEC made such a finding in determining that the 2015 "tunnel" project could be reviewed separately from the shaft that would ultimately connect to it. If, as Appellants argue, the later environmental review of the shaft project must nevertheless encompass the previously-permitted tunnel, the concept of permissible segmentation would be rendered meaningless.

It must also be noted that the SEQRA regulations cited by Appellants were drafted by Respondent DEC, which has never interpreted them to require a duplicative review of previously permitted activities in connection with the expansion or modification of an existing facility. As stated by DEC in response to comments raising this issue during the Shaft No. 4 permitting process, "SEQR does not get re-applied to previously approved actions" (R 3554). As the agency designated by the Legislature to promulgate the implementing regulations for

SEQRA, and as the state agency with the greatest expertise in environmental issues, DEC's interpretation of those regulations is entitled to deference (*see Matter of Medina v Building Maint. Servs.*, 302 AD2d 774, 776 [3d Dept 2003] ["It is axiomatic that deference should be given to an administrative agency's interpretation of its own regulations"]).

Appellants place heavy reliance on the "SEQR Handbook", the primary guidance document published by DEC to aid in the implementation of SEQRA. But that publication does not support their position. While they include almost five pages of excerpts from the SEQRA Handbook in their brief (at pp 34-38), none of the excerpts actually addresses the question posed by their argument: If the action under review involves an expansion of an existing, previously permitted facility, must the environmental review include a reconsideration of the environmental impacts existing facility? The answer to that question is specifically addressed in the SEQR Handbook, but is glaringly omitted from Appellants' Brief:

> Where the action involves the expansion of an existing facility . . . [o]nly the expansion should be considered and analyzed as the proposed action under SEQR.

(SEQR Handbook, 3d Ed. [2010], p 123 [Item 19], *reprinted at* R 1391; *see also* SEQR Handbook, Draft 4th Ed. [2019], p 126 [Item 19], available at: https://www.dec.ny.gov/docs/permits_ej_operations_pdf/dseqrhandbook.pdf). Not surprisingly, this answer is in accord with DEC's application of SEQRA in this

case. It is also in accord with the statutory directive that agencies "shall carry out [SEQRA's] terms with minimal procedural and administrative delay [and] avoid unnecessary duplication of reporting and review requirements" (ECL §8-0107).

Appellants have cited no case law to support their claim that SEQRA review of previously-permitted activities must be revisited in connection with later additions or modifications involving the same project. And they notably omit any reference to the clear precedent to the contrary from this Court and the Court of Appeals.

In *Matter of Stewart Park & Reserve Coalition v New York State Department of Transportation* (157 AD2d 1 [3d Dept 1990]), for example, this Court considered the adequacy of the environmental review conducted in connection with an expansion and rehabilitation of passenger facilities at Stewart Airport. Opponents of the project argued that, because the project was a necessary component of a plan to introduce regular passenger service to the airport, the environmental review should have included study of the impacts of that overall plan. As in this case, another component of the plan (a runway extension) had been approved several years earlier, accompanied by an environmental review. Noting that the environmental effects of bringing regularly scheduled passenger service to the airport "were problems readily apparent when the runway extension and related improvements were proposed,"

this Court held that DOT was not obligated to reconsider those impacts in connection with the new improvements (157 AD2d at 8). In an opinion by then-Justice Levine, the Court stated: "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'" *(id.* [quoting *Matter of E.F.S. Ventures Corp. v Foster,* 71 NY2d 359, 373]). The prior approval, the Court held, had "long since been time barred from further SEQRA review" *(id.).* Thus, the Court admonished that "petitioners may not use the present environmental proceeding as a pretext to force the reopening and reweighing of the environmental effects of making Stewart a functioning regional airport for scheduled airline service" (id. at 10). The Court of Appeals affirmed on the opinion by Justice Levine (77 NY2d 970).

Similarly, in *Matter of Schulz v State of New York* (274 AD2d 615 [3d Dept 2000]), this Court held that the petitioners could not use a challenge to a supplemental review for a later phase of a sewer project "as a vehicle for resurrecting their long since time-barred claims" regarding the SEQRA review associated with earlier phases (274 AD2d at 618).

These cases make clear that the SEQRA review of a subsequent phase of a project (or other project modification) does not require reconsideration of the

environmental impacts associated with previous permits. They also make clear that an Article 78 proceeding challenging the later permit does not open the door for litigants to raise time-barred claims regarding the adequacy of the environmental review associated with prior approvals.

Petitioners had ample opportunity to raise concerns about mining under Cayuga Lake, including any claims regarding the adequacy of the environmental review conducted by DEC, when those reserves were permitted in 2003 and earlier. They failed to do so, and such claims are now time-barred. They cannot circumvent the statute of limitations by challenging the permit for Shaft No. 4 and claiming that DEC should have reconsidered the impacts of mining under the lake in connection with that permit. Such a tactic — a collateral attack to raise time-barred claims — is exactly what this Court and the Court of Appeals have rejected in cases like *Stewart Park* and *Schulz.*

Point III

DEC THOROUGHLY INVESTIGATED THE POTENTIAL FOR ENVIRONMENTAL IMPACTS ASSOCIATED WITH SHAFT NO. 4 AND REASONABLY EXERCISED ITS DISCRETION IN DETERMINING THAT THERE WOULD BE NO SIGNIFICANT IMPACTS

A. Appellants Have Abandoned Any Argument that the Impacts of Constructing Shaft No. 4 Were Not Adequately Addressed.

Aside from their argument that the impacts of mining the Northern Reserves should have been revisited, Appellants have abandoned any claim that DEC did not adequately consider the potential environmental impacts of constructing Shaft No. 4 itself. The "Argument" section of their brief begins with two paragraphs summarizing their argument (Appellants' Brief at pp 10-11) which alludes only to their argument about mining the Northern Reserves. This is followed by thirteen pages outlining SEQRA's statutory scheme (*id.*, at pp 11-23), none of which includes any arguments about the potential impacts of constructing Shaft No. 4 or otherwise addresses the facts of this case. The next section simply recites a list of eleven issues raised by the Appellants during the administrative process (*id.*, at pp 24-28), accompanied by two conclusory (and erroneous) statements that these issues were ignored or not properly addressed by DEC (*id.,* pp 24, 27). This section of the Brief makes no effort to discuss how DEC reviewed any of the issues or in what way that review was inadequate or improper.

The remainder of the Brief contains three arguments, none of which addresses the propriety of DEC's review of Shaft No. 4 itself. Section C of the "Argument" portion of the Brief (pp 29-42) contains the argument addressed in Point II above – that DEC should have addressed mining the previously-permitted Northern Reserves. Section D (pp 42-45) argues that the court below improperly denied Appellants' discovery motion. Section E (pp 45-53) argues that the appeal is not moot. There is no substantive portion of the Brief that challenges the adequacy of the environmental review related to Shaft No. 4. Accordingly, Appellants have abandoned any such argument (*see Lamphear v State,* 91 AD2d 791, 791 [3d Dept 1982] [failure to raise issue in appellants' brief is an abandonment of that issue]).

B. In Any Event, DEC Thoroughly Investigated the Issues Related to Shaft No. 4 That Were Raised by Appellants During the Administrative Process.

As the court below correctly recognized, the issues raised by Appellants that were related to the construction of Shaft No. 4 – as opposed to those related to previously-permitted activities – all concerned a single hypothesis: that the drilling of the shaft might intersect significant water-bearing zones in the subsurface geology (R 12). If so, they theorized, the volume of water might be more than Cargill could manage; it might flood the mine, dissolve the salt formations and cause a collapse, or it might adversely impact residential wells in the area.

The court below summarized how Appellants' claims were addressed by DEC during the review process and concluded:

> The record reveals that DEC focused on water intrusion into the mine and potential impacts on local groundwater resources throughout the review process. By five separate requests for information DEC required Cargill to provide detailed responses about water-related impacts of the Shaft No. Four project. DEC then closely monitored the drilling of Corehole 18 and conducted 29 inspections of the test corehole drilling. Most of the first 1,000 pages of the Record are devoted to site-specific study of the environmental impacts of this project including the analysis of Corehole 18 by RESPEC, the Cargill consultants. DEC conducted with an internal evaluation of the RESPEC report and had its geotechnical consultant J.T. Boyd do the same.

(R 18).[10] The court further recognized that DEC had exceeded regulatory requirements by accepting, reviewing and responding to the comments received during two comment periods, noting that the regulations applicable to the Shaft No. 4 permit do not require DEC to respond to comments (R 13 and R 18, citing 6 NYCRR 621.10 [e]). Accordingly, the court concluded that DEC had satisfied the requirements of SEQRA by taking a "hard look" at the potential environmental impacts and providing a reasoned elaboration for why the shaft project will not adversely affect the environment (R 13).

[10] This page of the lower court's decision (page 7 of the decision as originally paginated) appears out of order in the Record on Appeal submitted by Appellants. It should appear following R 12 (page 6 of the decision), but is printed in the Record following R 17, the first page of the Petition.

The court was correct. In light of Appellants' abandonment of this claim, Cargill will not reiterate in full the arguments it made below. They can be found in the Record at R 764-777 and R 1366-1375. We emphasize only two points.

First, the Appellants' challenge to the sufficiency of DEC's SEQRA review of Shaft No. 4 in the court below was a challenge to DEC's substantive, not procedural, compliance with SEQRA (*see Matter of Wir Assoc., LLC v Town of Mamakating,* 157 AD3d 1040 [3d Dept 2018]). As such, judicial review is limited to whether the determination was "affected by error of law or was arbitrary and capricious or an abuse of discretion" (*Matter of Chinese Staff & Workers v Burden,* 19 NY3d 922, 924 [2012] [internal quotations omitted]). The strict compliance required for procedural requirements is not applicable.

Instead, in matters of substance, courts are required to accord a high degree of deference to the agency that performed the SEQRA review. The Court of Appeals has cautioned that it is not for a reviewing court to duplicate the lead agency's review of the underlying reports, analyses and other documents (*Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast,* 9 NY3d 219, 232 [2007]). It is sufficient if the lead agency "has reached its determination in some reasonable fashion" (*Matter of Kaufmann's Carousel v City of Syracuse Indus. Dev. Agency,* 301 AD2d 292, 304 (4th Dept 2002, *lv denied* 99 NY2d 508 [2003]), and it is not the role of the courts to "weigh the desirability of the proposed action

. . ., resolve disagreements among the experts, or to substitute its .judgment for that of the agency" (*Matter of Chinese Staff & Workers v Burden,* 88 AD3d 425, 429 [3d Dept 2011] *aff'd* 19 NY3d 922 [2012]).

Such deference is particularly appropriate where, as here, the matter calls for the lead agency's particular scientific and technical expertise. DEC is the executive agency charged by the Legislature to administer both the SEQRA and the MLRL programs, and has the specialized technical and scientific expertise necessary to evaluate the kind of claims made by Appellants. In such a case, the agency's judgment is entitled to "great weight and judicial deference" (*Flacke v Onondaga Landfill Sys.,* 69 NY2d 355, 363 [1987]).

The second point to emphasize is that the theoretical premise of Appellants' claims – that there might be a significant water-bearing zone in the subsurface geology that would be intersected during the drilling of the shaft – was disproven by empirical evidence. As explained in the affidavit of Robert LaFleur, a consultant with a specific expertise in hydrogeology, the Appellants' theory that the construction of Shaft No. 4 might open a pathway for water to flood the mine depends on the presence of two things: (1) a source of water; and (2) a pipeline (of sorts) from the source of water through the bedrock to the shaft opening that is large enough to conduct more water than can be managed during construction (R 834). Thus, Appellants tried to establish the theoretical potential that the

groundwater regime in the area of the shaft could be connected to the lake (a source of water) and that there could be a fault or some other fracture large enough to conduct water in large volumes (the pipeline) (*id.*).

As Mr. LaFleur explained, in the face of such a theoretical potential, the appropriate response would be to drill an exploratory corehole in close proximity to the proposed shaft to find out what is actually below the surface (*id.*). That is exactly what Cargill did here. When water was encountered, a pump test was conducted to determine how much was produced (*id.*). The minimal water encountered was not remotely close to Appellants' predictions and was well within the manageable amount (R 834-835). The results were analyzed by qualified technical experts – Cargill's experts, an independent expert selected by DEC and DEC's own experts (R 835). DEC weighed the site-specific empirical information obtained from the corehole against the theoretical possibilities advanced by Appellants and determined that "the inflow rates have been accurately determined and the shaft construction plans are designed to handle almost double the anticipated inflow" (R 2091 [Response No. 5]). DEC further concluded that "[t]here is no coring evidence that would suggest fractured conditions capable of producing high flow rates that could potentially become uncontrollable" (*id.*).

The Appellants contended that the issue merited further study but, as Mr. LaFleur attested, there is no more accurate way to determine where and how

much water will be encountered in constructing the shaft than by drilling a corehole and conducting a pump test when water-bearing zones are located (R 835-836). That has already been done. There is no further study that could be conducted that would not be redundant (R 836) and, as DEC noted, such redundancy is already built into the project (R 3551 [Response No. 5] ["Even though not plausible or probable, if unforeseen [water intrusion] conditions were encountered at the shaft location, they would be discovered during the drilling of the pilot hole prior to accessing the mine and reaming the shaft and would be properly addressed."]). In fact, as noted in the Supplemental Affidavit of William Gracon, that pilot hole has already been completed and has reconfirmed the absence of any significant water-bearing formation at the shaft location (Supplemental Gracon Affidavit, ¶ 16).

In short, Appellants' speculative claims have been twice disproven in the field – once as part of DEC's review process and once again during the actual construction of the shaft. The potential for groundwater inflow into the shaft was thoroughly examined by DEC. Its determination was based upon "[s]ite-specific empirical data . . . collected from corehole #18 which accurately characterize[d] the geology where the shaft will be constructed, as well as defined the water-bearing zones encountered and their characteristics" (R 3551 [Response No. 5]).

DEC's determination cannot be said to be unreasonable, arbitrary, capricious or to constitute an abuse of discretion. The determination was based upon solid science and empirical evidence and should not be disturbed.

Point IV

SUPREME COURT'S ORDER DENYING APPELLANTS' MOTION FOR DISCOVERY IS NOT REVIEWABLE ON THIS APPEAL AND, IN ANY EVENT, WAS A PROPER EXERCISE OF DISCRETION

A. The Discovery Order is not Reviewable.

Appellants' final argument is that the court below erred in denying their motion for discovery. But the interlocutory order denying that motion is not reviewable in the context of this appeal from the final judgment, because such an order does not necessarily affect the final judgment (CPLR 5501 [a]; *see Matter of Ruhle,* 173 AD3d 1389, 1392 [3d Dept 2019] [interlocutory order denying motion to compel discovery is not reviewable in context of appeal from final order because it does not necessarily affect final order]; *Matter of County of Nassau v State of New York,* 100 AD3d 1052, 1056 [3d Dept 2012] [interlocutory discovery orders do not affect final judgment; therefore appeal from final judgment does not bring them up for review]).

Accordingly, the order denying Appellants' motion for discovery is not reviewable on this appeal.

B. The Court Below Did Not Abuse its Discretion in Denying Appellants' Discovery Motion.

In any event, Appellants' argument is meritless. They acknowledge, as they must, that leave of court is required for disclosure in a special proceeding (CPLR 408) and that Supreme Court has broad discretion in determining whether to grant such an application (*Matter of Morris Bldrs., LP v Empire Zone Designation Bd.*, 95 AD3d 1381, 1385 [3d Dept 2012]). Even in a plenary action, where leave of court is not required to seek disclosure, Supreme Court has broad discretion in managing disclosure, and a reviewing court should not disturb its determination absent an abuse of discretion or unreasonable interference with the disclosure of relevant and necessary material (*Czarnecki v Welch*, 23 AD3d 914, 915 [3d Dept 2005]).

In an article 78 proceeding, in particular, there is rarely a basis for disclosure because the court's review is limited to the record considered by the agency in making its determination (*see Matter of Dolan v N.Y. Dept. of Civil Serv.,* 304 AD2d 1037, 1039 [3d Dept 2003], *lv denied* 100 NY2d 512 [2003]). The documents sought by Appellants in this case were not part of the administrative record and therefore could not be considered relevant and necessary to this litigation.

The documents in issue had been referenced in a letter sent to DEC by the outside consultant JT Boyd in February 2018, six months after the Shaft No. 4

permit was issued. Neither the letter itself nor the referenced documents had anything to do with Shaft No. 4. The letter from JT Boyd had been attached to an affidavit submitted by Cargill only to illustrate that the issues raised by Appellants concerning mining in the Northern Reserves had been addressed in the review of the 2003 Expansion by imposing permit conditions that required continuing research, annual reporting by Cargill and review by JT Boyd (SR 382-384). The February 2018 letter from JT Boyd was submitted as an example of how those 2003 permit conditions were continuing to be implemented (R 831 [Affidavit of Robert C. LaFleur at ¶ 14, citing and attaching the JT Boyd letter for its summary of the progress of research required by 2003 permit conditions]). Neither the JT Boyd letter nor the documents referenced in that letter (the subject of the discovery motion) were part of the record considered by DEC as part of the Shaft No. 4 review. Accordingly, they could not have been material and necessary to the claim that DEC violated SEQRA in its review of the Shaft No. 4 application.

The court below acted well within its discretion in denying Appellants' motion for discovery, and its determination should not be disturbed.

CONCLUSION

For the reasons stated in Point I above, the appeal should be dismissed as moot. Appellants failed to make a timely application to enjoin the project that is the subject of the litigation and the project is now substantially and irreversibly complete.

In the event that the Court nevertheless determines to review the merits of the appeal, the judgment appealed from should be affirmed. Appellants have abandoned the only issue that was properly before the court below – whether DEC took the required hard look at the potential environmental impacts of constructing Shaft No. 4 – and, in any event, the court below properly held that DEC had done so. The main argument raised in Appellants' brief – that DEC should have revisited the environmental review of previously-permitted underground mining as part of its review of Shaft No. 4 – rests on an erroneous interpretation of the governing regulations, is contrary to controlling precedent and DEC guidance and constitutes an untimely collateral attack on permits issued long ago.

The only remaining issue relates to an order denying Appellants' motion for discovery. That order does not "necessarily affect" the judgment appealed from

and is therefore not subject to review on this appeal. In any event the court below properly denied the discovery motion.

Dated: Syracuse, NY
March 12, 2020

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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