

SUPREME COURT OF NEW YORK  
COUNTY OF TOMPKINS

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In the Matter of

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

*Petitioners,*

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

Index No. EF2021-0422

-vs-,

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

*Respondents.*

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**MEMORANDUM OF LAW IN SUPPORT OF THE NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S MOTION TO DISMISS**

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Dated: July 26, 2021

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## PRELIMINARY STATEMENT

Petitioners bring this proceeding to challenge a February 12, 2021 mining permit modification issued by respondent New York State Department of Environmental Conservation (the Department) to respondent Cargill. The modified permit updated administrative provisions, such as how Cargill pays its consultant, and memorialized an agreement to restrict mining in certain areas. The modified permit did not expand Cargill's mining area or change its operations. Unsatisfied with the limits imposed, petitioners allege that the Department gave up control of Cargill's consultant and failed to take a hard look at potential geologic anomalies. In doing so, petitioners improperly attempt to use a minor permit modification to challenge environmental reviews conducted long ago.

Even if that were proper, petitioners failed to timely serve their pleadings, which deprives this Court of personal jurisdiction, and it is now too late to correct their deficiencies. Pursuant to CPLR 306-b, petitioners had until June 28, 2021—fifteen days after the relevant statute of limitations expired—to serve the Department and the Office of the Attorney General. But, petitioners did not even attempt to serve until July 19, 2021—more than a month after the statute of limitations expired. There is no reason for the Court to excuse the delay because petitioners lack standing and their underlying claims lack merit. Petitioners are not harmed by the modified permit because it does not change Cargill's operations, expand its mining area, or make any material changes to their previously permitted activities. Therefore, the Court should dismiss this petition.

## RELEVANT FACTS<sup>1</sup>

Petitioners seek to challenge a February 12, 2021 Department-issued modification to Cargill's permit to mine salt under Cayuga Lake (NY St Cts Elec Filing [NYSCEF] Doc No. 6, amended petition, ¶ 1). As background, on April 24, 2019, the Department renewed Cargill's mining permit (Affirmation of Nicholas Buttino, dated July 26, 2021, Ex. A). The 2019 permit indicated that Cargill must conduct additional investigations before mining in certain areas (*id.* ¶ 9). Petitioners did not challenge the 2019 permit.

On August 5, 2020, the Department published notice in the Environmental Notice Bulletin that it intended to modify Cargill's 2019 permit (Buttino Aff. Ex. B). Of note, the Department specified in the notice that, after Cargill performed additional analysis, the company had agreed not to mine under the Frontenac Point Anomaly and had further agreed to maintain a 1,000 foot setback (*id.* ¶ 2). Cargill would also require additional investigations before mining in other areas (*id.* ¶ 3). Finally, as relevant to the petition, the Department removed a cap on how much Cargill would spend on its consultant and removed an outdated condition that Cargill share its consultant with another mining company (*id.* ¶ 6). On February 12, 2021, the Department issued a modified permit incorporating these changes (Buttino Aff. Ex C).

Petitioners filed their petition on June 11, 2021—the day before the statute of limitations expired—and then amended the petition on June 17, 2021 (NYSCEF Doc No. 1, petition; NYSCEF Doc No. 6, amended petition).<sup>2</sup> Petitioners' initial notice of petition set a return date

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<sup>1</sup> The Department reserves its right to dispute petitioners' allegations in an answer.

<sup>2</sup> This proceeding is at least the third related to the Cargill mine. In 2017, many of the same petitioners challenged construction of a new shaft in the mine (NYSCEF Doc No. 2, petition, ¶ 1 in *Matter of City of Ithaca v New York State Dept. of Env'tl. Conservation*, Tompkins County, index No. EF2017-0285). Tompkins County Supreme Court, Hon. John Rowley, denied petitioners' claims (NYSCEF Doc No. 136, Decision and Order, in *Matter of City of Ithaca v New York State Dept. of Env'tl. Conservation*, Tompkins County, index No. EF2017-0285). The

of July 23, 2021, but the Court amended the return date to August 9, 2021 (NYSCEF Doc No. 11, Notice of Petition; NYSCEF Doc No. 13, Notice of Petition [updated return date]). The Court also set a briefing schedule, with respondents' opposition papers due on July 26, 2021 (NYSCEF Doc No. 15, court notice). Despite this schedule and the June 11, 2021 filing date, petitioners waited until July 19, 2021 and July 23, 2021 to serve the Department and the Attorney General's Office, respectively, with their papers (Buttino Aff. ¶¶ 5-6).

### LEGAL FRAMEWORK

To obtain personal jurisdiction over the State of New York, petitioners must deliver the pleadings "to an assistant attorney-general at an office of the attorney-general or to the attorney-general within the state" (CPLR 307[1]). Where petitioners sue a state agency, they must also deliver the petition "to the chief executive officer of such agency or to a person designated by such chief executive officer to receive service" or mail the papers "certified mail, return receipt requested, to such officer or to the chief executive officer of such agency" (CPLR 307[2]).

Additionally, petitioners must meet certain timing requirements. For Article 78 proceedings, petitioners must complete service no "later than fifteen days after the date on which the applicable statute of limitations expires" (CPLR 306-b). For most Article 78 proceedings, as here, the statute of limitations is four months (CPLR 217[1]). "If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service" (CPLR 306-b). Moreover, absent a court order, petitioners

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Third Department found petitioners' claims moot (*Matter of City of Ithaca v New York State Dept. of Env'tl. Conservation*, 188 AD3d 1322, 1323-24 [3d Dept 2020]). Petitioner John Dennis also brought an unsuccessful petition to challenge the Department's production of records about the Cargill mine (*Dennis v. New York State Dept. of Env'tl. Conservation*, Sup Ct, Tompkins County, September 20, 2019, Rowley, J. index No. 2018-0353).

must also serve their papers at least twenty days before the return date in an Article 78 proceeding (CPLR 7804[c]).

## ARGUMENT

### PETITIONERS FAILED TO OBTAIN PERSONAL JURISDICTION OVER THE DEPARTMENT

#### A. Petitioners Did Not Even Attempt Service until after the Deadline

Petitioners have failed to obtain personal jurisdiction over the Department because they timely served neither the Department nor the Attorney General's Office (Buttino Aff. ¶¶ 5-6). Petitioner bears the burden of service on both the Attorney General's Office and the Department (CPLR 307). In proceedings with a four month statute of limitations or shorter, like an Article 78 proceeding, petitioners must serve their papers within fifteen days of the expiration of the statute of limitations (CPLR 306-b). Failing to comply with CPLR 306-b renders the service invalid, depriving the Court of jurisdiction (*see Matter of Palmateer v Greene County Indus. Dev. Agency*, 38 AD3d 1087, 1088 [3d Dept 2007] [dismissing for untimely service under CPLR 306-b]; *see also Matter of Curto v State of N.Y. Dept. of Pub. Serv.*, 140 AD3d 1339, 1340 [3d Dept 2016] [holding proper service required for jurisdiction]).

Petitioners are too late to cure their service defect. Because the Department issued the challenged permit on February 12, 2021, the four month statute of limitations expired on June 12, 2021 (*see CPLR 217[1]*). Thus, petitioners had until June 28, 2021 to serve their pleadings (CPLR 306-b; *see also* General Construction Law § 25-a [providing an extension of time for completion where a due date falls on a weekend]). Petitioners did not attempt service on the Department and the Attorney General's Office until late July, meaning that they took more than double the amount of time allowed by CPLR 306-b. Indeed, petitioners did not even give the Attorney General's Office the twenty-days' notice required by CPLR 7804(c), having served the

office only 17 days before the court-ordered return date. The Court should dismiss the petition for lack of jurisdiction (*see Palmateer*, 38 AD3d at 1088).

**B. The Court Should Not Extend Petitioners' Time to Serve**

The Court should not grant petitioners additional time to cure their service defect. The Court has discretion to extend the time for service “upon good cause shown or in the interest of justice[,]” but such an extension is not warranted (CPLR 306-b). The rule allows the Court to consider separately if there is good cause or whether an extension is in the interest of justice (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105 [2001]). Good cause requires a showing of “reasonably diligent efforts at service” (*id.*). In weighing the interests of justice, “the court may consider diligence, or lack thereof, . . . expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to defendant” (*id.* at 106).

The Court should not allow an extension because petitioner lacks standing to bring this action and thus the petition lacks merit. To demonstrate standing, petitioner has the burden of showing that it “will actually be harmed by the challenged administrative action” (*New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). The injury must be specific, “more than conjectural” (*id.*), and “distinct from that of the general public” (*Lancaster Dev., Inc. v McDonald*, 112 AD3d 1260, 1261 [3d Dept 2013]).

Petitioners are not harmed because the modification did not expand mining or change operations (Buttino Aff. Ex. A). As explained in the Environmental Notice Bulletin, the modification memorialized Cargill’s agreement not to mine within 1,000 feet of the Frontenac Point Anomaly (Buttino Aff. Ex. B ¶ 2). If anything, the modification restricts Cargill’s ability to mine (Buttino Aff. Ex. C). While the permit set conditions for how Cargill selected its consultant and removed payment restrictions, it did not relinquish any of the Department’s



authority (*compare* Buttino Aff. Ex. A *with* Buttino Aff. Ex. C). Because none of these conditions impacts mining operations, and accordingly cannot harm petitioners, petitioners lack standing (*see Palmateer*, 38 AD3d at 1088).

Indeed, petitioners' premise—that they can challenge housekeeping modifications to attack the Department's prior environmental review—is misguided. The Third Department has held that "absent a material change in conditions" there is no need to conduct further environmental reviews on a permit modification or renewal (*see Matter of Plante v New York State Dept. of Envtl. Conservation*, 277 AD2d 639, 642 [3d Dept 2000]). As explained above, the modification did not cause a material change in conditions. Instead, petitioners seek to relitigate a late challenge to the Department's environmental review for the mining permit. Petitioners lost that argument in previous litigation and the Court informed them of the requirements of CPLR 306(b) (*see* NYSCEF Doc Nos. 84, 136 Decision and Order, in *Matter of City of Ithaca v New York State Dept. of Envtl. Conservation*, Tompkins County, index No. EF2017-0285). The Court should not entertain improperly served petitions that seek to collaterally attack previous permits and environmental reviews. Considering petitioners' failure to timely serve the State, lack of standing and flawed legal premise, the Court should dismiss for lack of personal jurisdiction and decline to allow petitioners to cure their service defect (*see Palmateer*, 38 AD3d at 1088; *Matter of Aubin v State of New York*, 282 AD2d 919, 922 [3d Dept 2001]).

**CONCLUSION**

For the reasons stated above, the Department requests that the Court dismiss this petition.

If the Court denies this motion to dismiss, the Department requests 30 days after service of notice of entry to answer the petition and submit an administrative record and supporting affidavits (*see* CPLR 7804[e]).

Dated: July 26, 2021  
Albany, New York

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**CERTIFICATE OF COMPLIANCE WITH  
WORD COUNT LIMIT**

The undersigned attorney hereby certifies:

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Dated: July 26, 2021

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