STATE OF NEW YORK
SUPREME COURT : COUNTY OF TOMPKINS

IN THE MATTER OF THE APPLICATION 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 Laws and Rules

-vs-

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

*Respondents.*

**Index No.** EF2021-0422

**MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' CROSS-MOTION AND IN OPPOSITION TO RESPONDENTS' MOTIONS TO DISMISS**

## I. INTRODUCTION

This is an Article 78 proceeding challenging the Department of Environmental Conservation's [hereinafter cited as "DEC"] modification of a mining permit issued on February 12, 2021 to Respondent Cargill Incorporated [hereinafter cited as "Cargill"]. The modification of the permit precluded Cargill from mining salt in a certain portion of their mine under Cayuga Lake designated as the Frontenac Point Anomaly (hereinafter cited as "FPA", along with a 1,000 foot buffer, and further precluding mining under other anomalies until further study is undertaken to determine whether it is safe to mine under those anomalies.

The anomalies occur because as mining proceeds northward under Cayuga Lake, the bedrock ceiling between the mine and the lake thins, as indicated in the exhibits attached to the Petition. Since the bedrock thins, mining under the FPA has therefore been determined to be

unsafe with a risk of mining collapse under the FPA, and potentially under the other anomalies, which according to the DEC, still has to be determined.[1]

While Petitioners agree with that portion of the modified permit that recognizes the potential hazards of mining under the anomalies, this proceeding is brought to assure that the geographic areas include all of the anomalous areas described by Cargill and accepted by the DEC are correct and include all of the anomalies that present a hazard of mine collapse and concomitant adverse effects upon the Petitioners if such mine collapse occurs.

## II. FACTS

Both Respondents have moved to dismiss the within proceeding based upon Petitioners' failure to serve the Respondents within 15 days of the end of the statute of limitations period, pursuant to CPLR § 306-b. The 15th day ended on June 28, 2021. However, the DEC was not served until July 19, 2021, or 21 days after the service period ended. The Attorney General was served on July 23, 2021. Respondent Cargill was served on July 16, 2021 or 18 days after the end of the service period.

While the primary basis for the Respondents' Motion to Dismiss is late service of process (and that is the only claim upon which Cargill basis its Motion to Dismiss), DEC also claims that this Court should not execute its discretion in allowing an extension of service *nunc pro tunc* in the interest of justice, as allowed by § 306-b in an appropriate case, because they claim that

[1] Petitioner CLEAN has previously provided the DEC with expert reports indicating the thinning bedrock as mining proceeds northward under the Lake, with internationally known experts providing reports to this effect, which were also supplied to the Court in Petitioner's CLEAN efforts to avoid these hazards in the previous Cargill case brought by CLEAN. City of Ithaca, et al v. New York State Department Of Environmental Conservation, et al, Index No. EF2017-0258 (Tomkins Cty,2017) Petitioners are gratified that the DEC has finally agreed with their position, at least as it concerns the Frontenac anomaly.

Petitioners lack standing and no harm will come to Petitioners due to the modified permit conditions.

While § 306-b requires service of process in an Article78 proceeding within 15 days of the end of the statute of limitations,[2] the provisions of § 306-b require the Court to dismiss an action that is not timely served without prejudice, unless the Court determines that the service period should be extended for good cause or in the interest of justice.

Petitioners concede that they cannot show that the service date should be extended for good cause, since they did not attempt to serve the Notice of Petition and Petition during the 15-day service period. However, it is respectfully submitted that based upon the facts of this case, and the facts that the Court is required to consider when determining whether to execute its discretion to allow late service, it is in fact in the interest of justice to extend the service *nunc pro tunc* to the date on which each of the Respondents was served.

## III. ARGUMENT

### (A) THE PETITIONERS HAVE STANDING

Respondent DEC claims that Petitioners do not have standing because the modified permit will not harm them in any fashion, and therefore, they cannot show they will be injured in a manner different than the public at large, as required by the Court in *Society of Plastics Industry, Inc v. County Of Suffolk*, 77 NY2d 761 (1991).

However, this claim by the DEC shows a misunderstanding of the gravamen of Petitioners' claims. The DEC has now recognized that mining under the FPA presents a hazard

[2] There is no dispute concerning whether or not this proceeding was filed in a timely manner, and it was in fact filed within the four months statute of limitations.

to the Petitioners, which is why they have precluded such mining under the FPA, and why they are requiring no mining under the other anomalies until further investigation is carried out to determine whether the same risk of mine collapse would occur under the other anomalies. Since the modified permit avoids mining under the hazardous FPA, DEC claims that the modification of the permit does not present an injury to the Petitioners, but rather avoids the hazard of a mine collapse by not allowing such mining under the FPA.

However, the issue raised in this proceeding is not whether mining should be allowed under the FPA, which as previously indicated, Petitioners appreciate. Rather, the issue in this proceeding is a challenge to whether or not the DEC fulfilled its responsibility in determining the size and location of hazardous geographic areas where the anomalies exist. If in fact Petitioners are correct that the geographic areas where the anomalies exist are larger and longer than indicated in the modified permit, mining under the broader geographic area of the anomalies in fact present a significant risk of injury to the Petitioners. Moreover, Petitioners have provided the Court with extensive scientific information from credible experts indicating that the geographic area of the anomalies were too narrowly drawn by the DEC, and in fact the anomalies exist in a broader area where mining should not be allowed. (See Exhibit "B" attached to the Affirmation of Richard J. Lippes).

Finally, the cases cited by the DEC in support of their claim of lack of standing occurred before the Decision in *Sierra Club v. Village of Painted Post*, 26 NY3d 301, 310-311 (2015) where the Court of Appeals held that the number of people harmed does not preclude a finding of standing, and further, that a Petitioners' claim of harm does not have to be "unique" to other members of the public that are harmed.

Therefore, the detailed information provided in the Petition concerning each of the Petitioners' use and enjoyment of the Lake, which will be adversely affected if a mine collapse occurs in the geographic area of the anomalies not included in the modified permit, provides adequate information for each of the Petitioners to show that they have standing.

## (B) THE COURT SHOULD GRANT PETITIONERS' CROSS-MOTION IN THE INTEREST OF JUSTICE

The Court of Appeals in *Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95 (2001) first pointed out that the "good cause" grounds and the "interest of justice" grounds are two separate and independent grounds on which the court may execute its discretion. As previously indicated, Petitioners do not assert the "good cause" application of § 306-b for purposes of extending the service date, since attempts at service were not made during the 15-day service period, which is required in order to show "good cause".

However, the fact that a petitioner could not show "good cause" through lack of diligence in service is only one of the factors that the Court is to consider in determining whether the broader "interest of justice" provision applies.

Rather, the *Leader* court indicated the factors that a court should consider in deciding whether to execute its discretion in the "interest of justice". Therefore, the *Leader* court indicated that the length of time beyond the 15-day service period upon which the Respondents were served should be considered, along with whether the statute of limitations has run and therefore dismissal would deny the Petitioner a judgment on the merits, and whether there was prejudice to the Respondents because of the late service. In addition, whether a meritorious claim is made in the Petition, and whether the Cross-Movant promptly cross-moved to extend the

service period should be considered. *Leader*, *supra* at 105-106. Also see, e.g., *Busler v. Corbett*, 259 A.D.2d 13 (4th Dept. 1999) (extension of service granted due to the expiration of the statute of limitations which would bar a new action, and that service of process was made only 28 days late, that the plaintiff moved for an extension *nunc pro tunc* in a timely fashion, and there is no prejudice to the defendant); *Bumpus v. New York City Transit Authority*, 66 A.D.3d 26 (2nd Dept. 2009) (eight month delay in service); *State of New York v. Stella*, 185 Misc.2d 549 (Sup. Ct. Albany Cty. 2000) (service was only 46 days late); *Estey-Dorsa v. Chavez*, 27 A.D.3d 277 (1st Dept. 2006) (the court in the interest of justice can even grant a second extension for service); but see; *Slate v. Schiavone Construction Co.*, 4 N.Y.3d 816 (2005) (one and one-half year delay in service is too late to grant an extension).

In *Busler v. Corbett*, *supra*, the Fourth Department provided additional guidance concerning the interest of justice provision of § 306-b. In determining whether prejudice exists the court, citing *Boley v. Kaymark*, 123 F.3d 756, 758-759, (3d Cir. 1997) *cert denied* 522 U.S. 1109, 118 S.Ct. 1038, 140 L.Ed.2d 104, indicated that "prejudice involves impairment of defendant's ability to defend on the merits, rather than foregoing such a procedural or technical advantage". *Busler v. Corbett*, *supra* at 16.

In the instant case, there can be no claim of prejudice for the 16-25 delay in service of process, since such delay has had no effect on the ability of Respondents to defend the proceeding, no witnesses or documents have been lost, and there has been no affect at all on Cargill's mining activities. However, since the statue of limitations has run, dismissal of the proceeding without prejudice would be faint help to the Petitioners since the statute of limitations has run, and would not allow the case to be decided on the merits, which courts encourage.

The other factors that the Court should consider all militate in favor of the Petitioners. The delay in service was 16-25 days. Moreover, Petitioners have promptly served this Cross-Motion less than one week after Respondents' Motions to Dismiss have been made, and if this Court decides to extend the time for service in the interest of justice, while the Court would eventually have to decide whether Petitioners' claims are meritorious, the chances of success certainly merit a hearing and decision, concerning the significant adverse consequences that may ensue if the Petitioners are correct in their position and this proceeding was dismissed.

Respondent DEC relies heavily on two cases, both of which are easily distinguishable. In the first case, *Palmateer v. Greene County Industrial Development Agency*, 38 A.D.3d 1087, 2007 N.Y. Slip Op. 2014, 831 N.Y.S.2d 604 (N.Y. App. Div. 2007), the delay in service was four months, significantly greater than the instant case. Moreover, the motion for late service was not very timely made, and the Court determined that the Plaintiffs claims were not meritorious. These facts are not present in the instant case. The second case relied on is *In the Matter of Aubin v. State*, 282 A.D.2d 919, 724 N.Y.S.2d 84 (N.Y. App. Div. 2001) The Court did not discuss any of the factors that led to the Courts affirming the Trial Courts dismissal for late service, only indicating that the Petitioners did not provide the Court withs support for either a good cause or interest of justice ground for extending the service dates However, the Court did indicate that the filing of the proceeding was beyond the Statute Of Limitations as to one of the party respondents, who would have been a necessary if the proceeding had continued,

Finally, as previously indicated, and as indicated by Respondent Cargill, a previous case was brought by some of the same Petitioners to challenge the permit granted by the DEC for the digging of a new shaft which would provide further egress and ingress into the salt mine. *City of Ithaca et al v. New York State Department Of Conservation, et al*, Index No: EF 2017-0285

(Tompkins County June 13, 2018) (Rowley, J) In that case, Respondents also raised the issue that service of process was beyond the 15 days allowed by § 306-b, and Petitioners also cross-moved to extend the service period *nunc pro tunc*. Justice John Rowley, who was assigned to the case, considered the *Leader* factors, and determined that the interest of justice would be served if the service period on Cargill and the DEC would be extended *nunc pro tunc* to the date of service. (See a copy of the decision and order, attached to the Affirmation of Richard J. Lippes as Exhibit "C".).

Therefore, it is respectfully submitted that the various issues that the Court is to consider militate in favor of extending the time of service *nunc pro tunc*, as requested in Petitioners' Cross-Motion.

## IV. CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should extend the period of time for service of process *nunc pro tunc* to date of actual service on the Respondents.

DATED: Buffalo, New York
July 28, 2021

Respectfully submitted,

RICHARD J. LIPPES, ESQ.
**LIPPES & LIPPES**
1109 Delaware Avenue
Buffalo, New York 14209
Telephone: (716) 884-4800
Email: rlippes@lippeslaw.com
Attorneys for Petitioners

TO: Letitia James, Attorney General
State of New York
Nicholas C. Buttino, Assistant Attorney General, of Counsel
Environmental Protection Bureau
New York State Department of Law
The Capital
Albany, New York 14224-0341
Telephone: (518) 776-2406
*Attorney for the Department of Environmental Conservation*

Patricia S. Naughton, Esq.
Kevin G. Roe, Esq.
Barclay Damon LLP
125 East Jefferson Street
Syracuse, New York 13202
Email: pnaughton@barclaydamon.com
kroe@barclaydamon.com
*Attorneys for Respondent, Cargill Incorporated*