To be Argued by:
BRIAN MATTHEWS
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division – Third Department

Appellate Case No.: 532083

TOWN OF SOUTHAMPTON; 101CO, LLC; 102CO NY, LLC; BRRRUBIN, LLC; BRIDGEHAMPTON ROAD RACES, LLC; CITIZENS CAMPAIGN FOR THE ENVIRONMENT; GROUP FOR THE EAST END; NOYAC CIVIC COUNCIL; SOUTHAMPTON TOWN CIVIC COALITION; JOSEPH PHAIR; MARGOT GILMAN; and AMELIA DOGGWILER,

Petitioners-Appellants,

ASSEMBLYMAN FRED W. THIELE, JR.,

Petitioner,

– against –

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; SAND LAND CORPORATION and WAINSCOTT SAND AND GRAVEL CORP.,

Respondents-Respondents.

BRIEF FOR RESPONDENTS-RESPONDENTS SAND LAND CORPORATION AND WAINSCOTT SAND AND GRAVEL CORP.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the lower court properly consider and find that the Answering Affidavit of NYDEC Director Catherine Dickert provided an account of the NYDEC's decision-making process based upon her personal knowledge, so that when considered, separately or together with the full Record, they established the propriety and rationality of the NYDEC's decisions to enter into the Settlement Agreement, adopt the Amended Negative Declaration, and issue the Renewal and Modified Mined Land Reclamation Permits?

Yes.

2. Did the lower court properly find that the NYDEC was not bound by the prior recommendations of the ALJ on a materially different application and that the NYDEC's interpretation of and actions under §§ 23-2703 (3) and 23-2711 (3) were rational and consistent with the pain language of the statutes?

Yes.

3. Did the lower court properly find that the Record contained ample support for the NYDEC's determination that mining to a depth of 120-ft amsl within

an already disturbed Life of Mine will not have a significant impact on the environment and will not adversely impact the groundwater?

Yes.

4. Did the lower court properly find that the Record sufficiently demonstrated that the NYDEC took the requisite hard look at the relevant areas of environmental concern in accordance with SEQRA and provided a reasoned elaboration of the basis for its determinations in the Amended Negative Declaration?

Yes.

5. Did the lower court, based on the totality of the Record and the controlling law, properly defer to the jurisdiction and expertise of the NYDEC and properly defer to each of their determinations at issue upon finding that the Record demonstrated their rationality and propriety?

Yes.

PRELIMINARY STATEMENT

This Brief is respectfully submitted by Respondents-Respondents Sand Land Corporation and Wainscott Sand and Gravel Corp. (collectively, "Sand Land") in opposition to the instant appeal.

In the Decision, Order, and Judgment being appealed from (the "Judgment"; Ferreira, J.; R. 4- 45) the lower court appropriately deferred to the determinations made by the New York State Department of Environmental Conservation ("NYDEC"), each of which were made in the proper exercise of their scientific expertise and exclusive statutory jurisdiction. The Record shows that this deference was warranted, as all of Appellants' claims are rebutted, resoundingly so, by the facts, the science, and the law.

Contrary to Appellants' forced narrative, this matter involves nothing more than a straightforward Article 78 proceeding by parties who are displeased with decisions made by an administrative agency. The decisions made here by the NYDEC are the type of determinations they make on a daily basis as part of their legislatively imposed obligations to "foster and encourage the development of an economically sound and stable mining industry" and to ensure that it is done in a manner that is "compatible with sound environmental management practices." ECL § 23-2703 (1); *see also,* ECL Article 23, Title 27 and 6 NYCRR Part 422 *et seq*.

None of the challenged decisions are remarkable or out of the ordinary in any way. The only "remarkable" aspect is the 15-plus-year crusade to shutter Sand Land's generational and legal family busines (operative since the 1960s) by the neighboring, ultra-exclusive, private golf club (which came into existence in the early 2000s).

Unable to present any facts or law to support their claims, Appellants resort to advancing grand conspiracy theories wherein every level of NYDEC staffer, from permit reviewers, to expert hydrologists and engineers, to attorneys, both in Region 1 and in the Albany Central Office, up through the Deputy General Counsel and the Office of the Commissioner, collectively conspired to ignore the law and the science to overtly permit groundwater contamination, all for some wholly unstated reason, but impliedly for the benefit of Sand Land.

Of course, none of this is true, or even remotely supported by anything in the Record, or any credible scientific theory, whatsoever.

What the Record does bear out is that the NYDEC and Sand Land at all times acted in the normal course of events, within the law, and based on accepted scientific principles. By contrast, Appellants have done nothing but misstate the law, cast aspersions, and push manufactured theories of groundwater contamination that are unsupported by even a scintilla of objective evidence.

It is for this reason that the lower court concluded that, *inter alia*, in entering into the Settlement Agreement, adopting a negative declaration on, and issuing a modified mining land reclamation permit, the NYDEC engaged in a rational and proper exercise of its jurisdiction, and why the lower court denied Appellants' Petition (as supplemented) in its entirety. *See,* R. 34.

For all of these reasons, this appeal must be denied.

SUMMARY OF ARGUMENT

Appellants take issue with the following actions taken by the NYDEC:

i. The execution of a Settlement Agreement between Sand Land and the NYDEC that, *inter alia*, settled issues raised by the NYDEC in a previous notice of intent to modify;

ii. The renewal of Sand Land's long held mined land reclamation permit;

iii. The adoption of an amended negative declaration on Sand Land's application to modify its mined land reclamation permit; and

iv. The issuance of a modified mined land reclamation permit to allow mining to a depth of 120-ft amsl.[1]

In challenging those actions, Appellants advanced six causes of action, all of which centered around two basic claims:

[1] Even following the issuance of the modified permit, the Record confirms that there is still approximately 100-feet between the floor of the mine and the groundwater table.

i. The NYDEC failed to consider potential groundwater impacts from allowing mining to continue on the Premises and from allowing mining to occur to a depth of 120-feet amsl, and

ii. The NYDEC's actions are violative of §§ 23-2703 and 23-2711 of the New York State Environmental Conservation Law.

The Record developed before the NYDEC and the lower court disproved all of these claims in their entirety.

i. The scientific evidence in the Record disproved Appellants' claims of groundwater contamination

Given the nature of Appellants' claims, it was a non-waivable condition precedent that they come to court with scientific studies showing, *first*, a causal link between sand and gravel mining and groundwater contamination, and *second*, that "continued mining [at the Premises] poses a serious threat to the safety of the water upon which the region depends," as Appellants' counsel repeatedly, and incorrectly, alleged to the lower court. *See, e.g.,* Affirmation of M. Tooher, R. 653, ¶ 4.

The lower court correctly held that Appellants never satisfied this condition precedent. *See,* R. 3550 ("[Appellants] have not submitted any proof - such as an affidavit or a study - specifically demonstrating that mining deeper than 160 feet amsl" would cause groundwater contamination); R. 3550 (The SCDHS study and the affidavits submitted by [Appellants] focus-on the potential impact on ground

water quality from VOWM activities and not mining); and R. 42 (the SCDHS report upon which [Appellants] rely found that VOWM activities/operations have had adverse impacts on groundwater quality; however, the report did not find that sand mining itself or sand mining within 90 feet of the underground water level causes contamination of the aquifer).

Appellants' complete failure to present any scientific evidence to support their groundwater claims was also recognized by the NYDEC during the permit review proceedings (*see, e.g.,* R. 1142-1143, 1147-1149).

What's more, none of the studies Appellants tried to rely on, including the 2018 "final report" from the SCDHS that is central to their arguments, concluded that the use of the Premises for mining would impact the aquifer. Indeed, not only did none of these studies conclude that mining should cease, they did nothing more than "recommend" that mechanisms be put in place to ensure no adverse impacts to water quality should the vegetative organic waste material ("VOWM") use continue. R. 2927; 2969.

There is, however, one definitive conclusion that was reached by the SCDHS regarding the groundwater:

> "sample results from private wells completed to date have not indicated any apparent water quality impacts from VOWM activities."

R. 2969.

Nothing in the Record warrants a departure from the NYDEC's and the lower court's thorough review of, and resounding rejection of, Appellants' groundwater claims.

ii. Sand Land's right to mine is legal, constitutionally protected, and extends to all 50-acres of the Premises

The second principal component of Appellants' appeal is their legally dishonest claim that mining is *prohibited* on the Premises. In advancing this claim, Appellants ask this Court to ignore established and dispositive facts, including, without limitation:

i. The 2011 issuance of a certificate of occupancy confirming the pre-existing nonconforming right to operate a sand and gravel mine on the full 50-acres of the Premises. (R. 1098-1099);

ii. That the mining rights were judicially affirmed by the Second Department (*see, e.g.*, Matter of Sand Land, et al. v. Zoning Bd. of Appeals, et al., 137 A.D.3d 1289, 1292 (2nd Dept., 2016));

iii. The 2016 issuance of a second certificate of occupancy following the Second Department's affirmation, again recognizing the right to operate a mine (R. 2828); and

iv. The Town's repeal of every mining provision from its Town Code in 2010. R. 1100-1102.

The Record makes clear that mining is very much *permitted* on the Premises as a recognized and constitutionally protected preexisting use. As such, that protected use is entitled to operate and expand, subject to NYDEC approval, as the

controlling law allows. People v. Miller, 304 N.Y. 105 (1952)); Matter of Syracuse Aggregate Cooperation v. Weise, 51 N.Y.2d 278 (1980) ("courts have been nearly unanimous in holding that quarrying, as a nonconforming use, cannot be limited to the land actually excavated at the time of enactment of the restrictive ordinance because to do so would, in effect, deprive the landowner of his use of the property as a quarry); Buffalo Crushed Stone, Inc. v. Town of Cheektowaga, 13 N.Y.3d 88 (2009) ("a prior nonconforming use for quarrying cannot be limited solely to the land that was actually excavated before the zoning law").

In fact, in their brief to the Second Department regarding Sand Land's preexisting rights, and as part of their efforts to force the closure of certain materials businesses, the Town conceded that:

> "This Board agrees with the Supreme Court's citing of Syracuse Aggregate Com. v. Weise 51 N.Y. 2d 278, 434 N.Y.S. 2d 150 (1980) for the proposition that mining contemplates the use of the land itself as a resource, *and in fact that holding was used by the Chief Building Inspector when he determined that the entirety of the 50 acre premises could be devoted to the pre-existing nonconforming mining use* …. [emphasis added]."

R. 1129.

This acknowledgement is a far cry from the Town's false and misleading claims advanced in this matter that mining is "prohibited."

iii. The lower court was required to defer to the NYDEC's rational exercise of its authority and jurisdiction

Equally as important to the *subject matter* of Appellants' claims is the *context* in which they were made.

In seeking to overturn a final determination made by a regulatory agency, Appellants had the burden of showing that the NYDEC's actions were arbitrary, capricious, an abuse of discretion, or contrary to law. This burden is even higher given the NYDEC's capacity as the executive agency solely responsible for the administration and enforcement of the Mined Land Reclamation Law, and the fact that all of Appellants' claims were presented to, considered by, and rejected by the NYDEC during the administrative proceedings, even before reaching and being rejected by the lower court.

Based on the required deference, and the overwhelming proof in the Record, the lower court found that Appellants presented no evidence to overcome (i) the NYDEC's rational rejection of Appellants' groundwater claims; (ii) the NYDEC's rational and legally sound determination that the Town's claim that "mining is prohibited" was not justifiable; (iii) the NYDEC's rational exercise of its jurisdiction to determine that vertical expansions within existing disturbed footprints do not trigger the notice requirements of § 23-2711; and (iv) the NYDEC's proper exercise of its discretion to "carry out the functions and powers of its department" to settle

issues surrounding a notice of intent to modify and entering into the challenged Settlement Agreement. *See,* R. 30.

None of Appellants arguments justify a departure from the lower court's well-reasoned Judgment, and this appeal should be denied all respects.

STATEMENT OF FACTS

Appellants provided the Court with some of the facts regarding this matter, but they fall far short of providing the full history of the Premises, and the 15-year assault on Sand land's business that has been orchestrated and financed by the owners of the neighboring private golf course.[2]

These facts are not all necessary for this Court to answer the simple question of: Did the NYDEC offer a rational basis for its various decisions, and did it engage in a rational exercise of its expertise and jurisdiction in this matter? *Each of these questions were properly answered in the affirmative by the lower court*. However, while the full set of facts lends color to the rationality and reasonableness of the NYDEC's actions, they also highlight Appellants' lack of good faith, lack of clean hands, and the lack of merit to their claims.

[2] In 2011, as part of the initial litigation (*Phair et al v Sand Land Corp*), Sand Land took the deposition of Robert Rubin, the beneficial owner of the golf course and surrounding residential lots, during which he admitted that: (i) he was funding the *Phair* plaintiffs' attempt to shut down Sand Land's business; (ii) achieving this result would increase the salability of his lots and memberships to his private golf club; and (iii) if the *Phair* plaintiffs opted to reach a settlement with Sand Land that was contrary to his individual interests, he was free to "pull the plug" on their litigation efforts. R. 1094-1097.

i. History of the Premises and Appellants' initial litigation

Sand Land owns and operates the 50-acre mining site at 585 Middle Line Highway in Southampton Town, where mining originally began in the 1950's-60s. The Premises was also historically used for the processing of vegetative organic yard waste, concrete, asphalt, and pavement. For years, the Town itself relied on Sand Land to handle material that the Town's facilities were not equipped for. Much of the processed material was used to reclaim the mine slopes, with the balance being re-sold to the landscapers and contractors, each of which are vital to the local economy. R. 1077-1093.

The first NYDEC mining permit was issued on March 31, 1981, and permitted mining on 20-acres of the 50-acre Premises. In 1985, the area to be mined was expanded to 31.5-acres. No approval of any kind was required from the Town for that expansion of the area to be mined. The mining permit was renewed in 1988, 1991, and 1994. In 1998, the mining permit was renewed and transferred to Sand Land, and was again renewed in 2003, 2008, and 2013. R. 6-7.

Appellants Phair, Gilman and Doggweiler purchased their properties in 2003 (Phair), 1999 (Gilman), and 2005 (Doggweiler), respectively, and almost immediately thereafter commenced an action under Town Law § 268 and common law nuisance, alleging that Sand Land lacked the requisite certificate of occupancy,

particularly for the VOWM and Part 360 activities. (Phair, et al v. Sand Land Corp, *Suffolk County Index No.: 26457/2005*).[3]

Not once in the 15-years that matter has been ongoing have the Phair Appellants ever sought to enjoin the mining use, ever contested the legality of that use (in fact, they have effectively conceded it), and have never claimed that mining would result in any adverse impacts to the groundwater.

ii. The Certificate of Occupancy and Appellants' continued litigation

Due, in part, to the Phair litigation, Sand Land applied for a certificate of occupancy. In July, 2011, the Building Inspector issued a written determination and certificate of occupancy confirming that the use of the Premises for (i) a sand and gravel mine, and (ii) for the receipt, processing, and sale of certain materials, was legally preexisting nonconforming. R. 1098-1099.

The Phair Appellants appealed those findings to the Town's zoning board. While they initially challenged the mining use, they abandoned that claim, conceding its legality as a nonconforming use, and placed their focus on eliminating the additional materials uses. The zoning board affirmed the Building Inspector's findings as they related to the mining use in all respects, while finding that some of the material processing uses were not legally preexisting. The legality of the mining

[3] Appellant Doggweiler was added as a plaintiff in 2011, after Robert Flood, an initial plaintiff, sold his home. The Town Law § 268 claims were dismissed, for the third time, on September 12, 2018.

use, and the zoning board's findings and affirmation thereof, were then affirmed by the Supreme Court and the Appellate Division, Second Department. Matter of Sand Land, et al. v. Zoning Bd. of Appeals, et al., 43 Misc. 3d 1202(A), 990 N.Y.S.2d 439 (N.Y.Sup.Ct., Suffolk County, February 18, 2014)9 *rev'd in part* 137 A.D.3d 1289 (2nd Dept., 2016) *lv. denied* 28 N.Y.3d 906 (2016).

Following the Second Department's affirmation, the Town issued a second certificate of occupancy confirming the legality of the mining use. At this point, the preexisting right to mine the entire 50-acre Premises became irrefutable. R. 2828; People v. Miller, *supra*; Matter of Syracuse Aggregate Cooperation, *supra*; Buffalo Crushed Stone, Inc., *supra*.

At no time during that litigation did the Phair Appellants, the Town, or anyone for that matter, raise concerns about groundwater contamination, argue that the preexisting mining rights are limited in anyway, or argue that Town approval was needed to modify those established rights. The absence of any claim regarding the need for Town approval is hardly surprising since the mine was expanded in 1985 without the need for any such approval, and since the Town had already repealed every mining provision from the Town Code. R. 1100-1102. In adopting Town Resolution 1107-2010, the Town specifically stated that the State's enactment of Article 23, Title 27 of the ECL was the basis for the repeal:

> "Whereas, as a result of the aforementioned State Regulations and the DEC's permitting program, the Town is preempted for [sic] regulating in this area"

Id.

As relevant here, the Town's repeal means that no provision exists in the Town Code pertaining to existing mines, and the Town has only the general ability to determine whether a mine is legally existing, as it already determined Sand Land's mine to be.

Appellants commenced their next action in 2016, when the golf course Appellants, 101CO, LLC, 102CONY, LLC, BRRRUBIN, LLC, instituted an action in Suffolk Supreme Court, principally concerning a minor and historical trespass claimed to have occurred on their properties. *See,* 101co et al v. Sand Land, et al, *Index No.: 600470-2016*.

At no time during that matter did the golf course Appellants ever seek to limit or enjoin the mining use due to concerns about potential groundwater contamination.

In 2017, these same golf course Appellants commenced an action in Albany Supreme Court against Sand Land and the NYDEC challenging a remediation plan required by the NYDEC and implemented by Sand Land, concerning the restoration of the 25-foot buffer area on the Premises that adjoins the golf club's properties, and

the reclaiming of certain areas of the mine slopes. *See,* 101co et al v. NYDEC, et al, *Index No.: 1883-2017*.[4]

Again, at no time during that matter did the golf course Appellants ever seek to limit or enjoin the mining use to any degree, for any reason, including any claims relating to potential groundwater contamination.

iii. Sand Land's 2014 application to modify its mining permit

In 2014, Sand Land applied to the NYDEC to modify its mining permit to (i) horizontally expand the area to be mined by 4.9-acres, (ii) increase the depth of the mine from 160-ft amsl to 120-ft. amsl; and (iii) retain the VOWM and Part 360 uses on the Premises. As correctly found by the NYDEC and the lower court, the 2014 application was materially different from the 2019 application, given the reduction in scope of the proposed activities. For instance, it is not in dispute that the 2014 application sought a nearly 2-acre horizontal expansion beyond the 3.1-acre stump dump area that Appellants object to. R. 1397-1398, ¶ 7. It is also not in dispute that, unlike the 2014 application, the 2019 application provided for the cessation of VOWM, the surrender of the Part 360, the presence of a third-party monitor, quarterly groundwater monitoring, a permanent mine floor of 120-feet amsl (100 above the groundwater table), and a cessation timetable.

[4] Sand Land is compelled to advise the Court that on November 12, 2020 the lower court issued a Judgment affirming the remediation plan and denying Appellants' petition. ECF Doc # 3.

On April 21, 2014, the NYDEC adopted a negative declaration under SEQRA for the 2014 application. Although that application was denied, principally due to concerns about the VOWM activities, the 2014 negative declaration was never overturned and remains in full force and effect. R. 1134-1136.

In the ensuing administrative proceeding on the 2014 application, petitions for party status were filed by each of these Appellants. While those petitions raised the issue of groundwater contamination, it was never made in the context of mining as a stand-alone use, but was instead raised in the context of Sand Land's intent, at that time, to continue the VOWM and Part 360 uses.[5]

A fundamental infirmity of this appeal is Appellants' misguided belief that Sand Land, the NYDEC, and/or the lower court, were bound by certain determinations made by the Administrative Law Judge ("ALJ") during those administrative proceedings regarding the denial of the 2014 application. Appellants' belief is incorrect as a matter of law. As discussed herein, the only issue before the ALJ was whether that 2014 application, seeking a vertical and horizontal expansion (beyond the 3.1-acres) and to retain the VOWM and Part 360 activities, was a material change that triggered the notice provisions of § 23-2711. The ALJ held that it was and that § 23-2711 applied.

[5] Under the Settlement Agreement, the Part 360 and VOWM uses have ceased.

First, no part of the ALJ's decisions are final and binding. As a matter of law, an ALJ only makes recommendations to the Commissioner, and only a Commissioner's Ruling is final and binding. 6 NYCRR § 622.18. As neither of the ALJ's recommendations have been adopted by the Commissioner, they are not final and not binding, as the lower court correctly held.[6]

Secondly, nothing in either of the ALJ decisions addressed or answered the question of whether this vertical expansion triggers the notice requirements of § 23-2711. As the question of whether a vertical expansion only was not at issue in that prior administrative proceeding, nothing precluded the NYDEC from interpreting its own statute and from determining that vertical expansions only in an existing mining footprint is not a material change that requires notice under § 23-2711.

iv. The Notice of Intent, Settlement Agreement, and Renewal Permit

On September 11, 2018, the NYDEC issued a Notice of Intent advising Sand Land of the NYDEC's proposal to modify its mining permit to require the cessation of mining and the commencement of reclamation. Sand Land objected to that proposal and requested a hearing, pursuant to 6 NYCRR 621.13 (d) and (e). No further actions were taken in furtherance of the Notice of Intent. The Notice of Intent is ultimately of no import as it was also never a final and binding decision and

[6] It is also worth noting that the lower court specifically found that the ALJ's interpretation of the ECL to be "nonsensical." R. 41.

inflicted no injury (*see,* Best Payphones, Inc. v. Dept. of Info. Tech. and Telecom. of City of New York, 5 N.Y.3d 30, 34 (2005)). The Notice of Intent was withdrawn by the NYDEC on March 14, 2019, and the record of the matter was closed by Order of Disposition on March 21, 2019. *See,* ECF Doc # 41.[7]

Beginning in 2018, and continuing into 2019, NYDEC and Sand Land engaged in a series of discussions to try and resolve the issues raised in the Notice of Intent and Sand Land's objections thereto, including the proof that (i) Sand Land had ample sand reserves to continue a viable mining operation and (ii) any elevated metals found in the soils and groundwater were naturally occurring and did not present a threat to the groundwater. R. Answering Affidavit of Catherine Dickert, R. 2712, ¶ 25. As a means of effectuating the desire to settle these issues, and to implement the substantial concessions offered by Sand Land, a Settlement Agreement was entered into on February 21, 2019. R. 356-373. In that Settlement Agreement, Sand Land agreed to the following:

[7] These documents were submitted to the lower court as part of Sand Land's May 9, 2019 Affirmation in Opposition to the initial Order to Show Cause. For some reason, these documents, along with a significant number of other documents, are not included in Appellants' Record on Appeal, despite it being described as "a full reproduced joint record." Respondents were not consulted about its contents and several items filed by both Respondents below are missing. The missing documents can be accessed via Supreme Court's NYSCEF docket. If necessary, the Court may take judicial notice of their contents. *See*, Williams v. Annucci, 175 A.D.3d 1667, 1678 n.1 (3rd Dept., 2019); Caffrey v. North Arrow Abstract & Settlement Servs., Inc., 160 A.D.3d 121, 126-128 (2nd Dept., 2018). For the remaining documents omitted from the Record, Sand Land will cite to the same via "ECF Doc # [ ]" and ask that they be considered on this appeal, as they should have been included in the Record.

i. Cease the receipt, storage, and processing of VOWM;

ii. Surrender its Part 360 Registration[8];

iii. Increase the reclamation bond from $90,000.00 to $380,000[9];

iv. Conduct quarterly groundwater monitoring;

v. Covenant that the floor of the mine will never go below 120-feet AMSL;

vi. Covenant that mining within the existing Life of Mine would cease within 8-years, and would be fully reclaimed within 10 years; and

viii. Employ a third-party monitor to oversee the mining operations, ensure compliance with the terms of the mining permit, and to expedite communications between Sand Land and the NYDEC.

R. 356-373.

The Settlement Agreement was entered into by the NYDEC in its capacity as the executive agency of the State of New York responsible for the administration and enforcement of the Mined Land Reclamation Law and permits issued thereunder, pursuant to Article 23 of the ECL and 6 NYCRR Part 422 *et seq*. As stated above, the obligations imposed on the NYDEC under Article 23 are two-fold - to "foster and encourage the development of an economically sound

[8] The Part 360-Registration was formally surrendered on March 15, 2019.

[9] Sand Land's reclamation bond was increased on or about February 15, 2019.

and stable mining industry" and to ensure that it is done in a manner "compatible with sound environmental management practices." ECL § 23-2703 (1).

The Settlement Agreement fulfilled both aspects of that legislative mandate.

The Settlement Agreement (i) addressed environmental concerns regarding the potential for groundwater contamination by requiring the cessation of the VOWM use and setting forth a timeline for the eventual closure of the mine, while (ii) allowing Sand Land to operate its legal and long-standing mining business, that serves a vital role in the local economy. For these reasons the lower court found that the Settlement Agreement "was a rational exercise of DEC's discretion" (R. 34), "reflects a considered balancing of DEC's policies of fostering an economically sound mining industry and ensuring solid environmental management practices" (R. 35), and that:

> "The Court finds that Sand Land's promises under the Agreement, especially its agreement to conduct groundwater monitoring and to cease its processing of VOWM, and the evidence regarding the amount and location of reserves available provide a rational basis for DEC's resolution of the NIM by negotiation and its approval of the Agreement."

(R. 37).

As it relates to the "change," or more accurately, the *correction* of the acreage of the Life of Mine from 31.5-acres to 34.5-acres, the NYDEC and the lower court correctly disregarded Appellants' concocted theory that this ministerial

change was done as part of some nefarious attempt to sidestep the prior modification denial. Instead, the Record meticulously establishes that this correction was done for the reasonable purposes of ensuring that the Life of Mine included the 3.1-acre stump dump area that had been mined prior to 1975, and to ensure that this area was subject to the NYDEC's reclamation requirements.

As stated by Director Dickert, "had DEC not corrected the permit Life of Mine acreage, then at the end of the mining operations, the Stump Dump would not have been reclaimed, leaving a reclaimed 31.5-acre mining facility with a raised "island" of three acres of unreclaimed, disturbed land" (R. 2716, ¶ 33) and the "DEC gave great weight to the benefit of including the Stump Dump in the reclamation plan maps so that it will be included in final reclamation." R. 2717, ¶ 34. Appellants' complaints regarding the 34.5-acre Life of Mine ring particularly hollow as it was Appellants who first brought the incorrect acreage calculation to the NYDEC's attention in 2013, as noted by Director Dickert. R. 2715-2716, ¶ 31.

With regards to the Renewal MLRP, Sand Land filed an application to renew that permit on October 2, 2019, and by letter dated November 2, 2019, the NYDEC confirmed that Sand Land's renewal application had been received, that it was timely and sufficient, and that, by law, the expiration date of Sand Land's permit would be extended pursuant to § 402 of the New York State Administrative Procedure Act.

Following the Settlement Agreement, the Renewal MLRP was issued on March 15, 2019. R. 1150-1157.

All of these actions were undertaken in the standard manner.

v. The Modified MLRP, the underlying Article 78, and the injunction denials

As contemplated by the Settlement Agreement, Sand Land filed an application to modify its mining permit to seek only a vertical expansion within the existing Life of Mine to allow mining to a depth of 120-ft amsl. On March 15, 2019, the NYDEC adopted an amended negative SEQRA declaration on that application. In that amended negative declaration, the NYDEC made a number of findings, including, without limitation, the findings that:

> i. Sand Land's prior mulching and composting operations had terminated in 2018;
>
> ii. Sand Land's Part-360 Registration had been surrendered; and
>
> iii. "[T]the elevation of the proposed new bottom of the mine is elevation 120' which will provide a minimum of 90 feet of soil between the bottom of the mine and groundwater. The expected 90 feet of sand and soil will provide filtering and buffering benefits to further protect the groundwater below the new floor of the mine."

R. 1141 – 1144.

Based on these findings, the amended negative declaration concluded that mining to a depth of 120-feet amsl "will not result in any significant adverse environmental impacts." Id.

Sand Land's modification application and the amended negative declaration were published in the Environmental News Bulletin on March 20, 2019. R. 1145-1146. That publishing fully described what the application entailed and that public comments could be submitted up through April 19, 2019. Id. Two days prior, Appellants commenced this underlying action and filed an Order to Show Cause to enjoin Sand Land from mining outside of the 31.5-acre life of mine and enjoin the NYDEC from processing Sand Land's modification application. ECF Doc # 23-29.[10]

On April 18, 2019, the parties appeared before the Honorable Kimberly A. O'Conner for a conference on Appellants' injunction request, at which time Appellants' application for a temporary restraining order was denied, although Sand Land voluntarily agreed to refrain from mining in the 3.1-acre stump dump area, and the parties agreed to extend the public comment period. ECF Doc # 166.[11] Clearly, each of these Appellants were provided ample opportunity to submit comments on the modified permit, and many of them availed themselves of that right. R. 683 - 1011.

On May 15, 2019, the parties again appeared before the lower court (Ferreira, J.) for further a conference on Appellants' injunction application. The lower court

[10] These documents were filed with the lower court but are not included in the Record on Appeal.

[11] This signed Order is also improperly omitted from the Record on Appeal.

again denied Appellants' request for a temporary restraining order, as confirmed by the So-Ordered May 15, 2019 correspondence. ECF Doc # 84.[12]

On May 30, 2019, the lower court granted a limited injunction, enjoining only "mining outside the 31.5 acres identified in the 2013 MLRP to a depth of 160 feet amsl" and "from disturbing the overburden in the 3-acre Stump Dump."[13] *See*, ECF Doc # 130, pg. 17.[14] In that decision, the lower court explicitly confirmed that the scope of the injunction was essentially limited to only the 3-acre expansion into the stump dump area, stating:

> "…respondents have failed to demonstrate how they will be harmed or prejudiced *if the injunction is granted with respect to the Stump Dump*."

ECF Doc # 130, pg. 14.

The Modified MLRP was issued on June 5, 2019, and permitted mining to a depth of 120-feet amsl. R. 1012-1018. On June 7, 2019, Sand Land advised the lower court of the Modified MLRP's issuance, and advised that they would adhere to the terms of the injunction by staying out of the 3.1-acre stump dump area. ECF Doc # 132. Notwithstanding the plain language of the May 30th Order, Appellants claimed

[12] This So-Ordered letter was omitted from the Record.

[13] This is the same area Sand Land had offered to refrain from mining in as a concession before Justice O'Conner.

[14] The lower court's initial injunction Order was omitted from the Record.

that Sand Land was precluded from acting under the Modified MLRP. ECF Docs # 133 and 134. In response, the lower court issued a letter order on June 10th confirming that the injunction did not preclude Sand Land from mining deeper within the remaining 31.5-acres, and reiterating the lower court's finding that Appellants' claims were "squarely focused on prohibiting mining within the 3.1-acre area." ECF Doc # 136, pg. 2, *citing* ECF Doc # 130, pgs. 10-15.[15]

On that same date the Modified MLRP was issued, the NYDEC took the extra step of publishing the Modified MLRP and the NYDEC's responses to the public comments in the ENB. R. 1019-1021.

On or about July 19, 2019, extensive oral arguments were held before the lower court on Appellants' application to enjoin Sand Land from operating under the Modified MLRP. By Decision dated August 1, 2019, the lower court denied the injunction, finding, *inter alia*, that:

> i. They "failed to demonstrate the danger of irreparable injury in the absence of an injunction" (R.3549);
>
> ii. They "submitted no evidence demonstrating that sand and gravel mining, itself, causes contamination or any other harm (R.3549);
>
> iii. They "have not submitted any proof - such as an affidavit or a study - specifically demonstrating that

[15] Sand Land's June 7, 2019 letter to the Court, Appellants' response thereto, and the Court's signed June 10th letter Order were omitted from the Record.

mining deeper than 160 feet amsl" would cause groundwater contamination (R.3550);

iv. The SCDHS study and the affidavits submitted by [Appellants] focus-on the potential impact on ground water quality of Sand Land's VOWM activities at the mine (R.3550);

v. The Court finds [Appellants] assertions insufficient to demonstrate that mining deeper than 160-ft amsl in any and all areas of the mine outside the Stump Dump will likely cause contamination (R.3550);

vi. Appellants failed to sufficiently demonstrate that a correlation exists between the alleged harm - groundwater contamination - and the activity that they are seeking to enjoin- mining anywhere in the 31.5-acre parcel (R.3551); and

vii. Appellants' assertions of harm were speculative and insufficient to justify the sweeping relief sought. R.3551.

Appellants filed a motion to reargue the lower court's injunction denial, which was denied by Decision and Order dated December 20, 2019. ECF Doc # 370.[16]

The Judgment being appealed was issued on August 31, 2020. Following its issuance of, Appellants sought relief from this Court to enjoin Sand Land from exercising its rights under the Modified MLRP. That application was opposed by Sand Land and the NYDEC, and following oral arguments, this Court denied

[16] While Appellants included their Notice of Motion and Affirmation in Support of Motion to Reargue in the Record (R. 4740-4757), Appellants omitted Respondents' opposition thereto, and lower court's denial that motion.

Appellants' injunction request by Decision and Order on Motion, dated October 22, 2020.

This appeal ensued.

vi. The "Huntington Ready Mix" Mine

Finally, no review of Appellants' claims, and particularly the claims regarding ECL §§ 23-2703 (3) and 23-2711 (3), is possible without a review of Appellants' collective actions and inactions regarding the "Huntington Ready Mix" mine ("HRM").

Like Sand Land, HRM is a preexisting nonconforming sand and gravel mine in the Town of Southampton. Like Sand Land, HRM's property is located within a designated Aquifer Protection Overlay District and Special Groundwater Protection Area. Like Sand Land, HRM holds a certificate of occupancy certifying the right to a preexisting nonconforming mining use, however, HRM's certificate of occupancy relates to four separate properties, including a "reserved lot" that had never been mined. R. 1187. Unlike Sand Land, the HRM property is located within the protected Long Island Pine Barrens.

On March 29, 2019, nearly contemporaneous with the commencement of this underlying special proceeding, HRM was issued a modification of its mining permit authorizing a significant horizontal expansion onto 19-acres that had never been mined, and a vertical expansion to allow mining *20-feet below the water table*. R.

1150-1156. The application materials submitted by HRM also reveal the following about HRM's (now judicially approved) expansion:

> i. HRM sought to allow mining on a 19.4-acres previously unmined parcel, thereby increasing the mined area from 13.5-acres to 32.9-acres, and to allow mining 20-feet below the water table (or -20-feet amsl).
>
> Sand Land's approved expansion was located within its same 50-acre property, and still maintained a near 100-foot separation to groundwater.
>
> ii. The "application type" for HRM's modification was that of a "new" application.
>
> Sand Land's modification "application type" was that of a "new" application.
>
> iii. Under the Uniform Procedures Act, HRM's modification application was classified as "major" project.
>
> Sand Land's modification application was likewise classified as "major" project under the Uniform Procedures Act.
>
> iv. HRM's application was classified as a Type I action under SEQRA and a Negative Declaration was issued.
>
> Sand Land's modification application was a Type I action under SEQRA and an Amended Negative Declaration was issued.

R. 1157-1207.

While the similarities are abundant, their treatment was wildly disparate.

Far from initially contesting HRM's right to expand under ECL §§ 23-2703 (3) and 23-2711 (3), the Town issued a letter to the NYDEC on December 27, 2017 confirming that HRM's preexisting designation gave it the right to expand to the four corners of the property under the Town's local laws and under Matter of Syracuse Aggregate. R. 1208-1209. The Town's letter is self-explanatory and highlights how indefensible it was for the Town to contest Sand Land's application under the guise of ECL §§ 23-2703 (3) and 23-2711 (3).

Moreover, the Town issued that letter knowing full well the nature of HRM's application through their discussions, correspondence, and meetings with the NYDEC. R. 1208-1215. Following those discussions, the Town advised that while mining is not a permitted use in the Town, the HRM mine had a right to expand as a preexisting non-confirming mining use, and that the Town had no issues with the proposed expansion.[17] It was not until the Town learned that Sand Land would rightfully rely on that HRM letter, and rightfully question the disparate treatment of their constitutionally protected mining rights, that a new, seemingly contradictory

[17] The only "issue" raised by the Town was a request not to mine in one identified area due to the clearing limitation of the Central Pine Barrens. The Town raised no concerns about potential groundwater impacts despite the proposal to mine below the water table.

(though frankly unintelligible) letter was issued on the HRM application. R. 1216-1217.[18,19]

Ultimately, it was not until Sand Land repeatedly brought this disparate treatment to the lower court's attention that the Town finally, on the last day of the statute of limitations, filed a barebones, 8-page boiler plate petition challenging HRM's modification permit (Town of Southampton v. NYDEC, et al, *Index No.: 3931/2019*). Notably absent from any of the HRM proceedings are Assemblyman

[18] While this second letter attempted to call itself the "official response," it was nothing more than a blatant attempt to distance itself from the first letter that provided a clear and unequivocal answer, "on behalf of the Supervisor" and "in response to" the NYDEC inquiry, that preexisting mines can be expanded under the Town Code by virtue of controlling State law.

[19] The Town sent a nearly identical (and equally incomprehensible) letter to the NYDEC regarding Sand Land's property. R. 137-138. As the Court can plainly see, despite purporting to weigh in on whether Sand Land has a right to mine, or to mine 40-feet deeper within the existing disturbed footprint, no mention is made by the Town of either the 2011 or 2016 certificates of occupancy, the 2012 zoning board determination, the Supreme Court and Second Department decisions, the Town's statement to the Second Department about the right to mine all 50-acres, or the controlling law in People v. Miller, Matter of Syracuse Aggregate, or Buffalo Crushed Stone, all of which unequivocally make mining "permitted" at this location. Despite these facts, the Town's letter states that "mining is not a permitted use in any zoning category." Id. Far from "precisely tracking" the statutory requirements as the Town claims, nothing in the Town's letter complies with § 2711 (3) (a) (v) as the Town does not provide the requisite determinations, notices, and supporting documentation "justifying the particular determination on an individual basis." Rather than provide anything specific about Sand Land's property, the Town does nothing but blithely state that "mining is not a permitted use," while wholly ignoring Sand Land's judicially affirmed and constitutionally protected mining rights. No one should have to accept the Town's baseless attempt to interfere with Sand Land's rights, and by law, the NYDEC, armed with the multiple certificates of occupancy, judicial rulings, and knowledge of the controlling State law, was specifically authorized by the ECL to disregard the Town's attempt to do so on the grounds that their conclusions were not "justifiable." ECL § 23-1711 (3) (b). In any event, the fact that this letter was sent moots and/or undermines all of Appellants' ECL § 2703 and 2711 claims.

Thiele (despite the HRM property being in his district), the Citizens Campaign for the Environment and Group for the East End, the Southampton Town Coalition, as well as the Suffolk County Department of Health Services, who never sought to intervene.[20] These facts lead to one conclusion only – that the one x-factor, and the one differing party from HRM to Sand Land, is the deep-pocketed, well connected, golf course, and their 15-year quest to shutter Sand Land's long running business for their private benefit.

Long history aside, the facts surrounding this matter refute all of Appellants' claims. The facts prove that the NYDEC handled each of these matters under their proper regulatory role and in the proper regulatory manner. By contrast, the only irregularities involve Appellants' false statements regarding their supposed "scientific proof" about groundwater threats, and the Town's legally dishonest claim that the Modified MLRP must be revoked because "mining is [allegedly] prohibited."

[20] The Court should also be advised that the Town's Petition in the HRM matter, which included the same ECL claims they advance here, was been denied by the lower court (Santorelli, J.) on December 7, 2020. ECF Doc # 16.

ARGUMENT

POINT I

THE LOWER COURT'S CONSIDERATION OF, AND RELIANCE ON, THE AFFIDAVIT FROM CATHERINE DICKERT, THE DIRECTOR OF MINING AND MINERAL RESOURCES, WAS ENTIRELY PROPER

Appellants, as they must, ask this Court to reject the lower court's consideration of, and reliance on, the Answering Affidavit of Catherine A. Dickert, the NYDEC Director of Mining and Mineral Resources (and therefore the top mining official in New York State; R. 2703-2721). Appellants' arguments against her affidavit are not based on any credible legal theory as to its appropriateness, but is instead due to the fact that they have no answer for the clear and concise manner in which Director Dickert rebuts Appellants' allegations.

Appellants misconstrue the lower court's ability to consider answering affidavits. Pursuant to CPLR 7804 (c) and (e), the NYDEC was not only *permitted* to file Director Dickert's Answering Affidavit, but was *required* to do so by law. *See, e.g.*, CPLR § 7804 (c) (An answer and supporting affidavits, if any, *shall* be served at least five days before the time the petition is noticed to be heard); CPLR § 7804 (e) (The respondent *shall* also serve and submit with the answer, affidavits or other written proof showing such evidentiary facts as shall entitle him to a trial of any issue of fact).

On this point, Appellants' brief is internally inconsistent, and undermines their own argument, as Appellants recognize that "in proceedings reviewing administrative determinations made without a hearing and challenged as arbitrary and capricious, the court may consider an affidavit outside the administrative return." Appellants' Brief, pg. 20, *citing* Matter of Office Bldg. Assoc., LLC v. Empire Zone Designation Bd, 95 A.D.3d 1402, 1405 (3rd Dept., 2012); *see also*, Matter of Brown v Sawyer, 85 A.D.3d 1614, 1615-1616 (3rd Dept., 2011); Matter of Kirmayer v New York State Dept. of Civ. Serv., 24 A.D.3d 850, 852 (3rd Dept., 2005) (affidavit was not in the record before the regulatory agency was properly considered because there was no administrative hearing and the issue was not one of substantial evidence but, rather, whether the determination has a rational basis).

It was clearly proper for the NYDEC to submit Dickert's Answering Affidavit, and the only question is then whether Director Dickert had sufficient familiarity with the DEC's decision-making process. This question was also properly answered in the affirmative by the lower court.

To be considered in reviewing an agency's determination, the affiant need only be "an official with personal knowledge of the duly established procedures and information demonstrating a reasonable basis for" the agency's decision. Matter of Kirmayer, *supra*. Director Dickert and her Affidavit easily meet this standard. Indeed, Director Dickert swore that she was "fully familiar with the facts, including

DEC's official records regarding this matter" and that her opinions set forth in her affidavit "are based upon my personal knowledge, my review of the DEC record in this matter, my education, training, and professional experience, the relevant scientific literature and the application of methodologies commonly accepted as reliable in forming such opinions." R. 2703-2704, ¶ 1-3.

To this end, the lower court expressly recognized that Director Dickert (i) is the Director of the Division of Mineral Resources and has held that position since 2016; (ii) has responsibilities that include the "supervision of the entire mineral resources program, including mining"; (iii) was "fully familiar with the facts, including DEC's official records regarding this matter"; (iv) submitted her answering affidavit "based upon her personal knowledge, her review of the DEC record in this matter, her education, training, and professional experience, the relevant scientific literature and the application of methodologies commonly accepted as reliable in forming such opinions." R. 27.

Based on these findings, the lower court correctly held that Director Dickert's Answering Affidavit "may be considered by the Court inasmuch as she provides an account of the decision-making process of DEC based upon her personal knowledge." R. 27 *citing* Matter of Molloy v. New York State Workers' Compensation Bd., 146 A.D.3d 1133, 1134 (3rd Dept., 2017) and 377 Greenwich

LLC v. New York State Dept. of Envtl. Conservation, 14 Misc. 3d 417, 827 N.Y.S.2d 608 (Sup. Ct., NY County, 2006).

As Director Dickert's Answering Affidavit was properly considered, a review of the substance of that Affidavit explains why Appellants take issue with its submission.

In her Answering Affidavit, Director Dickert summarizes the voluminous and dense documents contained in the administrative record and succinctly articulates the NYDEC's considerations, interpretations, and conclusions from those documents as to why "incorporating the Stump Dump into the Life of Mine, issuing the Amended Negative Declaration in March 2019, renewing the permit in March 2019, and approving the application to mine 40 feet deeper, were all proper exercises of DEC's statutory responsibility to foster and encourage the development of an economically sound and stable mining industry and assure satisfaction of economic needs compatible with sound environmental management practices." R. 2720-2721, ¶ 45.

Director Dickert's Answering Affidavit essentially acts as the SparkNotes version of the Record whereby, after carefully explaining Sand Land's permitting history and the specific documents considered by the NYDEC, Director Dickert goes on to explain that she personally directed mined land reclamation specialists to include the Stump Dump in the mine's acreage. R. 2715, ¶ 30. Director Dickert

continues by explaining the benefit of including the Stump Dump in the life of mine and how it actually promotes more stringent regulation, the potential for more NYDEC oversight, and limits Sand Land's activities within the Stump Dump. R. 2716, ¶ 32-33.

While Appellants' strategy has always been to muddy the waters, Director Dickert's Answering Affidavit is clear and concise and most importantly - rational.

Beyond the stump dump, perhaps most damaging to Appellants' story is that Director Dickert's Affidavit:

i. Succinctly articulates the NYDEC's considerations in concluding that there is no threat to groundwater at the site - having considered published data from the Town and County public water authorities. R. 2712-2713, ¶ 25;

ii. Succinctly articulates the NYDEC's considerations in concluding that there are no impacts to groundwater that can be associated with sand and gravel mining activities generally - having considered Suffolk County public water supply wells and private water wells tested by the County (including those near Sand Land). R. 2713, ¶ 26;

iii. Succinctly articulates the DEC's considerations in concluding that deepening the mine by 40 feet will not impact groundwater - having considered relevant scientific facts, including the complete lack of data connecting sand mining on Long Island to groundwater contamination. R. 2717-2718, ¶ 36-37;

iv. States that "DEC Division of Mineral Resources professional staff considered that the mine site location within an area designated as a Sole Source

Aquifer and a Special Groundwater Protection Area, as well as within the Town of Southampton's Aquifer Protection Overly District, before properly concluding, that the proposed deepening operation is not expected to result in any impacts to groundwater quality." R. 2718, 37; and

v. Specifically states that "in evaluating the modification application, DEC determined that a vertical expansion of the mine was not a material change under SEQRA and DEC regulations." R. 2717, 36.

Clearly, Director Dickert's Answering Affidavit is severely damaging to Appellants' convoluted arguments inasmuch as it abridges the voluminous administrative return and articulates the NYDEC's measured decisions in entering into the Settlement Agreement with Sand Land, and in issuing both the Renewal and Modified MLRP.[21]

As a matter of law, it was proper for the lower court to accept and consider Director Dickert's Answering Affidavit.

[21] Even assuming *arguendo* that Director Dickert's Affidavit should not have been considered by the lower court, the sum and substance of her Affidavit demonstrating the rational and reasoned basis for each of the NYDEC actions is shown by the documents within the administrative return.

POINT II

THE NYDEC ACTED RATIONALLY AND WITHIN ITS STATUTORY AUTHORITY IN DETERMINING THAT A VERTICAL EXPANSION WITHIN AN ESTABLISHED LIFE OF MINE WAS NOT MATERIAL AND DID NOT TRIGGER THE NOTICE OBLIGATIONS OF ECL § 2711

This Court is also respectfully compelled to find that Appellants' claims relating to ECL §§ 23-2703 and 23-2711 likewise have no merit, and cannot serve as grounds for vacating any of the Settlement Agreement, Renewal MLRP, Amended Negative Declaration, or Modified MLRP.

i. The NYDEC acted within its authority and discretion in determining that a vertical expansion within an already disturbed and established Life of Mine was not a material change that required notice to the Town

As expressly stated in the Answering Affidavit from Director Dickert, "[i]n evaluating the [2019] modification application, DEC determined that a vertical expansion of the mine as proposed was not a material change" (R. 2717, ¶ 36) and that "since the 2019 application was not for a new permit, but to modify an existing permit within the current disturbance footprint and without material change, input from the Town was not required under ECL 23-2703 or 23-2711." R. 2717, ¶ 38.

There is no dispute that the NYDEC is the sole agency responsible for administering the Mined Land Reclamation Law. Indeed, the Town recognized this when it repealed all of the mining and reclamation provisions from the Town Code in 2010. R. 1100-1102. The law is settled that where the interpretation of a statute or its application involves knowledge and understanding of underlying operational

practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld. Matter of LaCroix v. Syracuse Exec. Air Serv., Inc., 8 N.Y.3d 348, 352 (2007); Kurcsics v. Merchants Mut. Ins. Co., 49 N.Y.2d 451, 459 (1980).

As a matter of law, ECL Article 70, and its implementing regulations, establish uniform procedures governing the manner in which applications for permits, including mining permits, are to be submitted, processed, and decided, and subsequently, how a permit may be modified, suspended or revoked. ECL § 70-0115; 6 NYCRR § 621.13. The Uniform Procedures Act permits the NYDEC and its Commissioner to apply their individual and collective expertise in evaluating a permit application with respect to both technical issues and New York State policy concerns, while protecting the procedural rights of the applicant, as well as third parties who might choose to participate in those administrative processes. *See, e.g.,* ECL § 70-0115; 6 NYCRR §§ 621.13, 621.14, and 622.10 (f).

There is nothing in the Record or the controlling law that would support a finding that the NYDEC's interpretation that *a vertical modification within an existing life of mine is not a material change* is somehow irrational or unreasonable, or that would permit Appellants to have this Court stretch ECL §§ 23-2703 (3) and

23-2711 (3) beyond their plain language. As correctly found by the lower court, the "DEC's position is supported by the language of the statute" (R. 40), and these statutory provisions apply to applications for new permits, or renewals and modifications for existing permits, particularly those that have no material change in type, scope, or location of mining, do not trigger ECL 23-2703 (3) or 23-2711 (3). R. 40-41.

ii. The NYDEC was not bound by prior decisions made in the context of a non-final and materially different application

In arguing that the NYDEC was precluded from granting the Modified MLRP, Appellants rely solely on the decisions rendered by ALJ McClymonds in the prior administrative proceeding on a different application. R. 122-136; 139-151. Appellants' reliance on these decisions is misplaced, as the lower correctly held. R. 40-41.

It is beyond dispute that the question of whether the notice requirements of § 23-2711 are trigger by an application seeking only a vertical expansion within an already disturbed Life of Mine, with no horizontal expansion, was never presented to and never addressed by the ALJ.

As discussed above, administrative determinations are only final and binding when it is clear that the agency "reached a definitive position on the issue that inflicts actual, concrete injury," and that the injury inflicted "may not be prevented or significantly ameliorated by further administrative action or by steps available to the

complaining party." Best Payphones, Inc, *supra*. "To determine if agency action is final … consideration must be given to 'the completeness of the administrative action' and 'a pragmatic evaluation [must be made] of whether the 'decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.'" Essex County v. Zagata, 91 N.Y.2d 447, 453 (1998). "[A] determination will not be deemed final because it stands as the agency's last word on a discrete legal issue that arises during an administrative proceeding. There must additionally be a finding that the injury purportedly inflicted by the agency may not be 'prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.'" Essex County, *supra, quoting* Church of St. Paul & St. Andrew v. Barwick, 67 N.Y.2d 510, 520, *cert. den'd*, 479 U.S. 985. "If further agency proceedings might render the disputed issue moot or academic, then the agency position cannot be considered 'definitive' or the injury 'actual' or 'concrete.'" Id. at 954.

Here, the lower court was correct in holding that the ALJ's determinations with respect to the applicability of ECL 23-2711 (3) to the 2014 modification, which sought both a vertical and horizontal expansion, were not binding with respect to the 2019 application, which sought only a vertical expansion. R. 40.

Equally as untenable is Appellants' claim that the doctrine of *stare decisis* has any applicability whatsoever.

Generally, that doctrine stands for the proposition that "[a] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result *on essentially the same facts* is arbitrary and capricious [emphasis added]." Matter of Knight v. Amelkin, 68 N.Y.2d 975, 977 (1986) *quoting* Matter of Charles A. Field Delivery Serv., Inc., 66 N.Y.2d 516, 517 (1985).

The entirety of Appellants' *stare decisis* argument fails since its fundamental premise – that either the prior denial or either of the ALJ recommendations are final and binding – is incorrect. As a matter of law, each of those items are subject to administrative review, and Sand Land has in fact sought review of the prior denial in a process that is still ongoing.[22] Moreover, each of the ALJ's rulings are themselves, preliminary and non-final, in that they potentially subject to change as part of any further agency proceedings on the 2014 application. Again, an ALJ only makes *recommendations* to the Commissioner (6 NYCRR § 622.18) and the Record is clear that the ALJ recommendations upon which Appellants rely have not been adopted by the Commissioner.

[22] To this end, Appellants' claims that either the prior denial or the ALJ recommendations are final because they have purportedly not been appealed is false in all respects. *See,* 101co Brief, pg 290-30. Sand Land has appealed the prior denial and Appellants know full well that the ALJ, by email order dated August 14, 2019, stayed the time to appeal the ALJ's recommendations until the final resolution of these proceedings.

Even assuming, *arguendo*, that either of the ALJ's rulings were final, they are not subject to the doctrine of *stare decisis* as the NYDEC made abundantly clear that they view the 2014 and 2019 applications as being materially different. A prior agency ruling is not binding on a future agency action where the facts in the new proceeding are materially different from those of the prior proceeding. *See, e.g.,* Terrace Ct., LLC v. New York State Div. of Hous. & Community Renewal, 18 N.Y.3d 446 453 (2012); Hempstead v. Public Employment Relations Bd., 137 A.D.2d 378, 383-84 (3rd Dept., 1988).

In addition to finding the ALJ's rulings to be non-binding, the lower court recognized that there was sufficient basis in the Record for the NYDEC to treat the applications as being materially different. For instance:

1. The 2019 application sought only a vertical expansion, whereas the 2014 application sought a vertical and horizontal expansion;

2. The 2014 application contemplated the continued processing of VOWM, whereas the 2019 application did not, pursuant to the Settlement Agreement;

3. The 2019 application did not entail the continued use of the Part 360 registration, as the same was surrendered following the Settlement Agreement;

4. The 2019 application involved quarterly groundwater testing, which the 2014 application did not;

5. The 2019 application is subject to the agreement that the floor of the mine would never go below 120-ft amsl, whereas the 2104 application was not; and

6. The 2019 application is subject to the agreement that mining in the current Life of Mine will cease within 8-years of the Settlement Agreement, whereas the 2014 application was not.

R. 4-44

For all of these reasons, the NYDEC properly made the Record as to why the applications were materially different, and why the rulings made on the 2014 application were not binding.

As none of the administrative decisions relied on by Appellants were binding on the NYDEC, they did not preclude the NYDEC from determining that an application seeking a vertical expansion only, within an existing life of mine, is not a material change and does not trigger the notice requirements of ECL § 23-2711. As the court was required to give special deference to the NYDEC's interpretation and discretion, the lower court properly rejected Appellants' ECL claims, and this Court is respectfully compelled to do the same on this appeal.

iii. Appellants' arguments regarding ECL §§ 2703 and 2711 are also without merit as Sand Land is entitled to mine all 50-acres of its property

As extensively detailed in the Record, Appellants' claim that "mining is prohibited" is unsupported by the fact and the law. While the Town's Brief purports to expound upon this argument, and all of the reasons the NYDEC supposedly ran

afoul of the ECL and deprived the Town of a claimed right to determine if mining is permitted on the Premises, nowhere in their Brief does the Town mention the fact that:

i. A Certificate of Occupancy was issued by the Town in 2011 establishing the legal preexisting right to use the Premises for mining (R. 1098);

ii. A written determination was issued by the Building Inspector in 2011 confirming that this right expanded to all 50-acres (R. 1099);

iii. These mining rights were affirmed by the ZBA, the Supreme Court and the Second Department (Matter of Sand Land, *supra*);

iv. The Town specifically advised the Second Department that Sand Land could "devote the entire 50-acre Premises to mining," and citing to the Matter of Syracuse Aggregate (R. 1129); and

v. Following the Second Department's affirmation, a second Certificate of Occupancy was issued again recognizing the legal preexisting right to use the Premises for mining. R. 2828.

In addition to omitting any discussion of those pertinent and dispositive facts, the Town's Brief ignores the controlling New York State law regarding the expansion of legally preexisting nonconforming mines. This central question was answered by the Court of Appeals and confirms Sand Land's right, subject to NYDEC approval, to mine up to the boundaries of the 50-acre Premises: Matter of

Syracuse Aggregate Cooperation v. Weise, 51 N.Y.2d 278 (1980) and Buffalo Crushed Stone, Inc. v. Town of Cheektowaga, 13 N.Y.3d 88 (2009).

In Matter of Syracuse Aggregate, the Court of Appeals set forth its seminal holding:

> "At issue on this appeal is whether a prior nonconforming use involving the extraction of sand, gravel and related materials from a parcel of land extends to the entire parcel or is limited to that portion of the parcel actually excavated at the time the municipality adopted a zoning ordinance prohibiting the expansion of the nonconforming use."

Matter of Syracuse Aggregate, at 282.

> "By its very nature, quarrying involves a unique use of land. As opposed to other nonconforming uses in which the land is merely incidental to the activities conducted upon it (see, e.g., Matter of Off Shore Rest. Corp. v Linden, 30 NY2d 160; Matter of Harbison v City of Buffalo, 4 NY2d 553, supra; Matter of Cave v Zoning Bd. of Appeals of Vil. of Fredonia, 49 AD2d 228), quarrying contemplates the excavation and sale of the corpus of the land itself as a resource. Depending on customer needs, the land will be gradually excavated in order to supply the various grades of sand and gravel demanded. Thus, as a matter of practicality as well as economic necessity, a quarry operator will not excavate his entire parcel of land at once, but will leave areas in reserve, virtually untouched until they are actually needed.
>
> It is because of the unique realities of gravel mining that most courts which have addressed the particular issue involved herein have recognized that quarrying constitutes the use of land as a "diminishing asset". (See, e.g., County of Du Page v Elmhurst-Chicago Stone Co., 18 Ill 2d 479.) Consequently, these courts have been nearly unanimous in holding that quarrying, as a nonconforming use, cannot be

> limited to the land actually excavated at the time of enactment of the restrictive ordinance because to do so would, in effect, deprive the landowner of his use of the property as a quarry. (McCaslin v City of Monterey Park, 163 Cal App 2d 339; County of Du Page v Elmhurst-Chicago Stone Co., 18 Ill 2d 479, supra; Hawkins v Talbot, 248 Minn 549; Moore v Bridgewater Twp., 69 NJ Super 1; Borough of Cheswick v Bechman, 352 Pa 79; but see Town of Wayland v Lee, 325 Mass 637)

Matter of Syracuse Aggregate, at 285-286.

Furthering that premise, in Buffalo Crushed Stone the Court of Appeals held:

> "*a prior nonconforming use for quarrying cannot be limited solely to the land that was actually excavated before the zoning law*, because--in this unique type of industry--landowners commonly leave portions of their land as mineral reserves to be excavated at a future time. A landowner who engages in substantial quarrying activities within its property and demonstrates an intention to do so in other portions of the land may sufficiently establish a prior nonconforming use *extending to the boundaries of that property, notwithstanding the fact that quarrying may not have actually begun in that specific area* [emphasis added]."

Buffalo Crushed Stone, at 401.

Given their seminal and controlling nature, it is inexcusable that the Town would state its knowledge of, and reliance on, Matter of Syracuse Aggregate to the Second Department for the proposition that Sand Land could mine all 50-acres (while asking that Court to strike down the materials uses), and then to turn to this Court, and feign ignorance of the facts and established law, and falsely allege that "mining is prohibited" on Sand Land's Premises.

Respectfully, this Court should not countenance such actions.

Try as they might, Appellants cannot wish away or ignore the fact that Sand Land has a valid, subsisting, and judicially affirmed certificate of occupancy confirming the right to operate a sand and gravel mine on the Premises. Appellants also cannot wish away the controlling language of ECL § 23-2711 (3) (b), which authorizes the NYDEC to reject the Town's "unjustifiable" claim that "mining is not permitted" and their attempt to completely ignore Sand Land's certificates of occupancy, the judicial affirmation of the same, given that the Town's statement that "mining is not permitted" was not "accompanied by supporting documentation justifying the particular determinations on an individual basis," as required under § 23-2711 (3) (1) (v).

Of course, mining is *permitted* as a vested and constitutionally protected property right, and the Town has no ability to argue otherwise, and the fact that they attempt to do is simply indefensible.

The NYDEC fulfilled its statutory obligations under ECL §§ 23-2703 and 23-2711, in that (i) the NYDEC has the authority and discretion to interpret its own statute and to make the rational determination that a vertical expansion within a disturbed and established life of mine is not a material change that requires notice under 23-2711 and (ii) the NYDEC had in its possession multiple certificates of occupancy, judicial decisions, and controlling State law confirming that mining is a

permitted use on the Premises. Once the NYDEC was in possession of the above, and certainly once the rational determination was made that vertical expansions are not material, there was no obligation on the NYDEC to make a further inquiry to the Town as to whether Sand land could mine sand and gravel from the uncontested 31.5-acres that has been unquestionably permitted since 1985.

In light of the above, Appellants' claims relating to ECL §§ 23-2703 and 23-2711 have no merit and must be denied in their entirety.

POINT III

THE NYDEC HAD A RATIONAL BASIS FOR FINDING THAT MINING TO A DEPTH OF 120-FT WOULD NOT IMPACT THE AQUIFER

Without any hint of irony, Appellants blindly focus on administrative decisions that were neither final, nor binding, while ignoring actual final and binding Commissioners Rulings.

Throughout, Respondents cited to the Matter of Southern Dutchess wherein an applicant before the NYDEC sought to modify its mining permit to allow mining below the water table on an additional 22-acres, and effectively create a 22-acre lake.[23] In that matter, the following rulings and decisions were issued: (i) an Issues Ruling, dated April 20, 2015; (ii) an Interim Decision of the Commissioner, dated

[23] Again, even under the Modified MLRP, the floor of Sand Land's mine will still be approximately 100-feet above the water table.

March 6, 2006; and (iii) a Decision of the Deputy Commissioner, dated December 19, 2006. R. 1056-1058**.**

The April, 2005 Issues Ruling noted the following:

> "Department Staff maintained that sand and gravel mining below the water is a common practice. Indeed, at present, more than 300 sand and gravel mines operating in the State mine aggregate below the water table. In its experience, no such mining activity has ever resulted in the contamination of a drinking water supply. (T, 4/4/03, p. 152) Moreover, Department Staff observed that mining below the water table often occurs within primary and principal aquifers where public water supplies are also located. (Id., p. 158) Noting the lack of scientific data to support a conclusion to the contrary, Department Staff concurred with the conclusion reached by BCI Geonetics, Inc., of Laconia, New Hampshire, in its 1988 study entitled "The Impact of Sand and Gravel Mining on Groundwater Resources." (Exhibit 19) This study which entailed a comprehensive review of the scientific literature, field interviews with water supply managers, and an examination of case studies from New Hampshire, Ohio and New York, concluded that they had "*found no scientific documentation containing evidence that excavating gravel above or below the water table was detrimental to an underlying aquifer*." In further support of its position, Department Staff also cited the Department's own study entitled, "Upstate New York Groundwater Management Program Summary". In a section dealing with mineral extraction, this report, at page 30, states:
>
> Sand and gravel are good aquifer materials and the mining of them often occurs in productive aquifer areas. This mining often raises concerns in the public's mind about possible environmental impacts such as alteration of local groundwater flow patterns, use and possible spillage of petroleum products at the site, direct exposure of groundwater in mines near major transportation routes

> where spills are likely to occur, and possible illicit dumping of solid or hazardous wastes at the site.
>
> *DEC knows of no instance when significant groundwater quality or quantity problems have occurred at mines in New York State. In issuing Mined Land Reclamation Permits, DEC evaluates possible impacts on groundwater in the vicinity of mining sites [emphasis added].”*

Those findings were affirmed in the Interim Decision of the Commissioner. Then, in the final Decision of the Deputy Commissioner, the NYDEC was directed to file and publish an “amended SEQRA negative declaration” and to issue the requested mined land reclamation permit. Id.

Contrary to Appellants’ unsupported arguments as to the allegedly binding and precedential nature of the prior denial, the ALJ decisions, and the notice of intent, it is the final Rulings made in Southern Dutchess that constitute binding agency precedent that the NYDEC was obligated to follow. *See,* Matter of Knight, *supra, quoting* Matter of Charles A. Field Delivery Serv., Inc., *supra*.

At no point in the proceedings below did Appellants ever address this binding precedent. Instead, as the lower court noted, they continually presented “scientific studies” that no relation to mining, and never once concluded that mining to a depth of 120-ft would adversely impact on the aquifer. *See,* R. 3549-3551.

It was, and clearly remains, Appellants’ hope that their feigned hysteria and fearmongering will distract the Court from the complete lack of scientific evidence to link sand and gravel mining to adverse impacts to the aquifer, and from

recognizing that their claims about potential groundwater contamination are baseless.

The NYDEC's rational basis for concluding that mining to a depth of 120-ft amsl would not have an impact on the groundwater is detailed throughout Director Dickert's Affidavit. Again, Director Dickert stated that the NYDEC considered that: (i) published data from the Town and County public water authorities that determined that elevated levels of certain metals were naturally occurring in the soils and groundwater and did not present a threat to groundwater (R. 2712-2713, ¶ 25); (ii) the public water supply wells and private water wells tested by the County (including those near Sand Land) have not indicated any impacts to groundwater that can be associated with mining (R. 2713, ¶ 26); (iii) the relevant scientific facts, including the complete lack of data connecting sand mining on Long Island to groundwater contamination (R. 2717-2718, ¶ 36-37); and (iv) the mine site location is within an area designated as a Sole Source Aquifer and a Special Groundwater Protection Area, as well as within the Town of Southampton's Aquifer Protection Overly District, before properly concluding, that allowing mining to 120-ft will not result in any impacts to groundwater quality. R. 2718, 37.

The lower court correctly held that Appellants offered nothing to rebut these determinations or to call their rationality into question.

Even if this Court were to overlook Appellants' complete failure to support their claims, the evidence in the Record nonetheless mandates that Appellants' groundwater allegations be rejected in full.

With respect to Appellants' reliance on the SCHDS "final report," Sand Land's expert submitted his conclusions regarding that report, finding:

> The SCDHS's continued utilization of such a substandard and scientifically unacceptable approach is a disservice to any facility that has been, or may be, implicated by the SCDHS."

R. 1302.

This Record also contains multiple expert Affidavits from the NYDEC's engineers and licensed geologists (R. 439-443; 1442-1463; and 1464-1825), and Sand Land's expert licensed geologist (R. 459-649 and R. 1255-1393), who unequivocally advised:

> "It is my opinion, based on more than 40 years of assessing mine impacts on ground water, that the NYSDEC's Justification #3, of its Negative Declaration, that *"The expected 90 feet of sand and soil will provide filtering and buffering benefits to further protect the groundwater below the new floor of the mine"* is valid."
>
> "It is my opinion that a fair review of the SCDHS final report of the investigation of the WS&G site and surrounding area, dated June 29, 2018, leads to the conclusion that the SCDHS report has not demonstrated that the WS&G mine and associated former vegetative material processing is the source of the presumed ground water quality impacts beneath the WS&G site."

> "It is my opinion that the historical mining at the WS&G has not impacted ground water in the underlying aquifer, and mining 40 ft deeper as allowed under the permit modification will not damage the underlying aquifer in the future."

See, R. 466-467, ¶¶ 24-26.

> "Dr. Cohen states … 'it is reasonable to conclude that mining in this area [Stump Dump] will likely facilitate, and could even increase, the contamination in the aquifer.' This conclusion is not supported by the facts of this Site and is inconsistent with fundamental principles of environmental analysis."

> "DEC has no scientific, geologic or factual basis to determine that sand and gravel mining at the Sand Land site would negatively impact groundwater. In my professional opinion, future mining activities conducted in accordance with DEC permit conditions will not facilitate, increase, or otherwise threaten the aquifer."

See, R. 442, ¶ 6 and R. 443, ¶ 9.

Even if it were credible for Appellants to rely on a "final report" relating to VOWM, and not mining, the NYDEC's view of that testing and report cannot be overlooked or overstated:

> "*The Department fundamentally disagrees with the integrity, accuracy and reliability of the County's investigation*. Even if the investigation had been done properly, the County's final report did not reveal contamination under the location of the prior vegetative processing site at Sand Land and does not make a finding that sand and gravel mining causes or contributes to ground water contamination. *There is no scientific support for the claim that Sand Land is threatening the aquifer, even in the County's report* [emphasis added]."

R. 1052, ¶ 73.

The "integrity, accuracy and reliability of the County's investigation," and of Appellants' reliance thereon, was also directly questioned by Dr. Gowan, who confirmed that the County's methodologies were fundamentally flawed, that their conclusions were physically and scientifically impossible, and that the investigation and findings of the County were unsound and lack a reasoned scientific basis. R. 1260, ¶ 23. Dr. Gowan's attestation that the County's findings lack a reasoned scientific basis echoes the conclusion made by the NYDEC's licensed expert geologist, who stated that Cohen's conclusions are "not supported by the facts of this Site and are inconsistent with fundamental principles of environmental analysis." R. 442, ¶ 6.

Sand Land's expert also thoroughly refuted Appellants' claim that the source of any elevated manganese and iron in the northern areas of the Premises adjacent to the golf course is due to reclamation of the mine slopes in this area with the mulch that had been processed on site. In Dr. Gowan's expert opinion, it simply "defies logic to claim that iron and manganese would" appear in the areas where the mulch was applied, but "would not appear below the processing area" where that same mulch was created and stored. Id. at ¶ 49.

As stated by Dr. Gowan, a "key consideration" in determining where any alleged contamination originated is the understanding that contamination in the

groundwater moves in the direction the groundwater itself flows. Id. at ¶ 10. The determination of the source of a contaminant detected in the ground water requires a hydrogeologic investigation that defines the geology and determines the direction of ground water flow within that geology. The geology is very important since it provides the framework that controls the movement of ground water. Id. at ¶ 24. Dr. Gowan's own expert on-site investigation found that the groundwater beneath most of the Premises runs to the east, directly in contrast to the (internally inconsistent) findings by the County. Id. at ¶ 11. This easterly flow of the groundwater means that the area of high manganese along the northern boundary of the Premises, and just south of the Bridge Golf Course, is not downgradient from the 3.1-acre stump dump area. Id. at ¶ 15. For this reason, among others, Dr. Gowan rejected the County's conclusions, including their claim that the prior use of the Premises for VOWM is the source of any contamination.

According to Dr. Gowan, the actual direction of the groundwater flow makes it "physically impossible" for any elevated levels to be originating as a result of the prior use of the Premises; rather, it is "clear to him" that the elevated levels of iron and manganese came from another source, and Dr. Cohen's map shows The Bridge to be that source. Id. at ¶ 40; *see also*, Id. at ¶ 31.

The Record, and the Affidavits contained therein, confirm that the NYDEC was acutely aware of Appellants' groundwater claims. The Record further shows

how, prior to issuing the Modified MLRP, the NYDEC reviewed and considered all of Appellants' claims and the reports and other affidavits upon which those claims were based. The Record then confirms that the NYDEC responded to the Appellants' comments asserting these same claims, and provided Appellants with the NYDEC's rationale for rejecting their groundwater claims, and for concluding that mining to a depth of 120-feet amsl would not impact the aquifer. *See, e.g.,* R. 1141-1144; 1147-1149; 1394-1441; 1442-1463; and 1464-1825.

The law is clear that in reviewing administrative determinations, the court's role is limited to ascertaining whether there is any rational basis for the decision. *See,* Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 230-231 (1974); Matter of Lane Constr. Corp. v Cahill, 270 A.D.2d 609, 611 (3rd Dept., 2000) *lv denied* 95 NY2d 765 (2000). The determination of an agency acting pursuant to its authority and within its area of expertise is entitled to judicial deference. Matter of Salvati v Eimicke, 72 N.Y.2d 784, 791 (1988). The strong presumption of validity of an agency determination can only be overcome by a showing that the decision was unreasonable and arbitrary. Matter of Save Our Forest Action Coalition v City of Kingston, 246 A.D.2d 217, 221 (3rd Dept., 1998). This is so even where conflicting inferences can be drawn from the scientific evidence adduced, and courts will not substitute their judgment for that of the agency when the agency's

determination is supported by substantial evidence in the record. Matter of Riverkeeper, Inc. v. Johnson, 52 A.D.3d 1072 (3rd Dept., 2008). By law, an agency's decision should only be annulled if it is arbitrary and capricious, or unsupported by the evidence. *See*, Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast, 9 N.Y.3d, 219, 232 (2007).

As the lower court correctly held that the NYDEC had a rational basis for determining that mining to a depth of 120-feet amsl would not impact the aquifer, the lower court properly deferred to the NYDEC's technical and professional judgment and expertise. Appellants cannot point to anything in the Record to show any irrationality. Instead, they offer nothing more than irrelevant studies and their general objections.

As such, this Court is likewise compelled to defer to the NYDEC's findings, and deny the instant appeal.

POINT IV

THE AMENDED NEGATIVE DECLARATION WAS PROPER

The initial negative declaration was adopted on the prior 2014 application remains in full force and effect. In evaluating the instant modification application, and upon recognition of the material distinctions between the two applications, particularly the cessation of the VOWM and Part 360 activities, the NYDEC adopted the Amended Negative Declaration.[24]

In order to rescind the Amended Negative Declaration, Appellants bore the burden of proving that its adoption was irrational. That burden of proof, which Appellants did not meet, required them to show that the NYDEC failed to take a hard look at the relevant areas of environmental concern, and failed to set forth a reasoned elaboration for finding that the proposed vertical expansion would not have a significant environmental impact. *See*, Jackson v. New York State Urban Development Corp, 67 N.Y.2d 400 (1986); Matter of Citizens for Responsible Zoning v. Common Council of City of Albany, 56 A.D.3d 1060 (3rd Dept., 2008); Matter of Cathedral Church v. Dormitory Authority of NYS, 224 A.D.2d 95 (3rd Dept., 1996); 6 NYCRR § 617.7 (b).

[24] The SEQRA regulations provide that a negative declaration may be amended when "substantive … changes are proposed for the project; or [substantive] new information is discovered; or [substantive] changes in circumstances related to the project arise; that were not previously considered. . ." 6 NYCRR 617.7 (e)(1), (f)(1).

Although an EIS is presumptively required for a Type I action, it is not a *per se* requirement. Id. The standard of review is whether an agency's SEQRA determination is arbitrary and capricious. Matter of Jackson, *supra*; Gordon v. Rush, 100 N.Y.2d 236 (2003). Where the Record shows that the NYDEC identified and took a hard look at the areas of environmental concerns and issued a reasoned elaboration for its decision that there will be no adverse impacts from mining to a depth of 120-feet amsl, the adoption of a negative declaration is not irrational, is not an abuse of discretion, is not arbitrary and capricious and should not be disturbed. Gordon v. Rush, *supra*; Matter of Jackson, *supra*; Matter of Cathedral Church, *supra*; WEOK Broadcasting Corp. v. Planning Bd. of Lloyd, 79 N.Y.2d 373,383 (1992).

An agency's substantive obligations under SEQRA are viewed in light of a rule of reason, and not every conceivable environmental impact, mitigating measure or alternative requirements of SEQRA need be considered. Matter of Jackson, at 417 *citing* Aldrich v Pattison, 107 A.D.2d 258, 266 (2nd Dept., 1985); Coalition Against Lincoln W. v City of New York, 94 A.D.2d 483,491 (1st Dept., 1983) *aff'd* 60 N. Y.2d 805 (1983). Courts have regularly acknowledged that under SEQRA, agencies are provided considerable latitude in evaluating environmental effects and choosing among alternatives and nothing in the law requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency's choice, which

can be annulled only if arbitrary, capricious or unsupported by substantial evidence. Id. *citing* Aldrich, *supra*.

With particular reference to determinations made by the NYDEC, courts "accord 'great weight and judicial deference' to the technical and factual judgment of the NYDEC." Matter of Village of Woodbury v Seggos, 154 A.D.3d 1256, 1262 (3rd Dept., 2017) *citing* Flacke v Onondaga Landfill Sys., 69 N.Y.2d 355, 363 (1987); Matter of Gracie Point Community Council v New York State Dept. of Envtl. Conservation, 92 A.D.3d 123, 129 (3rd Dept., 2011) *lv denied* 19 N.Y.3d 807 (2012).

The only "area of environmental concern" raised by Appellants is the claim that the Modified MLRP will have the potential to adversely impact the aquifer. First, the merits of that claim have already been thoroughly rebutted and refuted. More importantly, however, no argument can be made that the NYDEC did not take the requisite "hard look" at this issue, or that they failed to set forth a "reasoned elaboration" for its conclusion that mining to a depth of 120-feet amsl would not have a significant environmental impact. Those undeniable facts have already been extensively detailed herein, as has the lower court's findings that "upon careful review, the Court is satisfied that there is a rational basis in the record supporting the issuance of the Amended Negative Declaration and modified permit" (R. 39), and that "the record before the Court contains ample support for DEC's determination

that the deepening of the mine will not have a significant impact on the environment." R. 42.

The issue of groundwater was specifically addressed in the Amended Negative Declaration, in Paragraphs 3 and 4 thereof. R. 1141-1144. The Amended Negative Declaration specifically acknowledges that the Premises is designated as a Sole Source Aquifer and a Special Groundwater Protection Area, and is located within a Town designated Aquifer Protection Overlay District. Id. It also specifically acknowledged that (i) VOWM operations at ended in 2018; (ii) the Part 360 was surrendered; (iii) the floor of the mine will still "provide a minimum of 90 feet of soil between the bottom of the mine and groundwater"; (iv) the 90-foot separation to groundwater will provide filtering and buffering benefits to further protect the groundwater below the floor of the mine; and (v) groundwater will be tested on at least a quarterly basis. Id.

The Record further confirms that the NYDEC expressly considered the County's final report, as the NYDEC stated in their response to the public comments:

> "Almost all the letters concerning groundwater reference the Suffolk County Department of Health Services' final report titled "Investigation of Potential Impacts to Groundwater at Wainscott Sand & Gravel/Sand Land Facility 585 Middle Line Highway, Noyack, N.Y." dated June 29, 2018 (Report). The Report concluded that vegetative organic waste management (VOWM) activities at the site have had adverse impacts to the groundwater, in particular through increased levels of manganese and iron.

The Report makes no mention of any adverse impacts associated with the mining activities.

In addition, the report states that "all of the private wells that have been sampled in the current survey have met all drinking water standards, and have not indicated any VOWM related water quality impacts."

* * *

DEC has approximately twenty years of sampling data from three mine sites in Suffolk County that are mining in the water table, as well as from several mine sites at varying elevations above the water table. At these mine sites, monitoring wells are in multiple locations around the property to capture groundwater coming onto and leaving the sites. This is designed to show what, if any, changes to water quality occur because of onsite mining. These data have not shown any impacts to groundwater quality associated with mining activities.

Historically, there were 73 sand and gravel mine sites throughout Long Island, mostly in Suffolk County. There are still 23 active mines. SCDHS has been conducting water quality analyses on groundwater, from public and private wells, since at least the 1970's. Many of the wells tested are in close proximity to sand and gravel mine sites. To date, Suffolk County public water supply wells and private water wells tested by SCDHS (including those near Sand Land) have not indicated any impacts to groundwater quality that can be associated with sand and gravel mining activities.

DEC believes that the cessation of VOWM at Sand Land will ensure the protection of the groundwater resource at this site even with ongoing mining activities. Frequent groundwater monitoring will provide validation that groundwater is being protected."

R. 1145-1147.

The issue of groundwater impacts stemming from the prior use of the Premises for VOWM was also addressed in the Mined Land Use Plan accompanying the Modified MLRP, stating in Section 2.4.6:

> "The storage and handling of materials that are unrelated to mining have occurred historically in the mine. The mine previously received yard waste, brush and leaves; processed this material into mulch and compost; and offered this product for sale. Sand Land ceased grinding land clearing debris into mulch at the mine, as of May 1, 2016; and ceased the sale of mulch as of November 1, 2016. Sand Land is no longer accepting yard waste, brush, and leaves. Sand Land ceased accepting concrete and masonry on September 1, 2018. Sand Land has also surrendered its Part 360 Registration."

And in Section 2.5.3 "Water Pollution":

> "Pollution of surface water from the site cannot occur since no runoff leaves the site. Most direct precipitation infiltrates the surface. Any runoff that does occur drains down the slopes toward the mine floor where it infiltrates to the subsurface.
>
> Pollution of ground water is controlled by the facts that hazardous materials are not used in the mining process and that no petroleum products are stored onsite. Petroleum products are used in front end loaders and haul trucks. These vehicles are maintained and refueled outside of the mine limit. Sand Land has also surrendered its Part 360 Registration; and there will be no receipt, storage, and processing of any volume of vegetative organic waste materials (VOWM), aside from any materials required to be kept at the Facility for the purposes of reclamation of the facility, or otherwise permitted under the Mined Land Reclamation Law.

> Additionally, the depth to ground water is approximately 140 ft below the currently permitted mine floor (160 ft amsl) and will be approximately 100 ft below the proposed floor elevation of 120 ft amsl that is the subject of this permit modification. Figure 6 provides the elevation of the water table as measured on May 2, 2018 from three onsite monitoring wells."

R. 375 – 386.

It is based on all of these findings and documentation that the lower court found that "record sufficiently demonstrates that DEC took the requisite hard look at the environmental issues in accordance with SEQRA. DEC also provided a "reasoned elaboration of the basis for its determination in the Amended Negative Declaration." R. 42 *citing* Matter of Brunner v Town of Schodack Planning Bd., 178 A.D.3d 1181, 1183 (3rd Dept., 2019).

Where an agency's SEQRA determination is supported by substantial evidence, meaning supported by "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" or "the kind of evidence on which responsible persons are accustomed to rely in serious affairs," the agency's determination should be left undisturbed. WEOK Broadcasting Com, *supra*.

The Amended Negative Declaration meets all of these elements.

The Record confirms that the NYDEC identified and took a hard look at the areas of environmental concerns and issued a reasoned elaboration. By law then, the issuance of the Amended Negative Declaration was not irrational, was not an abuse

of discretion, and was not arbitrary and capricious and, consequently, cannot be disturbed. Gordon v. Rush, *supra*; Matter of Jackson, *supra*; Matter of Cathedral Church, *supra*; WEOK Broadcasting Corp., *supra*

All of Appellants claims concerning the Amended Negative Declaration are without merit and must be denied by this Court.

CONCLUSION

The prior submissions to this Court and the Record of this Appeal, confirm that (i) all of Appellants' claims are without merit; (ii) the NYDEC engaged in a rational and proper exercise of its jurisdiction and expertise in entering into the Settlement Agreement, adopting the Amended Negative Declaration, and issuing the Renewal and Modified MLRP; and (iii) the lower court properly found that the NYDEC acted properly, and set forth a rational basis, for each one of its decisions and actions.

For these reasons, the instant appeal must be denied it its entirety.

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East Hampton, New York

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