To be Argued by:
MEAVE M. TOOHER
(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 PETITIONERS-APPELLANTS 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

BRAYMER LAW, PLLC
Attorneys for Petitioners-Appellants Citizens Campaign for the Environment, Group for the East End, Noyac Civic Council and Southampton Town Civic Coalition
P.O. Box 2369
Glens Falls, New York 12801
(518) 882-3252
claudia@braymerlaw.com

TOOHER & BARONE, LLP
Attorneys for Petitioners-Appellants 101Co, LLC, 102Co NY, LLC, BRRRubin, LLC and Bridgehampton Road Races, LLC
313 Hamilton Street
Albany, New York 12210
(518) 432-4100
mtooher@tabllp.com

(For Further Appearances See Reverse Side of Cover)

Albany County Clerk's Index No. 902239/19

LAZER, APTHEKER, ROSELLA
& YEDID, P.C.
Attorneys for Petitioners-Appellants
Joseph Phair, Margot Gilman
and Amelia Doggwiler
225 Old Country Road
Melville, New York 11747
(631) 761-0860
murdock@larypc.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ISSUES PRESENTED 1

STATEMENT OF THE CASE 3

The Mine and the DEC Determinations at Issue 4

The Subject Article 78 Proceeding 12

ARGUMENT 15

I. Supreme Court erred in relying upon the Affidavit of Catherine A. Dickert outside the Administrative Return to find a rational basis for the Department's decisions 18

II. Supreme Court erred in holding that the CALJ's decision prohibiting DEC from processing a prior substantially similar application is not binding on DEC's processing of the renewal and modification permit 28

A. The 2014 Modification Application and the 2019 Renewal and Modification are substantially identical 28

B. Allowing DEC to proceed with the permit process violates DEC administrative procedure, by ignoring prior DEC Decisions that are binding on DEC and Sand Land 34

III. Supreme Court erred in upholding an Amended Negative Declaration that ignored the procedural and substantive requirements of SEQR, and improperly relied upon future groundwater results 38

A. DEC's Amended Negative Declaration violates SEQRA's strict procedural requirements. 39

B. The Negative Declaration must be annulled because DEC failed to take a "hard look" at the environmental impacts of the proposed expansion 43

C. DEC's Negative Declaration improperly relied on future groundwater monitoring 47

D. The Court erred in Denying Appellants' Motion Seeking Leave to Submit Supplemental Evidence in Support of the Petition as it demonstrates DEC was Ignoring Its Own Groundwater Monitoring Results 49

CONCLUSION 52

TABLE OF AUTHORITIES

Page(s)

Cases

Bervy v. New York State Dept. of Environmental Conservation,
No. 2849-00, 2001 WL 37130714 (N.Y. Sup. Ct. June 08, 2001) 49

Brusco v. New York State Div. of Hous. & Community Renewal,
170 A.D.2d 184 (1st Dept. 1991) 20

Catskill Heritage Alliance, Inc. v. New York State DEC,
161 A.D.3d 11 (3d Dept. 2018).....36

Citizens Against Sprawl-Mart ex rel. Alcuri v. Planning Bd. of City of Niagara Falls,
8 A.D.3d 1052 (4th Dept. 2004).....40

Conley v. Ambach,
61 N.Y.2d 685 (1984).....36

Coursen v. Planning Bd. of Town of Pompey,
37 A.D.3d 1159 (4th Dept. 2007).....40

Gilman v. New York State Div. of Housing and Community Renewal,
99 N.Y.2d 144 (2002).....34

Glob. Tel*Link v. State, Dep't of Corr. Servs.,
70 A.D.3d 1157 (3d Dept. 2010).....19

Guptill Holding Corp. v. Williams,
140 A.D.2d 12 (3d Dept. 1988).....41

In the Matter of the Town of Marbletown's Application,
Interim Decision of the Commissioner, 1982 WL 177226
(DEC Case No. 56-S27 October 21, 1982) 37

Levine v. New York State Liquor Auth.,
23 N.Y.2d 863 (1969)..... 19 , 20

Malchow v. Bd. of Educ. for N. Tonawanda Cent. Sch. Dist.,
254 A.D.2d 608 (3d Dept. 1998).....20

Matter of Basile v. Albany Coll. of Pharmacy of Union Univ.,
279 A.D.2d 770 (3d Dept. 2001).....20

Matter of Benson v McCaul,
268 A.D.2d 756 (3d Dept. 2000).....19

Matter of Bull (Yansick Lbr. Co. – Sweeney),
235 A.D.2d 722 (3d Dept. 1997)..... 29

Matter of Charles A. Field Delivery Serv.,
66 N.Y.2d 516 (1985)..... 25, 29

Matter of Corrini v. Village Of Scarsdale,
1 Misc.3d 907(A), 2003 WL 23145905 (N.Y. Sup. Ct. 2003).....47

Matter of King v. Saratoga County Bd. of Supervisors,
89 N.Y.2d 341 (1996).....39

Matter of Menon v. New York State Dept. of Health,
140 A.D.3d 1428 (3d Dept. 2016)..... 21, 22, 23

Matter of Mid Is. Therapy Assoc., LLC v. New York State Educ. Dep't.,
129 A.D.3d 1173 (3d Dept. 2015).....38

Matter of National Fuel Gas Distrib. Corp. v. Public Serv. Commn.
of the State of N.Y.,
16 N.Y.3d 360 (2011).....26

Matter of Office Bldg. Assoc., LLC v. Empire Zone Designation Bd.,
95 A.D.3d 1402 (3d Dept. 2012)..... 20, 21 , 22, 26

Matter of Phelps v. Town Bd. of the Town of Alabama,
174 Misc.2d 889 (N.Y. Sup. Ct. 1997).....49

Matter of Preble v. Zagata,
263 A.D.2d 833 (3d Dept. 1999)..... 35 , 36

Matter of Roche v. Turner,
186 Misc.2d 581, 586-88 (Sup. Ct. N.Y. Co. 2000) 38

Matter of Van Antwerp v. Board of Educ. For the Liverpool Cent.
School Dist.,
247 A.D.2d 676 (3d Dept. 1998).....19

Miller v. City of Lockport,
210 A.D.2d 955 (4th Dept. 1994).....47

Molloy v. New York State Workers' Comp. Bd.,
146 A.D.3d 1133 (3d Dept. 2017).....21

Montauk Imp., Inc. v. Proccacino,
41 N.Y.2d 913 (1977).....19

Parkmed Assocs. v. New York State Tax Comm'n,
60 N.Y.2d 935 (1983).....20

Pyramid Co. of Watertown v. Planning Bd. of Town of Watertown,
24 A.D.3d 1312 (4th Dept. 2005).....39

Rizzo v. New York State Div. of Hous. & Cmty. Renewal,
16 A.D.3d 72 (1st Dept. 2005), aff'd, 6 N.Y.3d 104.....20

Rochester Eastside Residents for Appropriate Dev., Inc. v.
City of Rochester,
150 A.D.3d 1678 (4th Dept. 2017).....40

Schenectady Chemicals, Inc. v. Flacke,
83 A.D.2d 460 (3d Dept. 1981)..... 48, 49

Terrace Court, LLC v. New York State Div. of Hous. & Cmty. Renewal,
18 N.Y.3d 446 (2012)..... 29, 30

Uniform Firefighters of Cohoe v. Cuevas,
276 A.D.2d 184 (3d Dept. 2000).....25

Watch Hill Homeowners Ass'n Inc. v. Town Bd. of Town of Greenburgh,
226 A.D.2d 1031 (3d, 30 Dept. 1996).....47

Wellsville Citizens ex rel. Responsible Development, Inc. v.
Wal-Mart Stores, Inc.,
140 A.D.3d 1767 (4th Dept. 2016).....48

Yellow Lantern Kampground v. Cortlandville,
279 A.D.2d 6 (3d Dept. 2000).....40

Statutes

ECL § 23-2703 ..... *passim*

ECL § 23-2703(3) 6, 7, 16, 33

ECL § 23-2711 ..... *passim*

ECL § 23-2711(3) ..... 6 , 11, 16, 33

ECL § 55-107(3) 4

ECL § 70-0119(1) 35

Rules

CPLR § 7804 19

Regulations

6 NYCRR § 17.7(e)(2) 42

6 NYCRR § 617 40

6 NYCRR § 617.6(a)(2) 41

6 NYCRR § 617.7 12

6 NYCRR § 617.7(b) 41

6 NYCRR § 617.7[c][3] 47

6 NYCRR § 624.2(a) 38

6 NYCRR § 624.5(e) 37

6 NYCRR § 624.6(c)(4) 37

6 NYCRR § 624.8 37

6 NYCRR § 624.8(b)(1)(i) 37

6 NYCRR § 624.8(d) 37

6 NYCRR § 624.13 37

9 NYCRR § 4.131(II)(F).....37

Other Authorities

Davis, *Doctrine of Precedent as Applied to Administrative Decisions*, 59 W.Va.L.Rev. 111.....29

Executive Order No. 131 37

SEQRA Handbook, available at https://www.dec.ny.gov/docs/permits_ej_operations_pdf/dseqrhandbook.pdf.....41

ISSUES PRESENTED

I. Whether Supreme Court erred in denying the Petition as Supplemented based upon an affidavit dehors the record, that does not demonstrate first-hand knowledge of the decisions being challenged, to provide a rationale for the determinations of the New York State Department of Environmental Conservation which Supreme Court acknowledged the Administrative Return itself did not contain?

Answer: Supreme Court improperly relied upon a dehors the record affidavit from a staff member lacking personal knowledge, and denied the petition.

II. Whether Supreme Court erred in holding that the New York State Department of Environmental Conservation's Chief Administrative Law Judge's decision prohibiting the New York State Department of Environmental Conservation from processing a 2014 expansion application pursuant to ECL §§ 23-2703 and 23-2711, was not binding upon the 2019 renewal and modification applications that sought substantially the same expansion?

Answer: Supreme Court erroneously concluded that the 2019 renewal and modification applications that sought, respectively, a horizontal and vertical expansion, were not substantially identical to the 2014 application and thus not subject to principles of *stare decisis* and the New York State Department of

Environmental Conservation precedent that unappealed Chief Administrative Law Judge's decisions bind the parties.

III. Whether Supreme Court erred in denying Appellants' motion for supplemental briefing and in upholding the Amended Negative Declaration and modified permit despite the procedural and substantive errors and data contradicting New York State Department of Environmental Conservation's conclusions in the Amended Negative Declaration?

Answer: Supreme Court erroneously sustained New York State Department of Environmental Conservation's Amended Negative Declaration and further erroneously prohibited submission of data from groundwater testing referenced and relied upon in the Amended Negative Declaration.

Petitioners-Appellants 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 join in the Issue Presented and argument related thereto set forth in the Appellant's Brief filed on behalf of Petitioner-Appellant Town of Southampton.

STATEMENT OF THE CASE

This appeal involves the denial of an Article 78 petition challenging a series of New York State Department of Environmental Conservation ("DEC" or "Department") actions and decisions granting a major mine expansion over the sole source drinking water aquifer in Southampton, New York that is protected by State and local laws. It is impossible to reconcile the actions of the Department of Environmental Conservation in administratively nullifying provisions of the Environmental Conservation Law that uniquely restrict DEC's mining permit authority on Long Island, constraining that authority, acknowledging DEC's principal role as steward of the State's environment, and recognizing the towns as gatekeepers of Long Island's irreplaceable water source.

This Special Proceeding challenges a series of determinations and approvals by the DEC relating to a sand and gravel mine ("Mine" or "site") in Suffolk County, New York, owned and operated by Respondents Sand Land Corporation and Wainscott Sand and Gravel Corp.[1] [R. 52, ¶ 1; R. 55-56, ¶¶19-22][2]. Petitioner-

[1] Respondents Sand Land Corporation and Wainscott Sand and Gravel Corp. will be referred to collectively as "Sand Land."

[2] Citations to the Joint Record are cited as "[R. page number]". Where available, paragraph numbers used in the cited page have been included for the Court's convenience.

Appellants ("Appellants") consist of the Town of Southampton (the "Town") [3] in which the Mine is located, property owners located around the Mine, and local environmental and civic organizations. [R. 53-55, ¶¶ 4, 6-18].[4]

The Mine and the DEC Determinations at Issue

The Mine is within the Town's Aquifer Protection Overlay District and sits directly above the sole source aquifer for the region. [R. 58, ¶ 33]. The aquifer is the Town's sole source of public drinking water. [Id.]. The Mine is also located in a Critical Environmental Area and Special Groundwater Protection Area.[5] [R. 59, ¶ 34]. The Mine property has at various times been used for sand and gravel mining and for waste dumping and burying. Later, processing of clearing debris into mulch,

[3] Petitioner-Appellant Town of Southampton is filing a separate brief in this proceeding. This brief is submitted on behalf of Petitioner-Appellants 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.

[4] The local New York Assemblyman Fred W. Theile, Jr. was also a Petitioner in the proceedings below but is not an Appellant herein. [R. 53, ¶ 5]. Suffolk County sought amicus status in the proceedings before Supreme Court and is Appellant in the related appeal Town of Southampton, et al. v. New York State Department of Environmental Conservation, et al. (Appellate Docket No. 529380).

[5] A Special Groundwater Protection Area is a "recharge watershed area within a designated sole source area contained within counties having a population of one million or more which is particularly important for the maintenance of large volumes of high quality groundwater for long periods of time." ECL § 55-107(3).

and vegetative organic waste management ("VOWM"), and other non-mining uses were introduced at the facility. [R. 59, ¶ 37].

The first DEC permit to mine at this location was issued in or about 1985 to the prior owner for 20 acres. [R. 59-60, ¶ 38]. In 1998, Sand Land received a permit from DEC transferring and renewing the permit from the prior owner and operator to "Mine sand and gravel from 31.5 acres of a 50 acre site." [Id.; R. 85]. The Mine permit was last renewed before the events giving rise to this proceeding on November 5, 2013, again "to mine sand and gravel from 31.5 acres of a 50 acre site." [R. 60, ¶ 41; R. 89].

Between 1998 and 2018, Sand Land also operated a Part 360 waste processing facility in the Mine pursuant to a registration with DEC in the name of Bridgehampton Material & Heavy Equipment Co. Sand Land received and processed concrete, asphalt, brick, soil and rock and unadulterated wood. Sand Land also received and processed vegetative organic waste, including trees, brush, stumps, leaves, grass clippings, and other clearing debris. Sand Land also engaged in the businesses of receiving, stockpiling, and selling large quantities of compost, manure, and trap rock. [R. 60, ¶ 39].

In January 2014, Sand Land submitted an Application for a Modification of its Mine Permit, listing the "Total acreage permitted by DEC prior to this application" as 31.5 acres and the "Acreage included in this application, but not

previously approved" as 4.9 acres. It also sought to vertically expand the Mine by 40' to a depth of 120' above sea level. [R. 61, ¶ 43; R. 102].

On April 3, 2015, the DEC Executive Deputy Commissioner denied Sand Land's modification application. [R. 61, ¶ 46; R. 114-116]. The Notice of Permit Denial cited DEC Region 1 staff's failure "to consider several relevant areas of environmental concern associated with" the Mine when issuing its negative declaration for the modification, including, but not limited to, "impacts from the composting and C&D processing facility on groundwater given its location in a Special Groundwater Protection Area established by New York State, and within a designated Critical Environmental Area established by the town of Southampton and Suffolk County." [R. 115-116]. Additionally, it found that DEC staff failed to submit "the notification prescribed by ECL [§] 23-2711(3) and ECL [§] 23-2703(3)" to the Town and directed staff to do so. [R. 114, 116].

Sand Land requested a public hearing to challenge the permit denial and an Issues Conference was held in October 2015 before DEC Chief Administrative Law Judge James T. McClymonds ("the CALJ" or "CALJ McClymonds"). [R. 63, ¶ 51; R. 127]. The Town as well as all other Appellants sought party status. [R. 63, ¶ 51; R. 127-128]. On January 26, 2018, CALJ McClymonds issued a "Ruling of the Chief Administrative Law Judge on Threshold Procedural Issue". [R. 63-64, ¶ 56; R. 122-136]. The CALJ ruled that "[t]he Executive Deputy Commissioner . . .

correctly noted that applicant's expansion proposal triggered the inquiry required under ECL [§] 23-2711" and ECL § 23-2703(3) is applicable to the Modification Application. [R. 133]. The CALJ concluded that "whether the applicant's proposed mine expansion is legal under the Town's zoning laws cannot be determined on the current record" but that "[t]he Town's response does, however, raise reasonable doubt concerning whether applicant's proposed mine expansion is legal under the Town Code." [R. 133-134]. Consequently, the CALJ indefinitely "suspended and adjourned" the permit hearing proceeding because ECL § 23-2703(3) "prohibits the Department from further processing applicant's mining permit application until the legality of applicant's proposed mine expansion under Town law is definitively established." [R. 135].

Sand Land moved to reargue the CALJ's January 2018 ruling, which the CALJ denied on December 10, 2018. [R. 65, ¶ 59; R. 140]. In his decision, CALJ McClymonds reiterated that "ECL [§] 23-2703(3) applies to applications to modify existing permits where, as here, the application seeks to expand an existing mine beyond its previously approved boundaries"; that ECL § 23-2711 required an inquiry into whether an application for a new permit, or an application to renew or modify an existing permit, is authorized under local law; and that under the Mined Land Reclamation Law ("MLRL"), the Uniform Procedures Act (ECL Art. 70), and DEC policy, "applications for permits to mine outside any previously approved line-of-

mine boundaries-in this case outside the 31.5 acre area and below a depth of 60 feet below grade level-involve a material change in permitted activities and are treated as new applications triggering the requirements of ECL [§] 23-2711." [R. 141, 145]. The CALJ also found that "the term 'property not previously permitted' leads to the conclusion that it refers to property outside any previously approved line-of-mine boundaries. Thus, Sand Land's application to mine 4.9 more acres to a depth of 40 feet below that previously approved is an application to mine 'property not previously permitted.'" [R. 145].

On September 11, 2018, DEC served Sand Land with a Notice of Intent to Modify ("NIM") to "require the cessation of mining activities and the initiation of steps to reclaim the mine." [R. 68, ¶ 72; R. 293]. The NIM notes that "Department staff concluded that Sand Land has only *de minimis* reserves of sand left for mining purposes, and the areas where mining could occur are the subject of groundwater monitoring investigations." [R. 293]. Thus it concluded that "[t]he minimal reserves of sand left are insufficient to support any future mining operations, let alone the issuance to Sand Land of a further 5 year mining permit." [R. 293-294].

DEC further found that, because the *de minimis* sand is in areas of prior storing and processing of vegetative waste, "[f]uture site activities in and around those areas where processing and storing of vegetative waste formerly occurred, have the potential to allow the release of contaminants in that area which could impact the

local groundwater." [R. 294]. Thus, the proposed modified terms included "Renewal of an existing permit for a 31.5-acre Life of Mine sand and gravel mine . . . for **Reclamation Activities Only** . . . **No further mining or processing of material shall take place at this mine.**" [R. 295 (emphasis in original)].

The NIM was based substantially upon a series of studies of the impacts on groundwater and the aquifer on Long Island around vegetative organic waste management ("VOWM") facilities, including an October 2018 Suffolk County Department of Health Services ("SCDHS") study of the Mine and an August 2018 study by Sand Land's own consultant, Alpha Geoscience. [R. 294]. The Final Report of the Investigation of Potential Impacts to Groundwater at Wainscott Sand & Gravel/Sand Land Facility by SCDHS was issued on June 29, 2018. [R. 68, ¶ 71; R. 152-291]. SCDHS concluded:

> The vegetative waste management activities on the Sand Land site have had significant adverse impacts to the groundwater. The analytical results from the groundwater samples indicate impacts of elevated metals concentrations (in particular manganese and iron) and other groundwater impacts that are consistent with results observed at other VOWM sites throughout Suffolk County, which have been attributed to the VOWM activities performed at these sites. Detrimental groundwater impacts were observed at the Sand Land site despite the significant depth to groundwater (137 to 154 feet below grade). Additionally, data from wells installed on the site suggest the presence of downward vertical groundwater flow component, indicating this is a vital groundwater protection area. This also suggests that contaminants released on the site may flow into deeper portions of the aquifer.

[R. 155].

On September 21, 2018, Sand Land objected to the NIM's proposed modification and requested a hearing. [R. 69, ¶ 76]. On October 12, 2018, Sand Land applied to renew its Mining Permit, due to expire on November 1, 2018. The Application listed the "total acreage permitted by DEC prior to this application" as 31.5 acres and stated that the "Acreage included in this application, but not previously approved" is 0 acres. [R. 69-70, ¶ 79; R. 299].

On February 21, 2019, DEC and Sand Land entered into a Settlement Agreement ("Agreement") to "settle any and all issues surrounding the Department's Notice of Intent to Modify, Sand Land's objections thereto, and Sand Land's duly filed application for a renewal of the existing Mind Land Reclamation Permit." [R. 70, ¶ 84; R. 348]. The Agreement states:

> the Facility is used by Sand Land for the operation of a duly permitted sand and gravel mine . . . *within 34.5-acres of the 50-acre Facility* in accordance with a mined land use plan approved by the Department

[R. 346 (emphasis added)].[6] DEC agreed to rescind the NIM, issue "Sand Land's application to renew its Mined Land Reclamation Permit for the 34.5-acre Life of

[6] As outlined above, prior to February 21, 2019, the Mine had never been permitted for mining "within 34.5-acres of the 50-acre Facility," but was permitted for only 31.5 acres. The Agreement does not explain or acknowledge the additional 3 acres.

Mine", and to "timely process a permit application" for mining "within the existing Life of Mine to a depth of 120-feet [above mean sea level]." [R. 350, ¶ 9].

On March 5, 2019, Sand Land submitted an Environmental Assessment Form under SEQRA on a 34.5 parcel modification. [R. 3334-3371]. On March 12, 2019, Sand Land submitted another Application for Modification to mine to a depth of 120-feet above mean sea level ["AMSL"] as referenced in the Agreement. [R. 71-72, ¶ 89; R. 374]. That application states that the "Total acreage permitted by DEC prior to this application" is 34.5 acres, the "Current affected acreage" is 26.5 acres, and the "Acreage included in this application, but not previously approved" is 0 acres. [R. 374]. Thus, this Application for Modification includes the 3 acres included in the Agreement without explanation.

On or about March 14, 2019, DEC withdrew the NIM and the next day issued an "Amended Negative Declaration" pursuant to SEQRA for the new modification application[7]. [R. 3384-3887]. DEC did not transmit the notice to the Town required pursuant to ECL § 23-2711 (3). [R. 657, ¶ 15].

Also on March 15, 2019, DEC "reissued" the renewal of the Mined Land Reclamation Permit, now for 34.5 acres Life of Mine and 26.5 Current Permit Acres.

[7] This Amended Negative Declaration was based upon the Negative Declaration from the 2014 DEC-denied Modification and fails to include or discuss the SCDHS study and determination of impact to groundwater. [R. 58, ¶ 32; R. 351, ¶ 12; R. 3384-3387].

[R. 3378-3383]. Despite the increases, DEC determined the renewal application was a Type II action under SEQRA not requiring further review. [R. 73, ¶ 94]. The only explanation in the renewal documents regarding the additional 3 acres is a reference in the cover letter from the DEC to correcting an alleged "typographical error." [R. 3378].

On June 5, 2019, DEC issued the modified permit authorizing Sand Land to "[c]ontinue to mine sand and gravel from 34.5 acres of a 34.5-acre Life of Mine (LOM) on a 50-acre property. Within the 34.5-acre LOM, the final mine floor elevation will be changed from the current elevation of 160 feet amsl to elevation 120 feet amsl (40-foot deepening)." [R. 1012].

The Subject Article 78 Proceeding

Appellants filed this Article 78 proceeding on April 17, 2019, seeking judgment (a) annulling and declaring void the Agreement; (b) annulling and declaring void the renewal permit to mine issued to Sand Land on March 15, 2019; (c) annulling, vacating, and declaring void the "Amended Negative Declaration – Notice of Determination of Non Significance" (6 NYCRR § 617.7) issued March 15, 2019 upon Sand Land's filing of an Application for Modification permit on March 12, 2019; and (d) barring DEC from continuing to process Sand Land's Application for Modification filed March 12, 2019. [R. 52-83; R. 48-51]. On June

21, 2019, Appellants filed a Supplemental Petition seeking to vacate and nullify the Permit Modification approved during the pendency of the action. [R. 668-679].

DEC filed its Answer to the supplemented Petition and what it certified to be its Administrative Return on July 29, 2019. [R. 2663-2702, R. 2723-3517]. With its Answer and Memorandum of Law, DEC also submitted an affidavit of Catherine A. Dickert.[8] [R. 2703-2721]. Sand Land also filed its answer on July 29, 2019. [R. 3518-3538].

Appellants filed a Motion Seeking an Order Requiring the New York State Department of Environmental Conservation to Supplement the Administrative Return ("Motion to Compel Supplementation of Administrative Return") on August 22, 2019. [R. 4696]. Appellants asserted that the Administrative Return was incomplete and did not include documents explaining the Department's rationale for the determinations being challenged and requested that the Court require the Department provide all documents and communications relating to the determinations. [R. 4701-4702, ¶ 10; R. 4705, ¶ 22]. Appellants also noted that various documents existed that were not included in the Return. [R. 4705-708, ¶¶ 23-30]. While DEC opposed the motion and asserted the Administrative Return was complete, it ultimately filed three additional volumes of "inadvertently-omitted

[8] The Affidavit in Opposition to Petition as Supplemented of Catherine A. Dickert dated July 26, 2019, will be cited hereafter as "Dickert Aff."

documents" to the Administrative Return. [R. 4732-4736; R. 3651-4533]. The supplemental volumes consisted of a number of documents that Appellants attached to their Reply papers, but DEC again failed to include other relevant documents. [R. 4541, ¶ 10; R. 4542, ¶¶ 13-17].

On September 17, 2019, Supreme Court heard oral argument on the proceeding. [R. 9523].

On December 20, 2019, Appellants filed a Motion Seeking Leave to Submit Supplemental Evidence in Support of the Petition as Supplemented. [R. 4915]. Appellants sought to introduce four (4) Analytical Reports prepared for DEC and obtained by Appellants pursuant to the Freedom of Information Law ("FOIL") since September 17, 2019, along with an expert affidavit analyzing the reports, a memorandum of law, and various other exhibits. [R. 4920-4921, ¶ 10-13]. Those Analytical Reports pertain to water test samples taken at the Mine within one week after the DEC issued the Amended Negative Declaration, and before it approved the Modified Permit. [R. 4919, ¶ 3; R. 4920, ¶ 10; R. 4921, ¶ 13; R. 4933-8441]. Those reports were not included in the Administrative Return or produced in response to prior FOIL requests. [R. 4921, ¶ 13].

On August 31, 2020, nearly a full year after the matter was argued, Supreme Court issued the appealed-from Decision, Order & Judgment. [R. 4-45]. As relevant to this appeal, Supreme Court denied Petitioner-Appellants Motion to Compel

Supplementation of Administrative Return, denied Petitioner-Appellants Motion for Leave to Submit Supplemental Evidence, and denied all relief requested in the Petition as supplemented. [R. 43].

This appeal ensued. [R. 1-3].

ARGUMENT

This Article 78 proceeding was commenced to challenge the DEC's determination to utilize a Settlement Agreement and subsequent Renewal and Modification permits to circumvent and negate ECL § 23-2703 and § 23-2711, and the decisions of the Department's Deputy Commissioner, the CALJ, and the Division Director for Environmental Permits. As is laid out below and in the lengthy accompanying record, DEC engaged in improper and preordained decision making, and subsequently constructed a pretextual rationale to defend it; a textbook case of improper, arbitrary and capricious action. Indeed, following four decisions and pronouncements by, respectively, the DEC Deputy Executive Commissioner (R. 114-117), the DEC Chief Administrative Law Judge (twice) (R. 122-136; R. 139-151), and the DEC Division Director, Environmental Permits (R. 292-296), all denying the Mine the proposed expansion over Long Island's sole source drinking water aquifer (and in the case of the Division Director for Environmental Permits, calling for the end of all mining activity within 15 days of September 11, 2018), certain elements within DEC, along with the Mine operator and their paid

consultants, continued to work together to grant the Mine a major expansion. Thus, DEC and the mine operator achieved through a closed door deal, what they failed to obtain through repeated transparent legal proceedings.

Yet even behind closed doors, in order to achieve their preordained result, DEC had to ignore or circumvent not only the four decisions above, but a 2018 Suffolk County Department of Health Services groundwater investigation that identified contamination of the aquifer beneath the mine due to existing contamination in the sand, and specific State legislation in ECL §§ 23-2703(3) and 23-2711(3), enacted to protect the aquifer in this precise area of Long Island from the type of sand mining expansions presented in this case.

To do so, DEC had to deny that the long-proposed horizontal portion of Sand Land's expansion application was even an expansion, but somehow find it was a 34 year old, 7 permit long "typographical error" and that the area of mining was always meant to include the additional 3 acres. Thus, DEC actually granted a long denied 3 acre expansion by saying it was not really an expansion, in order to circumvent unique ECL provisions enacted to restrict DEC's mining permit authority in Suffolk and Nassau Counties and protect towns on Long Island from sand mining expansions over their drinking water.

DEC then went on to justify granting Sand Land's long proposed and repeatedly denied 40 foot depth expansion towards the aquifer in contravention of

this same statutory prohibition by drafting a new DEC internal "guidance" [R. 3372-3376], long after not only the proposed expansion, but indeed after all the previous DEC decisions that held that the proposed expansion triggered inquiry under the ECL §23-2711 regarding prohibition of mining under Southampton Town law. The new post hoc guidance led Supreme Court to an irrational statutory construction that the cited ECL provisions only applied to horizontal mine expansions (eliminated here through the typographical error correction) but not vertical or depth expansions towards, or apparently, even into the very aquifer the legislation was specifically enacted to protect.

These actions illustrate the lengths to which DEC has gone to make an end run around previous rulings denying the expansion, scientific data that in normal circumstances would disqualify any such proposal, and state legislation specifically enacted to protect the aquifer from these exact type of actions. This was clearly a result in search of after-the-fact reasoning, concocted solely to try to defend the indefensible and get courts to ignore the sequence of facts, decisions and actions that plainly illustrate an extremely disconcerting and disturbing case of repeated arbitrary and capricious DEC behavior and decision making.

Therefore, the Court should reverse Supreme Court's denial of the Petition as Supplemented and nullify DEC's approval of the Settlement Agreement, Renewal Permit, and Modification Permit.

I. Supreme Court erred in relying upon the Affidavit of Catherine A. Dickert outside the Administrative Return to find a rational basis for the Department's decisions

Supreme Court denied the Petition despite acknowledging that "[t]o be sure, petitioners are correct that the Administrative Return itself does not contain documentation which expressly provides DEC's rationale for several of the determinations challenged herein, including the change in the Life of Mine acreage set forth in the Agreement." [R. 26]. Supreme Court's inquiry should have ended there, and the Petition should have been granted. Instead, Supreme Court looked outside the Record, to the affidavit of Catherine A. Dickert, the Director of the Division of Mineral Resources for DEC, to provide "'an adequate basis upon which to review' the challenged determinations," even though she had no firsthand knowledge of critical actions. [Id.]. Given Supreme Court's determination that the Administrative Return lacks evidence of the rationale for the Department's determinations, it was error for Supreme Court to rely upon documents and rationale not contained in the Administrative Return to deny the Petition.

Supreme Court found that Appellants' contention that the Settlement Agreement established a process to authorize mining in areas and to depths previously denied without having to exhaust administrative remedies or comply with the ECL had "no record support." [R. 31]. However, it is not Appellants' obligation to explain the agency's determination; it is the DEC's responsibility under CPLR §

7804 to submit the evidence in the Administrative Return demonstrating the rationale for its decision(s). See Glob. Tel*Link v. State, Dep't of Corr. Servs., 70 A.D.3d 1157, 1158–59 (3d Dept. 2010) ("the requirement is for the record to be 'sufficiently developed to provide an adequate basis upon which to review' the rationality of the agency's action.") (quoting Matter of Benson v McCaul, 268 A.D.2d 756, 757-758 (3d Dept. 2000)). See also Montauk Imp., Inc. v. Proccacino, 41 N.Y.2d 913, 914 (1977) ("Failure of the agency to set forth an adequate statement of the factual basis for the determination forecloses the possibility of fair judicial review and deprives the petitioner of his statutory right to such review") (citations omitted). Instead, the Department relied upon an improper after the fact affidavit from an individual without firsthand knowledge of the Settlement Agreement negotiations or the underlying administrative proceedings to support their findings. Moreover, Supreme Court denied Appellants' motion to require the DEC to supplement the Return to provide such documentation.

Supreme Court correctly noted that "judicial review of an administrative determination is limited to the record before the agency, and proof outside the administrative record should not be considered." [R. 26 (quoting Matter of Van Antwerp v. Board of Educ. For the Liverpool Cent. School Dist., 247 A.D.2d 676, 678 (3d Dept. 1998))]. See also Matter of Levine v. New York State Liquor Auth., 23 N.Y.2d 863, 864 (1969) ("a court's review of administrative action is limited to

the record made before" the agency under review); Malchow v. Bd. of Educ. for N. Tonawanda Cent. Sch. Dist., 254 A.D.2d 608, 609 (3d Dept. 1998). "[T]he court may not consider arguments or evidence not contained in the administrative record." Rizzo v. New York State Div. of Hous. & Cmty. Renewal, 16 A.D.3d 72, 75–76 (1st Dept. 2005), aff'd, 6 N.Y.3d 104 (quoting Brusco v. New York State Div. of Hous. & Community Renewal, 170 A.D.2d 184, 185 (1st Dept. 1991)). See also Parkmed Assocs. v. New York State Tax Comm'n, 60 N.Y.2d 935, 936 (1983) ("Judicial review of an administrative determination is limited to the grounds invoked by the agency and a reviewing court which finds those grounds insufficient or improper may not sustain the determination by substituting what it deems to be a more appropriate or proper basis").

Consistent with the above principles, an affidavit that "was not part of the administrative record forming the basis for the administrative determinations" is generally not properly part of the record and the court should refuse to consider it. See Matter of Basile v. Albany Coll. of Pharmacy of Union Univ., 279 A.D.2d 770, 772 (3d Dept. 2001) (citing Matter of Levine, 23 N.Y.2d at 864). 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. Matter of Office Bldg. Assoc., LLC v. Empire Zone Designation Bd., 95 A.D.3d 1402, 1405 (3d Dept. 2012). This Court has

emphasized, however, that such affidavits must show "firsthand knowledge" or they cannot "be used to supply the rationale otherwise missing from the Board's determination." Id. See also Molloy v. New York State Workers' Comp. Bd., 146 A.D.3d 1133, 1134 (3d Dept. 2017) ("furnished by individuals having 'firsthand knowledge of the decision-making process'") (quoting Matter of Menon v. New York State Dept. of Health, 140 A.D.3d 1428, 1431 (3d Dept. 2016)). Where the affidavit fails to demonstrate such firsthand knowledge, it cannot be relied upon to supply the missing rationale. Matter of Menon, 140 A.D.3d at 1431.

Supreme Court discusses the Dickert Affidavit in depth. [R. 17-21]. The court notes that "she is the Director of the Division of Mineral Resources for DEC . . . her responsibilities include 'supervision of DEC's entire mineral resources program, including mining'" and "her opinions are based upon her personal knowledge, review of the record, education, training and professional experience, relevant scientific literature and the application of commonly accepted methodologies." [R. 27]. Therefore, the court concludes that "Ms. Dickert's affidavit may be considered by the Court inasmuch as she provides an account of the decision-making process of DEC based upon her first-hand knowledge." [Id.].

While Ms. Dickert's first-hand knowledge may be relevant, neither "familiarity with the relevant statutes and regulations nor . . . subsequent analysis of the materials submitted in support of petitioner's administrative appeal speaks to or

otherwise evidences firsthand knowledge of the decision-making." Matter of Office Bldg. Assocs., LLC, 95 A.D.3d at 1405. Therefore, neither Ms. Dickert's alleged "review of the DEC record in this matter" nor her position as Director of the Division of Mineral Resources give her the requisite "firsthand knowledge" of the decision-making process on this matter.

Similarly, Ms. Dickert's opinions based upon her "education, training and professional experience, relevant scientific literature and the application of commonly accepted methodologies" are irrelevant if they were not considered by the DEC personnel making the ultimate determination. The Administrative Return demonstrates that neither Ms. Dickert nor the Division of Mineral Resources made any of the challenged determinations.[9] Tellingly, DEC did not introduce affidavits from *any* of the individuals that actually made the challenged determinations. In Matter of Menon, the Third Department determined that since the determination at issue was referred to a different division of the agency and signed by that office's director, the affiant lacked firsthand knowledge of the decision-making process and

[9] Instead, the NIM and the Modified permit were signed by Daniel Whitehead, Division of Environmental Permits. [R. 3163-3167]. The Settlement Agreement was signed by Thomas Berkman, Deputy Commissioner and General Counsel. [R. 352-3279]. The Permit Renewal and Amended Negative Declaration were signed by the then Region 1 Deputy Regional Permit Administrator, Mark Carrara. [R. 3379-3387]. Finally, the 2019 Modified Mine Permit was also signed by Daniel Whitehead, Division Director, Division of Environmental Permits. [R. 3394-3399].

his affidavit could not provide the missing rationale. 140 A.D.3d at 1431. Likewise, Ms. Dickert's affidavit lacks demonstrable firsthand knowledge.

Neither Ms. Dickert nor Supreme Court distinguish between opinions premised upon "firsthand knowledge" and those improperly based upon a "review of the DEC record." Ms. Dickert refers generically to the "DEC" in numerous paragraphs.[10] She refers to actions by unnamed "DEC staff" including "DEC Division of Mineral Resources professional staff" and "DEC inspectors".[11] In several of those cases, the unnamed "DEC" personnel are clearly identifiable from the Administrative Return as Department staff other than Ms. Dickert.[12]

In contrast, Ms. Dickert offers a single explicit statement regarding her personal actions. [Dickert Aff. ¶ 30 ("I directed mined land reclamation specialists performing financial security calculations to consider 34.5 acres the correct and

[10] "DEC considered" – Dickert Aff. ¶¶ 37, 39, 41; "DEC properly decided" - Dickert Aff. ¶¶ 19, 25, 31, 32, 36; "DEC's understanding" - Dickert Aff. ¶ 22; "DEC expressed" – Dickert Aff. ¶ 29; "DEC gave great weight" – Dickert Aff. ¶ 34; and discussions and agreements between "DEC and Sand Land" - Dickert Aff. ¶¶ 25, 27, 28.

[11] Dickert Aff. ¶ 17 ("DEC inspectors"); Dickert Aff. ¶¶ 25, 26, 29, 37 ("DEC Division of Mineral Resources professional staff"); Dickert Aff. ¶ 30 ("DEC staff").

[12] See e.g., Dickert Aff. ¶ 22 (acknowledging the role of the DEC Director of the Division of Environmental Permits); Dickert Aff. ¶ 28 (the General Counsel); Dickert Aff. ¶¶ 32, 36, 37 (the Deputy Permit Administrator).

accurate life of mine acreage.")].[13] This one reference to directing certain actions implicitly demonstrates that Ms. Dickert was not personally involved in the determinations, discussions, and reviews done by "DEC" and "professional staff."

Supreme Court cites to the Dickert Affidavit to support the expansion of the Life of Mine from 31.5 to 34.5 acres in the Settlement Agreement and Renewal Permit on the grounds that such expansion was "a ministerial correction/update to the Life of Mine and was done, in part, to ensure that the Stump Dump area be reclaimed at the conclusion of mining." [R. 31].

The Department's reliance upon the Dickert Affidavit is contrary to its own 1987 Policy regarding discrepancies in "figures presented for overall area to be affected by mining. Such discrepancies, whether concerning affected acres, reclamation plans, or operation related impacts, must be cleared up prior to rendering a determination under SEQRA. Furthermore, *a clear paper record made of the resolution must be made in the file*." [R. 2738 (emphasis added)]. No such "clear paper record" of the alleged ministerial resolution exists. An agency acts in an arbitrary and capricious manner when the determination is "inconsistent with an agency's own precedent . . . or provides no basis for lack of adherence thereto . . . ."

[13] Ms. Dickert acknowledges, however, that the increase in the financial security calculation "was driven by recalculation of the true cost for reclamation . . . not by the addition of the three acres." Dickert Aff. ¶ 34.

Uniform Firefighters of Cohoe v. Cuevas, 276 A.D.2d 184, 187 (3d Dept. 2000) (citing Matter of Charles A. Field Delivery Serv., 66 N.Y.2d 516, 520 (1985)). Ms. Dickert also cites to and Supreme Court relied upon a DEC policy memorandum[14] that "post-dates the Agreement" despite previously acknowledging that documents not before the agency at the time of the decision are not proper. [R. 32]. However, the 2019 Policy specifically states "that such "administrative updates" as DEC alleges occurred here, are inappropriate for mines that were over-excavated or areas that were mined or affected by mining outside the approved Life of Mine Area *since the initial permit was issued*." [R. 3373 (emphasis added)]. The June 2016 violation includes failure to properly delineate the life of mine with appropriate markers and over-excavation at the site. [R. 841-2842]. Thus, even under the recently enacted 2019 Policy, Sand Land should be disqualified from consideration for such administrative updates and the DEC determination to attempt to utilize this Policy for this purpose on the Renewal or Expansion Modification is arbitrary and capricious. DEC's after-the-fact justifications do not provide a proper basis to establish the asserted rationale for these decisions.

[14] It should be noted that the process for creating this policy was allegedly begun in March 2018, after the CALJ determined that the horizontal and vertical expansions of the Sand Land mine were significant modifications requiring the DEC comply with ECL § 23-2703 and § 23-2711.

The relevant question is not whether a rational basis could be created to justify DEC's actions, but whether the actual basis for these decisions as set forth in the record was rational. See Office Bldg. Assocs., LLC, 95 A.D.3d at 1404 (noting the "Court cannot search the record for a rational basis to support the Board's determination") (citing Matter of National Fuel Gas Distrib. Corp. v. Public Serv. Commn. of the State of N.Y., 16 N.Y.3d 360, 368 (2011)).

Likewise, the court relies upon the Dickert Affidavit to provide the rationale for the withdrawal of the NIM, allegedly based upon sufficient unmined sand, absence of data showing mining has a negative impact on groundwater quality, and agreements by Sand Land to surrender its Part 360 registration and perform groundwater monitoring. [R. 34]. However, Ms. Dickert provides no rationale for addressing the concern articulated in the NIM that mining in and around areas where processing and storing of materials had previously occurred would release contaminants into the groundwater. Nothing in the Administrative Return supports her rationales regarding these determinations.

The Administrative Return is devoid of any documentation between September 11, 2018 and February 21, 2019 (the date of the Settlement Agreement) supporting a determination by DEC to abandon the NIM's findings. Specifically, there is no documentation in the Return that reflects how DEC addressed the more imperative issue contained in the NIM of the threat to the aquifer and the

contamination of the existing sand. Although the Settlement Agreement speaks to a future limited Department-approved protocol for ground water monitoring being put in place (R. 3255, ¶ 4), the potential issue of contamination after the fact fails to address the existing contamination currently impacting the aquifer raised in the NIM (and fails to meet the requirements of SEQRA as discussed below). Indeed, even Sand Land's letter response to the NIM glosses over this issue, merely asserting in a conclusory footnote that no contamination has occurred. [R. 3178]. DEC, according to their own record, did not conduct, or rely upon, a single scientific soil or groundwater test that refuted the findings of contamination at the Mine revealed by the SCDHS investigation. The concerns expressed in the Denial Letter regarding groundwater impacts are reiterated in the NIM issued some three and half years later demanding Sand Land cease mining. DEC's failure to provide documentation addressing this lingering threat and issue the Renewal Permit (the horizontal portion of the 2014 expansion request), and then the 40 foot vertical Modification (the second part of the 2014 expansion request) is arbitrary and capricious. Doing so without any scientific support is clearly reversible error.

Just as Supreme Court erroneously considered Ms. Dickert's affidavit in order to supply the missing rationale for the Settlement Agreement and Renewal Permit, it should not have relied upon Ms. Dickert's erroneous interpretation of the ECL as further discussed below and the Appellant's .

II. Supreme Court erred in holding that the CALJ's decision prohibiting DEC from processing a prior substantially similar application is not binding on DEC's processing of the renewal and modification permit.

The 2014 application requested a horizontal expansion to mine an additional 4.9 acres and a vertical expansion to mine to a depth of 120 feet AMSL. [R. 102]. Together, the 2019 Renewal and 2019 Modification Permits ultimately granted a horizontal expansion, allowing the mining of 3 of the 4.9 additional acres, and a vertical expansion taking the "final mine floor elevation . . . from the current elevation of 160 feet amsl to elevation 120 feet amsl (40-foot deepening)". [R. 3379; R. 3499]. The clear and substantial intersect between the denied 2014 application and the 2019 permits establishes that the Department's reversal was arbitrary and capricious and error of law.

A. The 2014 Modification Application and the 2019 Renewal and Modification are substantially identical.

Supreme Court concluded that DEC's determinations on the 2014 modification application, including the rulings of the CALJ, were not binding on the 2019 renewal and modification applications. The court accepted DEC's arguments that the 2014 modification application was a different application and thus decisions related thereto were not binding on the latter applications. Supreme Court committed reversible error as the 2019 renewal and modification combine into

substantially and materially the same expansion as the 2014 application, and the CALJ's decision was binding upon the Department's subsequent review.

The doctrine of *stare decisis* "applies to administrative agencies acting in a quasi-judicial capacity" (Matter of Bull (Yansick Lbr. Co. – Sweeney), 235 A.D.2d 722, 723 (3d Dept. 1997) (citing Charles A. Field Delivery Serv., 66 N.Y.2d at 518). "The underlying precept is that in administrative, as in judicial, proceedings 'justice demands that cases with like antecedents should breed like consequences.'" Charles A. Field Delivery Serv., 66 N.Y.2d at 519 (quoting Davis, *Doctrine of Precedent as Applied to Administrative Decisions*, 59 W.Va.L.Rev. 111, 117). "Absent an explanation by the agency, an administrative agency decision which, on essentially the same facts as underlaid a prior agency determination, reaches a conclusion contrary to the prior determination is arbitrary and capricious." Id. at 518. "The failure to provide a justification for the change requires reversal even if there is substantial evidence to support the agency's determination." Terrace Court, LLC v. New York State Div. of Hous. & Cmty. Renewal, 18 N.Y.3d 446, 453 (2012).

The CALJ issued a clear decision and interpretation of the ECL. That decision is no mere recommendation but is binding upon the parties to the administrative proceedings until it is administratively appealed to the Commissioner. See Matter of Bull, 235 A.D.2d at 724 ("[i]f the CALJ's decision is not appealed, it is binding upon the parties to the proceeding and entitled to

preclusive effect as fully as if it were the decision of the ultimate administrative arbiter."). Since DEC and Sand Land have not appealed the CALJ's decision, the CALJ's interpretation and application of ECL §23-2703 and §23-2711 are binding upon DEC. Failure to comply with the CALJ's decision is, therefore, clearly arbitrary and capricious.

DEC never explains why the CALJ's decision was not binding upon the 2019 Renewal despite both the 2014 Application and the 2019 Renewal including the same 3-acres. The failure to include such an explanation renders the 2019 Renewal arbitrary and capricious regardless of any after-the-fact justification. See Terrace Court, LLC, 18 N.Y.3d at 453.

In its Response to Comments on the 2019 Permit Modification, the DEC cites to the 2014 modification including a 1.9-acre horizontal expansion and cessation of VOWM processing, as distinguishing the 2019 application from the 2014 application. [R. 3510, ¶ 5]. To the extent that this explanation was intended to explain why the CALJ's decision on the 2014 application is not binding, such rationale was factually flawed. Supreme Court clearly erred in accepting the DEC's rationale premised upon a contrived bifurcation of the horizontal and vertical expansions, making the Court's refusal to apply the CALJ determination improper.

Supreme Court concluded that the CALJ's determination regarding the 2014 modification application is not binding on either the 2019 Renewal or the 2019

Modification application. In relation to the 2019 Renewal, Supreme Court set forth three distinctions from the 2014 application: 1) the 2014 application sought both a vertical expansion and a horizontal expansion; 2) the horizontal expansion in 2014 included "a 1.8 acre 'area of modification' as well as the 3.1 acre Stump Dump, characterized in the 2019 application as an 'area affected prior [to] 1975'"; and 3) the 2014 expansion "contemplated that Sand Land's processing of the [Vegetative Organic Waste Management ("VOWM")] would continue." [R. 38]. Supreme Court distinguished the 2019 Modification application for a vertical expansion on the basis that the 2014 application sought both a vertical *and* a horizontal expansion. [R. 40-41].

By addressing the renewal and modification applications separately, Supreme Court accepts a contrived fiction and improperly segments the review of what is one project. The Settlement Agreement establishes a single process involving two applications clearly directed towards a single goal: mining 34.5 acres to a depth of 120 feet, the same goal thwarted by denial of the 2014 application. The Settlement Agreement added the horizontal expansion of the Stump Dump in the renewal and specifically provided that "the agreements and covenants set forth herein are expressly contingent upon the Department's issuance of the modified permit." [R. 3256, ¶ 9; R. 3258, ¶ 15]. DEC's decision to just amend the Negative Declaration for the 2014 permit application and not perform a new SEQRA review on the 2019

Modification substantiates that the 2019 Renewal and Modification applications were intended to obtain the same relief as the 2014 application. [R. 3384-3387].

Supreme Court's error in considering the renewal and modification applications separately instead of as a single process results in the court citing to the 2014 vertical expansion to distinguish the Renewal's horizontal expansion, and citing the 2014 horizontal expansion to distinguish the Modification's vertical expansion. Compare R. 38 with R. 40. When properly considered as a whole, the determinations set out in the Settlement Agreement are sufficiently similar to the 2014 application that the CALJ's findings should be binding on DEC, or require a clearly evidenced determination in the Administrative Return to support the change in position. Even if considered separately, Supreme Court's distinctions between the 2014 application and the 2019 renewal and modification do not support ignoring the CALJ's rulings.

Supreme Court accepts false distinctions that the CALJ did not make. First, the court cites to the 2014 application's horizontal expansion including both the Stump Dump and an additional 1.8 acres. The CALJ's decision makes no distinction between the 1.8 acres and the Stump Dump, treating all 4.9 acres as "more acres than previously approved." [See R. 125; R. 133-135]. In 2014, DEC, Sand Land, and the CALJ all considered removal of sand in the Stump Dump to require a permit modification.

Second, the court cites the fact that the 2014 application "contemplated that Sand Land's processing of VOWM would continue." However, the CALJ never addressed the VOWM activities. [See generally R. 122-136]. Moreover, the VOWM activities are irrelevant to whether notice is required under ECL §23-2711(3) or whether DEC is barred from processing an application to mine under ECL §23-2703(3).

Finally, there is no dispute that the 2014 Modification Application at issue in the CALJ's decision included the same vertical expansion as the 2019 Modification. DEC's justification for not following the CALJ's decision ignores the CALJ's clear references to the vertical expansion. The CALJ clearly stated "applicant's application seeks a material change in the previously permitted activities at its mine. Applicant's proposal to excavate 4.9 more acres *and 40 feet deeper* than its previously approved life of mine limits would have the effect of increasing the volume of its mine by more than two-thirds." [R. 133 (emphasis added)]. The CALJ also cited the two-thirds increase in volume in concluding the application sought a material change, which clearly includes the much more significant vertical expansion. [Id.]. Thus, the vertical expansion at issue in the 2019 Modification was clearly a factor and part of the CALJ's decision on the 2014 Modification Application.

None of the distinctions Supreme Court draws materially affect the CALJ's decision. However, even if the asserted distinctions render the CALJ's ultimate determination (to pause processing of the 2014 application) not binding, Supreme Court does not explain why the CALJ's legal interpretations of the ECL (e.g., that treating an application as a "new" application requires compliance with the notice provision or that "area not previously permitted" includes both vertical and horizontal areas) are not binding.

B. Allowing DEC to proceed with the permit process violates DEC administrative procedure, by ignoring prior DEC Decisions that are binding on DEC and Sand Land

Given that the 2014 and 2019 applications are fundamentally the same, since they sought the same outcome (permission to mine 34.5 acres to a depth of 120 feet), the decisions in the still-pending 2014 application continue to control the administrative process. In particular, the 2014 modification application was denied by the DEC Executive Deputy Commissioner in the 2015 Denial. As shown above, the 2015 Denial is a binding decision that is subject to the doctrine of *stare decisis,* so it has a preclusive effect on DEC's review of the 2019 applications. Moreover, the 2015 Denial is a final agency decision that can only be reversed or modified by using DEC's procedural processes, not by ignoring them. See Gilman v. New York State Div. of Housing and Community Renewal, 99 N.Y.2d 144, 151-52 (2002) (noting that "[a]gencies are required to abide by their own regulations" and finding

that the agency "acted irrationally" when "the rules were changed in midstream"). The Court should not allow DEC and Sand Land to do an end run around the 2015 Denial, which has not been legally overturned or modified.

Initially, the applicant availed itself of the proper DEC process in order to try and reverse the 2015 Denial, and the matter was referred to the Office of Hearings and Mediation Services ("Office of Hearings") pursuant to the DEC's Part 624 hearing procedures. [R. 3239]. Notably, a "pre-adjudicatory hearing issues conference" was held, and the parties engaged in "post-issues conference briefing" over almost three years. [Id.] However, the adjudicatory hearing never continued as a consequence of DEC's decisions to enter into the Settlement Agreement and then grant the 2019 Renewal and Modification Permits, sidestepping the adjudicatory hearing process.

DEC's approach undermines the core purpose, function, and operation of the independent administrative adjudication undertaken by the Office of Hearings. See Matter of Preble v. Zagata, 263 A.D.2d 833, 835 (3d Dept. 1999) (noting that once the circumstances established that a hearing should be held, "the resulting adjudicatory hearing was mandatory"). See also ECL §70-0119(1) (stating that when the criteria have been triggered, "the department *shall* hold a public hearing on the application") (emphasis added). "The principal function of the hearing is to resolve disputed issues of fact." 6 NYCRR Part 624, Introduction Notes. The

hearing is intended to "provide a fair and efficient mechanism for the development of a factual record for the decision on a permit . . . ." 6 NYCRR Part 624, Introduction Notes. By issuing the 2019 Renewal and Modification Permits, the DEC Director of the Division of Environmental Permits acted as judge, jury, and appellate decision-maker all in one fell swoop, in violation of DEC regulatory process.

Moreover, the Director of the Division of Environmental Permits acted in excess of his jurisdiction by issuing the 2019 permits despite the valid and intact 2015 Denial. See Catskill Heritage Alliance, Inc. v. New York State DEC, 161 A.D.3d 11, 17 (3d Dept. 2018) (noting that the Commissioner, not staff, could reverse a prior decision and bypass the administrative hearing process because "under the Environmental Conservation Law, *it is the Commissioner alone* that is vested with the authority to evaluate the environmental impacts associated with a requested permit and to hold administrative hearings") (emphasis added). The Director of the Division of Environmental Permits "had no authority . . . to impose the prescriptions that he did" by eliminating the adjudicatory hearing before the CALJ, and issuing the challenged permits, in contravention of the final and binding 2015 Denial issued by the DEC Executive Deputy Commissioner. Conley v. Ambach, 61 N.Y.2d 685, 688 (1984). See also Matter of Preble, 263 A.D.2d at 835. Additionally, pursuant to DEC's own regulations, the CALJ makes the initial ruling

on a request or motion, which can then be appealed to the Commissioner. See 6 NYCRR §§624.6(c)(4), 624.8(b)(1)(i), 624.8(d). The "administrative appellate review" of the CALJ's ruling by the Commissioner is the cornerstone of a fair administrative hearing process. See In the Matter of the Town of Marbletown's Application, Interim Decision of the Commissioner, 1982 WL 177226 at *2 (DEC Case No. 56-S27 October 21, 1982) (noting that "an adjudicatory hearing is . . . a legislatively mandated forum both for the adjudication of [applicant's] entitlement to a permit and the involvement of the public likely to be impacted by the issuance of such a permit").

Finally, the DEC regulations grant the parties to a DEC permit hearing proceeding the right to participate in the hearing, to appeal to the Commissioner, and to receive a final decision based upon the CALJ's recommendations. See 6 NYCRR §§624.5(e), 624.8, 624.13. See also 9 NYCRR §4.131(II)(F), Executive Order No. 131: Establishing administrative adjudication plans (requiring, in the case of a "conflict with the findings, conclusions or recommended decision of the hearing officer", that the "head of an agency, or the designee shall set forth in writing the reasons why the head of the agency reached a conflicting decision."). These rights are fundamental parts of the process that cannot simply be dispensed with at the whim of DEC staff. The issuance of the 2019 Renewal and Modification Permits, granting the same expansions requested by the 2014 permit application, completely

eviscerated the administrative hearing process and the Petitioner-Appellants' ability to "present evidence on issues of fact, and argument on issues of law and fact *prior to the commissioner's rendering of a decision on the merits*." 6 NYCRR §624.2(a) (emphasis added). Appellants were also deprived of the right to have an impartial CALJ decide the issues and motions and to appeal from the CALJ's decision(s) to the Commissioner.

Accordingly, DEC's decisions, granting the 2019 Renewal and 2019 Modification Permit in violation of DEC's own administrative process, must be annulled. See Matter of Mid Is. Therapy Assoc., LLC v. New York State Educ. Dep't., 129 A.D.3d 1173, 1175 (3d Dept. 2015) (holding that "an agency determination arrived at in a manner inconsistent with its own regulations is not supported by a rational basis" and, therefore, must be overturned); Matter of Roche v. Turner, 186 Misc.2d 581, 586-88 (Sup. Ct. N.Y. Co. 2000) (holding that a decision made "in violation of the State Agency's own regulation . . . was a denial of due process such that a remand for a *de novo* hearing is required").

III. Supreme Court erred in upholding an Amended Negative Declaration that ignored the procedural and substantive requirements of SEQR, and improperly relied upon future groundwater results.

Supreme Court determined that "the record sufficiently demonstrates that DEC took the requisite hard look at the environmental issues in accordance with SEQRA" and provided a reasoned elaboration of the basis for its determination. [R.

42]. However, failure to achieve strict compliance with the letter and spirit of the State Environmental Quality Review Act ("SEQRA") requires annulment of subsequent decision-making. See ECL Article 8. The record below reflects that DEC failed to comply with both the letter and spirit of the law, and both the Amended Negative Declaration and the Modification Permit issued in reliance thereon should be annulled. The March 15, 2019, "Amended Negative Declaration" ostensibly determined that mining "an additional 40 vertical feet below the current floor of the mine" (now 34.5 acres) would "not result in any significant adverse environment [sic] impacts," ignoring critical areas of environmental concern. [R. 3384].

A. DEC's Amended Negative Declaration violates SEQRA's strict procedural requirements

Legislative and judicial mandates require "strict, not substantial, compliance" with SEQRA. Matter of King v. Saratoga County Bd. of Supervisors, 89 N.Y.2d 341, 347 (1996). "Because SEQRA requires strict adherence to its procedural requirements, the [DEC's] failure to comply with those procedural requirements cannot be deemed harmless." Pyramid Co. of Watertown v. Planning Bd. of Town of Watertown, 24 A.D.3d 1312, 1313 (4th Dept. 2005). DEC's failure to comply with those procedural mandates regarding the Mine expansion requires the Amended Negative Declaration be annulled.

The proposed mining expansion was identified by DEC as a Type 1 action, thus subject to a presumption, pursuant to 6 NYCRR §617, "that it is likely to have a significant adverse impact on the environment". DEC was required to complete Part 2 of the full Environmental Assessment Form ("EAF"). 6 NYCRR §617.6(a)(2). The Administrative Return does not contain a Part 2 or Part 3 of the EAF on the 2019 Modification.[15] A lead agency's failure to complete Parts 2 and 3 of the full EAF will nullify its SEQRA negative declaration. Citizens Against Sprawl-Mart ex rel. Alcuri v. Planning Bd. of City of Niagara Falls, 8 A.D.3d 1052, 1053 (4th Dept. 2004). See also Yellow Lantern Kampground v. Cortlandville, 279 A.D.2d 6, 11-12 (3d Dept. 2000) (annulling negative declaration when Town Board failed to complete Part 3). Although an agency can be considered to have properly complied with SEQRA's mandates if the contemporaneous record demonstrates the agency considered the factors set forth in Parts 2 and 3 and provides its answers, the record is devoid of such evidence here. Compare Coursen v. Planning Bd. of Town of Pompey, 37 A.D.3d 1159, 1160 (4th Dept. 2007) ("the minutes of the Board meeting in this case establish that the Board considered the factors set forth in Parts 2 and 3 of the short environmental assessment form and provided its answers."), with Rochester Eastside Residents for Appropriate Dev., Inc. v. City of Rochester, 150

[15] The Administrative Return also does not contain a completed Part 2 or Part 3 for the EAF on the 2014 Modification.

A.D.3d 1678, 1680 (4th Dept. 2017) ("despite the undisputed presence of preexisting soil contamination on the project site, the negative declaration set forth no findings whatsoever with respect to that contamination. The document containing the purported reasoning for the lead agency's determination of significance, *which was prepared subsequent to the issuance of the negative declaration*, does not fulfill the statutory mandate") (emphasis added).

Pursuant to SEQRA regulations, completion of parts 2 and 3 of the full EAF allows the lead agency to carefully consider all of the impacts of the action and to make a reasoned "determination of significance". 6 NYCRR §§617.6(a)(2), 617.7(b). The EAF "is a document developed specifically for SEQR that provides an organized approach to identifying and assessing the information needed by the lead agency as it makes its determination of significance". SEQR Handbook,[16] p. 77. DEC's failure to complete Part 2 of the EAF or to identify significant areas of environmental concern, resulted in a failure to consider a major issue of environmental concern requiring annulment of the Amended Negative Declaration. As a Type 1 action, DEC was required, pursuant to 6 NYCRR §617.7(b), to conduct a comprehensive SEQRA review of its "action" to expand the Mine but failed to do so. See Guptill Holding Corp. v. Williams, 140 A.D.2d 12, 18 (3d Dept. 1988)

[16] A copy of the SEQRA Handbook is available at https://www.dec.ny.gov/docs/permits_ej_operations_pdf/dseqrhandbook.pdf.

(Significant planned expansion of mining fully justified the request for additional information" and DEC subjecting the "application to full environmental review").

Although the 2014 application was denied, the Settlement Agreement states that the modification would be processed based upon the "existing Negative Declaration and the multiple legislative hearings[17] held on the prior, more expansive modification request . . . ." [R. 3257, ¶ 12]. However, the Amended Negative Declaration fails to contain the required reference to the original Negative Declaration or discuss the reasons supporting the amendment to the determination. See 6 NYCRR §17.7(e)(2). Additionally, as noted in the 2015 Denial, the prior Negative Declaration never adequately addressed the issue of potential groundwater contamination as a consequence of prior VOWM activities at the site (R. 2812),[18] and the Settlement Agreement acknowledges "an uncertainty regarding a correlation between groundwater contamination and VOWM" (R. 3254).

Supreme Court repeats DEC's misdirected statement that any issue of environmental concern was addressed by determining that sand mining does not have a negative impact on groundwater. [R. 42]. That is not the issue noted in the

[17] None of the information from DEC's "multiple legislative hearings" held for that application have been included in this Administrative Return.

[18] Any challenge to the 2014 Negative Declaration in the Administrative Proceeding on the Denial, suspended pending resolution with the Town of the issues under ECL §23-2703 and §2711, was circumvented through the Settlement Agreement on the subsequent NIM.

2015 Denial, the NIM, or raised in this proceeding or the comments on the 2019 application. Rather, the issue of significant environmental concern is whether increasing the depth of mine an additional 40 feet will increase the impact to the aquifer based upon the SCDHS' findings that the existing contamination at the Sand Land Mine has negatively impacted the underlying groundwater. The failure to properly identify that issue and properly evaluate its impacts demonstrates that the negative declaration was issued in violation of SEQRA and must be annulled. Similarly, the Modification Permit issued in reliance upon the Amended Negative Declaration must also be annulled.

B. The Negative Declaration must be annulled because DEC failed to take a "hard look" at the environmental impacts of the proposed expansion.

Even if DEC is considered to have complied with the procedures of SEQRA, the Administrative Return lacks any evidence to support DEC's claim that it took the requisite "hard look" at the groundwater impacts of deeper mining throughout the contaminated floor of the 34.5 acres of the mine when it issued the Amended Negative Declaration. Although the Amended Negative Declaration mentions eleven separate reasons supporting the determination [R. 3384-3387], the Administrative Return reveals DEC carefully avoided a review of the evidence regarding the impacts of mining the contaminated sand at this site.

The 2015 Denial specifically identified the failure of the Negative Declaration to consider VOWM activities at the mine and the impact of those activities on groundwater (as well as several other shortfalls in the negative declaration). The 2014 Negative Declaration references that Sand Land did submit "groundwater sampling results" as part of its 2014 application. [R. 2787]. Those results are not included in the Administrative Return and clearly were not sufficient to address concerns regarding potential impacts on groundwater, as demonstrated by the subsequent 2015 Denial and the NIM.

Even prior to the 2018 SCDHS Report based upon groundwater testing at the Mine, the 2015 Denial specifically referenced the concerns of SCDHS about possible "significant impacts to groundwater quality" at this location. [R. 116, ¶ 6]. The 2015 Denial further states "SCDHS recommends that DEC evaluate the impacts from the composting and C and D processing facility on groundwater given its location in a Special Groundwater Protection Area established by New York State, and within a designated Critical Environmental area established by the Town of Southampton and Suffolk County. . . . *The negative declaration did not address that issue.*" [Id. (emphasis added)]. That evaluation was never performed. Except for an additional statement that the "mulching and composting operations at the facility were terminated in 2018," DEC's Amended Negative Declaration is virtually the

same inadequate environmental review as the 2014 Negative Declaration that the DEC itself previously found to be insufficient. Compare R. 2787 with R. 3385.

The 2018 NIM recognized that "multiple investigations into potential groundwater impacts from vegetative organic waste processing activities on Long Island have been completed *in the last three months*. These studies were conducted by Suffolk County Department of Health Services (dated June 29, 2018) [the SCDHS Sand Land study], DEC (dated June 2018) [the DEC/SCDHS multiple facilities study], and Alpha Geoscience (dated August 2018) [Sand Land's own study]." [R. 3165 (emphasis added)]. Nothing in the Administrative Return identifies or addresses these groundwater investigations and impacts as items of environmental significance or reviews their effect on the 2014 Negative Declaration.

The Amended Negative Declaration does not mention the NIM or its statement that "the areas where [future] mining could occur are the subject of groundwater monitoring investigations." [R. 3164; R. 3384]. The Amended Negative Declaration acknowledges that the "mine site is located within an area designated as a Sole Source Aquifer and a Special Groundwater Protection Area" and that "the mine is within the Town of Southampton's Aquifer Protection Overlay District", but it does not address the June 2018, SCDHS report.[19] [R. 3384].

[19] The SCDHS Report is included in the Administrative Return and Record at R. 2923-2969.

The language of the Amended Negative Declaration carefully avoids the issue of the impacts at the Mine, instead stating "[a]ll vegetative waste has been removed from the mine site" and continuing "[t]he mining operation does not introduce chemicals or contaminants to the soils." [R. 3385]. This ignores the acknowledged environmental concern that "[f]uture site activities in and around those areas where processing of vegetative waste *formerly occurred*, have the potential to allow the release of contaminants in that area which could impact the local groundwater." [R. 2812].

DEC's contemplation of the threat to the aquifer was limited to its statement that the "expected 90 feet of sand and soil will provide filtering and buffering benefits to further protect groundwater below the new floor of the mine." [R. 3385]. However, the SCDHS 2018 report concluded that the activities on the entire 50-acre Sand Land site have the potential to contaminate the groundwater, even with a residual 90-foot separation between the groundwater and the bottom of the mine after removal of another 40 feet of protective sand. [R. 3684-3699; 3957-3969; 4251-4266]. DEC completely ignored that report and its implications for the Sand Land Mine when it issued the Amended Negative Declaration.

It was arbitrary and capricious for DEC to fail to evaluate the existing groundwater impacts at the Sand Land site, and to fail to take into consideration all of the previously-identified concerns about Sand Land's operations (R. 2813), when

making the determination of significance for the 2019 vertical expansion application. "Because respondent, in arriving at its decision to issue a negative declaration despite the existence of several "potential large impacts" the project might have on the environment, did not address the requisite criteria for determining whether those impacts are actually "important" (*see,* 6 NYCRR former 617.11 [c], replaced by 6 NYCRR §617.7 [c] [3]), it cannot be said to have made, as it was obliged to, a "reasoned elaboration" of the basis for that determination". Watch Hill Homeowners Ass'n Inc. v. Town Bd. of Town of Greenburgh, 226 A.D.2d 1031, 1033 (3d Dept. 1996).

C. DEC's Negative Declaration improperly relied on future groundwater monitoring.

DEC's Amended Negative Declaration must be annulled because it relies on future studies and mitigation to assess potential environmental harm to the aquifer. Conditioning the negative declaration on the future installation of groundwater monitoring wells and relying on future action to "mitigate any changes to groundwater quality originating from the mine" (R. 3386) is the antithesis of SEQRA planning and review. The potential impacts must be evaluated before making the SEQRA determination of significance and before permitting the action to take place. See Miller v. City of Lockport, 210 A.D.2d 955, 957 (4th Dept. 1994) (annulling negative declaration because instead of studying the environmental impacts, "conditions were being imposed" on the facility); Matter of Corrini v.

Village Of Scarsdale, 1 Misc.3d 907(A), 2003 WL 23145905 (N.Y. Sup. Ct. 2003) (annulling negative declaration because lead agency failed to study the relevant impacts and left it for future review and analysis).

Here, the DEC explicitly ordered groundwater quality testing for the site in February 2019, more than two weeks before issuing the Amended Negative Declaration for the application to mine an additional 40 feet deeper. [R. 349, ¶ 4; R. 4924, ¶ 25; R. 8440-8441]. Instead of waiting for the results of that testing, the DEC issued the Amended Negative Declaration without the test results, and improperly relied on future analysis and potential mitigation to justify its determination of no significant environmental impact. See Wellsville Citizens ex rel. Responsible Development, Inc. v. Wal-Mart Stores, Inc., 140 A.D.3d 1767, 1769 (4th Dept. 2016) (finding a failure to take a hard look when municipality failed to require studies to investigate the veracity of information regarding potential environmental impact). DEC's failure to wait for the results when making its determination fails to comply with the strict requirements of SEQRA and requires annulment of its negative declarations and the subsequent Modification Permit. Schenectady Chemicals, Inc. v. Flacke, 83 A.D.2d 460, 463 (3d Dept. 1981) ("The numerous State and local agencies charged with SEQRA compliance may be tempted to circumvent the fundamental, impact statement requirements if it appears that such defects may be subsequently cured without consequence.").

Relying on information that could be made available to DEC after the negative declaration is issued does not cure DEC's failure to take a hard look at environmental issues prior to the issuance of the negative declaration:

> [s]ubsequent analysis performed by DEC … have nothing to do with the distinct broader requirements of SEQRA, which provisions had already been held to be inapplicable by the DEC's issuance of the negative declaration. Because the SEQRA review and a determination of significance must be made prior to the commencement of the mining permit review process, the record should reflect that sufficient information was gathered and analyzed prior to the issuance of the negative declaration in order for the Court to be able to uphold it, which is simply not the case here.

Bervy v. New York State Dept. of Environmental Conservation, No. 2849-00, 2001 WL 37130714, at *11 (N.Y. Sup. Ct. June 08, 2001) (citing Matter of Schenectady Chemicals, Inc., *supra*). See also Matter of Phelps v. Town Bd. of the Town of Alabama, 174 Misc.2d 889 (N.Y. Sup. Ct. 1997). Accordingly, DEC's negative declaration must be annulled because it relied upon future groundwater monitoring results, and thus DEC made an uninformed determination about the significance of environmental impacts.

D. The Court erred in Denying Appellants' Motion Seeking Leave to Submit Supplemental Evidence in Support of the Petition as it demonstrates DEC was Ignoring Its Own Groundwater Monitoring Results.

Once the groundwater quality testing results were made available to DEC it irrationally ignored those results in its still-pending review of the vertical expansion application (to mine an additional 40 feet deeper). The groundwater quality testing

was conducted in March and April of 2019 and resulted in four groundwater quality reports. [R. 4920-4921, ¶¶ 10-12; R. 4924, ¶ 25; R. 4933-8419]. The Modification Permit, allowing mining an additional 40 feet deeper, was not issued until June 5, 2019. [R. 1012]. Nevertheless, DEC did not include the four groundwater quality reports in its July 29, 2019 Administrative Return submitted to Supreme Court in this Article 78 proceeding. [R. 2723-3517]. As a result, once Appellants' counsel discovered the existence of the four reports (via Freedom of Information Law requests), Appellants sought to have them added to the Administrative Return. [R. 4915; R. 4931; R. 8442-8447].

The four reports "actually confirm and support the integrity, accuracy, and reliability of the Suffolk County 2018 Report" and "show that the overall impacts to the groundwater quality are even worse than anticipated." [R. 9183-9184, ¶ 8; R. 9185, ¶ 11]. The reports also showed that the groundwater under the Sand Land mine is worse than similar sites that "are considered to pose significant problems for groundwater quality". [R. 9185-9187, ¶¶ 12-16]. Further, the "results indicate that . . . remedial efforts are necessary to prevent the contaminants in the soil from impacting the groundwater." [R. 9188-9189, ¶22]. "Ongoing mining activities prevent any such remedial efforts." [Id.].

Not only did DEC not provide these groundwater quality reports in the Administrative Return, there is no evidence in the Administrative Return reflecting

that DEC reviewed or analyzed the reports that it had required and referenced in the Settlement Agreement and in the Amended Negative Declaration, and there is nothing reflecting that DEC conducted any scientific comparison of these four reports to the prior Suffolk County report.[20] Supreme Court found that "the Reports were in existence at the time DEC issued the modified permit challenged in this proceeding (June 2019)", but held that "it would be inappropriate for the Court to consider groundwater data/analysis that post-dates the Amended Negative Declaration in determining whether DEC's environmental review of the application – memorialized in the Amended Negative Declaration – was arbitrary and capricious." [R. 28-29]. The Court then rejected Appellants' argument "that it was arbitrary and capricious for DEC to fail to consider the Reports before issuing the modified permit." [R. 29].

Since the Amended Negative Declaration was explicitly conditioned on the groundwater testing, the results of which are set forth in the four reports, and the Modified Permit relied on both the Amended Negative Declaration and was issued after the four reports, the groundwater quality reports should have been included in

[20] Affidavits from the SCDHS scientists who conducted the 2018 study were provided to DEC during the comment period on the 2019 Modification application indicating that mining in this location would unduly impact the groundwater due to existing contamination from prior VOWM activity. [R. 3654-4533; R. 3684-3699; R. 3957-3969; R. 4251-4266].

the Administrative Return. Moreover, for Supreme Court to make a substantive finding about the DEC's failure to consider the reports, the Court should have at the very least had the reports in the record before it. Supreme Court erred by making a ruling on the substance of Appellants' claims about the supplemental evidence while not granting Appellants' motion to file the supplemental evidence.

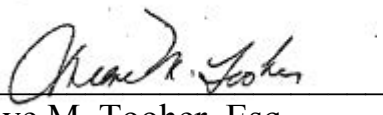
CONCLUSION

Respondents DEC and Sand Land, dissatisfied with the CALJ's rulings and the Department's own decisions to deny the 2014 Modification application and issue a NIM to cease mining, utilized a Settlement Agreement to circumvent and negate those decisions by approving an expansion of mining through a Renewal permit adding acreage and a Modification permit adding depth. The Administrative Return fails to identify a rational and proper basis for those determinations. Supreme Court erred by instead relying on an Affidavit supporting those determinations containing after-the-fact justifications without first-hand knowledge of the decision-making process. Supreme Court further erred in allowing DEC to ignore the CALJ's interpretations of ECL §23-2703 and §23-2711, and instead rely on an interpretation that moots the purpose of those provisions to provide towns on Long Island the authority to protect their groundwater. Finally, Supreme Court erred in sanctioning DEC's decision to ignore the procedural and substantive requirements of SEQRA, as well as the very groundwater testing results upon which the Amended Negative

Declaration of Significance was premised, when issuing the 2019 Modification Permit.

In entering into the Settlement Agreement, withdrawing the NIM, and issuing the Renewal and Modification Permits, DEC abandoned its obligation to enforce the State's policy "to conserve, improve and protect its natural resources" and ignored its own policies and prior determinations, the scientific evidence, and the law. The Court should reverse Supreme Court's denial of the Petition as Supplemented and nullify the Department's approval of the Settlement Agreement, Renewal Permit, and Modification Permit.

Dated: November 23, 2020



Meave M. Tooher, Esq.
William Demarest, Esq.
Tooher & Barone, LLP
Attorneys for Petitioners-Appellants 101Co, LLC, 102Co NY, LLC, BRRRubin, LLC and Bridgehampton Road Races, LLC
313 Hamilton Street
Albany, New York 12210
(518) 432-4100

Claudia K. Braymer, Esq.
Braymer Law, PLLC
Attorneys for Petitioners-Appellants Citizens Campaign for the Environment, Group for the East End, Noyac Civic Council and Southampton Town Civic Coalition
P.O. Box 2369
Glens Falls, New York 12801
(518) 882-3252

Zachary Murdock, Esq.
Lazer, Aptheker, Rosella
& Yedid, P.C.
Attorneys for Petitioners-Appellants Joseph Phair, Margot Gilman and Amelia Doggwiler
225 Old Country Road
Melville, New York 11747
(631) 761-0860

PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 1250.8(f) and (j)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules and regulations, etc. is 12,283 words.