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.

REPLY 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

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

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

(For Further Appearances See Reverse Side of Cover)

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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

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INTRODUCTORY STATEMENT

Respondents' briefs paint a markedly false and virtually unrecognizable picture of the law, facts and record of this case. Appellants do not wish to belabor the Court's time responding to the numerous irrelevant issues and "facts" outside the record, which Respondents themselves acknowledge are not necessary to this Court's review[1], rife with ad hominem attacks on Appellants, mischaracterizations, and misstatements. Therefore, Appellants refer the Court to the Statement of Facts in Appellants Brief[2], which clearly sets forth the relevant facts and circumstances and demonstrates that the approvals at issue were part of a single, consolidated process intended to circumvent prior, unfavorable decisions.

Respondent New York State Department of Environmental Conservation ("DEC" or "Department") blames the Appellants for the length of this litigation; and accuses Appellants of ignoring the six other mines in Southampton and only being concerned with the Sand Land mine because it is located "adjacent to high value properties". Brief of Respondent New York State Department of Environmental Conservation (NYSCEF Doc. No. 153) p. 1 (hereafter "DEC Brief"). This bizarre attempt to evoke class warfare in order to prejudice this Court is inappropriate, irrelevant and unworthy of a submission to this Court. This

[1] SLC Brief p. 11; DEC Brief p. 4 n.1.
[2] See Brief for Petitioners-Appellants 101Co, LLC, et al (NYSCEF Doc. No. 139) ("Appellants' Brief").

case has been brought by a large coalition of Petitioners, including the Town of Southampton, residents, environmental and civic organizations (and is further supported by *amici* from Suffolk County and Towns across Suffolk County) to protect the drinking water of Suffolk County, and whilst these other mines are not relevant to this matter, Respondents quite incredibly, cite Appellant Town's litigation against one of those mines in their briefs.

This litigation flows directly from Respondent Sand Land Corporation and Wainscott Sand and Gravel Corp.'s ("Sand Land") repeated efforts, and failed appeals and objections, since 2014, to reverse four decisions and opinions by the DEC Deputy Executive Director, the DEC Chief Administrative Law Judge ("Chief ALJ") (twice), and the DEC Chief Permit Administrator, all denying their expansion application. Given this history, logic would dictate that DEC would be siding with Appellants in upholding these prior determinations. However, the parties are here today because Respondents, after failing in the normal transparent legal and administrative process, chose to work together to do an end run around that process to obtain in secret what they could not obtain under the normal permit review process.

Respondents also raise, and misrepresent, unrelated litigation related to this mine and various Appellants that involved admitted trespasses, violations of Town Law, and violations of Sand Lands mining permit. Incredibly, both Respondents

attempt to spin these cases as part of an underhanded plot to "close" the Mine, instead of arising from a proven pattern of Sand Lands illegal conduct.[3]

Respondents briefs lays bare the disturbingly cozy relationship between the regulator and the regulated entity. The remarkable symmetry of Respondents arguments and briefs, right down to the inclusion of the same typographical error and incorrect citations, is disillusioning for any citizen that expects the DEC to protect their water. Indeed, we now see the DEC adopting legal positions and factual and statutory interpretations, formerly put forth in opposition by Sand Land, to now directly contradict DEC procedures and previous decisions of their own former Deputy Executive Commissioner, their Chief ALJ and their Chief Permit Administrator. In order to try and justify four reversals of their permit expansion denial over the aquifer at this location, the DEC even attacks the Suffolk County Health Services department, which for decades DEC has relied upon for water quality testing and assessment in Suffolk County.

As set forth in greater detail below, Respondents' briefs are filled with contradictions, inconsistencies, factual allegations outside the Record and

[3] Respondents distort the results of those cases from the Second Department as affirming Sand Land's nonconforming right to mine, when the decisions affirmed the Neighbors' challenge to solid waste activities and denied Sand Land's appeal and attempt to reverse the Town's prohibitions of such activities. [Phair v. Sand Land Corp., 137 A.D.3d 1237 (2d Dept. 2016); Matter of Sand Land Corp. v. Zoning Bd. of Appeals of Town of Southampton, 137 A.D.3d 1289 (2d Dept. 2016)]. The Second Department's confirmation of the Town's determination that such activities violated the Town Law further undermines the DEC's claim to credit for the cessation of on-site solid waste activities in the Settlement Agreement.

erroneous legal conclusions in an effort to conceal the arbitrary and capricious purpose of the Settlement Agreement, Renewal Permit, and Modification Permit approval. Respondents' arguments are a transparent effort to cloak an improper effort to approve mining above the sole source aquifer that senior DEC personnel previously denied and to which the Town has stated its objection

Despite the numerous, specious diversions in Respondents' briefs, Appellants brief the following arguments in reply to the arguments of Respondents:

- Respondents' cannot overcome Appellants' showing that the affidavit DEC submitted below in support of its actions was not made by an affiant with first-hand knowledge of the decision-making process applied in making the subject determinations;
- Respondents' cannot avoid the DEC's Chief ALJ's ruling respecting the special ECL provisions enhancing towns' abilities to protect Long Island's aquifer, which is binding unless appealed to and overturned by the Commissioner;
- Respondents' effort to distinguish the 2014 and 2019 applications to avoid application of the Chief ALJ's Rulings are contradictory and inconsistent;
- Respondents have not rebutted Appellants' showing that DEC's review of environmental impacts of the proposed modification was arbitrary and capricious and is unsupported by the Record; and finally

- The voluminous appellate Record is complete.

Appellant Town of Southampton is filing a separate Reply brief addressing the arguments raised regarding additional statutory and municipal arguments, in which Appellants join.

ARGUMENT

I. The Dickert Affidavit cannot support the determinations herein, as neither the Record nor alleged knowledge of DEC procedures demonstrate Ms. Dickert's first-hand knowledge of the decision-making process.

Respondents' arguments in support of Supreme Court's reliance upon the Affidavit of Catherine Dickert are based upon mischaracterizations of the law, mischaracterizations of the affidavit itself, and assertions of fact not set forth in the Record or the affidavit. The simple fact remains that the Dickert Affidavit fails to demonstrate that Ms. Dickert had "first-hand knowledge of the decision-making process" as required for consideration of the affidavit. See Menon v. State Dep't of Health, 140 A.D.3d 1428, 1431 [3d Dept. 2016] (quoting Matter of Office Bldg. Assoc., LLC v. Empire Zone Designation Bd., 95 A.D.3d 1402, 1405 [3d Dept. 2012]).

It is undisputed that the DEC had the right to submit an affidavit with its Answer and the Administrative Return[4]; however, any affidavit an agency chooses to submit must meet the requirements of first-hand knowledge. DEC improperly seeks to shift its burden of demonstrating first-hand knowledge, to require that Appellants demonstrate a lack of such first-hand knowledge. (DEC Brief, p. 32).

In Matter of Office Bldg. Assoc., LLC, this Court explicitly looked to whether the affidavit "speaks to or otherwise evidences firsthand knowledge of the decision-making process." 95 A.D.3d at 1405. Likewise, where this Court has accepted the use of affidavits, information in the affidavits themselves demonstrated such first-hand knowledge. See e.g., Molloy v. New York State Workers' Comp. Bd., 146 A.D.3d 1133, 1134 [3d Dept. 2017]; Kirmayer v. New York State Dep't of Civil Serv., 24 A.D.3d 850, 852 [3d Dept. 2005]. Moreover, it is the *agency's* burden to present a record "sufficiently developed to provide an adequate basis upon which to review" the agency action. Matter of Global Tel*Link v. State of N.Y. Dept. of Correctional Servs., 70 A.D.3d 1157, 1159, 894 N.Y.S.2d 580 [3d Dept. 2010] (quoting Matter of Benson v McCaul, 268 AD2d 756, 757-758 [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

[4] Sand Land's erroneous assertion that such affidavit was required under CPLR § 7804(c) ignores the "if any" language within that section. However, this contention is irrelevant as to whether the Dickert affidavit demonstrates first-hand knowledge.

basis for the determination forecloses the possibility of fair judicial review and deprives the petitioner of his statutory right to such review") (citations omitted). Thus, the burden rests with the DEC and the affiant to establish the requisite first-hand knowledge.

Respondents also distort the requirement for first-hand knowledge of "the decision-making process" by claiming that only first-hand knowledge of the duly established procedures is sufficient, citing Kirmayer, 24 A.D.3d at 852. However, Kirmayer is inapposite to this case. The affidavit in Kirmayer was not submitted to provide the missing rationale. Instead, the petitioners challenged the qualification of the subject matter experts upon which the Commission relied and the submitted affidavit discussed the procedures utilized for review and selection of the experts. Id. at 851-52. In contrast, Supreme Court here explicitly recognized, as in Matter of Office Bldg. Assoc., LLC, that "the administrative record itself does not contain documentation which expressly provides DEC's rationale for several of the determinations challenged herein" (R. 26) and that the Dickert Affidavit was submitted to provide said rationale. Thus, unless the Dickert Affidavit establishes first-hand knowledge of the decision-making process, and not just the procedures or a review of the administrative record, it cannot "supply the rationale otherwise missing from the Board's determination." Molloy, 146 A.D.3d at 1134 (quoting Matter of Menon v. New York State Dept. of Health, 140 A.D.3d 1428, 1431 [3d

Dept. 2016]). Mere familiarity with procedures and post decision-making review is insufficient. Matter of Office Bldg. Assoc., LLC, 95 A.D.3d at 1405.

As set forth in the Appellants' Brief, the Dickert Affidavit does not establish such first-hand knowledge but rather demonstrates other individuals made the decisions. See Appellants' Brief, p. 21-24. The only testimony in the Dickert Affidavit that DEC cites is Ms. Dickert's generic assertion that her testimony is based upon a combination of personal knowledge, document review, and education, training and professional experience. See DEC Brief p. 32 (citing R. 1395). DEC fails to respond to Appellants' numerous citations to examples in which Ms. Dickert herself demonstrates a lack of first-hand knowledge. DEC broadly asserts, however, "all aspects of the challenged determinations were overseen and processed through the Division of Mineral Resources, which Dickert oversees as its Director." (DEC Brief, p. 33). Similarly, it states that the settlement agreement was signed by an individual from a different department only because he "is the executive staff member who often signs such agreements." Id. Neither statement cites to any document in the Record or the Dickert Affidavit for support and is, therefore, improper at this stage. See People ex rel. Carroll v. Keyser, 184 A.D.3d 189, 195 [3d Dept. 2020] ("appellate review is limited to the record made at *nisi prius* and, absent matters which may be judicially noticed, new facts may not be injected at the appellate level") (quoting Broida v. Bancroft, 103

A.D.2d 88, 93 [2d Dept. 1984]). See also Rizzo v. New York State Div. of Hous. & Cmty. Renewal, 16 A.D.3d 72, 75–76 [1st Dept. 2005] ("the court may not consider arguments or evidence not contained in the administrative record.") aff'd, 6 N.Y.3d 104, 843 N.E.2d 739 (quoting Brusco v. New York State Div. of Hous. & Cmty. Renewal, 170 A.D.2d 184, 185 [1st Dept. 1991]).

Sand Land asserts that the Dickert Affidavit states that "she personally directed mined land reclamation specialists to include the Stump Dump in the mine's acreage." Brief for Respondents-Respondents Sand Land Corporation and Wainscott Sand and Gravel Corp. (NYSCEF Doc. No.155) p. 36 (hereafter "SLC Brief") (citing R. 2715, ¶ 30). Sand Land does not actually quote the affidavit, which provides in full "I directed mined land reclamation specialists *performing financial security calculations* to *consider* 34.5 acres the correct and accurate life of mine acreage." (R. 2715, ¶ 30 (emphasis added)). Contrary to Sand Land's attempt to aggrandize the only statement in the Dickert Affidavit of her first-hand knowledge, the affidavit does not provide that she "directed" the inclusion of the Stump Dump in the renewal permit or settlement agreement. The referenced statement only provides that she directed staff to "consider" the Stump Dump when performing "financial security calculations," calculations not challenged herein.

Recognizing the weaknesses in the Dickert Affidavit, Sand Land asserts that even if the Dickert Affidavit should not be considered, the "sum and substance" of her affidavit is "shown by the documents within the administrative return." (SLC Brief p. 38 n.21). However, Supreme Court explicitly noted that those documents do not provide DEC's rationale. (R. 26). "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." Parkmed Assocs. v. New York State Tax Comm'n, 60 N.Y.2d 935, 936 [1983]. Thus, simply because DEC and Sand Land may be able to craft a *post hoc* basis for its determination (which they cannot) from cherry-picked documents, that does not support upholding an administrative determination that failed to state and in fact lacked a rational basis at the time it was made.

II. Chief ALJ's ruling is binding on DEC staff unless appealed to and overturned by the Commissioner.

Respondents, appreciating that the Chief ALJ's decisions contain legal determinations regarding the proper construction of the subject ECL provisions that would be dispositive in Appellants' favor if applied here, contend those decisions are non-final because they are potentially subject to review by the Commissioner and the deadline to appeal the Chief ALJ's decision to the commissioner has not expired. (DEC Brief p. 20; SLC Brief p. 43). Respondents'

arguments are improperly based on facts outside the Record, are legally unsupported, and are disingenuous.

Respondents contend that the Chief ALJ's Ruling on Threshold Issues is non-final.[5] DEC regulations grant the Chief ALJ the power to "rule upon all motions and requests, including those that decide the ultimate merits of the case" and to "hear and determine arguments on fact or law" in a Permit Hearing process. 6 NYCRR §§ 624.8(b)(1)(i) & 624.8(b)(1)(ix). The Chief ALJ's decisions were on a threshold issue of law pursuant to § 624.8, not a recommendation following a hearing. Furthermore, 6 NYCRR § 624.8 provides that an ALJ ruling on the merits of any legal issue made as part of an issues ruling "*may* be appealed to the commissioner." 6 NYCRR § 624.8(d)(1) (emphasis added). While available as a matter of right, an appeal is not required and "if the ALJ's decision is not appealed, it is binding upon the parties to the proceeding and entitled to preclusive effect." Matter of Bull (Yansick Lbr. Co. – Sweeney), 235 A.D.2d 722, 724 (3d Dept. 1997). Thus, until the Chief ALJ's ruling is appealed to the Commissioner, it remains binding upon the parties.

DEC asserts that Matter of Bull's determination that an unappealed ALJ decision is binding on the parties is inapplicable here based upon that court's

[5] Respondents both cite to the incorrect portion of the regulations. Part 624 regarding Permit Hearings is the applicable section, not Part 622, which concerns Uniform Enforcement Hearing Procedures.

holding that that principle did not apply to the Board involved therein, which the court equated to an appellate tribunal. (DEC Brief p. 21, citing Matter of Bull, 235 A.D.2d at 723). DEC ignores the fact that the "Board" at issue in Matter of Bull is equivalent to the Commissioner of the DEC, the final decider of the issues on appeal, not DEC staff, who made the determinations challenged herein.[6] DEC staff, like applicants and petitioners, has the right and obligation to appeal an ALJ determination. See Matter of Roseton Generating LLC, Decision of the Commissioner (March 29, 2019), available at https://www.dec.ny.gov/hearings/116622.html (last visited January 5, 2021) (addressing appeals by Department staff, Petitioners, and the Applicant). Thus, DEC staff are not equivalent to the Board in Matter of Bull, but are parties to the ALJ's determination, and so long as the Chief ALJ's decision remains unappealed, it remains binding upon the parties.

Respondents cite no authority for the proposition that an unappealed ALJ decision is not binding upon the parties if the time for appealing has not expired. Respondents repeatedly refer to the decision needing to be "final," but none of the cases they cite support that conclusion. Matter of Leggio v. Devine, does not use the term "final" when addressing the application of stare decisis and did not

[6] See also Matter of Harry's Nurses Registry, Inc., 171 A.D.3d 1410 (3d Dept. 2019) (addressing decision by Unemployment Insurance Appeal Board); Matter of Ingle, 129 A.D.3d 1424 (3d Dept. 2015) (same).

address an unappealed ALJ decision. 34 N.Y.3d 448 (2020). Moreover, the Court premised its decision upon a finding that the agency had complied with its "core policy" in that precedent, not that the prior determinations were inapplicable. Id. at 462. Matter of Terrace Ct., LLC v. New York State Div. of Hous. & Cmty. Renewal, likewise, does not use the word "final" and determined that the agency had complied with prior precedent. 18 N.Y.3d 446, 453 (2012). Finally, Matter of Catskill Heritage Alliance, Inc. v. New York State Dept. of Envtl. Conservation addresses the ability of the ultimate decision-maker – the DEC Commissioner – to reconsider its own non-final decision. 161 A.D.3d 11, 17-18 (3d Dept. 2018). Matter of Catskill Heritage does not give agency staff, even a Division Director, the ability to "reconsider" an ALJ's unappealed decision. The authority to overturn the ALJ's decision rests exclusively with the Commissioner.[7]

Moreover, it would be inequitable to rule that the Chief ALJ's unappealed decision is not binding in this case as Respondents have contrived to avoid such deadline expiring. As acknowledged by all parties, the Chief ALJ's decision was not appealed prior to the DEC's decision to process applications in contravention of that decision. Additionally, despite the Settlement Agreement explicitly

[7] Respondents also cite to various cases defining when an agency determination is "final" for purposes of ripeness in an Article 78 proceeding. Those cases are clearly inapplicable to the question of whether an ALJ decision in an administrative proceeding is binding on the parties if not appealed pursuant to the administrative procedures.

providing that "upon the Department's granting of the above stated modified permit application, Sand Land agrees to discontinue any ongoing administrative proceedings relating to the Department's denial of the previously sought modification, and to withdraw that application." (R.3257, ¶ 11). Sand Land acknowledges it has not discontinued such proceedings, which would have rendered the Chief ALJ's decision final. Instead, Sand Land obtained the stay of the deadline to appeal "until the final resolution of these proceedings" (SLC Brief p. 43 n. 22), thereby defeating a supposed key purpose of the settlement agreement and hedging their bets to keep their appeal alive, over apparent concern of the likelihood that the courts would restore DEC's previous expansion denials. DEC, despite trumpeting Sand Land's agreement to drop their appeals as a major consideration for granting the long-denied expansion, did not void the agreement when Sand Land refused to do so. Rather, DEC cooperated with Sand Land's attempts to stay the proceedings and toll the statute of limitations, and now argue that because the proceedings are not final, they are not binding. Thus, Sand Land and DEC's self-serving efforts to postpone the deadline for an appeal based upon this case forms the very basis of why Sand Land and DEC contend the Chief ALJ's decision is not binding in this litigation.

III. Respondents' effort to distinguish the 2014 and 2019 applications to avoid application of the Chief ALJ's Rulings is contradictory and inconsistent.

Respondents contend that the 2014 Application for a horizontal and vertical expansion was a different application and not substantially identical to the combined 2019 Renewal and Modification applications and therefore not subject to stare decisis or res judicata. (DEC Brief, p.21; SLC Brief, p. 16). Respondents' arguments are inherently contradictory and unsupported by the Record.

Even the Dickert Affidavit, upon which Respondents improperly rely, contradicts the narrative that the inclusion of the Stump Dump in the renewal was independent of the future vertical expansion. Both Respondents' Briefs highlight the same explanation:

> [H]ad 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.

(DEC Brief p. 34 (citing R. 2716 ¶ 33); SLC Brief p. 22 (same)). This testimony explicitly reveals that the DEC premised its decision to add the Stump Dump to the Mine upon the impact of future vertical mining.

The Affidavit demonstrates that the elevation of the Stump Dump at the time of its addition to the Life of Mine was 160ft – the same as the permitted floor of the Mine. (Compare R. 2708, ¶ 14 ("Stump Dump, was filled in with sand from

other areas in the mine and is shown on an approved site plan for Sand Land's 2013 permit renewal as having elevations between 160 and 170 feet above mean sea level") with R. 2709, ¶ 18 ("Sand Land submitted a permit renewal in 2013 depicting the final elevation of the mine floor to be 160 feet amsl")). Thus, no "raised 'island'" existed or would exist at the time of reclamation unless the Department had already decided to approve the vertical expansion of the Mine floor to 120 feet amsl. The Dickert Affidavit, therefore, clearly demonstrates that adding the Stump Dump was not an independent "correction" but part of a consolidated and predetermined plan to authorize a vertical expansion throughout the Mine.

This statement from the Dickert Affidavit also contradicts the assertion that a permit was not required for Sand Land to remove the sand within the Stump Dump. Under DEC's interpretation that "mining" only applies to material in its original location, the Stump Dump did not need to be included in any permit to prevent a "raised 'island.'" If Sand Land did not require a permit to remove the sand within the Stump Dump, then the DEC's alleged concern of a "raised 'island'" is incongruous. Instead, the concern about a "raised 'island'" is consistent with DEC and Sand Land's shared belief from 2014 through 2018 that Sand Land required a modified permit including the Stump Dump in order to

remove the sand in that location.[8] The alleged concerns about a "raised 'island'" support the conclusion that the addition of the Stump Dump in the renewal was not a ministerial correction, but necessary for the proposed expansion, demonstrating that the two applications in 2019 were intentionally designed and coordinated to accomplish the same outcome as the 2014 application – lowering the entire 34.5 acres to 120 feet amsl. See DEC Brief p. 1 (the 2019 "modification and related actions allow Sand Land to mine 40 feet deeper on its current acreage and included an additional 3.1-acre area").

Likewise, while arguing on one hand that the 2014 application and the 2019 applications are distinct and that the decisions pertaining to the 2014 application are not binding on the 2019 application, Respondents on the other hand assert that "review of Sand Land's [2019] modified permit application [was] 'based on the

[8] The conclusion that a permit was and is necessary to remove the "sand from other areas" filled into the Stump Dump is consistent with the statutory definition of "mining." The DEC Brief asserts that "'mining' is limited to the removal of minerals and overburden from their original, naturally-occurring location." (DEC Brief, p. 24). DEC fails to quote an actual definition of mining or cite the source for the "original, naturally-occurring location" requirement, undoubtedly because neither ECL § 23-2705(8) nor 6 NYCRR § 420.1(k) are so narrow in scope. First, ECL § 23-2705(8) defines mining as "the extraction of overburden and minerals from the earth" without reference or requirement to being in their original, naturally occurring location. Second, the definition goes on to list a host of activities related to such extraction including "the preparation, washing, cleaning, crushing, stockpiling or other processing of minerals at the mine location so as to make them suitable for commercial, industrial, or construction use." See 6 NYCRR § 420.1(k) (emphasis added). The Dickert Affidavit explicitly states that the sand in the Stump Dump is "stockpiled sand." (R.2708, ¶ 15). Thus, if the stockpiled sand in the Stump Dump is removed for commercial or industrial use (including reclamation) it constitutes mining and requires a permit.

existing Negative Declaration and the multiple legislative hearings held" on the 2014 application. (DEC Brief p. 36). Either these are entirely distinct and "materially different"[9] applications such that none of the proceedings pertaining to the 2014 application should apply to the 2019 applications, or the applications are in fact substantially and materially the same and all such proceedings – including the denial and ALJ rulings – should apply. It is arbitrary for Respondents to pick and choose which documents and proceedings pertaining to the 2014 application should apply to the 2019 applications.

IV. The review of environmental impacts of the proposed modification was arbitrary and capricious and is unsupported in the Record.

Respondents argue that DEC decision-making is entitled to deference and should be upheld as long as it is supported by a rational basis. See DEC Brief, p. 18. However, arbitrary action is without sound basis in reason and is generally taken without regard to the facts." Pell v. Bd. of Ed. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cty., 34 N.Y.2d 222, 231, 313 N.E.2d 321 (1974). Because the DEC decision making in this action is without sound reason and was made without regard to the facts, it is not entitled to deference and should be reversed.

[9] SLC Brief, p. 60.

The DEC summarily argues that the determinations in this action involve factual evaluations in its areas of expertise and as such are entitled to great weight and judicial deference. (DEC Brief, p.18). Sand Land attempts to provide the factual grounds to support a rational basis for the DEC determinations, primarily relying upon its own expert. (SLC Brief, p. 54-57). However, the factual premise put forth by Respondents that mining to a depth of 120 feet AMSL would not impact the aquifer mischaracterizes Appellants' claims[10], and ignores the challenge made throughout this proceeding – that the identified contamination and impacts to the sand at this mine from Vegetative Organic Waste Management ("VOWM") activities have created a threat to the groundwater and aquifer with further mining. DEC has ignored its obligation to balance these legitimate environmental concerns against proposed future mining.

In particular, the amended negative declaration that DEC adopted in 2019 was arbitrary and capricious, whether the Court considers DEC's review to be anew, conducted completely in 2019, or a continuation of the 2014 review. DEC failed to satisfy its SEQRA obligations for making a determination about a Type I action. There is no basis in the record for the Court to uphold DEC's deficient, and arbitrary and capricious negative declaration that did not address the expansion's

[10] That said, Respondents' emphasis on the buffering benefits of the remaining sand over the aquifer after mining to a depth of 120 feet amsl (DEC Brief, p. 39; SLC Brief, p. 63) is irreconcilable with their repeated assertions that mining itself presents no threat to the aquifer.

impact on groundwater. See Wellsville Citizens ex rel. Responsible Dev., Inc. v. Wal-Mart Stores, Inc., 140 A.D.3d 1767, 1770 (4th Dept. 2016) (annulling negative declaration because lead agency failed to undertake "an analysis of the potential surface water impact" of the entire project).

While an EIS for a Type I action "is not a per se requirement" (SLC Brief p. 61), DEC must always take a hard look at the relevant environmental concerns, and take into consideration that a Type I action "is likely to have a significant adverse impact on the environment". 6 NYCRR § 617. "[N]ot every conceivable environmental impact" (SLC Brief p. 61) must be examined, but DEC must take a "hard look" at the relevant concerns. Shapiro v. Town of Ramapo, 185 A.D.3d 747, 748 (2d Dept. 2020).

DEC relies heavily on its argument that it "amended the 2014 negative declaration" (DEC Brief p. 37) and that it took the requisite hard look at environmental impacts in 2014. However, Respondents fail to address the fact that the prior negative declaration was deficient, as determined by DEC's 2015 Denial of the 2014 application finding that the negative declaration failed to consider VOWM activities at the mine and the consequent impacts. (R. 2812, ¶ 2). DEC failed to consider those impacts again in 2019 when it decided to issue a negative declaration, even though Respondents acknowledge in the 2019 Settlement Agreement that there is "uncertainty regarding a correlation between groundwater

contamination and VOWM." (R. 3254). DEC also acknowledged that the County Health Report "'concluded that [VOWM] activities at the site have had adverse impacts to the groundwater.'" (R. 1147).

Although DEC claims that "all vegetative waste has been removed from the mine" surface (DEC Brief p. 39), it does not follow that all of the potential contamination and impacts from decades of VOWM operations has been eliminated. See R. 2812. Indeed, if any potential contamination was completely eliminated, then there is no reason for DEC to require "groundwater monitoring wells" and periodic testing of the groundwater, as DEC claims "mining [uncontaminated sand] does not introduce chemicals or contaminants to the soils." (DEC Brief p. 39). On the contrary, DEC acknowledges that the risk of contamination of the groundwater was at most diminished, not eliminated, by "Sand Land's cessation of the processing of vegetative waste." (DEC Brief, p. 42).

Respondents also argue that the findings in Southern Dutchess County Sand & Gravel (Issues Ruling, Apr. 20, 2005) available at http://www.dec.ny.gov/hearings/11846.html, and Southern Dutchess County Sand & Gravel (Comm., Dec. 19, 2006) available at http://www.dec.ny.gov/hearings/38191.html demonstrate that mining is not a threat in the current action. (DEC Brief p.22; Sand Land Brief p.50-52) This argument is itself without basis in fact. Notably, in Southern Dutchess, the ALJ determined that the impacts to the water table were a

substantive and significant issue because there were questions regarding the applicant's "ability to engage in the proposed mining activities without compromising water quality in the … aquifer." The Deputy Commissioner affirmed this determination, but found there was not a threat in that particular mine. The "findings" from Southern Dutchess that the Department asserts are binding on this proceeding is a statement in the 14-year-old 2005 Issues Ruling that "DEC knows of no instance where significant groundwater quality or quantity problems have occurred at mines in New York State." Southern Dutchess County Sand & Gravel (Issues Ruling, Apr. 20, 2005) available at http://www.dec.ny.gov/hearings/11846.html. The mine in Southern Dutchess was not located on Long Island or over the extremely fragile and statutorily protected Long Island drinking water aquifer and had not been subject to findings regarding the existence of contaminants and heavy metals in the sand that were already impacting the aquifer.

In contrast, Sand Land sits in the specially protected Long Island aquifer protection district and directly atop the single most important recharge zone within that district. Even DEC agrees in its brief that the buffering and filtering capacity of the sand is important, and nowhere is this more critical than in the highly sensitive deep recharge zone under Sand Land. A statement of a general lack of knowledge, in an unrelated proceeding, at an unrelated mine, 14 years earlier

cannot provide the factual basis for DEC's determination here that mining to 120 feet AMSL above the recharge zone will have no environmental impacts, particularly where, as here, groundwater studies at this location have already found groundwater impacts from VOWM and other activities at this mine. See SCDHS Subsurface Investigation Report at the Sand Land Mine, July 11, 2018 (SCDHS 2018 Report), R-2416.

Sand Land maintains there is no scientific evidence to support mining as a threat to the aquifer, citing Southern Dutchess, the improper Dickert affidavit, and its own expert. (SLC Brief, p.53). However, this analysis ignores the circumstances at Sand Land which presents the environmental degradation double whammy: removal of tens of millions of yards of essential buffering and filtering sand from underneath an industrial site that has processed and store waste and debris for over 30 years. In Lane Const. Corp. v. Cahill, 270 A.D.2d 609, 612 (3d Dept. 2000), cited by Sand Land, the court upheld the Commissioner's denial of a mining permit over the ALJ's recommendation, following an adjudicatory hearing. In finding that the Commissioner's denial was supported by substantial evidence, the court in Lane noted the opportunity to review the ALJ's analysis and findings, and that DEC made a reasoned elaboration balancing the proposed mining project against the legitimate environmental concerns. "The Deputy Commissioner found

that despite the proposed mitigation efforts, unacceptable environmental impacts would occur." Lane Const. Corp., 270 A.D.2d at 609.

Here, DEC did an end run around the ALJ and the administrative process on Sand Land's 2014 application (after the Deputy Commissioner denied the expansion due to such environmental concerns), and approved a mine expansion without an opportunity to fully evaluate the environmental impacts. DEC ignored the Commissioner's prior determination, avoided the opportunity to develop a record regarding those impacts, and failed to adequately consider those impacts or any ongoing impacts prior to moving forward with the permit process. Choosing to ignore existing factual information cannot provide a rational basis for decision-making.

Contrary to Sand Land's misrepresentations (SLC Brief, p.55), DEC has never disavowed the multi facility studies it jointly conducted with the Suffolk County Department of Health Services (SCDHS) demonstrating that VOWM activities have negative impacts on groundwater underlying those facilities. (Investigation of Impacts to Groundwater Quality from Compost/Vegetative Organic Waste Management Facilities in Suffolk County, Dated January 22, 2016; R-480). While the VOWM activities and other illegal activities at the Sand Land mine allegedly recently stopped, the SCDHS 2018 Report, together with affidavits from the SCDHS employees that also participated in both the 2016 and 2018

Reports, confirmed that impacts from those activities at Sand Land are ongoing. (Reply Affidavit of Ron Paulsen July 17, 2019, and exhibits annexed thereto R-2014-2286; Reply Affidavit of Andrew Rapiejko, July 17, 2019; and exhibits annexed thereto, R-2087-2617).

Although DEC raised highly suspect and self-serving objections to the procedures of the SCDHS in the Sand Land ground water review, those post hoc arguments regarding those procedures cannot provide rational support for issuing the amended negative declaration or the permit modifications. There is no evidence in the record at the time of the permit determinations to refute the DEC's own findings in the 2016 Report that contaminated sand from VOWM impacts groundwater, or that prior VOWM activities at the Sand Land mine contaminated the sand as documented in the SCDHS 2018 Report. General statements regarding sand mining cannot provide substantial evidence to refute these specific findings of environmental impact.

To the extent that there is "uncertainty" about the impacts of expanded mining of contaminated sand atop of the aquifer (R. 3254), DEC is obligated to resolve the "uncertainty" about potentially significant adverse environmental impacts prior to (not after) issuing a negative declaration of significance). See Appellants' Brief Point IV.C. DEC's own guidance states that "[i]ssuing a negative declaration and then requiring the project sponsor to conduct studies to

determine the magnitude of an impact is improper." (DEC SEQRA Handbook[11] p. 88). DEC cites to nothing supporting its assertion that relying on future testing was not "improper[]." (DEC Brief p. 42). DEC's failure to obtain the new groundwater results *prior to* issuing the amended negative declaration shows that DEC did not meet its statutory duty pursuant to SEQRA.[12] See City of Buffalo v. New York State Dep't of Envtl. Conservation, 184 Misc. 2d 243, 255 (Sup. Ct. Erie Co. 2000) (holding that "permit by Respondent DEC is annulled [and] Negative Declaration of Respondent DEC is annulled").

Additionally, DEC's failure to include the prior SEQRA documents and the 2019 groundwater results in its administrative return require the Court to annul the negative declaration because there is no basis for the Court to determine that DEC had a rational basis for its amended negative declaration. Notably, DEC does not dispute the fact that the Administrative Return and this Record do not contain a Part 2 or Part 3 of the EAF on the 2019 Modification or "the environmental assessment form and supporting documents" that were prepared for the 2014 application. (DEC Brief, p. 38). See Bauer v. Cty. of Tompkins, 57 A.D.3d 1151,

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

[12] The Motion Seeking Leave to Submit Additional Supplemental Evidence in Support of the Petition as Supplemented, also the subject of this appeal, sought to provide evidence to the court, obtained from DEC after a delayed FOIL response, that the preliminary groundwater results obtained as a consequence of the DEC testing requirements, confirmed impacts to groundwater. R. 4915-4932, 9359-9373.

1153 [3d Dept. 2008] (upholding annulment of the negative declaration and noting that "Supreme Court correctly noted that the EAF does not include any such reasoned elaboration or make reference to the FDR or any other document as the basis for its negative declaration"). Appellants have argued all along that DEC's SEQRA review was insufficient and lacked a reasonable basis in the record. See Petition First Cause of Action, R. 73-75 (¶¶ 96-107). See also Affirmation of Meave M. Tooher in Support of Motion Seeking Leave to Submit Supplemental Evidence in Support of the Petition as Supplemented, R-4772-4773. As such, Appellants' arguments have been preserved for review by this Court.

V. The Appellate Record before this Court is appropriate and complete.

Respondents in largely verbatim footnotes[13] question the completeness of the Record. See DEC Brief p. 4 n.1; SLC Brief p.19 n.7. Respondents did not, however, file a challenge to the record with the trial court pursuant to 22 NYCRR § 850.7(b)(1) or file a motion for permission to file a supplemental record with any allegedly necessary documents pursuant to 22 NYCRR § 1250.4. Markedly, however, DEC explicitly notes that allegedly "missing documents . . . do not appear to be critical to this Court's review." Similarly, while Sand Land cites to

[13] In fact, both Respondents' briefs include the same typographical error in the case citation within their footnotes. For the Court's convenience, the correct citation is Williams v. Annucci, 175 A.D.3d 1677 (3d Dept. 2019). While Appellants do not dispute the Court's ability to take judicial notice of court clerk files as set forth in the cited cases, the Respondents' "objection" was procedurally improper and the Record includes all papers necessary for the Court's review.

documents in its extensive Statement of Facts, it acknowledges, "[t]hese facts are not all necessary for this Court" to decide this appeal and none of those documents are referenced in the Argument portion of the brief. (SLC Brief p. 11).

Moreover, the handful of documents that Respondents cite via Supreme Court case NYSCEF numbers consist of papers submitted on, and orders pertaining to, prior interlocutory orders and papers that related to prior motions that are not being reviewed in this appeal, do not involve the merits of the matter, or affect the final judgment. Therefore, they are properly not included in the already extensive (17 Volume) Record. CPLR §§ 5017, 5526. The extensive Record includes all of the "Papers Considered" as listed in the Decision, Order and Judgment as well as all papers that were cross-referenced via NYSCEF number within those papers. Pursuant to CPLR 2214, papers submitted on prior motions are not considered in support of, or in opposition to, the subsequent motions and merit briefing if not refiled or cross-referenced. CPLR § 2214(c).[14] See also Xiaoling Shirley He v. Xiaokang Xu, 130 A.D.3d 1386, 1388 (3d Dept. 2015) ("documents . . . neither considered in conjunction with nor relevant to the issues that gave rise to [the] order and judgment [being appealed]" are properly excluded from the Record).

[14] To the extent Respondents are questioning the use of a "Joint" Record, Appellants have filed concurrent appeals and separate briefs pursuant to 22 NYCRR § 1250.9(f)(2) and, therefore, a "Joint Record" was required.

CONCLUSION

As established throughout the Record and exhibited in the briefing herein, Appellants have demonstrated that the DEC abandoned their independent regulatory role in evaluating the environmental impacts of a proposed mine expansion above the sole source aquifer in Suffolk County. The Record demonstrates that the law, the facts, the science and the Department itself, acknowledged the environmental threats posed at this facility, and the Department's Chief ALJ determined the Department failed to comply with statutorily proscribed procedures. The Department has failed to meet its burden of producing a record supporting its decision to do an end run around these findings, instead revealing the arbitrary and capricious nature of a decision-making process, which is not entitled to deference.

WHEREFORE, it is respectfully submitted that this court should reverse the decision of Supreme Court, grant the Petition as Supplemented, and issue an Order:

a) Vacating and nullifying the DEC's March 15, 2019, issuance of a renewal Mining Permit;

b) Vacating and nullifying the DEC's revocation/withdrawal of the Notice of Intent to modify;

c) Vacating and nullifying the DEC's execution and approval of the Settlement Agreement executed February 21, 2019;

d) Vacating and nullifying the DEC's issuance of an Amended Negative Declaration of Non-Significance on March 15, 2019;

e) Vacating and nullifying the issuance of the DEC June 5, 2019 Modified Mining Permit; and

f) Enjoining Sand Land from mining outside the previously permitted Life of Mine of 31.5 acres or beyond a depth of 160 feet amsl throughout the 31.5 acres.

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Albany, New York

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

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