To be Argued by:
ELAINE M. BARRAGA
(*Time Requested: 15 Minutes*)

Supreme Court of the State of New York
Appellate Division – Third Department

Docket No.: 529380

TOWN OF SOUTHAMPTON, ASSEMBLYMAN, FRED W. THIELE, JR., 101CO, LLC, 102CO NY, LLC, BRRRUBIN, LLC, BRIDGEHAMPTON ROAD RACES, LLC, CITIZENS CAMPAIGN FOR THE ENVIRONMENT, GROUP FOR THE EAST END, NOYAC CIVIC COUNCIL, JOSEPH PHAIR, MARGOT GILMAN and AMELIS DOGGWILER,

Petitioners-Respondents,

- against -

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

Respondents-Respondents,

- and -

COUNTY OF SUFFOLK,

Proposed Intervenor-Appellant.

BRIEF FOR PROPOSED INTERVENOR-APPELLANT

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QUESTION PRESENTED

1. Was the lower court correct when it denied Appellant/Proposed Intervenor County of Suffolk's Motion to Intervene holding that the County of Suffolk lacked capacity to bring the claims set forth in the Proposed Intervenor Petition?

   Appellant maintains that the lower court was not correct in denying the County's motion to intervene.

PRELIMINARY STATEMENT

In May 2019, the original Petitioners filed the instant proceeding concerning the operation of a sand and gravel mine located in Suffolk County, New York. The subject mine is owned and operated by Respondents Sand Land Corporation and Wainscot Sand and Gravel Corp. (hereinafter, "Sand Land" or "Respondents"). The petition alleges, *inter alia* that the New York State Department of Environmental Conservation's (NYSDEC) determination to approve the Settlement Agreement, its issuance of an Amended Negative Declaration under SEQRA, and issuance of a renewed mine permit was a violation of lawful procedure, was effected by error of law, and/or was arbitrary and capricious and an abuse of discretion. Petitioners seek to vacate and annul the settlement agreement entered into between Sand Land and NYSDEC and NYSDEC's issuance of a modified Mined Land Reclamation Permit.

The County of Suffolk, the Proposed Intervenor-Appellant herein (hereinafter the "County" or "Appellant"), moved to intervene in this matter as of right pursuant to CPLR 1012(a), or in the alternative, permissive intervention pursuant to CPLR 1013. Appellant's motion to intervene included a Proposed Intervenor Petition. (R. 27).[1] The County's Petition shares common questions of law and fact with the main proceeding. The County's application was made at the earliest possible time in the litigation and prior to the scheduled return date for the original Petition.

The County of Suffolk is an entity who is or will be adversely affected by Sand Land's contamination of the aquifer beneath the Mine, based upon the Mine being located in the County of Suffolk, its reliance on the aquifer, and its dedication to protecting the groundwater in the County of Suffolk in the Town of Southampton.

The County, through the Suffolk County Department of Health Services ("SCDHS") is responsible, through its Office of Water Resources, Groundwater Investigative Unit, for the management and oversight of the Well Drilling Program, the Groundwater Monitoring Program, and the NYSDEC Pesticide Monitoring Program in Suffolk County. SCDHS is responsible for supervision and overall technical responsibility for all work related to the study and evaluation of hydrologic and geologic matters in Suffolk County including groundwater investigations related to hazardous waste and superfund sites (ECL Article 27, Title 13) and illegal

[1] All cites beginning with "R" are references to the Record on Appeal.

discharges (Suffolk County Sanitary Code Articles 4, 6, 7, and 12). SCDHS has been investigating potential impacts to groundwater from the Mine since 2014 pursuant to resolution passed by the Suffolk County Legislature. SCDHS issued its Final Report in 2018, in which SCDHS concluded that activities at the Mine have caused contamination of the sole source aquifer beneath the Mine presenting a threat to public health and safety. (R.129).

By order dated September 9, 2019 the lower court denied the County's motion to intervene. (R.4). The County moved to renew and by order dated February 11, 2020, the lower court denied the County's motion. (R.600).

Respectfully, and as explained below, the lower court's determination that the County does not have the requisite capacity to ensure compliance with its statutory mandate, through proceedings such as the one at bar, is incorrect. Such an interpretation defeats the salutary and legislatively intended role of the County to protect groundwater in these exact circumstances. The County has both the authority and functional responsibility, and thus the legal capacity, to bring the instant proceeding. *See Id.*; *Village of Woodbury v. Seggos*, 154 A.D.3d 1256, 65 N.Y.S.3d 76, 80 (3d Dept. 2017) (neighboring landowners and municipalities had standing to seek annulment of village's water withdrawal permit). The lower court's order should be reversed accordingly.

FACTUAL HISTORY

The Sand Land mine is located in the Country Residence (CR-200) zoning district within the hamlet of Noyac, in the Town of Southampton in the County of Suffolk. The Mine is also within the Town of Southampton's Aquifer Protection Overlay District because the Mine sits directly above the sole source aquifer for the region. The aquifer is the sole source of public drinking water for the Town of Southampton.

The Mine is located in a Critical Environmental Area and Special Groundwater Protection Area, designated in Article 55 of the Environmental Conservation Law. 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).

Although all of Long Island is recognized as being part of a sole source aquifer system (where drinking water is solely derived from groundwater), the subject parcel exists within a critically important "deep flow" hydrogeologic zone within the larger sole source designation. Such deep flow areas provide for the greatest quantity and deepest volume of fresh water recharge into the subsurface aquifer from among the various hydrogeologic zones present on Long Island. In addition to their value in

replenishing the region's largest stores of fresh water, such areas are also highly vulnerable to contamination from anthropogenic sources.

As noted above, the deep flow area beneath and around the Sand Land Mine has been designated as a Special Groundwater Protection Area, a Critical Environmental Area, and an Aquifer Protection Overlay District. The overarching policy objective inherent to these designations is the importance of protecting these groundwater reserves and providing for the continued recharge of clean water (from precipitation) into the aquifer system.

The property on which the Mine is located has at various times been used for sand and gravel mining, solid waste dumping, burying, processing and disposal, and vegetative organic waste management ("VOWM").

Sand Land obtained its first Mined Land Reclamation Permit in October 1998 to "Mine sand and gravel from 31.5 acres of a 50 acre site." This permit was purportedly a renewal and transfer of a prior lapsed permit from a separate company. Upon information and belief, the permits NYSDEC issued prior to January, 1985 allowed mining of no more than 20 acres. Every permit issued from January, 1985 until March, 2019 had allowed mining of 31.5 acres. A copy of the 1998 Permit is annexed to the Record at page 62.

Between 1998 and 2018, Sand Land operated a Part 360 waste processing facility pursuant to a registration with the NYSDEC 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. In addition to waste processing, Sand Land engaged in the businesses of receiving, stockpiling, and selling large quantities of compost, manure, and trap rock.

In September 2013, the NYSDEC approved 8 acres of the Mine as having been "reclaimed." This reduced the 31.5 mineable acres to 23.5 mineable acres within the 31.5 acre Life of Mine.

Its most recently issued Mined Land Reclamation Permit was issued on or about November 5, 2013, pursuant to an application for renewal. A copy of the November 5, 2013 renewal permit is annexed to the Record at page 66. (R.66). The 2013 Permit provides that the "Authorized Activity" is "to mine sand and gravel from 31.5 acres of a 50 acre site." (R.66). It further provides that "[a]ll mining shall be done according to the plans prepared by David Fox last revised on 10/28/13 and stamped NYSDEC approved on 11/5/13." (R.66).

The 2013 Fox Plans provide that the "[a]rea of mining to remain within 31.5 acre boundary outlined on site plan" (with a dashed line). (R.76). Of note from the 2013 Fox Plans is the clear exclusion of a 3.1 acre area identified as the "Stump

Dump" from the permitted 31.5 acre area of mining (hereafter referred to as the "Life of Mine").(R.76).

In January 2014, Sand Land submitted an Application for a Modification of its Mine Permit. The Application listed 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. In addition to this horizontal expansion, the Application also sought to vertically expand the mine by 40' to a depth of 120' above sea level. A copy of the 2014 Modification Application is included in the Record at page 77.

In support of its 2014 Modification Application, Sand Land provided an updated site plan from David Fox. (R.90). The Site Plan clearly depicts the location of the "Acerage included in this application, but not previously approved" as consisting of two separate areas – 1) a 1.8 acre area labeled "Area of Modification" and 2) a 3.1 area labeled "Area affected prior to 1975." (R.90). The 3.1 acre area is clearly the same 3.1 acre "Stump Dump" from the 2013 Site Plan.

NYSDEC Staff issued a Negative Declaration of Significance under the State Environmental Quality Review Act ("SEQRA") for the 2014 expansion. On April 3, 2015, the NYSDEC Executive Deputy Commissioner, Marc S. Gerstman, denied Sand Land's modification application. (R.91).

The Notice of Permit Denial provided several grounds for denial including potential impacts from historic disposal of solid waste and solid waste management activities on groundwater quality beneath the Mine. (R.91). The Notice of Permit Denial further concluded that NYSDEC Region 1 staff "failed to consider several relevant areas of environmental concern associated with" the Mine when issuing the negative declaration, 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.91).

Significantly, the Notice of Permit Denial observed that the NYSDEC Staff did not submit "the notification prescribed by ECL [§] 23-2711(3) and ECL [§] 23-2703(3)" to the Town of Southampton.(R.91). It, therefore, directed NYSDEC staff to transmit the notice to the Town of Southampton. (R.91).

In relevant part, ECL § 23-2711(3) provides:

> Upon receipt of a complete application for a mining permit, for a property not previously permitted pursuant to this title, a notice shall be sent by the department, by certified mail, to the chief administrative officer of the political subdivision in which the proposed mine is to be located (hereafter, "local government"). Such notice will be accompanied by copies

of all documents which comprise the complete application and shall state whether the application is a major project or a minor project as described in article seventy of this chapter.

(a) The chief administrative officer may make a determination, and notify the department and applicant, in regard to . . . (v) whether mining is prohibited at that location.

ECL § 23-2703(3) provides:

No agency of this state shall consider an application for a permit to mine as complete or process such application for a permit to mine pursuant to this title, within counties with a population of one million or more which draw their primary source of drinking water for a majority of county residents from a designated sole source aquifer, if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined.[2]

On April 23, 2015, Sand Land requested a public hearing pursuant to the NYSDEC Uniform Procedures Regulations to challenge the permit denial. Many of the Petitioners requested party status in that proceeding.[3]

[2] ECL § 23-2703(3) applies to towns located in Nassau and Suffolk counties.

[3] The Town, Assemblyman Theile, BHRR, CCE, GEE, Phair, Gilman, and Doggwiler sought full party status. The Civic Counsel and Southampton Town Civic Coalition sought amicus status. 101Co, 102Co, BRRRubin, and the County did not seek party status in that proceeding. The NYSDEC did not object to Petitioners' party status requests.

On April 21, 2015, the NYSDEC sent a notice to the Town of Southampton requesting that the Town state "whether or not mining is prohibited in the expansion area of the proposed sand mine." (R.95).

On May 20, 2015, Kyle Collins, the Town Planning and Development Administrator, responded to the NYSDEC notice letter. Mr. Collins noted *inter alia* that "[t]he Southampton Town Code prohibits mining activities within all zoning districts, but acknowledges that certain nonconforming uses, if they are established to pre-exist zoning, are allowed to continue" but reiterated "that new mines are prohibited in all zoning districts." (R.95).

On May 29, 2015, Town Supervisor Anna Throne-Holst submitted a follow-up letter reiterating that the "Town Code prohibits mining activities within all zoning districts." (R.98).

On January 26, 2018, Chief Administrative Law Judge James T. McClymonds issued a "Ruling of the Chief Administrative Law Judge on Threshold Procedural Issue." (R.99).

The Chief ALJ's Ruling focused on the application of ECL §§ 23-2711(3) and 23-2703(3) to the 2014 Modification Application. (R.99). The Chief ALJ ruled that that "[t]he Executive Deputy Commissioner . . . correctly noted that applicant's expansion proposal triggered the inquiry required under ECL [§] 23-2711" and that ECL § 23-2703(3) was applicable to the 2014

Modification Application. (R.110). Significantly, the Chief ALJ held that the Town's authority "includes not only the power to prohibit the development of new mines, but to impose reasonable restrictions to limit the expansion of and eventually extinguish prior nonconforming mining uses within the [town]."(R.110).

The Chief ALJ concluded that "whether the applicant's proposed mine expansion is legal under the Town's zoning laws cannot be determined on the current record" (R.110) 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.111). Therefore, 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" the Chief ALJ "suspended and adjourned" and the permit hearing proceeding without date.(R.112).

On July 18, 2018, Jay Schneiderman, the current Town Supervisor, sent a letter to the NYSDEC reiterating that "Mineral mining is not a permitted use in any zoning category in the Town of Southampton." (R. 114). Supervisor Schneiderman, therefore, advised that "the answer as to whether local zoning laws or ordinances prohibit mining uses within the area proposed to be mined is 'yes.'" (R.114).

Sand Land moved to reargue the Chief ALJ's ruling, which motion the Chief ALJ denied on December 10, 2018. (R. 116). In his decision on reargument, the Chief ALJ reiterated several points of law, including 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 § 23-711 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, the Uniform Procedures Act (ECL Art. 70), and Department 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.116).

Significantly, in his December 2018 decision, the Chief ALJ also noted that "the term 'property not previously permitted' leads to the conclusion that it refers to property outside any previously approved line-of mine boundaries. (R.122). 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.122). The Chief ALJ noted that principles enunciated in established case law from the Court of Appeals caution "against the belief that a prior non-

conforming mining use may be extended or enlarged without regard to local law." (R.122).

On information, neither Sand Land nor any other party has appealed the Chief ALJ's ruling to the Commissioner pursuant to the Uniform Procedures.

In both decisions and the briefing giving rise thereto, the Chief ALJ, along with Sand Land, the Department, and all of the petitioning parties, were of the uncontroverted understanding that the extant life-of-mine lateral boundaries were 31.5 acres.

A. <u>Threat to the Aquifer</u>

In 2013, the NYSDEC published the results of its Horseblock Road Investigation. The Horseblock Road Investigation traced the contamination of private wells by manganese, ammonia, thallium and gross alpha/beta and tritium radioactivity exceeding drinking water standards to the operation of a vegetative organic waste management facility known as Great Gardens. The NYSDEC Horseblock Road Investigation report concluded that the occurrence of groundwater contamination is not unique to the Great Gardens site and recognized the need to modify operating practices at these facilities in order to prevent such occurrences.

In January 2016, the SCDHS published its "Investigation of the Impacts to Groundwater Quality from Compost/Vegetative Organic Waste Management Facilities in Suffolk County." This report summarizes the groundwater investigation

downgradient of eleven (11) vegetative organic waste facilities ("VOWF") in Suffolk County to determine whether contamination similar to that which was documented in the Horse Block Road Report was occurring at other locations.

The Suffolk County investigation identified elevated metal concentrations in groundwater monitoring wells downgradient from ten (10) VOWF sites it studied and in four (4) private wells downgradient. The primary contaminant found to exceed groundwater and drinking water standards was manganese. However, a number of other metals including antimony, arsenic, beryllium, chromium, cobalt, germanium, molybdenum, thallium, titanium and vanadium exhibited detection rates at least twice that of typical Suffolk County shallow private wells.

In 2014, the SCDHS began investigating possible groundwater contamination from Sand Land's material processing business (that includes a VOWF) at the Mine.

In 2015, the NYSDEC collected ponded water at the Mine on behalf of SCDHS, because Sand Land denied SCDHS further well drilling and testing access at the Mine. The sample was taken from the "sump" identified on the Mine survey attached to the 2013 Mined Land Use Plan, a collection of surface water in the Mine that is approximately ¾ of an acre, over 15 feet deep, with an estimated volume of up to 1 million gallons.

SCDHS testing indicated that the ponded water contained hazardous substances and contaminants including metals, pesticides and radiological elements;

including extremely high concentrations of chlordane, a highly carcinogenic pesticide that was banned in New York over 30 years ago.

In November 2016, SCDHS sought to perform groundwater and soil sampling within the Mine. On August 9, 2017, the Supreme Court, Suffolk County granted the SCDHS's Petition in *County of Suffolk v. Wainscott Sand and Gravel Corporation, et al.*, Index No. 010233/2016, and confirmed the warrant for the soil and water testing. In October 2017, the SCDHS executed the warrant and obtained groundwater, soil, and surface water samples from the Mine. The sampling included drilling and sampling at multiple locations over 100 feet down to the level of the groundwater and the aquifer below the site.

The SCDHS's Final Report of the Investigation of Potential Impacts to Groundwater at Wainscott Sand & Gravel/Sand Land Facility was issued on June 29, 2018. (R.129). The 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.

B. Notice of Intent to Modify and Settlement

On September 11, 2018, the NYSDEC served Sand Land with a Notice of Intent to Modify. (R.269). The NYSDEC explained that the purpose of the modification was to "require the cessation of mining activities and the initiation of steps to reclaim the mine."(R.269).

The Notice of Intent to Modify notes that "Department staff concluded that Sand Land has only de minimus reserves of sand left for mining purposes, and the areas where mining could occur are the subject of groundwater monitoring investigations." Thus it concluded that "The 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.269).

The Notice of Intent to Modify notes the recent groundwater testing at the Mine, including the SCDHS testing, testing by the NYSDEC and Sand Land's consultant Alpha Geoscience, and concludes 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.269).

The proposed modified terms include that "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.**" (emphasis in original). The "Description of Permit Terms" appended to the Notice defined "authorized activity" as "the renewal of an existing permit for a *31.5 acre* Life of Mine…" (emphasis added). (R.269).

On September 21, 2018, Sand Land objected to the proposed modification and requested a hearing pursuant to the Uniform Procedures Regulations. A hearing was never held.

On October 2, 2018, Sand Land submitted an application for Renewal of its expiring Mining Permit Application. (R.274). The Application again notes the "total acreage permitted by DEC prior to this application" as 31.5 acres and states that the "Acreage included in this application, but not previously approved" is 0 acres. (R.274).

Sand Land submitted an updated Site Plan from David Fox updated as of September 27, 2018. (R.275). The Site Plan again notes the 3.1 acre Stump Dump and shows the "Life of Mine" line excluding that area. (R.275).

On October 9, 2018, the NYSDEC notified Sand Land that its application for renewal was incomplete. On October 12, 2018, Sand Land filed an updated application for renewal. (R.276). Sand Land included the same acreage numbers: "Total acreage permitted by DEC prior to this application" - 31.5 acres; and "Acreage included in this application, but not previously approved" - 0 acres. (R.276).

The October 12, 2018, application included a diagram from Alpha Geoscience showing the areas to be mined during the coming permit term.(R.276). Of note, the area of the Stump Dump is not included either within the "Life of Mine" line or the shaded area of proposed mining. (R.276).

On October 16, 2018, the NYSDEC again notified Sand Land that its application was incomplete and required that Sand Land submit three copies of an updated mine land use plan. On or about October 19, 2018, Sand Land filed a Mined Land Use Plan (Updated) prepared by Alpha Geoscience. (R.279).

Of significance, the Mined Land Use Plan includes a Mined Plan Map (Plate 1) that appears to include the Stump Dump within the Life of Mine. (R. 279). Upon information and belief, this is the first time that the Stump Dump has been included within any diagram of the Life of Mine or permitted acreage.

On November 2, 2018, the NYSDEC determined that Sand Land's renewal application was "sufficient under 6 NYCRR § 521.11." The NYSDEC and Sand Land agreed to suspend all of the time periods for a determination on the review.

On February 21, 2019, without the participation, comment, or approval of any of the petitioners herein, and in utter disregard of the mandates of ECL §§ 23-2711 and 23-2703, the NYSDEC and Sand Land entered into a Settlement 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.323).

The Settlement Agreement falsely states:

> WHEREAS, the Facility is used by Sand Land for the operation of a duly permitted sand and gravel mine under a Mined Land Reclamation Permit, last renewed by the Department on November 5, 2013, which permits Sand Land to engage in "mining," as defined in Section 23-2705(b) of the New York State Environmental Conservation Law, within **34.5-acres** of the 50-acre Facility in accordance with a mined land use plan approved by the Department (MLR # 10033; DEC #1-4736-00851/0001) (emphasis added). (R.323).

As noted above, the 2013 Permit only permits mining within 31.5-acres of the 50-acre Facility and the site plan approved by the Department excludes the 3.1 acre

Stump Dump. Now, and without any of the required notifications and Town responses mandated by the ECL that would permit the processing of this application as would be required to obtain what clearly amounts to a modification to a previously extant permit, and without any approved application to expand the life of mine in such fashion, the Department and Sand Land gratuitously expanded the life-of-mine by 3 acres**.**

To settle the Notice of Intent to Modify and Sand Land's renewal application, the NYSDEC agreed to rescind the Notice of Intent to Modify, to issue "Sand Land's application to renew its Mined Land Reclamation Permit for the 34.5-acre Life of Mine, and to timely process a permit application for mining "within the existing Life of Mine to a depth of 120-feet AMSL." (R.327).

While the NYSDEC does not explicitly agree that it will grant the permit for mining to a depth of 120-feet, the Settlement Agreement provides that "[t]he Parties agree and acknowledge that the agreements and covenants set forth herein are expressly contingent upon the Department's issuance of the modified permit . . . ." (R.329).

On March 12, 2019, Sand Land submitted the Application for Modification to mine to a depth of 120-feet AMSL referenced in the Settlement Agreement. (R. 351). The application falsely 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.351).

Sand Land submitted with the application a Mined Land Use Plan for A NYSDEC Mine Permit Modification by Alpha Geoscience. (R.352). It falsely states that "[t]he purpose of this mining permit modification is to deepen the mine excavation to an elevation of 120 feet relative to mean sea level (ft rmsl) while maintaining the current, 34.5 acre, permitted, mine footprint." (R.355). Plate 1 in the Plan shows a "Life of Mine" line clearly including the previously excluded Stump Dump. (R.372).

Upon information and belief, the NYSDEC withdrew the Notice of Intent to Modify on March 14, 2019.

On March 15, 2019, the NYSDEC issued an "Amended Negative Declaration" pursuant to the SEQRA for the modification application. Upon information and belief, this was an amendment to the Negative Declaration issued in relation to the 2014 Modification application that was denied. This act, too, was done without the required ECL § 23-2711 procedure for notification to the Town and in violation of the prohibitions in § 23-2703(3).

Also, on information, on March 15, 2019, the NYSDEC issued the renewal of the Mined Land Reclamation Permit.[4] According to the NYSDEC online searchable database, the renewal was issued for 34.5 acres Life of Mine and 26.5 Current Permit Acres. Characterization of the March 15, 2019, permit as a "renewal", even though it contained an illegal expansion of the life-of-mine boundaries, is clearly erroneous and should have been subjected to the ECL procedures applicable to a modification application.

The NYSDEC erroneously determined that the renewal application was a Type II action under SEQRA.

The NYSDEC's approval of the Settlement Agreement, issuance of an Amended Negative Declaration under SEQRA, and issuance of a renewed mine permit constitute final determinations of the NYSDEC subject to challenge in an Article 78 proceeding.

[4] On information, as of filing, the NYSDEC had not produced a copy of the Renewal Permit pursuant to the original Petitioners' FOIL request.

LEGAL ARGUMENTS

THE COUNTY OF SUFFOLK IS ENTITLED TO INTERVENE AS OF RIGHT UNDER CPLR 1012, OR IN THE ALTERNATIVE, UNDER CPLR 1013

Intervention is a procedure whereby an outsider not named in the action can become a party to a pending action on its own initiative. *See*, CPLR 1012, 1013, 1014; *Wells Fargo Bank, Nat. Ass'n. v. McLean*, 70 A.D.3d 676, 676 (2 Dept. 2010); *Nicholson v. Keyspan Corp.*, 14 Misc.3d 1236(A) (Sup. Ct. Suffolk Cty. 2007). Our courts now liberally permit persons to intervene in an action pending in the courts where they have a bona fide interest in an issue involved in that action (Siegel, *New York Practice* §178 (6th ed.). *Id.* Intervention will generally be permitted where the party has a real and substantial interest in the result of the litigation. *See Wells Fargo Bank, Nat. Ass'n. v. McLean*, 70 A.D.3d 676, 677 (2 Dept. 2010) (granting intervention in an action involving the disposition of property to a party whose interest may be adversely affected by the judgment); *Berkoski v. Board of Trustees of Inc. Vil. of Southampton*, 67 A.D.3d 840, 843 (2 Dept. 2009); *Cavages, Inc. v. Ketter*, 56 A.D.2d 730 (4 Dept. 1977).

Intervention, in addition to giving the intervenor the self-initiated opportunity to protect its own interest, avoids multiple litigations, possible inconsistent judgments and the expenditure of resources by litigants and the courts. *See, Bay*

State Heating & Air Conditioning Co. v. American Insurance Co., 78 A.D.2d 147, 149 (4 Dept. 1980).

"[W]hen an intervenor becomes a party to an action, whether as of right or in the court's discretion, he or she becomes an original party for all intents and purposes," meaning the intervenor may implead, cross-claim, and counterclaim. *Love v. Perales,* 222 A.D.2d 661, 636 N.Y.S.2d 93 (2d Dep't 1995) [citation omitted].

In New York, the statutes regarding intervention are liberally construed. *Bay State Heating & Air Conditioning Co. v. Amer. Ins. Co.*, 78 A.D.2d 147, 149 (4th Dep't 1980); *Plantech Housing Inc. v. Conlan*, 74 A.D.2d 920,921 (2d Dep't 1980), *app. dis'd 51* N.Y.2d 862,433 N.Y.S.2d 1018 (1980).

Whether intervention is sought as a matter of right under CPLR 1012 or 1013 is " 'of little practical significance,' " as the essential determination is whether the '"intervenor has a real and substantial interest in the outcome of the proceedings.' " *Berkoski v. Board of Trustees of Incorporated Village of Southampton*, 67 A.D.3d 840, 843,889 N.Y.S.2d 623,626 (2d Dep't 2009) [citations omitted]. Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action." *Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 201, 906 NYS2d 231 (2010). "Whether intervention is sought as a matter of right

under CPLR 1012 (a), or as a matter of discretion under CPLR 1013, is of little practical significance since a timely motion for leave to intervene should be granted, in either event, where the intervenor has a real and substantial interest in the outcome of the proceedings." *Wells Fargo Bank, N.A. v McLean*, 70 AD3d 676, 677, 894 NYS2d 487 (2010).

Granting intervention in this case will not delay or prejudice the adjudication of the original parties' rights whatsoever. Compare *Stanford Assoc. v. Board of Assessors of Town of* Niskayuna, 39 A.D.2d 800, 800 (3d Dept. 1972) (intervention allowed where sought immediately upon intervenor's learning of facts affecting their interest) with *Breslin Realty Development Corp. v. Shaw*, 91 A.D.3d 804, 804 (2d Dept. 2012) (proposed intervenor, who was aware of the action from its inception, waited until after parties entered into stipulation of settlement before seeking leave to intervene). Further, disposition of this action will not be unduly delayed, nor will the original parties be prejudiced if the County is permitted to intervene. *Norstar Apartments, Inc. v. Town of Clay*, 112 A.D.2d 750, 751 (4 Dept. 1985). Judicial economy, efficiency and fairness would be served by permitting this intervention. *See, e.g. Lamboy v. Gross*, 129 Misc.2d 564, 576, *affd.* 126 A.D.2d 265 (1 Dept. 1987).

The County's intervention should be deemed as one of right. CPLR §1012(a) confers the right to intervene when, as here, (1) the representation of the person's

interest by the parties is or may be inadequate and the person may be bound by the judgment; or (2) when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment. *See Wells Fargo Bank, Nat. Ass'n. v. McLean*, 70 A.D.3d 676, 677 (2 Dept. 2010). It has been held sufficient to permit intervention if the applicant's interests will be jeopardized by his absence and he is ultimately and really interested in the outcome of the litigation. *Harrison v Mary Bain Estates*, 2 Misc. 2d 52, *affd.* 2 A.D.2d 670 (1 Dept. 1956). Indeed, the County meets this test. The County's intervention petition (R. 62) raises the very same legal claims as asserted by the original Petitioners in their existing pleadings, and they rest upon the same factual allegations.

While the County respectfully asserts that it has met the standards of intervention as of right pursuant to CPLR. 1012, *assuming arguendo*, CPLR 1012 is not available to the County Petitioner, a permissive intervention pursuant to CPLR 1013 should be permitted. Clearly, the County's claims, and those alleged by the original petitioners, share a common question of law. The County further satisfies the requirements of a permissive intervention pursuant to CPLR 1013 in that the County Petitioner has a real and substantial interest in the outcome of this litigation on behalf of the residents of the County of Suffolk.

CPLR § 1013 states:

> Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

With respect to permissive intervention pursuant to 1013, "the only requirement for obtaining an order permitting intervention under this section is the existence of a common question of law or fact." *Pier v. Board of Assessment Review of Town of Niskayuna*, 209 A.D.2d 788, 789, 617 N.Y.S.2d 1004, 1005 (3d Dep't 1994). Whether or not to grant permissive intervention rests entirely " 'in the discretion of the court.' " *Jiggetts v. Dowling*, 21 A.D.3d 178, 185, 799 N.Y.S.2d 460,466 (1st Dep't 2005) [concurring, citations omitted]. " 'The courts are liberal in its allowance today.' " *Id.* One way a court can determine whether there is a common question of law or fact is whether the proposed pleading and the original pleading are similar. *Brown v. Waryas*, 45 Misc. 2d 77,78, 255 N.Y.S.2d 724,726 (Sup. Ct. Dutchess Co. 1965).

A. The County Has An Interest in the Property That Will Be Adversely Affected By the Final Judgment.

The County has a cognizable interest in the outcome of this litigation as it, through the SCDHS, Office of Water Resources, Groundwater Investigative Unit, is responsible for the management and oversight of the Well Drilling Program, the Groundwater Monitoring Program and the NYSDEC Pesticide Monitoring Program in Suffolk County and will be adversely affected by the final judgment, and thus, is entitled to intervene under CPLR 1012(a)(3). *See Cavages, Inc. v. Ketter*, 56 A.D.2d 730, 731 (4th Dep't 1977).

Unlike the municipality in *Matter of Town of Verona v. Cuomo*, 136 AD3d 36 (3d Dep't 2015) the County has express statutory authority to protect the aquifer. Capacity to sue may be expressly granted in enabling legislation or it may be inferred from review of the entity's statutory functions or responsibilities. *Graziano v. Cty. of Albany*, 3 N.Y.3d 475, 479, 821 N.E.2d 114, 117 (2004). Here, the federal government has officially designated the aquifer below Suffolk County as a sole-source for water supply. *Suffolk County Sanitary Code, Article 7*. It is the function of the Suffolk County Executive to serve the residents of Suffolk County. Clearly, protecting the County's water supply, which effects the welfare of the entire community, is a legitimate and actual County function and infers capacity to intervene in this case.

The County, through SCDHS, is responsible for the development and oversight of programs and studies related to groundwater contamination, including those involving pesticide, volatile organic chemical, metals and standard inorganics. SCDHS is responsible for supervision and overall technical responsibility for all work related to the study and evaluation of hydrologic and geologic matters in Suffolk County including groundwater investigations related to hazardous waste and superfund sites (New York State Environmental Conservation Law Article 27, Title 13 (hereinafter "NYS Superfund") and illegal discharges (Suffolk County Sanitary Code Articles 4, 6, 7, and 12).

In accordance with the Suffolk County Sanitary Code, under the authority of the Commissioner, SCDHS conducts numerous groundwater investigations specifically involving the installation and monitoring of wells. Several of these investigations have been referred to the NYSDEC for nomination to the NYS Superfund.

Specifically, Suffolk County Sanitary Code, §760-701 declares it to be the policy of the County of Suffolk to maintain its water resources as near to their natural condition of purity as reasonably possible for the safeguarding of the public health and, to that end, to require the use of all available practical methods of preventing and controlling water pollution from sewage, industrial and other wastes, toxic or hazardous materials, and storm water runoff.

Moreover, Suffolk County Code §760-702 states that it is the intent and purpose of this Article to safeguard all the water resources of the County of Suffolk, especially in deep recharge areas and water supply sensitive areas, from discharges of sewage, industrial and other wastes, toxic or hazardous materials and storm water runoff by preventing and controlling such sources in existence when this Article is enacted and also by preventing further pollution from new sources under a program which is consistent with the above-stated Declaration of Policy.

SCDHS has been investigating sites that store and process vegetative organic waste material (VOWM) since 2009. A recent report *(Investigation of the Impacts to Groundwater Quality from Compost/Vegetative Organic Waste Management Facilities in Suffolk County, January 2016*) of 10 sites across Suffolk County revealed that the processing and storage of Vegetative Organic Waste Management (VOWM) has the potential to negatively impact groundwater quality. This study concluded that elevated metals concentrations were the primary impact observed to the groundwater down gradient of the sites investigated. Elevated metals concentrations were observed in monitoring wells down gradient of 10 sites, and in four private wells down gradient of one site.

The primary constituent that exceeded groundwater and drinking water standards most frequently, and at the highest concentrations, was manganese. Other metals such as antimony, arsenic, beryllium, cadmium, chromium, cobalt,

germanium, molybdenum, thallium, titanium and vanadium exhibited detection rates that were at least two times that of typical Suffolk County shallow private wells. Additionally, the number of radiological detections (gross alpha and gross beta) was higher than what is typically observed in native Suffolk County groundwater. Pesticides and wastewater related compounds were also detected. An additional study done in cooperation with NYSDEC showed similar impacts to groundwater quality (*Horseblock Road Investigation, Yaphank NY issued by the New York State Department of Environmental Conservation*).

Due to concerns about the respondent Sand Land facility's potential impact to groundwater, a resolution was passed by Suffolk County Legislature in 2014 instructing SCDHS to investigate the Sand Land site. The facility is located in a deep groundwater recharge area and is in the Town of Southampton's Aquifer Protection Overlay District Critical Environmental Area. Indeed, the County has been a critical participant in evaluating the injury to the aquifer and the impact of the activities at the Sand Land Mine on the sole source aquifer. *See* Suffolk County Department of Health Services Final Report of the Investigation of Potential Impacts to Groundwater at Wainscott Sand & Gravel/Sand Land Facility, June 29, 2018 (R.129); Affidavit of Ronald Paulsen in Support of Preliminary Injunction dated May 15, 2019 (R. 615); Affidavit of Andrew J. Rapiejko in Support of Preliminary Injunction dated May 14, 2019 (R. 703).

In addition to providing source water for public water supply wells, the area also has numerous private wells that provide potable water to local residents. One behalf of the residents of Suffolk County, the County of Suffolk is an interested party herein because there is an immediate threat to ground water safety and therefore, a public health threat to the residents of Suffolk County. Indeed, the County of Suffolk is adversely affected by the alleged violations set forth in the proposed supplemental petition. *Murray Bresky Consultants, Ltd v. New York Compensation Manager's Inc.*, 106 A.D.3d 1255, 1258 (3d Dep't 2013). Specifically, the residents of the County of Suffolk face a concrete injury within the zone of interests protected by the procedural statutes. Indeed, this case does not present the risk that the courts will be adjudicating the rights of individuals who have only a tangential stake in the litigation.

It is undisputed that the aquifer system underlying Nassau and Suffolk Counties is a sole source aquifer designated by the USEPA. *See* USEPA, Aquifers Underlying Nassau and Suffolk Counties, Determination, June 12, 1978, 43 Fed Reg 26611 (1978). It is also undisputed that Suffolk County has a population of more than one million residents, and that more than 50 percent of the drinking water for Suffolk County is supplied by the aquifer system (see e.g. id.; USEPA, Nassau-Suffolk Aquifer System, Support Document, May 1975, at 6, available at

http://www.epa.gov/region2/water/aquifer/nasssuff/nassau.htm; see also MLR92-2, ¶ 4).

B. The County has the Capacity to Bring the Instant Proceeding

The lower court's determination that the County does not have the capacity to bring the instant proceeding is misplaced. *City of New York, et al. v. State of New York*, 86 N.Y.2d 286, 655 N.E.2d 649 (1995). *City of New York* is wholly distinguishable from the instant matter as it dealt solely with challenges to State legislation, as opposed to the instant proceeding which challenges a State agency's action that has run afoul of state law.

Specifically, in *City of New York,* the plaintiff/appellant City of New York raised constitutional challenges to the State's statutory scheme for funding public education under Article XI of the New York State Constitution, the 14th Amendment of the Equal Protection Clause and Title VI of the Federal Civil Rights Act. *City of New York,* 86 N.Y.2d at 289. The Court's decision to dismiss that action was premised on the traditional principle that municipalities and other local governmental corporate entities and their officers lack the capacity to mount constitutional challenges to acts of the State and State legislations. *Id.* at 289-90.

In contrast, the instant proceeding involves, in part, an application for a preliminary injunction barring the NYSDEC from further processing Sand Land's application for a modification of its mining permit in violation of the Environmental

Conservation Law ("ECL") §23-2711(3) and §23-2703(3). Clearly, there is no challenge to any state legislation in the instant application, nor is there a constitutional challenge to acts of the State. The County is challenging the inadequate review of the NYSDEC's actions conducted under SEQRA and its implementing regulations.

It is well-established law that a governmental entity's capacity to bring suit may be inferred as a necessary incident of its powers and its responsibilities, provided that no clear legislative intent negates review. *See Matter of City of New York v. City Civ. Serv. Commn.,* 60 N.Y.2d 436, 444-45, 485 N.E.2d 354 (1983). The Court of Appeals has held that authority to bring a particular claim may be inferred when the agency in question has "functional responsibility within the zone of interest to be protected." *Id*. at 445. To satisfy the "zone of interest" test, the municipality must possess the requisite "policy-making authority and functional responsibility" from which the capacity to sue may be inferred. *Id.* at 444-45.

Here, the Respondent NYSDEC has on several occasions in the past referenced the County's findings and conclusions in relation to the Sand Land Mine in denying and seeking to modify the Mine's permits. (R.606,610). Not only can it be clearly *inferred* that the County herein has the requisite "policy making authority and functional responsibility" contemplated by the "zone of interest test", in order for the protections provided to Long Island municipalities to be enforceable, the

statutory scheme must be read to explicitly confer upon the County the capacity to sue to protect its "functional responsibility within the zone of interest to be protected." *Id*. at 445.

In addition, ECL §23-2703(3) provides that "No agency of this State shall consider an application for a permit to mine as complete *or process* such application for a permit to mine pursuant to this title, within counties with a population of one million or more which draw their primary source of drinking water for a majority of County residents from a designated sole source aquifer, *if local zoning laws or ordinances* prohibit mining usages within the area proposed to be mined" (emphasis added). It is uncontroverted that §23-2703(3) was enacted for the benefit of, and solely applies to municipalities in Nassau and Suffolk counties.

An interpretation that the County does not have the requisite capacity to insure compliance with its statutory mandate defeats the salutary and legislatively intended role of the County to protect groundwater in these exact circumstances. The County has both the authority and functional responsibility, and thus the legal capacity, to bring the instant proceeding. *See Id.*; *Village of Woodbury v. Seggos*, 154 A.D.3d 1256, 65 N.Y.S.3d 76, 80 (3d Dept. 2017) (neighboring landowners and municipalities had standing to seek annulment of village's water withdrawal permit).

Moreover, pursuant to Section C16-2 of the Suffolk County Charter, the County Executive has authorized, empowered and directed the County to participate in the matter. The County Attorney Dennis M. Brown has previously notified this Court that the County would be seeking to intervene because of the importance of the interests involved and in an effort to protect the interests of the residents of Suffolk County in protecting their water supply. (R.464).

Contrary to the State's contention that the County lacks standing to intervene in this proceeding, "New York courts take a relatively permissive view of standing to bring an Article 78 proceeding and other challenges to governmental action." *See* 1 New York Civil Practice: C.P.L.R. P 7802:04. For example, in *City of New York v. City Civil Serv. Comm'n*, the Court of Appeals held that the New York City Personnel Director had standing to challenge a Civil Service Commission determination awarding veterans' preferences. *See City of New York v. City Civil Serv. Comm'n*, 60 N.Y.2d 436 (1983).

The County also has the capacity to bring suit because "when these local entities are unable to fulfill their constitutional and statutory obligations because of the State's failure to carry out its own constitutional obligations, a substantive right to sue has been and must continue to be recognized." *City of New York*, at 297, *citing Jeter v. Ellenville Centr. School Dist.,* 41 N.Y.2d 283, 287. "Granted there is apparent substantial authority prohibiting a municipality or agency of the State from

challenging a State statute," *Black Riv. Regulating Dist. v. Adirondack League Club*, 307 N.Y. 475 (1954), municipalities have the statutory power to sue and be sued in their own name. *See* N.Y. County Law § 51 (McKinney 2006). The Suffolk County Charter expressly authorizes Suffolk County to sue and be sued, and states in pertinent part:

> The County Attorney shall be the attorney and counsel for the county and every agency and office thereof and shall have charge of all the law business of the county and its agencies. The County Attorney shall prosecute and defend all civil actions and proceedings brought by or against the county, the County Legislature, and any officer whose compensation is paid from county funds for an official act, except as otherwise provided by the Charter. He shall perform such additional and related duties as may be prescribed by law and directed by the County Executive or the County Legislature.
>
> Suffolk County Charter § C16-2.

The County's ability to bring suit here may be inferred as a necessary incident of its powers and responsibilities because the clear legislative intent does not negate review. *See City of N.Y. v. State of N.Y.*, 86 N.Y.2d 286, 304 (1995), *citing City of New York v. City Civil Serv. Comm'n*, 60 N.Y.2d 436.

The County's motion to intervene should be granted as the County intervenor has a direct and substantial interest in the outcome of this litigation. CPLR §1013, 7802(d); *Rent Stabilization Ass'n of New York City v. State Div. of Hous. & Cmty.*

Renewal, 252 A.D.2d 111, 116, 681 N.Y.S.2d 679,683 (3d Dep't 1998)(citations omitted). Further the County's intervention will not substantially prejudice the Respondents or cause delay. Accordingly, the County has the requisite capacity to bring the instant proceeding.

This Court has questioned the adequacy of an intervenor's interest if the intervenor's rights have already been adequately represented. *See Quality Aggregates Inc. v. Century Concrete Corp.*, 213 A.D.2d 919, 623 N.Y.S.2d 957 (3d Dep't 1995). However, the County is charged to safeguard all the water resources of the County of Suffolk, especially in deep recharge areas and water supply sensitive areas, from discharges of sewage, industrial and other wastes, toxic or hazardous materials and storm water runoff by preventing and controlling such sources in existence and also by preventing further pollution from new sources, has different interests and has suffered, and will continue to suffer, different harms than the current Petitioners as explained above and should be permitted to intervene accordingly. The County clearly has an obvious bona fide and substantial interest in the outcome of this proceeding.

Finally, the Respondents would not be prejudiced if the motion to intervene were granted, but the County could suffer substantial prejudice were the motion denied. *Seawright v. The Bd. of Elections in the City of New York,* No. 100435/2020, 2020 WL 2332785, at *3 (N.Y. Sup. Ct. May 08, 2020). The County's claims are

premised upon fundamental allegations of environmental harm, which address basic SEQRA principles and law. *Soc'y of Plastics Indus., Inc. v. County of Suffolk,* 77 N.Y.2d 761, 570 N.Y.S.2d 778, 787 (1991) ("Clearly, the zone of interests, or concerns, of SEQRA encompasses the impact of agency action on the relationship between the citizens of this State and their environment."). The County should be permitted to intervene accordingly.

CONCLUSION

It is respectfully requested that the lower court's decision be reversed in its entirety and the Proposed County Petitioner's motion seeking intervention be granted in its entirety and that the County of Suffolk be granted permission to intervene in this proceeding.

Dated: Hauppauge, New York
July 14, 2020

Respectfully submitted,

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STATEMENT PURSUANT TO CPLR 5531

Supreme Court of the State of New York

Appellate Division – Third Department

TOWN OF SOUTHAMPTON, ASSEMBLYMAN, FRED W. THIELE, JR., 101CO, LLC, 102CO NY, LLC, BRRRUBIN, LLC, BRIDGEHAMPTON ROAD RACES, LLC, CITIZENS CAMPAIGN FOR THE ENVIRONMENT, GROUP FOR THE EAST END, NOYAC CIVIC COUNCIL, JOSEPH PHAIR, MARGOT GILMAN and AMELIS DOGGWILER,

Petitioners-Respondents,

- against -

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

Respondents-Respondents,

- and -

COUNTY OF SUFFOLK,

Proposed Intervenor-Appellant.

1. The index number of the case in the court below is 902239/2019.

2. The full names of the original parties are set forth above. There have been no changes.

3. This action was commenced in Supreme Court of the State of New York, Albany County.

4. The action was commenced on or about April 17, 2019 by filing of a Notice of Petition and Petition. Issue was joined thereafter.

5. This is a special proceeding brought pursuant to Article 78 to annul, vacate and void the issuance of a Mined Land Reclamation Law Renewal Permit.

6. The appeal is from the Decision and Order of the Honorable James H. Ferreira, Dated September 9, 2019 and entered on September 13, 2019.

7. The appeal is being perfected on a full reproduced record.