

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.*

**REPLY BRIEF FOR PROPOSED  
INTERVENOR-APPELLANT**

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## PRELIMINARY STATEMENT

The County of Suffolk<sup>1</sup>, the Proposed Intervenor-Appellant herein (hereinafter, the “County” or “Appellant”) respectfully submits this Reply memorandum of law in in further support of the instant appeal.

An express grant of authority is not always necessary for a governmental entity to have a right to sue (*Town of Riverhead v. New York State Bd. of Real Property Services*, 5 N.Y.3d 36, 799 N.Y.S.2d 753, 832 N.E.2d 1169 (2005); *23A Carmody-Wait 2d § 144:4*), rather, the capacity to sue may be inferred as a necessary implication from the powers and responsibilities of a governmental entity provided that there is no clear legislative intent negating review. *Town of Riverhead v. New York State Dept. of Environmental Conservation*, 50 A D.3d 811, 858 N.Y.S.2d 183 (2d Dep't 2008); *Town of Riverhead v. New York State Bd. of Real Property Services*, 5 N.Y.3d 36, 799 N.Y.S.2d 753, 832 N.E.2d 1169 (2005). 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.

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<sup>1</sup> Actions or proceedings must be brought by or against a county in the name of the county. County Law §51, Suffolk County Charter § C16-2.

When Respondent DEC granted Sand Land Corporation and Wainscott Sand and Gravel Corp's (Sand Land) application to a modification permit to vertically deepen a pre-existing mine to depths substantially closer to the County's sole-source aquifer system, DEC circumvented protections afforded to Suffolk County, a legislatively protected area. ECL §23-2703(3). Indeed, this directly affects the County which has long recognized that ensuring a clean and reliable source of drinking water for its residents is a fundamental necessity for the protection of the health of its residents and the continued prosperity of the County in general.

Suffolk County has invested millions of dollars to perform numerous studies that have been conducted to: enhance the understanding of the County's aquifer system and its relationship to the County's surface waters; to assess the relationships between water quality and land use; to identify groundwater, drinking water supply and surface water issues facing Suffolk County in the near term and the long term; and to present the framework for programs to guide future resource protection efforts, management decisions and regulations. These studies include investigation of possible groundwater contamination from Sand Land's material processing business (that includes a VOWF) at the Mine that concluded 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. 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). Indeed, as the County has express statutory authority to protect the aquifer, and the area at issue provides source water for public water supply wells, as well as numerous private wells that provide potable water to local residents, the County has a real and substantial interest in the outcome of this litigation and intervention is necessary. *Wells Fargo Bank, N.A. v McLean*, 70 AD3d 676, 677, 894 NYS2d 487 (2010); *Suffolk County Code §760-702*.

**THE COUNTY OF SUFFOLK HAS STANDING  
AND THE CAPACITY TO SUE**

Appellant's capacity and standing to bring the proceeding below must be inferred not only because the County has functional responsibilities within the zone of interest to be protected, but also because no legislative intent exists to negate judicial review. In fact, the regulatory framework promulgated by Respondent seemingly infers both capacity and standing.

The capacity of a governmental entity to sue may be granted expressly in enabling legislation or may be inferred from review of the entity's statutory functions or responsibilities. *Graziano v. County of Albany*, 3 N.Y.3d 475, 787 N.Y.S.2d 689, 821 N.E.2d 114 (2004). The Record and the controlling law confirm that the County holds the salutary and legislatively intended role to protect groundwater in these

exact circumstances. Additionally, 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). Certainly, the County has an interest in interpreting its own findings and conclusions to the Court, which are now the subject of select misinterpretation by Respondents in the instant litigation.

In *Matter of the City of New York v. City Civil Service Commission*, the Court held that the power to bring a particular claim may be inferred when the agency in question has "functional responsibility within the zone of interest to be protected". 60 N. Y. 2d 436, 445, 470 N.Y.S. 113 (1983). Here the NYSDEC's actions undermined the County's statutory obligation to protect the sole-source aquifer in Suffolk County. *Suffolk County Code §760-702*. As a result of the actions of DEC, the County has, and will, suffer sufficient injury-in-fact to confer standing in this matter as contamination of the aquifer remains a predominant concern in Suffolk County, as the aquifer will remain the only means through which the County's residents may obtain drinking water for the foreseeable future.

"Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria" *Society of Plastics Indus. v County of Suffolk*, 77 N.Y.2d 761, 769 (1991). Petitioner has the



burden of establishing both an injury-in-fact and that the asserted injury is within the zone of interests sought to be protected by the statute alleged to have been violated. *See Society of Plastics*, 77 NY2d at 772-773. In land use matters, moreover, petitioner "must show that it would suffer direct harm, injury that is in some way different from that of the public at large." *Society of Plastics*, 77 N.Y.2d at 774. These requirements ensure that the courts are adjudicating actual controversies for parties that have a genuine stake in the litigation. *See Society of Plastics*, 77 N.Y.2d at 773-774.

However, the Court of Appeals has also recognized that standing rules "should not be heavy-handed." *Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 N.Y.2d 406, 413 (1987). Rather, the Court of Appeals has been reluctant to apply these principles in an overly restrictive manner where the result would be to completely shield a particular action from judicial review. *Matter of Har Enters. v. Town of Brookhaven*, 74 N.Y.2d 524, 529 (1989).

As previously stated the County of Suffolk, through Suffolk County Department of Health Services (hereinafter "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 New York State Department of Environmental Conservation (hereinafter "NYSDEC" or "Department") Pesticide Monitoring Program in Suffolk County.

The County has long recognized that land uses and activities occurring above ground can have a direct impact upon groundwater quality, as recharging precipitation can transport dissolved contaminants from materials used, stored or disposed of at the ground surface down through the unsaturated zone (the sand beneath the ground from the ground surface to the top of the water table) to the underlying aquifer. The sands, silts, gravels and clays that make up the unsaturated zone and the aquifer system function as a large ‘sand filter’ that has helped to limit the impact of many of these contaminants on groundwater quality.

The process of sand mining in Suffolk County is such that the sand that makes up the unsaturated zone is removed, thus decreasing the ability of the ‘sand filter’ to remove or reduce contaminant concentrations. Contaminants or contaminant producing materials that are placed onto the ground surface after sand mining has occurred may impact the groundwater aquifer quicker and at higher concentrations than before the sand was removed. As a result of this concern, and 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.

Here 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 which is challenging the inadequate review of the DEC’s actions conducted under SEQRA and its implementing regulations, nor is there a constitutional challenge to acts of the State. Accordingly, the County maintains that *City of New York et al. v. State of New York*, 86 N.Y.2d 286, 655 N.E.2d 649 (1995) is distinguishable and should not have been relied on by the lower court in making its determination.

The County of Suffolk is one of only two counties in the state with a population of one million or more which draw their primary source of drinking water from designated sole source aquifers. As such, the aquifer in County of Suffolk is afforded special protection under ECL §23-2703(3) which prohibits the DEC from considering an application for a permit to mine as complete or process such an application in [Suffolk County] if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined.

As such, the County has both capacity and standing to seek judicial review of Respondent DEC’s determination which usurped local land use controls and which will directly affect the sole-source aquifer. Intervention is necessary and just in this critically important circumstance.

## CONCLUSION

For all of the foregoing reasons, the lower court's determination denying the County the opportunity to intervene in this matter should be reversed in its entirety and this Court should permit the County to intervene in this matter.

Dated: Hauppauge, New York  
January 11, 2021

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