

**Town of Southampton v New York State Dept. of
Envtl. Conservation**

2020 NY Slip Op 35364(U)

August 31, 2020

Supreme Court, Albany County

Docket Number: Index No. 902239-19

Judge: James H. Ferreira

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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 AMELIA DOGGWILER;

**DECISION, ORDER
AND JUDGMENT**
Index No.: 902239-19
RJI No.: 01-19-ST-0296

Petitioners,

-against-

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

Respondents.

(Supreme Court, Albany County, Article 78 Term)

APPEARANCES: David H. Arnsten, Esq.
The Law Offices of Thomas M. Volz, PLLC
Attorneys for Petitioner Town of Southampton
280 Smithtown Blvd.
Nesconset, New York 11767

Assemblyman Fred W. Thiele, Jr., *Petitioner*
New York State Assemblyman
2302 Main Street, Box 3062
Bridgehampton, New York 11932

Meave M. Tooher, Esq.
Tooher & Barone, LLP
Attorneys for Petitioners 101Co, LLC, 102Co NY, LLC, BRRRubin, LLC,
and Bridgehampton Road Races, LLC
313 Hamilton Street
Albany, New York 12210

Claudia K. Braymer, Esq.
Braymer Law, PLLC
*Attorneys for Petitioners Citizens Campaign for the Environment, Group
for the East End, Noyac Civic Council and Southampton Town Civic
Coalition*
PO Box 2369
Glens Falls, New York 12801

Zachary Murdock, Esq.
Lazer, Aptheker, Rosella & Yedid, P.C.
*Attorneys for Petitioners Joseph Phair, Margot Gilman and Amelia
Doggwiler*
225 Old Country Road
Melville, New York 11747

Stephen M. Nagle, Esq., Assistant Attorney General
Office of the New York State Attorney General
*Attorneys for Respondent New York State Department of Environmental
Conservation*
The Capitol
Albany, New York 12224-0341

Brian E. Matthews, Esq.
Matthews, Kirst & Cooley, PLLC
*Attorneys for Respondents Sand Land Corporation and Wainscott Sand
and Gravel Corp.*
241 Pantigo Road
East Hampton, New York 11937

HON. JAMES H. FERREIRA, Acting Justice:

This CPLR article 78 proceeding concerns the operation of a sand and gravel mine in respondent Town of Southampton, Suffolk County, New York (hereinafter the Town). The mine is owned and operated by respondents Sand Land Corporation and Wainscott Sand and Gravel Corp. (hereinafter collectively referred to as Sand Land). Petitioners, a group comprised of a variety of individuals and entities, including neighboring landowners and civic groups, challenge, among other things, a settlement agreement entered into between Sand Land and respondent New York State

Department of Environmental Conservation (hereinafter DEC), as well as DEC's issuance of a modified Mined Land Reclamation Permit (hereinafter MLRP) to Sand Land pursuant to the settlement agreement. This proceeding was commenced in April 2019 and has been the subject of considerable litigation since that time. The procedural and factual history of this proceeding can be summarized as follows.

Background

Sand Land owns and operates a sand and gravel mine on a 50-acre parcel of property located on Middle Line Highway in the Town. Petitioners allege that Sand Land's mine "sits directly above the sole source aquifer for the region" which "is the sole source of public drinking water for the Town" (Petition ¶ 33). The mine has been operating since the 1960's. At the time the mine began operating, the parcel was zoned "G-Industrial" and mining was allowed pursuant to a permit. Bridgehampton Materials & Heavy Equipment, Inc. (hereinafter Bridgehampton Materials), Sand Land's predecessor in interest, originally operated the mine pursuant to approval from the Town's Zoning Board of Appeals. In 1972, the Town re-zoned the parcel and surrounding area to "CR-200 County Residence District," a district where mining is prohibited. In March 1981, after the adoption of the Mined Land Reclamation Law, Bridgehampton Materials obtained a MLRP to mine 20 acres of the property (Affidavit in Support of Answer [DEC] ¶ 14; see R at S027).¹ In 1985, DEC renewed the MLRP and granted the application of Bridgehampton Materials to expand the land affected by mining to 31.5 acres. The amended MLRP from DEC permitted mining "only from" 31.5 acres of the 50-acre site (see R at S006). In 1998, the MLRP was renewed and transferred to Sand Land.

¹ References preceded by "R" are to the six-volume, consecutively-paginated administrative record submitted by DEC with its answer.

The 1998 MLRP describes the authorized activity as follows: “To mine sand and gravel from 31.5 acres of a 50 acre site” (Petition, Exhibit A). In addition to mining, Sand Land received and processed vegetative organic waste materials (hereinafter VOWM) at the property pursuant to a Part 360 registration issued by DEC. In 2011, Sand Land obtained a certificate of occupancy from the Town stating that the use of the site as a sand mine was a pre-existing use (R at S025-S026).²

DEC renewed Sand Land’s MLRP in 2003, 2008 and 2013. The authorized activity described in the 2013 MLRP is “[m]ine sand and gravel from 31.5 acres of a 50 acre site” (R at S042). The 2013 MLRP further provided 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” (*id.*). The plans prepared by David Fox (hereinafter the 2013 Fox Plans) show an approximately 3.1-acre area which is denominated on the plans as “Stump Dump” (Petition, Exhibit C). The 2013 Fox Plans provide that the area of affected acreage is 34.5901 acres, the area of the Stump Dump is 3.0901 acres and the net area of affected acreage is 31.5 acres. The plans state: “area of mining to remain within 31.5 acre boundary outlined on site plan” (*id.*). Also in 2013, DEC approved the reclamation of 8 acres of the mine, thus reducing the mineable acres to 23.5 acres. The 2013 MLRP was due to expire on November 4, 2018.

In 2014, Sand Land submitted an application to DEC to modify its MLRP. Sand Land summarized the proposed expansion as a vertical expansion of its mining operation to increase the depth of the mine from 160 feet above mean sea level (hereinafter amsl) to 120 feet amsl. The

² The Town issued an updated certificate of occupancy in 2016 following a decision of the Town’s Zoning Board of Appeals that “the processing of trees, brush, stumps, leaves, and other clearing debris into topsoil or mulch, and the storage, sale, and delivery of mulch, topsoil, and wood chips were ‘new uses’ that were not preexisting and which were not a permitted expansion of any legally established nonconforming use” (Matter of Sand Land Corp. v Zoning Bd. of Appeals of Town of Southampton, 137 AD3d 1289, 1291 [2d Dept 2016], lv denied 28 NY3d 906 [2016]; see R at S100).

application also indicated that 4.9 acres were included in the application which had not been previously approved. The 4.9 acres included in the modification consisted of a 1.8 acre “area of modification” and the 3.1 acre Stump Dump which is characterized on the plans as an “area affected prior [to] 1975” (Petition, Exhibit E). In April 2014, DEC issued a Negative Declaration of Significance with respect to the proposed modification pursuant to the State Environmental Quality Review Act (hereinafter SEQRA), finding that the proposed action will not result in any significant adverse environmental impacts (R at S058). DEC, however, denied the permit modification application by letter dated April 3, 2015 (R at S083-S086). Among the various reasons provided for the denial is the failure of the Environmental Assessment Form and Negative Declaration of Significance to consider several areas of environmental concern, including Sand Land’s receipt and processing of VOWM and its impact on groundwater quality. The letter noted that a Suffolk County Department of Health Services (hereinafter SCDHS) report had “documented significant impacts to groundwater quality” of facilities that manage VOWM and that the Negative Declaration had failed to address this issue (id.).

Sand Land requested a hearing on the permit denial. DEC conducted an administrative legislative hearing and issues conferences in October 2015. In a ruling dated January 26, 2018, the Chief Administrative Law Judge (hereinafter ALJ) adjourned the matter pending the submission of proof that the proposed mine expansion is authorized under the Town’s local zoning laws (see Petition, Exhibit I; see also ECL 23-2730 [3]; 23-2711). The ALJ specifically determined that ECL 23-2703 (3) and ECL 23-2711 “apply to applicant’s present MLRL permit modification application, at least insofar as those statutory provisions require an inquiry into the status of applicant’s proposal under local law and a bar on permit processing until that inquiry is completed in applicant’s favor”

(Petition, Exhibit I at 10). The ALJ found that ECL 23-2703 (3) “prohibits [DEC] from further processing applicant’s mining permit application until the legality of applicant’s proposed mine expansion under Town law is definitively established by the appropriate local authorities” (*id.* at 13). In a ruling dated December 10, 2018, the ALJ, among other things, denied Sand Land’s motion to renew and reargue.³

Meanwhile, on or about September 11, 2018, DEC issued a Notice of Intent to Modify (hereinafter NIM) to Sand Land advising that DEC proposes to modify the MLRP “to require the mining activities at the facility cease and reclamation activities begin” (R at S430). The NIM stated:

“Staff’s evaluation of the remaining reserves available to Sand Land has determined that only de minimus quantities of sand remain available for mining. 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. Therefore, modification of Sand Land’s Mining Permit is appropriate to require the cessation of mining activities and the initiation of reclamation of the mine (R at S430-S431).

The NIM further stated:

“Additionally, multiple investigations into potential groundwater impacts from vegetative organic waste processing activities on Long Island have been completed in the past three months. These studies were conducted by [SCDHS], DEC . . . , and Alpha Geoscience The groundwater concerns identified in the various studies are raised principally in connection with potential contaminants from vegetative waste and land clearing debris. While Sand Land could potentially remove the de minimus amounts of sand in the existing life of mine, that sand is located predominantly in the area of the mine formerly used for storing and processing of vegetative waste. Future 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 at S431).

Sand Land objected to the NIM and requested a hearing.

³ Petitioners allege that the deadline for filing appeals from the ALJ’s determinations was August 12, 2019. The Court has received no information as to the current status of that proceeding.

Thereafter, as its MLRP was due to expire on November 4, 2018, Sand Land submitted an application for renewal on or about October 2, 2018. The renewal application stated that 31.5 acres were permitted prior to the application and that there was no acreage included in the application that was not previously permitted (R at 446). Sand Land submitted with its application revised plans prepared by Mr. Fox, dated September 27, 2018. The plans provide that the area of affected acreage is 34.5901 acres, the area of the Stump Dump is 3.0901 acres and the net area of affected acreage is 31.5 acres. Sand Land thereafter provided an updated renewal application dated October 12, 2018; attached to the updated application is a map showing – with yellow shading – the area to be mined during the permit term. On this map, the 3.1 Stump Dump area is not shaded (R at S452). On or about October 19, 2018, at the request of DEC, Sand Land filed a Mined Land Use Plan (hereinafter MLUP) in connection with its renewal application. A site map included with the MLUP includes the Stump Dump in the Life of Mine boundary (R at S475).

On February 21, 2019, Sand Land and DEC entered into a settlement agreement (hereinafter the Agreement) which settled “any and all issues” related to the NIM and Sand Land’s renewal application (R at S520). The Agreement recites that Sand Land’s MLRP “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 use plan approved by [DEC]” (R at S518). Pursuant to the Agreement, Sand Land agreed to, among other things, immediately and permanently cease using the facility for the receipt, storage and processing of VOWM and surrender its Part 360 Registration. Sand Land also agreed to conduct quarterly groundwater monitoring and submit the results to DEC. The parties agreed that the NIM would be rescinded, DEC would issue a renewed MLRP “for the 34.5-acre Life of Mine” and would timely

process “a permit application in accordance with” the terms of the settlement agreement “including the proposal for mining to be conducted within the existing Life of Mine to a depth of 120-feet AMSL” (R at S522). Sand Land agreed to cease “all mining within the existing 34.5-acre Life of Mine” within 8 years from the effective date of the “modified permit” (*id.*). The parties agreed that the submission of a modified permit application “shall not affect or otherwise legally impact” the legal proceedings concerning DEC’s denial of Sand Land’s prior modification application but Sand Land agreed that, upon DEC’s granting of the second modification application, it would discontinue administrative proceedings with respect to the first application (R at S523). The Agreement further states:

“The Department agrees that the modified permit application referenced . . . above, which would be entirely located within the existing Life of Mine, shall be processed based upon the existing Negative Declaration and the multiple legislative hearings held regarding the prior, more expansive, modification request, which also contemplated the continued use of the Facility for the processing and storage of vegetative waste. . . . In agreeing to the terms of this settlement, the Department affirmatively states it has reviewed the testimony and accompanying correspondence submitted to the Department in connection with the two legislative hearings held on the prior, more expansive, modification proposal, and that the conditions being imposed, and the concessions being required from, Sand Land, as part of this settlement are specifically being required and implemented in direct response to the concerns raised in connection with those prior legislative hearings” (R at S523-S524).

The Agreement also states: “[t]he agreements and covenants set forth herein are expressly contingent upon the Department’s issuance of the modified permit . . . on the terms set forth herein” (R at S524).

Sand Land thereafter submitted an application to DEC to modify its MLRP. The modification application stated that 34.5 acres were permitted prior to the application and that there was no acreage included in the application that was not previously permitted (R at S637). Sand Land

submitted with its application a modified MLUP which stated that the purpose of the modification was to deepen the mine to an elevation of 120 amsl “while maintaining the current, 34.5-acre, permitted, mine footprint” (R at S550). The Stump Dump is not identified on a site map included with the MLUP (R at S567). On or about March 15, 2019, DEC issued a renewed MLRP to Sand Land (R at S639-S643). The 2019 MLRP provides that “[m]ining is only permitted on the 34.5 acres of the 50 acre site” (R at S640).

Also on March 15, 2019, DEC issued an Amended Negative Declaration for the modification application. In the Amended Negative Declaration, DEC found, among other things, that the 40-foot deepening of the mine “will not significantly impact groundwater quality,” noting that all vegetative waste had been removed from the site and all mulching and composting operations at the site were terminated in 2018 (R at S645). DEC further found:

“The existing groundwater level is approximately elevation 20’ (groundwater levels fluctuate). The elevation of the proposed new bottom of the mine is elevation 120’ which will provide a minimum of 90 feet of soil between the bottom of the mine and groundwater. The expected 90 feet of sand and soil will provide filtering and buffering benefits to further protect the groundwater below the new floor of the mine. In addition, some groundwater monitoring wells have been installed at the site and additional ones will be added to periodically sample and test the groundwater quality on at least a quarterly basis. Actions can be taken to mitigate any changes to groundwater quality originating from the mine. Therefore, no significant impacts from composting or past composting activities are expected to [impact] groundwater quality” (R at S645-S646).

Petitioners allege that DEC withdrew the NIM on March 14, 2019 (Petition ¶ 91).

Petitioners commenced this proceeding on April 17, 2019. In the Verified Petition, petitioners seek to vacate and annul the Agreement, DEC’s issuance of the renewal permit, DEC’s revocation/withdrawal of the NIM and DEC’s issuance of the Amended Negative Declaration. Petitioners also seek a permanent injunction enjoining mining in the Stump Dump area and enjoining

DEC from further processing Sand Land's application for modification. Petitioners also moved, by Order to Show Cause, for a preliminary injunction enjoining Sand Land, during the pendency of this proceeding, from "mining outside the previously permitted Life of Mine of 31.5 acres to a depth of 160 feet amsl as shown on the 2013 Fox Site Plan annexed to the Petition as Exhibit C" and from "disturbing the overburden in the 3 acre Stump Dump" and enjoining DEC from continuing to process Sand Land's modification application or from closing the public comment period (Order to Show Cause, dated April 18, 2019).⁴ In a Decision and Order dated May 30, 2019, the Court granted petitioners' motion for a preliminary injunction only inasmuch as it ordered that, during the pendency of this proceeding, "Sand Land is enjoined from mining outside the 31.5 acres identified in the 2013 MLRP to a depth of 160 feet amsl as shown on the 2013 Fox Site Plan annexed to the Petition as Exhibit C and from disturbing the overburden in the 3 acre Stump Dump" (Decision and Order dated May 30, 2019, at 17). The Court denied the motion inasmuch as petitioners sought to enjoin DEC from continuing to process Sand Land's permit modification application.

On June 5, 2019, following a public comment period, DEC granted Sand Land's modification application and issued a modified MLRP. The modified MLRP authorizes mining within the 34.5-acre Life of Mine to a depth of 120 amsl, a 40-foot deepening (R at S759-S765). In response to correspondence from the parties, the Court, by Letter Order dated June 10, 2019, clarified that the preliminary injunction issued by the Court applies only to mining in the 3.1-acre Stump Dump area of the mine and does not pertain to any activities outside of that area. The Court amended the Decision and Order to state that Sand Land is enjoined, during the pendency of this proceeding, from

⁴ Petitioners also sought a temporary restraining order (hereinafter TRO) in the Order to Show Cause; the Part I Judge struck that relief from the Order to Show Cause when she signed it.¹ Following argument on May 15, 2019, this Court denied petitioners' application for a TRO to the extent that the application was still pending.

“mining outside the 31.5 acres identified in the 2013 MLRP as shown on the 2013 Fox Site Plan annexed to the Petition as Exhibit C and from disturbing the overburden in the 3 acre Stump Dump” (Court’s Letter Order, dated June 10, 2019).

Petitioners thereafter moved for: (1) leave to file and serve a Verified Supplemental Petition; and (2) a preliminary injunction enjoining Sand Land, during the pendency of this proceeding, from mining below 160 feet amsl anywhere in the 31.5 acre Life of Mine. By letter Order dated June 19, 2019, the Court granted that part of petitioners’ motion which sought leave to file and serve a Verified Supplemental Petition, on consent, and petitioners filed the Verified Supplemental Petition on June 21, 2019. Therein, petitioners add causes of action challenging DEC’s issuance of the modified MLRP and seek a permanent injunction enjoining Sand Land from mining below 160 feet amsl throughout the floor of the mine. After hearing oral argument, in a Decision and Order dated August 1, 2019, the Court denied petitioners’ second motion for a preliminary injunction. In a Decision and Order dated December 20, 2019, the Court denied petitioners’ motion for leave to reargue the second preliminary injunction motion.

Respondents thereafter filed answers to the proceeding and petitioners filed a reply. The Court heard oral argument on the proceeding on September 17, 2019.⁵ On September 10, 2019, after the proceeding was fully submitted, DEC filed a supplement to its administrative return consisting of two submissions from petitioners’ counsel, with attachments, which were considered by DEC in preparing its response with respect to the public comments that were submitted with respect to the

⁵ Prior to oral argument, in a Decision and Order dated September 9, 2019, the Court denied a motion filed by the County of Suffolk (hereinafter the County) seeking to intervene as a petitioner in this proceeding. In a Decision and Order dated February 11, 2020, the Court denied the County’s motion to renew its motion to intervene. The County filed an appeal from the Court’s denial of its motion to intervene. To date, the Court has not received any information as to whether the appeal was perfected or, if so, whether a decision on the appeal has been issued.

modification application.⁶

Petition and Supplemental Petition

In the petition, petitioners argue that the 2019 renewal permit changed the scope of permitted activity from that approved in the 2013 mining permit by expanding the Life of Mine from 31.5 acres to 34.5 acres; petitioners contend that this was done to circumvent DEC's denial of Sand Land's permit modification application, the ALJ's ruling and the Town's right under ECL 23-2703(3) to review the legality of the mine expansion. Petitioners argue that the expansion of the scope of mining to 34.5 acres constituted a modification rather than a renewal and, inasmuch as DEC had previously denied such an expansion, was arbitrary and capricious and in violation of lawful procedure in the absence of any statement or explanation for the change in position.

Petitioners also assert that the Agreement falsely states that the 2013 permit permitted mining on 34.5 acres of the property and that this "false listing" of the Life of Mine was done to circumvent DEC's denial of Sand Land's permit modification application, the ALJ's ruling and the Town's right under ECL 23-2703(3) to review the legality of the mine expansion (Petition ¶ 112). Petitioners claim that DEC's execution of the Agreement with the false statement was arbitrary and capricious and a violation of the law. Petitioners also allege that the Agreement is arbitrary and capricious, in violation of lawful procedure and in violation of the law because it did not provide any explanation or justification for DEC's "complete reversal of position" – as stated in the NIM – regarding the potential risks of mining in areas where processing and storing of VOWM formerly occurred (*id.* ¶ 118). Petitioners allege that no groundwater or soil testing was completed in the areas where

⁶ The supplemental documents provided by DEC were submitted to DEC by petitioners in the underlying administrative proceeding; as such, the Court discerns no prejudice to petitioners arising from the fact that the documents were inadvertently omitted from DEC's initial administrative return.

VOWM was processed and no review or analysis was done that would support DEC's change of position, and that the Agreement is arbitrary and capricious because it is contrary to DEC's prior findings and the findings in the SCDHS report and fails to provide for testing of the overburden in the mine prior to allowing mining. Petitioners also allege that DEC acted in contravention of ECL 23-2711(3) and 23-2703(3) by issuing the Amended Negative Declaration and was acting in excess of its jurisdiction in continuing to process petitioner's modification application.

In their supplemental petition, petitioners allege that DEC's issuance of the modification permit is subject to annulment for the same reasons as its issuance of the renewal permit inasmuch as the 3-acre Stump Dump was improperly and arbitrarily added to the Life of Mine in the 2019 renewal permit. Petitioners also allege that the issuance of the modification permit violated ECL 23-2711(3) because DEC did not submit the required notice to the Town's chief administrative officer prior to issuing the permit and because the Town has notified DEC that its code prohibits mining in all zoning districts; petitioners note that the ALJ has concluded that there is doubt as to whether previously unpermitted mining is legal under the Town Code and that DEC is prohibited from processing the application without submission of proof of the legality of the modification under the Town law. Petitioners also challenge the modification permit on the ground that DEC failed to sufficiently consider the environmental issues prior to issuing the Amended Negative Declaration, asserting that the statement in the Amended Negative Declaration that the expansion of the depth of the mine will not significantly impact groundwater quality is without any factual basis and is arbitrary and capricious; petitioners assert that the statement is directly rebutted by the findings in the SCDHS report. Petitioners argue that DEC failed to adequately study the current levels of contamination in the sand proposed to be removed and failed to consider evidence that further

mining at the location presents a significant risk of increased contamination of the aquifer. Petitioners urge that the approval of the modification application is directly contrary to its denial of a “nearly identical” application in 2015 and that the differences in the applications do not support their being treated differently (Supplemental Petition ¶ 170).

DEC’s Answer - Dickert Affidavit

In response, DEC has submitted, along with its administrative return, the affidavit of Catherine A. Dickert, the Director of the Division of Mineral Resources for DEC. Therein, she states that the term “Life of Mine” is a term memorialized in a July 1987 DEC policy memorandum and is defined as “ ‘the total area to be mined and the length of time to exhaust the minerals intended to be excavated from that area, generally shown in the Mined Land Use Plan’ ” (Affidavit in Support of Answer [DEC] ¶ 10). She avers: “DEC has routinely corrected the life of mine acreage when it discovers that a life of mine permit condition or a reclamation plan does not adequately reflect the total acreage permitted under a Mined Land Reclamation Permit and the reclamation plan obligations. Corrections are processed as part of a modification or renewal application review” (*id.* ¶ 11). She further states:

“Pursuant to a Memorandum on Mined Land Reclamation Permit Renewals and Modification, staff should make adjustments to mining and reclamation maps to correct and accurately outline the affected areas and the life of mine. This type of correction is appropriate only to correct the documents so that they show areas that have been historically affected by mining activities (e.g., affected prior to initial permit issuance) and have been continuously used as such but were not included in the original Life of Mine Area. This guidance was developed through a process improvement exercise conducted by DEC beginning in March of 2018” (*id.* ¶ 12).

Ms. Dickert provides the following additional facts in her affidavit. She avers that “[r]oughly five acres” of Sand Land’s 50-acre parcel was disturbed by mining prior to 1975 and consequently

not subject to mined land-use plan requirements (Affidavit in Support of Answer [DEC] ¶ 13). She states that approximately 3 acres of the previously-mined area is the area known as the Stump Dump.

She states:

“The original Mining Plan noted that a five-acre ‘existing hole’ had previously been excavated to a ‘depth of 120 ft. below the grade of the surrounding land.’ . . . Later, the hole, including the 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 (amsl); level or nearly level with the mine floor. . . . At 120 feet below grade, the Stump Dump had historically been excavated to an approximate elevation of 110 to 110 feet amsl, before being filled with sand. In other words, the material in the Stump Dump from the surface at 160 to 170 amsl down to approximately 110 to 100 amsl, is stockpiled sand or fill[,] not minerals in their original location” (*id.* ¶¶ 14-15).

She also asserts that “[f]uture removal of all of th[e] fill material from the Stump Dump area is prevented by the permitted final mine floor elevation, which would be reached before the bottom of the fill can be removed. The bottom of the fill material is estimated at 110 to 100 feet amsl, but the current final mine floor elevation is higher at 120 amsl” (*id.* ¶ 18). Ms. Dickert avers that the Stump Dump was not reflected in the permits or reclamation plans because it was land affected by mining prior to the enactment of the Mined Land Reclamation Law in 1975. However, the Stump Dump was “continuously disturbed” by excavation activities, was surrounded by actively-mined areas, was considered by DEC inspectors as part of the mine site and was inspected “over the years as though it was part of the total permitted acres” (*id.* ¶ 17). Ms. Dickert asserts that removing fill from the Stump Dump does not require a DEC permit because such removal is not “mining” under ECL 23-2705 (8) where the fill is not in its original location. She further asserts that, given the mine floor elevation requirements in the modified permit, mining of the virgin material in the Stump Dump below the fill is not authorized. She avers: “Therefore, the corrected permit clarifying that the Stump

Dump was part of the Life of Mine did not authorize mining in the Stump Dump” (id. ¶ 42).

Ms. Dickert asserts that, in late 2018 and early 2019, DEC and Sand Land engaged in a series of discussions in an effort to resolve Sand Land’s objections to the NIM. DEC considered a report prepared by a geologist on behalf of Sand Land and determined that there were sufficient quantities of unmined sand within the permitted area – more than a de minimus amount – to support the continuation of a commercially viable mining operation. DEC also found, consistent with published data, that “elevated levels of certain naturally occurring metals and other elements in the soils and groundwater at the site did not present a threat to the groundwater” (Affidavit in Support of Answer [DEC] ¶ 25). Ms. Dickert further asserts that DEC’s staff also considered “the absence of reliable data or studies indicating that sand and gravel mining negatively impact groundwater,” noting that DEC has approximately 20 years worth of sampling data from three mine sites in Suffolk County that are mining in the water table and that the data has not shown any impacts to groundwater quality arising from mining activities (id. ¶ 26). She states that, in entering into the Agreement, DEC staff “properly considered the significant Sand Land commitments within the context of the agency’s statutory mandate to encourage the orderly development of mineral resources necessary to assure satisfaction of economic needs compatible with sound environmental management practices” (id. ¶ 29).

Ms. Dickert further states that, when Sand Land applied for a permit renewal in 2018:

“DEC staff considered the difference in acreage between the life of mine as inspected in the field (34.5 [acres]) by mined land reclamation specialists and life of mine depicted on maps and in documents (31.5 acres). I directed mined land reclamation specialists performing financial security calculations to consider the 34.5 acres the correct and accurate life of mine acreage. Including the three-acre Stump Dump resulted in accurate and consistent acres reported on permit documents, consideration of the Stump Dump in financial security calculations, and it ensured reclamation of

the entire disturbed life of mine, including the Stump Dump, at the conclusion of mining” (Affidavit in Support of Answer [DEC] ¶ 30).

She avers that, had the correction not been made, the Stump Dump would not have been reclaimed. In addition, including of the Stump Dump in the permit restricts certain activities from occurring there and limits removal of sand from the area to a depth of 120 amsl (in the modified permit). She notes that the renewal permit “did not include the [1.8-acre] wood processing area that the operator applied to mine in their 2014 permit modification because this area was not historically affected by mining activities and is outside the Life of Mine” (*id.* ¶ 33). Inclusion of these additional acres would require a permit modification.

Ms. Dickert avers that, in reaching the conclusions underpinning the Amended Negative Declaration, DEC considered the relevant scientific facts, including the facts that the mine is located within an area designated as a Sole Source Aquifer and a Special Groundwater Protection Area and within the Town’s Aquifer Protection Overly District, and properly concluded that the proposed deepening “is not expected to result in any impacts to groundwater quality” (Affidavit in Support of Answer [DEC] ¶ 37). She states that it is her understanding that input from the Town was not required under ECL 23-2703 or 23-2711 because the 2019 application was to modify an existing permit within the current disturbance footprint and without material change. She avers that, in evaluating the application, DEC considered the Town’s zoning law and two letters from the Town, as well as two Certificates of Occupancy issued by the Town with respect to the site. In conclusion, Ms. Dickert states:

“DEC properly updated the permit to correct the scope and acreage of the Life of Mine by including the three-acre-Stump Dump for the limited purposes of regulation and reclamation. The renewed permit, modified permit and Settlement Agreement did not authorize mining within the Stump Dump and approval of the application for

a 40' vertical expansion in 31.5 acres remainder of the life of mine was not a material change because it did not include any horizontal expansion, the mining method did not change, and there were no hydrologic impacts to be considered since mining would not take place in the water table" (*id.* ¶ 43).

Pending Motions

Preliminarily, there are three motions pending which must be resolved before the Court addresses the merits of the proceeding. First, Sand Land has filed a motion to dismiss petitioner Assemblyman Fred W. Thiele, Jr. (hereinafter Mr. Thiele) as a named petitioner on the ground that he lacks the requisite standing to commence and prosecute this proceeding (Motion No. 5).⁷ In addition, petitioners move for an order directing DEC to supplement its administrative return to provide "all documents and materials" pertaining to the various determinations that DEC made with respect to this matter (Notice of Motion [Motion No. 6], dated August 22, 2019) (hereinafter Motion No. 6). Petitioners also move for an order permitting them to file supplemental affirmations, affidavits, exhibits and memoranda of law in support of the Petition and Supplemental Petition (Motion No. 10).

Motion No. 5 (Standing)

In this motion, as stated above, Sand Land seeks an order dismissing Mr. Thiele from this matter as a named petitioner on the ground that he lacks standing. Mr. Thiele opposes the motion. DEC has submitted an affirmation in support of the motion, and Sand Land has submitted a reply. Petitioners also address the issue of Mr. Thiele's standing in their memorandum of law in reply to

⁷ The Court herein will refer to the pending motions by the number that they have been assigned in the e-filing system.

respondents' answers.⁸

Upon review, Sand Land's motion is granted. " '[S]tanding is a threshold determination and a litigant must establish standing in order to seek judicial review, with the burden of establishing standing being on the party seeking review' " (Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO v City of Schenectady, 178 AD3d 1329, 1331 [3d Dept 2019], quoting Rudder v Pataki, 246 AD2d 183, 185 [3d Dept 1998], aff'd 93 NY2d 273 [1999]). "A petitioner challenging governmental action must 'show injury in fact, meaning that [the petitioner] will actually be harmed by the challenged [governmental] action[,] and, further, that the injury 'fall[s] within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the [governmental entity] has acted' " (Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO v City of Schenectady, 178 AD3d at 1331, quoting New York State Assn. of Nurse Anesthetists v Novello, 2 NY3d 207, 211 [2004][internal quotation marks omitted]; see Matter of Curry v New York State Educ. Dept., 163 AD3d 1327, 1329 [3d Dept 2018]). "[I]n limited circumstances, legislators . . . have capacity and standing to sue when conduct unlawfully interferes with or usurps their duties as legislators" (Silver v Pataki, 96 NY2d 532, 542 [2001]). "The alleged conduct must have caused a 'direct and personal injury [that] is clearly within a legislator's zone of interest and unquestionably represents a concrete and particularized harm' that is distinct from that suffered by the general public" (Matter of Townsend v Spitzer, 69 AD3d 1026, 1027 [3d Dept 2010],

⁸ Inasmuch as petitioners argue that the motion is procedurally improper and violates CPLR 7804(f) because Sand Land raised the issue in both a pre-answer motion and in its answer, the Court is not persuaded by that argument. CPLR 7804(f) provides that "[t]he respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition." However, nothing in that provision specifically prohibits a respondent from proceeding as Sand Land has here, and petitioners have not submitted any case law in support of their position.

lv denied 15 NY3d 702 [2010], quoting Silver v Pataki, 96 NY2d at 540).

Here, Mr. Thiele is named as a petitioner in his official capacity as an Assemblyman. The petition alleges that Mr. Thiele is “the duly elected New York State Assemblyman for Assembly District 1 composed of the Towns of East Hampton, Southampton and Shelter Island” (Petition ¶ 5). The petition does not contain any additional information as to Mr. Thiele’s interest in this matter. In an affidavit in opposition to the motion, Mr. Thiele asserts, in relevant part, that the mine lies within his district and his constituents will be injured in fact by the adverse environmental impacts of Sand Land’s activities at the site. He also notes that he lives approximately two miles from the mine site. He asserts that, as an elected official, he “believe[s] it is [his] duty as well as [his] right to advocate on [behalf of his constituents] in this matter that will have significant impacts on their health, safety and welfare” (Affidavit in Opposition [Motion No. 6] ¶ 15). The Court finds these assertions, and the other assertions made by Mr. Thiele in his affidavit, insufficient to establish his standing to commence this proceeding in his official capacity as a legislator. Mr. Thiele makes no assertion that any challenged conduct unlawfully interfered with or usurped his duties as a legislator, and the Court does not find that he has demonstrated that he suffered a direct and personal injury which is within his zone of interest as a legislator and which is distinct from the harm suffered by the general public. As such, Sand Land’s motion is granted and Mr. Thiele is dismissed as a petitioner in this proceeding.

The Court notes that, in its answer, DEC raises two related objections in point of law. First, DEC asserts that certain petitioners – namely petitioners Citizens Campaign for the Environment, Group for the East End, Noyac Civil Council and Southampton Town Civic Coalition – lack standing to commence this proceeding. DEC also contends that Mr. Thiele lacks capacity to

commence this proceeding. Inasmuch as the Court has found that Mr. Thiele lacks standing, it is unnecessary for the Court to address the issue of whether he had capacity to bring this proceeding. The Court also finds it unnecessary to address DEC's contention that certain other petitioners lack standing. Importantly, respondents have only specifically challenged the standing of certain petitioners, leaving wholly unchallenged the standing of numerous other petitioners named in the caption, including the Town. Moreover, upon review, the Court finds that the allegations in the petition establish that at least one petitioner has standing to commence this proceeding. Indeed, the petition alleges that several of the petitioners – petitioners 101Co, LLC, 102Co NY, LLC and BRRRubin, LLC – are current owners of land adjoining the mine and that several other petitioners – petitioners Joseph Phair, Margot Gilman and Amelia Doggwiler – own homes that are between 105 and 650 feet from Sand Land's property. Given petitioner's allegations with respect to the negative impact of Sand Land's mining operations on the nearby water supply, the Court finds that these petitioners have sufficiently alleged standing to commence this lawsuit (see Matter of Village of Woodbury v Seggos, 154 AD3d 1256, 1259 [3d Dept 2017]). The allegations in the petition are also sufficient to establish the Town's standing to commence this proceeding (see Matter of Town of Riverhead v New York State Dept. of Env'tl. Conservation, 50 AD3d 811, 812-813 [2d Dept 2008]). Again, as noted above, respondents have not challenged the standing of these petitioners to commence this proceeding. Having found that at least one petitioner has standing, the Court finds it unnecessary to address respondents' arguments – which were not raised in a motion but in DEC's answer – with respect to the standing of Citizens Campaign for the Environment, Group for the East End, Noyac Civil Council and Southampton Town Civic Coalition (see Saratoga County Chamber of Commerce v Pataki, 100 NY2d 801, 813 [2003], cert denied 540 US 1017 [2003]; Matter of New

York State Bd. of Regents v State Univ. of N.Y., 178 AD3d 11, 18 [3d Dept 2019]).

Motion No. 6 - Supplement Administrative Return

In Motion No. 6, petitioners argue that the administrative return submitted by DEC is “demonstrably and materially incomplete” (Affirmation in Support [Motion No. 6] ¶ 10). Specifically, petitioners claim that DEC’s administrative return provides no insight or documentation as to why DEC decided to enter into the Agreement and “abandon[]” its findings in the NIM (id. ¶ 21). Petitioners also argue that the administrative return is missing documentation explaining DEC’s rationale for its decision to grant a horizontal expansion of mining operations to include the 3-acre Stump Dump. They also urge that the record is incomplete with respect to DEC’s determination to issue the modification permit. Petitioners assert that, for example, the administrative return is missing emails between Sand Land’s counsel and DEC Deputy Counsel Scott Crisafulli, dated February 21, 2019 and March 15, 2019 which concern the Agreement and which petitioners received in response to a Freedom of Information Law (hereinafter FOIL) request. Petitioners also note that there is no documentation in the administrative return reflecting (1) DEC’s review of a settlement offer presented by Sand Land, (2) DEC’s analysis of the ALJ’s decision, (3) the negotiated resolution of the NIM and DEC’s consideration of the scientific issues therein, (4) DEC’s analysis of a report by Sand Land’s consultant and the SCDHS report or (5) DEC’s analysis of a dispute in the record regarding the amount of mineable sand. DEC opposes the motion.⁹

⁹ By letter dated August 26, 2019, the Court denied the request of petitioners for an adjournment of the deadline for the filing of their reply to respondents’ answers to the proceeding pending the Court’s determination as to Motion No. 6. The Court advised that, if it determined that further briefing is required after its made a decision on the motion, it would direct the parties to file supplemental papers.

CPLR 7804 (e) provides: “The body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration.” Upon review, the Court declines to order DEC to supplement its administrative record. To be sure, petitioners are correct that the administrative record itself does not contain documentation which expressly provides DEC’s rationale for several of the determinations challenged herein, including the change in the Life of Mine acreage set forth in the Agreement. However, DEC’s rationale is fully set forth in the affidavit of Ms. Dickert. The Court finds that the administrative record, coupled with Ms. Dickert’s affidavit, provides “an adequate basis upon which to review” the challenged determinations (see Matter of Benson v McCaul, 268 AD2d 756, 757-758 [3d Dept 2000], lv denied 94 NY2d 764 [2000]; see Matter of Framan Mech., Inc. v State Univ. Constr. Fund, 151 AD3d 1429, 1432 [3d Dept 2017]; Matter of County of Rockland v Town of Clarkstown, 128 AD3d 957, 958 [2d Dept 2015]). In the Court’s view, petitioners have not demonstrated that additional records are necessary for the Court to make a decision with respect to this proceeding. As such, Motion No. 6 is denied.

Inasmuch as petitioners argue, in reply to respondents’ answers, that Ms. Dickert’s affidavit should not be considered as evidence to support the challenged determinations because it was not part of the administrative record, the Court disagrees. “Fundamentally, judicial review of an administrative determination is limited to the record before the agency, and proof outside the administrative record should not be considered” (Matter of Van Antwerp v Board of Educ. for the Liverpool Cent. School Dist., 247 AD2d 676, 678 [3d Dept 1998]). However, where, as here, the issue before the Court is whether the administrative determination has a rational basis, affidavits such as the one submitted by Ms. Dickert are properly considered by the Court where the affiant has “firsthand knowledge of the decision-making process undertaken by the [agency]” (Matter of Office

Bldg. Assoc., LLC v Empire Zone Designation Bd., 95 AD3d 1402, 1405 [3d Dept 2012]; see Matter of Brown v Sawyer, 85 AD3d 1614, 1615-1616 [4th Dept 2011]; Matter of Kirmayer v New York State Dept. of Civ. Serv., 24 AD3d 850, 851 [3d Dept 2005]). Here, in her affidavit, Ms. Dickert states that she is the Director of the Division of Mineral Resources for DEC and has held that position since 2016. She states that her responsibilities include “supervision of DEC’s entire mineral resources program, including mining” (Affidavit in Support of Answer [DEC] ¶ 2). She states that her opinions are based upon her personal knowledge, review of the record, education, training and professional experience, relevant scientific literature and the application of commonly accepted methodologies. Upon review, the Court finds that Ms. Dickert’s affidavit may be considered by the Court inasmuch as she provides an account of the decision-making process of DEC based upon her first-hand knowledge (see Matter of Molloy v New York State Workers’ Compensation Bd., 146 AD3d 1133, 1134 [3d Dept 2017]; 377 Greenwich LLC v New York State Dept. of Envtl. Conservation, 14 Misc 3d 417, 426-427 [Sup Ct, New York County 2006]).

Motion No. 10 - Leave to Submit Supplemental Evidence

In Motion No. 10, petitioners seek an order, pursuant to CPLR 2214(c), permitting them to file supplemental evidence/documents in support of the petition. Specifically, petitioners seek to file: (1) an attorney affirmation; (2) four Analytical Reports prepared for DEC dated March 30, 2019 (2 reports), April 2, 2019 and April 8, 2019; (3) an expert affidavit providing analysis of the Analytical Reports; (4) a memorandum of law; and (5) various other exhibits. Petitioners assert that the Analytical Reports – which provide results of groundwater testing at the Sand Land site – are material to this proceeding, were omitted from DEC’s administrative return and were not timely disclosed to petitioners’ counsel. Petitioners assert that they received copies of these reports in

November 2019 and December 2019 pursuant to a FOIL request. Petitioners argue that the reports demonstrate that the challenged determinations are arbitrary and capricious, as they “confirm and support the integrity, accuracy, and reliability” of the SCDHS report dated June 2018 and contradict DEC’s determination that the cessation of VOWM activities at the site will ensure the protection of the groundwater (Affirmation in Support of Motion [Motion No. 10] ¶ 14). Petitioners also argue that it was arbitrary and capricious for DEC to fail to consider the reports before issuing the modification permit. Petitioners request an order allowing the filing of the documents/exhibits, directing that these papers be considered in support of the petition and providing respondents an opportunity to respond to the supplemental filing and petitioners an opportunity to reply. Respondents oppose the motion.

Upon review, this motion is also denied. As DEC points out, the Analytical Reports post-date most of the challenged determinations in this matter, including the Agreement, renewal permit and the Amended Negative Declaration. As the Reports were not available to, or relied upon by, DEC in making those determinations, they cannot be considered by the Court in reviewing them (see Matter of Paladino v Board of Educ. for the City of Buffalo Pub. Sch. Dist., 183 AD3d 1043, 1045 [3d Dept 2020]). Moreover, even though the Reports were in existence at the time DEC issued the modified permit challenged in this proceeding (June 2019), the Court does not find that this fact requires that the Reports – and petitioners’ accompanying evidence analyzing the Reports – be considered by this Court in reviewing that determination. DEC’s substantive environmental analysis of Sand Land’s modification application is contained in the Amended Negative Declaration, not the June 2019 permit that was issued by DEC. Thus, in the Court’s view, it would not be appropriate for the Court to consider groundwater data/analysis that post-dates the Amended Negative

Declaration in determining whether DEC's environmental review of the application – memorialized in the Amended Negative Declaration – was arbitrary and capricious. The Court finds petitioners' contention that it was arbitrary and capricious for DEC to fail to consider the Reports before issuing the modified permit to be without merit. As such, Motion No. 10 is denied in its entirety.

ANALYSIS

Where, as here, a petitioner challenges an administrative determination made where a hearing is not required, judicial review is limited to the issues of whether the challenged determination is rationally based, and whether it was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion (see CPLR 7803 [3]; Matter of Ward v City of Long Beach, 20 NY3d 1042, 1043 [2013]; Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753, 758 [1991]; Matter of Bais Sarah Sch. for Girls v New York State Educ. Dept., 99 AD3d 1148, 1150 [3d Dept 2012], lv denied 20 NY3d 857 [2013]). “[A] court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion” (Matter of Arrocha v Board of Educ. of City of N.Y., 93 NY2d 361, 363-364 [1999] [internal citations and quotations omitted]; see Matter of Boatman v New York State Dept. of Educ., 72 AD3d 1467, 1468 [3d Dept 2010]). In addition, where “the judgment of the agency involves factual evaluations in the area of the agency’s expertise and is supported by the record, such judgment must be accorded great weight and judicial deference” (Flacke v Onondaga Landfill Sys., 69 NY2d 355, 363 [1987]).

It is the policy of New York State “to foster and encourage the development of an economically sound and stable mining industry, and the orderly development of domestic mineral resources and reserves necessary to assure satisfaction of economic needs compatible with sound

environmental management practices” (ECL 23-2703; see Matter of Lane Constr. Corp. v Cahill, 270 AD2d 609, 611 [3d Dept 2000], lv denied 95 NY2d 765 [2000]). The Mined Land Reclamation Law, which went into effect in 1975, “established a detailed legislative framework under which DEC is empowered to regulate mining and the reclamation of mined lands and to promulgate and enforce rules and regulations for such purposes” (Matter of Valley Realty Dev. Co. v Jorling, 217 AD2d 349, 352-353 [4th Dept 1995]). The Mined Land Reclamation Law supersedes all “local laws relating to the extractive mining industry” (ECL 23-2703 [2]; see Matter of Frew Run Gravel Prods. v Town of Carroll, 71 NY2d 126, 131 [1987]) but also specifically states:

“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” (ECL 23-2703 [3]).

Agreement (Second and Third Causes of Action)

The Court turns first to petitioners’ causes of action that seek to nullify DEC’s approval of the Agreement entered into between DEC and Sand Land. Importantly, DEC’s Commissioner has the power to “[e]nter into contracts with any person to do all things necessary or convenient to carry out the functions, powers and duties of the department” (ECL 3-0301 [2][b]; see Matter of Bayswater Civic Assn. v New York State Dept. of Envtl. Conservation, 159 AD2d 566, 567 [2d Dept 1990]). Petitioners first argue that DEC’s execution and approval of the Agreement was arbitrary and capricious and a violation of the law because the Agreement falsely states the Life of Mine acreage. Petitioners urge that the false listing of the Life of Mine – and the agreement that DEC will approve Sand Land’s application to renew its MLRP for the 34.5-acre Life of Mine – was done to circumvent

DEC's 2014 denial of a permit modification application, the ALJ's 2014 ruling and ECL 23-2703

(3). The Agreement specifically states:

“WHEREAS, the Facility is used by Sand Land for the operation of a duly permitted sand and gravel mine under a [MLRP], last renewed by [DEC] 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 use plan approved by [DEC]” (R at S518).

The Agreement also refers to a 34.5-acre Life of Mine throughout and states that DEC will approve Sand Land's application to renew its MLRP for the 34.5-acre Life of Mine. It is undisputed that the authorized activity described in the 2013 MLRP is “[m]ine sand and gravel from 31.5 acres of a 50 acre site” (R at S042). Petitioners' claim is that the change in the Life of Mine acreage was done for improper reasons. However, there is no record support for this claim.

In opposition to the petition, DEC has offered evidence – specifically Ms. Dickert's affidavit – which explains the change in acreage. Specifically, Ms. Dickert explains that the change in the Life of Mine acreage was a ministerial correction/update to the Life of Mine and was done, in part, to ensure that the Stump Dump area be reclaimed at the conclusion of mining. Ms. Dickert further explains that the Stump Dump area was not reflected in the prior permits or reclamation plans because it was land affected by mining prior to the enactment of the Mined Land Reclamation Law in 1975; she avers that the Stump Dump was “continuously disturbed” by excavation activities and was historically considered by DEC as part of the mine site (Affidavit in Support of Answer [DEC] ¶ 17). Ms. Dickert states that she personally “directed mined land reclamation specialists performing financial security calculations to consider the 34.5 acres the correct and accurate life of mine acreage” (Affidavit in Support of Answer [DEC] ¶ 30). This explanation is also provided in DEC's published response to comments it received with respect to Sand Land's modification application

(R at S766-767).¹⁰

Although the Agreement itself is silent as to the change in the Life of Mine acreage, or the reasons therefor, DEC's proffered explanation for the change has a rational basis in the record. First, a DEC policy memorandum dated 1987 submitted by DEC as part of the administrative return confirms that it is the policy of DEC to conduct a "historical review" when considering a renewal permit where, as here, a negative declaration has previously been issued (R at S012). The policy states: "Ideally, one should examine the entire scope of the previous review, comparing previously proposed operations and the potential impacts known at that time with the operations and potential impacts proposed in the renewal" (*id.*). The administrative return also contains a DEC policy memorandum dated March 11, 2019. Although this memorandum post-dates the Agreement, the Court finds that it is nonetheless instructive as to DEC's policy with respect to MLRP renewals and modifications.¹¹ This memorandum explains: "Occasionally mined land reclamation permits include areas that have been historically affected by mining or mining activities (i.e. affected prior to initial permit issuance) and have been continuously used as such but were not included in the original Life of Mine" and confirms that it is the policy of DEC to adjust a Life of Mine area and affected areas "[t]o correctly and accurately outline the affected areas at a mine" (R at S635).

¹⁰ In relevant part, the response to comments states: "The three-acre difference is due to an area in the SW corner of the mine called the 'stump dump.' This three-acre area was mined in the 1960's and later tree stumps were buried there. This mining and burying of stumps pre-dated both the 1975 Mined Land Reclamation Law, which regulates mining and DEC's Part 360 regulations governing disposal of vegetative waste. . . . The three acres should have been included in the life of mine acreage, in all past site descriptions and plans for permitting, but was left out as it was not being actively mined. It was however, inspected as part of the mine site by DEC over the years" (R at S766-767).

¹¹ The Court notes that, in her affidavit, Ms. Dickert states that the guidance in the March 2019 memorandum "was developed through a process improvement exercise conducted by DEC beginning in March of 2018" (Affidavit in Support of Answer [DEC] ¶ 12).

Ms. Dickert's assertion that the Stump Dump area was an area affected by mining prior to the enactment of the Mined Land Reclamation Law and has been continuously disturbed is also supported by the record. A mining plan submitted in support of Bridgehampton Materials' 1980 application for a mining permit states:

“[P]rior mining operations created the existing hole outlined in red as LINE B which has a depth of 120 ft. below the grade of the surrounding land and covers a surface area of approximately five acres on the top perimeter. Current mining operations (since 1975) have been using stockpiled sand mined prior to 1975” (R at S003).

A comparison of the map showing the “existing hole 120’ deep” (R at S004), which appears to be dated June 1965, and the 2013 Fox Plans (R at S040; Petition, Exhibit C) confirms that the Stump Dump identified on the 2013 Fox Plans appears to be in roughly the same location as the “existing hole.” Moreover, the Stump Dump was included in the calculation of the “area of affected acreage” on the 2013 Fox Plans (R at S040; Petition, Exhibit C).¹² In addition, the administrative return contains an evaluation of the mine's compliance with the permit done by Leggette, Brashears & Graham, an environmental engineering firm, in 2013. Among other things, the evaluation found that the “current estimated extent of mining” was 34.9 acres and also included the Stump Dump in the “mined area” on a map included with the evaluation (R at S028, 030). Similarly, the record contains maps prepared by Leggette, Brashears & Graham in 2014 which identify the Stump Dump as an area affected by mining prior to April 1, 1975 (R at S080-S081). In addition, a 2014 evaluation by Leggette, Brashears & Graham characterized the Stump Dump as an area “affected prior to April 1, 1975” and stated that the “currently permitted area” is “31.5 acres (34.6 acres including the 3.1-acre

¹² ECL 23-2705(2) defines “[a]ffected land” and “land affected by mining” as “the sum of that surface area of land or land under water which: (i) has been disturbed by mining since April [1, 1975] and not been reclaimed, and (ii) is to be disturbed by mining during the term of the permit to mine.”

area identified as ‘stump dump’ that was reportedly affected prior to April 1, 1975)” (R at S063). Furthermore, the Stump Dump was included in the Life of Mine boundary on maps included in Sand Land’s revised MLUP presented to DEC in 2017, and was included in the proposed reclamation plan (see R at S148, S150). The foregoing record evidence, along with Ms. Dickert’s affidavit, provides a rational basis for the 34.5 Life of Mine acreage as stated in the Agreement. As such, the Court declines to nullify the Agreement on that ground.

Petitioners also seek to nullify the Agreement on the ground that DEC’s agreement to withdraw the NIM and issue a renewal permit was arbitrary and capricious because it constituted a reversal of its prior position regarding potential groundwater contamination arising from mining in and around the Stump Dump without any explanation or justification. Upon review, the Court finds that DEC’s agreement to withdraw the NIM and issue a renewal permit was a rational exercise of DEC’s discretion and declines to disturb it. In her affidavit, Ms. Dickert states that DEC, in negotiating a resolution to Sand Land’s objections to the NIM and entering into the Agreement, considered: (1) evidence demonstrating that there was enough unmined sand present at the site to support a commercially viable mining operation, contrary to what was stated in the NIM; (2) the absence of data showing that sand mining has any negative impact on groundwater quality; and (3) Sand Land’s commitments under the Agreement, including its agreement to surrender its Part 360 registration and to implement a regular soil and groundwater inspection and testing program at the site.

Ms. Dickert’s assertions in this regard are supported by the record, including the Agreement itself. Importantly, as noted above, the principal reason provided in the NIM for the proposed cessation of mining was the potential for groundwater contamination arising from VOWM

processing activities and the assertion that the remaining sand

“is located predominantly in the area of the mine formerly used for storing and processing of vegetative waste. Future 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 at S431).

The record – specifically a map prepared by Alpha Geoscience – confirms, however, that there are 98,170.1 cubic yards of reserves available at the Sand Land site, excluding the Stump Dump (R at S435), which supports a finding that there are reserves available which are more than de minimus and which are located outside of the Stump Dump area (see ECL 23-2711 [1][requiring a permit to mine more than 750 cubic yards of minerals from the earth within twelve successive calendar months]). In addition, pursuant to the Agreement, Sand Land agreed to permanently cease the receipt, storage and processing of VOWM, to conduct quarterly groundwater monitoring and to cease all mining within 8 years. The Court finds that the Agreement reflects a considered balancing of DEC’s policies of fostering an economically sound mining industry and ensuring sound environmental management practices.

The Court notes that, in support of their petition, petitioners have submitted the expert affidavit of Stuart Z. Cohen, a certified ground water professional. Therein, Mr. Cohen opines that the solid waste material processing activities at the Sand Land site have caused groundwater contamination. He opines that “the conclusions reached in the SCDHS water testing results and the potential threat to the aquifer represented in those results” support DEC’s determination, in the NIM, that future site activities in and around the areas where processing and storing of VOWM formerly occurred have the potential to cause groundwater contamination (Cohen Affidavit in Support of Petition ¶ 13). He avers that there is no scientific data supporting DEC’s change in position to

consider the Stump Dump a mineable area and, without adequate soil testing of the upper layer of soil known as the overburden to demonstrate it is not contaminated, it is reasonable to conclude that future mining in this area will likely facilitate, and could even increase, the contamination of the aquifer” (*id.* ¶ 17).

Upon review, the Court does not find that this affidavit demonstrates that DEC’s apparent authorization of mining in the Stump Dump area – through its approval of the Agreement and through its issuance of the resulting permits – is arbitrary and capricious, irrational or an abuse of discretion. There is a rational basis in the record for DEC’s finding that sand mining itself does not cause groundwater contamination and, as noted above, the Agreement does require Sand Land to perform regular groundwater testing. Although petitioners claim that mining in the Stump Dump area, specifically, will cause groundwater contamination, importantly, there is no indication in the record that Sand Land, in fact, intends to mine in the Stump Dump area. Rather, the record reflects that the Stump Dump area was *already mined to depth below 120 amsl* (the maximum depth permitted under the modified MLRP) prior to the issuance of the first MLRP at the site and therefore does not contain any mineable virgin material.¹³ Notably, in its response to comments, DEC indicated that the Stump Dump contains buried tree stumps and stated that “the inclusion of the three-acre stump dump will allow Sand Land to make sure any remaining buried stumps are taken out and disposed of properly and in accordance with Part 360 regulations” (R at S767). Therefore, as the evidence demonstrates that there is no virgin material to be mined in the Stump Dump, the Court does not find the expert evidence submitted by petitioners establishes that DEC abused its

¹³ Indeed, DEC’s position is that, because the material presently in the Stump Dump is fill and not material in its original location, removing the material is not “mining” as defined by ECL 23-2705 and a permit is not required to do so.

discretion in entering into an Agreement which included the Stump Dump in the Life of Mine. The Court finds that Sand Land's promises under the Agreement, especially its agreement to conduct groundwater monitoring and to cease its processing of VOWM, and the evidence regarding the amount and location of reserves available provide a rational basis for DEC's resolution of the NIM by negotiation and its approval of the Agreement. The Court therefore denies petitioners' challenge to the Agreement.

Renewal Permit (First Cause of Action)

In this cause of action, petitioners argue that the 2019 renewal permit expanded the scope of mining from 31.5 acres to 34.5 acres and, as such, should have been treated as a modification of the permit rather than a renewal. Petitioners urge that the consideration of the application as a renewal was done to circumvent DEC's prior denial of Sand Land's permit modification application, the ALJ's ruling and the Town's right under ECL 23-2703(3) to review the legality of the mine expansion. They argue that it was arbitrary and capricious and in violation of lawful procedure for DEC to change its position on the modification.

MLRPs are renewable pursuant to ECL 23-2711 (11). "Generally, in the absence of a material change in conditions or evidence of a violation of the terms of the permit, a renewal should be granted without unduly burdening the applicant" (Matter of Atlantic Cement Co. v Williams, 129 AD2d 84, 88 [3d Dept 1987]). By contrast, if the permit holder seeks a modification that involves a material change in permit conditions, the application is treated as one for a new permit (see ECL 70-0115[2][b]), and the notice and procedural requirements set forth in ECL 23-2711(3) apply.

Upon review, the Court discerns no error in DEC's treatment of the renewal application as one for a renewal permit rather than a modification. In the Agreement, DEC specifically agreed to

grant the renewal application for the 34.5-acre Life of Mine. As discussed above, DEC's stated rationale for the change in acreage – that the change was a correction to the Life of Mine – has a rational basis in the record. It follows that DEC's treatment of the application as one for a renewal of the MLRP and not a modification of the permit also has a rational basis. Indeed, where the change in the Life of Mine was simply a correction to the Life of Mine in the permit, it was rational for DEC to find that the application did not “involve a material change in permit conditions” (ECL 70-0115 [2][a]) such that it could be treated as a renewal application rather than a modification.

The Court is not persuaded by petitioners' contention that DEC's granting of the renewal permit for the 34.5-acre Life of Mine was arbitrary and capricious because it circumvented DEC's prior denial of Sand Land's permit modification application and the ALJ's ruling that ECL 23-2703(3) applied to the modification application. Importantly, Sand Land's 2014 application to modify its MLRP differed substantially from its 2018 renewal application which is challenged in the First Cause of Action. The 2014 application sought 40-foot deepening of the mine, as well as a horizontal expansion of 4.9 acres. The proposed horizontal expansion included a 1.8 acre “area of modification” and the 3.1 acre Stump Dump, which was characterized in the application as an “area affected prior [to] 1975” (Petition, Exhibit E). The modification also contemplated that Sand Land's processing of VOWM would continue. Given these significant differences, the Court does not find that DEC's determinations in the administrative proceedings with respect to the 2014 modification application are binding on Sand Land's 2018 renewal application to renew its permit, and the Court does not find that DEC abused its discretion inasmuch as it may have departed from those determinations in addressing the 2018 renewal permit. In addition, since the administrative proceedings with respect to the 2014 modification application, Sand Land has ceased its receipt and

processing of VOWM at the site. This is a significant change, as the Negative Declaration's failure to address the environmental impact of those activities was among the reasons provided by DEC for its denial of the modification permit. As such, the Court rejects petitioners' arguments on this point and denies their challenge to DEC's issuance of the renewed MLRP to Sand Land with a 34.5-acre Life of Mine.

Amended Negative Declaration (Fourth Cause of Action) and Modified Permit (Fifth and Sixth Causes of Action)

Initially, inasmuch as petitioners seek injunctive relief prohibiting further processing of Sand Land's modification application, that claim has been rendered moot by the granting of the application and will not be addressed here. In addition, to the extent that petitioners challenge the issuance of the modification permit on the ground that the Stump Dump was improperly and arbitrarily added to the Life of Mine in the 2019 renewal permit, the Court need not address that argument based upon its conclusion, above, that there is a rational basis for the increase in the Life of Mine acreage in the renewal permit.

Upon careful review, the Court is satisfied that there is a rational basis in the record supporting the issuance of the Amended Negative Declaration and modified permit. The Court is unpersuaded by petitioners' argument that DEC violated ECL 23-2711(3) and 23-2703(3) in making these challenged determinations. ECL 23-2711 (3) sets forth certain procedures to be followed with respect to an application for "a mining permit, for a property not previously permitted" including the provision of notice to the local government and, where the proposed mine is considered a major project, the provision of a public comment period. Moreover, as noted above, ECL 23-2703 (3) states:

“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.”¹⁴

Here, there is no indication in the record that DEC provided the notice required by ECL 23-2711 (3) to the local government, even though it did provide a public comment period. DEC’s position is that such notice was not required because the application was to modify an existing permit within the current disturbance footprint and without material change. This position is supported by the language of the statute – which requires DEC to provide the notice “[u]pon receipt of a complete application for a mining permit, *for a property not previously permitted pursuant to this title*” (ECL 23-2711[3] [emphasis added]). DEC’s position is also supported by DEC’s March 2019 policy memorandum, which provides that a change in mining depth “may not be substantial or material if there is no change in already-approved mining or excavation methods, no change in the approved reclamation objective, no need for additional hydrogeologic information to assess local impacts and no change in the approved Life of Mine Area” (R at S633). The Court is not persuaded that the ALJ’s determinations with respect to the applicability of ECL 23-2711 [3] to petitioner’s 2014 modification application – which sought both a vertical and horizontal expansion of mining – are binding with respect to the 2019 application, which sought only a vertical expansion.

Likewise, the Court discerns no violation of ECL 23-2703 (3) in the processing of the modification application. DEC determined that input from the Town as to the legality of the mining

¹⁴ It is undisputed that Suffolk County, where the mine is located, is a county “with a population of one million or more which draw [its] primary source of drinking water for a majority of county residents from a designated sole source aquifer” (ECL 23-2703 [3]).

expansion was not required because the proposed modification was a vertical expansion within the current disturbance footprint. DEC's interpretation is consistent with the language of the statute which states that it applies to an "application for a permit to mine" (ECL 23-2703 [3]). In the Court's view, it would be nonsensical to interpret the statute to apply to modification applications such as this one which *only proposes mining deeper* within an existing disturbance footprint/area where mining is already otherwise authorized. Again, the Court does not find that the ALJ's determinations with respect to the applicability of ECL 23-2703 (3) to petitioner's 2014 modification application – which sought both a vertical and horizontal expansion of mining – are binding with respect to the 2019 application, which sought only a vertical expansion.

Petitioners also argue that the modification permit must be vacated because DEC failed to sufficiently consider the environmental issues. The Court also rejects this argument. "Judicial review of an agency determination under SEQRA is limited to whether the lead agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" (Matter of Brunner v Town of Schodack Planning Bd., 178 AD3d 1181, 1183 [3d Dept 2019][internal quotation marks and citations omitted]; see Matter of Keil v Greenway Heritage Conservancy for Hudson River Valley, Inc., 184 AD3d 1048, 1051-1052 [3d Dept 2020]; Matter of Village of Ballston Spa v City of Saratoga Springs, 163 AD3d 1220, 1223 [3d Dept 2018]). "A lead agency need not investigate every conceivable environmental problem during the course of SEQRA review, and generalized community objections or speculative environmental consequences are not sufficient to establish a SEQRA violation" (Matter of Heights of Lansing, LLC v Village of Lansing, 160 AD3d 1165, 1167 [3d Dept 2018][internal quotation marks and citations omitted]).

Here, the record reflects that, in determining that the proposed sand mine deepening will not significantly impact groundwater quality, DEC had before it and considered groundwater sampling data, the fact that the proposed new floor of the mine will be 90 feet above the existing groundwater level and will provide filtering and buffering benefits, the removal of all vegetative waste from the mine site, Sand Land's surrender of its Part 360 registration and the fact that groundwater monitoring wells have been installed at the site. In issuing the permit, DEC also considered public comments submitted with respect to the application, which included comment letters from petitioners raising the environmental concerns raised in this proceeding. The Court finds that this record sufficiently demonstrates that DEC took the requisite hard look at the environmental issues in accordance with SEQRA. DEC also provided a "reasoned elaboration of the basis for its determination" in the Amended Negative Declaration (Matter of Brunner v Town of Schodack Planning Bd., 178 AD3d at 1183).

The record before the Court contains ample support for DEC's determination that the deepening of the mine will not have a significant impact on the environment as petitioners strenuously urge. Notably, the SCDHS report upon which petitioners rely found that VOWM activities/operations have had adverse impacts on groundwater quality; however, the report did not find that sand mining itself or sand mining within 90 feet of the underground water level causes contamination of the aquifer (see Petition, Exhibit L). As such, the Court rejects petitioners' argument that DEC failed to adequately consider the environmental impacts associated with the permit modification. Finally, the Court disagrees with petitioners that the granting of the modification application is arbitrary and capricious because DEC denied Sand Land's 2014 application which sought the same deepening. Importantly, the environmental concerns arising from

VOWM activities which were identified by DEC in response to the original Negative Declaration have been ameliorated by Sand Land's relinquishment of its Part 360 registration.

In sum, upon careful review of the petition, supplemental petition and supporting documents, the administrative record, including Ms. Dickert's affidavit, and the arguments made by the parties, the Court finds that a rational basis exists for the challenged determinations. As such, the relief sought by petitioners is denied and the proceeding is dismissed.

Accordingly, based upon the foregoing, it is hereby

ORDERED AND ADJUDGED that Motion No. 5 is granted and petitioner Assemblyman Fred W. Thiele, Jr., is dismissed as a petitioner in this proceeding; and it is further

ORDERED AND ADJUDGED that Motion No. 6 and Motion No. 10 are denied in their entirety; and it is further

ORDERED AND ADJUDGED that the relief sought in the petition and supplemental petition is denied in its entirety and this proceeding is dismissed; and it is further

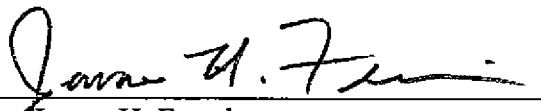
ORDERED AND ADJUDGED that the preliminary injunction ordered by the Court in its Decision and Order dated May 30, 2019, as modified by its Letter Order dated June 10, 2019, is hereby vacated in its entirety.

The foregoing constitutes the Decision, Order and Judgment of the Court.

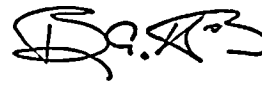
SO ORDERED AND ADJUDGED

ENTER.

Dated: Albany, New York
August 31, 2020


Hon. James H. Ferreira
Acting Justice of the Supreme Court

Papers Considered:



09/03/2020

1. Notice of Verified Petition, dated April 19, 2019;
2. Verified Petition, dated April 17, 2019, with attached exhibits;
3. Affidavit in Support by Stuart Z. Cohen, Ph.D., CGWP, sworn to April 15, 2019, with attached exhibit;
4. Verified Supplemental Petition, dated June 12, 2019, with attached exhibits;
5. Verified Answer (DEC), dated July 29, 2019, with Appendix;
6. Affidavit in Support of Answer (DEC) by Catherine A. Dickert, sworn to July 26, 2019, with attached exhibit;
7. Memorandum of Law in Opposition (DEC) by Stephen M. Nagle, dated July 29, 2019;
8. Verified Answer (Sand Land), dated July 29, 2019;
9. Memorandum of Law in Opposition (Sand Land) by Brian E. Matthews, Esq., dated July 29, 2019;
10. Affirmation in Reply by Meave M. Tooher, Esq., dated August 29, 2019, with attached exhibits;
11. Memorandum of Law in Reply (Corrected) by Petitioners' Counsel, dated August 29, 2019;
12. Affidavit in Reply by Robert S. DeLuca, sworn to August 28, 2019, with attached exhibits;
13. Affidavit in Reply by Adrienne Esposito, sworn to August 29, 2019;
14. Affidavit in Reply by Elena Loreto, sworn to August 28, 2019;
15. Affidavit in Reply by Andrea Spilka, sworn to August 28, 2019;
16. Affirmation in Support of Answer (DEC) by Scott Crisafulli, Esq., filed September 10, 2019, with attached exhibits;
17. Affidavit in Support of Answer (DEC) by Mary Mackinnon, sworn to September 10, 2019;
18. Affirmation in Response by Claudia Braymer, Esq., dated September 12, 2019;
19. Notice of Motion for Partial Dismissal (Motion No. 5), dated July 29, 2019;
20. Affirmation in Support (Motion No. 5) by Brian E. Matthews, Esq., dated July 29, 2019;
21. Affidavit in Opposition (Motion No. 5) by Fred W. Thiele, Jr., sworn to September 9, 2019;

22. Affirmation in Support (Motion No. 5) by Stephen M. Nagle, Esq., dated September 3, 2019;
23. Affirmation in Reply (Motion No. 5) by Deborah Choron, Esq., dated September 16, 2019;
24. Notice of Motion (Motion No. 6), dated August 22, 2019;
25. Affirmation in Support (Motion No. 6) by Meave M. Tooher, Esq., dated August 22, 2019, with attached exhibits;
26. Memorandum of Law in Opposition (Motion No. 6) by Meredith G. Lee-Clark, Esq., dated August 28, 2019;
27. Affirmation in Opposition (Motion No. 6) by Stephen M. Nagle, Esq., dated August 28, 2019, with attached exhibit;
28. Notice of Motion (Motion No. 10), dated December 20, 2019;
29. Affirmation in Support (Motion No. 10) by Meave M. Tooher, Esq., dated December 20, 2019;
30. Affirmation in Support (Motion No. 10) by Claudia Braymer, Esq., dated December 20, 2019, with attached exhibits;
31. Affidavit in Support (Motion No. 10) by Stuart Z. Cohen, Ph.D., CGWP, sworn to December 20, 2019, with attached exhibits;
32. Memorandum of Law in Support (Motion No. 10) by Petitioners' Counsel dated December 20, 2019;
33. Affirmation in Opposition (Motion No. 10) (Corrected) by Stephen M. Nagle, Esq., dated January 10, 2020;
34. Affidavit in Opposition (Motion No. 10) by Kristy A. Salafrio, sworn to January 10, 2020, with attached exhibits;
35. Affirmation in Opposition (Motion No. 10) by Brian E. Matthews, Esq., dated January 10, 2020, with attached exhibit;
36. Reply Affirmation (Motion No. 10) by Meave M. Tooher, Esq., dated January 16, 2020, with attached exhibits;
37. Reply Affidavit (Motion No. 10) by Stuart Z. Cohen, Ph.D., CGWP, sworn to January 16, 2020, with attached exhibits; and
38. Reply Affirmation (Motion No. 10) by Claudia Braymer, Esq., dated January 16, 2020, with attached exhibits.