



--- N.Y.S.3d ----, 2022 WL 617883 (N.Y.A.D.  
3 Dept.), 2022 N.Y. Slip Op. 01360

**This opinion is uncorrected and subject to revision  
before publication in the printed Official Reports.**

**\*1** In the Matter of 101CO, LLC, et al., Appellants,  
v.  
New York State Department of Environmental  
Conservation et al., Respondents.

**OPINION**

Supreme Court, Appellate Division,  
Third Department, New York  
532561

Decided and Entered: March 3, 2022  
Calendar Date: January 12, 2022

Before: Lynch, J.P., Clark, Aarons and Reynolds Fitzgerald,  
JJ.

**APPEARANCES OF COUNSEL**

Toohar & Barone, LLP, Albany (Meave M. Toohar of  
counsel), for appellants.  
Letitia James, Attorney General, Albany (Frederick A. Brodie  
of counsel), for New York State Department of Environmental  
Conservation, respondent.  
Matthews, Kirst & Cooley, PLLC, East Hampton (Brian  
E. Matthews of counsel), for Sand Land Corporation and  
another, respondents.  
Aarons, J.

Appeal from a judgment of the Supreme Court (Ferreira,  
J.), entered November 24, 2020 in Albany County, which  
dismissed petitioners' application, in a combined proceeding  
pursuant to CPLR article 78 and action pursuant to  [ECL  
71-1311](#), to review a determination of respondent Department  
of Environmental Conservation accepting the remediation  
plan proffered by respondents Sand Land Corporation and  
Wainscott Sand and Gravel Corporation in satisfaction of an  
order on consent entered into between respondents.

The underlying facts are set forth in a previous appeal (169  
[AD3d 1307 \[2019\]](#), *lv dismissed* 34 NY3d 1010 [2019]).  
Briefly, respondents Sand Land Corporation and Wainscott  
Sand and Gravel Corporation (hereinafter collectively  
referred to as Sand Land) operate a sand and gravel mine in  
Suffolk County. Respondent Department of Environmental  
Conservation (hereinafter DEC) issued two notices of  
violation to Sand Land in 2015 and 2016. It was determined  
that Sand Land's mining activities encroached into the  
minimum 25-foot buffer area that was between the mine and  
neighboring properties, that slopes contained impermissible  
materials and that certain slopes had been over-excavated.  
The notices were subsequently resolved in a consent order,  
which required, among other things, that Sand Land submit  
a remediation plan to DEC. Sand Land did so, and DEC  
approved the remediation plan. Petitioners commenced  
this combined CPLR article 78 proceeding and action  
seeking, as relevant here, to nullify DEC's approval of the  
remediation plan. Supreme Court dismissed the petition/  
complaint, prompting this appeal. We affirm.

Our review of DEC's determination to approve the  
remediation plan is limited to 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" (CPLR 7803 [3]; *see Matter of Eastern Niagara  
Project Power Alliance v New York State Dept. of Env'tl.  
Conservation*, 42 AD3d 857, 861 [2007]; *Matter of Plante v  
New York State Dept. of Env'tl. Conservation*, 277 AD2d 639,  
641 [2000]). Petitioners raise a litany of reasons as to why  
DEC acted arbitrarily and capriciously. None, in our view, has  
merit.

One grievance that petitioners have with respect to the  
remediation plan is that it did not reconstruct the buffer area  
and slopes within the meaning of the consent order. The  
schedule of compliance that was referenced in the consent  
order stated that any remediation plan must include "[a]  
grading and re-vegetation plan to reconstruct the 25-foot  
buffer from the property line" and "[a] grading and re-  
vegetation plan to re-construct the slopes on the north and  
east sides to a slope of 1V:2H." Petitioners posit that, in  
order to "reconstruct" the buffer area and slopes, Sand Land  
was required to restore them to their original or former state.  
The schedule of compliance, however, does not support this  
position. Although "reconstruct" was not specifically defined  
by the **\*2** consent order, it did set forth how to backfill the

Matter of 101CO, LLC v New York State Dept. of Env'tl., --- N.Y.S.3d ---- (2022)

2022 N.Y. Slip Op. 01360

buffer area and what soil and vegetation was to be used in the reconstruction process. The schedule of compliance also sets forth certain parameters for the slopes. As such, petitioners' claim that it was incumbent upon Sand Land to restore the buffer area and slopes to their original condition is without merit.

Petitioners also question the methods proposed by Sand Land for the reconstruction of the slope. “[W]here, as here, 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]). In our view, no basis exists in the record to disturb DEC's determination. Petitioners' contention that the remediation plan did not comply with a DEC guidance memorandum is unavailing given that there is no indication that such document reflected the official policy of DEC or was applicable to enforcement proceedings. To that end, because the remediation plan stemmed from an enforcement proceeding, petitioners' argument that a variance permit or

review under the State Environmental Quality Review Act was required to effectuate what the remediation plan proposed is also unavailing.

Petitioners assert that the remediation plan did not address particular geographic areas. As mentioned, however, the schedule of compliance required that Sand Land reconstruct the slopes “on the north and east sides.” The remediation plan proposed modifying the slopes on the north and east sides, discussed the backfill to be used “along the northern boundary” and specified the vegetation and trees to be planted at both ends of the north slope. Accordingly, the remediation plan complied with the schedule of compliance as to the slopes. Petitioners' remaining arguments, to the extent not specifically discussed herein, are without merit.

Lynch, J.P., Clark and Reynolds Fitzgerald, JJ., concur.

ORDERED that the judgment is affirmed, without costs.

Copr. (C) 2022, Secretary of State, State of New York

End of Document

© 2022 Thomson Reuters. No claim to original U.S. Government Works.