SHORT FORM ORDER

INDEX No. 12-27600

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 001 - CDISPSUBJ
002 - MG

WAINSCOTT PROPERTIES, INC.,	ESSEKS, HEFTER & ENGEL, LLP
	Attorneys for Petitioner/Plaintiff
Petitioner/Plaintiff,	108 East Main Street
	P.O. Box 279
- against -	Riverhead, New York 11901
THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and THE CENTRAL PINE BARRENS JOINT PLANNING AND POLICY COMMISSION,	ERIC T. SCHNEIDERMAN, ESQ.
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Respondents/Defendants.	

Upon the following papers numbered 1 to 55 read on this Article 78 proceeding and motion to dismiss : Notice of Petition and supporting papers 1 - 24 ; Notice of Motion and supporting papers 25 - 47 ; Answering Affidavits and supporting papers 48 - 52 ; Replying Affidavits and supporting papers 53 - 55 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant New York State Department of Environmental Conservation for an order pursuant to CPLR 3211 dismissing the petition/complaint is granted.

In this hybrid Article 78 proceeding and declaratory judgment action, petitioner/plaintiff Wainscott Properties, Inc. seeks a judgment annulling a determination by respondent/defendant New York State Department of Environmental Conservation (DEC) that its application for permission to mine sand and gravel on two acres of property it acquired in November 2006 involves "development" within the meaning of the Pine Barrens Maritime Reserve Act (ECL art 57) and the Central Pine Barrens Comprehensive Land Use Plan. Wainscott Properties also seeks a judgment declaring that its application for a permit to mine the two acres involves the continuation of a pre-existing, nonconforming use, not "development" within the meaning of ECL article 57, as well as an order directing the DEC to resume processing such permit application by, among other things, declaring itself the lead agency for SEQRA review and issuing a SEQRA determination.

In 1981, Riverhead Cement Block Company, Inc., was granted a permit by the DEC to conduct mining and reclamation activities on three acres of a 10-acre, irregular-shaped parcel of land, set back from the roadway, on the southwest side of Flanders Road, in the Town of Southampton. Evidence in the record indicates that a sand and gravel mine had been conducted on such property since the 1950s, and a mining permit application filed with the DEC in 1981 states the mining operation constituted a non-conforming, pre-existing use of the land. In 1984, the DEC issued Riverhead Cement Block Company another permit to continue mining activities on the three affected acres until 1987. In December 1986, Wainscott Properties, which is operated by Patrick Bistrian, Jr., purchased the sand and gravel mine from Riverhead Cement Block Company. In March 1987, Riverhead Cement Block Company gave Wainscott Properties permission to use the three-year mining permit that had been issued to it in 1984. Thereafter, Wainscott Properties applied for and was granted permits by the DEC to mine sand and gravel from the same three acres mined by Riverhead Cement Block Company.

Meanwhile, two parcels of land contiguous to the 10-acre parcel owned by Wainscott Properties were purchased by Bistrian and his wife, Addie Bistrian. One parcel, improved with a single-family residence and situated northeast of the 3-acre area subjected to mining, was purchased in 2002, and the other parcel, also improved with a single-family residence but situated south of such 3-acre area, was purchased from Lyle Austin in 2004. In 2006, the Bistrians transferred their ownership interests in the two properties, which had a combined area of approximately seven acres, to Wainscott Properties, resulting in a merged parcel totaling 17.7 acres. Significantly, the 10-acre parcel southwest of Flanders Road obtained by Wainscott Properties in 1986, as well as the two parcels transferred to it in 2006, are situated within the boundaries of the compatible growth area of the Long Island Pine Barrens maritime reserve (*see* ECL § 57-0107). Thereafter, in November 2007, Wainscott Properties submitted an application to the DEC for renewal of its permit for surface mining of sand and gravel on the three acres for which mining had previously been conducted, and for permission to conduct mining on two acres situated on the portion of the now-merged property that had been owned by Lyle Austin. In addition to increasing the acreage on which mining activities occur, the proposed project would require the clearing of vegetation from two acres that had been part of the former Austin property. It is noted that Wainscott Properties' permit application, a copy of which was submitted by the DEC with its moving papers, revised the acreage amount under the permit from 10 to 17.7 acres, characterized the request as seeking renewal and modification of its mining permit, and stated that its permit expired on May 6, 2003.

By letter dated August 14, 2008, the DEC advised Wainscott Properties that its application to renew the existing permit to conduct mining on three acres of its property off of Flanders Road had been granted, but that its application for modification of such permit to allow mining on two additional acres was "incomplete pending receipt of a letter from the Town of Southampton confirming mining at the new location was not prohibited by local ordinances." During the next few years, the DEC, as well as the Town of Southampton and the Central Pine Barrens Joint Planning and Policy Commission, sought additional information from Wainscott Properties regarding the proposed expansion of its mining activities from a total of three acres to five acres. In July 2010, the DEC sent a letter to the Town of Southampton Department of Land Management and to the Central Pine Barrens Joint Planning and Policy Commission (hereinafter the Pine Barrens Commission) seeking information pertaining to the designation of a lead agency pursuant to the State Environmental Quality Review Act (SEQRA). By letter to the DEC dated August 4, 2010, the Pine Barrens Commission advised that it did not object to the DEC assuming the role of lead agency for SEQRA

review of Wainscott Properties' application to conduct a mining project on two additional acres at its property on Flanders Road. It also set forth numerous comments regarding the project that "originate[d] from the inconsistencies in the data provided in the Mining Permit Application and the EAF Part I." Similarly, by letter to the DEC dated August 27, 2010, the Town of Southampton asserted that, in view of the DEC's general role in mining projects, its technical ability and expertise in comprehensive environmental review, and the fact that Wainscott Properties must obtain a mined land reclamation permit from the DEC, it was appropriate for the DEC to serve as lead agency on the proposed project. The Town also set forth various comments regarding the project, and stated that Wainscott Properties needed to provide additional information before it could make a determination as to whether the proposed mining project was subject to Town zoning laws. A letter sent by the DEC in September 2010 to Young & Young, an engineering, architecture and land surveying firm hired by Wainscott Properties, directed that responses be provided to the comments raised in the August 4 and August 27 letters by the Town and the Pine Barrens Commission

Subsequently, by correspondence dated June 16, 2011, the Town of Southampton advised the DEC that it had received additional documentation from Wainscott Properties and had completed its review of such documents. The Town advised the DEC that a certificate of occupancy had been issued to Wainscott Properties for the parcel of land southwest of Flanders Road, identified as 1021 Flanders Road. The certificate, dated June 8, 2011, states there is a "pre-existing certificate of occupancy for merger of two pre-existing non-conforming properties on [Suffolk County Tax Map] # 900-145-4-6.3 to include One story single family dwelling . . . on the north side of the property, One two story single family dwelling . . . on the south side of the property, sand and gravel mine use on [Suffolk County Tax Map] lot # 6.3 to extend over rear portion of former [Suffolk County Tax Map] lot # 6.1 per affidavit of Vivian Jeski dated May 24, 2011." The Town explained that, having issued the certificate of occupancy for the merger of the two "pre-existing non-conforming properties" with the 10-acre parcel, it determined "there has been no expansion of the pre-existing non-conforming mining use beyond the boundaries of the properties which supported the use, since October 14, 1957, when the Town's Zoning Code came into existence." It further stated that, having concluded the proposed project constitutes a pre-existing, nonconforming use of the land, it was not subject to Town ordinances regulating the clearing of natural vegetation in the Aquifer Protection Overlay District or actions occurring in freshwater wetlands. However, the Town's June 2011 letter also stated that further review of the proposed project was required to determine whether it was subject to Article 57 of the Environmental Conservation Law.

Then, in September 2011, Young & Young submitted a written response on behalf of Wainscott Properties to the Pine Barrens Commission addressing the comments raised in the Commission's August 4, 2010 letter to the DEC. Less than two months later, by letter dated December 14, 2011, the Town advised Wainscott Properties that, based upon a review conducted under ECL article 57, the Central Pine Barrens Comprehensive Land Use Plan (*see* ECL § 57-0121), and the Town's provisions governing the Cental Pine Barrens Overlay District, it had determined that the proposed action "does not constitute 'development' pursuant to ECL article 57 Section 0107 (13)(xii) as the project is located in the Compatible Growth Area (CGA) and consists of a 'continuation of existing non-conforming uses, and activities permitted by special permit or special exception," and that approval from the Pine Barren Commission was not required for the project.

Thereafter, by letter dated April 27, 2012, the DEC informed Young & Young, in its capacity as agent for Wainscott Properties, that it had determined the proposed project is subject to the requirements of the Pine Barrens Maritime Reserve Act and the Central Pine Barrens Comprehensive Land Use Plan (the Plan) (*see* ECL § 57-0121). Explaining that it primarily was concerned with vegetation disturbance and conformance with the Plan's clearance standards, the DEC stated that Wainscott Properties was required to submit a signed and sealed survey depicting "the total area of the existing disturbed native vegetation and the proposed additional disturbed native vegetation," and that such survey should depict undisturbed areas "currently in native vegetation cover which will remain undisturbed during and following the proposed mine expansion." By letter to the DEC dated July 2, 2012, counsel for Wainscott Properties advised that it would not comply with the request for a survey, asserting, among other things, that the DEC lacks jurisdiction to enforce ECL article 57 and, therefore, must abide by the Town of Southampton's determination that the proposed project is a continuation of a pre-existing, nonconforming use, not "development" within the meaning of ECL § 57-0107 (13). Such letter also demanded that the DEC declare itself the lead agency for SEQRA review of the proposed project, that it deem the permit application complete, that it issue a determination of significance, and that it make a final determination on the application. Less than three weeks later, by letter dated July 20, 2012, the Pine Barrens Commission advised the DEC that the mining project proposed by Wainscott Properties constitutes development within the meaning of ECL § 57-0107, and that such action must conform to the Plan's standards, particularly the standard restricting the amount of vegetation that may be cleared from a site.

Next, Wainscott Properties, by letter from counsel dated July 31, 2012, served a notice under ECL 70-0109 and Department of Environmental Regulations (6 NYCRR) § 621.10 demanding that the DEC make a decision on its application to perform sand and gravel mining on the two acres that formerly were part of the Austin property. Dated August 8, 2012, the DEC's response to the five-day demand letter stated that the request for a permit modification allowing mining on two additional acres was denied based on Wainscott Properties' failure "to provide information necessary for the Department to approve the application." More particularly, the DEC's letter stated that, as Wainscott Properties refused to provide additional information on the proposed project, it is unable to perform its obligation under ECL § 57-0123 to ensure that such project conforms with the Plan's standards. It further stated that, as the two new acres sought to be mined were acquired by Wainscott Properties and merged with its existing 10-acre parcel after the effective date of the Plan, mining the two acres would be considered "development" within the meaning of ECL § 57-0107 (13), making the proposed project subject to the Plan's vegetation clearance standards. In addition, the letter stated the denial was without prejudice to a new application showing conformance with the Plan's requirements or requesting a hardship waiver, and that, pursuant to 6 NYCRR 621.10, Wainscott Properties had a right to request a public hearing on the decision.

In September 2012, Wainscott Properties commenced this hybrid Article 78 proceeding and declaratory judgment action. The petition/complaint seeks a judgment annulling the DEC's determination, set forth in its letter dated August 8, 2012, that the proposed project involving the mining of two additional acres of land at its property off of Flanders Road constitutes "development" within the scope of ECL article 57 and, as such, is subject to the requirements of the Plan. It also seeks a declaratory judgment that Wainscott Properties' mining application involves the continuation of a nonconforming use, not "development" within the scope of ECL article 57 and the Plan. In addition, Wainscott Properties seeks mandamus relief in the form of an order compelling the DEC "to declare itself lead agency under SEQRA,

to issue a determination of significance under SEQRA, and to continue processing [its] application" to mine the additional two acres. Wainscott Properties argues, in part, as a determination has been made by the Town of Southampton that the proposed mining project constitutes a pre-existing, nonconforming use of the land under its zoning law, the DEC lacks the jurisdiction to classify the project as "development" for purposes of ECL article 57.

The DEC now moves, pursuant to CPLR 3211, for an order dismissing the petition/complaint for lack of subject matter jurisdiction and for failure to state a cause of action. It asserts that ECL § 57-0123 (3) requires it to make an independent determination as to whether the proposed mining activity constitutes "development" as defined by ECL § 57-0107 (13). Moreover, the DEC argues its August 8, 2012 response to Wainscott Properties' five-day demand letter does not constitute a final determination on the permit application subject to judicial review, and that it has been unable to process the application due to Wainscott Properties' refusal to comply with its request for additional information about the clearing of vegetation on the two acres that had been part of the former Austin property. Wainscott Properties opposes the motion, alleging ECL article 57 does not give the DEC jurisdiction over zoning matters and, therefore, the Town's determination the proposed mining constitutes a pre-existing, nonconforming use, made as part of its power to regulate land use within the municipality, is binding on the DEC. It further argues that the August 8, 2012 letter from the DEC constitutes a final determination, that the issue of the DEC's jurisdiction with respect to ECL article 57 matters is a question of law, and that pursuing further administrative remedies would be futile. Additionally, Wainscott Properties argues the DEC's determination that the proposed project involves development of the land, instead of a pre-existing, nonconforming use, ignores the Court of Appeals' holdings in the actions Buffalo Crushed Stone, Inc. v Town of Cheektowaga, 13 NY3d 88 (2009) and Matter of Syracuse Aggregate Corp. v Weise, 51 NY2d 278 (1980).

Dismissal of Wainscott Properties' claim for a judgment annulling the DEC's determination that the proposed project constitutes "development" within the scope of ECL article 57 is granted. Pursuant to CPLR 7801(1), a proceeding challenging an agency's determination may not be brought until such determination is "final." An agency's action or determination is considered final for purposes of Article 78 review when it represents the agency's definitive position on a discrete legal issue which results in actual, concrete injury to the petitioner, and the alleged harm may not be prevented or significantly ameliorated by further administrative action or steps available to the petitioner (Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y., 5 NY3d 30, 34 [2005]; Matter of Essex County v Zagata, 91 NY2d 447, 453-454 [1998]; see Matter of Green Thumb Lawn Care, Inc. v Iwanowicz, 107 AD3d 1402 [4th Dept 2013]; Matter of Demers v New York State Dept. of Envtl. Conservation, 3 AD3d 744 [3d Dept 2004]; see also Church of St. Paul & St. Andrew v Barwick, 67 NY2d 510 [1986]). However, as an exception to the rule requiring finality for judicial review of an administrative proceeding, a court may, under certain circumstances, review an administrative action before the ultimate resolution of the matter if the government agency acted beyond its jurisdiction and caused injury that further proceedings would not lessen (see Matter of Gordon v Rush, 100 NY2d 236 [2003]; Matter of Demers v New York State Dept. of Envtl. Conservation, 3 AD3d 744).

The controversy between Wainscott Properties and the DEC is not ripe for judicial review, as no final SEQRA determination has been made by the DEC on the merits of Wainscott Properties' application for a modification of its mining permit to allow additional mining on two new acres of it property (see Matter of

Agoglia v Benepe, 84 AD3d 1072 [2d Dept 2011]; Matter of Guido v Town of Ulster Town Bd., 74 AD3d 1536 [3d Dept 2010]; Matter of Demers v New York State Dept. of Envtl. Conservation, 3 AD3d 744; Matter of Sour Mtn. Realty v New York State Dept. of Envtl. Conservation, 260 AD2d 920 [3d Dept], lv denied 93 NY2d 815 [1999]; see also Matter of PC Group, LLC v Grannis, 83 AD3d 848 [2d Dept 2011]). Furthermore, no actual, concrete injury resulting from the DEC's preliminary determination that the proposed mining activity on the land acquired in 2006 constitutes "development," which is defined under ECL § 57-0107 (13) as including "commencement of mining, excavation or material alteration of grade or vegetation on a parcel of land," has been alleged by Wainscott Properties, other than a delay in the processing of its application (see Matter of Town of Riverhead v Central Pine Barrens Joint Planning & Policy Commn., 71 AD3d 679 [2d Dept 2010]; Matter of Modern Landfill, Inc. v New York State Dept. of Envtl. Conservation, 21 AD3d 1381 [4th Dept 2005]). The alleged burden on Wainscott Properties, namely the obligation to provide additional information to the DEC on its proposed activities, does not support its claim that the DEC has reached a final decision on its application for modification of its mining permit (see F.T.C. v Standard Oil Co. of California, 449 US 232 [1980]; Matter of Enlarged School Dist. of Middletown v City of Middletown, 96 AD3d 840 [2d Dept 2012]; Matter of Town of Riverhead v Central Pine Barrens Joint Planning & Policy Commn., 71 AD3d 679 [2d Dept 2010]; cf. Matter of Essex County v Zagate, 91 NY2d 447). "Allowing piecemeal review of each determination made in the context of the SEQRA process would subject it to 'unrestrained review which could necessarily result in significant delays in what is already a detailed and lengthy process'" (Matter of Sour Mtn. Realty v New York State Dept. of Envtl. Conservation, 260 AD2d 920, 921, quoting Matter of Town of Coeymans v City of Albany, 237 AD2d 856, 857 [3d Dept], lv denied 90 NY2d 803 [1997]). Here, the years long delay in performing SEQRA review of the application is attributable, in substantial part, to deficiencies in the information supplied by Wainscott Properties to the DEC, the Town and the Pine Barren's Commissions regarding its proposed actions. Moreover, the DEC halted its review of the application in August 2012 after Wainscott Properties, rejecting the preliminary determination that the proposed project involved development within the Pine Barrens, expressly refused to provide further information about the clearing of vegetation that would occur on the site in connection with the expanded mining activities. Wainscott Properties also has not availed itself of the opportunity for a hearing on the determination that the project involves development in the Pine Barrens or filed an application with the Pine Barrens Commission for a hardship waiver.

The argument raised by Wainscott Properties that the DEC lacks jurisdiction to consider ECL article 67 in its decision-making process, and therefore the dispute is ripe for review, is rejected. Under the Mined Land Reclamation Law (ECL article 23), activities pertaining to the operation and process of mining on a legal mining site are regulated by state statute, regulation and permit (*see* ECL § 23-2703 [2]), and the DEC "is empowered to regulate mining activities and to promulgate and enforce necessary and appropriate standards and rules and regulations for such purposes" (Matter of Frew Run Gravel Prods. v Town of Carroll, 71 NY2d 126, 129 [1987]). The DEC, therefore, has exclusive jurisdiction over the issue of whether Wainscott Properties may be granted a modification of its existing permit to mine an additional two acres at the property off Flanders Road (see Matter of Hunt Bros. v Glennon, 81 NY2d 906 [1993]; see generally Matter of Frew Run Gravel Prods. v Town of Carroll, 71 NY2d 126). Concomitantly, Section 57-0123 (3) (a) of the Environmental Conservation Law provides, in relevant part, that following adoption of the Plan by the Pine Barrens Commission, "no application for development within the Central Pine Barrens area shall be approved by any municipality or county . . . or the commission, and no state approval, certificate, license,

consent, permit or financial assistance for the construction of any structure or the disturbance of any land within such area shall be granted, unless such approval or grant conforms to the provisions" of the Plan. The statute further authorizes a majority of the Pine Barrens Commission to waive strict compliance with the Plan or with any standard contained therein "upon a finding that such waiver is necessary to alleviate hardship for development proposed. . . in the compatible growth area . . .is consistent with the purposes and provisions of this title and would not result in substantial impairment of the resources of the Central Pine Barrens Area" (ECL § 57-0123 [3][b]). As the property at issue is located within the compatible growth area of the Pine Barrens Maritime Reserve area, the Town, the Pine Barrens Commission and the DEC share jurisdiction over activities, other than extractive mining, conducted by Wainscott Properties within such area (see Matter of Hunt Bros. v Glennon, 81 NY2d 906; cf. Matter of Gordon v Rush, 100 NY2d 236). Contrary to the assertion by Wainscott Properties' counsel, the Town's determination that the proposed action did not require relief from the Town Zoning Code does not divest the DEC of its jurisdiction under ECL article 57 (cf. Matter of Sour Mtn. Realty v New York State Dept. of Envtl. Conservation, 260 AD2d 920; Matter of Town of Coeymans v City of Albany, 237 AD2d 856). Thus, as ECL article 57 makes conformance with the Plan part of the environmental review process that must be undertaken before a final determination is made on Wainscott Properties' application, the DEC is statutorily obligated to consider whether the proposed mining project conforms with the Plan.

Wainscott Properties' claim for mandamus relief is dismissed for failure to state a cause of action upon which relief may be granted. The extraordinary relief of mandamus to compel lies against a governmental agency or officer only to require the performance of a purely ministerial act and only where there exists a clear legal right to the relief sought (see Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753 [1991]; Klostermann v Cuomo, 61 NY2d 525 [1984]; Matter of Legal Aid Socy. of Sullivan County v Scheinman, 53 NY2d 12 [1981]). The availability of mandamus to compel performance of a duty by an administrative agency or officer "depends not on the applicant's substantive entitlement to prevail, but on the nature of the duty sought to be commanded, i.e. mandatory, nondiscretionary action" (Matter of Hamptons Hosp. & Med. Ctr., Inc. v Moore, 52 NY2d 88, 97 [1981]), and the right to such performance "'must be so clear as to not admit of reasonable doubt or controversy'" (Matter of Association of Surrogates & Supreme Ct. Reporters within City of N.Y. v Bartlett, 40 NY2d 571, 574 [1976], quoting Burr v Voorhis, 229 NY 382, 387 [1920]). Mandamus will not be awarded to compel performance of an action by an agency or officer which involves an exercise of judgment or discretion (see Matter of Brusco v Braun, 84 NY2d 674 [1994]; Klostermann v Cuomo, 61 NY2d 525; Matter of Alltow, Inc. v Village of Wappingers Falls, 94 AD3d 879 [2d Dept 2012]; Matter of Rose Woods, LLC v Weisman, 85 AD3d 801[2d Dept 2011]; Matter of Klein v New York State Off. of Temporary & Disability Assistance, 84 AD3d 1378 [2d Dept 2011]). A ministerial act amenable to mandamus has been defined as " a specific act which the law requires [an administrative] officer to do in a specified way on conceded facts without regard to his [or her] own judgment" (Matter of Posner v Levitt, 37 AD2d 331, 333 [3d Dept 1971]).

The conclusory allegations that Wainscott Properties' permit application is complete and that the DEC should be compelled to resume processing such application, because"there is no outstanding request for legitimate information needed from [Wainscott Properties]," are insufficient to demonstrate a claim of entitlement to mandamus relief (see Matter of Agoglia v Benepe, 84 AD3d 1072; Matter of PC Group, LLC v Grannis, 83 AD3d 848). Enforcement of environmental permit regulations necessarily "involves

'questions of judgment, discretion and the allocation of resources and priorities which are inappropriate for resolution in the judicial arena'" (Matter of Agoglia v Benepe, 84 AD3d 1072, 1075). Here, the DEC's determinations that the project at issue involves "development" within the scope of ECL article 57, and that additional information pertaining to the question of compliance with the Plan's standards for clearing vegetation in the Pine Barrens is required to assess the environmental impact of such project, involve questions of judgment and discretion on matters pertaining to extractive mining and SEQRA review over which the DEC has been granted authority (see New York Civil Liberties Union v State of New York, 4 NY3d 175 [2009]; Matter of Agoglia v Benepe, 84 AD3d 1072).

Finally, dismissal of the declaratory judgment claim is granted. Declaratory judgment actions are a means for establishing the respective legal rights of the parties to a justiciable controversy (see CPLR 3001; Rockland Light & Power Co. v City of New York, 289 NY 45 [1942]; Thome v Alexander & Louisa Calder Found., 70 AD3d 88 [1st Dept 2009], lv denied 15 NY3d 703 [2010]). "The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or future obligations" (James v Alderton Dock Yards, 256 NY 298, 305 [1931]). A court, however, should decline to apply the discretionary relief of declaratory judgment to administrative determinations that arise within a controversy that is not yet ripe for judicial review (Church of St. Paul & St. Andrew v Barwick, 67 NY2d 510, 518). Having found that the DEC's determination that the proposed project involves development within the Pine Barrens is not a final determination on Wainscott Properties' application for modification of its mining permit, and that Wainscott Properties has not incurred an actual, concrete injury, the declaratory judgment action is not ripe for review (see Matter of Association for a Better Long Is., Inc. v New York State Dept. of Envtl. Conservation, 97 AD3d 1085 [3d Dept 2012]; Matter of Enlarged School Dist. of Middletown v City of Middletown, 96 AD3d 840; Matter of Town of Riverhead v Central Pine Barrens Joint Planning & Policy Commn., 71 AD3d 679).

Accordingly, the DEC's motion is granted and this proceeding is dismissed.

Dated: November 13, 2013

HON. JOSEPH C. PASTORESSA, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION