



STATE OF NEW YORK
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
ALBANY, NEW YORK 12233

DEPUTY COMMISSIONER AND GENERAL COUNSEL

DEC 23-07

October 25, 1988

Rosemary Nichols
Attorney at Law
P.O. Box 365
Albany, New York 12201

Re: Request for Declaratory Ruling by the Concerned Citizens
of Franklin, New York.

Dear Ms. Nichols:

On behalf of the Concerned Citizens of Franklin, you requested a Declaratory Ruling pursuant to Section 204 of the State Administrative Procedure Act and this Department's ("DEC") regulations at Part 619 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

The inquiry concerns the interrelationship between the Mined Land Reclamation Law requirement of a permit for mining over 1,000 tons of minerals within twelve successive calendar months and the State Environmental Quality Review Act ("SEQR") in two particulars. First, the petition requests a determination whether the 1,000 ton threshold may be exceeded by an operator's accumulated operations at several locations. Second, the petition requests a determination whether DEC jurisdiction attaches to mining operations which extract less than the 1,000 ton threshold when operations are expected to exceed that threshold.

The applicable provision of the Mined Land Reclamation Law ("MLRL"), §23-2711 of the Environmental Conservation Law ("ECL") states:

It shall be unlawful after April first, nineteen hundred seventy-five for any operator who mines more than one thousand tons of minerals from the earth within twelve successive calendar months to engage in such mining unless a permit for such mining operation has first been obtained from the department as provided in this section.

That the threshold is applicable to the mine operation at a fixed site or location, rather than to the operator or operators, is evident from the statutory scheme. As noted above, ECL §23-2711.1 envisions permitting a mine, rather than an operator, in that the permit must be obtained for a "mining operation". ECL §§23-2713 and 23-2715 require site-specific mining and reclamation plans which must contain graphic and written descriptions illustrating numerous details "as they affect the surface", including but not limited to existing and proposed excavation areas, processing areas, stockpiles and the status of the land showing the proposed final stage of reclamation. ECL §23-2715, which requires the Department to inspect areas where reclamation has been completed, authorizes the Department "to contract with soil and water conservation district in the county where the mine operation is located" to undertake that inspection in lieu of the Department. ECL §23-2715.4.

The scope of the regulations underlying ECL §23-2711(1) is described in 6 NYCRR §420.2(b) as follows: "[t]he provisions of Title 27 and this Subchapter shall apply to all mines from which 1,000 tons of minerals are to be removed from the earth within twelve successive calendar months after April 1, 1975." Consistently, the permit requirement under 6 NYCRR §421.1 is expressed as follows: "...a mining permit must be obtained from the department for every mine from which more than 1,000 tons of minerals will be removed from the earth within 12 successive calendar months" (emphasis added).

This legislative and regulatory intent is further reflected in the Governor's memorandum in support of the bill which established the 1,000 ton threshold. According to the memorandum, the stated purpose of the bill was to "assure that land damaged by mining operations is restored to a reasonably useful and attractive condition" (McKinney 1974 Session Laws of New York, pp. 2047-48, emphasis added). The memorandum notes that: "since the bill is aimed at the regulation of substantial, commercial mining operations, it includes specific provisions exempting non-commercial and relatively minor operators" Id. at 2049, emphasis added). Likewise, the Governor's Memorandum on Approval of the Bill states:

the bill...will aid in assuring that land damaged by mining operations is restored to a reasonably useful and attractive condition. To accomplish this goal, the bill will prohibit the initiation or continuation of major mining activities within the state after April 1, 1975 until the operator of the mine secures a permit from the department of environmental conservation.

Id. at 2133, emphasis added. Thus, it is clear that both the Governor and the Legislature intended to impose the requirement of land reclamation at the location of potential damage: the mine operation. Although permit violations will be enforced against operators, it is to the physical circumstances of mine operation that the mining permit applies.

It is the conclusion of this ruling that the applicability of the 1,000 ton threshold is site-specific to a mining operation; it is there that the excavated tonnage must be calculated to determine whether the Department's permitting authority and attendant mine reclamation requirements attach. Thus, one operator who undertakes mining operations at ten different site locations and will mine less than 1,000 tons annually at each, needs no permit even though, collectively, this tonnage is well beyond that figure. The statute contemplates imposition of the reclamation obligation only on those site-specific operations which exceed the threshold. Separate sub-1,000 ton excavations within the boundaries of one site would, however, necessarily be aggregated.

Petitioner also requests a ruling as to whether a permit applicant is entitled to rely upon the 1,000 ton threshold and to commence mining operations up to that limit while an application has been submitted and the SEQRA review is pending pursuant to ECL Article 8 and 6 NYCRR Part 617. As a practical matter, it should be noted that SEQRA review in this context is inextricable from permit application review.

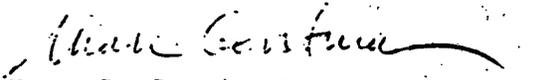
The effect of the ECL declaration that it shall be unlawful to mine more than 1,000 tons in a year without a permit is that there is no direct Departmental jurisdiction pursuant to the MLRL over mining at levels below the 1,000 ton threshold. ECL §23-2711(1). It is only at the point that mining exceeds the 1,000 ton threshold that a permit is required.

However, a caveat to the above must be stated in light of the SEQR regulations promulgated in 1987, 6 NYCRR §617.3(a): "No physical alteration related to an action shall be commenced by a project sponsor until the provisions of SEQR have been complied with except as provided under §617.3(c) or §617.13(d)(18) of this Part." Thus, where an operator applies to the Department for a mining permit and a SEQR positive declaration is made, no mining activity can be conducted until the appropriate SEQR determination and a permit are issued. If the application is given a negative declaration or a conditioned negative declaration, or is declared exempt or excluded, then mining up to 1,000 tons a year may commence after issuance of the declaration, subject to the imposition of permit conditions possibly requiring remediation of environmental impacts which occurred prior to permit issuance.

If an operator mines up to 999 tons in a year and then stops and submits a permit application for continuation beyond 1000 tons, the environmental impact of the sub-1000 ton mining activity will be taken into account in the Department's evaluation of the application and may be the subject of remedial action requirements imposed as permit conditions.

In conclusion, the MLRL threshold of 1,000 tons or less of minerals within 12 consecutive calendar months is applied to a site-specific mining operation, as opposed to a mine operator. Furthermore, mining below 1000 tons in a year is not subject to Departmental jurisdiction except as governed by SEQR and by the subsequent environmental impact review process, both as noted above.

Sincerely,


Marc S. Gerstman
Acting Deputy Commissioner and
General Counsel