

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Application of  
Diane and Edward O'Neal for a  
Declaratory Ruling

DECLARATORY RULING  
DEC #23-09

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Statute & Regulations

Petitioners, Diane and Edward O'Neal ("the "O'Neals" or "Petitioners"), by their attorney, George A. Rodenhausen, Esq., Rappoport, Meyers, Whitbeck, Shaw and Rodenhausen, seek a Declaratory Ruling pursuant to State Administrative Procedure Act §204 and 6 NYCRR Part 619 to determine whether under Article 23, Title 27, of the Environmental Conservation Law ("ECL") a permit from the Department of Environmental Conservation ("Department" or "DEC") is required for the construction of a residential pond if the excavated material remains on the site and is not produced for sale or exchange, or for industrial, commercial or municipal use. In their submissions, Petitioners contend that a Mined Land Reclamation ("MLR") permit is not required.

Background

The O'Neals are the owners of a parcel of land located in the Town of Clermont, Columbia County. At this site, they intend to commence construction of a residential pond of 7.9 acres. The Department issued Petitioners a wetlands permit in 1993 pursuant to ECL Article 24 for a portion of the pond which is located in a freshwater wetland. That permit

expired on December 1, 1994. It is my understanding that the O'Neals do not intend to file an application for a new ECL Article 24 permit.

There has been an exchange of correspondence between the O'Neals and Department staff, and I take official notice of that correspondence. That correspondence resulted in the Department staff notifying the O'Neals that a Mined Land Reclamation Permit would be needed. DEC Region 4, to George A. Rodenhausen, Esq., dated December 4, 1995. Subsequently, the O'Neals, by their attorney, requested the Department's position whether the ECL requires a mining permit for excavation of any residential pond where the excavated material is kept on site, and not sold or exchanged, and not produced for industrial, commercial or municipal use. Letter from George A. Rodenhausen, Esq., to Glen Bruening, Greg Sovas, and Arlene Lotters, DEC, dated January 22, 1996. The O'Neals contend that where a residential pond is excavated and the excavated material is to be left on site and graded, but not sold, exchanged, nor produced for commercial, industrial or municipal use, there is no jurisdictional basis for the Department to require a MLR permit and they seek a ruling to that effect.

### Analysis

Under ECL §23-2711(1) and its implementing regulations, 6 NYCRR Parts 420-425, a Department MLR permit must be obtained for "any person who mines or proposes to mine from each mine site more than one thousand (1,000) tons or seven hundred fifty (750) cubic yards...of minerals from the earth within twelve (12) successive calendar months..." ECL §23-2705(5)

defines a “mine” as a facility from which a mineral is produced for sale or exchange or for commercial, industrial or municipal use. The regulations mirror the statutory definition of “mine” [6 NYCRR §420.1(h)].

Subdivision 8 of the ECL §23-2705 provides:

“Mining” means the extraction of overburden and minerals from the earth; the preparation and processing of minerals, including any activities or processes or parts thereof for the extraction or removal of minerals from their original location and the preparation, washing, cleaning, crushing, stockpiling or other processing of minerals at the mine location so as to make them suitable for commercial, industrial, or construction use; exclusive of manufacturing processes, at the mine location; the removal of such materials through sale or exchange, or for commercial, industrial or municipal use; and the disposition of overburden, tailings and waste at the mine location. “Mining” shall not include the excavation, removal and disposition of minerals from construction projects, exclusive of the creation of water bodies, or excavation in aid of agricultural activities.

ECL §23-2711(1) envisions permitting a site-specific mining operation from which minerals in excess of one thousand tons or seven hundred fifty yards are removed within twelve successive calendar months. Despite the fact that the O’Neals propose to excavate more than one

thousand tons of minerals, the O'Neals proposed activities nonetheless does not constitute a "mining operation" since the excavated materials will be utilized on the site by the property owner, the activity does not involve a transaction of sale or exchange or an industrial or municipal use, and "reclamation" is assured by the creation of the pond. This is consistent with the Mined Land Reclamation Law's (MLRL) primary purpose to ensure that there would be reclamation of mined lands, to return mined land to productive use and to protect the health, safety and general welfare of the people, as well as the natural beauty and aesthetic value of the affected areas of the state. See, ECL §23-2703(1).

This statutory language reflects the legislative intent in enacting the MLRL. As stated in the Governor's memorandum upon approval of the bill:

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.

See, McKinney's 1974 Session Laws of New York, p. 2133, emphasis added.

Likewise, the Legislative Memorandum in Support submitted by the State's Executive

Chamber explains that the purpose of the bill was to “assure that land damaged by mining operations is restored to a reasonably useful and attractive condition” (Id. at 2047-48, emphasis added). The Memorandum explains that “(s)ince the bill is aimed at the regulation of substantial, commercial mining operations, it includes specific provisions exempting non-commercial and relatively minor operators. Accordingly, the proposal does not affect excavation or grading when conducted solely in aid of on-site farming or construction.” Id. at 2048.

Prior Department Declaratory Rulings examined the applicability of the statutory exemption for excavation in aid of on-site farming or construction. In Syragram Realty Corporation, DEC 23-01 (dated June 17, 1980) it was determined that the exemption was not applicable because the eventual construction activity was merely speculative and the removal of the minerals benefitted the petitioners. The Declaratory Ruling 23-04, Matter of Irvington Union Free School District, DEC 23-04 (March 23, 1984), rejected arguments that the excavation of more than one thousand tons of minerals required a MLR permit since the school field would not be “mined;” the proposed project would not result in an economic transaction with respect to the extracted minerals; and the project would result in the productive use of the land for improved playing fields.

The facts and circumstances in the Irvington Union Free School District ruling are similar to the facts and circumstances involving the O’Neals’ Petition. The O’Neals’ proposed residential pond will not be “mined” to serve as a source of material to serve commercial or municipal needs for mineral resources; the pond construction will not be undertaken in order to

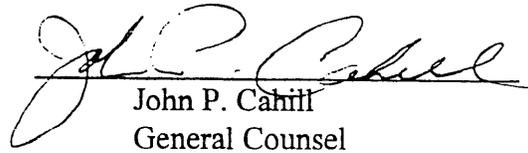
benefit petitioners economically from the use of the extracted materials; the material will remain on-site; and the restoration of the land is assured by the completion of the residential pond.

The 1991 amendments to the MLRL deletes the reference to “solely in aid of on-site farming and construction” from the definition of “mining” and adds clarifying language that “(m)ining shall not include the excavation, removal and disposition of minerals from construction projects, exclusive of the creation of water bodies, or excavation in aid of agricultural activities.” L. 1991, c. 166, §228. The 1991 amendments, however, do not change the Syragram Realty or Irvington Union Free School District standards. To the extent that the O’Neals’ on-site pond project accomplishes the basic statutory environmental conservation objectives of the Mined Land Reclamation Law, a MLR permit is not required. Unlike the factual situation present in Syragram Realty, the O’Neals’ proposed pond will include full reclamation of the property, clearly serving the statute’s reclamation purposes.

### Conclusion

Based on the facts and a review of the pertinent provisions of law as discussed above, it is my conclusion that construction of the O’Neals’ proposed residential pond is exempt from the permit requirement of ECL §23-2711(1) since the excavated material will remain on site; there is no sale or exchange of the material; and there is no commercial, industrial or municipal use. Moreover, the regulatory objective of the MLRL is inherent in the reclamation of the excavated lands. However, it remains incumbent upon the O’Neals to obtain a Mined Land Reclamation

permit prior to the removal of any extracted minerals for sale or exchange or for commercial, industrial or municipal use. Furthermore, the O'Neals are not relieved from the obligation to obtain any applicable state and local approvals prior to commencement of the project.



John P. Cahill  
General Counsel

Dated: November 27, 1996  
Albany, New York