

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application
of Theodore Miller for a
Declaratory Ruling

DECLARATORY
RULING
23-10

Statute and Regulations

Petitioner, Theodore Miller, by his attorney, John F. Artman, Chernin & Gold, has petitioned for a Declaratory Ruling pursuant to State Administrative Procedure Act §204, and 6 NYCRR Part 619, to determine whether under Environmental Conservation Law (“ECL”) Article 23, Title 27, a permit from the Department of Environmental Conservation (“Department” or “DEC”) is required for the excavation and removal of material so as to increase the available farming land. The Petition consists of a submission dated December 10, 1997, and a March 31, 1998 supplement in response to General Counsel’s letter of February 3, 1998 requesting additional information. Mr. Miller seeks a Declaratory Ruling that the excavation activity is exempt from Mined Land Reclamation (“MLR”) permit requirements based upon the agricultural exclusion.

Background

For the purpose of issuing this Declaratory Ruling, the facts set forth in the petition are assumed to be correct. Accordingly, the binding effect of this Ruling is limited by the assumed factual predicates. Power Authority of the State of New York v. NYSDEC, 58 N.Y.2d 427 (1983).

Mr. Miller is the owner of a 22 acre parcel of land located in the Town of Fenton, Broome County, New York. At this site, Mr. Miller currently farms 2-3 acres of 12 acres. He intends to grade two hills lying on his property by stripping and stockpiling the topsoil from the hills and removing approximately 343,000 cubic yards of gravel in order to eliminate “steep slopes” to conduct farming activities. The gravel would be permanently hauled off the property. The stockpiled topsoil would be replaced subsequent to the removal and off-site disposition of the underlying gravel.

The petition for a Ruling was initiated by a DEC Deputy Regional Permit Administrator’s determination that Mr. Miller needed a MLR permit to excavate and mine approximately 12 acres of materials because greater than 1,000 tons or 750 cubic yards of minerals would be removed within 12 successive calendar months, citing ECL §23-2711(1). Mr. Miller contends that inasmuch as the proposed grading plan is for the purpose of increasing agricultural production by eliminating steep slopes, he is entitled to an exemption from MLR permit requirements.

Analysis

Subdivision 1 of ECL §23-2711 provides, in pertinent part, that:

After September first, nineteen hundred ninety-one, any person who mines or proposes to mine from each mine site more than one thousand tons or seven hundred fifty cubic yards, whichever is less, of minerals from the earth within twelve successive calendar months...shall not engage in such mining unless a permit for such mining operation has been obtained from the department.

Subdivision 5 of ECL §23-2705 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 repeat 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.

Therefore, the statute’s plain language requires a MLR permit in order to operate a mine from which more than one thousand tons or seven hundred fifty cubic yards of minerals or overburden are to be extracted from the earth within twelve successive calendar months. ECL §§23-2713 and 23-2715 require site-specific mining and reclamation plans which depict the potential affected acreage, including but not limited to areas of excavation; areas of topsoil and stock piles; drainage features and water impoundments; and the status of the land showing the manner in which the affected acreage is to be reclaimed. The regulatory provisions require that the reclamation plan include “a description of the applicant’s land-use objective such as: farming; pasture; forestry; recreation, industrial, commercial or residential uses; solid waste disposal; a combination thereof; or other uses acceptable to the department” [6 NYCRR §422.3(d)(1)].

Moreover, the purpose of the statute and the objectives to be accomplished are set forth in the declaration of policy set forth in ECL §23-2703 which evinces the intent of the Mined Land Reclamation Law (“MLRL”) and reads in pertinent part that:

...it is the policy of this state to...provide for the management and planning for the use of these non-renewable natural resources and to provide, in conjunction with such mining operations, for reclamation of affected lands; ...to protect the health, safety, and general welfare of the people, as well as the natural beauty and aesthetic values in the affected area of the state [ECL §23-2703(1)].

This policy statement shows that the legislature intended that the MLRL’s primary purpose was to ensure that there would be reclamation of mined lands, as well as requiring mining activity to minimize erosion, sedimentation, dust, noise, water pollution, and visual intrusions. Syragam Realty Corporation, DEC 23-01 (1980).

Certain activities are exempt from the definition of “mining.” Specifically, Subdivision (8) of ECL §23-2705 provides that “(m)ining shall not include the excavation, removal and disposition of minerals from construction projects, exclusive of the creation of water bodies, or excavations in aid of agricultural activities” (emphasis added).

Pursuant to current DEC policy governing agricultural exemptions, as detailed in Technical Guidance Memorandum #92-2, dated May 4, 1992, entitled, “Activities Exempt from the Mined Land Reclamation Law,” each of the following criteria must be met for a project to be exempt from the State’s MLRL:

Excavations or grading undertaken to enhance the agricultural use of lands or to provide for structures or other improvements, including ponds, that benefit or are necessary for agricultural pursuits. The following criteria must be met:

a) The excavations and/or grading activity must be directly related to enhancements or improvements associated with ongoing or imminent agricultural activity.

b) A detailed description of the proposed improvements must be submitted to the Department and must include:

- areas to be affected, provisions for saving all topsoil, plans for seeding and mulching of affected areas and final drainage configurations.

c) The excavation and restoration of the site must be completed in a 12-month period.

- d) No mineral processing equipment will be allowed.
- e) Agricultural ponds must be of a size that is no larger than that required to meet agricultural needs and must be directly related to agricultural use such as irrigation water source for crops, water for livestock, pond for fish propagation.

The concluding paragraph of the policy guidance provides that “(t)he agricultural exemption will not apply to excavations where the mineral removal and subsequent reclamation does not enhance the agricultural usability or productivity of the land. Proposing to excavate material and reclaim them in a manner that makes them suitable for agricultural use will not be considered exempt from the MLRL.”

The documentation provided by Petitioner in support of his request for a Declaratory Ruling seeking an exemption from the mining permit requirements contemplates the excavation of 343,000 cubic yards of gravel in order to level the land for a new land configuration that would increase the acreage suitable for farming from 2-3 acres to 12 acres. Once the excavated gravel was hauled off-site by the contractor performing the excavation, the area would be regraded to be used for row crop production for such crops as sweet corn, various vegetables, and gladiolas. The Petitioner refused to indicate the ultimate disposition of the 343,000 cubic yards of excavated material except noting that all gravel excavated will be loaded in a truck and permanently hauled off site. However, it is certainly reasonable to presume that 343,000 cubic yards of a commercial commodity has some economic value and that there is a reasonable likelihood there will be a sale or exchange.

Petitioner’s narrow view of the statutory scheme and the intent of the legislature in enacting the Mined Land Reclamation Law disregards the scope of the applicable provisions of the MLRL. Principles of statutory construction provide that a statute or legislative act is to be construed as a whole and that all sections of a law are to be read and construed together to determine the legislative intent. McKinney’s Statutes, §§97, 130. Sections of an act must be construed in view of all of the provisions of the act as well as the general intent of the whole statute. McKinney’s Statutes §98. Exceptions to the statute must be strictly construed in order that the major policy underlying the legislation is not defeated. McKinney’s Statutes §213. The MLRL’s declaration of policy emphasizes that the MLRL is to provide for reclamation of affected lands to prevent pollution, protect property values, and protect the “health, safety and general welfare of people, as well as the natural beauty and aesthetic value in the affected areas of the state.” (ECL §23-2703).

The legislative history indicates that the primary concern in enacting the Mined Land Reclamation Law was to assure the reclamation of mined lands. The Legislative Memorandum in Support of the bill 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.” See, McKinney’s 1974 Session Laws of New York, p.2047- 48. 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.

The legislative history indicates that the statute, as enacted, represents a careful balance between the potential environmental impacts that may be associated with unregulated mining activities against the perceived legitimate needs of farmers, recognizing that enhancement of ongoing agricultural activity would not present the likelihood of permanent damage. From this perspective, the agricultural exemption contained in ECL §23-2705(8) and 6 NYCRR §420.1(k), when read in conjunction with the policy of the MLRL, allows excavation only when the excavation enhances or furthers the agricultural use of an agricultural property and results in immediate subsequent agricultural activity on the excavated site. In contrast, excavation and disposition activities where the land-use objective is farming is a land-use objective that legitimately can serve as the goal of a mined land use and reclamation plan under the MLRL [ECL §23-2703(1) and 6 NYCRR §422.3(d)(1)].

While the petitioner’s submissions include information regarding grading and excavation, guidelines for erosion and sediment control, and discussion regarding the benefits of removing large knolls and changing drainage patterns to add value and efficiencies to a farm (Exhibits C, D, and E to the Petition), the submissions include only generalized information regarding an actual, implementable agricultural plan. The petitioner’s statement that the grading plan will increase the acreage available for farming and that the site will be used for row crop production for the planting of sweet corn, various vegetables and gladiolas is inadequate in terms of a viable agricultural plan that will be put into place at the conclusion of the excavation to justify an exemption from the statute. The documentation showing removal of gravel goes more toward petitioner’s ability to meet the statutory requirements for obtaining a mining permit than an entitlement to an exemption from the statute. Syragram Realty Corporation, DEC 23-01 (1980).

The lack of a definite and implementable actual agricultural plan fails to provide assurance that the proposed excavation and grading plan will result in timely completion of an agricultural project or proper reclamation and restoration of the site. Additionally, the lack of supporting documentation describing the characteristics of the soils located at the site, land capability, classification of the soils, soil drainage class or site geology makes it difficult to determine the viability of petitioner’s plan. Little is known of the soils that exist now or that will exist after 343,000 cubic yards of material are removed. Further, the lack of information regarding the geology and soil characteristics at the site make it impossible to determine whether or not the material could be removed from the site without the aid of processing equipment and within the time constraints of 12 months.

The failure to provide requested documentation regarding the ultimate disposition of the 343,000 cubic yards of minerals and whether the commodity will be sold or exchanged fails to account for the explicit statutory language under ECL §§23-2705(5) and 23-2705(8) which defines a “mine” and “mining” as inclusive of excavation and removal of materials through sale or exchange, or for commercial, industrial or municipal use. Likewise, the legislative history and regulatory intent reflect that the primary purpose of the bill was to assure reclamation of land damaged by mining operations, while including “specific provisions exempting non-commercial and relatively minor operators.” (McKinney 1974 Session Laws of New York,

p. 2049, emphasis added). Previous Department Declaratory Rulings that examined the applicability of the statutory exemption for agriculture or construction activities reviewed whether the eventual construction activity was merely speculative and whether the removal of the minerals benefitted the petitioners (Syragram Realty Corporation, DEC 23-01, June 17, 1980); whether the proposed project would result in an economic transaction with respect to the extracted minerals (Matter of Irvington Union Free School District, DEC 23-04, March 23, 1984); and whether the “mined” material would remain on-site or benefit the petitioners economically (Matter of Diane and Edward O’Neal, DEC 23-09, November 27, 1996).

In the Syragram Realty Corporation ruling the exemption was not applicable where the eventual construction activity was speculative and the removal of the minerals benefitted the petitioners. In the Irvington Union Free School District ruling the exemption was applicable since the school field would not be “mined” to serve as a source of material to serve commercial or municipal needs for mineral resources. In the O’Neals’ ruling the exemption was applicable since the material would remain on-site and the construction activity would not benefit petitioners economically from the use of the extracted materials. The ultimate disposition of the minerals was an important factor in all of these earlier rulings; contrary to petitioner’s claim that there is no provision in the exemption criteria which requires an accounting of the excavated gravel.

The MLRL requires the posting of financial security to ensure the performance of reclamation, naming the State as beneficiary, to guarantee that the affected land will be restored. This assurance of reclamation is not addressed when the agricultural exemption is viewed from the perspective advocated by petitioner.

The Department is also aware that a local level of regulation is involved under a local zoning law, Town of Fenton, which establishes procedures for siting a new mine. Although the Department will not become involved in local zoning issues, no local government is prevented from enacting or enforcing local zoning laws which determine permissible uses in zoning districts (see, Matter of Gernatt Asphalt Products v. Town of Sardinia, 87 NY2d 668, 642 N.Y.S. 2d 164, 664 NE.2d 1226 (1996)).

The excavation activities must be viewed in the context in which it is proposed to assure that the activity will not be in contravention of the purposes and policies of the MLRL in total. Therefore, the regulation of mining cannot be construed so narrowly, as Petition urges, to ignore the statutory language and purpose to allow excavation activities that meet the definition of mining and that exceed the regulatory thresholds, as in the instant case, consistent with DEC mining permit requirements. Under petitioner’s interpretation of the agricultural exemption, the MLRL would be impossible to administer in a manner which is consistent with the purpose of the statute because any mining project sponsor could assert they are exempt from the MLRL’s requirements because they ultimately intend to make sites suitable for agricultural use. The agricultural exemption to the MLRL’s permit requirements, ECL §23-2711(1), cannot be used to convert a “mine” to an agricultural plan and thus eliminate any need for a mining permit (cf. Ellis v. Marsh, 164 Misc 2d 135, 143, 623 NYS 2d 482, 488 (Sup. Ct., Albany Co., 1995)).

Bearing in mind the large size of the excavation (10 acres); the potential environmental

impacts associated with a significant land reconfiguration including erosion, runoff, drainage patterns, and visual impacts; the limited, generalized information contained in the petition regarding actual agricultural activity; and the incomplete statements presented with respect to petitioner's planned use of the 343,000 cubic yards of gravel, the proposed excavation and grading plan do not provide an adequate basis for the conclusion that the excavation falls within the scope of the agricultural exemption. Again, while the Petitioner did provide generalized information regarding the grading plan, absent evidence that the excavation and grading plan will result in a definitive agricultural plan that will proceed to fruition, the proposal cannot be considered an enhancement of ongoing agricultural activity.

Conclusion

For the reasons set forth above, we conclude that the Millers are required to obtain a MLR permit before undertaking any excavation activities on the site. This decision does not preclude the Millers from excavating the site, it only requires that they apply for and receive the applicable permits before excavation can proceed.

Frank V. Bifera
General Counsel

Dated: January 28, 1999
Albany, New York