

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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Application of

A.L. BLADES & SONS, INC.

DECLARATORY
RULING

for a Declaratory Ruling pursuant
to Section 204 of the State
Administrative Procedure Act

72-07

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INTRODUCTION

This matter has been referred to the New York State Department of Environmental Conservation's ("Department") Office of General Counsel by the Department's Office of Hearings for a Declaratory Ruling pursuant to State Administrative Procedure Act §204 and §481.10(f)(4) of Title 6 of the Official Compilation of Codes, Rules and Regulations of New York State ("NYCRR") : A.L. Blades & Sons, Inc. ("A.L. Blades") is disputing the assessment of a mined land reclamation program fee ("reclamation fee") for the calendar year 1991. The issue to be decided is whether, as a matter of equity, the fact that the project was performed for the New York State Department of Transportation ("DOT"), a State agency, should warrant a waiver of the reclamation fee.

BACKGROUND

According to the stipulated facts set forth in the February 3, 1994, report by Administrative Law Judge Frank Montecalvo, A.L. Blades held a mined land reclamation permit (#809-3-30-0591) for a mine, known as the "Wentworth Road Pit", located in the Town of Avoca, Steuben County,

New York. The permit was issued by the Department on June 14, 1990, and bore an expiration date of June 14, 1991. The Department designated the mine as a "minor project" affecting less than five acres of land. The permit was obtained by A.L. Blades while building a project designated as New York DOT project #D253269.

The Department sent invoice #34678, dated September 23, 1991, to A.L. Blades which bore the assessment of a \$400.00 reclamation fee for 1991.

On October 31, 1991, A.L. Blades responded to the invoice by submitting, pursuant to 6 NYCRR §481.9(c), a Regulatory Fee Recalculation Request, which sought a waiver of the fee assessment on the grounds that the project of which the mine was a part was completed by November 30, 1990, and DOT had accepted the entire project on December 4, 1990. For purposes of this ruling, it is assumed that some form of approval was given by DOT for work performed by A.L. Blades at the mine site.

The Department denied A.L. Blades' fee recalculation request on December 3, 1991. The basis stated by the Department for its denial was that A.L. Blades had failed to notify the Department of any reclamation activity and, consequently, the Department had not inspected the site for proper reclamation.

On December 16, 1991, the Department inspected the mine site, found that the mined land was properly reclaimed and

approved the reclamation. A.L. Blades filed a mining termination notice for the site on January 14, 1992.

ANALYSIS

Authority to impose reclamation fees is established by Environmental Conservation Law ("ECL") Article 72, Title 10. The particular statutory provisions applicable to A.L. Blades are set forth below.

ECL §72-1003, entitled "Fees", reads, in pertinent part, as follows:

All persons required to obtain a permit or approval or subject to regulation under this title shall submit annually to the department a fee in the amount to be determined for affected land as follows:

1. four hundred dollars for minor projects.

(Emphasis added.)

ECL §23-2705, entitled "Definitions", reads, in pertinent part, as follows:

As used in [the New York State Mined Land Reclamation Law], unless the context otherwise requires:

. . . .

12. "Person" means any individual, public or private corporation, political subdivision, government agency, department

or bureau of the state, municipality,
industry, partnership, association, firm,
trust, estate or any other legal entity
whatsoever.

See also 6 NYCRR §480.2(af).

ECL §72-1005, entitled "Liability for fees", reads, in pertinent part, as follows:

Liability for fees authorized by this title shall be as follows:

1. for persons holding permits or approvals or subject to regulation under this title on January first in any year beginning with the year nineteen hundred ninety-one, liability for fees shall commence on January first;

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3. for all persons holding permits or approvals, or subject to regulation under this title liability to pay annual fees shall continue until such time as reclamation has been completed and approved by the department and any required financial security has been released, and shall be prorated to the date of approval by the department.

(Emphasis added.)

A.L. Blades concedes that it neither sought nor obtained Department approval of the reclamation of the mined land until December 16, 1991. A.L. Blades does not dispute that it is

liable under the law for the payment of the reclamation fee. However, it claims that it would be unfair or inequitable to require payment of this fee in light of the fact that DOT, another State agency, had approved, in December 1990, the work A.L. Blades had completed at the mine site.

This argument fails to recognize that even DOT, had it been the entity subject to regulation under the Mined Land Reclamation Law, would have constituted a "person" liable for payment of the reclamation fee. In that circumstance, DOT itself would have been liable, pursuant to ECL §72-1005(3), for payment of the fee until such time as the Department approved the reclamation. If DOT could not approve its own reclamation, and thereby terminate its liability for payment of the reclamation fee, it cannot be said that inequities result from DOT's inability to terminate such liability for its contractors, including A.L. Blades.

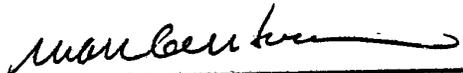
Equity is defined as "[j]ustice administered according to fairness as contrasted with the strictly formulated rules of common law." BLACK'S LAW DICTIONARY 484 (5th ed. 1979). Here the statutory terms are clear: only the Department can approve the reclamation of the mined land and thereby terminate liability for payment of reclamation fees. There has been no showing of unfairness in application of the statute; rather, there would be an inequity were it to be applied as A.L. Blades suggests. There is thus no cause to determine the extent of the Department's general equitable or

discretionary authority to waive the assessment of regulatory fees.

CONCLUSION

ECL §72-1005 requires that reclamation fees be paid by those holding permits or approvals or subject to regulation until such time as reclamation has been completed and has been approved by the Department. A.L. Blades was subject to regulation by the Department during the period January 1, 1991, through December 16, 1991, when the Department approved of the reclamation of the mined land. A.L. Blades is liable for regulatory fees which accrued during that period.

Dated: Albany, New York
April 28, 1994



Marc S. Gerstman
Deputy Commissioner and
General Counsel