

NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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Application of

Philip A. Desborough

DECLARATORY  
RULING  
72-08

for a Declaratory Ruling pursuant  
to Section 204 of the State  
Administrative Procedure Act  
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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"). Philip A. Desborough is disputing the assessment of a mined land reclamation program fee ("reclamation fee") for each of the calendar years 1991, 1992 and 1993. The issue to be decided is whether Mr. Desborough is liable for payment of the reclamation fee.

BACKGROUND

According to the stipulated facts set forth in the March 21, 1994, report by Administrative Law Judge Frank Montecalvo, Mr. Desborough held a mined land permit (#903-3-30-0217) for a mine, known as the "Ellington Gravel Products Pit," located in Cherry Creek, New York. The permit was originally issued by the Department during August 1981 or 1982, then reissued at three-year intervals until 1992 when it was reissued for five years. The mine is classified as a "minor project" as defined at Environmental Conservation Law ("ECL") §72-1001(3).

Mr. Desborough has neither surrendered his permit nor requested the Department to approve of reclamation of the mined land. He does not contend that the mined land has ever been reclaimed. The Department has not approved of any reclamation of the mined land.

The Department assessed reclamation fees by invoices sent to Mr. Desborough on September 23, 1991; August 17, 1992; and August 16, 1993. Mr. Desborough was incorrectly assessed an annual fee of \$700 for 1991 and 1992. The 1993 invoice reflected an assessment of \$400.

Mr. Desborough timely challenged each of the invoices by submitting, pursuant to 6 NYCRR §481.9(c), a Regulatory Fee Recalculation Request. On each recalculation request, Mr. Desborough asserted that the fee should be eliminated because the mine site constituted a minor project and there had been no mining activity since 1986 or 1987. For the purposes of this ruling, it is assumed that there has been no mining activity conducted at the mine since 1986.

In response to Mr. Desborough's recalculation requests, the Department reduced the assessed reclamation fee to \$400 for each of the years 1991 and 1992 and affirmed Mr. Desborough's liability for an additional annual payment of \$400 for 1993.

For all years in question, Mr. Desborough filed notices of continued disagreement. In his notices of continued disagreement, dated December 15, 1991, and February 6, 1992 (relating to the 1991 fee), and his submission dated November 10, 1992 (relating to the 1992 fee), Mr. Desborough reiterated the assertions in opposition to the imposition of the fee that were contained in his original recalculation requests. However, in his notice of continued disagreement dated November 2, 1993 (relating to the 1993 fee), Mr. Desborough asserted that he was not liable for the \$400 fee because the mine was under a permit covering the period from August 1990 through 1993, mining and reclamation plans had been approved, a \$5,000 bond securing reclamation had been submitted, and no gravel had been removed from the mine since 1987. Additionally, Mr. Desborough claimed that the 1991 fee had been waived in writing and that the 1992 fee had been waived during a telephone conference. No evidence was advanced to substantiate these latter claims and Department staff, after investigation, were unable to verify these purported waivers by the Department.

The total amount of assessed fees in dispute is \$1,200, covering the calendar years 1991, 1992 and 1993.

#### ANALYSIS

Authority to impose reclamation fees is established by ECL Article 72, Title 10. The particular statutory provisions applicable to Mr. Desborough 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 §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;

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.

Mr. Desborough concedes that he has neither sought nor obtained Department approval of any reclamation of the mined land. As such, he remains liable for payment of the annual reclamation fee until such time as reclamation of the mined land is approved. Application of A.L. Blades & Sons, Inc., DEC 72-07. The fact that no disturbance of the land by mining has occurred since 1986 is irrelevant.

Mr. Desborough contends that he does not have to pay the reclamation fee if he has a reclamation plan and bond on file with the Department. The provision of a reclamation plan and bond are prerequisites to obtaining a mining permit. See ECL §§23-2711, 23-2713 and 23-2715. Provision of a reclamation plan and bond does not obviate the need to pay the annual reclamation fee; only Department approval of the reclamation can terminate fee liability.

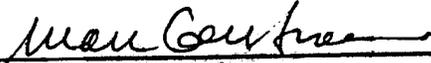
Mr. Desborough's claim that the Department waived his liability for the 1991 and 1992 fees is unsupported. When challenging the imposition of a program fee, it is the permittee's responsibility to precisely state the basis for

his or her challenge to the imposition of the fee and to offer supporting documentation necessary to substantiate the claim. 6 NYCRR §481.9(g). Mr. Desborough has failed to provide any proof of his allegations. Furthermore, there is no basis for the Department to waive the imposition of the reclamation fee on Mr. Desborough while imposing it on all similarly situated mining permittees.

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. Mr. Desborough is subject to regulation by the Department until such time as the reclamation of the mined land is approved by the Department. Mr. Desborough is liable for payment of outstanding reclamation fee assessments totalling \$1,200.

Dated: Albany, New York  
May 13, 1994

  
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Marc S. Gerstman  
Deputy Commissioner and  
General Counsel