

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
-----X
In the Matter of the Application of
Southern Cayuga Resources, Inc. for a
Declaratory Ruling
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DECLARATORY
RULING
DEC 72-10

INTRODUCTION

This matter was referred to the Office of General Counsel of the New York State Department of Environmental Conservation ("Department") 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"). Southern Cayuga Resources, Inc. ("SCR") is disputing the assessment of mined land reclamation program fees ("program fees") for each of the calendar years 1991, 1992, and 1993. The issue to be decided is whether SCR is liable for payment of the program fees.

BACKGROUND

According to the summary of material facts set forth in the August 31, 1994 report by Administrative Law Judge Robert P. O'Connor, SCR (the "Permittee") was issued a Department mining permit, No. 7-00728, dated January 29, 1985, in accordance with the permitting requirements of Environmental Conservation Law ("ECL") Article 23, Title 27 [New York State Mined Land Reclamation Law ("MLRL")]. The mine site consists of approximately 0.5 acres of land which has been disturbed by mining since enactment of the MLRL (i.e., April 1, 1975). No reclamation plan for the mined land has been approved by the Department nor has the Permittee completed any reclamation for the mined land.

The Permittee has been assessed annual program fees pursuant to ECL §72-1003.2 and 72-1005 for each of the years 1991, 1992 and 1993. The Permittee has not paid any of these assessments.

SCR was dissolved by proclamation on March 24, 1993 pursuant to New York State Tax Law §203-a. The Organizational Report filed with the Department lists Timothy C. Buhl as Vice-President and Secretary of SCR; Mary Ellen Buhl was listed as President and Treasurer. Timothy C. Buhl is the successor to, and present owner of, the assets of SCR. The Landowner Consent Form filed with the Department lists Timothy C. Buhl and Mary Ellen Buhl as the owners of the property on which SCR operated.

In accordance with 6 NYCRR §481.10(f)(4), the parties were requested to submit briefs concerning the liability, if any, of SCR for the disputed program fees. Specifically, three issues were to be addressed: (1) the liability of the permittee to pay

the program fees in the context of ECL §72-1005; (2) the liability of a former corporate officer or shareholder to pay the unpaid program fees subsequent to the dissolution of the permittee; and (3) whether ECL Article 72, Title 10 is effective in the absence of promulgated rules and regulations for the implementation of said Title.

The Department Staff's position, in its January 6, 1995 Brief and January 20, 1995 Reply Brief, is as follows: (1) the Permittee is liable for the payment of the program fees pursuant to ECL §72-1005; (2) the Permittee remains liable for payment of the fees despite its dissolution and, further, should efforts to pursue the Permittee prove futile, then Mr. Buhl is liable for the corporate debts of the Permittee; and (3) ECL Article 72, Title 10 is effective because it is sufficiently clear and detailed to stand alone; promulgation of regulations is not necessary to implement Title 10.

SCR's untimely January 9, 1995 letter brief takes the position that SCR is not liable for the payment of the regulatory program fees. First, SCR contends that inasmuch as it has not had a mining permit since September 1987 it is not subject to the requirements set forth in ECL §72-1005(1), asserting that "only persons who hold a valid permit in January of any year (beginning in 1991) are subject to the program fee." In addition, SCR raises a matter not previously agreed to by the Parties in the summary of material facts set forth in the August 31, 1994 report of the Administrative Law Judge In the Matter of Disputed Regulatory Program Fees Assessed to SCR. SCR alleges in its January 9, 1995 letter brief that it is not subject to the Department's regulation because its ongoing mining activities are either sub-jurisdictional (i.e., "under 1,000 tons per year") or are for on-site construction and agricultural use.

Second, SCR acknowledges that the corporation that held the permit has been dissolved and acknowledges the obligation to reclaim the 0.5 acres of land that was affected by mining after 1975. Third, SCR maintains that pursuant to the effective date paragraph of the amendments to ECL Article 72, Title 10 (i.e., September 1, 1991), rules and regulations necessary for implementation are directed to be made and completed within 180 days of that date; therefore the Department can enforce Title 10 only if it has promulgated implementing regulations, which the Department has not done.

The total amount of assessed fees in dispute is \$2,100, covering the calendar years 1991, 1992, and 1993.

ANALYSIS

Environmental Conservation Law §72-1003 provides 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:...(2) seven hundred dollars for affected land of an acreage equal to or less than five acres.... (Emphasis added.)

ECL §72-1001(1) defines "affected land" as:

...the sum of that surface area of land or land under water which: (a) has been disturbed by mining since April first, nineteen hundred seventy-five, and has not been reclaimed, and is to be disturbed by mining during the term of the permit to mine. (Emphasis added.)

Subdivisions 1 and 3 of ECL §72-1005 state that liability for fees shall be:

(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.)

As an initial matter, for purposes of this Declaratory Ruling SCR's January 9, 1995 letter brief is accepted in spite of its filing after the established submittal deadline.

However, I note that SCR's supplemental issues of fact, i.e., its contentions that during the years in question it was engaged in either sub-jurisdictional mining or excavation in connection with construction projects or excavations in aid of agricultural operations, were not stipulated to by the parties. The Summary Report by Administrative Law Judge Robert P. O'Connor states:

During the aforementioned telephone conferences, the parties reviewed the relevant facts and agreed there was no dispute regarding the material facts pertaining to this case. ...There being no material facts in

dispute, this matter is being referred to the Department's General Counsel for a declaratory ruling pursuant to 6 NYCRR §481.10(f)(4).

In any event, I find these issues irrelevant to resolution of the matter referred for a Declaratory Ruling regarding the disputed program fees. Although SCR may or may not have operated its mine in the past three years at sub-jurisdictional levels or as an excavation for construction or agricultural projects, SCR concedes it did not reclaim the 0.5 acres of affected acreage mined after 1975. Since the mined land has not been properly reclaimed, it must be determined whether ECL Article 72, Title 10 requires submission of the assessed program fee.

SCR contends that since it was not subject to permit requirements, it also was not subject to program fee requirements. However, the provisions of ECL Article 72 do not restrict program fee liability to persons actually possessing permits. As previously noted, subdivisions 1 and 3 of ECL §72-1005 provide, in pertinent part, that liability for fees shall apply to "persons holding permits or approvals or subject to regulation under this title." In light of the Legislature's use of the disjunctive "or" in the statute, there are three categories of persons subject to program fees: (1) those holding permits; (2) those holding approvals; and (3) those subject to regulation. This interpretation is consistent with the commonly accepted meaning of the word "or" as a term used to denote alternatives. Words and Phrases, vol. 30, p. 53 et seq.; Shipley Construction and Supply Co. v. Magar, 165 A.D. 866, 150 N.Y.S. 969, (1914); Buff v. Board of Trustees of Incorporated Village of Greenwood Lake, 5 N.Y.2d 602, 186 N.Y.S.2d 619 (1959).

Thus, the proper inquiry under ECL §72-1005 is whether SCR held a permit or was subject to regulation. As SCR concedes, the mine includes a surface area of land with an acreage of approximately 0.5 acres which has been disturbed by mining since April 1, 1975 and has not been reclaimed. Because the affected land has not been reclaimed in accordance with the requirements of the MLRL, and because the Department has not inspected and approved the reclamation, the mining site is subject to the regulatory requirements of ECL Article 23, Title 27, and ECL Article 72, Title 10, and SCR is therefore subject to regulation.

The MLRL and the regulations adopted pursuant to it require reclamation of all affected land in accordance with a schedule in an approved mined land-use plan. In addition, to achieve this result they require continuous, concurrent reclamation, where possible [ECL §23-2713(2)]. In the absence of an approved reclamation plan, the Department may, after notice and an opportunity for a hearing, impose a reclamation plan [ECL §23-2713(1)(d)]. This regulatory oversight is consistent with the declaration of policy set forth in the MLRL to ensure that land

affected by mining activities is reclaimed in order to achieve the future productive use of the land.

Even after the expiration of its permit, SCR remains legally obligated to reclaim under ECL §23-2713(2), which requires that "[r]eclamation of the affected land shall be completed within a two year period after mining is terminated...." Finally, as noted, SCR's brief acknowledges the obligation to reclaim the mined land. Thus, SCR remains "subject to regulation" in accordance with the provisions under ECL §§72-1003 and 72-1005, and subdivision 3 of ECL §72-1005 expressly states that "liability to pay annual fees shall continue until such time as reclamation has been completed and approved by the department..." (emphasis added).

In summary, SCR has conducted mining operations at the subject property and is therefore "subject to regulation" as the owner of "affected land" which has not been properly reclaimed. Liability for fees continues until reclamation is complete.

This analysis is consistent with two previous Declaratory Rulings in mined land reclamation regulatory fee cases. In A.L. Blades and Sons, Declaratory Ruling 72-07, Blades held a valid mined land reclamation permit in 1990 which expired in June 1991 but argued that it should pay no regulatory fee for 1991 because it had terminated its mining operations and reclaimed the land in 1990. Blades had not, however, notified the Department of the reclamation. The Declaratory Ruling held that, under ECL 72-1005, Blade's fee liability continued until its reclamation was completed and approved by the Department. The Department did not inspect and approve the reclamation until December 1991, due to Blades' failure to provide notice. Consequently, Blades was liable for regulatory fees until that time, even though it had allegedly not mined in 1991.

This result was reaffirmed in Philip A. Desborough, Declaratory Ruling 72-08 (1994). Desborough also had a valid mining permit during the fee years in question, 1991-1993, but argued that he should not have to pay a fee because he had done no mining since 1987. Desborough also failed to inform the Department that he had completed reclamation and, accordingly, the Department did not inspect and approve any reclamation. The Declaratory Ruling held that Desborough's liability for the fee continued throughout the fee years in question.

Similarly, SCR has not informed the Department that it has completed any reclamation, and the Department has not inspected and approved any reclamation. Accordingly, under ECL 72-1005, SCR is liable for the regulatory fee as a person who is "subject to regulation" by being the owner of "affected land" which has not been properly reclaimed and which accordingly has not been inspected and its reclamation approved by the Department.

As noted, the MLRL provides for continuous reclamation, concurrent with mining. ECL 23-2713(2). A permittee can avoid fee liability by reclaiming the affected land and having the Department inspect and approve the reclamation, and surrendering the permit. The mine site may then be reopened when material is needed, without a permit in the case of subjurisdictional or exempt mining, and with a permit in the case of jurisdictional mining.

The second issue referred by the Department's Office of Hearings is whether a former corporate officer or shareholder is liable to pay the unpaid program fees subsequent to the dissolution of the permittee. SCR has been dissolved, Mr. Buhl, the successor to and present owner of the assets of SCR, contends that he may not be held personally liable for any program fees for which SCR may be liable. However, no authority was cited which supports this contention.

SCR underwent dissolution three years ago and its Vice-President and Secretary, Timothy C. Buhl, claims SCR was for all practical purposes dissolved in 1988.

New York State Debtor and Creditor Law ("DCL") §273 provides as follows:

Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

A "person" includes a corporation. Doehler v. Real Estate Board of New York Bldg. Co., Inc., 150 Misc. 733, 270 N.Y.S. 386 (1934). Therefore SCR is a "person" under the statute.

A conveyance is defined broadly under DCL §270 to include: "every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance." Under the facts of this case, SCR's conveyance of any assets during dissolution to the successor and present owner of the property, Timothy C. Buhl, the prior vice-president and secretary of SCR, falls within the statutory definition of a "conveyance."

Fraud is imputed to business where, after a conveyance, the property or assets remaining in the business are insufficient as to its creditors. DCL §274 provides that any conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction where "the property remaining after the conveyance is an unreasonably small

capital, is fraudulent as to creditors...without regard to his actual intent." "The requisite intent need not be proven by direct evidence, but may be inferred (a) where the transferor had knowledge of the creditor's claim and knew he would be unable to pay it; (b) where the conveyance was made without fair consideration; or (c) where the transfer is made to a related party." United States v. 58th Street Plaza Theatre, Inc., 287 F.Supp 475 (DCNY, 1968). In Beol, Inc. v. Dorf, the court held, "as a matter of law," a voluntary dissolution of a corporation by its officers and directors without the equal and equitable distribution of assets to creditors constitutes fraud on the part of the corporate officers. 22 Misc.2d 798, 193 N.Y.S.2d 394, affd 12 A.D.2d 459, 209 N.Y.S.2d 267, reh and app den 12 A.D.2d 616, 210 N.Y.S.2d 753, app dismd 9 N.Y.2d 963, 218 N.Y.S.2d 43, 176 N.E.2d 499 (1959). In Schultz v. Itemco, Inc., the court held that there was no fair consideration for a transfer of 100% of all the assets of a corporation, then insolvent, as a retainer agreement to an attorney, to provide defense against a suit. 233 N.Y.S.2d 655 (1962). Similarly, the conveyance of corporate assets, where the transferor was an active participant in the transfer of assets from the former to the latter, and was aware of the outstanding claim against the former, the individual, who was the ultimate transferee of the corporate assets of the original corporation, with knowledge of the diversion, remains liable as a constructive trustee. Laco X-Ray Systems, Inc. v. Fingerhut, 88 A.D.2d 425, 453 N.Y.S.2d 757, appeal dismissed 58 N.Y.2d 606, 460 N.Y.S.2d 1026, 447 N.E.2d 86 (1982).

Here, SCR had direct knowledge of the corporation's debts of annual mined land reclamation program fees of \$700 for each of the Billing Periods 1991, 1992, and 1993 since it was sent bills for each of these years. Despite these bills, the permittee has not paid any of these assessments to date.

Based on the above, SCR remains liable for payment of the program fees. In circumstances where the assets of the corporation have been conveyed and the corporation dissolved, the Department may seek to have the conveyance set aside or obligation annulled to the extent necessary to satisfy its claim [DCL §278(a)] or disregard the conveyance and attach or levy execution upon the property conveyed [DCL §278(b)].

The third issue is whether ECL Article 72, Title 10, is effective in the absence of promulgated rules and regulations for the implementation of said Title. ECL Article 72, Title 10, entitled "Mined Land Reclamation Program Fees," was enacted as part of an omnibus tax law in 1991. See McKinney's 1991 Session Laws of New York, Ch. 166, §238, pp. 357-59. The effective date of the statute is established by the following language:

This act shall take effect immediately, provided, however, that:

(o) The provisions of:

(3) sections two hundred twenty-seven through two hundred thirty-eight of this act shall take effect on the first day of September next succeeding the date on which it shall have become a law, provided however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of the foregoing sections of this act on their effective date are authorized and directed to be made and completed within 180 days after the date on which these sections become law;...

1991 McKinney's Session Law, Ch. 166, §406(o), p.434 (emphasis added).

SCR contends that ECL Article 72, Title 10, is invalid in the absence of promulgated rules and regulations. A close reading, however, shows that this provision of the act of the Legislature authorizes administrative agencies to initiate rulemaking if regulations are "necessary" to implement the law. Conversely, an administrative agency need not engage in rulemaking if regulations are not necessary to implement the law. As a general rule, an administrative agency need not promulgate rules and regulations in order to apply criteria set forth in statute. An administrative agency is authorized to carry out its statutory duty even in the absence of specific regulations [Patchoque Nursing Center v. Bowen, 797 F.2d 1137, 1143 (2d Cir. 1986)]. The Legislature may confer discretion upon an administrative agency and in the enabling statute itself provide the standard to be followed by the agency in exercising the discretion [Occidental Chem. v. New York State Environmental Facilities Corporation, 125 Misc 2d 1046, 1050 (Sup. Ct. 1984), aff'd, 113 A.D.2d 4 (1985); citing Matter of Levine v. Whalen, 39 NY2d 510]. As long as an administrative agency proceeds in accordance with "ascertainable standards," and provides a statement showing its reasoning when applying the standards, formal rulemaking is not required. [Patchoque Nursing Center v. Bowen, supra at 1143]. By enactment of ECL Article 72, Title 10, the Legislature provided a comprehensive and detailed statutory scheme which establishes clear guidelines regarding the assessment of mined land reclamation program fees. It is, therefore, not "necessary" to add, amend and/or repeal any rules

or regulations for the proper "implementation" of the statute. Adequate guidelines for the assessment of program fees are expressly set forth in ECL Article 72, Title 10.

Furthermore, 6 NYCRR Part 481 establishes procedures regarding program fees in general, including procedures to challenge the Department's program fee determinations. The criteria for assessing program fees set forth in Title 10 and the regulations defining the procedures for program fees set forth in 6 NYCRR Part 481 provide ascertainable guidelines for persons required to obtain a Department permit or approval or subject to regulation. The specificity of these standards provide an adequate safeguard against arbitrary administrative action and ensure meaningful judicial review. [Lap v. Axelrod, 97 A.D.2d 583, 584 (3d Dept. 1983)]. Thus, SCR is incorrect in contending that ECL Article 72, Title 10, is invalid because of lack of regulations.

CONCLUSION

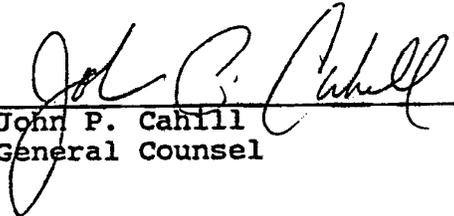
Based on the above analysis, it is my conclusion that SCR remains liable for the annual mined land reclamation regulatory program fee since it remains "subject to regulation" as the owner of "affected land" which has not been properly reclaimed. ECL §72-1005 requires that the liability for fees continues until reclamation is complete and approved by the Department. As noted, this conclusion is consistent with previous Rulings in A.L. Blades & Sons, Inc. (DEC 72-07), and Philip A. Desborough (DEC 72-08).

Debtor and Creditor Law §273 provides that "every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent, if the conveyance is made or the obligation is incurred without a fair consideration." Accordingly, the transaction between SCR and Timothy Buhl is fraudulent as to the State in respect to the assessment of regulatory fees.

ECL Article 72, Title 10, is self-implementing as enacted; no additional regulations are necessary for effective implementation.

Accordingly, SCR or Mr. Timothy C. Buhl remain liable for program fees which accrued during the fee years in question: January 1, 1991, through December 31, 1993.

Dated: Albany, New York
May 17, 1996



John P. Cahill
General Counsel