

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application of
John H. Newell for a Declaratory Ruling

DECLARATORY
RULING
DEC 72-11

INTRODUCTION

This matter has been 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, Environmental Conservation Law ("ECL") Article 72, and §481.10(f)(4) of Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York ("6 NYCRR"). John H. Newell is disputing the assessment of mined land reclamation program fees ("program fees") for each of the calendar years 1991, 1992, and 1993. The issues as stated in Administrative Law Judge ("ALJ") Frank Montecalvo's February 8, 1996 hearing report are (1) Does the law require payment of the fees assessed? If so, (2) may the Department legally waive the fees. If so, (3) would it be appropriate for the Department to waive the fees? If so, (4) may and would it be appropriate to do the same for Fiscal Years 1994 and 1995, absent a record of a fee challenge, given that the same facts apply to those years as well?

BACKGROUND

The following relevant facts, as set forth in ALJ Montecalvo's February 8, 1996 report, have been accepted by both parties. They are as follows:

1. Mr. Newell (the "Permittee") was assessed Mined Land Reclamation Program Fees for Fiscal Years 1991 through 1993 based on mining permit number 506-3-30-0321, issued to John H. Newell, 2940 Route 29, Middle Grove, NY 12850, on October 24, 1984 and renewed through October 24, 1994. A renewal application is pending.

2. The fees assessed were for a mine in the "minor project" category, as defined at ECL §72-1001(3), in the amount of \$400 for each year mentioned. All the fees assessed have been paid, but are disputed by Mr. Newell.

3. As of January 3, 1996, the mine has not been reclaimed. In addition, Mr. Newell, in his November and December 1993 letters, amplifies these facts by stating, inter alia, that he had not taken material out of the permitted mine for over three years because he is disabled. Department Staff does not dispute

this claim for the purpose of resolving this regulatory fee dispute. In his December 1993 letter, Mr. Newell stated that he did not want to reclaim the land involved (less than 1/2 acre), as he was trying to sell the property and equipment as a "turn key operation." Department Staff does not dispute that less than 1/2 acre is involved for the purpose of resolving this regulatory fee dispute.

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:...(1) four hundred dollars for minor projects....(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.)

Subdivision 3 of ECL §72-1005 states that liability for fees shall be:

...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.)

The policy of the Environmental Regulatory Program Fees, ECL §72-0101, states:

...that comprehensive environmental regulatory management programs are essential to protect New York state's environmental resources and the public's health and welfare. It further declares that those regulated entities which use or have an impact on the state's environmental resources should bear the costs of the regulatory provisions which permit the use of these resources in a manner consistent with the environmental, economic and social needs of the state.

For purposes of this Declaratory Ruling, Mr. Newell's March 21, 1996 letter brief is accepted in spite of its filing after the established submittal deadline. Mr. Newell's supplemental brief reiterates his earlier contentions, i.e., that since he has

not used the mining permit he should not have to pay the program fees. Mr. Newell contends that he has engaged in sub-jurisdictional mining; that the mine site existed on his property when he purchased the property; and that he has financial security in place.

The regulations pertaining to program fees in general provide that:

Program fees must be paid by each person: (a) required to obtain a permit, certificate or approval pursuant to a State environmental regulatory program; or (b) subject to regulation under a State environmental regulatory program... [6 NYCRR §481.2].

Section 481.5 requires "(a) person who must pay a program fee pursuant to section 481.2 of this Part is obligated to pay the entire amount of the invoiced program fee." (Emphasis added). When challenging the imposition of a program fee, the person having to pay the annual program fee "has the burden of proving, by a preponderance of the evidence, that it is entitled to the relief requested" [6 NYCRR §481.10(k)(5)].

This issue concerning fee liability for a permit that may not have been used was raised in Philip A. Desborough, Declaratory Ruling 72-08 (1994) and J.F. Lomma, Inc., Declaratory Ruling 72-04 (1989). In Declaratory Ruling 72-08, Mr. Desborough held a mining permit from 1981 or 1982 to the present, but claimed he discontinued mining in 1986. He contended he owed no fee as long as his reclamation plan was on file with the Department and no mining occurred. The Declaratory Ruling held that he owed the fee for each year since the statute requires payment of annual program fees "until such time as reclamation has been completed and approved by the department...[ECL §72-1005(3)].

Similarly, in J.F. Lomma, Inc., Declaratory Ruling 72-04, Lomma held a New York State Waste Transporter Permit which he never actually used. Lomma argued that since the permit was not utilized, it should not have to pay the program fee. The statutory language set forth in ECL §72-0502 imposing Waste Transporter Program Fees states that fees are owed by all persons who obtain a waste transporter permit (or who conduct activities requiring such a permit). The statutory language imposing Mined Land Reclamation Program Fees similarly applies to "(a)ll persons holding permits or approvals or subject to regulation under this title..." [ECL §72-1005(1)]. The Declaratory Ruling held that the program fee must be paid since that statute applies to one obtaining, rather than using, a permit.

The statute here in question, ECL §§72-1003 and 72-1005, similarly does not contain any contingent language relating fee liability to the use of the permit. ECL §72-1003 specifically states that the amount of fees owed is based, not upon the amount of minerals extracted, but on the number of acres of "affected land."

The ruling in Declaratory Ruling 72-08 (Philip A. Desborough) (1994) is also dispositive of Mr. Newell's view that the bonding requirement is part of the cost to comply with the regulations. The Declaratory Ruling held that "(p)rovision 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." Consequently, Desborough was liable for regulatory fees until reclamation was completed and approved by the Department. Since Mr. Newell has not informed the Department that he has completed any reclamation, and the Department has not inspected and approved any reclamation, he remains liable for regulatory fees as being the owner of "affected land" which has not been reclaimed and which, accordingly, has not been inspected and approved by the Department

The second issue referred by the Department's Office of Hearings is whether the Department may legally waive the fees. ALJ Montecalvo's February 8, 1996, report, in the section entitled, "Position of the Parties," sets out that "Mr. Newell seeks fairness in the law." Mr. Newell does not cite any authority which supports this position. Although Mr. Newell states that he was forced to retire in 1989, that he is disabled, and that his business plans did not materialize, Mr. Newell concedes that he did not reclaim the 0.5 acres of affected land, as he was trying to sell the property and equipment as a "turn key operation."

Where the words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation. McKinney's Statutes §76. In its Declaration of Policy establishing environmental regulatory program fees, the legislature declared:

...that those regulated entities which use or have an impact on the state's environmental resources should bear the costs of the regulatory provisions which permit the use of these resources in a manner consistent with the environmental, economic and social needs of the state [ECL §72-0101].

Further, ECL §§72-1003 and 72-1005 clearly establish program fee assessments. These statutory provisions clearly do not include any explicit language that allows the Department to vary the program fee. When interpreting statutes, "courts will not indulge in a strained construction so as to extend power under them if such a strained construction is productive of disorder and chaos in the administration of government" [Application of Hushion, 253 App. Div. 376, 2 N.Y.S.2d 256 (1938)]. To be avoided is a construction which would cause confusion to the business interests of the state. Likewise, the construction of a statute that treats similarly situated persons equally is favored in the law. Southold Savings Bank v. Gilligan, 76 Misc.2d 30, 350 N.Y.S.2d 303 (1973).

ECL Article 72, Title 10, regulatory fees were promulgated to serve a significant governmental interest of ensuring that the use of environmental resources by regulated entities is consistent with the environmental, economic and social needs of the state and that those regulated entities should bear the costs of the regulatory provisions. The statutory scheme of ECL Article 72, Title 10, provides clear guidelines regarding the assessment of mined land reclamation program fees and should be interpreted under a strict construction and not extended by implication. To rule otherwise would encourage situations as we have here where the Permittee would determine when and under what circumstances to pay program fees.

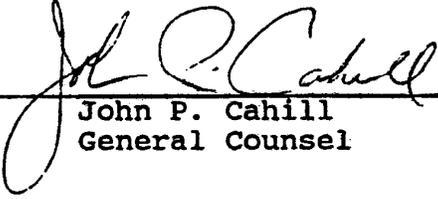
John H. Newell claims that he seeks fairness in the law. Here the statutory terms are clear and there has been no showing of unfairness in the application of the law. Mr. Newell could terminate the liability for payment of the program fees by reclaiming the "affected land" and having the Department inspect and approve the reclamation, and surrendering the permit. Subsequently the mine may be reopened without a permit in the case of subjurisdictional mining or exempt mining, and with a permit in the case of jurisdictional mining.

CONCLUSION

Based on the above analysis, it is my conclusion that, under the first question presented, ECL §72-1003 requires that program fees be paid by those holding permits based on the amount of "affected land" and not the amount of minerals removed from a mine site. As noted, this conclusion is consistent with the previous Declaratory Rulings in Philip A. Desborough (DEC 72-08) which held that "liability to pay annual fees shall continue until such time as reclamation has been completed and approved by the department..." and in J.F. Lomma, Inc. (DEC 72-04) which held that the program fee applies to one obtaining, rather than using, a permit.

Second, ECL Article 72, Title 10, provides explicit language regarding the assessment of mined land reclamation program fees. Accordingly, the Department, as an impartial regulatory agency may not engage in discretionary waiver of program fees. Therefore, the third and fourth questions need not be addressed.

Dated: Albany, New York
May 23, 1996



John P. Cahill
General Counsel