

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations
of Articles 23 and 72 of the
Environmental Conservation Law ("ECL")
of New York State,

ORDER

DEC Case No.
R4-2004-0823-102

- by -

L. Robinson Excavating, Inc.,

Respondent.

By service of a motion for order without hearing dated October 21, 2004, staff of the New York State Department of Environmental Conservation ("Department") commenced an administrative enforcement proceeding against L. Robinson Excavating, Inc. ("respondent") (see sections 622.3[b][1] and 622.12[a] of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ["6 NYCRR"]).

The motion for order without hearing was personally served on respondent by Environmental Conservation Officer Harry J. Young III on October 28, 2004. The motion alleges that respondent violated section 23-2713(2) of the Environmental Conservation Law ("ECL") and 6 NYCRR 422.3(e) by failing to reclaim land affected by mining within a two year period after the mining ceased.

Respondent failed to serve an answer in this proceeding. Respondent's time for serving answering papers expired on November 17, 2004, and such time has not been extended.

Upon review of the record and the attached Ruling and Report of Administrative Law Judge ("ALJ") Molly T. McBride, I adopt the ALJ's findings of fact, conclusions of law and recommendation subject to my comments in this order. As set forth in the Ruling and Report, the Department issued a mining permit to respondent on April 23, 1996. The permit, which expired on April 23, 2001 and has not been renewed, authorized respondent to mine sand and gravel from the Wakeman Brook Road Pit ("site") in the Town of Walton, New York. According to the terms of the permit, respondent was required to reclaim the mine within two years after mining terminated.

An inspection of the Wakeman Brook Road Pit on May 5, 2003 by Department staff revealed that the mined area had not been reclaimed. A subsequent inspection by Department staff on August 10, 2004 indicated that the mined area had still not been reclaimed.

ECL 71-1307 provides that any person who violates any provision of ECL article 23 shall be liable for a civil penalty not to exceed five thousand dollars and an additional penalty of one thousand dollars for each day during which such violation continues.

ECL 72-1003(1) and 6 NYCRR 421.2(b)(1) require the payment of an annual fee of \$400.00 to be submitted by all persons "required to obtain a permit or approval or subject to regulation under this title." Such fees are due and payable for each year until reclamation has been completed and approved by the Department. A regulatory fee of \$400.00, which was due from respondent on September 1, 2004, has not been paid.

In its motion, Department staff requested a civil penalty of five thousand dollars (\$5,000), payment of the outstanding regulatory fee of \$400.00, the reclamation of the mine, cleanup of trees, stumps and other stockpiled materials within the life of mine, and the lining of drainage features with geotextile and rip-rap. Based on the record of this proceeding, the civil penalty and other measures requested by Department staff are appropriate.

On April 8, 2005, the Department was notified that respondent filed a petition for bankruptcy in the United States Bankruptcy Court for the Northern District of New York. Section 362(b)(4) of title 11 of the United States Code ("USC") provides an exception to the automatic stay provision for the commencement or continuation of an action or proceeding of a governmental unit to enforce its police or regulatory powers (see also Matter of Oil Co., Inc., ALJ Ruling on Motion to Dismiss, December 31, 1996, at 2-3 [administrative proceeding to establish respondent's liability, including civil penalties, for failure to comply with environmental laws falls within the police and regulatory powers exception to the automatic stay provision]). Such exception is applicable in this proceeding.

NOW, THEREFORE, having considered this matter and being duly advised, it is ORDERED that:

I. Staff's motion for an order without hearing against respondent L. Robinson Excavating, Inc. is granted.

Respondent is adjudged to have violated ECL 23-2713(2), ECL 72-1003(1), 6 NYCRR 422.3(e), and 6 NYCRR 421.2(b)(1).

II. Respondent is assessed a civil penalty in the amount of five thousand dollars (\$5,000), which is due and payable within 30 days from the service of this order upon respondent. Payment shall be made in the form of a certified check, cashier's check or money order payable to the order of the New York State Department of Environmental Conservation and delivered to the Department at the following address: New York State Department of Environmental Conservation, Attn: Richard Ostrov, Esq., Assistant Regional Attorney, Region 4, 1150 North Westcott Road, Schenectady, New York 12306.

III. Respondent shall:

A. prior to November 30, 2005, reclaim the mine in accordance with the Department-approved Life of Mine Reclamation Plan;

B. within 15 days of the service of this order upon respondent, remove all trees, stumps, and other materials which have been stockpiled within the site;

C. within 15 days of the service of this order upon respondent, ensure that all drainage features which currently transport water from springs encountered in the mine floor to the Johnnie Brook (including ditches which are along and ditches which cross the haul road) be geotextile and rip-rap lined to prevent future erosion and to prevent the transport of sediment-laden water off-site; and

D. within 10 days of completion of final reclamation of the mine, respondent shall contact the Department to schedule an inspection of the reclamation work by Region 4 mined land reclamation staff.

IV. Within 30 days of the date of the service of this order upon respondent, respondent shall pay the regulatory fee of \$400.00 due and owing to the Department pursuant ECL 72-1003(1) and 6 NYCRR 421.2(b)(1). Such payment shall be made in the form of a certified check, cashier's check or money order payable to the order of the New York State Department of Environmental Conservation and delivered to the Department at the following address: New York State Department of Environmental Conservation, Attn: Richard Ostrov, Esq., Assistant Regional Attorney, Region 4, 1150 North Westcott Road, Schenectady, New York 12306.

V. All communications from respondent to Department staff concerning this order shall be made to Richard Ostrov, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, Region 4, 1150 North Westcott Road, Schenectady, New York 12306.

VI. The provisions, terms and conditions of this order shall bind respondent and its successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Denise M. Sheehan
Acting Commissioner

Dated: Albany, New York
May 31, 2005

To: Richard Ostrov, Esq. (By Regular Mail)
Assistant Regional Attorney
Region 4
New York State Department of
Environmental Conservation
1150 North Westcott Road
Schenectady, New York 12306

L. Robinson Excavating, Inc. (By Certified Mail)
265 Otego Street
Franklin, New York 13775

NEW YORK STATE: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged
Violations of the New York
State Environmental Conservation
Law (ECL) Articles 23 and 72

Ruling and Report on
Department Staff's
Motion for an Order
Without Hearing

by

DEC Case No.
R4-2004-0823-102

L. Robinson Excavating, Inc.,

Respondent.

Proceedings

Staff of the Department of Environmental Conservation (Department staff, Department) commenced the captioned enforcement action with service of a motion for order without hearing dated October 21, 2004 on L. Robinson Excavating, Inc. (respondent) on October 28, 2004. In support of the motion, Department staff included an affirmation by Richard Ostrov, Assistant Regional Attorney, DEC Region 4, dated October 21, 2004, and an affidavit by Christopher McKelvey, Mined Land Reclamation Specialist, DEC Region 4 sworn to October 21, 2004, with attached exhibits. The motion alleges that respondent violated ECL 23-2713(2), Title 6 of New York Codes of Rules and Regulations (6 NYCRR) 422.3(e) and ECL 72-1003(1) by failing to reclaim its mine within two years of the expiration of its permit and by failing to pay regulatory fees.

The respondent has not appeared in the action. The time to serve a response to the motion expired on November 17, 2004. The motion was filed with the Office of Hearings and Mediation Services and assigned to Administrative Law Judge (ALJ) Molly T. McBride.

The Department was notified on April 8, 2005 that the respondent has filed a petition for bankruptcy with the U.S. Bankruptcy Court. Pursuant to 11 U.S. Code section 362(b)(4), this matter is not stayed. Pursuant to *Matter of Oil Co., Inc., et al* NYSDEC Case No. R1-5340-93-05, December 31, 1996, 1996 WL 33141596, in addition to the administrative action continuing, the Department may pursue a monetary judgment against the respondent as well.

Discussion

To commence an administrative enforcement action, Department staff may move for an order without hearing in lieu of a notice

of hearing and complaint pursuant to 6 NYCRR 622.12. That provision is governed by the same principles that govern summary judgment pursuant to CPLR 3212. Section 622.12(d) provides that a contested motion for an order without hearing will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party. The Commissioner has provided extensive direction concerning the showing the parties must make in their respective motions and replies, and how the parties' filings will be evaluated (see *Matter of Richard Locaparra, d/b/a L&L Scrap Metals*, DEC Case No. 3-20000407-39, Final Decision and Order of the Commissioner, June 16, 2003).

Staff's Position

A New York State Mining Permit (permit) was issued to the respondent on April 23, 1996 with an expiration date of April 23, 2001. The permit authorized the respondent to mine sand and gravel from the Wakeman Brook Road Pit in the town of Walton, New York. Section 422.3(e)(1) & (2) of 6 NYCRR and ECL 23-2713(2) require all land affected by mining to be reclaimed within a two year period after mining ceases unless the Department shall approve a longer period of time. The Department has not approved a longer period of time to reclaim the land. Joe Barbieto, formerly a Department mined land reclamation specialist, inspected the mine on May 5, 2003. Mr. McKelvey's affidavit alleges that Mr. Barbieto observed that the mine area had not been reclaimed as required in the Department approved Written Portion of the Life of Mine Mining Plan (Plan). Mr. Barbieto sent a letter to the respondent on May 6, 2003 stating that it must remedy off-site drainage by June 15, 2003 and it must reclaim the mine by September 30, 2003. A copy of the letter was an exhibit to the affidavit of Christopher McKelvey. Mr. McKelvey inspected the mine on August 10, 2004 and it had not been reclaimed. He also states that there were erosion features indicating that storm water had likely drained to a nearby creek. A photograph of the erosion problems alleged by the Department was attached to the McKelvey affidavit.

The Department also alleges that the respondent owes regulatory fees related to the mining operation. Section 421.2(b)(1) of 6 NYCRR and ECL 72-1003(1) require the payment of an annual fee of \$400.00 to be submitted by all persons "required to obtain a permit or approval or subject to regulation under this title." Such fees are due and payable for each year until reclamation has been completed and approved by the Department. Pursuant to 6 NYCRR 421.2(b)(1), the respondent was assessed an annual regulatory fee of \$400.00. The respondent did not pay that fee for the years 1997 through July 19, 2004. The Department obtained a judgment against the respondent for the

past due fees. There was an additional regulatory fee due on September 1, 2004 which has not been paid and is now past due. Regulatory fees will continue to be assessed until the mine is reclaimed. The Department is asking that the order direct the respondent to pay the past due \$400 fee.

The Department is asking that the mine be reclaimed as set out in the Plan. In addition to following the reclamation Plan and allowing Department staff to inspect the reclamation work upon completion, the Department is asking that the respondent take the following action within 15 days of the order: "ensure that all drainage features which currently transport water from springs encountered in the mine floor to the Johnnie Brook (including ditches along and that cross the haulroad) shall be geotextile and rip-rap lined to prevent future erosion and transport of sediment laden water off-site." Finally, the Department is asking that the Commissioner order the respondent to "remove all trees, stumps, and other materials which have been stockpiled within the life of mine."

Finally, the Department is asking for a civil penalty of \$5,000. Department Staff addressed the Department's Civil Penalty Policy sufficiently along with the State's Mined Land Reclamation Law to justify the penalty requested.

Respondent's position

The respondent failed to respond to the motion and the time to do so expired on November 17, 2004.

Findings of Fact

1. The respondent is located at 265 Otego Street, Franklin, New York.

2. The Department issued a New York State Mining Permit to the respondent on April 23, 1996 and the permit expired on April 23, 2001. The permit was not extended by the Department. The permit authorized the respondent to mine sand and gravel from the Wakeman Brook Road Pit in the Town of Walton, New York.

3. The permit required the respondent to reclaim the mine within two years after mining terminated. A Department staff inspection of the Wakeman Brook Road Pit on May 5, 2003 revealed that the mine had not been reclaimed.

4. The Department put respondent on notice to reclaim the mine by September 30, 2003. The mine was not reclaimed by September 30, 2003.

5. The mine has not been reclaimed as of August 10, 2004.

6. The respondent was required to pay an annual fee of \$400.00 on or about September 1, 2004. The fee has not been paid by respondent and is due and owing.

Conclusions of Law

1. ECL 23-2713(2) requires that mine reclamation be completed within two years. The respondent has not complied with ECL 23-2713(2) and the Department approved Written Portion of the Life of Mine Mining Plan which also required the mine to be reclaimed within two years of the end of mining. The respondent's actions in failing to reclaim the mine are a violation of ECL 23-2713(2) and 6 NYCRR 422.3(e).

2. The respondent has failed to pay an annual fee of \$400.00 that was due on September 1, 2004. This constitutes a violation of ECL 72-1003(1).

Ruling

I grant Department Staff's motion for order without hearing. There are no material issues of fact remaining. Pursuant to 6 NYCRR 622.12(d), I submit this ruling as my report to the Commissioner consistent with the requirements outlined in 6 NYCRR 622.18.

Recommendation

The Commissioner should conclude there are no material issues of law or fact related to respondent L. Robinson Excavating, Inc. and grant Department Staff's motion, including the request for penalties.

/s/
Molly T. McBride
Administrative Law Judge

Dated: April 12, 2005
Albany, New York

To: Richard Ostrov, Esq.
Assistant Regional Attorney
NYS Department of Environmental Conservation
1150 North Westcott Rd.
Schenectady, New York 12306

L. Robinson Excavating, Inc.
265 Otego Street
Franklin, New York 13775