

**Environmental Forum: “Sustainable Development and Mining”, Perspectives on New York’s Mined Land Reclamation Law
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Introduction

Good afternoon, ladies and gentlemen. My purpose in participating on this distinguished panel today is to give you the Department’s perspective on the Mined Land Reclamation Law (MLRL) and how the many facets of this important public policy initiative are implemented.

One of the more interesting outcomes of the implementation of the law is the perception that different interest groups have about DEC: that we run roughshod over local governments, that there is little compliance monitoring and enforcement, that there is no reclamation that is occurring, that the state has conflicting values (demand for materials versus residential neighborhoods), and perhaps the most critical comment: ‘DEC has never met a mine it didn’t like.’

Hopefully, my presentation will give you a better perspective and understanding about the role of the DEC, and we will dispel at least some of the misconceptions that some of you may have.

Background, the Early years, and Litigation

Here are some of the statistics. There are over 2,500 active mines in the state with 700 being municipally-owned and operated. Approximately 40,000 acres are currently affected by mining and will need to be reclaimed after mining is completed. Over 15,000 acres of land have been reclaimed since the law was enacted in 1975. We currently hold \$64 million in financial security to assure reclamation of these lands. We receive about 150 new applications annually, and there are 500 permit renewals, modifications, or final reclamation inspections that need to be done every year. In addition, every one of the eight DEC regions, excluding New York City, has what we refer to as “mining Vietnam.” These are applications or cases that have taken on a life of their own, sometimes in process for five years or more, and drain staff resources over time, sometimes without final resolution.

Until this year, we have had only one Mined Land Reclamation Specialist in each one of the eight regions to deal with all of the workload. For your information, each one of the DEC regions is the size of the states of Connecticut and Rhode Island combined, so you can see immediately that the territory that the Specialists have to cover and the workload for each of the regions (approximately 350 mines) is enormous. We did receive an additional four staff for selected regions and continue to work to staff the program commensurate with legislative intent.

As I said, the State's Mined Land Reclamation Law first became effective on April 1, 1975 with three main policies:

- Provide for the wise and efficient use of natural resources and provide for the reclamation of disturbed lands
- Assure satisfaction of economic needs compatible with sound environmental practice
- Foster and encourage an economically sound mining industry

With the new law came an extensive regulatory framework for mining regulation. Permits were issued on a one and three-year basis. Basically the law contained significant detail about how the state would regulate the industry. Primarily this detail, which was usually found in regulation, was included in the legislation because the industry did not trust the DEC and didn't want to give it great latitude in the formulation and promulgation of regulations. The law envisioned a partnership with local governments. At the time, there were only 900 mines and the major thrust of the legislation was to ensure reclamation of mining sites. While the MLRL preceded the passage of the State Environmental Quality Review Act (SEQR) by only one year, there was significant authority within the MLRL for DEC to mitigate environmental impacts and to impose permit conditions. This fact is significant because most of the existing state regulatory permits did not have comprehensive environmental review authority -- the primary reason why SEQR was enacted.

SEQR was passed in 1976 and provided for phased-in implementation for different types of actions. For the first time, the state had authority to review projects comprehensively, and SEQR provided a comprehensive planning tool to assess environmental impacts and to establish mitigation through an environmental impact statement review process. SEQR mandated the DEC to look at projects as a whole and to take a "hard look" at the environmental consequences of an application.

Shortly after the passage of SEQR, the divisions in the DEC were asked to evaluate their application processes and to make changes to ensure that the present permit regulatory schemes were consistent with the law. From that effort in 1980 was born the "life of mine policy."¹ While included in guidance to staff on how to handle permit renewals under SEQR, this guidance provided that mining applications could no longer be reviewed on a one and three-year basis. Rather at the time of initial application, the DEC would need to review the environmental impacts for the entire life of the mining project, in acres. In other words, the review would need to take a "hard look" at the environmental impacts of a project that may stretch over fifty years and affect over hundreds of acres. Therefore, the application for a mining permit was much more complex, and the review undertaken that much more technically and environmentally sophisticated and comprehensive than previously accomplished. Superimposed on the SEQR process shortly after implementation was the Uniform Procedures Act which now mandated time frames for review by state governments. The law was enacted in response to applicants who claimed that delays by the

state made it impossible to plan for projects and to secure necessary financial backing.

Through the period from the early 1980's through the rest of the decade, the partnership between the DEC and local governments deteriorated for a variety of reasons. Local governments enacted local mining laws that made it difficult or even impossible for a mining operator to obtain a permit. The mining industry sued local governments and the DEC and won on the issue that only the state can regulate mining. Later cases led to a court decision that municipalities could enact stricter mined land reclamation standards than the state. This led to another round of litigation that essentially held that a reclamation standard is only a mining standard in disguise. The result was that local mining ordinances were superceded by the MLRL, and many of the local reclamation ordinances were similarly found to be superceded by State law when the mining entity challenged local government. One of the sidelights to the validity of the local ordinances that involved DEC were situations where the local government was "lead agency" under SEQR on the premise that the local government had some permit authority. Thus, DEC was placed in the position of having to review local ordinances to "rule" on their legality before giving "lead agency" to the local government. Out of this dilemma was born the "Lead Agency Policy" ² which provides that DEC will assert lead agency status under SEQR for all mining applications where mining is the primary objective.

The point of this background and discussion is that no one was happy with the current application and review process: not the local governments who were spending money on costly litigation and who were losing their ability to control mining; not the mining industry who were spending money on litigation but, more importantly, couldn't plan on obtaining approvals for new sources in a timely manner; and not the state who found itself embroiled in litigation from all parties as well as being dragged into conflicts between local governments and the miners. In short, the Legislature was forced to act. While the DEC had proposed changes since 1981, the time had come for wholesale changes to the MLRL.

The 1991 Amendments to the Mined Land Reclamation Law

In 1991, major amendments to the MLRL were passed. Among the more important provisions were the following:

- State (MLRL) supercedes all local laws for mining and reclamation
- Preserves and enhances zoning authority for local governments
- Localities can
 - ▶ enact laws of general applicability as long as they do not regulate mining exclusively
 - ▶ establish permissible uses in zoning districts, which was really a codification of some of the lawsuits
 - ▶ control ingress and egress to a mine site including the use of local roads

- ▶ incorporate and enforce limited conditions from the state permit into special use permits
- Establishes formal process for input from the Chief Administrative Officer (CAO) after an application is deemed complete for review
- Enhances public notice provisions
- Imposes annual regulatory fees on private operators - - \$1.7 million for the implementation of the MLRL

While we cannot discuss all of the provisions in detail, it is important to note that it was the DEC that insisted on the language about clarifying and enhancing the ability of local governments to zone and to participate more formally in the review process. Particularly important are the provisions under the special use permit authority where local governments can actually enforce some of the conditions from the state's permit.

Local Zoning and DEC Processing of Permits

The 1991 Amendments clarified local government's authority to enact zoning laws and enhanced the ability to participate both formally and informally in the review of mining applications. Furthermore, local governments may enact special use permit authority and enforce conditions from the state permit. It is important to recognize that DEC is not a land use agency, and that the authority remains at the local government level. It has always been our position that localities need to determine appropriate land uses and that DEC, even if we believe that a site may not be zoned properly, will not interfere in those decisions. We do not want conflicts with the localities. We want and need local governments to plan for mineral resources as natural resources just like they would do for any other land use, consistent with the MLRL.

Another area where there may be misconceptions relates to DEC's processing of mining applications under the MLRL. The law requires a statement by the applicant inquiring on the application about whether mining is prohibited at that location by a local government's zoning law. If the applicant affirms that mining is prohibited, the application is deemed "incomplete" and DEC would stop processing it unless and until the prohibition is lifted. I should note that this process is for upstate New York. Long Island is treated differently under the law.

If the applicant states that mining is not prohibited, then DEC is obligated to process the application to a decision, regardless of whether there may be a dispute between the applicant and local government regarding whether it is prohibited or not. There is no explicit provision in the MLRL or the Uniform Procedures Act directing the DEC to stop processing the application. The entire administrative system of the processing of mining applications is found in Technical Guidance Memorandum MLR 92-2³, available on our website which I'll discuss later (see internet: <http://www.dec.state.ny.us/website/dmn>). In one case where a court confirmed the

legality of a zoning ordinance prohibiting mining as reflected in Valley Realty Development Co., Inc. v. Town of Tully⁴, DEC stopped processing the application. DEC, in reliance upon a court decision upholding a zoning law prohibiting mining, suspended processing of the application. Subsequently, in separate litigation, a reviewing court⁵ directed continued processing of the application. Therefore, the Department's implementation of the statute that resulted in the Technical Guidance was confirmed -- the Department must continue processing an application if the applicant states that mining is not prohibited at that location. By way of explanation, while mining was prohibited in the town prospectively, the existing mining application apparently held some non-conforming use rights so that the ordinance did not apply to that location.

The processing of mining permit applications under the Uniform Procedures Act is handled exactly the same way as any other state permit. If a local government and an applicant have a dispute over zoning, that dispute can be handled after the state completes its regulatory responsibilities under the state law, in accordance with the Uniform Procedures Act and the State Environmental Quality Review Act. Technical Guidance Memorandum MLR 92-2 addresses the processing of a state permit application when there may continue to be a dispute at the local level. First, the applicant is advised through a letter after the application has been deemed complete, and the CAO has responded that mining is prohibited:

Your application for a NYSDEC Mined Land Reclamation permit has been deemed complete; however, the Chief Administrative Officer of the local government ... has advised the Department that mining is prohibited at that location.

Please be advised that if a permit is issued by the Department, this does not relieve you of the responsibility for obtaining other permits, approvals, lands, easements, rights-of-way that may be required for this project...

An opportunity exists within the Uniform Procedures Act to suspend the time frames under which the Department must make a decision on permit issuance or denial. If you choose to explore this option, the processing of your permit application will be suspended for six months in order for you to resolve the matter of local prohibition with the local government. If not resolved at the end of the six-month period, the Department will make a decision based on the merits of the application.

Secondly, a letter is sent to the CAO responding to the comments that were formally submitted and also informing the CAO that a letter has been sent to the applicant notifying him of the conflict with the local government and that the applicant has been further advised that he needs to obtain all other approvals, presumably at the local level, before he can commence mining:

The Department has received your comments regarding the Mined Land Reclamation Permit application that mining is prohibited at that location due to local zoning ordinances or laws. The Department will process to permit issuance or denial solely based upon the contents of the application and all coordinated technical and environmental reviews.

The prohibition has been noted and a letter advising the applicant of this prohibition has been sent by the Department. The applicant has been advised that if a permit is issued by the Department, he/she is not relieved of the obligation of obtaining all necessary local permits,

approvals, lands, easements and rights-of-way that may be required for this project.

Finally, if and when a permit is issued to an applicant, Uniform Procedures Act permits contain sixteen general conditions in addition to site and permit- specific conditions. General condition number 8 states that “permittee is responsible for obtaining any other permits, approvals, lands, easements and rights-of-way that may be required for this project.”

One further point needs to be made with regard to lead agency. The Department has continued to assert lead agency status for all mining operations consistent with Department policy. If the Department asserts that it will be lead agency and the local government objects, any involved agency or the project sponsor may appeal to the Commissioner (6NYCRR §617.6(b)(5)). The Commissioner must use the specific criteria contained in the SEQR Regulations, 6NYCRR§617.6(b)(5)(v), to make a decision on lead agency. The primary reasons for DEC continuing to assert lead agency are that (1) only the state can have a mining or reclamation law, (2) the impacts from mining are generally regional, but in some cases, these mines could be of statewide or even international importance, and (3) the greatest expertise for comprehensive environmental review is at the state (DEC) level. Because the state is bound by the Uniform Procedures Act time frames, the application review process is significantly more efficient. As a general rule, local governments are more than happy to have DEC be the lead agency so that they don't have to deal with public opposition to proposed mining projects.

MLRL and SEQR

The key document of a mining application is the Mined Land Use Plan (MLUP) required under the statute and regulations. The Mined Land Use Plan is comprised of two parts -- the mining plan, and the reclamation plan. The mining plan must describe in detail the operations of the mine, including the mining methods, sequence of mining, equipment, location of stockpiles, buildings, blasting techniques and frequencies, and the hours of operation. The mining plan must include mitigation measures to ameliorate any environmental impacts to the greatest extent practicable. The reclamation plan needs to identify the final reclamation objective of the land after mining is completed at the site. The plan would also include any plans for concurrently reclaiming acreage as mining progresses. DEC's review of the plan ensures that (1) the reclamation objective can be achieved for the type of mining, and (2) the manner in which the site will be reclaimed. It is also important to note that an environmental impact statement (EIS) can be substituted for a Mined Land Use Plan. While the corollary is not entirely true, the MLUP is a substantive document containing significant information for environmental review and can and often does act as a stand alone document in lieu of an EIS.

The Mined Land Reclamation Law as amended gives the Department very extensive authority to mitigate environmental impacts and to impose permit conditions and to negotiate with applicants. As I said previously, the industry distrusted DEC in 1974 (not that they trust us now) to the extent that the law contains great detail about the mining and environmental review process. The law allows the DEC to impose conditions on permits without relying on the authority of the

SEQR for issues such as noise, dust control, blasting, hours of operation, erosion and sedimentation plans, berms, buffers and setbacks, and reclamation. These potential environmental impacts are identified in the MLRL and in the rules and regulations under 6NYCRR Parts 420-425. Our imposition of conditions using the MLRL has been upheld in the courts⁶.

Because of the extensive authority in the MLRL and the ability of the staff to work with the mining industry to incorporate mitigation measures in the Mined Land Use Plan, a substantial number of negative declarations are issued under SEQR, meaning that an EIS was not required by the Department. I have heard from staff on many occasions that there would be no more substantive information gained through an environmental impact statement that would not be obtained directly under the MLRL. An EIS is required when there is a potential for significant adverse environmental impacts. Most likely, there would be a legislative and sometimes adjudicatory public hearings held on the project. While one could view the high number of negative declarations as positive evidence that the mining industry is planning their operations to avoid or mitigate significant environmental impacts, some of the public and local governments take the approach that the consequence is limited public involvement in the review of mining applications. As usual, there is some truth to both arguments.

The State Environmental Quality Review Act must be read in conjunction with the MLRL, supplemental to the authority of the MLRL. Recall that the MLRL was passed only a year before SEQR, so many of the same arguments that were made for comprehensive planning for mining were also brought forward in SEQR. The major role for SEQR in the review of mining applications is to incorporate the review of those offsite impacts that could result from a mining operation that were not specifically identified in the MLRL. The primary example is truck traffic where material is being hauled on roads that need to be reviewed to ensure that they are capable of sustaining the traffic and are the most appropriate routes to avoid impacts to residences, schools, and other areas of local significance. Other common issues that may be subjected to review under SEQR include offsite noise, dust, and sometimes visual impacts. In determining whether an environmental impact statement is required, the lead agency must decide whether an action may have a significant effect on the environment requiring the preparation of an EIS. Not wanting a mine in a particular location is not a substantive issue without some further environmental impact justification. Where there is no zoning, DEC is forced to face the public ire because the Department is viewed as the entity “giving” a permit to an applicant for a location which we have little or nothing to say about its siting. The public needs to focus its attention on its local officials to ensure that prospective zoning and planning are accomplished in our communities.

The Mined Land Reclamation Law and the State Environmental Quality Review Act give DEC a powerful combination of authority and responsibility in the comprehensive review of mining applications. What we continue to want and need is local government comprehensive planning and zoning, including the prohibition of mining if the community believes that is in their best interests. Prohibiting mining, however, has consequences for increased costs and does not address the real issue of planning for non-renewable mineral resources as natural resources.

What Have I Told You About Perceptions

At this point, it's my turn to summarize some of the things that I have told you so that you will leave here with a better understanding of the DEC and at least have a better comfort level in the mining application review process. First, DEC must process a mining permit under the Uniform Procedures Act to a decision if the applicant states that mining is not prohibited at that location. Second, DEC is not a land use agency, and we must abide by the local zoning whether we agree or not. Third, the issuance of a state permit does not mean that a miner can ignore the zoning or special use permit requirements of the locality. Fourth, DEC will not process an application for a permit when the applicant states that mining is prohibited. Fifth and perhaps most important, the success of the implementation of the MLRL is dependent on proper local planning and zoning, and in that regard, the MLRL is different from other DEC regulatory programs. Hopefully, I have conveyed why and how DEC processes mining permits, and that it is important for DEC to establish a clear and consistent regulatory framework for implementation of the MLRL.

Steps for the Future

Now it is time to talk about what DEC is doing or is planning to do in the future.

Model Ordinance

One of the more disappointing aspects of the passage of the 1991 Amendments was that there was little or no recognition on the part of local governments to understand their respective role and the potential that exists within the MLRL to participate, both formally and informally, in the review and in the ultimate enforcement of some permit conditions under a special use zoning permit. We had fully expected that the local government organizations or at least some of the municipalities would adopt the authority to require special use zoning permits and enforce certain conditions from the state permit consistent with the MLRL.

The law allows, and DEC encourages, local governments to enact and enforce local laws regulating mining and reclamation for mines not regulated by the state, i.e., mines of less than a thousand tons removed in twelve calendar months. Many of the complaints that DEC receives, including many from local government officials, deal with these small mining operations where a state permit may not be required or where the level of proof of violation is both difficult and time-consuming. To that end, the DEC has been working on a model ordinance that could be adopted by local governments establishing a regulatory program for the sub-jurisdictional mines and enacting the authority to require special use zoning permits consistent with the MLRL, as set forth under ECL §23-2703(2).

Surficial Geology and Mine Location Maps

The Division of Mineral Resources maintains a current database of all the mines in the state. This database includes all the mines subject to our jurisdiction since 1975 when the law was first

enacted. The New York State Geological Survey has prepared and digitized the surficial geology of the State of New York. This data gives an indication of the types of subsoils and geology throughout the state. The data can be used as a general guide to where potential sources of sand and gravel and other hard rock minerals can be found. Using one of the geographic information systems programs, these geologic mineral types can be displayed on a county basis. Then using our database, we can superimpose the existing mining locations on the geologic mineral types, giving an indication as to where mines are in operation, where supplies in economic quantities exist, and potentially where new mine applications can be expected. Remember, minerals can only be mined where they are found in nature. Therefore, it is incumbent upon local governments to plan for these resources and to zone accordingly. We have begun a program to produce these maps for the county environmental management councils in the hope that they will encourage the county and the towns to zone appropriately. While we continue to have some technical problems in the production of the maps, they are impressive and give a real indication of future areas for which mining may be proposed.

Open Space Plan

Whether you support mining or not, you need to recognize that mines are open space. In many respects, these open spaces will be kept that way for many years into the future. I should add that mines do provide sanctuary for wildlife. It is not uncommon to see deer, foxes, and a number of other wildlife species on the property. These mines should be looked upon as opportunities for the future. The reclamation objective becomes that much more important when the mine is now or will be surrounded by development in the future. For those mines with water access, such as some along the Hudson River, open space and access to waterways is extremely important as our chances of securing public access to these waterways continues to diminish over time. In the guide, "Local Open Space Planning - A Guide to the Process,"⁷ there is a chapter on 'Open Space Resources to be Conserved' which includes planning for mineral resources written by the Division of Mineral Resources. We hope to see some forward thinking about the ultimate use of mines as open space and public access by local governments, regional planning agencies, and of course, the state.

DEC and DMN Website

Perhaps the most exciting development in recent years is the Internet. It is changing the way all of our business is done. At DEC, we have established a website (<http://www.dec.state.ny.us>) that contains a significant amount of information about the Department, and work is continually being done to upgrade our efforts. The Division of Mineral Resources has completed work on a rather extensive site at <http://www.dec.state.ny.us/website/dmn>. There are approximately seventy pages of information on our programs including our entire mined land database. Thus, anyone can download all of the mine locations and use these in a geographic information system. There is extensive information on numbers and sizes of mines, educational and public information on mining and uses of minerals, and links to the mined land law and regulations. We are hoping that the public makes good use of the site, and we will continue to enhance the information and

expand our site. We look forward to feedback from the public, local governments, and the industry on what they would like to see.

Conclusion

The siting of mines is difficult, costly, and time-consuming. The experiences here in New York are no different from the siting of mines in all parts of the Nation. We have to balance the demand for products and the use of these minerals in public works projects with the negative impacts of siting mines in proximity to residential development, for example. We need to improve the public perception of mining and of the role of DEC. After all these years, we still have conflicts with local governments and adjacent homeowners on issues of noise, traffic, hours of operation, and blasting, to name a few. Many of these conflicts would diminish if the locals undertook comprehensive zoning in their communities. DEC does not want conflicts with local governments and does not have an interest in siting mines in areas where the locals don't want them. Unfortunately, as I have continually said, DEC is not a land use agency.

I want to state for the record that our mining staff have done and continue to do unbelievably good work given our responsibilities and workload. But we recognize that DEC, and specifically the Division of Mineral Resources, needs to improve. Hopefully we can do that with new staff. We need to provide technical assistance to small operators, especially on reclamation techniques. We need to provide more and better public information on mining and the DEC's role in the regulation of the industry. We need to think about incentives for local governments to plan for minerals as natural resources. We need to continue to encourage concurrent reclamation. In short, we need to foster a better relationship with local governments and the public. I am confident that we can continue to improve our service to all. Today I hope that I have given you an inkling about what we do, how we do it, and maybe even improved the perceptions that you may have had about the DEC and the Division of Mineral Resources.

1. Memorandum to Mined Land Reclamation Specialists titled "POLICY ON MINING PERMIT RENEWALS," from Greg Sovas, Chief, Bureau of Mineral Resources; March 30, 1981.
2. Memorandum to Staff titled "GUIDANCE ON LEAD AGENCY: MINING PERMITS," from Marc Gerstman, Greg Sovas, and Lou Concra: January 18, 1989.
3. Memorandum to Staff titled "Technical Guidance Memorandum MLR-92-2, Implementation of the New Mined Land Amendments in Regard to Permit Processing," from Gregory H. Sovas, Director, Division of Mineral Resources, Lou Concra, Director, Division of Regulatory Affairs and Ann Hill DeBarbieri, Director, Division of Legal Affairs; May 4, 1992.

4. Valley Realty Development Co., Inc. v. Town of Tully, 187 A.D. 2d 963, 590 N.Y.S. 2d 375 (4th Dept. 1992), lv. den. 81 N.Y. 2d 880, 597 N.Y.S. 2d 930.
5. Valley Realty Development Co., Inc. v. Jorling, 217 A.D.2d 349, 634 N.Y.S.2d 899 (4th Dept. 1995).
6. Mid-Hudson Preservation Alliance, Inc. v. Sterman, DEC, and Stissing Valley Farms, Inc. (Index #01-97-ST7478), Sup. Ct. 1997.
7. See pages 41-43, "Local Open Space Planning, A Guide to the Process," New York State Department of Environmental Conservation, Office of Natural Resources, 1994.