ASTON'S MINING LAW CASE REVIEWS™

R. LEE ASTON
Ph.D., D. Eng., J.D. LL.M., Attorney,
Mining & Geological Engineer
Aston Mineral Law & Engineering Div.,
Aston Law Offices-Ga.,Va., Ind.,Mont.- Attorneys-at-Law,
P.O. Box 34, Elberton, Georgia 30635 USA
E-mail: leeaston@negia.net

Jurisdiction- United States **Example Case Review # 1**

SPECIAL USE PERMIT EXTENSION FOR S & G OPERATION UPHELD

In the Matter of Stephentown Concerned Citizens v. Dean Herrick / Town of Stephentown, and Troy Sand & Gravel Co., Inc. , 280 A.2d 801, (N.Y App., 3d Dept., 2001), plaintiff /appellant appealed a decision of the lower court upholding the issuance of a permit by the Department of Environmental Conservation to Troy Sand & Gravel Co., Inc. (hereafter, TSG) to operate a gravel mine.

Respondent Troy Sand and Gravel Co. Inc. leased property in the Town of Stephentown, Rensselaer County, N.Y.,where it has operated a gravel mine subject to the regulation of respondent Department of Environmental Conservation (hereafter, DEC) since 1981. In 1990, the Town rezoned various property within the Town, placing the gravel mine in a residential area in which mining was prohibited, but permitted TSG to continue mining activities as a nonconforming use so long as such activities were not discontinued for more than one year. DEC issued a permit to TSG in May 1990 after full environmental review. The permit application was treated as a type I action under the State Environmental Quality Review Act (ECL art 8) (hereafter, SEQRA) because, at that time, TSG had requested a modification in use, expanding the mine area from 28.7 acres to 37.7 acres. The May 1990 permit expired on May 23, 1993.

On June 17, 1993, after two notices to TSG from DEC that TSG was required to file a renewal application if it expected to continue its operations and that such application was due 30 days prior to the expiration of the 1990 permit, TSG submitted an application for a five-year renewal and modification requesting an expansion of seven acres to the mine area. Due to the proposed expansion, DEC again classified the request as a type I action and, thus, deemed the application incomplete. TSG was permitted to continue mining in conformance with the 1990 permit while the application was pending. Shortly after, DEC determined that TSG was illegally discharging pollutants from a discharge pipe into State waters. On July 11, 1994 DEC and TSG entered in an order on consent whereby TSG agreed to remove the discharge pipe and to construct retention ponds, as well as some additional reclamation activities and payment of a penalty. (*Stephentown* @ 802)

At that point, several of the petitioners involved in the case successfully challenged DEC's authority to allow TSG to continue mining in the absence of a timely and sufficient

permit renewal application [Citizens v Herrick, 223 A.2d 862, 636 N.Y.S.2d 470). After Supreme Court ordered TSG to cease its mining operations, TSG withdrew its request for a modification of its permit to expand the mining area and instead requested a straight renewal of its 1990 permit. Thereafter, DEC treated the renewal application as a type II action under SEQRA and, on January 22, 1996, issued a five-year renewal permit. (Id., p.803)

Petitioners then commenced this combined proceeding and action for declaratory judgement seeking to overturn DEC's determination to grant the renewal permit and for a declaration that TSG's mining activity was no longer a valid preexisting nonconforming use under Stephentown's zoning laws. The Supreme Court held that by allowing its permit to expire without submitting a timely renewal application, TSG lost its grandfathered status. That decision was reversed on appeal (246 A.2d 166, 676 N.Y.S.2d 246) and the matter was remitted to Supreme Court for consideration of petitioners' challenge to the issuance of the 1996 permit. The Supreme Court rejected petitioners' arguments and dismissed the petition. Petitioners now appeal, arguing : (1) that DEC lacked discretion to treat TSG's most recent renewal application as a type II action because it should have been treated as a new application subject to review, as if no prior permit had ever been issued, in light of its untimeliness; (2) that DEC's determination that the application was a type II action was arbitrary and capricious because the proposed action contemplated significant changes to the use authorized under the 1990 permit, and (3) that DEC was not authorized to grant a five year permit because, at the time the 1990 permit expired, DEC's regulations authorized only a three-year maximum extension.

The court noted that, “Although TSG's application for renewal was unquestionably late, it is within DEC's discretion either to treat a late application as a new application or to treat it as a renewal request of a previously authorized action. 6 NYCRR 621.13 [e] [4] states that, ‘The department may determine that any application for renewal or modification shall be treated as a new application for a permit if ... the renewal application is not timely or sufficient’. Here, although technically the application for renewal was not submitted until two years following the expiration of the 1990 permit, for the majority of that time TSG's application for a modification was pending and it was continuing its operation with DEC's consent. The initial modification request was submitted less than two months past DEC's deadline. Once the Supreme Court ruled that DEC lacked authority to allow TSG to continue its operations under the 1990 permit while the modification request was pending, TSG promptly submitted an application for renewal without the proposed expansion. Under these circumstances, we cannot say that DEC abused its discretion in treating the application as a renewal application. (Id., p.804)

The court continued, “Absent some material change in circumstances, a renewal application ordinarily is considered a type II action. ‘What constitutes a 'material change' in permit conditions ...requires evaluation of factual data within DEC's expertise and DEC's interpretation is, therefore, to be given deference unless unreasonable; (Matter of Scenic Hudson v Jorling, 183 A.2d at 262). Here, petitioners allege that TSG's construction and use of water retention ponds and its recent reclamation activities constitute a material change from the conditions under which TSG was issued its 1990 permit. These actions, however, were all authorized and, indeed, mandated by the 1994 consent order. Thus, these actions

were undertaken pursuant to an order in an enforcement proceeding and, as such, are not subject to SEQRA review. The remaining activities which petitioners allege warrant type I classification - - below water table mining and noise created by rock crushing and traffic - - were specifically contemplated at the time the 1990 permit was issued and, therefore, DEC is not required to reconsider the environmental impacts of those activities. Accordingly, it was not unreasonable for DEC to conclude that there had been no material change in permit conditions requiring further SEQRA review." (Id. p. 804)

The Court rejected the petitioners' contention that the DEC's ruling was arbitrary and capricious in granting a five-year permit. The Court added, "DEC clearly has the authority to issue a five-year permit. Petitioners argue that because in 1993, when TSG's prior permit expired, the regulation authorized three-year renewals rather than the five-year renewal contemplated by the current regulation, and DEC should only have renewed the permit for three years. Petitioners provide no persuasive authority for the proposition that DEC is required to adhere to the regulation in effect when the former permit expired, rather than that in effect when the renewal application is granted. Thus, finding nothing unreasonable about DEC's interpretation, we accord that agency the deference to which it is entitled when interpreting the regulations that it is charged with enforcing." (Id. p.805)

TSG's mining permit was approved.

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