



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

Sand and Gravel Mine/Order on Consent: New York Appellate Court Addresses Challenge to Remediation Plan

03/10/2022

The New York Supreme Court (Appellate Division) (“Court”) addressed in a March 3rd Memorandum and Order (“Memorandum”) a challenge to the New York Department of Environmental Conservation’s (“NYDEC”) acceptance of a remediation plan related to a sand and gravel mine. See *In the Matter of 101CO, LLC, et al., v. New York State Department of Environmental Conservation, et al.*, 2022 WL 617883.

The remediation plan was proffered by Sand Land Corporation and Wainscott Sand and Gravel Corporation (collectively, “Sand Land”) to satisfy an order on consent (“Consent Order”) that they entered into with NYDEC.

Sand Land is stated to operate a sand and gravel mine in Suffolk County, New York.

NYDEC issued two notices of violation to Sand Land in 2015 and 2016 alleging:

- The mine’s activities encroached into the minimum 25-foot buffer area that was between the mine and neighboring properties
- That slopes contained impermissible materials
- Certain slopes had been over-excavated

The notices of violation were resolved pursuant to a Consent Order between Sand Land and NYDEC. The Consent Order required that Sand Land submit a remediation plan to NYDEC. Such remediation plan was approved.

Petitioners challenged such approval.

The Court notes that its review of the NYDEC determination is limited to whether it was:

- Made in violation of lawful procedure
- Affected by an error of law or was arbitrary and capricious
- An abuse of discretion

Petitioners argued on appeal that the remediation plan did not reconstruct the buffer area and slopes within the meaning of the Consent Order. The Consent Order schedule of compliance stated that any remediation plan must include:

... a grading and re-vegetation plan to reconstruct the 25-foot buffer from the property line and a grading and re-vegetation plan to re-construct the slopes on the north and east sides to a slop of 1V:2H.

The petitioners argued that to “reconstruct” the buffer areas and slope they would have to be restored to their original former state. However, the Court notes that the schedule of compliance did not support such position because:

. . . Although “reconstruct” was not specifically defined by the Consent Order, it did set forth how to backfill the buffer area and what soil and vegetation was to be used in the reconstruction process.

Certain parameters were also specified for the slopes.

Consequently, the Court held that it was not incumbent upon Sand Land to restore the buffer area and slopes to their original condition.

Petitioners second contention were objections to the methods proposed for the reconstruction of the slope. They argued that the remediation plan did not comply with a NYDEC guidance memorandum.

This argument was rejected based on the Court’s view that there was no indication that this document reflected the official policy of NYDEC or was applicable to the enforcement proceedings. It also stated that:

. . . because the remediation plan stemmed from an enforcement proceeding, petitioners' argument that a variance permit or review under the State Environmental Quality Review Act was required to effectuate what the remediation plan proposed is also unavailing.

Finally, petitioners argued that the remediation plan did not address particular geographic areas.

This argument was rejected because the schedule of compliance required reconstruction of the slopes on the north and east sides and the remediation plan proposed modifying the slopes on the north and east sides. It also discussed the backfill to be used “along the northern boundary” and specified the vegetation and trees to be planted at both ends of the north slopes.

This was deemed to be in conformance with the schedule of compliance as to the slopes.

A copy of the Memorandum can be downloaded [here](#).