CHAPTER 5.2

MINED LAND PERMIT REQUIREMENTS

PROJECT ENVIRONMENTAL GUIDELINES

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New York State Department of Transportation
Environmental Analysis Bureau
5.2 MINED LAND PERMIT REQUIREMENTS

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I. SUMMARY

Some activities involving borrow areas are regulated under the State’s Mined Land Reclamation regulations, or are subject to a Memorandum of Understanding (MOU) that was signed on May 12, 1977 between the New York State Departments of Transportation (NYSDOT) and Environmental Conservation (NYSDEC). That MOU (Attachment 5.2.A) describes NYSDOT’s responsibilities for complying with these regulations on construction projects. Under the State Mined Reclamation Law, “mining” does not include excavation, grading, removal and disposition of soil and rock materials during construction projects, and no permits are required.

This guidance supersedes Interim Project Development Guideline (IPDG) #23 issued February 2, 1978. The State’s Mined Land Reclamation regulations were revised in 1991, and this guidance includes the current, revised regulatory definitions and requirements. Although some of the provisions in the State’s mining regulations have changed, the 1977 MOU remains in effect.

II. DEFINITIONS

Affected land and land affected by mining - means the sum of that surface area of land or land under water which: (i) has been disturbed by mining since April first, nineteen hundred seventy-five (1975) and not been reclaimed, and (ii) is to be disturbed by mining during the term of the permit to mine.

Landowner - means the person in whom the legal title to the surface rights of the affected land is vested.
Mine - means any excavation from which a mineral is to be produced for sale or exchange, or for commercial, industrial or municipal use; all haulageways and all equipment above, on or below the surface of the ground used in connection with such excavation, and all lands included in the life of the mine review by the department.

Mined land-use plan - means the applicant’s proposal for mining and reclaiming the affected land. The mined land-use plan shall consist of a mining plan and a reclamation plan which shall include maps and other documents as required to describe and illustrate environmental, physiographic, cultural and surface conditions at and surrounding the mine as well as the applicant’s proposed mining and reclamation methods.

Mineral - means any naturally formed, usually inorganic, solid material located on or below the surface of the earth. For the purposes of this title, peat and topsoil shall be considered minerals.

Mining - means the excavation of overburden and minerals from the earth; the preparation and processing of minerals, including any activities or processes or parts thereof for the extraction or removal of minerals from their original location and the preparation, washing, cleaning, crushing, stockpiling or other processing of minerals at the mine location so as to make them suitable for commercial, industrial, or construction use; exclusive of manufacturing processes, at the mine location; the removal of such materials through sale or exchange, or for commercial, industrial or municipal use; and the disposition of overburden, tailings and waste at the mine location. Mining shall not include the excavation, removal and disposition of minerals from construction projects, exclusive of the creation of water bodies, or excavations in aid of agricultural activities.

Overburden - means all of the earth, vegetation and other materials which lie above or alongside a mineral deposit.

Project Area - means an area shown on NYSDOT plans that are either on the State right-of-way, leased, or held on easement by the State. For the purpose of these permit requirements, the project area considered to be an integral part of the project activities shall typically include the road section plus a reasonable work area at top of cut and toe of fill.

Reclamation - means the conditioning of the affected land to make it suitable for any productive use including but not limited to: the planting of forests, the planting of crops for harvest, the seeding of grass and legumes for grazing purposes, the protection and enhancement of wildlife and aquatic resources, the establishment of recreational, residential, commercial, industrial and historical sites or for other uses demonstrated to be consistent with the policy of the department.

Surface consolidated mine - means a mine from which such minerals as limestone, dolostone, sandstone, marble, slate, flagstone, curbing, dimension stone, riprap, abrasives, gypsum, iron, talc, titanium or other metallic or nonmetallic minerals are removed.

Surface unconsolidated mine - means a mine from which such minerals as topsoil, borrow, fill, peat, humus, sand or gravel are removed.
III. APPLICABILITY

A permit from the NYSDEC is required for anyone who mines, or who proposes to mine, more than 1,000 tons or 750 cubic yards, whichever is less, within twelve successive calendar months. Excavation, grading, or moving earth materials for construction projects are specifically excluded from the definition of "mining," and do not require a mining permit. To be exempt from permitting requirements, the excavation or grading must meet the following criteria:

- Be necessary to prepare the site for construction;
- Take place within the project area and be an integral part of the project activities;
- Must be reclaimed concurrently with the project or soon thereafter (i.e., within 6 months); and
- Have all necessary Local, State, and Federal approvals for the project.

Mined Land Permits are also required for anyone who mines, or proposes to mine, over 100 cubic yards from, or adjacent to any body of water that does not fall under the jurisdiction of Article 15 of the Environmental Conservation Law (ECL). Alternatively, work adjacent to protected waterbodies must comply with Article 15 regulations (6 NYCRR Part 608) and the 1997 NYSDEC/NYSDOT Memorandum of Understanding regarding coordination with NYSDEC of any projects that involve filling or excavation in or adjacent to streams. Article 15, Protection of Waters Program, applies to all navigable waters of the State and to streams classified by NYSDEC as C(T) or higher.

On May 12, 1977 representatives from NYSDOT and NYSDEC signed a Memorandum of Understanding (MOU) that provides for the following:

1. An applicant who proposes to mine as part of a NYSDOT contract can submit a copy of the contract document and specifications in their application to NYSDEC to satisfy the NYSDEC permitting requirements instead of a mined land-use plan.
2. The NYSDOT Engineer-in-Charge (EIC) will ensure that contractors have obtained NYSDEC mining permits, if any are required, before work is authorized on any proposed borrow source.
3. The NYSDOT contract specifications for restoring the borrow area will adequately satisfy the corresponding requirements of the NYSDEC reclamation regulations.
4. A waiver of revegetation can be given by the EIC if the borrow area will be used within six months, and the written consent of both the property owner and NYSDEC representative is obtained. *Note: NYSDOT staff will require contractors to stabilize borrow sites by seeding and mulching or other means unless the material is taken from an actively operating pit.*
5. Disputes between the NYSDOT's EIC and the NYSDEC representative will be referred to the appropriate Regional Directors of both agencies for resolution.
IV. PROCEDURES

STEP 1 - Will the project involve mining (or excavating backfill, removing fill, etc.) of more than 1,000 tons or 750 cubic yards, whichever is less; or mining of 100 cubic yards of minerals from or adjacent to any body of water that is not regulated by Article 15 of the ECL within 12 successive months?

If the answer to the question above is "yes," then proceed to Step 2 below. If the answer to this question is "no," then neither the contractor nor NYSDOT must obtain a mining permit from NYSDEC. (See Flow Chart 1).

STEP 2 - Is the mining (or excavation, removal, etc.) an integral part of a construction project and located within the project area?

If the answer to this question is "yes," then neither the contractor nor NYSDOT must obtain a permit from NYSDEC.

If the answer to the second question is "no," then the contractor must obtain a mining permit (See Attachment 5.2.B for an example) before the excavation or removal work can begin. The contractor, however, can use the NYSDOT contract and specification documents to satisfy NYSDEC’s requirements for a mined land-use plan. The documents must address the reclamation of the excavations/borrow areas if reclamation is not included as part of a construction project itself. NYSDEC staff may monitor the operation, in cooperation with NYSDOT’s EIC to ensure that the excavation and restoration activities are being conducted properly, and that the borrow area is properly reclaimed.

Because of potential impacts to federal jurisdictional wetlands, cultural resource sites, etc., regional NYSDOT staff could potentially disapprove of an excavation/borrow area even if NYSDEC has approved it. Therefore, the contractor should obtain preliminary approval to use the site from the NYSDOT region before contacting the NYSDEC for a permit. The contractor is also prohibited from using an area until written approval of the reclamation plan is given by the NYSDOT. The reclamation plan generally incorporates any special conditions required by the NYSDEC permit.

Note: Permit applications typically require at least 45 days for NYSDEC approval, but longer time frames are required to review major projects and projects that require a public hearing. Typically a permit for a major project may take up to 90 days if no public hearing is needed, and up to 60 days after the close of a public hearing if one is necessary. NYSDOT staff and contractors should consider such time frames in project planning.

The EIC is NYSDOT’s representative with primary responsibility for ensuring that contractors comply with the requirements of the MOU. If a more stringent standard is requested by NYSDEC’s representative, and the resulting change will significantly increase the contractor’s work, then the EIC should consult with his or her supervisor before agreeing to the change.
A. **BONDING**

Before NYSDEC can issue a permit, the applicant must furnish financial security in the form of a reclamation bond or other appropriate substitute. NYSDOT and other government agencies are exempt from this requirement. In addition, a contractor who obtains borrow or fill material from an off-site source can satisfy this financial security requirement using the same bonds posted for the NYSDOT work, if these were required.

B. **BORROW SOURCES FOR MAINTENANCE ACTIVITIES**

Because the State’s Mined Land regulations exempt only excavation or grading "from construction projects," a permit is required if more than 1,000 tons or 750 cubic yards (whichever is less) of material is removed within twelve successive months from other than construction projects, even if the land is owned or leased by the State. Maintenance staff should seek assistance from the Regional Environmental Contact (REC) in preparing and submitting a Mined Land permit.

C. **PRIVATELY OWNED AND OPERATED MINES AND BORROW AREAS**

If the minerals, overburden, fill, sand or gravel will be obtained from a private commercial source or supplier, then the mine owner (land owner) must obtain a permit from NYSDEC. Neither the contractor nor the NYSDOT staff are required to obtain a permit when these materials are purchased from privately owned and operated sources. Some NYSDOT regions require the contractor to obtain a copy of the NYSDEC permit from the owner or operator of the private mine. This serves as proof that the mine is properly permitted and that the permit has not expired or been revoked.

V. **CITATIONS**

The following State and federal laws and regulations are used as a source for this guidance. Copies of the State regulations are attached to this document; copies of the State laws can be obtained by contacting the Regional Environmental Contact or staff in the Environmental Analysis Bureau.

**State Laws:**

Environmental Conservation Law (ECL) § 23-2703 declares that it is the state's policy to foster and encourage the development of an economically sound and stable mining industry, and to provide for the management and planning for the use of mineral resources.

ECL § 23-2705 provides definitions such as "mined land-use plan" and "mineral".

ECL § 23-2709 is the administration of title, and details the powers and duties of NYSDEC to administer and enforce provisions in this title.
ECL § 23-2721 states that any act, omission, determination or order of NYSDEC, pursuant to or within the scope of this title, may be reviewed in accordance with Article Seventy-Eight of the Civil Practice Law and Rules (CPLR).

ECL § 8-0117 details the phased implementation of actions or classes of actions by any State agency.

**State Regulations:** 6 NYCRR Parts 420-426 (Attachment 5.2.C)

**Federal Laws & Regulations:** No similar federal laws or regulations similar to the State's law and regulations exist for non-coal mines. The U.S. Mine Safety and Health Administration (MSHA), however, regulates health and safety aspects and procedures in all mines.

**NYSDOT DOCUMENTS:**

NYSDOT Standard Specifications, Section 107-10 and 107-11, Restoration of Disturbed Areas Outside and Within the Right-of-Way, respectively.


**VI. ADDITIONAL INFORMATION**

This guidance document was prepared by Laura Greninger and Jeanne Hewitt in the Environmental Analysis Bureau. For further information contact the Environmental Analysis Bureau, Building 5, Room 303, 1220 Washington Avenue, Albany, New York 12232-0473, telephone: (518) 457-5672.

The NYSDEC Regional Mining Staff (Attachment 5.2.D) can also be contacted for questions and/or interpretations on the need for a mining permit.
Step 1
Will the project involve mining:
- more than 1,000 tons or 750 cubic yards (whichever is less)? or
- more than 100 cubic yards adjacent to water bodies?*

Yes → No Permit Required
No → Step 2

Step 2
Is the mining (or excavation, removal, etc.) part of a construction project within the project area?

Yes → Contractor must apply for NYSDEC Mining Permit
No → No Permit Required

*Note: Only mining adjacent to water bodies that are not regulated by Article 15 are covered by the NYSDEC Mining Permit Program. Alternatively, Article 15 "Protection of Waters" regulations should be followed for any mining adjacent to Title 15-regulated waters.
VIII. ATTACHMENTS

5.2.A. Memorandum Of Understanding
5.2.B. Mining Permit Application
5.2.C. State Regulations
5.2.D. NYSDEC Regional Mining Staff
ATTACHMENT

5.2.A  MEMORANDUM OF UNDERSTANDING
MEMORANDUM OF UNDERSTANDING

BETWEEN THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND THE NEW YORK STATE DEPARTMENT OF TRANSPORTATION

IMPLEMENTATION OF MINED LAND RECLAMATION LAW RULES AND REGULATIONS RELATING TO MINING OPERATIONS SUBJECT TO DEPARTMENT OF TRANSPORTATION CONTRACT SPECIFICATIONS

This Agreement is entered into the 12th day of May, 1977, between the New York State Department of Environmental Conservation and the New York State Department of Transportation

WHEREFORE, 6 NYCRR Part 422.1 (e) provides as follows:

"(e) An applicant proposing to conduct a mining operation in conjunction with a department of transportation contract, in accordance with the requirements of said agency’s contract documents and specifications, may submit a copy of the contract agreement to the department in lieu of a mined land-use plan. If a mining permit is issued, the contract documents and specifications shall satisfy the requirements of this part and shall be enforceable as such. The department will monitor the mining operation in cooperation with the engineer-in-charge to insure conformance with the title and these
rules and regulations."; and

WHEREFORE, the Departments of Environmental Conservation and Transportation mutually recognize the need to cooperate in both the enforcement of Department of Transportation contract specifications relating to the restoration of disturbed areas outside of the right-of-way where contract documents and specifications have been accepted by the Department of Environmental Conservation in satisfaction of the requirements of Part 422, and the determination of necessity for, and implementation of, any more stringent standard set forth in Part 422 of the Mind Land Reclamation Rules and Regulations deemed necessary by both Departments.

NOW THEREFORE, the New York State Department of Environmental Conservation and the New York State Department of Transportation do agree as follows:

1. The engineer-in-charge employed by the Department of Transportation on any project shall insure that the contractor has obtained a mining permit from the Department of Environmental Conservation before work is authorized on any proposed borrow source, gravel source, or the like, subject to the engineer-in-charge’s approval and control from which more than 1,000 tons of material is to be removed within any twelve successive calendar months.

2. The restoration of borrow source, gravel source, or the like, for which the Department of Transportation’s contract documents and specifications have been accepted by the Department of Environmental Conservation in satisfaction of Part 422, shall be accomplished in accordance with the contract specifications of the Department of Transportation relating to the restoration of disturbed areas outside of the right-of-way. However, should the engineer-in-charge and the appropriate representative of the Department of Environmental Conservation mutually decide that a more stringent standard for the operation of a mine or reclamation as
contained in the Mined Land Reclamation Rules and Regulations is necessary for a particular
borrow source, gravel source, or the like, the engineer-in-charge shall order the contractor to
comply with such standard.

3. A waiver of revegetation may be considered if other use of the borrow source,
gravel source, or the like, is planned within six months. However, in no instance shall the
revegetation requirements of the Department of Transportation’s specification be waived by the
engineer-in-charge without the written consent of both the affected property owner and the
appropriate representative of the Department of Environmental Conservation.

4. The submission of a grading plan by the contractor for a mining operation to be
carried out in conjunction with a Department of Transportation contract where the contract
documents and specifications have been accepted by the Department of Environmental
Conservation in satisfaction of the requirements of Part 422 may be deemed desirable where
quantities of borrow, gravel, or the like, will be removed such that genuine concerns with the
future aesthetic or stability of the remaining terrain are raised. Such submission shall be required
by the engineer-in-charge and the appropriate representative of the Department of Environmental
Conservation mutually agree as to the necessity of such grading plan.

5. Should it come to the attention of the engineer-in-charge or any other official of
the Department of Transportation that construction materials to be used or being used on a
Department of Transportation project will be obtained or are being obtained from a mine which
is subject to the permit requirements specified in the Mined Land Reclamation Law Rules and
Regulations and for which no permit has been obtained, the engineer-in-charge or other such
Department of Transportation official shall immediately notify the appropriate official of the
Department of Environmental Conservation at the Regional Office which has jurisdiction over
such mining operations.

6. In the case of disputes between the engineer-in-charge and the appropriate representative of the Department of Environmental Conservation regarding any of the foregoing provisions or other matters relating to the administration of the Mined Land Reclamation Law, the engineer-in-charge shall defer action with respect to the disputed issue until such dispute is settled as follows: The disputed matter shall be referred for resolution to the appropriate Regional Directors of both Departments. In the event that the matter cannot be resolved by the Regional Directors the dispute shall be referred to the First Deputy Commissioner of the Department of Environmental Conservation and the Executive Deputy Commissioner of the Department of Transportation for resolutions.

7. This agreement may be terminated by either Department upon 30 days’ written notice.

_________________________________________
Commissioner of the NYSDEC

William C. Henessy

Commissioner of the NYSDOT

(Originals signed)
ATTACHMENT

5.2.B MINING PERMIT APPLICATION
ATTACHMENT

5.2.C  STATE REGULATIONS
ATTACHMENT

5.2.D  NYSDEC REGIONAL MINING STAFF