

Memorandum

To: Melanie Loyzim, Deputy Commissioner, Department of Environmental Protection

From: Mary M. Sauer, Assistant Attorney General
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Date: September 14, 2016

Subject: Extent of DEP's rulemaking authority regarding mining on state-owned lands

Introduction

Questions have arisen regarding the scope of the rulemaking authority of the Department of Environmental Protection (DEP) related to metallic mineral mining on state-owned lands. Specifically, you have asked us to prepare a memorandum addressing the question whether the DEP (which includes the Board of Environmental Protection [BEP]) has the authority to prohibit mining on state land or otherwise regulate mining on state land. In this memorandum, we review applicable laws enacted by the Maine Legislature and discuss how these laws relate to the DEP's authority over mining on state-owned land. As explained in detail below, we believe DEP does not have authority from the Maine Legislature to adopt categorical bans on mining on state-owned lands.

Summary of Mining on State Lands Subchapter

Title 12 of the Maine Revised Statutes contains an entire subchapter pertaining to (and entitled) mining on state lands. 12 M.R.S. §§ 549-549-C.¹ The Mining on State Lands subchapter was enacted in 1985 to “modernize an antiquated procedure by expediting and facilitating the exploration, development and administrative activities on state-owned lands.” P.L. 1985, ch. 201; L.D. 1466, Statement of Fact (112th Leg. 1985). This subchapter provides that the agency with jurisdiction over the state-owned land and the Division of Geology, Natural Areas and Coastal Resources (within the Bureau of Resource Information and Land Use Planning, Department of Agriculture, Conservation, and Forestry) have jurisdiction “over all state-owned lands for the purpose of mineral development and mining on that land” as set forth

¹ Citation to Maine Revised Statutes throughout this memorandum is to version currently in effect.

in sections 549 to 549-C.² 12 M.R.S. § 549. Regarding rulemaking authority, this subchapter provides that “[t]he Bureau of Resource Information and Land Use Planning and the agencies having jurisdiction over state-owned lands may make such rules as each considers proper with respect to the authority delegated pursuant to this subchapter.” *Id.*

The Mining on State Lands subchapter contains a number of provisions related to exploration permits, exploration claims and mining leases on state-owned land, including the following:

- authorizes the Director of the Survey³ to issue exploration permits;
- authorizes the director of the agency having jurisdiction over the state land where a recorded exploration claim is located to issue a land use consistency ruling (whether mining operations can be carried on consistently with any prior or proposed other use by State) after consulting with the Director of the Survey and following a public hearing;⁴
- authorizes the director of the agency having jurisdiction over the state land to issue a mining lease, with consent of the Director of the Survey, and following a hearing; and
- authorizes the director of the agency having jurisdiction over state-owned land, under certain circumstances, to allow the diversion or drainage of water from bodies of water on that state land.

12 M.R.S. § 549-B. The Mining on State Lands subchapter also prescribes fees for exploration claims, mandates royalty payments for mining leases, requires annual reports related to mining leases, and expressly grants to the Director of the Survey and the Director of the land-owning state agency the authority to terminate a mining operation on state land and pursue injunctive relief in Superior Court. *Id.*

The Mining on State Lands subchapter ends with a section termed “Compliance with regulatory laws” and states that “[n]othing in this subchapter may be deemed to relieve any explorer or mining lessee from the obligation to comply with all applicable environmental or other regulatory laws and rules of the State.” 38 M.R.S. § 549-C.

² The agency with jurisdiction over the state-owned lands may be the Department of Agriculture, Conservation, and Forestry through one of its other Bureaus, such as the Bureau of Parks and Lands, or it may be another state agency, such as the Department of Inland Fish and Wildlife. *E.g.*, 12 M.R.S. §§ 1803(1), 10109.

³ The Director of the Survey is the Director of the Bureau of Resource Information and Land Use Planning. 38 M.R.S. § 549-A(2).

⁴ 12 M.R.S. § 549-B(6) provides that “the director of the agency having jurisdiction over the state lands on which the [recorded exploration] claim is located” must determine, following a public hearing, whether mining operations can be carried on consistent with any prior or proposed other use by the State or any agency of instrumentality of the State. . . . No mining lease may be issued under this subchapter without a land use ruling which answers the question in this subsection in the affirmative.

Extent of DEP's Rulemaking Authority Regarding Mining on State-Owned Land

The Maine Legislature in 2012 enacted P.L. 2011, ch. 653, An Act to Improve Environmental Oversight and Streamline Permitting for Metallic Mineral Mining in Maine (hereinafter, "2012 Mining Law"). The 2012 Mining Law included certain revisions to Title 12 (related primarily to mining in the unorganized and deorganized territories of the State), Title 36 (related to the Mining Oversight Fund), and Title 38, including most notably a new Article 9, the Maine Metallic Mineral Mining Act (hereinafter, "Mining Act"), 38 M.R.S. §§ 490-LL to 490-TT.

The 2012 Mining Law provided the DEP with specific rulemaking authority. Section 23 of the Mining Law enacted 38 M.R.S. § 490-NN(1)(B) providing that the DEP "shall adopt rules to carry out its duties under this article, including, but not limited to, standards for exploration, advanced exploration, construction, operation, closure, post-closure monitoring, reclamation and remediation" and that, except as otherwise provided, rules adopted under Article 9 are major substantive rules. Section 30 of the 2012 Mining Law (in unallocated language, meaning that the language was not allocated to the Maine Revised Statutes) required the DEP to provisionally adopt and submit to the Legislature for review rules related to the new Mining Act, and designated these rules as major substantive.⁵ Section 30 also addressed the standards that DEP could include in the rules:

The rules adopted pursuant to subsection 1 must include standards determined by the department to be necessary to protect the public health and safety and the environment. Standards adopted by the department may include, but are not limited to, standards regarding effects on groundwater quantity, control of noise, preservation of historic sites, preservation of unusual natural areas, effects on scenic character and protection of wildlife and fisheries.

This rulemaking authority in the 2012 Mining Law does not specifically mention state-owned lands, and the law made no changes to the Mining on State Lands subchapter, 12 M.R.S. §§ 549-549-C.

Interpreting the 2012 Mining Law as authorizing the DEP to categorically prohibit mining on state land would require a conclusion that the 2012 Mining Law repealed 12 M.R.S. §§ 549-549-C by implication, at least in part, for metallic mineral mining. Statutory repeal by implication, however, has been disfavored for decades, and a strong presumption is applied against it. *Bowler v. State*, 2014 ME 157, ¶ 12, 108 A.3d 1257; *Blair v. State Tax Assessor*,

⁵ As a matter of clarification, the DEP's rule "Metallic Mineral Exploration, Advanced Exploration and Mining," 06-096 ch. 200, which currently is in effect, is the rule effective as of August 26, 1991, as amended by routine technical rulemaking regarding exploration and advanced exploration, effective April 21, 2013. The 2013 amendments were authorized by P.L. 2011, ch. 653, § 31. Since the enactment of P.L. 2011, ch. 653, the BEP provisionally adopted a revised Chapter 200 on January 10, 2014. The provisionally adopted rule was submitted to the Legislature in 2014 and re-submitted in 2015, but was not approved for final BEP adoption.

485 A.2d 957, 960 (Me. 1984). There is no indication in the 2012 Mining Law of legislative intent to ban mining on state-owned lands. Thus, a Court likely would declare invalid those provisions of a DEP rule, promulgated pursuant to the 2012 Mining Law, that categorically prohibit mining on state-owned land.⁶ See 5 M.R.S. § 8058(1) (requiring courts to declare invalid any rule that exceeds an agency’s rulemaking authority). In the absence of legislation amending the Mining on State Lands subchapter and giving the DEP express authority to prohibit mining on state-owned land, whether to allow mining on state land continues primarily to be governed by the applicable statutes in Title 12. This would include the requirement for an affirmative land use consistency ruling and a mining lease. 12 M.R.S. § 549-B(6) & (7).

In addition, if the state land at issue is “designated land,” such lands “may not be reduced or substantially altered, except by a 2/3 vote of the Legislature.” 12 M.R.S. § 598-A. See also Me. Const. art. IX, § 23. “Substantially altered” is defined as “changed so as to significantly alter physical characteristics in a way that frustrates the essential purposes for which that land is held by the State.” 12 M.R.S. § 598(5). The essential purposes of different categories of designated lands are set forth in the statute. *Id.* Therefore, before mining could be allowed on designated lands, the director of the land-owning agency must first determine that a proposed mining activity would not frustrate the essential purposes for which that agency holds and manages the land. 12 M.R.S. §§ 598(5), 598-A.

Although review of Maine law shows an absence of legislative intent for the DEP to adopt categorical prohibitions on mining on state land, sections 23 and 30 of the 2012 Mining Law (as noted above) provide express rulemaking authority for the DEP to adopt standards for exploration, advanced exploration, construction, operation, closure, post-closure monitoring, reclamation and remediation, as well as standards determined by the DEP to be necessary to protect the public health and safety and the environment. Such standards may include standards regarding effects on preservation of historic sites, preservation of unusual natural areas, effects on scenic character and protection of wildlife and fisheries. In light of the provision in the Mining on State Lands subchapter at 12 M.R.S. § 549-C that “[n]othing in this subchapter may be deemed to relieve any explorer or mining lessee from the obligation to comply with all applicable environmental or other regulatory laws and rules of the State,” metallic mineral mining rules adopted by DEP generally will apply to mining operations on state-owned lands. Under the current statutory framework, however, DEP lacks authority to adopt categorical bans on mining on state lands.

⁶ DEP rules prohibiting mining activities on federal land or prescribing standards for such activities would be valid to the extent not preempted by federal law. U.S. Const. art. VI, cl. 2; see *Verizon New England, Inc. v. Me. Pub. Utils. Comm’n*, 2005 ME 64, ¶ 21, 875 A.2d 118 (articulating the U.S. Supreme Court’s preemption test).