



STATE MINING AND GEOLOGY BOARD

EXECUTIVE OFFICER'S REPORT



ARNOLD
SCHWARZENEGGER
GOVERNOR

For Meeting Date: April 9, 2009

Agenda Item No. 5: Issuance of an Order to Comply to the Feather River Levee Improvement Project (FRLIP), Three Rivers Levee Improvement Authority (TRLIA; Operator), County of Yuba, to Correct Violations of the Surface Mining and Reclamation Act (Public Resources Code Section 2710 et seq.).

INTRODUCTION: The Surface Mining and Reclamation Act of 1975 (SMARA) allows for a one-time exemption for certain surface mining operations should the State Mining and Geology Board (SMGB) determine the operation to be of an infrequent nature and involve only minor surface disturbances. On behalf of the Three Rivers Levee Improvement Authority (TRLIA), a request was received from the law firm of Downey Brand, LLP, for a one-time exemption for two borrow pits associated with the Feather River Levee Improvement Project (FRLIP). The request was made pursuant to Public Resources Code (PRC) Section 2714(b) or PRC Section 2714(f).

STATUTORY CONSIDERATIONS: SMARA allows for an exemption for certain earthmoving activities pursuant to PRC Article 1 Section 2714(b) which states:

“(b) Onsite excavation and onsite earthmoving activities that are an integral and necessary part of a construction project that are undertaken to prepare a site for construction of structures, landscaping, or other land improvements, including the related excavation, grading, compaction, or the creation of fills, road cuts, and embankments, whether or not surplus materials are exported from the site, subject to all of the following conditions:

(1) All required permits for the construction, landscaping, or related land improvements have been approved by a public agency in accordance with applicable provisions of state law and locally adopted plans and ordinances, including, but not limited to, Division 13 (commencing with Section 21000).

(2) The lead agency’s approval of the construction project included consideration of the onsite excavation and onsite earthmoving activities pursuant to Division 13 (commencing with Section 21000).

(3) The approved construction project is consistent with the general plan or zoning of the site.

(4) Surplus materials shall not be exported from the site unless and until actual construction work has commenced and shall cease if it is



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determined that construction activities have terminated, have been indefinitely suspended, or are no longer being actively pursued.”

SMARA also allows for a one-time exemption pursuant to PRC Article 1 Section 2714(f), which states:

“Any other surface mining operations that the board, as defined by Section 2001, determines to be of an infrequent nature and which involve only minor surface disturbances.”

The Executive Officer can deny a one-time exemption request if, upon review, the request does not comply with the criteria set forth in PRC Section 2714(f) (formerly section 2714(d)). However, this matter can also be placed before the SMGB should 1) a request be made by one SMGB member; 2) the Executive Officer cannot come to a clear consensus; or 3) if controversy arises surrounding the request. In considering such requests, the Executive Officer, pursuant to the SMGB’s Resolution No. 93-6, is required to consider and fully address the following four criteria:

Criteria 1 - Compliance with the California Environmental Quality Act

(CEQA): Pursuant to PRC Section 2712(a), has an environmental review been completed on the activity either separately or as part of a larger project? PRC Section 2712(a) states *“It is the intent of the Legislature to create and maintain an effective and comprehensive surface mining and reclamation policy with regulation of surface mining operations so as to assure that: (a) Adverse environmental effects are prevented or minimized and that mined lands are reclaimed to a usable condition which is readily adaptable for alternative land uses.”*

Criteria 2 - Local authority: Pursuant to PRC Sections 2715 and 2770(a), is the activity conducted permitted or otherwise authorized by a local lead agency? PRC Section 2715 states *“No provision of this chapter or any ruling, requirement, or policy of the board is a limitation on any of the following:*

(a) On the police power of any city or county or on the power of any city or county to declare, prohibit, and abate nuisances.

(b) On the power of the Attorney General, at the request of the board, or upon his own motion, to bring an action in the name of the people of the State of California to enjoin any pollution or nuisance.

(c) On the power of any state agency in the enforcement or administration of any provision of law which it is specifically authorized or required to enforce or administer.

(d) On the right of any person to maintain at any time any appropriate action for relief against any private nuisance as defined in Part 3 (commencing with Section 3479) of Division 4 of the Civil Code or for any other private relief.



(e) *On the power of any lead agency to adopt policies, standards, or regulations imposing additional requirements on any person if the requirements do not prevent the person from complying with the provisions of this chapter.*

(f) *On the power of any city or county to regulate the use of buildings, structures, and land as between industry, business, residents, open space (including agriculture, recreation, the enjoyment of scenic beauty, and the use of natural resources), and other purposes.”*

PRC Section 2770(a) states *“Except as provided in this section, no person shall conduct surface mining operations unless a permit is obtained from, a reclamation plan has been submitted to and approved by, and financial assurances for reclamation have been approved by, the lead agency for the operation pursuant to this article.”*

Criteria 3 - End use of the mining or borrow site: Pursuant to PRC Sections 2711(b) and 2712, is the end use or proposed end use of property on which the activity occurs defined? PRC Section 2711(b) states *“The Legislature further finds that the reclamation of mined lands as provided in this chapter will permit the continued mining of minerals and will provide for the protection and subsequent beneficial use of the mined and reclaimed land.”*

PRC Section 2712 states *“It is the intent of the Legislature to create and maintain an effective and comprehensive surface mining and reclamation policy with regulation of surface mining operations so as to assure that:*

(a) *Adverse environmental effects are prevented or minimized and that mined lands are reclaimed to a usable condition which is readily adaptable for alternative land uses.*

(b) *The production and conservation of minerals are encouraged, while giving consideration to values relating to recreation, watershed, wildlife, range and forage, and aesthetic enjoyment.*

(c) *Residual hazards to the public health and safety are eliminated.”*

Criteria 4 - Impacts of the operation on commercial activities: Pursuant to PRC Section 2714(b), have the commercial impacts of the activity been considered? PRC Section 2714(b) states *“Onsite excavation and onsite earthmoving activities that are an integral and necessary part of a construction project that are undertaken to prepare a site for construction of structures, landscaping, or other land improvements, including the related excavation, grading, compaction, or the creation of fills, road cuts, and embankments, whether or not surplus materials are exported from the site, subject to all of the following conditions:*

(1) *All required permits for the construction, landscaping, or related land improvements have been approved by a public agency in accordance with*



applicable provisions of state law and locally adopted plans and ordinances, including, but not limited to, Division 13 (commencing with Section 21000).

(2) The lead agency’s approval of the construction project included consideration of the onsite excavation and onsite earthmoving activities pursuant to Division 13 (commencing with Section 21000).

(3) The approved construction project is consistent with the general plan or zoning of the site.

(4) Surplus materials shall not be exported from the site unless and until actual construction work has commenced and shall cease if it is determined that construction activities have terminated, have been indefinitely suspended, or are no longer being actively pursued.”

For the purposes of this consideration, SMARA defines the terms reclamation and mined lands.

PRC Section 2733 defines reclamation as *“the combined process of land treatment that minimizes water degradation, air pollution, damage to aquatic or wildlife habitat, flooding, erosion, and other adverse effects from surface mining operations, including adverse surface effects incidental to underground mines, so that mined lands are reclaimed to a usable condition which is readily adaptable for alternate land uses and create no danger to public health or safety. The process may extend to affected lands surrounding mined lands, and may require backfilling, grading, resoiling, revegetation, soil compaction, stabilization, or other measures.”*

PRC Section 2729 defines mined lands to include *“the surface, subsurface, and ground water of an area in which surface mining operations will be, are being, or have been conducted, including private ways and roads appurtenant to any such area, land excavations, workings, mining waste, and areas in which structures, facilities, equipment, machines, tools, or other materials or property which result from, or are used in, surface mining operations are located.”*

In situations when a surface mine site does not have an approved reclamation plan or financial assurance, PRC Section 2774.1(a) states:

“Except as provided in subdivision (i) of Section 2770, if the lead agency or the director determines, based upon an annual inspection pursuant to Section 2774, or otherwise confirmed by an inspection of the mining operation, that a surface mining operation is not in compliance with this chapter, the lead agency or the director may notify the operator of that violation by personal service or certified mail. If the violation extends beyond 30 days after the date of the lead agency's or the director's notification, the lead agency or the director may issue an order by personal service or certified mail requiring the operator to comply with this chapter or,



if the operator does not have an approved reclamation plan or financial assurances, cease all further mining activities.”

BACKGROUND:

Project Description: The Feather River Levee Repair Project is one component of a multi-year regional levee improvement project along the Feather, Yuba, and Bear rivers, and the Western Pacific Interceptor Canal. For this particular project, TRLIA has commenced construction of a new 5.7-mile long setback levee approximately 0.5 miles east of the existing left (east) bank Feather River levee in South Yuba County to enhance flood protection. Other benefits resulting from the project include widening the river channel to allow better flow, eliminating water flow choke points, replacing the current defective levee, and expanding the floodplain and creating habitat for the benefit of several threatened and endangered species.

The Feather River Levee Repair Project Segment 2 (Project) proposed to utilize five borrow sites: Nordic/H&H Borrow, Naumes Borrow, Uppal Borrow, Platter/JTS Borrow, and Ella Borrow. TRLIA proposed, and has subsequently commenced, mining of subsurface clay materials suitable for levee construction on approximately 300 acres composed of several distinct borrow sites adjacent to and in close proximity to the 1,500-acre levee setback area for a period of 2 years. The borrow excavations will encompass approximately 177 acres within the levee setback area and 106 acres outside (east of) the levee setback area. It is estimated that 3.6 million cubic yards of compacted borrow material, or approximately 4.2 million “bank” cubic yards, will be needed for levee construction. To the west of the levee construction site, the borrow sites are proposed to be reclaimed to conditions suitable for riparian and wildlife habitat, and to agricultural uses. On the landward, or eastern side, final end uses of the borrow sites may include an enhanced detention basin, agricultural operations, and/or possible future residential development.

Issuance of Notice of Violation: On September 23, 2008, the SMGB received the proposed *Reclamation Plan for the Three Rivers Levee Improvement Authority, Feather River Levee Repair Project, Segment 2* (Reclamation Plan), prepared by PBS&J, dated September 2008. Following receipt of this document, a preliminary review was undertaken by the SMGB and the Office of Mine Reclamation (OMR), and a site visit to the project area was conducted on November 14, 2008. Based on our preliminary review and site visit, SMGB staff concluded that the project is indeed subject to SMARA, and that surface mining operations have already commenced. On December 23, 2008, a Notice of Violation was issued by the Executive Officer to the TRLIA for operating a surface mine without possession of a lead agency approved Reclamation Plan and Financial Assurance, and County Permit to Mine.

Review of Reclamation Plan: On September 23, 2008, the SMGB received the proposed *Reclamation Plan for the Three Rivers Levee Improvement Authority, Feather River Levee*



Repair Project, Segment 2 (Reclamation Plan), prepared by PBS&J, dated September 2008. Upon review of the proposed Reclamation Plan and associated environmental reports, OMR and SMGB staff determined that the proposed reclamation plan included provisions for reclaiming all but the Ella Borrow site pursuant to SMARA. The Ella Borrow site was not included in the proposed reclamation plan because the project operator claimed an exemption from SMARA.

Applicability of SMARA: Based on review of the 2008 Reclamation Plan, it was determined by OMR and SMGB staff that the Nordic/H&H Borrow, Naumes Borrow, and Uppal Borrow were onsite excavation and onsite earth moving activities that are an integral and necessary part of the levee construction project, all required permits had been obtained and applicable environmental analysis completed, and no surplus materials were to be exported from the construction site; therefore, these borrow pits met all the criteria for the onsite construction exemption pursuant to PRC Section 2714(b)(1) through 2714(b)(4).

DISCUSSION: The request for exemption is being made under either PRC Section 2714(b) or PRC 2714(f) for two separate borrow pits: the Ella Borrow Site and the Platter/JTS Borrow site.

Request for Exemption Pursuant to PRC Section 2714(b): The Platter/JTS Borrow and Ella Borrow sites were not considered onsite excavations or onsite earth moving activities because they are located about 0.5 miles offsite. The construction project in this case is the levee improvement project and the Platter/JTS and Ella Borrow sites clearly serve as sources of material for levee construction. Since the borrow areas are not “onsite,” they cannot be exempted as onsite construction.

Furthermore, the Ella Borrow site does not separately meet the criteria for an onsite exemption. The Ella Borrow site is a borrow pit, which is defined as “*Excavations created by the surface mining of rock, unconsolidated geologic deposits or soil to provide material (borrow) for fill elsewhere*” pursuant to California Code of Regulations (CCR) Section 3501. The end use for the Ella Borrow site is an enhanced detention basin. Because the Ella Borrow site is an excavation, not a construction project, it cannot be exempted pursuant to Section 2714(b) as an onsite excavation activity “that is an integral and necessary part of a construction project.”

Because reclamation of the Ella Borrow site was not included in the proposed reclamation plan developed for the Feather River Levee Repair Project, a reclamation plan must be developed for this area that satisfies the minimum requirements of SMARA. Reclamation for this area to the end use of a detention basin needs to be described in the reclamation plan. In addition to text describing the mining and reclamation for the site, it was recommended that a map and grading plan, including cross-sections, be added to the figures in the reclamation plan to depict the proposed



final configuration of the detention basin. A description of revegetation for the banks and any surrounding disturbed areas also needed to be included.

Request for One-Time Exemption Pursuant to PRC Section 2714(f):

Exemption Criteria: It is recognized that not all surface mining operations are an efficient “fit” under SMARA, and that many projects of limited size, duration, economic and environmental impact would be prevented, delayed, or rendered uneconomic if the requirements of SMARA were fully applied. To address these special situations, SMARA provides the SMGB with authority under PRC Section 2714(f) to grant exemptions under specific conditions when the proposed activity is of an infrequent nature and involves only minor surface disturbance.

The Executive Officer considered four specific criteria in reviewing the request for a one-time exemption pursuant to PRC Section 2714(f):

Criteria No. 1: Pursuant to PRC Section 2712(a), has an environmental review been completed on the activity either separately or as part of a larger project?

Finding No. 1: A reclamation plan is considered a project pursuant to the California Environmental Quality Act (CEQA). An Environmental Impact Report (EIR) was prepared for the Feather River Levee Repair Project to satisfy CEQA requirements in 2006, and an Environmental Impact Statement (EIS) was prepared in 2008 to satisfy the National Environmental Protection Act (NEPA). Both of these documents analyze all potential impacts of the levee repair project, including a generalized discussion of the excavation and reclamation of the borrow areas as discussed in the reclamation plan. However, neither the proposed reclamation plan nor the EIR included the Platter/JTS or the Ella Borrow sites.

Addenda to the EIR dated April, 2008 and May, 2008 were received by the SMGB, and subsequently forwarded to OMR for review, on January 20, 2009. The April Addendum contains discussion on pages 7 and 8, and a graphical representation (Figure 2-1), describing the new soil borrow area corresponding to the Platter/JTS Borrow site. The May Addendum 2 contains discussion on pages 2-1 and 2-2, and a graphical representation (Figure 1-2), describing the new soil borrow area corresponding to the Ella Borrow site. These addenda satisfy the requirement for a CEQA document that has been approved, and that apply specifically to the Ella and Platter/JTS Borrow sites.



Criteria No. 2: Pursuant to PRC Sections 2715 and 2770(a), is the activity to be conducted permitted or otherwise authorized by a local lead agency?

Finding No. 2: The larger project is not exempt from SMARA. The operator has submitted a proposed reclamation plan, although surface mining commenced without obtaining approval of a reclamation plan and financial assurance from its lead agency (in this case, SMGB), and appropriate permit to mine from Yuba County. As noted above, on September 23, 2008, the SMGB did receive the proposed Reclamation Plan for the project. Upon review, OMR and SMGB staff determined that the project was not exempt from SMARA, and a Notice of Violation was issued on December 23, 2008. However, with respect to the activities for which an exemption is requested, extracting material from the Platter/JTS Borrow and Ella Borrow sites, grading permits have been issued by the County for both borrow sites.

Criteria No. 3: Pursuant to PRC Sections 2711(b) and 2712, is the end use or proposed end use of property on which the activity occurs defined?

Finding No. 3: The end use, or proposed end use, for the Platter/JTS Borrow site has been defined and will be reclaimed to grazing. The end use for the Ella Borrow site is an enhanced detention basin.

Criteria No. 4: Pursuant to PRC Sections 2714(b), have the commercial impacts of the activity been considered?

Finding No. 4: On March 18, 2009 the SMGB received documentation from TRLIA representatives which included summaries of analyses conducted to identify locally available suitable borrow material at permitted sites that are currently in compliance with SMARA. One alternative site was identified in nearby Sutter County; however, excessive haulage costs deemed utilization of this site infeasible. Thus, it does not appear that an unfair competitive advantage has been developed in the implementation of this project.

SURFACE MINING STANDARDS COMMITTEE: A meeting of the SMGB's Surface Mining Standards Committee (Committee) was held on March 25, 2009. The Committee concluded that the ongoing and proposed activities of the Platter/JTS and Ella Borrow sites, which are a part of the FRLIP, were subject to the requirements of SMARA. The Committee noted that public safety and the project's early commencement in the spring is essential for completion of the project in a safe manner for the public. The Committee recommended that the Board grant a temporary, one-time exemption, if appropriate, to allow surface mining activities at the two borrow sites to continue. Should a temporary exemption be deemed inappropriate,



the operator should proceed with submittal of a reclamation plan, associated environmental documents, and financial assurance cost estimate, to be considered for SMGB approval no later than the SMGB's regular business meeting scheduled for July 9, 2009.

CONSIDERATIONS BEFORE THE SMGB: The SMGB is considering whether activities associated with extracting material from the Platter/JTS and Ella borrow pits for use on the Feather River Levee Improvement Project are exempt from SMARA pursuant to either PRC Section 2714(b) or Section 2714(f). If the SMGB determines these activities are not exempt, the operator would be required to comply with SMARA and the SMGB regulations.

EXECUTIVE OFFICER'S RECOMMENDATION: Two considerations are before the SMGB: consideration of an exemption, or consideration of issuance of an Order to Comply.

Exemption: In determining whether the activities at issue are exempt pursuant to PRC Section 2714(f), the Executive Officer, in accordance with the SMGB's Resolution No. 93-6, considered the following criteria:

- 1) Compliance with the California Environmental Quality Act (CEQA);
- 2) Local authority;
- 3) End use of the mining or borrow site; and
- 4) Impacts of the operation on commercial activities.

It is the Executive Officer's conclusion that the larger project, the Feather River Levee Repair Project, does not meet the requirements of SMARA and the SMGB's criteria for consideration of an exemption pursuant to PRC Section 2714(f). The activity has already commenced and consideration of the level of effort that was put into the preparation of the 2008 Reclamation Plan suggests that the operator knew that the project was not exempt from SMARA, in part or in its entirety, but commenced activities regardless. However, the need for readily available borrow materials for the project, and the need to remain on schedule, is recognized. Based on the analysis and findings set forth above, it is the Executive Officer's recommendation that the SMGB at this time determine that the activity associated with extracting material from the Platter/JTS and Ella borrow sites are exempt in accordance with PRC Section 2714(f).

Order to Comply: Should the SMGB determine that the activities are not exempt, the SMGB must determine if the operator is in violation of SMARA and the SMGB's regulations, and whether the operator has shown good faith in complying with the SMGB's NOV.



SUGGESTED SMGB MOTION:

To deny the request for a one-time exemption:

Mr. Chairman, in light of the information before the SMGB today, I move that the SMGB find that the project referred to as the Feather River Levee Improvement Project, and as described in this report and its attachments, is subject to the requirements of SMARA, and that the SMGB deny a one-time exemption from SMARA for this project under its authority provided by Public Resources Code Section 2714(f).

Or,

To approve the request for a one-time exemption:

Mr. Chairman, in light of the information before the SMGB today, I move that the SMGB find that the project referred to as the Feather River Levee Improvement Project, and as described in this report and its attachments, is not subject to the requirements of SMARA, and that the SMGB grant a one-time exemption from SMARA for this project under its authority provided by Public Resources Code Section 2714(f).

Or,

To consider issuance of an Order to Comply:

Mr. Chairman, in light of the information before the State Mining and Geology Board today, I move that the Board issue to the Three Rivers Levee Improvement Authority, the operator for the project referred to as the Feather River Levee Improvement Project, and as described in this report and its attachments, an Order to Comply to provide the SMGB with an adequate reclamation plan, associated environmental documents, and financial assurance cost estimate, within 30 days upon issuance of the Order of Comply. This order shall be heard at the Board's regular business meeting on June 11, 2009.

Respectfully submitted:

Stephen M. Testa
Executive Officer



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