



# STATE MINING AND GEOLOGY BOARD

Surface Mining Standards Committee

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## EXECUTIVE OFFICER'S REPORT



ARNOLD  
SCHWARZENEGGER  
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For Meeting Date: March 25, 2009

### **Agenda Item No. 2: Discussion of Issues Concerning the Feather River Levee Improvement Project (FRLIP), Three Rivers Levee Improvement Authority (Operator/Agent), County of Yuba.**

**INTRODUCTION:** The State Mining and Geology Board (SMGB) is the lead agency pursuant to the Surface Mining and Reclamation Act of 1975 (SMARA) for the County of Yuba (County). 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 a site visit to the project area by SMGB staff, which was performed on November 14, 2008, it was concluded that the project was, at least in part, indeed subject to SMARA, and that material extraction had already commenced without a SMARA lead agency approved reclamation plan, financial assurance, or permit issued by the County. On December 23, 2008, a Notice of Violation was issued by the Executive Officer to the Operator, the Three Rivers Levee Improvement Authority (TRLIA), for conducting surface mining without possession of a lead agency approved Reclamation Plan and Financial Assurance, and County Permit to Mine.

Upon further review of the proposed reclamation plan, environmental studies, and other pertinent documents, it was determined that two borrow pits, the Platter/JTS Borrow site and the Ella Borrow site, were situated outside the project area, and subject to SMARA. The Operator, TRLIA, was subsequently provided two options: 1) supplement the proposed Reclamation Plan to include a revegetation plan for the Platter/JTS Borrow site, then amend the plan upon SMGB approval to include the Ella Borrow site, or 2) request a one-time exemption consideration from SMARA for both the Platter/JTS and/or Ella Borrow sites.

**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).*



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(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."*

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(d) which states:

*"Prospecting for, or the extraction of, minerals for commercial purposes and the removal of overburden in total amounts of less than 1,000 cubic yards in any one location of one acre or less."*

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."*

### **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 this office 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 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: As stated above, on September 23, 2008, the SMGB received the proposed Reclamation Plan for the Project dated September 2008. Upon review of the proposed Reclamation Plan and associated environmental reports by the Office of Mine Reclamation (OMR) and SMGB staff, it was 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 it was erroneously considered exempt from SMARA.

Applicability of SMARA: Based on review of the September 2008 Reclamation Plan, it was determined 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 and, therefore, met all the criteria for the onsite construction exemption pursuant to PRC Section 2714(b)(1) through 2714(b)(4).

**DISCUSSION:** The request for a one-time 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 One-Time 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 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 meets the criteria of 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. However, the Ella Borrow site does not meet the criteria for the onsite construction exemption of a detention basin, because it is an excavation, not an engineered construction project.



Because reclamation of the Ella Borrow site was not included in the proposed Reclamation Plan developed for the 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):**

General Threshold Criteria: Pursuant to PRC Section 2714(d), SMARA does not apply to operations where “*Prospecting for, or the extraction of, minerals for commercial purposes where the removal of overburden or mineral product total less than 1,000 cubic yards in any one location, and the total surface area disturbed is less than one acre.*” Based on the description of the Ella Borrow site, the borrow pit encompasses 20 acres, with about 682,000 cubic yards of materials to be removed. The Platter/JTS Borrow site encompasses about 124 acres, with about 86 acres anticipated to be disturbed, and with approximately one million cubic yards of material to be removed.

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 proposed projects, that being the Ella and Platter/JTS Borrow sites, 1) exceeds SMARA's minimum thresholds by disturbing more than one acre of land and 1,000 cubic yards of material for commercial purposes, and 2) are not a part of an on-site construction project that may be exempt from SMARA pursuant to the requirements under Section 2714(b); however, one-time exemptions have been granted by the SMGB in the past in instances where such thresholds have been significantly exceeded.

The Executive Officer considered four specific criteria in considering 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 and circulated for the Feather River Levee Repair Project to satisfy CEQA requirements in 2006, and an Environmental Impact Statement (EIS) was prepared and circulated 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.

Addendums 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 of 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 on Figure 1-2, describing the new soil borrow area corresponding to the Ella Borrow site. These addendums satisfy the requirement for a CEQA document that has been circulated and 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 project in its entirety is not exempt from SMARA, and thus, the operator commenced surface mining without obtaining approval of a reclamation plan and financial assurance from its lead agency (i.e., SMGB), and appropriate permit to mine from Yuba County. On September 23, 2008, the SMGB did receive 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, OMR and SMGB staff determined that the project was not exempt from SMARA, and a Notice of Violation was issued on December 23, 2008.

The Operator has provided documentation to show that grading permits were issued by the County for grading/excavation and drainage basin construction activities at the Platter/JTS and Ella Borrow sites, respectively.

Criteria No. 3: Pursuant to PRC Sections 2711(b) and 2712, is the end use or proposed end use of the 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 defined as an enhanced drainage detention basin.

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

Finding No. 4: There are numerous active surface mining operations in Yuba County that supply sand (fill) and aggregate. To date, no documentation has been provided to demonstrate whether the operator considered the availability of material from other permitted local surface mining operations. Thus, a "level playing field" has not been established in this case, and based solely on review



of the documents submitted, there is the possibility that an unfair competitive advantage may have developed in the implementation of this project.

**CONSIDERATIONS BEFORE THE COMMITTEE:** The Committee is considering recommending to the whole SMGB that they deny the request for a one-time exemption from SMARA for the Platter/JTS and Ella Borrow sites, or recommending to the whole SMGB that they approve the request for a one-time exemption from SMARA for the Platter/JTS and Ella Borrow sites. The whole SMGB may grant the exemption, or decide not to grant the exemption, in which case the operator would be required to comply with SMARA and the SMGB regulations.

**EXECUTIVE OFFICER'S RECOMMENDATION:** 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(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. Pursuant to the SMGB's Resolution No. 93-6, the Executive Officer 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 one-time exemption request does not meet the requirements of SMARA, and the SMGB's criteria for consideration of such exemptions. The activity has already commenced, and consideration of the level of effort that was put into the preparation of the September 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 in light of the significant public safety concerns related to future flooding, is recognized. Based on the analysis and findings set forth above, at this time it is the Executive Officer's recommendation that, if the operator can provide evidence that a good faith effort was expended to acquire suitable borrow material from nearby permitted sources, then the Committee should recommend to the whole SMGB that they approve the request for a one-time exemption.



**SUGGESTED COMMITTEE MOTION:**

To recommend denial of the request for a one-time exemption:

*Mr. Chairman, in light of the information before the Surface Mining Standards Committee today, I move that the Committee find that the ongoing and proposed activities at the Platter/JTS and Ella Borrow sites, which are a part of the Feather River Levee Improvement Project, and are described in this report and its attachments, are subject to the requirements of SMARA, and that the Committee recommend that the whole Board deny a one-time exemption from SMARA for these activities under its authority provided by Public Resources Code Section 2714(f).*

**OR**

To recommend approval of the request for a one-time exemption:

*Mr. Chairman, in light of the information before the Surface Mining Standards Committee today, I move that the Committee find that the ongoing and proposed activities at the Platter/JTS and Ella Borrow sites, which are a part of the Feather River Levee Improvement Project, and are described in this report and its attachments, are not subject to the requirements of SMARA, and that the Committee recommend that the whole Board grant a one-time exemption from SMARA for these activities under its authority provided by Public Resources Code Section 2714(f).*

Respectfully submitted:

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Stephen M. Testa  
Executive Officer

