



STATE MINING AND GEOLOGY BOARD

EXECUTIVE OFFICER'S REPORT

For Meeting Date: July 8, 2010

Agenda Item No. 6: Designation of Lead Agency under the Surface Mining and Reclamation Act (SMARA) Pursuant to Public Resources Code Section 2771 for the McLaughlin Mine (CA Mine ID #91-28-0003), Karl Burke (Agent), Homestake Mining Company (Operator), Counties of Lake, Napa and Yolo.

INTRODUCTION: Pursuant to the Surface Mining and Reclamation Act of 1975 (SMARA), whenever a proposed or existing surface mining operation is within the jurisdiction of two or more public agencies, is a permitted use within the agencies, and is not separated by a natural or manmade barrier coinciding with the boundary of the agencies, the evaluation of the proposed or existing operation shall be made by the lead agency. Should a question arise regarding which public agency serves as the SMARA lead agency, the State Mining and Geology Board (SMGB) shall designate which public agency will serve as the Surface Mining and Reclamation Act (SMARA) lead agency. The SMGB is considering making such determination at the request of the Department of Conservation Office of Mine Reclamation (OMR).

STATUTORY CONSIDERATIONS: Article 2 Public Resources Code Section 2728 defines a SMARA lead agency as:

“Lead agency” means the city, county, San Francisco Bay Conservation and Development Commission, or the board which has the principal responsibility for approving a surface mining operation or reclamation plan pursuant to this chapter.”

In regards to lead agency jurisdiction, Article 5 PRC Section 2771, states:

“Whenever a proposed or existing surface mining operation is within the jurisdiction of two or more public agencies, is a permitted use within the agencies, and is not separated by a natural or manmade barrier coinciding with the boundary of the agencies, the evaluation of the proposed or existing operation shall be made by the lead agency in accordance with the procedures adopted by the lead agency pursuant to Section 2774. If a question arises as to which public agency is the lead agency, any affected public agency, or the affected operator, may submit the matter to the board. The board shall notify in writing all affected public agencies and operators that the matter has been submitted, specifying a date for a public hearing. The board shall designate the public agency which shall serve as the lead



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agency, giving due consideration to the capability of the agency to fulfill adequately the requirements of this chapter and to an examination of which of the public agencies has principal permit responsibility.”

Need to submit an amended reclamation plan is addressed in the SMGB regulations, Title 14 California Code of Regulations (CCR) Sections 3502(d), 3502 (e) and 3502(i).

CCR Section 3502(d) addresses conditions for the lead agency to require an amended reclamation plan:

“An amended reclamation plan shall be filed if the lead agency determines, after an inspection, that the surface mining operation can no longer be reclaimed in accordance with its approved reclamation plan. Such amended plan shall incorporate current standards as described in Chapter 9 (commencing with Section 2710) and Title 14 of the CCR commencing with Section 3700”.

CCR Section 3502(e) requires the need for one reclamation plan for each surface mining operation:

“Each surface mining operation as defined in Public Resources Code Section 2735 and Title 14 California Code of Regulations Section 3501, shall have no more than one approved reclamation plan applicable to that operation except as described in subsection (i) to this section.”

CCR Section 3502(i) addresses exemptions to this section:

“(i) The following exemptions to this section shall apply:

(1) Where a single surface mining operation has separate facilities located within different lead agency jurisdictions, and where these facilities are separated by a distinct and significant physical boundary such as a major highway, stream channel, or the like, the operator may obtain separate reclamation plans and financial assurances for the facilities from the lead agencies in which those facilities are located.”

BACKGROUND: The McLaughlin Mine is located within Lake, Napa and Yolo Counties (Figure 1), and is comprised of the following facilities:

- Lake County: Mill and tailings impoundment facility (TIF);



- Napa County: Eighty percent of the pit lakes and waste rock disposal units; and
- Yolo County: Davis Creek Reservoir and twenty percent of the mine pit lakes.

Essentially, the reclamation footprint encompasses approximately 1,566 acres (Table 1). The breakdown per county is Napa County (761 acres), Lake County (540 acres), and Yolo County (255 acres). All three lead agencies implemented permits for select surface mining activities within their respective jurisdiction.

Table 1 Summary of Surface Mine Components		
Project Component	Acres to be Disturbed	Location
Mining area	211	Napa (80%), Yolo (20%)
Crushing and grinding area	60	Napa
Low grade ore storage	76	Napa
Waste rock dump	342	Napa
Mill site	24	Lake
Tailings disposal facility	493	Lake
Water reservoir	204	Yolo
Ore disposal facility	20	Napa and Lake
Roads, transmission lines, and substations	15	Lake, Lake and Yolo
Quarry	8	Lake
Powder magazine storage	3	Yolo





Figure1: Aerial image of the McLaughlin Mine and vicinity, Napa, Lake and Yolo Counties.

A single reclamation plan was developed and approved for the entire mine site in 1983. Napa County was established as the lead agency during the California Environmental Quality Act (CEQA) process, which was triggered by the preparation of a mining and reclamation plan, and a permit to mine.

SMARA was amended in 1990 to require annual reporting. The McLaughlin Mine was given a Napa County mine identification number, and Napa County was identified as the lead agency contact by OMR

Minor amendments to the 1983 reclamation plan were approved by Napa County in 1985, 1992 and 1993, which consisted of continuing the use of explosives, expanding the south mine pit, and disposing of waste rock in the north and south mine pits, respectively. In 2002, Lake County proposed a Negative Declaration for CEQA purposes to amend the reclamation plan for the Tailings Impoundment Facility (TIF); however, OMR did not receive correspondence from Napa County on this matter.

Mining ceased at McLaughlin Mine in 1996. Ore processing/gold production ceased in 2002. The mine is currently in the process of being reclaimed. The operator maintains that the TIF cannot be reclaimed pursuant to the approved reclamation plan for technical reasons, necessitating an amendment to the reclamation plan (CCR Section 3502(e)). The operator requested that Lake County amend the reclamation plan to reflect a different reclamation strategy for the TIF. A plan has been developed to close the TIF as a “containment zone” which has yet to be approved by the Regional Water Quality Control Board (RWQCB).

On February 1, 2010, OMR provided comments (copy attached) on a proposed amendment to the reclamation plan received from Lake County for reclaiming the Tailings Impoundment Facility (TIF) as a “containment zone.” In addition to technical concerns, OMR pointed out that, according to their records, Napa County is the SMARA lead agency, and the issue as to which county is the lead agency should be resolved prior to Lake County taking an action to amend the reclamation plan. OMR’s letter was copied to Napa County

Lake County responded to OMR’s comments in a letter dated March 18, 2010 (copy attached) indicating that Lake County would be the SMARA lead agency for changes to the approved reclamation plan affecting areas within Lake County and that Napa would be the lead agency for changes to the reclamation affecting areas in Napa County.

Because of the statutory requirement that there be only one lead agency, on April 6, 2010 OMR sent a letter to Lake County (copy attached) requesting that Lake County provide confirmation that both Napa and Yolo Counties had formally recognized Lake County as the



SMARA lead agency for the mine. OMR indicated that if the matter was not resolved by April 20, 2010, it would refer the issue to the SMGB for resolution.

On April 20, 2010, Lake County responded (copy attached) to OMR explaining that “none of the counties is prepared to relinquish its SMARA authority over those portions of the McLaughlin Mine that lie within their respective jurisdiction.” On April 23, 2010, Lake County approved the proposed amendment to the McLaughlin reclamation plan.

Based on discussions held with representatives of Napa, Lake and Yolo Counties, the SMGB, on May 10, 2010, received a request from the OMR to make a determination of lead agency jurisdiction pursuant to SMARA.

On May 28, 2010, OMR and the SMGB received a letter from Napa County (copy attached) clarifying that “OMR’s records are correct, Napa County is the Lead Agency of the McLaughlin Mine...” Similarly, on June 3, 2010, OMR and the SMGB received a letter from Lake County (copy attached) explaining that “OMR’s records are correct, in that Napa is the Lead Agency of the McLaughlin Mine facility and will continue to carry out their role and responsibilities under the Surface Mining and Reclamation Act, including those associated with the facilities proposed reclamation plan amendment.” Also, on June 3, 2010, OMR and the SMGB received a letter from Yolo County (copy attached) explaining that “...will continue to carry out our appropriate roles and responsibilities under the Surface Mining and Reclamation Act.”

PRC Section 2728 defines lead agency as the county which has the principal responsibility for approving a reclamation plan pursuant to SMARA. The need for determination of one lead agency for the McLaughlin Mine is further exemplified in the sporadic inspection reporting activities conducted by each of the three Counties involved. The inspection reporting history for the site is summarized in Table 2.



**Table 2
 Summary of Inspection Record**

Inspection Report Date	Inspection Agent	Inspection Report Date	Inspection Agent
10/4/1991	Napa Co.	2/20/2001	Yolo Co.
5/4/1992	Lake Co.	4/30/2001	Lake Co.
4/27/1993	Lake Co.	6/8/2001	Napa Co.
5/23/1994	Yolo Co.	4/1/2002	Napa Co.
5/26/1994	Lake Co.	4/28/2002	Lake Co.
5/1/1995	Lake Co.	4/18/2004	Lake Co.
5/11/1995	Yolo Co.	4/19/2004	Napa Co.
4/28/1997	Lake Co.	5/9/2005	Napa Co.
4/20/1998	Lake Co.	6/3/2005	Lake Co.
4/21/1998	Napa Co.	5/8/2006	Napa Co.
5/17/1999	Napa Co.	5/7/2007	Napa Co.
5/18/1999	Lake Co.	6/23/2008	Napa Co.
5/8/2000	Napa Co.	7/16/2009	Napa Co.

A lead agency under SMARA is responsible for the issuance of a permit to mine, or Conditional Use Permit for the entire surface mining operation. The various permits required, and the agency which issued the permit is summarized in Table 3.

At its June 10, 2010, regular business meeting, the SMGB heard preliminary comment from representatives of Homestake Mine, Lake and Napa Counties, and Office of Mine Reclamation. In spite of their recent correspondence, both Lake and Napa Counties maintained a desire that the SMGB recognize each of the three counties as co-lead agencies. The SMGB took no action and continued the matter for further discussion at its next scheduled meeting.



**Table 3
 Major Permit Requirements for the McLaughlin Project**

Permit	Agency
Use Permits	Napa ^{a, b} , Yolo ^{a, b} , and Lake ^{a, b} counties
Variance	Napa County ^a
Rezoning	Lake ^{a, b} and Yolo ^{a, b} counties
Surface Mining and Reclamation Act permits	Napa ^a , Yolo ^a , and Lake ^a counties
Mining and Reclamation Regulations (43 CFR 3809)	Bureau of Land Management ^b
Dam approvals	California Department of Water Resources, Division of Safety of Dams ^b
Hazardous waste facility permit	California Department of Health Services ^b
Solid waste disposal facility permit	Lake ^b county, State Solid Waste Management Board
Waste discharge requirements and NPDES permit	Regional Water Quality Control Board Central Valley Region ^b
Authorities to construct and permits to operate	Bay Area Air Quality Management District ^b , Yolo/Solano Air Quality Pollution Control District ^{a, b} , Lake County Air Pollution Control District ^b
Water appropriation	State Water Resources Control Board ^{a, b}
Stream alteration agreement	California Department of Fish and Game ^b
Miscellaneous building, grading, road encroachment and abandonment permits	Napa ^b , Yolo ^b , and Lake ^{a, b} counties
Williamson Act Contract cancellations	Lake ^{a, b} County and possibly Yolo ^{a, b} County

^a Public meetings on permits and permit conditions prior to permit issuance

^b Review of permit conditions by the interested public or agencies upon the request of the interested party.

DISCUSSION: The SMGB is being requested by OMR to designate the public agency which shall serve as the lead agency. In considering this matter, the SMGB must give due consideration to 1) the capability of the agency to fulfill adequately the requirements of this chapter, and 2) to an examination of which of the public agencies has principal permit responsibility.



In regards to which of the public agencies has principal permit responsibility is uncertain. Based on information presented in the Environmental Impact Report/Environmental Impact Statement, dated June 1983, Volume 1, there was not one agency that issued a permit to mine. Conditional use permits were issued by all three counties for select surface mining activities within their respective jurisdictions, along with permits being issued by other state and public agencies. It is clear from Figure 1 that most of the actual mining occurred in County of Napa, with a small amount of overlap into Yolo County. In summary, no one agency, or county, accepted responsibility for issuance of a permit to mine for the entire surface mining operation, or conducted mine inspections at least one each calendar year.

It is clear from historical records that Napa County was the lead agency for CEQA when the mine was permitted and in several subsequent amendments to the reclamation plan. However, Lake County adopted a Mitigated Negative Declaration in approving the recent amendment allowing the TIF to be reclaimed to a “containment zone.” Lake County inspection reports cover only facilities in Lake County, including the TIF.

The County of Napa has, in its correspondence dated May 28, 2010, requested that it “*continue to carry out our role and responsibilities under the Surface Mining and Reclamation Act, including those associated with the facilities proposed Reclamation Plan amendment.*” Lake County in their correspondence dated June 3, 2010, concurs that “...Napa County *is the lead agency for the McLaughlin Mine...*” There remains no readily apparent reason why the County of Napa cannot fulfill this role. As a lead agency, it is clear from the historical record that all three counties independently performed mine inspections at different times. However, only Napa County inspections were comprehensive of the entire mine site.

Absence of Clarity: An absence of clarity exist as to which county is the SMARA lead agency for the McLaughlin Mine, as noted by 1) inconsistent inspection reporting by each of the counties, 2) conflicting correspondence from the three counties, and 3) attempts by Lake County to amend the reclamation plan that was originally approved and amended by Napa County. The lead agency has responsibility for implementation of SMARA, and the law states that there can be only one lead agency. Because the mine is in the post-mining reclamation phase and facing difficult reclamation challenges, it is imperative that the lead agency with responsibility for implementation of the reclamation plan be unmistakably clear. Thus, OMR has requested that the SMGB make a determination regarding lead agency jurisdiction for the site. The requested determination is critical to ensure that the intent of SMARA as this site undergoes reclamation, which relies on the fundamental idea that there is only one reclamation plan and one lead agency for each surface mining operation, is upheld.

One Surface Mining Operation – One Reclamation Plan: SMARA requires that a reclamation plan be developed that describes how all areas disturbed by surface mining operations will be reclaimed to a beneficial end use. A single comprehensive reclamation plan



was approved for the McLaughlin Mine in 1983. Subsequently, the SMGB adopted regulations that state that each surface mining operation shall have no more than one approved reclamation plan applicable to that operation. An exception is allowed when a single surface mining operation has separate facilities located within different lead agency jurisdictions, and where these facilities are separated by a distinct and significant physical boundary such as a major highway, stream channel, or the like. No distinct and significant physical boundary exists between the TIF and the area where excavation and waste disposal occurred. In fact, during the mining phase, both were connected by a slurry pipeline and a road to allow daily access to both.

The statute clearly states that there can be only one lead agency who is responsible for implementing SMARA. Napa, Lake, and Yolo Counties coordinated in approving a reclamation plan for McLaughlin Mine. Napa County has amended the reclamation plan, several times, which is consistent with its role as the lead agency. Lake County has approved an amendment for reclamation of the TIF; however, approving an amendment for reclaiming the TIF is different from amending the approved reclamation plan. Only the lead agency has the authority to approve an amended reclamation plan for the mine.

It is imperative that there be clarity regarding who is the SMARA lead agency for McLaughlin Mine. Substantial reclamation challenges remain. According to OMR's records, the current reclamation plan covers over 1400 acres and the financial assurance amount is \$15,061,491.

Designation of SMARA Lead Agency: Designation of a single lead agency, which takes place after there may have been uncertainty in that regard with respect to this operation, raises some question whether that decision will impact SMARA-governed actions taken by the operator in the past, and in reliance on approvals provided by entities other than that lead agency. It is important to note that no such conduct is presented to the SMGB at this point, so this analysis will provide only general principles which would guide consideration of same should that come up.

The starting point for reviewing past operator behavior relies on well-established concepts governing vested rights. The primary rule to understand is that government behavior must abide by constitutional limitations affecting property, while still being free to ensure the public health and welfare. More specifically, where a private entity has, in good faith relied on a governmental approval, and expended significant funds in proceeding along the terms of that approval, the government will face serious obstacles in the event it seeks to revoke, reverse or substantially modify that approval, should that proposed action cause material financial loss to the private entity.

The foregoing basic concept is fraught with modifying aspects that are largely fact-dependent. Thus, it is impossible, and is not attempted herein, to predict the outcome of any analysis of a situation before the circumstances are fully articulated. For example, the notion



of “good faith reliance” is critically important to determining whether a private entity’s conduct can even begin to qualify as rising to vested stature. Moreover, there are powerful reasons why government’s ability to protect the public welfare should be circumscribed only in the most narrow situations; the private actor is charged with knowledge of the law, and thus cannot be allowed to “snap up” a mistake of law made by a government employee acting beyond his or her capacity to approve a particular conduct.

In the present circumstances, it is fair to say only that we are unaware of any past approvals given, excepting anything raised by the situation that led to the current agenda item, that would suggest the designated lead agency revisiting same.

Amendments to the Reclamation Plan: Under SMARA there can only be one lead agency, and so it is a legal impossible for there to be three lead agencies. The SMGB must designate a single SMARA lead agency. For example, should the SMGB designate the County of Napa to serve as the SMARA lead agency (or confirm that the County of Napa shall continue in this capacity), any amendment to the approved reclamation plan set forth by either Lake or Yolo County will need to eventually be approved by the County of Napa, and should such amendments be deemed substantial or changes that would substantially affect the approved end use of the site as established in the approved reclamation plan (CCR Section 3502(d), then an amended reclamation plan would need to be developed by the operator, and eventually approved by the County of Napa (i.e., amendments to the TIF could be considered and approved by Lake County, but their can be no reasonable reliance on the Lake County approval under the circumstances, and thus, such amendment would also require consideration and approval by Napa County). Once the lead agency has been designated, all changes to the reclamation plan must be approved by that lead agency. The SMGB would consider any changes to the TIF facilities to be unapproved by Lake County until subsequently approved by Napa County. There is no reasonable basis for the operator to have relied solely on approval by Lake County.

CONSIDERATIONS BEFORE THE SMGB: The SMGB is to designate which County is to serve as the SMARA lead agency for the McLaughlin Mine.

EXECUTIVE OFFICER’S RECOMMENDATION: The Executive Officer, based on the information provided herein, recommends that the SMGB determine that Napa County is the SMARA lead agency, and that Napa County will fulfill all the obligations and responsibilities of a SMARA lead agency, for the entire surface mining operation, and until the site is adequately reclaimed in accordance with the approved reclamation plan, SMARA and the SMGB’s regulations. As the SMARA lead agency, the County of Napa will need to consider amending the approved reclamation plan to incorporate the amendment approved by Lake County for reclaiming the TIF.



SUGGESTED SMGB MOTION:

To confirm SMARA lead agency status:

Mr. Chairman, in light of the information before the SMGB today, I move that the SMGB find that Napa County is the SMARA lead agency for the McLaughlin Mine, CA Mine ID #91-28-0003, as defined by Public Resources Code Section 2728.

Or,

To determine the SMARA lead agency:

Mr. Chairman, in light of the information before the SMGB today, I move that the SMGB find that [Napa, Lake or Yolo] County is the SMARA lead agency for the McLaughlin Mine, CA Mine ID #91-28-0003, under its authority provided by Public Resources Code Section 2771.

Respectfully submitted:

Stephen M. Testa
Executive Officer



EXHIBITS

Exhibit A **Pertinent Correspondence.**

Exhibit B **Pillsbury Winthrop Shaw Pittman, LLP correspondence dated
June 23, 2010.**

