



STATE MINING AND GEOLOGY BOARD

EXECUTIVE OFFICER'S REPORT

For Meeting Date: September 9, 2010

Agenda Item No. 6: Consideration for Issuance of a 45-Day Notice to Correct Deficiencies to the County of Sierra.

INTRODUCTION: Sierra County (County), with a population of 3,555, is located in the heart of the northern section of the Sierra Nevada Mountains, on Highway 49. The county seat is Downieville. At its regular business meeting, held on July 9, 2009, the SMGB was presented with a review of the current status for all surface mines located within the County's jurisdiction. The SMGB subsequently decided not to issue a 45-Day Notice to Correct Deficiencies to the County, based on a commitment from the County that it would fulfill its obligations and responsibilities as a SMARA lead agency. The SMGB is considering whether a 45-Day Notice to Correct Deficiencies should be issued to the County, or whether the County is fulfilling its obligations and responsibilities and no action by the SMGB is deemed necessary at this time.

STATUTORY AUTHORITY: Pursuant to Public Resources Code (PRC) Sections 2774.4(a) and (b),

"If the board finds that a lead agency either has (1) approved reclamation plans or financial assurances which are not consistent with this chapter, (2) failed to inspect or cause the inspection of surface mining operations as required by this chapter, (3) failed to seek forfeiture of financial assurances and to carry out reclamation of surface mining operations as required by this chapter, (4) failed to take appropriate enforcement actions as required by this chapter, (5) intentionally misrepresented the results of inspections required under this chapter, or (6) failed to submit information to the department as required by this chapter, the board shall exercise any of the powers of the lead agency under this chapter, except for permitting authority."

(b) If, no sooner than three years after the board has taken action pursuant to subdivision (a), the board finds, after a public hearing, that a lead agency has corrected its deficiencies in implementing and enforcing this chapter, and the rules and regulations adopted pursuant to this chapter, the board shall restore to the lead agency the powers assumed by the board pursuant to subdivision (a)."



Executive Officer's Report

Consideration for issuance of a 45-Day Notice of Deficiencies is provided pursuant to PRC Section 2774(c):

“(c) Before taking any action pursuant to subdivision (a), the board shall first notify the lead agency of the identified deficiencies, and allow the lead agency 45 days to correct the deficiencies to the satisfaction of the board. If the lead agency has not corrected the deficiencies to the satisfaction of the board within the 45-day period, the board shall hold a public hearing within the lead agency's area of jurisdiction, upon a 45-day written notice given to the public in at least one newspaper of general circulation within the city or county, and directly mailed to the lead agency and to all surface mining operators within the lead agency's jurisdiction who have submitted reports as required by Section 2207.”

BACKGROUND: At its regular business meeting held on July 9, 2009, the SMGB was presented with a review of the current status for all surface mines located within the County's jurisdiction. The SMGB heard from the County's Planning Director, and subsequently decided not to issue a 45-Day Notice to Correct Deficiencies based on a commitment from the County that it would fulfill its obligations and responsibilities as a SMARA lead agency. The Executive Officer was directed to conduct a thorough review of mine inspection reports within the County's jurisdiction, and conduct on-site visits, as appropriate and deemed necessary, and report back to the SMGB. A chronology of pertinent events and activities is provided in Table 1.



Table 1	
Chronology	
Date	Activity
December 12, 2006	OMR informs Sierra County of its intent to review its SMARA program.
April 4, 2007	OMR notifies Sierra County of the results of its review of the County's SMARA program and requests additional information.
August 7, 2008	Request from USFS received.
August 14, 2008	Notification to OMR.
October 7, 2008	Multi-agency site visit performed.
November 2008 to January 2009	SMGB's Executive Officer reviewed SMARA database and mine files maintained by OMR.
January 20, 2009	Correspondence from USFS to Mr. Brian Dries.
March 12, 2009	Notice of Violation issued by Sierra County to Mr. Brian Dries and Mr. Jack Nixon.
July 9, 2009	SMGB considered issuance of a 45-Day Notice to Correct Deficiencies, and subsequently deferred such determination for one year.
August-December, 2009	Executive Officer review of 2009 inspection reports performed.

ANALYSIS: In review of the OMR SMARA database, materials produced from surface mining operations located in the County include sand and gravel, decomposed granite, gold (placer and lode) and silver. Based on 2007 information provided by the County, there are 10 surface mines situated within its jurisdiction, of which six are active, two are idle, and two closed with no intent to resume operations. More recent information provided by OMR indicates that of the 10 surface mines, four are active, three are idle, and three are closed with no intent to resume.

The County, however, recognizes eight sites, of which five are deemed active, and three deemed idle for years without an approved Interim Management Plan and thus are deemed abandoned. Two sites, the Gardners Point/Pioneer Pit (CA Mine ID 91-46-0004) and Telegraph/Dutch/Klondike (CA Mine ID #91-46-0011) surface mining operations were abandoned a decade ago, and in cooperation with USFS and EPA, subsequently reclaimed and deemed by the County as closed.

A preliminary review of the current status for all surface mines located within the County's jurisdiction was performed. In particular, certain parameters indicative of overall SMARA lead agency performance were evaluated. These parameters reflect upon those minimal activities required by all SMARA lead agencies - such as conduct of inspections at least once each calendar year, review and adjustment of financial assurance cost estimates, and

appropriate enforcement actions. Also noted were substantial deviations from the approved reclamation plan, and those mines initially reported as idle that have since become abandoned, whether that was the operator's intent or not (i.e., no Interim Management Plan (IMP) in place). In addition, the average reclamation cost per disturbed acre was evaluated to serve as a general indicator as to whether such costs are reasonable or otherwise significantly lower than amounts established elsewhere throughout the state.

SMARA Mine Inspections: Adequate inspection reports are the foundation upon which a determination for adjusting the financial assurance is made, and are the vehicle for determining whether administrative and compliance/enforcement actions need to be considered by the lead agency (County). Pursuant to PRC Section 2774(b), SMARA requires that all surface mines be inspected at least once each calendar year. In addition, CCR Section 3504.5(f) of the SMGB's regulations state:

“Inspections may include, but shall not be limited to the following: the operation's horizontal and vertical dimensions; volumes of materials stored on the site; slope angles of stock piles, waste piles and quarry walls; potential geological hazards; equipment and other facilities; samples of materials; photographic or other electronic images of the operation; any measurements or observations deemed necessary by the inspector or the lead agency to ensure the operation is in compliance with Public Resources Code Chapter 9.”

CCR Section 3504.5(g) also states *“The inspection report to the lead agency shall consist of the inspection form MRRC-1...and any other reports or documents prepared by the inspector or inspection team...The lead agency shall provide a copy of the completed inspection report along with the lead agency's statement regarding the status of compliance of the operation to the director within 30 days of completion of the inspection...”*

As reported in the SMGB's Information Report 2007-01, as of 2005, about 77 percent of the surface mines within the County's jurisdiction were inspected. Although the County has claimed that inspections were performed from 2005 to 2007, such reports were not apparently provided to OMR. As of 2009, all surface mining operations (eight sites) were inspected and reports submitted to OMR. In review of these inspection reports, the following specific observations are offered:

- Based on the most recent inspections performed by the County, such inspections have significantly improved. For example, the total number of violations noted on the 2009 inspection reports is 34, reflecting the



comprehensive nature of the inspections performed by County staff. From the County's perspective, five sites are deemed active and three idle.

General observations and recommendations to improve upon the adequacy of the inspection reports are offered below:

- No reference, or in some cases inadequate reference, to reclamation or performance requirements as set forth in the approved reclamation plan, Conditions of Approval, or permit requirements, are referenced in the inspection reports. The inspection reports would benefit if specific performance standards and conditions noted in the approved reclamation plan and Conditions of Approval were specifically referenced (i.e., all slopes should not be steeper than 2H:1V). Without such references, the reports fail to assure that the mine inspections meet the requirements of the approved reclamation plan, and any Conditions of Approval, and permit requirements.
- The SMGB's regulations, CCR Section 3504.5(f) states "*Inspections may include, but shall not be limited to the following: the operation's horizontal and vertical dimensions; volumes of materials stored on the site; slope angles of stock piles, waste piles and quarry walls; potential geological hazards; equipment and other facilities; sample of materials; photographic or other electronic images of the operation; any measurements or observations deemed necessary by the inspector or the lead agency to ensure the operation is in compliance with Public Resources Code Chapter 9.*" Inadequate quantitative field information, with exception to the amount of disturbed acreage, was provided in the inspection reports. The reports fail to quantify the current configuration of cut and reclaimed slopes, including certain geologic parameters such as existing height of slopes and steepness or gradient, quantification of erosion features, amount of off-site encroachment, volume of waste piles, etc.
- The inspection reports would benefit if photographs were annotated showing specific areas of concern, and complimented conditions characterized as being out-of-compliance with the approved reclamation plan or conditions of approval.

Financial Assurance Annual Review and Adjustment: Pursuant to PRC Section 2773.1(a)(3), SMARA requires that the financial assurance cost estimate (FACE) for each surface mining operation be reviewed and adjusted annually, as appropriate. As reported in the SMGB's Information Report 2007-01, as of 2005, about 23 percent of the financial assurances had been reviewed. FACEs have since been reviewed annually by the County. However, such FACEs have not necessarily been adjusted and subsequently approved by the County. It is the operator's responsibility to provide an adjusted FACE on an annual

basis. The County has proceeded with having some of the FACEs adjusted, as appropriate, and proceeding with enforcement actions as necessary for those sites that have not been adequately adjusted.

Reclamation Cost per Disturbed Acre: As reported in the SMGB's Information Report 2007-01, as of 2005, the average cost per acre statewide was \$3,948. OMR has historically used \$5,000 per acre as a general and reasonable cost for reclamation of land disturbed by surface mining with a proposed end use as open space in Yuba County, and as a very preliminary means in evaluating whether overall financial assurances are low. Based on information provided by the County, the average amount of financial assurance held per disturbed acreage is \$6,898.78.

Enforcement: Identification of violations based on site inspections, and the issuance of a Notice of Violation (NOV), Order to Comply (OTC) and administrative penalties, when appropriate, is an important element of the SMARA administrative process available to the lead agency to ensure compliance. PRC Section 2774.1 et seq. provides the administrative procedure for the issuance of NOV's, OTC, and administrative penalties, if appropriate, and following issuance of a NOV. PRC Section 2774.1(b) states "*An order issued under subdivision (a) shall not take effect until the operator has been provided a hearing before the lead agency, or board for orders issued by the lead agency, or board for orders issued by the director, concerning alleged violations. Any order issued under subdivision (a) shall specify which aspects of the surface mine's activities or operations are inconsistent with this chapter, shall specify a time for compliance which the lead agency or director determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements and shall set a date for the hearing, which shall not be sooner than 30 days after the date of the order.*"

The County has recognized existing violations during conduct of mine inspections, and has issued NOV's. Should the operator(s) not respond in an appropriate manner, it is anticipated that the County will proceed with consideration of an Order-to-Comply and Administrative Penalties, should the situation warrant.

AB 3098 Status: The number of surface mining operations on or off the AB 3098 list can be indicative of overall site compliance. Not one surface mine site within the County is currently included on the AB 3098 list.

OMR periodically publishes a list of mines regulated under SMARA that meet provisions set forth under PRC Section 2717(b). This list is generally referred to as the AB 3098 List, in reference to the 1992 legislation that established it. Sections 10295.5 and 20676 of the Public Contract Code preclude mining operations that are not on the AB 3098 List from selling sand, gravel, aggregates or other mined materials to state or local agencies. For OMR to place a mining operation on the AB 3098 List, the surface mining operation must meet all of the following conditions:

- The operation has an approved reclamation plan;
- The operation has an approved financial assurance;
- The operation has filed its annual report;
- The operation has paid its reporting fee; and
- The operation has had its annual inspection by the lead agency which reflects the operation is in full compliance with the law.

The surface mining operation may be on the AB 3098 List if it has a pending appeal with the SMGB regarding its reclamation plan or financial assurance, provided its appeal has not been pending for more than 180 days.

Comparison with Other Lead Agencies: As noted in the SMGB's Information Report 2007-01 pertaining to SMARA lead agency performance, based on 2005 data, statewide performance of lead agencies in the area of performing inspections of surface mine sites within their respective jurisdiction, at least once each calendar year, was moderate, with the overall quality of such inspections inferred to be poor. Lead agency performance in the annual review and adjustment of financial assurances was poor, averaging 29 percent compliance, with 91 percent of the lead agencies performing below 50 percent compliance. Enforcement of SMARA in regard to IMP requirements was deemed almost non-existent.

In regard to overall performance of the County as a SMARA lead agency in 2009, in comparison with other lead agencies performance as summarized in SMGB IR 2007-01, current evaluation indicates:

- The County is now performing inspections at least once each calendar year for all eight sites within its jurisdiction, albeit, the adequacy of such inspections could be improved upon.
- Although the County has reviewed existing financial assurances, the total number of adjusted and subsequently approved financial assurances is zero. This in part reflects a determination by the County that the financial assurance amount and mechanism is deemed adequate. Regardless, the operator has an obligation to provide and adjust the financial assurance on an annual basis, and such amount is required to be reviewed and subsequently approved by the lead agency.
- The average amount of reclamation monies on file per disturbed acre is \$6,898.78, which are above the state average.

SUMMARY OF EFFORTS: At its July 9, 2009, regular business meeting, the County made a commitment to the SMGB to improve its overall SMARA program. The County has significantly improved upon its overall SMARA program over the past year, and areas of ongoing deficiencies have been identified and discussed. A comparative summary, based on information obtained from OMR, is provided below.

Table 2		
Summary of County's Past Year's Efforts		
Parameter	2008	2009
Approved Reclamation Plans	8	8
Number of Inspections Performed	0	8
Approved Financial Assurances	8	8
Total Inspection Reported Disturbed Acreage	85 (8 sites)	28.7 (8 sites)
Total Financial Assurance Mechanisms on File	\$108,939.90	\$197,994.90
Financial Assurance Amount on File per Disturbed Acre Reported on Operators Annual Reports	\$47.39	\$6,898.78
Submittal of Annual Report	4 (2007)	5 (2008)
Number of Violations Noted	0	Minimum of 34 among 7 sites
Number of Enforcement Actions Taken during Past Year (i.e., NOV, etc.)	0	6 (4 permitted sites and 2 unpermitted sites)
Number of Sites on AB 3098 List	0	0

FINDINGS: The following findings are offered:

- Based on the summary provided in Table 2, there has been appreciable improvement in the County's overall implementation of its SMARA program, and the County appears to be performing above the state's average.
- Review of the 2009 Mining Operation Annual Reports indicates five sites are deemed active and 3 sites deemed idle.
- A minimum of 34 violations among 7 surface mining sites have been noted in review of the 2009 inspection reports, with four NOVs issued to four operators (CA Mine ID #91-46-0001, #91-46-0002, #91-46-0008 and #91-46-0012). The County has indicated that it plans to follow-up with consideration of an Order-to-Comply and Administrative Penalties, as appropriate.

- No adjustments of the financial assurance were performed and subsequently approved by the County since 2007. The County plans to follow-up with appropriate enforcement actions should an operator not submit an adjusted FACE on an annual basis.
- An evaluation of the reclamation cost per acre of disturbed land appears to above state averages.
- The number of surface mining operations on or off the AB 3098 list can be indicative of overall site compliance. No sites are currently noted on the AB 3098 list.

EXECUTIVE OFFICER'S RECOMMENDATION: A SMARA lead agency need only fail in one of the six conditions set forth pursuant to PRC Section 2774.4(a), for the SMGB to consider commencement of the administrative process toward assumption of the lead agency's SMARA responsibilities and obligations, excluding permitting authority. It is the Executive Officer's opinion that the County has significantly improved upon its overall SMARA program over the past year. Areas of ongoing deficiencies have been identified and discussed. The County continues to take appropriate actions in meeting its obligations and responsibilities as a lead agency pursuant to SMARA. Thus, based on review of the administrative record, the Executive Officer recommends that the SMGB not issue a 45-Day Notice of Deficiencies to the County.

SUGGESTED MOTION LANGUAGE: The SMGB may consider the following motion language:

[Should the SMGB determine that the County is making significant progress, and that no deficiencies and violations exist, the following motion may be considered.]

Mr. Chairman, I move that the SMGB, in light of the evidence presented before the Board today find that the County is making a good faith effort in fulfilling its responsibilities and obligations as a Lead Agency under SMARA, has appreciable improved its overall SMARA program, and that the Board not consider issuance of a 45-Day Notice to Correct Deficiencies.

[Or]

[Should the SMGB determine that deficiencies and violations remain uncorrected and the County is failing to make satisfactory progress, the following motion may be considered.]

Mr. Chairman, I move that the SMGB, in light of the evidence presented before the Board today and contained in the Executive Officer's Report, direct the Executive Officer to issue a 45-Day Notice to Correct Deficiencies to Sierra County pursuant to Public Resources Code Section 2774.4(a)(c).

Respectfully submitted:

Stephen M. Testa
Executive Officer

EXHIBITS

- A SMARA Lead Agency Summary dated June 2010
(Provided by OMR)**
- B Select County Enforcement Correspondence**
- C Sierra County Response to EO Report, July 8, 2010**

