



STATE MINING AND GEOLOGY BOARD

EXECUTIVE OFFICER'S REPORT

For Meeting Date: February 10, 2011

Agenda Item No. 5: Public Hearing: Reclamation Plan Appeal for the Mosler Rock Quarry (CA Mine ID #91-56-0025), Ventura County, Pursuant to Title 14, Division 2, Chapter 8, Subchapter 1, California Code of Regulations, Article 5, Section 3655.

INTRODUCTION: Petitioner Mosler Rock Products, Inc. (hereinafter referred to as Mosler), on July 21, 2010, filed with the State Mining and Geology Board (hereinafter referred to as SMGB) an Intent to Appeal stating that the County of Ventura (hereinafter referred to as County) failed, pursuant to Division 2, Chapter 9, Public Resources Code (PRC) Section 2770(e) of the Surface Mining and Reclamation Act (SMARA), to act within a reasonable time frame, and failed to review and approve Mosler's reclamation plan amendment and financial assurance cost estimate for the Mosler Ojai Quarry (CA Mine ID# 91-56-0025). Mosler has petitioned the SMGB to take jurisdiction of the appeal under two statutes within the Surface Mining and Reclamation Act (hereinafter referred to as SMARA; PRC Section 2770, subdivisions (e)(2) and (e)(3)).

REGULATORY AUTHORITY: The SMGB has established procedures and regulations for determining if the grounds upon which a petition to appeal are made under PRC Section 2770(e) raise significant issues that are within the jurisdiction of the SMGB (California Code of Regulations (CCR), Title 14, Section 3650, et seq.).

PRC Section 2770(e) provides that:

"Any person who, based on the evidence of the record, can substantiate that a lead agency has either (1) failed to act according to due process or has relied on considerations not related to the specific applicable requirements of Sections 2772, 2773, and 2773.1, and the lead agency surface mining ordinance adopted pursuant to subdivision (a) of Section 2774, in reaching a decision to deny approval of a reclamation plan or financial assurances for reclamation, (2) failed to act within a reasonable time of receipt of a completed application, or (3) failed to review and approve reclamation plans or financial assurances as required by subdivisions (c) and (d), may appeal that action or inaction to the board."

CCR Section 3650 provides, in part:

"Any person filing an appeal to the Board pursuant to PRC 2770 shall, within 15 days of exhausting his or her right to appeal in accordance with the procedures



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of the lead agency, file an intent to appeal by submitting the following information. Failure to submit all the required, completed documents to the board within the 15 day filing period will result in an incomplete filing of intent and an automatic rejection of the appeal....”

California Code of Regulations (CCR), Title 14, Section 3650, et seq. provides procedures and regulations for determining if the grounds upon which a petition to appeal are made under PRC Section 2770(e) raise significant issues that are within the jurisdiction of the SMGB. CCR Section 3650 provides, in part:

“Any person filing an appeal to the Board pursuant to PRC 2770 shall, within 15 days of exhausting his or her right to appeal in accordance with the procedures of the lead agency, file an intent to appeal by submitting the following information. Failure to submit all the required, completed documents to the board within the 15 day filing period will result in an incomplete filing of intent and an automatic rejection of the appeal....”

CCR Section 3651 provides two criteria upon which the Chairman shall make his decision to accept or deny a hearing on a reclamation appeal. These two criteria are:

“(a) Whether the appeal raises any issues which can legally be addressed by the Board within the limits of PRC 2770(e) and the rules of the Board; and,

(b) Whether the appeal specifically relates to the lead agency's review of reclamation plans submitted for surface mining operations pursuant to the provisions of PRC 2770.”

Upon consideration of the evidence before the SMGB, PRC Section 2770(g), notes the consideration before the SMGB:

"Appeals that the board does not decline to hear shall be scheduled and heard at a public hearing held within the jurisdiction of the lead agency which processed the original application within 45 days of the filing of the appeal, or any longer period as may be mutually agreed upon by the board and the person filing the appeal. In hearing an appeal, the board shall only determine whether the reclamation plan or the financial assurances substantially meet the applicable requirements of Sections 2772, 2773, 2773.1 and the lead agency surface mining ordinance adopted pursuant to subdivision (a) of Section 2774. A reclamation plan or financial assurances determined to meet these requirements shall be approved. A reclamation plan or financial assurances determined not to meet these requirements shall be returned to the person filing the appeal with a notice of deficiencies, who shall be granted, once only, a



period of 30 days, or a longer period mutually agreed upon by the operator and the board, to correct the noted deficiencies and submit the revised reclamation plan or the revised financial assurances to the lead agency for review and approval.”

Upon determination by the SMGB in a public hearing, notification of the SMGB’s determination is provided in CCR Section 3659 which states:

"Hearing Procedures - Determination. Following the public hearing, the Board shall determine whether, upon the record before it, the proposed reclamation plan substantially meets the requirements of PRC Section 2772 and 2773 and the lead agency surface mining and reclamation ordinance, and the provisions of Section 3654 of this article. Notification of the Board's determination shall be made by certified mail to the appellant and the lead agency within 15 days following the regular business meeting of the Board at which the decision is made. In cases where the reclamation plan is not approved, deficiencies shall be noted in the correspondence notifying the appellant and the lead agency of the Board's decision, and the operator shall be put on notice that deficiencies must be corrected and a revised reclamation plan filed with the lead agency within 30 days."

BACKGROUND:

Jurisdictional issues: Jurisdictional and completeness issues were reviewed and summarized below:

Timeliness of Appeal under CCR Section 3650: *Mosler timely filed its Intent to Appeal with the SMGB within the 15 days of exhausting its right to appeal in accordance with the procedures of the County. Mosler notified the County by letter dated July 10, 2010, that it had exhausted its appeal rights with the County; the Intent to Appeal was received at the SMGB office on July 22, 2010. Thus, the Intent to Appeal was timely filed with the SMGB.*

The Intent to Appeal **was** timely filed with the SMGB.

Completeness of Appeal under CCR Section 3650: CCR Section 3650 requires that the appeal include completed documents. Such documents include a) a map indicating the exact location of the surface mining operation, including township and range, b) copy of all documents which together were proposed to serve as the reclamation plan and which were submitted to the lead agency for review and approval pursuant to PRC Section 2770, c) written statements with supporting documentation indicating the basis for the appellant’s challenge of the lead agency’s action or lack of action, and d) copy of the notice to the lead

agency that the appellant intends to file an appeal to the SMGB. All such documents were provided as part of the Appeal request.

*The Intent to Appeal **was** completely filed with the SMGB.*

3. Completeness of Appeal under CCR Section 3651(a): In considering jurisdiction, a determination needs to be made as to whether the appeal raises any issues which can legally be addressed by the SMGB within the limits of PRC Section 2770(e) and the rules of the SMGB.

The issue under appeal is the consideration by the County; acting as the SMARA lead agency, of a reclamation plan amendment submitted by Mosler. Mosler argues that the County failed to act within a reasonable time of receipt of a completed application, and failed to review and approve the reclamation plan amendment or financial assurances provided by Mosler. After two years, the County failed to either accept or deny approval of Mosler's Amended Reclamation Plan. One could argue that interminable processing by a public agency is functionally equivalent to a denial, and failure of the City to process Mosler's application, or take action upon it, within a reasonable period of time is tantamount to a denial, which meets the requirements of PRC Section 2770(e). However, one could also argue that when no times are specified in the lead agency's ordinance, then the interval between successive review steps shall not exceed 60 days (CCR Section 3650(d)).

Thus, the appeal **did** raise an issue that can legally be addressed by the SMGB within the limits of PRC Section 2770(e).

Site Description: Petitioner Mosler, on July 21, 2010, filed with the SMGB an Intent to Appeal stating that the County of Ventura (hereinafter referred to as County) failed to approve and timely act upon an Amended Reclamation Plan for the Ojai Quarry. Mosler has petitioned the SMGB to take jurisdiction of the appeal under three statutes under SMARA: PRC Section 2770(e), subdivisions (e)(1), (e)(2) and (e)(3)). The Chairman on August 26, 2010, and pursuant to CCR Section 3651, made a determination that the appeal was within the jurisdiction of the SMGB.

Material extraction has occurred on the property since the 1930s. The surface mining operation is characterized as a hard rock quarry located northwest of the City of Ojai, Ventura County. The site is claimed to be the only source for rip-rap and other rock in the County that meets all federal and state standards and specifications for marine usage. Schmidt Construction, the original operator, received approval of a reclamation plan in 1981 and originally covered 4 acres. In 1995, the reclamation plan was amended to cover 13 acres, as part of an application to modify the site's conditional use permit (CUP 3489-2). The current owner/operator, Mosler Rock Products, acquired the operation from Schmidt Construction in February 2005.



Prior to February 2005, several issues were noted. The previous operator encroached on 1.3 acres of neighboring property, and perched rocks posed both a potential safety and environmental hazard. Following issuance by the County of a Notice of Violation on February 14, 2008, an Amended Reclamation Plan was submitted to the County on August 8, 2008, along with proof of a financial assurance in the amount of \$22,322.33, and financial assurance cost estimate and supportive documentation.

Summary of County's Review Process: On February 14, 2008, an Amended Reclamation Plan was submitted to the County on August 8, 2008, along with proof of a financial assurance in the amount of \$22,322.33, and financial assurance cost estimate and supportive documentation. The County subsequently commented in correspondence dated October 14, 2008, on the Amended Reclamation Plan (2.5 months after the initial submittal). In correspondence dated June 25, 2009 (11 months following submittal of the plan), County staff forwarded the plan to the Office of Mine Reclamation, and noted upon review of the amended Reclamation Plan, County has deemed it adequate pursuant to SMARA and the SMGB's regulations, and the Ventura County Non-Coastal Zoning Ordinance.

The Department of Conservation Office of Mine Reclamation (OMR) commented on the February 14, 2008, Amended Reclamation Plan in July 2009, but the County did not get back to the OMR until October 27, 2009 with clarification that the Amended Reclamation Plan was a minor amendment, which OMR subsequently concurred, based on additional findings made by the County, as noted in correspondence dated November 18, 2009. OMR also requested from the County an amended site map, but the County did not provide a request for such map from Mosler until January 19, 2010, and rather than forward the previously submitted reclamation map, County staff noted that the map was no longer adequate, and requested a new map reflecting additional issues – a new request a year and a half after the original submittal in February 2008.

New issues raised by the County pertained to a new interpretation by the County; whereas, the County concluded that the newly disturbed areas noted in the Amended Reclamation Plan did not correspond with mining phasing limits set forth in CUP 3289-2. Despite efforts to clarify what was considered a minor amendment to an existing approved reclamation plan and Financial Assurance Cost Estimate (FACE), as noted in Mosler's correspondences dated August 9 and 12, 2010, no approval consideration of the amended reclamation plan or FACE was made.

In lieu of taking any action on the Amended Reclamation, addenda, and the accompanying FACE, the County issued a Notice of Violation and although an Amended Reclamation Plan has been pending for nearly two years, noted in correspondence dated July 9, 2010, that "*To date, you have not submitted the requested amended reclamation plan.*" The Notice of Violation also requested submittal of an updated FACE.



ANALYSIS: An analysis was performed to assess whether the County failed to act within a reasonable time of receipt of a completed application, or failed to review and approve reclamation plans or financial assurances as required by PRC Section 2770(c) and (d). More specifically, the SMGB must determine whether the amended reclamation plan and financial assurance cost estimate substantially meet the applicable requirements of Sections 2772, 2773, 2773.1, and the lead agency surface mining ordinance adopted pursuant to subdivision (a) of Section 2774.

The two primary issues are further discussed herein:

- 1) The failure of the County to process Mosler's Amended Reclamation Plan and Financial Assurance in a timely manner; and
- 2) Are the amended reclamation plan and financial assurance cost estimate adequate and do they meet the minimum requirements of SMARA and the SMGB's regulations.

Alleged failure of the County to process Mosler's Amended Reclamation Plan and Financial Assurance in a timely manner: Pursuant to CCR Section 3650 (B) notes that "reasonable time" means the time period specified in the lead agency's surface mining and reclamation ordinance, or that which is mutually agreed upon by the applicant and the lead agency. Where no times are specified in the lead agency's ordinance, then the interval between successive review steps shall not exceed 60 days.

The County is the SMARA lead agency for the subject site. After two years, the County failed to either accept or deny approval of Mosler's Amended Reclamation Plan. In addition, the County issued a Notice of Violation on July 9, 2010, requesting submittal of an amended reclamation plan and FACE, apparently ignoring the earlier submittal of an Amended Reclamation Plan and FACE.

Alleged adequacy of the amended reclamation plan and financial assurance cost estimate deem as meeting the minimum requirements of SMARA and the SMGB's regulations: CCR Section 3653 provides guidance in the review for adequacy of amended reclamation plan. A review of the February 2008 amended reclamation plan was performed by OMR as documented in their correspondence dated July 28, 2009. Several inadequacies were raised by OMR pertaining to mining operation and closure, geotechnical requirements, hydrology and water quality, environmental setting and protection of wildlife habitat, and resoiling and revegetation. The absence of any slope stability analysis further questions the feasibility of the final configuration of the cut slope. Since these specific items still require to be



addressed, the February 2008 amended reclamation plan is not adequate for approval consideration by the SMGB at this time.

Furthermore, the financial assurance cost estimate is not adequate and can not be determined as adequate until the amended reclamation plan is eventually approved. In the meantime, a financial assurance bond was issued (?) in the amount of \$22,322.33 (County approved in October 2008).

The County is the SMARA lead agency for the subject site. The County reviewed the contents of the reclamation plan amendment application dated February 14, 2008, and initially considered the application adequate. After 19 months following the initial submittal of an Amended Reclamation Plan and FACE, the County failed to deny or approve such submittals.

The issue under appeal is the consideration by the County, acting as a SMARA lead agency, of a reclamation plan amendment application submitted by Mosler. PRC Section 2770(d) states that *“Reclamation plans or financial assurances determined not to substantially meet these requirements shall be returned to the operator within 60 days. The operator has 60 days to revise the plan or financial assurances to address identified deficiencies, at which time the revised plan or financial assurances shall be returned to the lead agency for review and approval.”* Mosler argues that the County failed to act within a reasonable time of receipt of a completed application for the subject site. Mosler made necessary revisions to its application, but the County did not follow up as stipulated pursuant to PRC Section 2770(d). “Approval” means presentation of the matter to a discretionary body for consideration and decision. Excessively protracted and serial reviews, although each may be conducted within 60 days, is inconsistent with PRC Section 2770(d). Where the application is not presented for a discretionary decision the agency is acting in conflict with SMARA’s intent.

Thus, it could be concluded that County did fail to review and approve the reclamation plan and financial assurances as required under subdivision (c) and (d), because Mosler had been provided no reasonably foreseeable conclusion to the process of County review. And although the County did not deny approval of Mosler’s reclamation plan, it could be concluded that interminable processing by a public agency is functionally equivalent to a denial. Failure of the County to process Mosler’s application, ignore it, or take action upon it, within a reasonable period of time is tantamount to a denial.

In regards to financial assurances, a FACE was initially submitted with the Amended Reclamation Plan on February 14, 2008. A revised financial assurance and addenda to the Amended Reclamation Plan were submitted to the County on June 25, 2010. The County apparently has, to date, not acknowledged such submittals nor provided a list of deficiencies.



- (3) Substantial compliance with the reclamation provisions of the lead agency surface mining and reclamation ordinance as certified by the Board pursuant to the provisions of PRC 2774; and

In regards to substantial compliance with the reclamation provisions of County's mining ordinance as certified by the SMGB, the County's mining ordinance, Section 8107-9.5.1, clearly states the requirements for approval of a reclamation plan noting "*All mining and reclamation shall be consistent with the County General Plan, the Ventura County Water Management Plan, and the State Surface Mining and Reclamation Act of 1975 (SMARA), as amended, and State policy adopted pursuant to SMARA.*" In addition, Section 8107-9.5.3 states: "*No provisions in this Chapter or in the County General Plan shall be construed to encourage any mining operation or facility which would endanger the public's health, safety or welfare, which would endanger private or public facilities or....*" It is apparent that Mosler has not fully complied with such requirements to date, albeit, the operator has taken steps and continues to take steps to remedy public safety concerns.

HEARING PROCEDURE: The purpose of this Hearing is to allow the Appellant and the County of Ventura to hear arguments regarding the County's alleged failure to approve an amended reclamation plan and financial assurance cost estimate in a timely manner. Following the presentations, the SMGB will consider the issues before it, and may ask questions of the participants.

CCR Section 3947 set forth hearing procedures as follows:

- (1) Identification of the record;
- (2) Statements on behalf of the appellant;
- (3) Statements on behalf of the lead agency;
- (4) Statements on behalf of the public;
- (5) Rebuttal on behalf of the appellant; and
- (6) Motion to close the public hearing.

Notwithstanding the above, the Chairman or the Chairman's designee (SMGB Member) for purposes of conducting the hearing may in the exercise of discretion, determine the order of the proceedings.

The Chairman or the Chairman's designee (SMGB Member) shall have the authority to impose time limits upon statements and presentations and accept written statements in lieu of oral statements.

Written statements (12 copies) must be submitted to the SMGB at least five days prior to the hearing. The public hearing shall be recorded.

CCR Section 3659 provides administrative procedures pertaining to the SMGB's determination and states:

“Following the public hearing, the Board shall determine whether, based on the record before it, the proposed reclamation plan substantially meets the requirements of PRC 2772 and 2773 and the lead agency surface mining and reclamation ordinance, and the provisions of Section 3654 of this article. Notification of the Board's determination shall be made by certified mail to the appellant and the lead agency within 15 days following the regular business meeting of the Board at which the decision is made. In cases where the reclamation plan is not approved, deficiencies shall be noted in the correspondence notifying the appellant and the lead agency of the Board's decision, and the operator shall be put on notice that deficiencies must be corrected and a revised reclamation plan filed with the lead agency within 30 days.”

CONSIDERATION BEFORE THE BOARD: The SMGB at the time of this hearing and as defined pursuant to PRC Section 2770(g), will determine whether:

1. A reclamation plan or financial assurances determined to meet these requirements shall be approved; or
2. A reclamation plan or financial assurances determined not to meet these requirements shall be returned to the person filing the appeal with a notice of deficiencies, who shall be granted, once only, a period of 30 days, or a longer period mutually agreed upon by the operator and the board, to correct the noted deficiencies and submit the revised reclamation plan or the revised financial assurances to the lead agency for review and approval.

In hearing an appeal, the SMGB shall only determine whether the reclamation plan or the financial assurances substantially meet the applicable requirements of Sections 2772, 2773, 2773.1 and the lead agency surface mining ordinance adopted pursuant to subdivision (a) of Section 2774.

The SMGB in its deliberations has several options for consideration:

1. The SMGB may deem the County has acted in a manner consistent with the intent of SMARA, and was correct in its action not to approve an amended reclamation plan and financial assurance cost estimate until Mosler adequately addressed all comments to the satisfaction of the County. In this case, Mosler would be requested to revise the August 2008 Amended Reclamation Plan and submit it to the County within 30 days for approval consideration;
2. The SMGB may deem that the County has failed to act in a manner consistent with the intent of SMARA, and approve the August 2008 Amended Reclamation Plan and financial assurance cost estimate of \$22,322.33 (County approved in October 2008), that being the last version of the plan reviewed by the County at the time the appeal submittal by Mosler was accepted by the SMGB's chairman;
3. The SMGB may consider "Conditional Approval" of the August 2008 Amended Reclamation Plan, providing any outstanding issues the County's and OMR's may have are fully resolved; or
4. The SMGB may consider continuing this matter until a time mutually agreed upon between the Mosler and the SMGB.

EXECUTIVE OFFICER'S FINDINGS: The Executive Officer offers the following findings:

Finding No. 1: The County did fail to review and approve the reclamation plan and financial assurances as required under subdivision (c) and (d), because the County had not presented the matter to a discretionary body for consideration and decision. Mosler was not provided any reasonably foreseeable conclusion to the process of County review.

Finding No. 2: Mosler had not adequately addressed all pertinent comments and issues identified by both the County and OMR, as of the submittal of the amended reclamation plan dated August 2008.

CONSIDERATIONS BEFORE THE SMGB: The SMGB has several considerations pursuant to CCR Section 3659.

- The SMGB must first determine whether upon the record before it, the proposed reclamation plan substantially meets the requirements of PRC Section 2772 and 2773 and the lead agency surface mining and reclamation ordinance, and the provisions of Section 3654 of this article.

- Should the SMGB not deem the amended reclamation plan as adequate, and not approve the amended reclamation plan, deficiencies shall be provided in the correspondence notifying the appellant and the County of the SMGB's decision, and the operator shall be put on notice that deficiencies must be corrected and a revised reclamation plan filed with the lead agency within 30 days.

EXECUTIVE OFFICER'S RECOMMENDATION: The Executive recommends that the SMGB determine that the County has failed in approving an amended reclamation plan and financial assurance cost estimate for the Mosler Ojai Quarry in a timely manner. It is also recommended that the SMGB does not approve the amended reclamation plan for the subject site, since it is not deemed adequate in meeting the minimum requirements of SMARA and the SMGB's regulations. The SMGB should also direct the Executive Officer to notify the operator of the deficiencies, and direct the operator within 30 days upon notification to submit a amended reclamation plan to the County which meets the minimum requirements of SMARA and the SMGB's regulations.

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

Motion Option No. 1 – To approve the August 2008 amended reclamation plan:

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, approve the amended reclamation plan dated August 2008 for the Mosler Rock Quarry (CA Mine ID #91-56-0025), located in the County of Ventura.

Or,

Motion Option No. 2a – Deny approval of the August 2008 amended reclamation plan:

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, 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, deny approval of the amended reclamation plan dated August 2008 for the Mosler Rock Quarry (CA Mine ID #91-56-0025), located in the County of Ventura.

And,

Motion Option No. 2b – Provide notification of determination and listing of deficiencies:

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, Mr. Chairman, I move that the Board, in light of the evidence presented before the Board today and contained in the Executive Officer's Report, to direct the Executive Officer to notify the appellant and County of the Board's determination and list of deficiencies, put the operator on notice that deficiencies must be corrected and a revised reclamation plan filed with the lead agency within 30 days.

Respectfully submitted:

Stephen M. Testa
Executive Officer

EXHIBIT A: August 2008 Amended Reclamation Plan

EXHIBIT B: Appellant and County Briefs

EXHIBIT C: Select Correspondence

