STATE MINING AND GEOLOGY BOARD

EXECUTIVE OFFICER'S REPORT

For Meeting Date: March 14, 2013

Agenda Item No. 6: Public Hearing: Appeal to the State Mining and Geology Board Regarding Approval by the County of Fresno of the Carmelita Mine and Reclamation Project (Colony Land Company, LP, Operator), County of Fresno, Pursuant to Public Resources Code Section 2775.

INTRODUCTION: Petitioner Friends of the Kings River (Friends, Petitioner) filed on October 30, 2012, with the State Mining and Geology Board (SMGB) an Intent to Appeal a decision by the County of Fresno (Fresno) to approve a reclamation plan and Conditional Use Permit for the Carmelita Mine and Reclamation Project (Project) on land designated by the SMGB to contain regionally significant mineral resources on the grounds that the permit and reclamation plan for the Project were not in compliance with the Surface Mining and Reclamation Act (SMARA) and the County's Zoning Ordinance 858. Friends have petitioned the SMGB to take jurisdiction for the appeal pursuant to SMARA, and specifically, PRC Section 2775(a). Pursuant to PRC Section 2775(c), the SMGB shall not exercise its independent judgment on the evidence but shall only determine whether the decision of the County is supported by substantial evidence in the light of the whole record. If the SMGB determines the decision of the County was not supported by substantial evidence in the light of the whole record it shall remand the appeal to the County and the County shall schedule a public hearing to reconsider its action.

STATUTORY AND REGULATORY AUTHORITY: Under the provisions of SMARA, the SMGB has authority to designate in regulation specific geographic areas of the State of California as having statewide or regional mineral significance (ref. PRC Section 2790). SMARA Section 2775(a) provides that the SMGB may hear an appeal of an applicant whose request for a permit to conduct a surface mining operation in an Area of Regional Significance (as defined PRC Section 2726) has been denied by a lead agency. The SMGB has, pursuant to PRC Section 2775(b), established procedures in 14 CCR Section 3625 et seq. for determining if the grounds upon which a petition to appeal are made raise significant issues that are within the jurisdiction of the SMGB. PRC Section 2775(c) provides an administrative process for appeals the SMGB decides not to decline. Specifically, PRC Section 2775 et seq. states:

> *"(a) An applicant whose request for a permit to conduct surface mining operations in an area of statewide or regional significance has been denied by a lead agency, or any person who is aggrieved by the granting of a permit to conduct surface mining operations in an area of statewide or regional significance, may, within 15 days of exhausting his rights to appeal in accordance with the procedures of the lead agency, appeal to the board.*
>
> *(b) The board may, by regulation, establish procedures for declining to hear appeals that it determines raise no substantial issues.*

"*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 30 days of the filing of the appeal, or such longer period as may be mutually agreed upon by the board and the person filing the appeal. In any such action, the board shall not exercise its independent judgment on the evidence but shall only determine whether the decision of the lead agency is supported by substantial evidence in the light of the whole record. If the board determines the decision of the lead agency is not supported by substantial evidence in the light of the whole record it shall remand the appeal to the lead agency and the lead agency shall schedule a public hearing to reconsider its action*."

The administrative process for a designation appeal under PRC Section 2775 et seq. is provided under CCR Section 3626 which states:

"Any person filing an appeal to the Board pursuant to PRC 2775 shall, within 15 days of exhausting his or her rights 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 3627 provides three criteria upon which the Chairman shall make his decision to accept or deny a hearing on the appeal:

"*(a) Whether the appeal raises any issues which legally can be addressed by the Board within the limits of the Public Resources Code and the rules of the Board; and,*

(b) Whether the appeal specifically relates to the approval or denial of a permit to conduct surface mining operations in an area designated by the Board as being of statewide or regional significance.

(c) Whether the appeal is that of a lead agency's reconsideration of an appeal previously remanded by the board to that lead agency, and the appellant's challenge raises no new substantial issues with respect to the action taken by the lead agency to approve or deny the permit to conduct surface mining operations."

Pursuant to California Code of Regulations (CCR) Article 4, Section 3634, the SMGB will be considering:

"*Hearing Procedures - Determination. Following the public hearing, the Board shall determine whether, upon the record before it, the lead agency decision was made based on substantial evidence in light of the whole record. Notification of the Board's determination shall be made by certified mail to the appellant, the lead agency, and the project proponent (when not the same person as the appellant) within 15 days following the regular business meeting of the Board at which the decision is made*."

BACKGROUND: The proposed project site is within the jurisdictional boundaries of the County of Fresno and is situated south of State Route 180, east of the Kings River, approximately 15 miles east

of the City of Fresno, six miles east of the City of Sanger, in an unincorporated area of the County. Colony Land Company LP (Applicant) submitted an application to the County for a Conditional Use Permit and Reclamation Plan dated May 2012 to develop and reclaim an aggregate mine and related processing plant, concrete and asphalt plants, and a recycling plant on 886 acres of a 1,500 acre site, which is further comprised of 14 parcels. The project is proposed to be operated by Carmelita Resources. Most of the site is currently in fruit plant production. The project is anticipated to have a maximum production rate of 1.25 million tons of aggregate per year, with an operating life of 100 years.

The proposed project area is located within Sector K of the Fresno Production-Consumption Region (CCR Section 3550.13), an area of statewide or regional significance. The area where the project is proposed has been classified by the California Geological Survey (CGS; formerly California Division of Mines and Geology) as a Mineral Resources Zone (MRZ) since 1986, and incorporated as MRZ in the Fresno County General Plan in 1987. The area where the proposed project site is located, Sector K, was designated by the SMGB as being of regional significance in 1988. The proposed project area is zoned agricultural; the site would be converted to non-agricultural use (FEIR, 2012).

The reclamation plan calls for backfilling a portion of the 886 acres to be mined, reclaiming up to 240 acres for agricultural purposes. Depending on the amount of available fill, as much as 646 acres of the site will be left as water basins. Such water basins would be maintained completely devoid of vegetation or habitat value in order to deter wildlife. Note that the Environmental Impact Report states, "*a maximum of 583 acres may be permanently removed from agricultural production. . . ",* which is in conflict with the reclamation plan. Notably, being in close proximity to the Reedley Municipal Airport, the project proponent has determined that the water basins will need to be maintained void of vegetation and habitat value in perpetuity to reduce potential risk to aircraft striking birds.

Administrative Process under SMARA: As an overview, a chronology of salient actions or activities is summarized in Table 1.

Table 1 Summary of Salient Actions and Activities	
Date	**Action or Activity**
May 7, 2012	County submits proposed reclamation plan dated May 2012 to OMR for review.
July 9, 2012	OMR comment letter to County following review of reclamation plan dated May 2012.
July 10, 2012	County responds to OMR's comments on the reclamation plan, and request that the applicant supplement the reclamation plan with additional information which the County notes certain comments (OMR comment nos. 4, 6 and 7 which pertains to grading and drainage, water balance calculation and RWQCB discharge regulations) via an amended reclamation plan.
July 10, 2012	County provides DOC OMR 30-Day Notice of hearing before the County's Planning Commission.
July 10, 2012	County responds to OMR's comments (OMR's Letter dated July 9, 2012), and notes comments shall be processed as a plan amendment.
August 1, 2012	OMR notes that their July 9, 2012, comment letter meets the minimum requirements of SMARA and the SMGB's regulations.
August 8, 2012	OMR notes "*that the reclamation plan will not be considered complete until the operator complies with the following specific conditions from the County's July 10, 2012 letter*." (OMR comments nos. 4, 6 and 7 pertain to grading and drainage, water balance calculation and RWQCB discharge regulations)
August 8, 2012	County responds to OMR's comments noting that responsive conditions will be incorporated via an amendment to the reclamation plan.
August 9, 2012	County's Planning Commission approves conditional use permit and reclamation plan.
September 14, 2012	County publishes 30-Day Notice of Hearing.
October 16, 2012	County Board of Supervisors approves the project.
October 30, 2012	Intent to Appeal submitted by Friends
November 13, 2012	County Notice of Reclamation Plan Approval
November 15, 2012	Pursuant to PRC Section 2774(d)(2), County provides final response to Director's (DOC, OMR) comments; Conditions of approval pertaining to grading and drainage, water balance calculation and RWQCB discharge regulations to be addressed via an amendment, minor amendment, and amendment to the reclamation plan, respectively.
Post Administrative Record Submittals	
March 4, 2013	Correspondence from Appellant to County Counsel requesting copy of water balance report submitted to OMR which Appellant has not had opportunity to review, procedural matters, among other issues.
March 5, 2013	Correspondence from County to SMGB summarizing its position and actions previously taken.
March 5, 2013	Correspondence from law firm of Downey Brand (representing project) to SMGB with executive summary
March 5, 2013	Document provided by Downey Brand (representing operator) with suggested language for the SMGB's Executive Officer's report.
March 6, 2013	Email from law firm of Downey Brand (representing project) to Executive Officer regarding position.

March 6, 2013	Correspondence from Appellant to SMGB expanding on the issues raised in the previous appeal letter

County's Decision: The Colony Land LP submitted a reclamation plan dated May 2012 to the County for approval consideration. On August 9, 2012, the County Planning Commission considered the Project (both the reclamation plan and Conditional Use Permit application), and approved the Project. Friends appealed to the Board of Supervisors. On October 16, 2012, the County Board of Supervisors, on appeal from the Planning Commission, approved the Project.

Friends' Appeal to the SMGB: Petitioner Friends asserts that the Conditional Use Permit application and Reclamation Plan as submitted by Colony Land Group LP and approved by the County was inconsistent with SMARA and the SMGB's regulations.

Specifically, Petitioner in the Intent to Appeal dated October 30, 2012, alleged:

- The County's decision to approve the proposed reclamation plan was in conflict with CCR Section 3704(d)(f) since insufficient data and analysis was provided to support the conclusions pertaining to slope stability.

- The County's decision to approve the proposed reclamation plan was in conflict with PRC Section 2733 and 2712(a), 2712(b) and 2712(c) since more than 600 acres will not be reclaimed to a usable condition, and the Project and proposed reclamation will harm the watershed and create public health and safety hazards.

- The County's decision to approve the proposed reclamation plan was in conflict with PRC Section 2711(b) since the Project will not result in the "*subsequent beneficial use of the mined and reclaimed land*."

- The County's decision to approve the proposed reclamation plan was in conflict with CCR Sections 3707 and 3708 because approximately 600 acres of prime and important agricultural lands will not be reclaimed to produce any crops, and may or may not perform the dubious "*function*" identified as "*water basins*."

Appeal Decision: In light of the foregoing and the body of evidence submitted by the Petitioner with its Intent to Appeal, on November 7, 2012, the Chairman determined that there was sufficient prima facie evidence to conclude that the SMGB does have jurisdiction under PRC Section 2775 to consider the Petitioner's appeal. The appeal under this statute was accepted.

Administrative Record: On February 27, 2013, the SMGB received three certified copies of the administrative record. On February 27, 2013, upon review and pursuant to CCR Title 14, Division 2, Chapter 8, Subchapter 1, Article 4, Section 3628, the Executive Officer concluded that the administrative record was considered complete.

DISCUSSION: CCR Section 3700 addresses applicability of reclamation performance standards. CCR Section 3700(b) states:

> "*Where an applicant demonstrates to the satisfaction of the lead agency that an exception to the standards specified in this article is necessary based upon the*

> *approved end use, the lead agency may approve a different standard for inclusion in the approved reclamation plan. Where the lead agency allows such an exception, the approved reclamation plan shall specify verifiable, site-specific standards for reclamation. The lead agency may set standards which are more stringent than the standards set forth in this Article; however, in no case may the lead agency approve a reclamation plan which sets any standard which is less stringent than the comparable standard specified in this Article.*"

A fundamental procedural problem is evident in this matter. In OMR correspondence dated August 8, 2012, OMR reiterated and clarified its earlier comments provided in correspondence dated July 9, 2012, and August 1, 2012. Notably, it is stated that "*OMR's position is that the reclamation plan will not be considered complete until the operator complies with the following specific conditions from the County's July 10, 2012 letter (Attachment), prior to the commencement of mining activities:*

- *Condition of Approval from County Response #4.*
- *Condition of Approval from County Response #6.*
- *Condition of Approval from County Response #7."*

The status of condition of Approval #4 and #6 remain uncertain at the time this Executive Officer's report was prepared. However, it is my understanding that OMR received a letter titled "*Colony Company's Carmelita Project Supplemented Reclamation Plan*," dated February 26, 2013. In addition, OMR informed the Executive Officer that the letter also indicated that the reclamation plan for this project was updated to include *Carmelita Mine and Reclamation Project, Engineered Grading and Drainage Plan*, dated February 19, 2013, prepared by EMKO Environmental, Inc. and Sespe Consulting, Inc. (Condition of Approval from Response # 4 of Fresno County's July 10, 2012 letter), and *Carmelita Mine and Reclamation Project, Postmining Water Balance Report*, dated February 19, 2013, prepared by EMKO Environmental, Inc. (Condition of Approval from Response #6 of County's July 10, 2012 letter)

In the County's July 10, 2012 response to OMR's comments dated July 9, 2012, the County notes, "*Upon receipt of and deeming the materials to be complete, the information shall be processed as a plan amendment to allow the incorporation of these documents into the reclamation plan. As part of the review process, the County shall provide the Department of Conservation/Office of Mine Reclamation the opportunity to review the amended reclamation plan, in accordance with the provisions of Public Resources Code Section 2774",* and that the Conditional Use Permit would be subject to such Conditions of Approval.

From the foregoing, it seems evident that the County's final determination of how it will address all these concerns is yet to be reached, and yet, those decisions necessarily will become part of what the reclamation plan, coupled with the CUP, will require. Because the proposed water basins raise serious issues with respect to whether reclamation standards will be met by the proposed plan, and because the foregoing OMR concerns are likely to lead to alterations to the plan which will refine how those issues are addressed, it is apparent that the final reclamation plan remains to be determined. It appears, therefore, that the SMGB properly may conclude that it would be appropriate to defer consideration of Petitioner's appeal until the lead agency has finally resolved all SMARA-related issues it intends to with respect to the project proposal.

While it could be argued that the SMGB could receive the parties' inputs regarding OMR's concerns and, from that, determine appropriate modifications, if any, to Fresno County's current approval of the project's reclamation plan, so that OMR's concerns would be addressed consistent with SMARA, that duty belongs first and foremost with the lead agency.

Another question raised is whether establishment of a habitat value of zero, or even a negative habitat value, can be deemed or characterized as reclamation. In other words, a question is raised as to whether the proposed end use, without sufficient supportive analysis and documentation, meets the intent of SMARA and the definition of reclamation. The intent of SMARA is provided pursuant to PRC Section 2712 which 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."

Furthermore, SMARA defines reclamation pursuant to PRC Section 2733 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*."

FINDINGS: In review of the administrative record, the following findings are offered:

Finding No. 1: The County did not have available a water balance analysis or slope stability analysis to address the potential instability of proposed 2:1 (horizontal:vertical) slopes designed for all water basins at the time the County approved the reclamation plan and conditional use permit. Thus, it remains uncertain as to whether the water balance calculations and issues related to slope stability were adequately addressed at the time the County approved the reclamation plan.

Finding No. 2: The County was informed by OMR that the reclamation plan would not be deemed complete until three conditions of approval were adequately addressed. These conditions pertained to grading and drainage, water balance calculations and Regional Water Quality Control Board (RWQCB) discharge regulations and requirements. The County agreed to address these conditions in the reclamation plan and CUP for the project. The County nevertheless approved the reclamation plan prior to incorporating its responses to the OMR-suggested conditions into the plan. The County should be provided an opportunity to address the OMR-suggested conditions.

Finding No. 3: Due to uncertainties associated with the water balance calculations and related slope stability issues, as well as whether the proposed mined lands can be reclaimed to a useable condition which is readily adaptable for alternative land uses pursuant to PRC Section 2712(a), and because the County may address those issues

> upon remand to allow it to complete its determination of the reclamation plan at issue, it is apparent that such remand is appropriate.

CONSIDERATION BEFORE THE SMGB: Ordinarily, the issue before the SMGB at the time of the hearing is defined pursuant to PRC Section 2775(c). In any such action, the SMGB shall not exercise its independent judgment on the evidence but shall only determine whether the decision of the lead agency is supported by substantial evidence in the light of the whole record.

If the SMGB determines the decision of the lead agency is not supported by substantial evidence in the light of the whole record it shall remand the appeal to the lead agency and the lead agency shall schedule a public hearing to reconsider its action."

In the present case, it is apparent that the lead agency intends to consider additional input pertaining to the conditions suggested by OMR, as discussed herein. It remains to be seen whether, after the County receives that input, it will make changes that affect the reclamation plan it has approved and which is the subject of this appeal. Certainly, it would be inappropriate for the SMGB to make any determination as to the issues on appeal before the lead agency finally takes action on those issues. Thus, the proper course for the SMGB here is to remand the case to the County on the ground that its approval of the reclamation plan was not final, but was premature, and to defer any further consideration of the appeal until and unless the lead agency finally acts on the OMR conditions.

It should be noted that a remand is appropriate, given the representations in the record that Fresno County intends to address OMR's suggested conditions to the reclamation plan. As stated above, the issues thereby raised are quite pertinent to the concerns raised by this appeal. The lead agency has not committed to any particular response to OMR's conditions, and may, indeed make no modifications to the approvals it has already issued in this matter. However, in fairness to all, the record on the current appeal does not include all the material pertinent to the lead agency's consideration of how it might address OMR's suggested conditions. When the County has completed its evaluation and acted on that evaluation, even if that results in no changes to the current approvals, the record will then include all that has been placed before the lead agency. If, at that point, any party wishes to appeal the County's final determination, the SMGB will have a full understanding of how the lead agency responded to OMR, and can evaluate that in the context of any appeal.

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

Motion Option 1: To remand the decision by the lead agency as premature:

> *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, determine that the decision of the lead agency was not a final determination of all the issues intended to be addressed by the lead agency in the reclamation plan, and therefore, because the decision is premature, remand it to Fresno County with direction to the lead agency to consider how it will address the concerns expressed by OMR and to incorporate any necessary modifications (or not) to the reclamation plan in a new decision.*

[or]

Motion Option 2: To continue the public hearing:

> *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, continue the public hearing, and have the Executive Officer schedule this matter at its next scheduled regular business meeting.*

Respectfully submitted:

Stephen M. Testa
Executive Officer

Hearing Procedures-Sequence

Pursuant to CCR Section 3633. (a) The public hearing should normally proceed in the following manner:

(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 project proponent (when not the same person as the appellant);
(5) Statements on behalf of the public;
(6) Rebuttal on behalf of the appellant; and
(7) Motion to close the public hearing.

Pursuant to CCR Section 3633(b): Notwithstanding the above, the Chairman or the Chairman's designee for purposes of conducting the hearing may in the exercise of discretion, determine the order of the proceedings.

Pursuant to CCR Section 3633(c): The Chairman or the Chairman's designee may impose reasonable time limits upon statements and presentations and may accept written statements in lieu of oral statements. Written statements must be submitted to the SMGB at least five days prior to the hearing.

Pursuant to CCR Section 3633(d) The public hearing shall be recorded either electronically or by other convenient means.

Pursuant to CCR Section 3634. Hearing Procedures - Determination. Following the public hearing, the SMGB shall determine whether, upon the record before it, the lead agency decision was made based on substantial evidence in light of the whole record. Notification of the SMGB's determination shall be made by certified mail to the appellant, the lead agency, and the project proponent (when not the same person as the appellant) within 15 days following the regular business meeting of the SMGB at which the decision is made.