STATE MINING AND GEOLOGY BOARD

EXECUTIVE OFFICER'S REPORT

For Meeting Date: February 13, 2013

Agenda Item No. 2: Public Hearing: Appeal for Failure of the City of Oxnard to Adjust a Financial Assurance for the RiverPark Mine (CA Mine ID #91-56-0007 and #91-56-0026), City of Oxnard, Pursuant to Public Resources Code Section 2770(e) and Title 14, Division 2, Chapter 8, Subchapter 1, California Code of Regulations, Article 7, Section 3680.

INTRODUCTION: Petitioner RiverPark B, LLC, (RiverPark), on September 10, 2012, filed with the State Mining and Geology Board (SMGB) an Intent to Appeal stating that the City of Oxnard (City) failed to approve and timely act upon an adjusted financial assurance for the RiverPark Mine. RiverPark has petitioned the SMGB to take jurisdiction of the appeal pursuant to the Surface Mining and Reclamation Act (SMARA), notably, Public Resources Code (PRC) Section 2770(e)(3). The SMGB shall determine whether, based on the record before it, the proposed or existing financial assurances for reclamation substantially meet the applicable requirements of PRC Sections 2770, 2773.1, and the lead agency surface mining ordinance adopted pursuant to subdivision (a) of Section 2774. Should such financial assurance meet the applicable requirements, the financial assurance cost estimate shall be approved. At its February 13, 2013 regular business meeting, the SMGB continued this matter for 60 days to allow both the City and RiverPark (operator) to review and consider updated the financial assurance cost estimate to reflect outstanding reclamation activities to be performed.

STATUTORY 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(c) requires lead agencies to administratively review existing financial assurances and states:

> "*If a person with an existing surface mining operation has received lead agency approval of its financial assurances for reclamation prior to January 1, 1991, the lead agency shall administratively review those existing financial assurances in accordance with subdivision (d) prior to January 1, 1992. The review of existing financial assurances shall not be considered a project for purposes of Division 13 (commencing with Section 21000). Any person with an existing surface mining operation which does not have financial assurances that received lead agency approval prior to January 1, 1991, shall submit financial assurances for reclamation for review in accordance with subdivision (d).*"

PRC Section 2773.1(3) requires lead agencies to administratively review existing financial assurances and states:

> *"The amount of financial assurances required of a surface mining operation for any one year shall be adjusted annually to account for new lands disturbed by surface mining operations, inflation, and reclamation of lands accomplished in accordance with the approved reclamation plan."*

PRC Section 2770(d) provides criteria for a lead agency in determining whether reclamation plans or financial assurances substantially meet the applicable requirements of SMARA and states:

> "*The lead agency's review of reclamation plans submitted pursuant to subdivision (b) or of financial assurances pursuant to subdivision (c) is limited to whether the plan or the financial assurances substantially meet the applicable requirements of Sections 2772, 2773, and 2773.1, and the lead agency surface mining ordinance adopted pursuant to subdivision (a) of Section 2774, but, in any event, the lead agency shall require that financial assurances for reclamation be sufficient to perform reclamation of lands remaining disturbed. Reclamation plans or financial assurances determined to substantially meet these requirements shall be approved by the lead agency for purposes of this chapter. 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. Except as specified in subdivision (e) or (i), unless the operator has filed on or before July 1, 1990, an appeal pursuant to subdivision (e) with regard to nonapproval of the reclamation plan, or has filed on or before January 1, 1994, an appeal pursuant to subdivision (e) with regard to nonapproval of financial assurances, and that appeal is pending before the board, the continuation of the surface mining operation is prohibited until a reclamation plan and financial assurances for reclamation are approved by the lead agency*."

<u>PRC Section 2770(e) provides that</u>:

> "*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*."

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:

> "*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*."

CCR Section 3690 states:

> " *Following the public hearing, the Board shall determine whether, based on the record before it, the proposed or existing financial assurances for reclamation substantially meet the applicable requirements of Public Resources Code sections 2770, 2773.1, and the lead agency surface mining ordinance adopted pursuant to subdivision (a) of section 2774. Financial assurances determined to meet these requirements shall be approved. 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 was made. In cases where the financial assurances for reclamation are not approved, deficiencies shall be noted in the correspondence notifying the appellant and the lead agency of the Board's decision. The appellant 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 financial assurances for reclamation to the lead agency for review and approval."*

BACKGROUND: Petitioner RiverPark on September 10, 2012, filed with the SMGB an Intent to Appeal stating that the City failed to approve and timely act upon an adjusted financial assurance for the RiverPark Mine. RiverPark petitioned the SMGB to take jurisdiction of the appeal pursuant to SMARA, notably, Public Resources Code (PRC) Section 2770(e)(3). A Determination of Jurisdiction was made on November 6, 2012, with a request pursuant to Title 14, Article 7, CCR Section 3684(a) for three certified copies of the complete administrative record dated November 7, 2012. The Administrative Record was received on January 15, 2013, and deemed complete by the SMGB's Executive Officer on January 29, 2013.

Site Description: Material extraction has occurred on the property since the early 1950s. Hanson Aggregates West, Inc. (Hanson) obtained approval to resume mining of construction-grade aggregate from the County of Ventura on March 22, 1979. The mining permit expired in March 1999, with all extraction activities terminated. The ready-mix concrete and asphalt plant permit also expired in March 1999, but the plant is still in use and operates under temporary status authorized by the County of Ventura. The site is being reclaimed to accommodate an approximately 701-acre mixed-use development.

Summary of County's Review Process: On September 5, 2002, a revised Reclamation Plan and financial assurance was approved by the SMARA lead agency, the City of Oxnard, for both surface mine sites referenced above, and under the same ownership. The current approved financial assurance amount is $16,648,526. Substantial reclamation work has been accomplished over the past ten years under the direct observation of the City, with no associated reduction in bond amount.

RiverPark has prepared multiple and annual adjusted financial assurance cost estimates (FACE) since 2009 reflecting a reduction in costs due to reclamation efforts accomplished. The most recent FACE submitted to the City was in April 2011, with an estimated FACE in the amount of $2,843,723 (based on remaining reclamation activities as set forth in the approved reclamation plan). It is alleged that the City refuses to reduce the bond amount from the original amount of $16,648,528.

An additional request for adjustment and reduction of the financial assurance bond amount was made by RiverPark to the City's attorney on May 2, 2012. The City attorney denied such request in correspondence dated August 24, 2012 stating *"…much of the work set forth in the Reclamation Plan has been accomplished. Our concern is that reclamation, even in the areas where work has been accomplished, is not complete.*"

Filing of Appeal: RiverPark filed its Intent to Appeal with the SMGB within the15 days of exhausting its right to appeal in accordance with the procedures of the City. RiverPark notified the City by letter dated September 7, 2012, that it had exhausted its appeal rights with the City. The Intent to Appeal was received at the SMGB office on September 11, 2012.

Determination of Jurisdiction: Jurisdictional and completeness issues were reviewed and summarized below:

1. Timeliness of Appeal under CCR Section 3681:

RiverPark timely filed its Intent to Appeal with the SMGB within the15 days of exhausting its right to appeal in accordance with the procedures of the City. RiverPark notified the City by letter dated September 7, 2012, that it had exhausted its appeal rights with the City; the Intent to Appeal was received at the SMGB office on September 11, 2012. Thus, the Intent to Appeal was timely filed with the SMGB.

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

2. Completeness of Appeal under CCR Section 3681:

CCR Section 3681 requires that the appeal include completed documents. Such documents include 1) a map indicating the exact location of the surface mining operation, including township and range, 2) copy of all documents which together comprise the financial assurances for reclamation which are the subject of the appeal, 3) written statements, with supporting documentation, indicating the basis for the appellant's challenge of the action or inaction by the lead agency concerning financial assurances for reclamation, and 4) copy of the notice to the lead agency that the appellant intends to file an appeal with 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 3682(a) and (b) and (c): In considering jurisdiction, a determination needs to be made as to whether 1) the appeal raises any issues which legally can be addressed by the SMGB within the limits of Public Resources Code section 2770 and the rules of the SMGB, 2) the appeal specifically relates to the lead agency's review of financial assurances submitted for existing surface mining operations pursuant to the provisions of Public Resources Code section 2770, and 3) the appellant exhausted his or her appeal remedies before the lead agency.

The issue under appeal is the consideration by the City, acting as the SMARA lead agency, of an adjusted financial assurance based on reclamation work completed to date as submitted by RiverPark. RiverPark argues that the City failed to act within a reasonable time of receipt of a completed application, and failed to review and consider adjustment of a FACE based on reclamation work performed. Since 2009, the City failed to adjust the financial assurance, and since May 2, 2012, failed to take action on the adjusted FACE**.**

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

Completeness of Appeal under PRC Section 2770(e)(3): Has the lead agency failed to review and approve reclamation plans or financial assurances as required under subdivision (c) and (d) pursuant to PRC Section 2770(e)(3)?

The City is the SMARA lead agency for the RiverPark Mine site. Pursuant to SMARA, PRC Section 2773.1(3), “The amount of financial assurances required of a surface mining operation for any one year shall be adjusted annually to account for new lands disturbed by surface mining operations, inflation, and reclamation of lands accomplished in accordance with the approved reclamation plan.” The City apparently has, to date, not acknowledged any reclamation work performed to date, nor provided a list of deficiencies.

Thus, the lead agency **did** fail to review and approve an adjusted FACE as required under subdivision (c) and (d).

Administrative Record: Upon Determination of Jurisdiction, a request was made to the City for a copy of the complete administrative record in correspondence dated December 18, 2012. The Administrative Record was received on January 15, 2013, and upon review deemed complete by the SMGB's Executive Officer on January 29, 2013.

Previous Executive Officer's Analysis: At its February 13, 2013 regular business meeting, the Executive Officer noted that the issue under appeal was the consideration by the City, acting as the SMARA lead agency, of an adjusted financial assurance submitted by RiverPark. RiverPark argued that the City failed to act within a reasonable time of receipt of a completed application, and failed to review and consider adjustment of a FACE based on reclamation work performed.

The approved reclamation plan for the RiverPark B Development, LLC, dated September 2002, notes that the site, divided into two areas, will comprise a Town Center, residential development and a flood control detention basin. The current financial assurance mechanism, established and approved on September 5, 2002, is for the amount of $16,648,526. Although a significant amount of reclamation related work has been completed, no adjustment of the financial assurance amount has been made to date. As of April 23, 2011, the estimated amount of reclamation costs remaining was calculated to be on the order to $2,843,723. RiverPark requested the City to review and adjust in correspondence dated May 2, 2012, and August 21, 2012. In correspondence dated August 21, 2012, the City denied an adjustment acknowledging that much of the work has been accomplished, but concerns remain over reclamation not being complete in certain areas. RiverPark forwarded a Notice of Intent to Appeal to the SMGB in correspondence dated September 7, 2012.

The City is mandated by law to review and adjust the financial assurance cost estimate annually, and subsequently the operator can adjust the financial assurance mechanism appropriately, to account for new lands disturbed by surface mining operations, inflation, and reclamation of lands accomplished in accordance with the approved reclamation plan. Recent submittal of adjusted financial assurance cost estimates were provided by RiverPark in correspondence dated January 25, 2013. The two scenarios reflecting reclamation activities remaining to be completed were of the amount of $1,586,390 and $1,982,068, respectively. At the time this Executive Officer's Report was prepared, the City had refused to review and adjust the financial assurance bond amount.

ADDITIONAL CONSIDERATIONS FOLLOWING FEBRUARY 13, 2013 REGULAR BUSINESS MEETING OF THE SMGB: At its February 13, 2013 regular business meeting, the SMGB held a public hearing and moved to continue this matter for 60 days to allow both the City and RiverPark time to review and consider updating the financial assurance cost estimate to reflect outstanding reclamation activities to be performed. In addition, a site visit was conducted by the Executive Officer to observe current site conditions. Since such time, a revised 2013 financial cost estimate, and opinions dated March 11, 2013, were submitted by RiverPark. In addition, the City also submitted a revised financial assurance cost estimate dated March 28, 2013.

The subject site includes two large water storage basins: the Brigham-Vickers pit and the Large Woolsey pit. The perimeter of both pits are to be graded at 2:1 (horizontal to vertical), and able to

withstand predominant water elevation and seasonal fluctuations, and the influence of prevailing strong winds.

The financial assurance cost estimate for the subject site has been revised by RiverPark to $2,023,598. This estimate reflects the use of rip rap for slope protection between elevations 40 and 55 feet, and to elevation 60 feet (relative to mean sea level) for select portions of the Brigham-Vickers pit (i.e., notably northeast and southwest portions coincident with prevailing wind directions), and northerly portion of the Large Woolsey pit.

The City's consultant has forwarded a revised financial assurance cost estimate of $5,016,175. This estimate reflects slope protection via use of rip rap or similar alternatives (i.e., Flexamat; a proprietary tied concrete black mat) from elevation 36 to 60 feet, regrading of slope faces that exceed 2:1 (horizontal to vertical), and drainage devices along the top of slopes to prevent surface runoff.

HEARING PROCEDURE: The purpose of this Hearing is to allow the Appellant and the City of Oxnard to present arguments regarding the City's alleged failure to approve and timely act upon an adjusted financial assurance for the RiverPark Mine. Following the presentations, the SMGB will consider the issues before it, and may ask questions of the participants. For the purpose of this appeal, the public hearing will need to be re-opened.

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."

CONSIDERATIONS BEFORE THE SMGB: The SMGB shall determine whether, based on the record before it, the proposed or existing financial assurances for reclamation substantially meet the applicable requirements of PRC Sections 2770, 2773.1, and the lead agency surface mining ordinance adopted pursuant to subdivision (a) of Section 2774. Should such financial assurance meet the applicable requirements, the financial assurance cost estimate shall be approved.

The SMGB has several considerations pursuant to CCR Section 3690.

- The SMGB must first determine whether upon the record before it, the proposed adjusted financial assurance substantially meets the requirements of PRC Section 2770, 2773.1, and the City's surface mining ordinance adopted pursuant to subdivision (a) of Section 2774.

- Should the SMGB not deem the adjusted financial assurance cost estimate to be adequate, and not approve the adjusted financial assurance cost estimate, deficiencies shall be noted in the correspondence notifying the appellant and the lead agency of the SMGB's decision. The appellant shall be granted, once only, a period of 30 days, or a longer period mutually agreed upon by the operator and the SMGB, to correct the noted deficiencies and submit the revised financial assurances for reclamation to the lead agency for review and approval.

EXECUTIVE OFFICER'S RECOMMENDATION: Both the City and RiverPark recognize that additional reclamation work remains to be completed. The difference in estimated cost reflects essentially the extent of rip rap protection, both laterally and vertically, along portions of the Brigham-Vickers and Large Woolsey pits. In review of the financial assurance cost estimates provided by both the City and operator, both estimates have been developed in accordance with SMARA and the SMGB's regulations and guidelines. The City's estimate, although higher, is not deemed unreasonable based on pit wall performance observed, since the pit walls were graded in their final configuration. The Executive Officer recommends that the SMGB grant the appeal and determine that the City has failed in approving a financial assurance cost estimate for the RiverPark Mine in a timely manner. Also, the SMGB may wish to determine which financial assurance cost estimate is the most appropriate one. Considering what information was made available at the time this Executive Officer's report was prepared, the Executive Officer finds that the City's financial assurance cost estimate is reasonable and was prepared in accordance with SMARA and the SMGB's regulations and guidelines. However, any future adjustment (i.e., decrease) should be considered without prejudice to further reductions by the City upon demonstration of future reclamation efforts, including a showing that less costly remediation of the slopes of the pits against erosion will be successful to the City's satisfaction. A review of such estimate by the Office of Mine Reclamation was not available at the time this Executive Officer's report was prepared.

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

Motion Option No. 1 – To approve the City's March 28, 2013, estimated financial assurance cost estimate:

> *Mr. Chairman, I move that the State Mining and Geology Board, in light of the evidence presented before the Board today and contained in the Executive Officer's Report, grant the appeal and approve the financial assurance cost estimate prepared by the Pioneer Law Group on behalf of the City of Oxnard, and dated March 28, 2013, for the RiverPark Mine (CA Mine ID #91-56-0007 and #91-56-0026), located in the City of Oxnard,* without prejudice to further reductions by the City upon demonstration of future reclamation efforts, including a showing that less costly remediation of the slopes of the pits against erosion will be successful to the City's satisfaction.

Or,

Motion Option No. 2a – Deny approval of the City's March 28, 2013, estimated financial assurance cost estimate:

> *Mr. Chairman, I move that the State Mining and Geology Board, in light of the evidence presented before the Board today and contained in the Executive Officer's Report, deny approval of the estimated financial assurance cost estimate prepared by the Pioneer Law Group on behalf of the City of Oxnard, and dated March 28, 2013, for the RiverPark Mine (CA Mine ID #91-56-0007 and #91-56-0026), located in the City of Oxnard.*

And,

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

> *Mr. Chairman, I move that the Board direct the Executive Officer to notify the Appellant and City of the Board's determination and list of deficiencies, put the operator on notice that deficiencies must be corrected and a revised adjusted financial assurance cost estimate filed with the lead agency within 30 days.*

Respectfully submitted:

Stephen M. Testa
Executive Officer