



STATE MINING AND GEOLOGY BOARD

EXECUTIVE OFFICER'S REPORT

For Meeting Date: June 13, 2013

Agenda Item No. 10: Issuance of an Administrative Penalty to the Big Cut Mine (CA Mine ID #91-09-00XX), Joseph and Yvette Hardesty and Rick Churches (Operators), Joseph and Yvette Hardesty, Rick Churches, and Dan Tankersley (Agents), County of El Dorado, for Failure to Correct Violations Pursuant to the Surface Mining and Reclamation Act (Public Resources Code Section 2710 et seq.).

INTRODUCTION: The State Mining and Geology Board (SMGB) acts as the lead agency pursuant to the Surface Mining and Reclamation Act of 1975 (SMARA, Public Resources Code (PRC) Section 2710 et seq.) for all surface mining operations in the County of El Dorado. The Big Cut Mine is an unpermitted and illegal surface mining operation located south of Placerville in El Dorado County. This report presents discussions of pertinent SMARA statutes and SMGB regulations, a history of violations, and site background and compliance status. Additionally, an analysis of administrative penalty criteria and Executive Officer's recommendations for penalty amounts are presented for SMGB consideration.

STATUTORY AND REGULATORY AUTHORITY: Surface mining operations pursuant to SMARA, PRC Article 2, Section 2735, are defined as:

"...all, or any part of, the process involved in the mining of minerals on mined lands by removing overburden and mining directly from the mineral deposits, open-pit mining of minerals naturally exposed, mining by the auger method, dredging or quarrying, or surface work incident to an underground mine. Surface mining operations shall include, but are not limited to:

- (a) Inplace distillation or retorting or leaching*
- (b) The production and disposal of mining waste*
- (c) Prospecting and exploratory activities"*

PRC Article 5, Section 2770(a) states:

"Except as provided in this section, no person shall conduct surface mining operations unless a permit is obtained from, a reclamation plan has been submitted to and approved by, and financial assurances for reclamation have been approved by, the lead agency for the operation pursuant to this article."

In issuance of an Order to Comply, PRC Section 2774.1(a) further states:

"Except as provided in subdivision (i) of Section 2770, if the lead agency or the director determines, based upon an annual inspection pursuant to Section 2774, or otherwise confirmed by an inspection of the mining operation, that a surface mining operation is not in compliance with this chapter, the lead agency or the director



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may notify the operator of that violation by personal service or certified mail. If the violation extends beyond 30 days after the date of the lead agency's or the director's notification, the lead agency or the director may issue an order by personal service or certified mail requiring the operator to comply with this chapter or, if the operator does not have an approved reclamation plan or financial assurances, cease all further mining activities."

In upholding an Order to Comply, 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 for orders issued by the lead agency, or board for orders issued by the director, concerning the alleged violation. 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."

In the issuance of an administrative penalty, PRC Section 2774.1(c) states:

"Any operator who violates or fails to comply with an order issued under subdivision (a) after the order's effective date, as provided in subdivision (b), or who fails to submit a report to the director or lead agency as required by Section 2207, shall be subject to an order by the lead agency or the director imposing an administrative penalty of not more than five thousand dollars (\$5,000) per day, assessed from the original date of noncompliance with this chapter or Section 2207. The penalty may be imposed administratively by the lead agency or the director. In determining the amount of the administrative penalty, the lead agency or the director shall take into consideration the nature, circumstances, extent, and gravity of the violation or violations, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and any other matters justice may require. Orders setting administrative penalties shall become effective upon issuance thereof and payment shall be made to the lead agency or the director within 30 days, unless the operator petitions the legislative body of the lead agency, the board, or the superior court for review as provided in Section 2774.2. Any order shall be served by personal service or by certified mail upon the operator. Penalties collected by the director shall be used for no purpose other than to cover the reasonable costs incurred by the director in implementing this chapter or Section 2207."

HISTORY OF VIOLATIONS: On September 3, 2010, the SMGB issued a Notice of Violation (NOV) to the owners/operators of the Big Cut Mine for operating a surface mine without an approved Reclamation Plan, Financial Assurance, and County Permit to Mine. On December 10, 2010, the SMGB issued an Order to Comply (OTC) to the owners/operators to immediately cease illegal surface mining activities and commence corrective actions to bring activities at the Big Cut Mine site into compliance with SMARA. On March 10, 2011, the SMGB issued an Order Imposing



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Administrative Penalty in the amount of \$100,000.00 to the owners/operators for failure to comply with the September 3, 2010 NOV and the December 10, 2010 OTC.

The SMGB staff conducted an inspection of the Big Cut Mine site with County of El Dorado personnel pursuant to a civil warrant on January 28, 2011. During that site inspection, SMGB staff confirmed that extensive illegal surface mining activities were occurring on the subject site.

On April 27, 2011, California Department of Fish and Wildlife (CDFW – formerly California Department of Fish and Game) staff informed SMGB staff that surface mining operations at the above referenced property apparently had resulted in an off-site discharge of sediment to Weber Creek. CDFW staff invited Will Arcand, Senior Engineering Geologist with the SMGB, to accompany them during a follow-up site inspection at the Big Cut Mine and adjacent property, which was conducted on April 29, 2011. Mr. Hardesty was present on the Big Cut Mine property during the April 29, 2011 site inspection.

Based on observations made during the April 29, 2011 site inspection, SMGB staff confirmed that ongoing and *expanded* surface mining operations were occurring at the Big Cut Mine site. Such operations included excavation and grading of slopes, ongoing stockpiling of processed aggregate materials and construction of water collection and drainage facilities. SMGB staff also confirmed that drainage facility construction at the site had resulted in discharge of sediment to both an un-named seasonal watercourse and to Weber Creek. The seasonal watercourse is located immediately south of the Big Cut Mine property and is directly tributary to Weber Creek. The Executive Officer of the SMGB issued a second NOV to the owners/operators of the Big Cut Mine on May 5, 2011, via certified mail. On May 24, 2011, the NOV sent to Joseph and Yvette Hardesty was returned unclaimed to the SMGB office. At the SMGB's June 9, 2011, regular business meeting, a duplicate NOV was hand delivered to Mr. Daniel Tankersley who was present on behalf of the Big Cut Mine owners/operators. On June 10, 2011, the NOV sent to Rick Churches was returned unclaimed to the SMGB office.

At its September 8, 2011, regular business meeting, the SMGB determined to issue an OTC to the owners/operators of the Big Cut Mine for failure to comply with the May 5, 2011 and June 9, 2011 NOV, requiring the owners/operators to take specific actions not later than October 10, 2011. On September 13, 2011, letters were transmitted to Joe and Yvette Hardesty and Rick Churches via regular and certified mail enclosing the subject OTC. The certified letters were returned unclaimed to the SMGB office on October 3, 2011 and October 24, 2011.

The SMGB upheld its September 8, 2011 OTC at its December 8, 2011, regular business meeting. Further, at its January 12, 2012, regular business meeting the SMGB moved to issue an Order Imposing Administrative Penalty pursuant to Public Resources Code Section 2774.1(c) in the amount of \$750,000.00 to the owners/operators of the Big Cut Mine for failure to comply with the May 5, 2011 and June 9, 2011 NOV, and the September 8, 2011 OTC.

On November 28, 2012, pursuant to a Civil Warrant for Site Inspection issued on November 26, 2012 by the Superior Court of California, County of El Dorado, SMGB staff and California Office of the Attorney General staff conducted an inspection of the Big Cut Mine property. The purpose of this inspection was to ascertain existing site conditions, and to evaluate whether the owners/operators had made any attempts to comply with enforcement actions taken by the SMGB in 2011 and 2012, or whether they have continued to operate the mine in violation of SMARA. Based on observations



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made during the November 28, 2012 inspection, SMGB staff confirmed that ongoing operation and *extensive expansion* of illegal surface mining operations have been occurring at the Big Cut Mine site since April of 2011, and that none of the previously noted violations have been remedied, either in whole or in part. Additionally, SMGB staff noted that surface mining operations have encroached across the southern boundary of the Big Cut Mine property.

At the time this report was prepared, the Big Cut Mine site remains out of compliance with SMARA. As such, the SMGB is considering rescission of its January 12, 2012 Order Imposing Administrative Penalty in the amount of \$750,000.00, and, based on the information before it today, reissuance of an Order Imposing Administrative Penalty of a modified amount.

BACKGROUND:

Description of Subject Property: The Big Cut Mine site encompasses approximately 150 acres, and is located off Big Cut Road, approximately 1.5 miles south of the town of Placerville, and about 2 miles northwest of Diamond Springs, in El Dorado County, California. The site and vicinity are underlain by meta-sedimentary basement rocks of Paleozoic age (230 to 600 million years before present; mybp), which are overlain by three sedimentary rock formations of Tertiary age (1 to 63 mybp), including extensive deposits of auriferous gravels belonging to the Valley Springs formation. Such auriferous gravels were extensively mined during the latter half of the 19th Century for gold and other heavy minerals. Relatively younger portions of the gravel deposits would later be mined to produce road base and surfacing materials. Historically, previous property owners mined both gold and aggregate from the Big Cut Mine site and vicinity. The Big Cut Mine site is situated on a south-facing slope, and is characterized by two distinct east-west oriented benches. Surface mining operations are primarily located on and immediately adjacent the lower of these two benches at an elevation of approximately 1,950 feet above mean sea level (msl). During the time period from April 2010 through November 2012 significant surface disturbance was noted resulting from mining activity throughout the property, affecting an estimated total of 53 acres.

Chronology of Pertinent Events and Actions: A complete chronology of pertinent events and actions is as follows:

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| June 14, 2007 | SMGB approves Interim Financial Assurance Cost Estimate amount of \$166,931.50 for reclamation of areas previously disturbed by unpermitted surface mining activities. Interim Financial Assurance received by SMGB on January 31, 2008. |
| September 11, 2008 | Surface Mining Standards Committee of the SMGB moves to recommend approval of the proposed Reclamation Plan for the Big Cut Mine pending completion of environmental review pursuant to the requirements of the California Environmental Quality Act (CEQA). |
| March 2, 2009 | Administrative Draft Initial Study and Proposed Mitigated Negative Declaration: Big Cut Mine Reclamation Plan, dated February 2009, received by SMGB. SMGB staff stays review of this document pending the outcome of a vested rights determination requested by the owners/operators, as such determination affects the required scope of CEQA analysis. |



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April 1, 2010	SMGB staff inspects Big Cut Mine site and determines approximately 4 acres disturbed by surface mining operations.
April 15, 2010	SMGB determines that mine owners/operators had not demonstrated by a preponderance of evidence that Big Cut Mine has vested rights.
June 10, 2010	SMGB adopts Resolution No. 2010-05 denying the claim of vested rights for surface mining operations at the Big Cut Mine.
September 3, 2010	SMGB issues Notice of Violation (NOV) to Big Cut Mine owners/operators for operating a surface mine without an approved Reclamation Plan, Financial Assurance, and County Permit to Mine. NOV subsequently received by owner/operator on September 7, 2010.
November 10, 2010	SMGB moves to issue Order to Comply (OTC) to owners/operators to immediately cease illegal surface mining activities and commence corrective actions to bring activities at Big Cut Mine site into compliance with SMARA. SMGB also moved to set Public Hearing date for OTC of February 10, 2011.
December 10, 2010	SMGB issues OTC. OTC subsequently received by owners/operators on December 16, 2010.
January 19, 2011	SMGB receives additional Interim Financial Assurance Cost Estimate in partial response to 12/10/10 OTC. However, additional estimate is only in the amount of \$20,683.00, and only applies to areas <i>outside of</i> the previously proposed Reclamation Plan boundaries.
January 20, 2011	Owners/operators deny SMGB staff's request for permission to inspect Big Cut Mine site to verify the validity of the Interim Financial Assurance Cost Estimate with current site conditions.
January 21, 2011	SMGB and El Dorado County staff access neighboring property to the north of Big Cut Mine site, and observe active surface mining activities at the Big Cut Mine site.
January 28, 2011	SMGB staff accompanies El Dorado County personnel to inspect Big Cut Mine site under civil warrant. Property owner is cited by County for violating two County ordinances (mining without a Special Use Permit and grading without a permit). Extensive illegal surface mining activities are confirmed to be occurring on site, with an additional 11 acres estimated disturbed since the inspection on April 1, 2010.



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February 10, 2011	SMGB upholds its December 10, 2010, OTC.
March 10, 2011	SMGB issues Order Imposing Administrative Penalty in the amount of \$100,000.00 to Big Cut Mine owners/operators for failure to comply with September 3, 2010 NOV and December 10, 2010 OTC, e.g. failure to obtain required permits, failure to provide a remediation plan ¹ to correct effects of illegal mining and for failure to provide an adequate financial assurance cost estimate. Owner/operator (Hardesty) receives the order on March 16, 2011.
April 11, 2011	SMGB receives “Petition/Notice of Defense” from counsel for the owners/operators requesting review of SMGB’s March 10, 2011 Order Imposing Administrative Penalty.
April 27, 2011	SMGB staff informed by California Department of Fish and Wildlife (CDFW) staff that surface mining operations at the Big Cut Mine site had resulted in off-site discharge of sediment to local watercourses.
April 28, 2011	SMGB notifies counsel for the owners/operators that the March 10, 2011 Order Imposing Administrative Penalty cannot be petitioned to the SMGB, and that the owners/operators’ recourse, in lieu of paying the accrued penalties and reclaiming the lands disturbed, is with the courts.
April 29, 2011	Ongoing and expanded surface mining operations confirmed to be occurring at the Big Cut Mine site based on observations made by SMGB staff during a site inspection conducted with CDFW staff. SMGB staff estimates additional 2 to 5 acres are disturbed since the inspection on January 28, 2011.
May 5, 2011	SMGB issues NOV to Big Cut Mine owners/operators for ongoing and expanded operation of an illegal surface mine and illegal discharges into watercourses.
June 9, 2011	May 5, 2011 NOV re-issued via hand delivery to Dan Tankersley, an agent/representative of the owners/operators, at SMGB regular business meeting.
September 8, 2011	SMGB issues OTC to Commence Corrective Actions issued to Big Cut Mine owners/operators. OTC returned unclaimed.

¹ A remediation plan differs from a reclamation plan in that it is a document meant to provide a short term plan for correcting unpermitted surface disturbance and preventing further environmental degradation, while a reclamation plan is a longer term planning and compliance document meant to adhere to the requirements of SMARA.

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| December 8, 2011 | SMGB upholds September 8, 2011 OTC. |
| January 12, 2012 | SMGB issues Order Imposing Administrative Penalty in the amount of \$750,000.00 to Big Cut Mine owners/operators for failure to comply with the May 5, 2011 and June 9, 2011 NOV and September 8, 2011 OTC, e.g. failure to obtain required permits, failure to provide a remediation plan to correct effects of illegal mining and for failure to provide an adequate financial assurance cost estimate. Counsel for owners/operators receives order on January 20, 2012. |
| August 9, 2012 | SMGB staff sends formal request to owners/operators for permission for SMGB staff to conduct an annual compliance inspection on August 28, 2012 of the Big Cut Mine site. SMGB receives no response to this letter. |
| November 26, 2012 | SMGB counsel obtains civil warrant to inspect Big Cut Mine site from El Dorado County Superior Court. |
| November 28, 2012 | SMGB staff conducts site inspection under civil warrant and estimates and additional 33 to 36 acres are disturbed since April 29, 2011. |

Compliance Status: The history of ongoing violations at the subject site since April of 2010 is detailed above. As noted above, on April 27, 2011, SMGB staff was informed by CDFW staff that activities at the Big Cut Mine property had resulted in off-site discharge of sediment to Weber Creek. During the site inspection with CDFW staff on April 29, 2011, SMGB staff confirmed that ongoing and expanded surface mining operations were occurring, and that such activities had resulted in off-site discharge of sediment to local watercourses. The following photographs illustrate site conditions as observed during the April 29, 2011, site inspection:



Photograph No. 1. Ongoing excavations, heavy equipment and processing plant (viewing southwest).



Photograph Nos. 2 and 3. Surface water and grading in area of recently installed drainage facility installation.



Photograph Nos. 4 and 5. Fine sediment deposition in unnamed watercourse just south of Big Cut Mine.

Subsequently, on May 5, 2011, the Executive Officer issued an NOV to the owners/operators of the Big Cut Mine for the violations observed during the April 29, 2011 site inspection. Because the certified mail receipts for this NOV were returned unclaimed, SMGB staff re-issued the NOV via hand delivery to Dan Tankersley, an agent of the Big Cut Mine, on June 9, 2011. The NOV directed the owners/operators to immediately cease any and all mining activities, and to provide the following items to the SMGB within 30 days of receipt of the NOV:

1. A Remediation Plan to correct the effects of illegal mining activities on the Big Cut Mine site. Such plan should address all areas disturbed by illegal surface mining operations on the Big Cut Mine property during the past year, and shall include specific measures for restoring off-site watercourses impacted by recent sediment discharges.
2. A Financial Assurance Cost Estimate that substantially complies with SMARA and Title 14, California Code of Regulations, Section 3804. (A copy of the SMGB's *Financial Assurance Guidelines* is available on our website to assist you in preparing the cost estimate.) Such Financial Assurance Cost Estimate must be of a sufficient amount to cover all costs associated with reclaiming areas currently disturbed by surface mining activities at the Big Cut Mine site,

and shall include costs for restoring off-site watercourses impacted by recent sediment discharges.

3. Copies of all permits as deemed required by each respective jurisdiction in order to bring the Big Cut Mine site into compliance with all local, state and federal requirements. If such permits are not available within the above timeframe, then copies of permit applications or other written correspondence establishing that such permits are actively being sought may be acceptable.

The owners/operators of the Big Cut Mine have not met, or attempted to meet, any of the requirements of the May 5, 2011 and June 9, 2011 NOV. Nor have they addressed, or attempted to address, the requirements of the OTC the SMGB issued on September 8, 2011 and upheld on December 8, 2011. Finally, the SMGB has received no payment, in whole or in part, or any other indication from the owners/operators of the Big Cut Mine that they intend to comply with the March 10, 2011 and January 12, 2012 Orders Imposing Administrative Penalties on the owners/operators.

As noted above, on November 28, 2012, SMGB staff and counsel conducted a SMARA compliance inspection at the Big Cut Mine property under civil warrant. Based on observations made at that time, SMGB staff estimated that approximately 53 total acres were disturbed by surface mining operations. This total disturbed acreage reflects an increase of approximately 49 acres since SMGB staff visited the site in April of 2010, and an increase of 33 to 36 acres since SMGB visited the site in April of 2011.

Included in the 53 acres of total disturbance observed on November 28, 2012 are approximately 2.6 acres of disturbance outside of the Big Cut Mine property. These areas of encroachment are along and across the southern and southwestern boundary line of the subject parcel on property owned by the El Dorado Irrigation District.

Not included in the 53 acres of total disturbance is the area encompassed by the main site access road connecting to Big Cut Road. It is estimated that an additional 2.5 acres have been disturbed by construction of this road across property owned by the El Dorado Irrigation District.

In addition to the expanded surface area disturbance and off-site encroachment, the November 28, 2012 inspection confirmed that since April of 2011 the owners/operators of the Big Cut Mine had expanded the size of the aggregate processing plant, excavated several additional water retention ponds, imported and assembled multiple pieces of heavy mining equipment, increased the volume of stockpiled processed aggregate materials, and installed a truck scale and other mining infrastructure such as water pipelines. The 2012 SMARA Mine Inspection report contains a detailed discussion of observations made during the November 28, 2012 inspection, and is attached to this Executive Officer's report as Exhibit B.

EXECUTIVE OFFICER'S ANALYSIS OF ADMINISTRATIVE PENALTY CRITERIA:

Pursuant to PRC Section 2774.1(c), the SMGB must consider the following criteria when determining the amount of an administrative penalty:

A. Nature & Extent (Degree and substance of violation)



1. Is the case one of total failure to provide approved reclamation plans or financial assurances, or to report and pay fees? Is the failure one of intentional delay and obfuscation, or refusal to comply?
2. Is the case one of partial failure to provide approved documentation, or pay partial fees? Is the failure a “clerical error,” or a misunderstanding of what was required and when?

Analysis: This is a case of an egregious, ongoing, total and intentional failure on the part of the owners/operators to comply with SMARA and its implementing regulations and local county laws. The owners/operators have commenced, continued and *significantly* expanded surface mining operations without obtaining prior approval of a permit to mine from the County of El Dorado and approval of a legally adequate reclamation plan and financial assurance from the SMGB. Nor have they prepared a remediation plan to correct the effects of illegal surface mining on the site. Except for the invalid “Interim Financial Assurance Cost Estimate” the SMGB received on January 19, 2011, the SMGB has not received any documentation of any attempts by the owners/operators to address the violations cited by the SMGB in the time following the SMGB’s issuance of the September 3, 2010 NOV.

Finally, the SMGB has received no payment, in whole or in part, from the owners/operators of the March 10, 2011 and January 12, 2012 Orders Imposing Administrative Penalties. The conduct of the owners/operators thus continues to manifest an intentional and blatant disregard for, and refusal to comply with, the law.

B. Circumstances (*Outside influences*) What are the circumstances affecting the Operator’s failure to comply?

1. Were the circumstances avoidable had the Operator acted on his/her own behalf? How responsible was the Operator in attempting to control and to take charge of “circumstances” that directly affected his/her business?

- (a) Should the operator have had a more active role in directing hired consultants?
- (b) Should the operator have had a more active role in obtaining responses from government agencies?

2. Were the circumstances particularly unique, or were they encountered by other operators and could have been anticipated?

- (a) How many other surface mines are already in compliance with the lead agency?
- (b) Is it reasonable to assume that the operator should have been aware of circumstances encountered by other compliant operators?

Analysis: The owners/operators were acting on their own behalf in refusing to provide an adequate reclamation plan and remediation plan, an adequate financial assurance cost estimate, and copies of required permits, and they are

the sole responsible parties. The owners/operators, in lieu of complying with state and local laws, have continued to escalate surface mining operations at the subject site.

Nor are the circumstances of this site unique in any respect. The requirements imposed on these owners/operators are the same as those imposed on every other surface mine operator in the State that is not exempt from SMARA: a permit to mine from the applicable county, and a legally adequate reclamation plan and financial assurance approved by the lead agency.

C. Gravity (Financial costs or economic losses to others)

1. What financial or economic burden has the lead agency had to bear as a result of the non-compliance of this operator?

(a) Has the lead agency had to expend excessive funds (personnel time and costs) to try to bring the operator into compliance, thus increasing the amount of fees to be collected from the compliant operators to pay for the local SMARA administration?

(b) Has the lead agency had to redirect personnel from other tasks, thereby delaying the implementation of those tasks and services, in order to deal with the non-compliant operator?

Analysis: SMGB staff has expended significant personnel time and material and financial resources attempting to bring the subject site into compliance with SMARA, including but not limited to: (1) conducting several site inspections in coordination with El Dorado County, CDFW and California Office of the Attorney General staff; (2) preparing and issuing several NOV's, OTC's and Orders Imposing Administrative Penalties; (3) preparing accompanying site inspection reports, EO reports, correspondence with the owners/operators, and other documents; (4) preparing presentations to the SMGB on the foregoing; and (5) communicating and meeting with, or attempting to communicate and meet with, the owners/operators. SMGB staff and resources have been diverted from other important tasks because of the owners' and operator's willful disregard for the law and failure to comply with notices and orders issued by the SMGB.

D. Prior Violations (History of compliance/cooperation)

1. Has the Operator received Administrative Penalties in the past?

(a) For the same violation at the same or a different operation?

(b) For a different violation at the same or a different operation?

2. Has the operator been cooperative regarding past violations? Has the operator paid previous penalties and made necessary corrections, or had to be referred to the Attorney General's Office for failure to respond?

Analysis: The Big Cut Mine property came under SMGB jurisdiction with its assumption of SMARA lead agency authority from El Dorado County in 2001.

On July 10 2003, the SMGB issued to the operators of the Big Cut Mine (Joseph and Yvette Hardesty and Rick and Deanna Churches) an order imposing an administrative penalty in the amount of \$5,000.00 (plus \$100 per day from May 23, 2003 to September 11, 2003, and then plus \$500 per day until a satisfactory financial assurance instrument was submitted) for failure to submit a legally adequate financial assurance instrument. On September 11, 2003, the SMGB issued to the same operators and Dan Tankersley an order imposing an administrative penalty in the amount of \$5,000.00 (plus \$1,000 every 30 days from July 10, 2003 until a complete draft reclamation plan was submitted) for failing to provide a reclamation plan for lands disturbed by surface mining activities.

The operators challenged both of the above orders in court. Ultimately, the Third District Court of Appeal denied the operator's challenges to the SMGB's imposition of penalties in excess of \$220,000. There is no documentation verifying that the SMGB ever received payment of such penalties, in whole or in part.

In addition, as noted above, on March 10, 2011, the SMGB issued an Order Imposing Administrative Penalty in the amount of \$100,000.00 to the owners/operators for failure to comply with the September 3, 2010 NOV and December 10, 2010 OTC. On January 12, 2012, the SMGB issued an Order Imposing Administrative Penalty in the amount of \$750,000 to the owners/operators for failure to comply with the May 5, 2011 and June 9, 2011 NOV and September 8, 2011 OTC. To date the SMGB has received no payment, in whole or in part, of either penalty amount.

To date, the owners/operators of the Big Cut property have provided no documentation or offered any meaningful communication to the SMGB that any attempts are being, or have been, made to bring the site into compliance with NOVs and OTCs issued during 2010 or 2011. The SMGB's site inspection on November 28, 2012, documented that illegal surface mining activities have continued on the property and in fact have significantly expanded. The owners/operators have displayed an ongoing lack of cooperation with regard to enforcement actions taken by the SMGB.

Based on the owners/operators' ongoing lack of cooperation and the existence of ongoing violations of SMARA since 2010, the SMGB has referred these matters to the Attorney General's office.

E. Degree of Culpability (Personal knowledge and behavior)

1. Could it be assumed that a reasonable person in this position should have known that documents or fees were due?
2. How long has the operator known that plans, reports, fees or financial assurances were due prior to the issuance of the penalty?

3. How much notice was given by the Department/Lead Agency?

Analysis: The record clearly demonstrates that the owners/operators have been aware of the necessity to comply with SMARA's requirements to secure an approved reclamation plan and financial assurance, and the necessity to obtain a permit to mine from the County, prior to conducting surface mining operations, since *at least* September 7, 2010.

The owners/operators have conducted unpermitted and illegal surface mining operations at this site continually since April 1, 2010. Since that time, the owners/operators and their agents have demonstrated a general understanding of the requirements of SMARA during several SMGB proceedings, including those undertaken to determine whether the subject site had a vested right to mine. The owners/operators were specifically made aware of the requirements to have an approved reclamation plan, financial assurance and permit in place prior to conducting surface mining operations upon receipt of the SMGB's September 3, 2010, NOV. Such requirements were reiterated to the operator during the SMGB's November 10, 2010, regular business meeting regarding issuance of the OTC. State and local legal requirements were also reiterated to the property owner by SMGB staff during the site inspection conducted under warrant on January 28, 2011. SMGB staff also discussed the May 5, 2011, and June 9, 2011 NOV with Dan Tankersley when he was acting as an agent of the Big Cut Mine site. Finally, requirements of the September 8, 2011 OTC, and general requirements of SMARA were discussed with Mr. William Brewer, attorney for the Big Cut Mine owners/operators, during the December 8, 2011 SMGB meeting when the SMGB upheld the OTC. The owners/operators thus have been well aware of their responsibilities under state and local laws for many years.

On June 10, 2010, the SMGB adopted Resolution No. 2010-05 denying the claim of vested right for the Big Cut Mine surface mining operation. As noted above, the owners/operators, or their agents or counsel of record, received the September 3, 2010 NOV on September 7, 2010; received the December 10, 2010 OTC on December 16, 2010; received the March 10, 2011 Order Imposing Administrative Penalty on March 16, 2011; received the May 5 and June 9, 2011 NOV on June 9, 2011; and received the January 12, 2012 Order Imposing Administrative Penalty on January 20, 2012. In addition, the owners/operators, or their agents or counsel of record, received notice of each of the SMGB meetings at which the various orders were issued or upheld, and were present and/or provided verbal comments at the November 10, 2010, February 10, 2011, March 10, 2011, and December 8, 2011 SMGB meetings. In summary, the owners/operators of the Big Cut mine site have been fully aware of the legal requirements and violations since at least September of 2010.

F. Economic Savings (*Financial or economic gains to self*)

1. Has the operator received a financial or economic benefit from avoiding SMARA requirements?

- (a) Not preparing a reclamation plan (reclamation plan and CEQA).
- (b) Not posting a financial assurance (actual value or paying premiums).
- (c) Not securing local permits (permitting fees and inspection costs).
- (d) Not paying annual reporting fees to Lead Agency and State.

2. What length of time has the operator enjoyed these economic savings? The extent of any economic savings realized by the operator may depend on the length of time the appellant has been out of compliance.

Analysis: The owners/operators have enjoyed a significant economic and financial benefit from not being in compliance with the legal requirements adhered to by other owners and operators of surface mines locally and throughout the state. As discussed below, the owners/operators' overhead costs and capital outlay have been reduced for at least a period of thirty one months.

From at least April 1, 2010, to November 28, 2012 (over thirty one months), the owners/operators have continuously conducted some level of surface mining activity at the site. Based on the extent of operations SMGB staff observed during the April 29, 2011 and November 28, 2012 site inspections, SMGB staff estimates that the owners/operators began conducting significantly accelerated surface mining operations starting in mid- to late November of 2010 (at least twenty four months). From April 1, 2010, to November 28, 2012, the total area disturbed by surface mining operations has increased from approximately 4 acres to approximately 53 acres.

G. Any Other Matters Justice May Require -- This criterion is necessary to ensure that "the quality of justice/mercy is not strained" in either direction.

SMARA has been in effect since 1976 and the requirements of AB 3551 (i.e., PRC Section 2207) have been in effect since 1990. Ignorance of the existence of these laws and their requirements may not make a reasonable argument.

1. Has the non-compliant mining operation caused, or has the potential to cause, serious property damage to neighboring lands, roads, or other community facilities; or caused, or has the potential to cause, irreparable damage to the environment, if left to operate as is; or threatened, or has the potential to threaten, the safety or health of humans?
2. How truthful is the operator in his/her request? Does the argument seem reasonable and logical and supported by documented facts, or is the operator trying to obfuscate facts or events?
3. What is the culpability of the lead agency in allowing the continuance of a non-complying operator? Although the operator ultimately must bear full responsibility for

his/her operation and its effects, what steps did the lead agency take to encourage or discourage compliance?

4. Has the operator truly made “good-faith” efforts to comply, or continually missed deadlines for compliance? Has the operator repeatedly ignored direct warnings from the lead agency or from the Department?

5. Have unforeseen and unavoidable personal circumstances delayed or prohibited the operator from complying fully?

Analysis: Based on the evidence before the SMGB, the Executive Officer believes with respect to the criteria cited above:

- (1) The noncompliance of the Big Cut Mine surface mining operation, in combination with the owners/operator’s intentional disregard for the law, has the potential to bring long-term harm to the site and the natural environment, and to create a safety hazard due to the existence of steep slopes and unsupported historical underground workings. The amount and cost of mitigation work has steadily increased since at least April 1, 2010. In addition, sediment discharges off of the Big Cut Mine property and into waters of the state were confirmed during the April 29, 2011 site visit by CDFG and SMGB staff. Although observed to be relatively stable on November 28, 2012, the existence of large volumes of fill material along the southern property boundary still poses a potential threat to neighboring lands and the environment, especially if left unmaintained and subject to water erosion over time.
- (2) As discussed, the owners/operators have not been forthcoming, and have exhibited ongoing intentional disregard for state and local laws.
- (3) As outlined above, since September 3, 2010, the SMGB has taken numerous steps against these owners/operators to enforce compliance with SMARA. In addition, the SMGB has made numerous attempts since September of 2010 to communicate with the owners/operators via telephone calls, e-mails and written correspondence. SMGB staff has been readily available to address any and all issues and questions the owners/operators may have had.
- (4) Overall, the owners/operators have not made any good faith efforts to comply with state and local law and have repeatedly ignored SMGB notices, orders and correspondence. The owners/operators either have not responded to the SMGB’s multiple NOV, orders, correspondence and requests at all, or have not responded in a helpful or timely manner. Since May 5, 2011, copies of SMGB notices, orders and correspondence served on the owners/operators via certified mail consistently have been returned unclaimed. Consequently, the SMGB staff has had to repeatedly re-issue and re-serve such notices and orders. Moreover, the owners/operators have repeatedly denied, or not



responded to, the SMGB staff's multiple oral and written requests for permission to conduct site inspections in 2011 and 2012.

- (5) No unforeseen and unavoidable personal circumstances have delayed or prohibited the owners/operators from complying fully with state and local laws.

EXECUTIVE OFFICER'S RECOMMENDATION: The owners/operators have failed to obtain a permit to mine from the County of El Dorado, and to obtain an approved reclamation plan and financial assurance prior to conducting surface mining operations at the site. They also have failed to prepare a remediation plan to correct the effects of illegal surface mining on the site. In April of 2011, surface mining activities at the Big Cut Mine resulted in discharge of sediment off site and into waters of the state. The owners/operators failed to respond in a meaningful manner to the SMGB's subsequent NOV's issued on September 3, 2010, May 5, 2011 and June 9, 2011, and they failed to respond in a meaningful manner to the SMGB's Orders to Comply issued on November 10, 2010 and September 8, 2011. After the SMGB upheld the November 10, 2010 and September 8, 2011 OTCs on February 10, 2011 and December 8, 2011, respectively, the owners/operators failed to respond in a meaningful manner to the subsequent Orders Imposing Administrative Penalties in the amounts of \$100,000.00 and \$750,000.00, issued on March 10, 2011 and January 12, 2012, respectively. Based on observations made by SMGB staff on November 28, 2012, unpermitted and illegal surface mining activities have been occurring at the Big Cut Mine site for at least 31 months, and up to 37 months when calculating to the date of this Executive Officer's report. From April 1, 2010, to November 28, 2012, the total area disturbed by unpermitted and illegal surface mining operations has increased from approximately 4 acres to approximately 53 acres.

Pursuant to PRC Section 2774.1(c), an order setting an administrative penalty becomes effective upon issuance. The penalty amount may be assessed from the original date of non-compliance. As authorized by statute, the maximum amount of penalties that may be imposed per violation is \$5,000 per day. The Executive Officer submits that the original date of non-compliance for purposes of the current penalty proceedings is June 9, 2011, which is the date on which an authorized agent of the owners/operators received the SMGB's May 5, 2011/June 9, 2011 NOV. Three separate violations are identified in the June 9, 2011 NOV. Thus, the maximum modified amount of penalty to be considered is \$11,025,000.00 [\$5,000.00 per day x 735 days (June 9, 2011 through June 13, 2013) x 3 (number of violations identified in June 9, 2011 NOV)].

Based on consideration of the above maximum penalty amount, the existing site conditions and the substantial amount of SMGB staff time and resources expended in addressing this matter to date, the Executive Officer recommends that the SMGB issue an order imposing an administrative penalty in the total amount of \$2,500,000.00. This amount is reflective of approximately \$250,000.00 worth of SMGB staff time and resources expended, a preliminary estimate of approximately \$750,000.00 to reclaim the property, and a fine for continuing non-compliance of \$1,500,000.00. This recommended amount supersedes and replaces the January 12, 2012 administrative penalty in the amount of \$750,000.

CONSIDERATIONS BEFORE THE SMGB: The SMGB may consider and take the following actions:



1. Determine to rescind the January 12, 2012 Administrative Penalty in the amount of \$750,000.00, and reissue an order imposing an administrative penalty in the maximum amount of \$11,025,000.00;

[or]

2. Determine to rescind the January 12, 2012 Administrative Penalty in the amount of \$750,000.00, and reissue an order imposing an administrative penalty for a further modified amount, in whole or in part;

[or]

3. Determine to not rescind the January 12, 2012 Administrative Penalty in the amount of \$750,000.00 and not impose a modified administrative penalty on the owners/operators at this time.

SUGGESTED MOTION LANGUAGE:

Motion to Rescind the January 12, 2012 Administrative Penalty and Reissue an Order Imposing the Maximum Administrative Penalty:

Mr. Chairman, in light of the information before the SMGB today, I move that the SMGB accept the analysis, findings, and recommendations contained in the Executive Officer's Report, and move that the SMGB, acting as lead agency with authority provided under PRC Section 2710 et seq., rescind the January 12, 2012 Order Imposing Administrative Penalty in the amount of \$750,000.00, and reissue an Order imposing an Administrative Penalty in the amount of \$11,025,000.00 to Joseph and Yvette Hardesty, Rick Churches, and Dan Tankersley, the owners/operators of the Big Cut Mine, located in the County of El Dorado, for failure to obtain a permit to mine and to correct ongoing violations pursuant to the Surface Mining and Reclamation Act of 1975. Effective date of the Order shall be June 13, 2013.

Or,

Motion to Rescind the January 12, 2012 Administrative Penalty and Reissue an Order Imposing an Administrative Penalty for a Further Modified Amount:

Mr. Chairman, in light of the information before the SMGB today, I move that the SMGB accept the analysis, findings, and recommendations contained in the Executive Officer's Report, and move that the SMGB, acting as lead agency with authority provided under PRC Section 2710 et seq., rescind the January 12, 2012 Order Imposing Administrative Penalty in the amount of \$750,000.00, and reissue an Order imposing an Administrative Penalty in the amount of [\$_____] to Joseph and Yvette Hardesty, Rick Churches, and Dan Tankersley the owners/operators of the Big Cut Mine, located in the County of El Dorado, for failure to obtain a permit to mine and to correct ongoing violations pursuant to the Surface Mining and Reclamation Act of 1975. Effective date of the Order shall be June 13, 2013.

Or,

Motion to Determine to Not Rescind the January 12, 2012 Administrative Penalty in the Amount of \$750,000.00 at This Time:

Mr. Chairman, in light of the information before the SMGB today, I move that the SMGB determine to not rescind the January 12, 2012 Order Imposing Administrative Penalty in the amount of \$750,000.00 to Joseph and Yvette Hardesty, Rick Churches, and Dan Tankersley, the owners/operators of the Big Cut Mine, located in the County of El Dorado, for failure to correct violations pursuant to the Surface Mining and Reclamation Act of 1975 and not impose any modified administrative penalty on the owners/operators at this time.

Respectfully submitted:



Stephen M. Testa
Executive Officer

Exhibit A: DRAFT Order Imposing Administrative Penalty

**Exhibit B: 2012 SMARA Mine Inspection Report dated
November 28, 2012**

**Exhibit C: Executive Officer's January 17, 2012, Letter to
Mr. William K. Brewer Enclosing the SMGB's
January 12, 2012 Order Imposing Administrative Penalty**

