



# **STATE MINING AND GEOLOGY BOARD**

## **EXECUTIVE OFFICER'S REPORT**

For Meeting Date: June 13, 2013

**Agenda Item No. 4: Review of Lead Agency Response to the State Mining and Geology Board's Issuance of a 45-Day Notice to Correct Deficiencies to the City of Pacifica Pursuant to the Surface Mining and Reclamation Act (SMARA). Following Review, the Board may take appropriate action in accordance with Public Resources Code Section 2774.4(a).**

**INTRODUCTION:** At its October 11, 2012 regular business meeting, the State Mining and Geology Board (SMGB), based on the October 2012 Office of Mine Reclamation (OMR) Lead Agency Review Team (LART) Report on the City of Pacifica (City), moved to issue a 45-Day Notice to Correct Deficiencies (Notice) to the City pursuant to Public Resources Code (PRC) Section 2774.4(a). The Notice was issued on October 16, 2012, and a response was received from the City dated December 15, 2012. The SMGB will 1) assess whether the City has adequately addressed all outstanding deficiencies, and 2) consider, based on the response received from the City, whether the SMGB will take appropriate action in accordance with Public Resources Code Section 2774.4(a).

**STATUTORY AUTHORITY:** PRC Sections 2774.4(a) and (b) provide criteria to the SMGB when considering assumption, or restoration, of certain SMARA powers of a lead agency. Specifically, PRC Section 2774.4(a) states that if certain deficiencies exist, the SMGB can assume certain SMARA lead agency responsibilities as follows:

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

PRC Section 2774.4(c) provides criteria the SMGB considers should it determine to issue a 45-Day Notice to Correct Deficiencies, and states:

*"(c) Before taking any action pursuant to subdivision (a), the board shall first notify the lead agency of the identified deficiencies, and allow the lead agency 45 days to correct the deficiencies to the satisfaction of the board. If the lead agency has not corrected the deficiencies to the satisfaction of the board within the 45-day period, the board shall hold a public hearing within the lead agency's area of jurisdiction, upon a 45-day written notice given to the public in at least one newspaper of general circulation within the city or county, and*



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*directly mailed to the lead agency and to all surface mining operators within the lead agency's jurisdiction who have submitted reports as required by Section 2207."*

**BACKGROUND:** The SMGB was the former SMARA lead agency for the City from 2003 to 2006. When the SMGB certified the City's mining ordinance on May 12, 2006, the City became the SMARA lead agency. The City has one surface mining operation (Pacifica Quarry; CA Mine ID #91-41-0001) within its jurisdiction. The primary commodity was sand and gravel, and the current status is noted as closed with no intent to resume. Although deemed stable with no identified public health and safety issues, the site remains unreclaimed in accordance with its approved reclamation plan.

The LART report dated October 3, 2012 noted several outstanding deficiencies based on an inspection conducted on August 2, 2011. From a review of the City in its administration of SMARA, several deficiencies were noted. These deficiencies included failure to adjust the financial assurance and subsequently allowing the financial assurance mechanism of \$1,044,179 to expire on January 17, 2012, without the site being reclaimed (Deficiency No. 1), failure to conduct adequate inspections (Deficiency No. 2), failure to seek forfeiture of financial assurances and to carry out reclamation of surface mining operations (Deficiency No. 3), and failure to take appropriate enforcement actions (Deficiency No. 4). A summary is provided in Table 1.

Table 1 Summary of Surface Mining Operations Situated in the City of Pacifica								
Surface Mine Name	California Mine Identification Number	Operator	Surface Mine Status	Last Inspection Report on File (year)	Approved Acreage	Disturbed Acreage (2011 Annual Report/Inspection Report/GPS - Aerial Photo)	Produced has Product	Deficiencies Noted
Pacifica Quarry	91-41-0001	Pacific Lenders, LLC	Abandoned	2011	34	34/34/34	Sand and gravel	1,2,3,4

A 45-Day Notice was issued to the City dated October 16, 2012. Since receipt of the Notice, the City provided a copy of its most recent inspection report dated June 27, 2012. In addition, the status for reestablishing and maintaining an adequate financial assurance mechanism for the Pacifica Quarry was also provided.

**CITY OF PACIFICA RESPONSE TO 45-DAY NOTICE TO CORRECT DEFICIENCIES:** The six categories of violations listed in PRC Section 2774.4(a) under which the SMGB may find a lead agency needs to take corrective actions:

**Category [ 1 ]** - A lead agency has approved reclamation plans or financial assurances which are not consistent with SMARA;

**Category [ 2 ]** - A lead agency has failed to inspect or cause the inspection of surface mining operations as required by SMARA;

**Category [ 3 ]** - A lead agency has failed to seek forfeiture of financial assurances and to carry out reclamation of surface mining operations as required by SMARA;

**Category [ 4 ]** - A lead agency has failed to take appropriate enforcement actions as required by SMARA;

**Category [ 5 ]** - A lead agency has intentionally misrepresented the results of inspections required under SMARA;

**Category [ 6 ]** - A lead agency has failed to submit information to the Department of Conservation as required by SMARA.

The following specific deficiencies in the City's administration of SMARA were identified with respect to these surface mines within the City's jurisdiction:

**Deficiency No. 1 - Approved reclamation plans or financial assurances which are not consistent with this chapter:** Pacifica Lenders became the owner of the Pacifica Quarry through foreclosure proceedings in 2010. As previously noted, the financial assurance mechanism for the Pacifica Quarry was allowed to expire on January 17, 2010. A chronology of pertinent events and actions regarding this deficiency is summarized in Table 2.

<b>Table 2 Chronology of Pertinent Events and Actions</b>	
2003-2006	SMGB acting as SMARA lead agency
April 13, 2006	SMGB certified City's Surface Mining and Reclamation Ordinance No. 711-C.S.
May 12, 2006	The SMGB as the SMARA lead agency approved a financial assurance instrument of \$1,319,476 for the Pacifica Quarry (CA Mine ID #91-07-0007) in the City of Pacifica, and notified the new owner, Rockaway Beach, LTD., that they are now designated as the new Operator of the Pacifica Quarry.
January 17, 2010	Financial assurance mechanism (FAM; Letter of Credit) expired.
April 19, 2011	City requested a new FAM be obtained
May 25, 2011	Notice of Violation issued by City to Pacifica Lenders
November 29, 2011	Pacifica Lenders' consultant LSA provided financial assurance cost estimate (FACE) of \$992,566; rejected by City on January 3, 2012
June 26, 2012	Revised FACE provided in the amount of \$1,067,043
October 16, 2012	45-Day Notice to Correct Deficiencies issued by SMGB based on SMGB's action on October 11, 2012; no FAM in place at such time.
October 18-23, 2012	City requested a FAM from Pacifica Lenders/LSA by November 29, 2012; meeting held between City and Pacifica Lenders on November 20, 2012

The City claims that attempts to attain a financial assurance mechanism via traditional approaches have not been successful. The inability to attain a financial assurance mechanism reflects the absence of traditional bond providers and/or the needs for 100% collateral requirements.

The City has expressed that it believes that Pacifica Lenders is earnest in their attempt to obtain an adequate financial assurance mechanism. The City has given Pacifica Lenders until March 31, 2013, to obtain the mechanism, or be subject to a compliance hearing and administrative penalties, as afforded by SMARA. In the meantime, Pacifica Lenders has agreed to pay the City \$100,000, to be held by the City until Pacifica can raise the additional capital from investors to obtain the mechanism.

Analysis based on City's Response: This deficiency remains unresolved. The exact circumstances as to why the financial assurance mechanism was allowed to expire remain unclear. The City is taking appropriate steps to rectify this situation; however, at the time this Executive Report was prepared, no financial assurance mechanism exists for the Pacifica Quarry.

**Deficiency No. 2 - Failed to inspect or cause the inspection of surface mining operations as required by this chapter:** In review of the most recent inspection report dated June 27, 2012, which fulfills the minimum requirements of SMARA and the SMGB's regulations, existing violations remain identified. No health and safety concerns are noted, albeit the site has not been reclaimed in accordance with the approved reclamation plan.

Analysis based on City's Response: This deficiency has been partially resolved. An agreement between Pacifica Lenders, LLC, and the City has been executed as of January 28, 2013. The agreement includes a commitment from Pacifica Lenders for a deposit of \$100,000 immediately and submittal of a financial assurance mechanism of \$1,067,043 by March 31, 2013.

**Deficiency No. 3 - Failed to seek forfeiture of financial assurances and to carry out reclamation of surface mining operations as required by this chapter:** The former financial assurance mechanism was in the form of a Letter of Credit whereas OMR was the sole beneficiary. Regardless, the Letter of Credit was released even though such action was not authorized by the City (i.e., the City claims that a notice of expiration would have also been sent to the State (i.e., DOC/OMR).

Analysis based on City's Response: The former financial assurance mechanism was in the form of a Letter of Credit in which OMR was the sole beneficiary. Release of the Letter of Credit was never authorized by the City, and the City claims that a notice of expiration would have also been sent to the State (i.e., DOC/OMR).

**Deficiency No. 4 - Failed to take appropriate enforcement actions as required by this chapter:** The City has previously issued a Notice of Violation to Pacifica Lenders: one on May 25, 2011, and the other on October 27, 2012. The City plans to proceed

with compliance hearings and consideration of administrative penalties, if necessary, after March 31, 2013.

Analysis based on City's Response: The financial assurance mechanism for the Pacifica Quarry was allowed to expire on January 17, 2010. However, the City did not take any enforcement action until May 25, 2011, when the City eventually issued a Notice of Violation to Pacifica Quarry. Although delinquent in commencing enforcement actions, the City is taking appropriate steps to rectify this situation, and as of April 8, 2013, this deficiency has been corrected.

**EXECUTIVE OFFICER'S RECOMMENDATIONS:** It is the opinion of the Executive Officer that the City has addressed all deficiencies. Although delinquent in commencing enforcement actions and failing to act promptly to secure an adequate financial assurance mechanism, the City is taking appropriate steps to rectify this situation, and as of April 8, 2013, this deficiency has been corrected.

In review of the City's response to the 45-Day Notice to Correct Deficiencies, it is the Executive Officer's recommendation that the SMGB recognize that the City has adequately addressed the deficiencies to the satisfaction of the SMGB, and does not recommend the SMGB consider further action in accordance with Public Resources Code Section 2774.4(a).

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

Option No. 1 – Deficiencies addressed to the satisfaction of the SMGB:

[Should the SMGB determine that the City is fulfilling its responsibilities and obligations as a lead agency pursuant to SMARA, and that no deficiencies and violations exist, the following motion may be considered.]

*Mr. Chairman, I move that the SMGB, in light of the evidence presented before it today and contained in the Executive Officer's Report, find that the City of Pacifica is making a good faith effort in fulfilling its responsibilities and obligations as a lead agency under SMARA, and that the City has addressed the deficiencies to the satisfaction of the Board.*

[or]

Option No. 2 – Deficiencies not addressed to the satisfaction of the SMGB:

[Should the SMGB determine that deficiencies and violations remain uncorrected and the City continues to fail to make progress, the following motion may be considered.]

*Mr. Chairman, I move that the SMGB, in light of the evidence presented before it today and contained in the Executive Officer's Report, has determined that the City of Pacifica has not corrected the deficiencies to the satisfaction of the Board, and direct the Executive Officer to schedule a public hearing within the lead agency's area of jurisdiction, upon a 45-day written notice given to the public, pursuant to Public Resources Code Sections 2774.4(c).*

Respectfully submitted:



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Stephen M. Testa  
Executive Officer