



# **STATE MINING AND GEOLOGY BOARD**

## **EXECUTIVE OFFICER'S REPORT**

For Meeting Date: November 14, 2013

**Agenda Item No. 19: 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:** On October 30, 2012, Petitioner Friends of the Kings River (Friends, Petitioner) filed, with the State Mining and Geology Board (SMGB) an Intent to Appeal a decision by the County of Fresno (County) 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 pursuant to SMARA, and specifically, PRC Section 2775(a). At its March 14, 2013 regular business meeting, the SMGB held a public hearing in the matter and subsequently granted the appeal, denied the County's approval of the reclamation plan on procedural grounds, and remanded the reclamation plan back to the County for approval consideration upon completion of the reclamation plan.

On August 16, 2013, Petitioner Friends filed with the SMGB a second Intent to Appeal a decision by the County to approve an amended reclamation plan and Conditional Use Permit for the Project 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) has 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*



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*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. Most of the site is currently in fruit plant production.

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).

Colony Land Company LP (Applicant) submitted an application to the County for a Conditional Use Permit and revised Reclamation Plan dated April 2013, 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 reclamation plan calls for extraction of approximately 85 cubic yards of material from 22 mining-reclamation "cells". Cells are generally 40-acre lots which are defined by current agricultural infrastructure (i.e., farm roads, water distribution ditches, production wells and associated power lines). The project is proposed to be operated by Carmelita Resources. The project is anticipated to have a maximum production rate of 1.25 million tons of aggregate per year, with an operating life of up to 100 years.

**Administrative Process:**

As an overview, a chronology of salient actions is summarized in Table 1.

<b>Table 1 Summary of Salient Actions (not inclusive)</b>	
<b>Date</b>	<b>Action or Activity</b>
March 14, 2013	SMGB holds public hearing, grants the appeal and remands reclamation plan back to the County on procedural grounds.
May 22, 2013	Following review of the revised reclamation plan provided by the County, OMR comments on revised Reclamation Plan dated April 2013.
June 7, 2013	County responds to OMR's comments.
July 5, 2013	OMR indicates to County that its concerns have not been adequately addressed
July 9, 2013	County Board of Supervisors approves revised reclamation plan
August 6, 2013	County via Resolution No. 13-254 adopts Findings and Approving Revised Reclamation Plan and Considering the Addendum to the Final Environmental Impact Report.
August 9, 2013	Friends forwards notice to County of its Intent to Appeal
August 16, 2013	SMGB receives Intent to Appeal to SMGB from Friends.
August 28, 2013	Determination of Jurisdiction to hear the appeal granted by the SMGB's Chairman.

At its March 14, 2013 regular business meeting, the SMGB held a public hearing in the matter and subsequently granted the appeal, denied the County's approval of the reclamation plan on procedural grounds, and remanded the reclamation plan back to the County for approval consideration upon completion of the reclamation plan.

On August 6, 2013, the County adopted approval of a revised Reclamation Plan dated April 2013, and an Addendum to the Carmelita Mine and Reclamation Project Final Environmental Impact Report, dated June 2013. The reclamation plan was a version of the earlier May 2012 but supplemented to include a post-mining water balance, an engineered grading and drainage plan, and slope stability evaluations. OMR reviewed and commented on the April 2013 revised Reclamation Plan in correspondence dated May 22, 2013. Several comments were provided pertaining to end land use, geotechnical requirements, hydrology and water quality, and administrative requirements. The County subsequently reviewed and responded to such comments in correspondence dated June 7, 2013.

On August 16, 2013, Petitioner Friends filed with the SMGB a second Intent to Appeal a decision by the County to approve an amended reclamation plan and Conditional Use Permit for the Project 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.

**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 August 16, 2013, alleged the following:

- The Plan violates CCR Section 3704(d)(f) because there is still not enough data and analysis in the record to support the conclusions regarding slope stability.
- The Plan violates CCR Section 3502(b)(3) because the engineered grading and drainage plan and the calculated water balance for the Project fail to provide adequate information regarding slope stability and probable water content of the Postmining pits.
- The Plan violates CCR Section 3706(b) because it does not adequately address impacts to groundwater and aquifer storage.
- The Project violates PRC Sections 2733 and 2712(a), (b) and (c) because most of the Project area will not be reclaimed to a usable condition, and there is evidence to show that the Project and proposed reclamation will harm the watershed and also create public health and safety hazards.
- The Project violates PRC Section 2711(b) because the Project area will not result in the "*subsequent beneficial use* of the mined and reclaimed land."
- The Project and Plan violate PRC Section 2711(b) because the Plan fails to clearly identify how reclamation would be completed and the Project area transition to any subsequent beneficial use and its operation and maintenance.
- The Project violates CCR Sections 3707 and 3708 because approximately 600 acres of the 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."

Friends also alleged that the County failed to adequately respond to OMR's comments, failed to request additional information and analysis where appropriate. Furthermore, Friends alleges further that the County adopted a revised Plan that proposed an illegal end use for most of the project area, and that the proposed end use is harmful to the environment and the County, and does not provide for completion of reclamation and transition to another end use.

**Appeal Decision:** In light of the foregoing and the body of evidence submitted by the Petitioner with its Intent to Appeal, on August 28, 2013, 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 October 21, 2013, the SMGB received three certified copies of the administrative record. On October 23, 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.

**CONSIDERATION BEFORE THE SMGB:** 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."

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

Motion Option 1: To concur with the County's action:

*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 supported by substantial evidence in the light of the whole record.*

[or]

Motion Option 2: To remand the matter back to the County:

*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 supported by substantial evidence in the light of the whole record, and remand the appeal to the County to schedule a public hearing to reconsider its action.*

[or]

Motion Option 3: 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:



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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.