



STATE MINING AND GEOLOGY BOARD

EXECUTIVE OFFICER'S REPORT

For Meeting Date: May 12, 2006

Agenda Item No. 5: Continued Consideration of an Administrative Penalty and Discussion of Mine Status to Mr. Richard E. Norris, Representative for Bottoms Family Trust, for Failure to Provide a Financial Assurance Instrument in the Amount of \$1,319,476 for its Pacifica Quarry site (CA Mine ID #91-41-0001), City of Pacifica, CA.

INTRODUCTION: The State Mining and Geology Board (SMGB) is the lead agency for the Pacifica Quarry (CA ID #91-41-0001), located in the city of Pacifica, San Mateo County, California. At the SMGB's regularly scheduled business meeting on November 10, 2005, the Bottoms Family Trust (operator) was issued an administrative penalty amount of \$50,000. This penalty was upheld by the SMGB at its regular business meeting held on February 9, 2006, with consideration of additional penalties deferred. Reconsideration of the imposition of the \$50,000, and any additional penalty amount, based on the time period between receipt of the Notice of Violation (June 24, 2005) and notification by the operator that the property and its associated reclamation obligations have been sold and undertaken by Rockaway Beach (November 4, 2005), was to be deferred to the SMGB's regular business meeting scheduled for May 12, 2006.

REGULATORY ASPECTS:

Regulatory aspects pertaining to financial assurances:

SMARA requires that all surface mine operators maintain a financial assurance adequate to reclaim those lands affected by surface mining activities (Public Resources Code Sections 2770 and 2773.1).

In addition, PRC Section 2770(d) 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 case, the lead agency shall require that financial assurances for reclamation be sufficient to perform reclamation of lands remaining disturbed.*"

PRC Section 2773.1(f) states, "*On or before March 1, 1993, the board shall adopt guidelines to implement this section. The guidelines are exempt from the requirements of Chapter 3.5*



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(commencing with Section 11340) of Part I of Division 3 of Title 2 of the Government Code, and are not subject to review by the Office of Administrative Law.”

PRC Section 2774.2(a) states “*Within 30 days of the issuance of an order setting administrative penalties under subdivision (c) of Section 2774.1, the operator may petition that legislative body of the lead agency, if the lead agency has issued the order, or the board for orders issued by the director, for review of the order. If the operator does not petition for review within the time limits set by this subdivision, the order setting administrative penalties shall not be subject to review by any court or agency.*”

California Code of Regulations (CCR), Article 12, Section 3901, states “*Any person filing a petition to the Board pursuant to Public Resources Code Section 2774.2 concerning the issuance of an administrative penalty by the Director of the Department of Conservation shall, within 30 days of the date of issuance of the order setting an administrative penalty, file a petition/notice of defense with the Board requesting a hearing.*”

Regulatory aspects Pertaining to Abandoned Mines:

PRC Section 2727.1 states Idle to mean “*to curtail for a period of one year or more surface mining operations by more than 90 percent of the operation’s previous maximum annual mineral production, with the intent to resume those surface mining operations at a future date.*”

PRC Section 2770(h)(1) states “*Within 90 days of a surface mining operation becoming idle, as defined in Section 2727.1, the operator shall submit to the lead agency for review and approval, an interim management plan...*”

In addition, pursuant to PRC Section 2770(h)(6) “*Unless review of an interim management plan is pending before the lead agency, or an appeal is pending before the lead agency’s governing body, a surface mining operation which remains idle for over one year after becoming idle as defined in Section 2727.1 without obtaining approval of an interim management plan shall be considered abandoned and the operator shall commence and complete reclamation in accordance with the approved reclamation plan.*” PRC Section 2770(i) further states “*Any enforcement action which may be brought against a surface mining operation for operating without an approved reclamation plan, financial assurance, or interim management plan, shall be held in abeyance pending review pursuant to subdivision (b), (c), (d), or (h) or the resolution of an appeal filed with the board pursuant to subdivision (e), or with a lead agency governing body pursuant to subdivision (h).*”

Pursuant to PRC Section 2773.1(b), “*If the lead agency or the board, following a public hearing, determines that the operator is financially incapable of performing reclamation, or*



has abandoned its surface mining operation without commencing reclamation, either the lead agency or the director shall do all of the following:

- (1) Notify the operator by personal service or certified mail that the lead agency or the director intends to take appropriate action to forfeit the financial assurances and specify the reasons for so doing.*
- (2) Allow the operator 60 days to commence or cause the commencement of reclamation in accordance with its approved reclamation plan and require that reclamation be completed within the time limits specified in the approved reclamation plan or some other time period mutually agreed upon by the lead agency or the director and the operator.*
- (3) Proceed to take appropriate action to require forfeiture of the financial assurances if the operator does not substantially comply with paragraph (2).*
- (4) Use the proceeds from the forfeited financial assurances to conduct and complete reclamation in accordance with the approved reclamation plan. In no event shall the financial assurances be used for any other purpose. The operator is responsible for the costs of conducting and completing reclamation in accordance with the approved reclamation plan which are in excess of the proceeds from the forfeited financial assurances.*

BACKGROUND: At the SMGB's regularly scheduled business meeting on May 12, 2005, the SMGB approved a financial assurance amount of \$1,319,476 for the Pacifica Quarry (Mine). On May 13, 2005, the SMGB notified the operator of the Board's approval of this amount, and subsequently requested that an acceptable financial assurance instrument in that amount be provided by June 15, 2005.

On June 24, 2005, Richard E. Norris, of the firm Archer-Norris, and representing the Bottoms Family Trust (operator), requested an extension of the date by which the operator was to provide the financial assurance mechanism. Mr. Norris outlined a plan for the Bottoms family to meet their financial assurance requirement for this site in their letter dated June 24, 2005. On June 30, 2005, the SMGB office replied that only the SMGB can change a deadline it has set, and the request was received after the SMGB's July meeting agenda had been established. The Bottoms family was encouraged to file the financial assurance as outlined in their letter dated June 24, 2005, and informed that the SMGB would take any good faith and proactive actions into consideration at its September meeting.

Close of escrow for the property occurred on July 29, 2005, although the SMGB office was not formally notified of this change until November 4, 2005.

On August 19, 2005, the SMGB issued a Notice of Violation (NOV) of the Surface Mining and Reclamation Act (SMARA; Public Resources Code Section 2710 et seq.) for failing to post a



Financial Assurance Mechanism for the Pacifica Quarry. Such instrument was to be submitted to the SMGB office within 30 days of receipt of the NOV.

As of the SMGB's regular business meeting held on September 22, 2005, an Order to Comply to provide a financial assurance instrument in the amount of \$1,319,476 was issued to the operator. On November 4, 2005, the SMGB's office, as previously mentioned, received notice from the operator's agent, Mr. Norris, that the quarry site was sold to Rockaway Beach, Ltd., a Florida limited partnership, and that a condition of the close of escrow was the new owner's obligation to post the financial assurance instrument.

On October 3, 2005, the new owner's representative, Mr. James Reuben, with the law firm of Reuben and Junius, LLP, notified the SMGB's office of their intent to *"to design and develop a first class mixed-use project that would include hotel, commercial and residential components. In our view, a reclamation could not most efficiently be implemented at the time of the build out of such a project and it is our hope that we would be able to work with you and your staff to modify the Reclamation Plan accordingly."*

A SMARA site inspection was performed on November 15, 2005, by the Executive Officer. Mr. Daniel Grimm, senior Vice President of Peebles Atlantic Development Corporation and representing the new owner, and Ms. Mignone Wood, a consultant and associate of Malcolm Carpenter Associates, accompanied the Executive Officer. The site was deemed inactive with no significant change evident relative to previous inspections performed in 2003 and 2004.

At the SMGB regular business meeting held on January 12, 2006, the SMGB moved the effective date for posting of an acceptable financial assurance instrument to January 19, 2006. On January 20, 2006, the SMGB office received an Irrevocable Standby Letter of Credit No. S247836 dated January 19, 2006, for the amount of \$1,319,476, with an expiration date of January 17, 2007, at the counters of Northern Trust, Miami, Florida. Two deficiencies were apparent in review of the instrument:

1. An acceptable Letter of Credit is a letter from any bank authorized to do business in the State of California granting credit on behalf of the mine operator (Reference: PRC Section 2773.1(a)(1), and SMARA Financial Assurance Guidelines, page 3). No documentation was provided to demonstrate that Northern Trust was authorized to do business in California; and
2. The mechanism is required to remain in effect for the specified term of coverage plus an additional 120 days, during which time the lead agency can take necessary steps to collect the financial assurance if deemed necessary (Reference PRC



Sections 2773.1(a)(2), and 2207(a)(9), and SMARA Financial Assurance Guidelines, pages 3 and 4).

For failing to provide the SMGB an adequate financial assurance by January 19, 2006, the operator was issued an administrative penalty of \$50,000 at the SMGB February 9, 2006, regular business meeting, with any additional penalty amount deferred to the SMGB regular business meeting scheduled for April 13, 2006.

The SMGB at its regular business meeting held on April 13, 2006, received a financial assurance instrument from the San Diego Branch of the Northern Trust Bank, and an official copy on bank letterhead on April 14, 2006, with a cover letter from the bank on April 18, 2006. The instrument was reviewed by SMGB staff and determined to be acceptable, with the aforementioned outstanding issues adequately addressed.

EXECUTIVE OFFICER'S ANALYSIS OF ADMINISTRATIVE PENALTY CRITERIA:

Pursuant to PRC Section 2774.1(c), the SMGB must take under consideration several criteria when setting the amount of administrative penalty. These criteria are discussed below:

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 total failure on the part of the operator to provide an acceptable financial assurance instrument to the Department of Conservation. The conduct of the operator manifests an intentional disregard for 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, 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 operator was acting on his own behalf in failing to file, and is the sole responsible party. The mine does not continue to conduct surface mining operations on a daily basis, with no intention to resume such activities, thus, the site should be considered abandoned, and reclamation should proceed promptly. The issue faced by the operator is not unlike that faced by every other surface mine operator in the State: the requirement to have an acceptable financial assurance instrument in place, in the amount approved by the lead agency. The operator has conducted surface mining operations at this site for many years, and has had an approved, albeit inadequate, financial assurance instrument in the past. The operator is well aware of this responsibility.

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: The staffs of the Office of Mine Reclamation and the SMGB have expended time, material resources, and finances, attempting to bring the Mine into compliance with SMARA, specifically by conducting physical site inspections pursuant to PRC Section 2774. Staff and resources have been diverted from other important tasks because of the operator's willful disregard for the law, and failure of the operator to comply with 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 Mine came under SMGB jurisdiction with the assumption of lead agency authority from the City of Pacifica in 2002. The operator was issued an administrative penalty of \$50,000 at the SMGB's regular business meeting held on November 10, 2005, and upheld on February 9, 2006, with any additional penalty amount deferred to the SMGB regular business meeting scheduled for April 13, 2006, and again for May 12, 2006. The SMGB could have issued a fine of up to \$5,000 a day between June 24, 2005 (receipt of the NOV), and the effective date of the Order to Comply (September 22, 2005). The SMGB was generous in that it issued a penalty of \$5,000 per day for only ten days of noticed violation.

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 operator has long known of the necessity to comply with SMARA's requirements, and the necessity to provide an acceptable financial assurance instrument in the amount of \$1,319,476 since May 13, 2005. An acceptable financial assurance instrument was due on June 15, 2005.

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 SMGB at its regular business meeting held on May 12, 2005, approved a financial assurance amount for this site, to be provided by June 15, 2005. The operator has enjoyed an economic and financial benefit from not being in compliance with the annual reporting requirements since such date. The operator's overhead costs and capital outlay have thus been reduced.

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, the Executive Officer believes with respect to the criteria cited above:

(1) The noncompliance of the Mine with its financial assurance requirement had the potential to bring long term harm to the mine site and the natural environment, and to create a safety hazard to humans, in that there would be no funds available to the lead agency to reclaim the site if the operator became incapable of completing reclamation. The amount and cost of reclamation work continued to increase with time.

(2) The operator previously informed the SMGB office that financial assurance funds would be forthcoming. The operator's agent notified the SMGB in its July 21, 2005, correspondence "*of the Bottoms family's continuing efforts to comply with its financial assurance obligations.*" The new owner has indicated to the SMGB it assumed that more time would be available before the financial assurance instrument would be due; however, according to the operator the new owner was "*cognizant of the existence of the financial obligation*" and a "*preference that the Bottoms family not post the financial assurance prior to closing.*" The SMGB's office notified the operator in its correspondence dated July 19, 2005, that "*the Bottoms family continues to be fully responsible for the posting of the financial assurances for the Pacifica Quarry and is subject to administrative penalties, regardless of the sales agreement...*"

Furthermore, although *close of escrow occurred on July 29, 2005, and post closing, Rockaway Beach was obligated to post the increased financial assurance*, the SMGB was not notified of this until November 4, 2005.

(3) SMARA requires an operator to post a financial assurance until the site is reclaimed. The operator has had several opportunities to post a financial assurance instrument, but has not provided such instrument as required anytime between May 13, 2005 and November 4, 2005.

(4) The operator has not made good faith efforts to comply with SMARA or PRC Section 2207 as is clearly indicated in the record. The operator has made efforts to contact the SMGB to explain why the financial assurance instrument was not submitted, however, such explanations did not excuse the operator from adhering to the due dates set forth by the SMGB.

(5) Not applicable.



DISCUSSION: The operator failed to provide a revised and adequate financial assurance instrument as required by SMARA and as requested by the SMGB on numerous occasions, and to adequately respond to the SMGB's Order to Comply issued on September 22, 2005. At the regular business meeting of the SMGB held on February 9, 2006, the SMGB upheld the administrative penalty of \$50,000, and deferred additional penalties. According to PRC Section 2774.1(c), an order setting an administrative penalty becomes effective upon issuance, and the penalty amount reflected the original date of non-compliance with SMARA and Public Resources Code Section 2207.

The SMGB at its April 13, 2006, regular business meeting requested that the administrative penalty to be considered reflect the period from when the NOV was received (June 24, 2005) and the date the SMGB was notified that the property had been sold to Rockaway Beach (November 4, 2005).

Furthermore, the mine has previously been characterized as idle for several years with no intent to resume mining operations in the future. However, since no interim management plan (IMP) was ever prepared and submitted by the operator to the lead agency for review and approval within 90 days of the surface mining operation becoming idle, the mine site is currently considered abandoned pursuant to PRC Sections 2727.1 and 2770(h)(1) and 2770(h)(6).

EXECUTIVE OFFICER'S RECOMMENDATION: The SMGB can consider:

1. Rescinding the administrative penalty the SMGB issued effective on November 10, 2005, and upheld on February 9, 2006;
2. Upholding the administrative penalty upheld on February 9, 2006;
3. Re-evaluating the administrative penalty amount based on the period of non-compliance, that being between June 24 and November 4, 2005.

As authorized by statute, the maximum amount per violation is \$5,000 per day. The Executive Officer submits that the date of non-compliance is June 24, 2005, which is the date on which the operator received the SMGB's initial NOV. Thus, the maximum amount of penalty to be considered is \$665,000.

Violation: Failure to provide an adequate financial assurance instrument as required by Public Resources Code Section 2773.1.



Administrative Penalty Amount of \$35,000 becomes effective at 5:00 P. M. on May 12, 2006. The penalty is to be paid to the SMGB office within 30 calendar days from the date of issuance of the Administrative Penalty. This amount represents a fine of \$5,000 per day for an additional seven of the 133 days of noticed violation between June 24, 2005 (receipt of Notice of Violation), and November 4, 2005 (notification to the SMGB that the property has been sold to Rockaway Beach).

Furthermore, the Executive Officer recommends that the operator be put on notice that a public hearing will be held to consider whether the operator has abandoned its surface mining operation without commencing reclamation, and consider an Order to commence reclamation of the site pursuant to PRC Section 2773.1(b).

SUGGESTED MOTION LANGUAGE:

Motion to accept the Executive Officer's recommendations and issue the Administrative Penalty as set forth:

Mr. Chairman, I move that the Board approve the analysis, findings, and recommendations contained in the Executive Officer's Report and that the Board, acting as lead agency with authority provided under PRC Section 2774.1, rescind the administrative penalty of \$50,000 issued at the SMGB's regularly business meeting held on November 10, 2005, and upheld by the SMGB at its regular business meeting held on February 9, 2006, and issue the implementation of the Administrative Penalty to the operator for the amount of \$35,000, for failure to provide financial assurance instrument. The Order of Administrative Penalty is to issue and become effective at 5:00 P. M., May 12, 2006.

