Agenda Item No. 8: Adoption of Resolution 2012-05 Certifying the County of Riverside’s Surface Mining and Reclamation Ordinance No. 555.19, as Amended by Surface Mining and Reclamation Ordinance No. 711-C.S., as Being in Accordance with the Surface Mining and Reclamation Act (SMARA; Public Resources Code Section 2710 et seq.)

INTRODUCTION: The County of Riverside (County) has recently amended its Surface Mining and Reclamation Ordinance. The County’s mining ordinance was originally certified by the State Mining and Geology Board (SMGB) in May 1994. In correspondence received on November 5, 2012, the County requested review of the County’s amendments of its certified ordinance No. 555.19. The amendment to the County’s ordinance was adopted by the County’s Board of Supervisors on September 19, 2012. The County has requested review of its surface mining ordinance by the board, pursuant to Public Resources Code (PRC) Section 2774.3.

STATUTORY AUTHORITY: Public Resources Code Section 2774.4(a) states:

“Every lead agency shall adopt ordinances in accordance with state policy which establish procedures for the review and approval of reclamation plans and financial assurances and the issuance of a permit to conduct surface mining operations, except that any lead agency without an active surface mining operation in its jurisdiction may defer adopting an implementing ordinance until the filing of a permit application. The ordinances shall establish procedures requiring at least one public hearing and shall be periodically reviewed by the lead agency and revised, as necessary, to ensure that the ordinances continue to be in accordance with state policy.”

PRC Sections 2774.3 provides information pertaining to the role of the SMGB and states:

“The board shall review lead agency ordinances which establish permit and reclamation procedures to determine whether each ordinance is in accordance with state policy, and shall certify the ordinance as being in accordance with state policy if it adequately meets, or imposes requirements more stringent than, the California surface mining and reclamation policies and procedures established by the board pursuant to this chapter.

Furthermore, PRC Section 2774.5(a), (b) and (c) states:
“If, upon review of an ordinance, the board finds that it is not in accordance with state policy, the board shall communicate the ordinance’s deficiencies in writing to the lead agency. Upon receipt of the written communication, the lead agency shall have 90 days to submit a revised ordinance to the board for certification as being in accordance with state policy. The board shall review the lead agency’s revised ordinance for certification within 60 days of its receipt. If the lead agency does not submit a revised ordinance within 90 days, the board shall assume full authority for reviewing and approving reclamation plans submitted to the lead agency until the time the lead agency’s ordinances are revised in accordance with state policy.

(b) If, upon review of a lead agency’s revised ordinance, the board finds the ordinance is still not in accordance with state policy, the board shall again communicate the ordinance’s deficiencies in writing to the lead agency. The lead agency shall have a second 90-day period in which to revise the ordinance and submit it to the board for review. If the board again finds that the revised ordinance is not in accordance with state policy or if no revision is submitted, the board shall assume full authority for reviewing and approving reclamation plans submitted to the lead agency until the time the lead agency’s ordinances are revised in accordance with state policy.

(c) In any jurisdiction in which the lead agency does not have a certified ordinance, no person shall initiate a surface mining operation unless a reclamation plan has been submitted to, and approved by, the board. Any reclamation plan, approved by a lead agency under the lead agency’s ordinance which was not in accordance with state policy at the time of approval, shall be subject to amendment by the board or under the ordinance certified by the board as being in accordance with state policy.

BACKGROUND: The Surface Mining and Reclamation Act (SMARA; Public Resources Code Section 2710 et seq.) requires that each city or county with a surface mining operation within its jurisdiction adopt a surface mining ordinance in accordance with State Policy that establishes procedures for the review and approval of reclamation plans and financial assurances and the issuance of a permit to conduct surface mining operations. SMARA provides for the SMGB to certify local agency mining ordinances as being in accordance with State Policy before they become effective (PRC Section 2774.3).

The County’s mining ordinance was originally certified by the SMGB in May 1994. In correspondence received on November 5, 2012, the County requested review of the County’s amendments of its certified ordinance No. 555.19. The amendment to the
County’s ordinance was adopted by the County’s Board of Supervisors on September 19, 2012.

Specifically, the amended language includes the following:

Section 1. “e. Notwithstanding the above, or any other provision herein to the contrary, the Board of Supervisors reserves exclusively to itself the duty to investigate, hear, approve, conditionally approve or disapprove all surface mining permits and reclamation plans including any modifications to said permits and plans included as part of a fast track project as defined by Section 21.34d of County Ordinance No. 348.”

Section 2. This ordinance shall take effect thirty (30) days after its adoption.

Such amendment essentially allows for the Board of Supervisors to reserve its right to investigate, hear, approve and conditionally approve or disapprove all surface mining permits and reclamation plans included as part of a fast-track process; whereas, prior to the amendment being adopted, only the County’s Planning Commission would hear such matters.

REVIEW METHODOLOGY: When a mining ordinance is received for review, it is examined for content, clarity, and conflict. The review is typically conducted by the Executive Officer, but could also include SMGB staff, one or more administrative and/or technical analysts from the Office of Mine Reclamation, and the SMGB’s legal counsel. If necessary, additional technical and legal advice may be sought from the California Geological Survey or from the Attorney General’s Office. Evaluation of content is to determine if all SMARA requirements are addressed and contained within the Ordinance. Evaluation of clarity is to determine if they are clearly stated or might be construed in more than one way, which might lead to later confusion. Evaluation of conflict is to determine that they are not in conflict with statute, nor are in conflict internally with other portions of the Ordinance.

In addition, two types of review comments are offered: recommendations and suggestions. Recommendations are comments that should be followed if the Ordinance is to be certified by the SMGB. These recommendations relate to serious omissions in content or statements in conflict with SMARA or the SMGB’s Regulations. Suggestions are comments that are made to improve the clarity of statements, usually by making them more complete or by offering references. These comments are not binding and are offered as a constructive service.

COMMENTS RECEIVED PERTAINING TO THE AMENDMENT: Comments in opposition to the County’s amendment dated November 15, 2012, were received from
Andrew Brady, representing the City of Temecula as City Attorney, and Raymond Johnson with the Johnson & Sedlack law firm and on behalf of the Elsinore Murrieta Anza Conservation District (EMACD).

Comments Received on behalf of the City of Temecula: The City of Temecula provided six specific comments/allegations as presented in their November 15, 2012, correspondence and summarized below:

1. The amendment enacted by the County was initiated in support of the proposed Liberty Quarry Project, albeit the amendment would be applicable for all surface mining operations throughout the County’s jurisdiction.
2. The amendment limits agency and public review of surface mining projects
3. The amendment violates SMARA since it was enacted prior to review and approval by the SMGB.
4. The City has separate pending legal challenges to the proposed Liberty Quarry Project and the Surface Mining and Zoning Ordinance Amendments and such lawsuits are severely compromised by the SMGB’s “approval of the County’s actions.”
5. The County’s use of CEQA’s Common Sense Exemption in adopting the Amendments was inappropriate
6. County is currently subject to a LART audit and alleges that the audit “ranks the County near the bottom among counties in the State when it comes to administering SMARA.”

Comments received on behalf of the Elsinore Murrieta Anza Conservation District (EMACD): EMACD provided two specific comments as presented in their November 15, 2012, correspondence and summarized below:

1. EMACD claims that the County has taken the position that all materials submitted are draft and are thus unavailable for public review, and that all documentation would only be available for review by the public and other stakeholders is when the matter is finally noticed for a public hearing before the Board of Supervisors.
2. Fast-tracking procedures enacted by the Board of Supervisors would essentially limit review of documents and project, and prepare conditions of approval and mitigation measures, to a maximum of ten calendar days.

ANALYSIS: Pursuant to PRC Section 2728, a lead agency is defined as the city, county, San Francisco Bay Conservation and Development Commission, or the SMGB, that has the principal responsibility for approving a surface mining operation or reclamation plan. In order for a lead agency to have such responsibility, it must have a SMGB certified mining ordinance.
In considering certification or recertification of a mining ordinance, the SMGB is tasked with reviewing a lead agency's mining ordinance, and has authority to require that agency to adopt an ordinance that conforms to state policy. A lead agency can revise its ordinance, and the ordinance would become effective upon adoption as in this case by the Board of Supervisors (or at some date set forth when the amendment was adopted). Furthermore, should the ordinance is in conflict or contrary to state policy, it remains effective unless the SMGB has an opportunity to review and pursue administrative actions afforded the SMGB pursuant to PRC Section 2774.5(a), (b) and (c). However, pursuant to PRC 2774.5(c), should the lead agency not have a certified ordinance (i.e., amended and adopted by the Board of Supervisors, but not recertified by the SMGB), no person shall initiate a surface mining operation unless a reclamation plan has been submitted to, and approved by, the SMGB. This raises an issue as to when the amended and subsequently adopted ordinance is effective when considering approval of a reclamation plan by the lead agency.

Approval of a reclamation plan does not circumvent any requirements set forth pursuant to the California Environmental Quality Act (CEQA), or administrative processes therein. Approval is also does not provide approval for commencement of surface mining activities for a new or proposed surface mining operation. It should also be noted that in order for an operator to commence surface mining in accordance with SMARA and the SMGB’s regulations, the operator must have a SMARA lead agency approved reclamation plan and financial assurance cost estimate and mechanism in place, completion all an environmental study and associated requirements pursuant to CEQA, and a permit to mine from the jurisdiction in which the proposed surface mining operation is located. Simply having an approved reclamation plan is not sufficient under SMARA to commence surface mining operations.

ADDITIONAL CONSIDERATIONS: In light of some the issues raised herein, the SMGB may wish to consider discussion of regulations for 1) mandatory notification from the lead agency to the SMGB of any mining ordinance that has been amended, and 2) mandatory recertification of any amended mining ordinance. Another approach is for the SMGB to engage in a periodic review of all lead agency mining ordinances to determine whether any changes had been made since the last review, and then decide if such changes require SMGB action.

EXECUTIVE OFFICER’S RECOMMENDATION: The SMGB could consider recertifying the County of Riverside’s Surface Mining and Reclamation Ordinance Number 555.19, assuming as amended the ordinance remains in accordance with the requirements of State Policy, SMARA and the SMGB’s regulations. However, considering the pending litigation between the City of Temecula and the County, it is recommended that the SMGB defer recertification consideration until the pending litigation is resolved.
SUGGESTED MOTION LANGUAGE:

Motion – Recommend recertification:

Mr. Chairman, in light of the information before the SMGB, I move that the SMGB adopt Resolution Number 2012-05 recertifying the County of Riverside’s Surface Mining and Reclamation Ordinance Number 670-C.S, as amended by Surface Mining and Reclamation Ordinance No. 555.19, as being in accordance with the requirements of State Policy, the Surface Mining and Reclamation Act and the SMGB’s regulations.

[or]

Motion – Recommend to defer:

Mr. Chairman, in light of the information before the SMGB, I move that the SMGB defer this matter until pending litigation is resolved.

Respectfully submitted:

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Stephen M. Testa
Executive Officer