March 11, 2020

RE: Permanente Quarry Intent to Appeal Reclamation Plan Amendment (PLN19-0106)

To all Interested Parties:

On November 22, 2019, an "Intent to Appeal" was submitted to the State Mining and Geology Board (Board) on behalf of Lehigh Southwest Cement Company (Lehigh). Lehigh asserts that the County of Santa Clara (County) has "functionally" denied the May 22, 2019 amended reclamation plan application for expansion of the Permanent Quarry (PLN19-0106) and requests that the Board consider the application on appeal.

At this time, the Board has declined to accept the appeal under the provisions of Public Resources Code section 2770, subdivision (e).

At this point, neither the County Planning Commission nor the board of Supervisors has taken any final action on Lehigh's application. Lehigh's assertion that the County has denied its application is based on a statement from County staff that it will recommend denial if Lehigh does not enter into a Compliance Agreement and Stipulated Order to Comply and, pursuant to such Agreement, agree to put application PLN19-106 on hold until the County acts on application PLN19-0067. For this reason, we believe that the appeal is not merited, and Lehigh must first exhaust its options with the County and make the arguments that it makes in its letter to the Board to the County decisionmakers. We further believe the appeal is not ripe because the facts underlying County staff's determination to recommend denial appear to have changed.

Public Resources Code (PRC) Section 2770 of the Surface Mining and Reclamation Act of 1975 (SMARA) sets forth the grounds for appealing a lead agency decision to the Board.

> A person who can substantiate, based on the evidence of the record, that a lead agency has either (A) failed to act according to due process or has relied on considerations not related to the specific applicable requirements of Sections 2772, 2772.1, 2773, 2773.1, 2773.3, and 2773.4 and the lead agency's surface mining ordinance adopted pursuant to subdivision (a) of Section 2774 in reaching a decision to deny approval of a reclamation plan or financial assurances for reclamation, or (B) failed to act within a reasonable time of receipt of a completed application may appeal that action or inaction to the Board.

(PRC § 2770 (e)(1))

The Board may decline to hear an appeal if it determines that the appeal raises no substantial issues related to the lead agency's decision to deny the approval of a reclamation plan or financial assurance, or the timeliness in reviewing a completed application. (PRC, § 2770 (f)(1)) The Chairman of the Board, or the Chairman's designee, shall determine whether the appeal is within the jurisdiction of the Board for purposes of hearing the appeal. (Title 14 of the California Code of Regulations (CCR) § 3651.)

Lehigh raises three grounds for its appeal. As discussed below, we believe these grounds are insufficient to justify an appeal, at least at this time.

First, Lehigh contends that its appeal is appropriate because the County has relied on considerations not related to the specific requirements of SMARA and the County's SMARA ordinance. "The County bases its denial of the Amended Reclamation Plan upon the existence of a reclamation plan violation which the County treats as resolved." (11/22/2019 Letter from Lehigh to Board, at p. 5.) Lehigh also argues that the County is not authorized "to require the operator to process a different, lead agency-devised reclamation plan amendment as a prerequisite to acting on the operator's application." (*Id.* At p. 6.)

Lehigh points out that the County ordinance cited as justification for withholding action on the reclamation plan amendment, Ordinance C 1-71, is not part of the County's SMARA ordinance. We agree that denial of a reclamation plan amendment based on an outstanding violation could constitute a basis to appeal to the Board. However, the County has *not* denied the reclamation plan amendment on this basis. Indeed, the County has not taken any official action to approve or deny the reclamation plan amendment.

The planning department letter states: "If Lehigh does not enter into a Compliance Agreement and Stipulated Order to Comply, the County may schedule the Reclamation Plan Amendment for public hearing with a recommendation of denial…" (11/8/2019 Letter from County to Lehigh at p. 2.) This has not yet occurred, and neither the Planning Commission nor the Board of Supervisors has taken final action. If Lehigh refuses to enter into the Compliance Agreement and the County eventually denies the reclamation plan amendment for that reason, the time to appeal will run from the date of the denial.

In addition, it appears that the County's request that Lehigh amend PLN19-0067 to include the Yeager Yard slope stabilization may be moot as Lehigh has apparently included the Yeager Yard slope stabilization as well as the rest of PLN19-0067 into PLN19-0106.

Second, Lehigh argues that the County has failed to act according to due process. Lehigh incorporates many of the same arguments discussed above to support its claim that the County has violated its due process, and these arguments fail for the same reasons discussed above. But, in addition, Lehigh argues that the County's decision "requires Lehigh to follow a piecemeal approach to the Amended Reclamation Plan, rather than processing a single, integrated Amended Reclamation Plan for the entire reclamation project, as contemplated by the Application." (11/22/2019 Letter from Lehigh to Board at p. 7.)

We agree that it makes sense to consider all pending reclamation plan amendments together. It is our understanding that PLN19-0106 includes everything from PLN19-0067 and more. Therefore, it is unclear why Lehigh does not withdraw PLN 19-0067 and request that the County begin consideration of PLN19-106. We further believe that Lehigh's attempt to appeal PLN19-106, while the County continues to consider and process PLN19-0067, exacerbates the piecemealing issues. Having two separate agencies process different but overlapping amendments will not result in the integrated process that Lehigh recognizes is required by SMARA as well as the California Environmental Quality Act.

Finally, Lehigh contends that the County has failed to act within a reasonable time following submittal of a complete application. The County deemed the application complete on November 8, 2019. In a regulation not directly applicable to reclamation plan amendments,

"reasonable time" means "the time period specified in the lead agency's surface mining and reclamation ordinance, or that which is mutually agreed upon by the applicant and the lead agency." (Title 14 CCR § 3650(c)(3)(B)). Where no time is specified in the lead agency's ordinance, then the interval between the successive review steps shall not exceed 60 days.

Here, in the same letter in which it deemed the application complete, the County staff informed Lehigh that the County might schedule Lehigh's application for public hearing with a recommendation of denial if Lehigh did not enter into a Compliance Agreement. Lehigh did not give the County an opportunity to schedule the public hearing and instead filed its Intent to Appeal just fourteen days after the County sent its letter. Therefore, we do not believe that the County failed to act within reasonable time period.

We agree that if the County ultimately refuses to act on PLN19-0106 until after Lehigh revises PLN19-0067 and the County acts upon that amendment, then it may raise grounds for an appeal. But at this time the County has not taken or failed to take any action.

V/R,

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