BEFORE THE MINED LAND RECLAMATION BOARD
STATE OF COLORADO

THE DIVISION OF RECLAMATION, MINING AND SAFETY'S RESPONSE TO REQUEST FOR RECONSIDERATION

In the Matter of the 112c Permit Application of Rocky Mountain Aggregate & Construction, LLC, File No. M-2013-007

The Division of Reclamation, Mining and Safety ("Division") submits its Response to Objectors'[1] Request for Reconsideration ("Request") dated September 16, 2013 submitted for consideration by the Mined Land Reclamation Board ("Board") at its formal hearing scheduled for October 16, 2013. The Division states as follows:

I. Background

The Objectors' Request seeks reconsideration of the Board's August 30, 2013 Findings of Fact, Conclusions of Law, and Order ("Order"). The Order found that the 112c application, as amended, satisfied the requirements of the Mineral Rules and Regulations of the Colorado Mined Land Reclamation Board for the Extraction of Construction Materials, 2 CCR 407-4 ("Rules") and therefore approved the application over objections. The Board's findings and conclusion were based, in part, upon the scrutiny employed by the Division during the course of its technical adequacy review process as evidenced by the Division's two detailed adequacy letters and the thorough Rationale for Recommendation to Approve ("Rationale"). Additionally, the Board's findings and conclusions were based upon detailed scientific facts presented over the course of a 5-hour long formal public hearing, at which all parties were able to fully present arguments.

Through the Division's Rationale and the volume of testimonial information provided during the course of the hearing, the Board was provided an incredible amount of information relating to jurisdictional issues raised by the Objectors, including issues/concerns related to water quantity and water rights. The Board made an informed decision to conditionally approve the application over objections. Nevertheless, Objectors' Request asks that the Board reconsider certain aspects of the application.

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[1] The written Request for Reconsideration was submitted by Janice Wheeler, Dennis Schultz, Kathy and Stan Borinski, Leigh Robertson, Barbara Bernhardt, Keith and Sharon Rasmussen, and Roger and Gail Nobel, collectively referred to as the "Objectors".

The Board's published agenda for the October hearing noticed interested parties that the request for reconsideration has been scheduled for a formal hearing at the October 16-17 hearing and that the Board will consider only whether to grant or deny Objectors' Request. If granted, the reconsideration hearing will be set for argument on November 13-14, 2013. If denied, no further hearing will be set before the Board.[2] Additionally, pursuant to Rule 2.9.3, Division is acting as staff to the Board for this reconsideration proceeding.

II. Regulatory Provisions Applicable to Reconsideration Request

To request reconsideration, Rule 2.9.1(2) requires a party to "set forth a clear and thorough explanation of the grounds for justifying reconsideration, including but not limited to new and relevant facts that were not known at the time of the hearing and an explanation why such facts were not known at the time of the hearing." Thus, granting reconsideration is not appropriate if the petition simply re-states facts already known and presented during the initial application hearing. The intent of Rule 2.9 is not to allow parties an opportunity to re-argue old issues, but rather an opportunity to introduce truly new information or evidence not known at the time of the original hearing. New and relevant facts not known at the time of hearing are the *sole* justification for rehearing under Rule 2.9. As argued below, the current Request does not present new or relevant facts not known at the time of the hearing, but rather asks the Board to re-hear previously raised issues.

[2] This process differs from the Board's historic practice of hearing both the reconsideration request and, if granted, the formal hearing simultaneously. Bifurcating the hearing is a reasonable alternative procedure in this matter. Most parties to this matter live out-of-town and would incur an expense to travel to Denver for the hearing. Additionally, all parties would spend time and resources preparing for a substantive hearing that may not occur if the petition is denied. Therefore, under these circumstances, it is reasonable to bifurcate the hearing and defer the expenditure of resources until the Board has ruled on the petition. The Division has filed a Request to Appear by phone at the October 16, 2013 hearing simultaneously with this Response, and does not object to other interested parties appearing by phone at the October 16 hearing.

III. Objectors' Request is Properly Denied as it Fails to Raise New or Relevant Facts not Known at the Original Hearing

a. The Division of Water Resources Letters are not new facts sufficient to justify reconsideration.

Objectors' argue that two letters submitted to the Division by the Division of Water Resources ("DWR") dated July 30, 2013 and August 1, 2013 constitute new information not known at the time of the hearing justifying reconsideration pursuant to Rule 2.9.1(2). Request, p. 1. They argue that the DWR letters were not submitted to the Division by the June 23, 2013 deadline, that Objectors did not have access to the letters prior to the hearing, and that the letters contain information that requires further investigation in regard to water rights, change in water use, and rainwater collection. *Id.*

The letters were received by the Division on August 1, 2013 and added to the permit file. Although late, as explained during the formal hearing, it is the Division's practice to accept tardy letters from State agencies because, as in this instance, the Division defers to State agencies as the State's expert in a particular field. In this instance, the Division accepted the DWR letters because they directly addressed issues raised by both the Division and Objectors and DWR is the State's expert on water rights. Of importance, the letters did not object to the mine plans set forth in the application but rather confirmed the application would be in compliance with Colorado water law so long as the operator abides by the dam safety regulations for the settling ponds (if required) and adheres to the water rights priority system when there is a call on the river.

The Division attempted to offer the letters as evidence during the August 14, 2013 hearing, however, the Objectors objected to their inclusion. Even though the letters themselves constituted the best evidence available regarding water rights, the Division's position at hearing was that the two letters merely confirmed information already contained in the permit file, making the content of the letters duplicative. The Board ruled in favor of Objectors' objection and excluded the letters from the hearing record. Strangely, the Objectors are now arguing that not only do they want the letters considered, but that the letters constitute new information justifying a new hearing. Objectors cannot have it both ways.

The actual content of the letters are not new facts unknown to the Objectors at the time of the hearing. Issues relating to water rights were specifically raised by Objectors and addressed by the Division in the Rationale on page 6, paragraph 7. In addition, although the letters themselves were excluded, the content of the letters were discussed during the course of the formal public hearing. The Board accepted testimony regarding water rights, source of water (Ouray Ditch), change in water use, and storm water control/management plans. After considering all information, the Board ordered "The application materials are in compliance with

applicable Colorado water law and regulations governing injury to existing water rights….The Division of Water Resources did not indicate that the Application and proposed mine operation presented any conflict with existing Colorado water laws". Order, page 2-3, paragraph 10. Thus, the original hearing record indicates that the water rights issue was fully presented and argued during the August hearing; therefore the substance of Objectors' Request fails to raise new or relevant facts that were not known at the time of the August hearing.

In sum, Objectors should not be permitted to object to the inclusion of the DWR letters at the original hearing, and then procedurally attempt to use those very letters as justification for a re-hearing. Additionally, the actual content of the DWR letters are not new facts unknown at the time of the hearing. Therefore, this issue fails to satisfy the reconsideration requirement set forth in Rule 2.9.

b. Alleged errors within the application are not new facts sufficient to justify reconsideration.

Objectors' argue that there exist errors within the application and that the applicant did not meet the requirements of the Division's two adequacy letters, therefore this matter should be reconsidered by the Board. Request, p. 1. The substance of Objectors' Request fails to raise new or relevant facts that were not known at the time of the August hearing; the Request instead confirms that this issue was previously raised and discussed during the August hearing. The Request confirms that the Objectors' provided the Board an itemized list of all alleged errors at the August hearing. Request, p. 1. Additionally, compliance with the Division's adequacy letters was also an issue raised and discussed at the August hearing. Finally, the arbitrary and capricious standard, as argued by Objectors, is not applicable to petitions for reconsideration. Again, new and relevant facts not known at the time of hearing are the *sole* justification for reconsideration under Rule 2.9. Even if it is an applicable standard, Objectors' fail to state how, considering the Order was the result of a thorough, well-reasoned, and fully vetted deliberative process, a Board decision on this issue was arbitrary or capricious.

Denial of Objectors' Request is proper because the Request confirms facts already found and fails to set forth any new or relevant facts for the Board to consider.

c. Aggrieved Party Status.

Objectors' raise a confusing argument regarding the Division's definition and conclusion that Objectors are not aggrieved by this permit application. In response,

the Division does not take issue with the Objectors' status as "party"[3] to this matter, nor has staff taken the position that the Objectors are not aggrieved. To the extent this application potentially directly and adversely affects the Objectors regarding matters within the Division and Board's regulatory jurisdiction they are aggrieved.

IV. Conclusion

The Division respectfully requests that the Board deny Objectors' Request for Reconsideration of the Board's August 30, 2013 Order conditionally approving the 112c application over objections.

Respectfully submitted to the Colorado Mined Land Reclamation Board on October 4, 2013.

/s/ Jeff M. Fugate
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[3] As defined by Rule 1.1(34.1), "Party means a person who demonstrates he/she/it is directly and adversely affected or aggrieved by the conduct of a mining operation, proposed mining operation or an Order of the Board and whose interests are entitled to legal protection under the Act."

Certificate of Service

I, Jeff M. Fugate, hereby certify that on this 4th day of October, 2013, I served **via electronic mail** a true copy of the foregoing THE DIVISION OF RECLAMATION, MINING AND SAFETY'S RESPONSE TO REQUEST FOR RECONSIDERATION, addressed to the following:

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