



COLORADO

Division of Reclamation,
Mining and Safety

Department of Natural Resources

1313 Sherman Street, Room 215
Denver, CO 80203

DATE: January 9, 2017

TO: John P. Ary
Fremont Paving & Redi-Mix, Inc.
839 MacKenzie Avenue
P.O. Box 841
Canon City, CO 81212

RE: Findings of Fact, Conclusions of Law and Order
Fremont Paving & Redi-Mix, Inc.
File No's. M-2006-009

On January 9, 2016, the Mined Land Reclamation Board signed the enclosed Board Order for the above captioned operation. We strongly advise that you read this document carefully.

Sincerely,



Camille Mejia
Board Secretary

Enclosure(s)

Certified Mail

7014 2120 0001 7885 6767

Cc's
Elliott Russell
Wally Erickson
John Roberts
Scott Schultz



**BEFORE THE MINED LAND RECLAMATION BOARD
STATE OF COLORADO**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

**IN THE MATTER OF THE APPLICATION OF FREMONT PAVING & REDI-MIX, INC. FOR A 112
CONSTRUCTION MATERIALS RECLAMATION PERMIT, File No. M-2016-009**

THIS MATTER came before the Mined Land Reclamation Board ("Board") on December 15, 2016 in Denver for a hearing to consider the application for a 112c construction materials reclamation permit filed by Fremont Paving & Redi-Mix, Inc. ("Applicant"), file number M-2016-009.

Elliott Russell, Wally Erickson, and Assistant Attorney General Scott Schultz appeared on behalf of the Division of Reclamation, Mining and Safety ("Division"). Angela Bellantoni, Ph.D.; Richard Ranson, Esq.; and John Ary appeared on behalf of Applicant. David Shohet, Esq. appeared on behalf of objectors Hobbs Family Farms; Rusler Produce, Inc.; Kelly G. Bond; Jason and Tina Potestio; and Michael and Velma Rinks. Objector Doug Wiley appeared on his own behalf.

The Board, having considered the presentations, testimony, and evidence of the Division¹; Applicant; and the objectors, and being otherwise fully informed of the facts in the matter, enters the following:

FINDINGS OF FACT

1. On February 26, 2016, the Applicant filed an application with the Division for a 112c reclamation permit under section 34-32.5-112, C.R.S. for a site known as the Pueblo County Aggregate Project, file number M-2016-009; on June, 10, 2016, the Applicant filed an amendment to the application (the application, as amended, is referred to herein as "Application"). The Application proposed an operation to be located in section 25, Township 21 South, Range 63 West, 6th Principal Meridian in Pueblo County, Colorado.

2. During the public comment periods, as mandated by Rule 1.7.1 of the Mineral Rules and Regulations of the Colorado Mined Land Reclamation Board for the Extraction of Construction Materials, 2 CCR 407-4 ("Rules"), the Division received comment and objection letters from individuals, businesses, organizations, and agencies.

¹ The Division was advisory staff to the Board, not a party, in this proceeding.

3. During the review period, the Division generated three adequacy letters between April 2016 and October 2016. The Applicant addressed all of the Division's adequacy issues to the Division's satisfaction.

4. On October 21, 2016, the Division issued and served on all parties both a written recommendation to approve the Application over objections and a written rationale for that recommendation.

5. On November 2, 2016, the Board, through a prehearing officer, conducted a prehearing conference in Pueblo. The prehearing officer issued a draft prehearing order. Among other things, the draft prehearing order identified four categories of issues for the parties to present to the Board for consideration. At the hearing, the Board considered the draft prehearing order and invited amendments or adjustments to be proposed by the parties. Mr. Shohet orally moved the Board to strike the Applicant's witness list as non-compliant with Rule 2.6(2)(a); and to substitute a witness identified on the objectors' witness list. The Board denied Mr. Shohet's motion to strike the Applicant's witness list and granted his request to substitute a witness.

6. The Application described a proposed construction materials (gravel) mining operation and on-site processing of mined materials, including the use of portable cone crushers, screeners, and conveyors. The permit boundary described in the Application included 1,517 acres on the Cascajo Gravel Terraces, with 465.9 acres disturbed. Mining is proposed to proceed through four phases; active mining is limited to 25 acres along with concurrent reclamation. The proposed mining area is more than one thousand feet in distance from the Bessemer Ditch and at least fifty feet higher in elevation than the Bessemer Ditch. The Application proposed to reclaim the affected land for rangeland. The Division calculated the financial warranty for the operation through Phase I and construction of the North Haul Road and the Southwest Haul Road to be \$672,083, including \$269,979 for revegetation.

7. At the hearing, Angela Bellantoni, Ph.D. of Environmental Alternatives, Inc. ("Dr. Bellantoni"), the Permitting Contact of the Applicant, testified on behalf of the Applicant. Dr. Bellantoni described the proposed operation, mining plan, and reclamation plan, including that the Applicant will leave undisturbed native berms around the mining area. Dr. Bellantoni testified that all structures to be used at the proposed mining site will be temporary structures only. Dr. Bellantoni stated that there will be no anthrax contamination due to disruption of the soil. Dr. Bellantoni also stated that affected lands will be blended with the surrounding topography during reclamation, and described the proposed weed management plan. In response to objectors' argument that the terrain of the area makes reclamation difficult or impossible, Dr. Bellantoni testified that the nearby State Pit has been successfully reclaimed. Dr. Bellantoni stated that the owner of the Applicant, John Ary, has received the Jack Starner reclamation award and has been released from the financial warranty on four projects. Dr. Bellantoni also testified that public notice

signs for the project were in compliance with the rules, including being moved with the relocation of the haul road access points.

8. At the hearing, Bill Schenderlein of Blue Earth Solutions testified ("Mr. Schenderlein") on behalf of the Applicant. Mr. Schenderlein testified that the proposed mine site is a topographical high point and that water will run off from the site toward the Bessemer Ditch. Mr. Schenderlein testified that the Applicant will comply with all requirements of the Colorado Department of Public Health and Environment, including compliance with a Stormwater Management Plan. Mr. Schenderlein testified that the operation will limit the disturbed acres and that the mine floor will contain all stormwater. Mr. Schenderlein testified that the Applicant will implement best management practices to reduce sediment and erosion, construct perimeter berms around the site with armored upgradient faces, install straw and riprap filtration and drainage outlets and structures, and strategically place detention basins.

9. Chris Sanchez of Bishop-Brogden Associates, Inc. ("Mr. Sanchez") testified at the hearing on behalf of the Applicant. Mr. Sanchez testified that the mine site's location on high areas will prevent interception of water resources; that the proposed mine site is not designed to intercept groundwater; that the nearest water right points of diversion are on Sixmile Creek and the Huerfano River, more than 1.4 miles from the proposed mining area and in separate drainage areas; that there is no potential for the operation to impact water rights; and that the mining operation will not interfere with surface water, deplete any stream system, or impact diversion structures. Mr. Sanchez stated that while the only possible impact is the delivery of sediment to the Bessemer Ditch, that will not occur because of the Applicant's erosion and sediment control plan, best management practices, and that the Applicant will construct a rim around the boundary to detain runoff. Mr. Sanchez testified that the mine will not intercept groundwater, deplete groundwater, or use groundwater as a water supply for mining operations. Mr. Sanchez testified that the Spill Prevention, Control, and Countermeasure Plan ("SPCC") will prevent contamination of groundwater by the operation and that the operation has no potential to impact area wells. Mr. Sanchez testified that the source of the Bessemer Ditch is the Arkansas River, and that water rights owners are not entitled to water from overland flow.

10. At the hearing, David Shohet stated on behalf of objectors that the proposed site is prime agricultural land, expressed concerns that the operation will threaten food safety, and stated that reclamation is difficult in the area of the proposed mine.

11. Dan Hobbs ("Mr. Hobbs") testified at the hearing on behalf of the Hobbs Family Farm. Mr. Hobbs stated that the Hobbs Family Farm produces onions, garlic, and chiles; testified that the property is premium farming land; and opined that the Applicant will be unable to contain stormwater in a major rain event. Mr. Hobbs also expressed concern about damage to gramma grass by the proposed operation. Specifically, Mr. Hobbs stated that the water from the Bessemer Ditch is very clean and that disturbance of native grasses will diminish the quality of the ditch water.

12. Nolan Doesken, State Climatologist ("Mr. Doesken"), testified at the hearing on behalf of objectors. Mr. Doesken testified that the driest portion of Colorado is east of Pueblo. Mr. Doesken also testified that it does not rain frequently at the proposed mine area, but that rains produce a high volume in a short time. Mr. Doesken stated that he had not reviewed the Applicant's revegetation plan for the site and that his only familiarity with the proposed mine is what he observed at the hearing.

13. At the hearing, Tom Rusler ("Mr. Rusler") testified on behalf of objector Rusler Produce, Inc. Mr. Rusler stated that his companies possess seven hundred acres of irrigated farmland that includes miles of underground pipelines and center pivot sprinklers. Mr. Rusler testified that center pivot sprinklers require clean water such as the water from the Bessemer Ditch. Mr. Rusler stated that native gramma grass is responsible for holding hillsides together during storm events, and that the mining operation will remove hundreds of acres of gramma grass.

14. Jay Winner ("Mr. Winner") of the Lower Arkansas Valley Water Conservancy District ("LAVWCD") testified at the hearing on behalf of objectors. Mr. Winner stated that the proposed mining operation could contaminate nearby food sources, and that stormwater runoff may create sediment that could clog area sprinklers.

15. Leah K. Martinsson, Esq. with Berg, Hill, Greenleaf, Ruscitti, LLP ("Ms. Martinsson") testified on behalf of objectors. Ms. Martinsson testified that she is an attorney representing LAVWCD. Ms. Martinsson stated that the Applicant's reclamation plan and revegetation plan are inadequate, specifically that the plans do not identify the source of water to irrigate revegetation measures, or detail how the water will be paid for. Ms. Martinsson stated that the financial warranty is inadequate because it could take years to revegetate the area, and the financial warranty does not account for the cost of irrigation.

16. At the hearing, objector Velma Rinks ("Ms. Rinks") testified on her own behalf. Ms. Rinks stated concerns that contaminants from the mining operation will affect gramma grasses, that loss of gramma grass and transportation of weed seed will impact ranching in the area, that the mining operation will interrupt wildlife migratory patterns, that required notices near powerlines were inadequate, and that the mining operation will increase the danger of fire.

17. Objector Kelly Bond ("Mr. Bond") testified at the hearing on his own behalf. Mr. Bond stated that the photograph of the State Pit presented by the Applicant showed tumbleweed plants, that gramma grass cannot be reestablished, and that manure used for revegetation at the mining site could be a problem if not adequately processed and weed seed removed.

18. The Division testified at the hearing, stating that, based on its review of the permit and the Applicant's responses to the adequacy review letters, impact on the

prevailing hydrological impact at the site and surrounding the site will be minimized. The Division also testified that its calculation of reclamation costs takes into consideration a 40% failure rate of revegetation efforts. The Division stated that regardless of cost and duration, operators must complete reclamation pursuant to the approved reclamation plan. The Division stated that the financial warranty amount is the state's cost to reseed, not the amount the Applicant is required to spend on reclamation. The Division testified that the photograph of the State Pit shown by the Applicant is likely only after one year of revegetation, and that sites typically could take five to ten years to establish grass. The Division also testified that the permit boundary parallels powerlines and that public notices complied with Rule 1.6.2. The Division testified that issues concerning wildlife were not raised by objectors, but that the Applicant has committed to following wildlife guidelines issued by Colorado Parks and Wildlife. The Division also testified that sediment in groundwater caused by the mining operation would be considered a pollutant and could constitute the Applicant's failure to mitigate impacts on the hydrologic balance in the area.

19. The Applicant has obtained Storm Water Discharge Permit COR341772 from the Water Quality Control Division of the Colorado Department of Public Health and Environment.

20. The Division of Water Resources of the State Engineer's Office ("DWR") conditioned its approval of the Application upon the Applicant allowing stormwater at the site to infiltrate into the ground or releasing it to the natural stream system within seventy-two hours, or cease all work until a substitute water supply plan or augmentation plan is approved by a water court. The Applicant concurs with the DWR's conditions.

21. The mining operation is not expected to expose groundwater. The Division testified at the hearing that groundwater at the site is between twenty and thirty-five feet below the native surface, and the proposed operation will excavate not more than three feet deep outside the gravel terraces. The operation does not propose and is not authorized to use groundwater.

22. The Application provides that diesel fuel will be stored on-site in an above-ground storage tank within an appropriate secondary containment structure. The Applicant commits to implement a SPCE, which will be posted at the mine site.

23. The Applicant provided either appropriately executed damage compensation agreements with the owners of structures within two hundred feet of the proposed permit boundary, including owners of the Bessemer Ditch, or an engineering evaluation for all structures identified within two hundred feet of the proposed permit boundary showing that such structures will not be damaged by the proposed mining operation.

24. The Application provides for the Applicant to improve a crossing of the Bessemer Ditch. The Application provides that the crossing improvement will not restrict

current water capacity or function of the ditch, and the installation of the crossing will not interrupt water flow, capacity, or function of the ditch.

25. At the hearing, the Division testified that the USDA Natural Resources Conservation Service ("NRCS") developed the reclamation plan in the Application in 2001. The Division testified that the NRCS confirmed it the reclamation plan in 2016.

26. John Ary testified at the hearing on behalf of the Applicant. Mr. Ary stated that the site will disturb only twenty-five acres at a time, with twenty-five acres in concurrent reclamation. Mr. Ary testified that he and his company has a history of opening mines and completing reclamation.

CONCLUSIONS OF LAW

27. The Board has jurisdiction over this matter pursuant to the Colorado Land Reclamation Act for the Extraction of Construction Materials, Article 32.5 of Title 34, C.R.S. (2016) ("Act").

28. Under section 34-32.5-115(4), C.R.S., "the applicant must comply with the requirements of this article and section 24-4-105(7), C.R.S."

29. Under Rule 1.4.1(10), the Applicant "has the burden of demonstrating that the application meets the minimum requirements of the Act, Rules, and Regulations."

30. Under Rule 2.8.1(1) and section 24-4-105(7), C.R.S., "the proponent of an order shall have the burden of proof." As the party initiating this matter by filing the Application, Applicant was the "proponent of an order" at the hearing and, therefore, has the burden to prove that the Application is consistent with applicable laws and rules, and should be approved by the Board.

31. The Application adequately address possible adverse impacts on man-made structures from mining operations. The proposed mining operation will not adversely affect the stability of any significant, valuable, and permanent manmade structures located within two hundred feet of the affected land, the Applicant has submitted either executed damage compensation agreements with the owners of such structures, or the Applicant has submitted an engineering evaluation showing that such structures will not be damaged by the proposed mining operation. The Application is in compliance with section 34-32.5-115(4)(e), C.R.S. and Rule 6.4.19.

32. Reclamation plans for mining sites must, among other things, provide that disturbances to the prevailing hydrologic balance of the affected land and surrounding areas, and to the quality and quantity of water in surface water and groundwater systems, will be minimized. C.R.S. § 34-32.5-116(4)(h); Rule 3.1.6(1)(a). In consideration of the Application, DWR's evaluation of the proposed operation, information from Applicant, and other information presented at the hearing, the proposed reclamation plan will minimize

disturbances to the prevailing hydrologic balance of the affected land and surrounding areas, and to the quality and quantity of water in surface water and groundwater systems. Applicant is in compliance with section 34-32.5-116(4)(h), C.R.S. and Rule 3.1.6(1)(a).

33. The reclamation plan in the Application is sufficient and compliant with the Act and Rules, specifically including but not limited to issues related to the operation's location, protection of organic soil, management of litter on-site, weed management, and restoration of the pre-mining topography, as required by section 34-32.5-116(4), C.R.S. and Rules 3.1 and 6.4.5. The proposed reclamation plan conforms to the requirements of section 34-32.5-116, C.R.S.

34. The Applicant provided adequate and timely public notice of the proposed operation in the Application, as required by Rule 1.6.2.

35. Under the Act, the Division and the Board shall grant a permit to an applicant who complies with section 34-32.5-115(4), C.R.S. The Application complies with section 34-32.5-115(4), C.R.S.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Board hereby GRANTS the Application.

DONE AND ORDERED this 9 day of January 2017.

FOR THE COLORADO MINED LAND
RECLAMATION BOARD


Thomas Brubaker, Chair

NOTICE OF JUDICIAL REVIEW RIGHTS

This order becomes effective and final upon mailing. Any party adversely affected or aggrieved by agency action may commence an action for judicial review by filing a complaint with the district court within thirty-five (35) days after the effective date of this order, pursuant to section 24-4-106, C.R.S. (2016) and the Colorado Rules of Civil Procedure. In the event that a complaint for judicial review is filed, designations of record made in accordance with section 24-4-106(6), C.R.S. should be served on the Board at: 1313 Sherman Street, Room 215, Denver, CO 80203, Attention: Camie Mojar.

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 9th day of January 2017 addressed as follows:

By certified mail to:
7014 2120 0001 7885 6767

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Camille Mojar, Board Secretary