BEFORE THE MINED LAND RECLAMATION BOARD STATE OF COLORADO

DRAFT PREHEARING ORDER

IN THE MATTER OF THE APPLICATION OF TRANSIT MIX CONCRETE COMPANY FOR A 112 CONSTRUCTION MATERIALS RECLAMATION PERMIT, File No. M-2016-010

The Mined Land Reclamation Board ("Board"), through prehearing officer Jeff Graves ("PHO Graves"), and pursuant to Rule 2.7 of the Mineral Rules and Regulations of the Colorado Mined Land Reclamation Board for the Extraction of Construction Materials ("Rules"), conducted a prehearing conference on October 5, 2016 in Colorado Springs, Colorado. The Board, having considered this order, as proposed by the PHO Graves, and having considered any subsequent objections or comments from the parties, hereby enters the following Prehearing Order for the captioned proceeding:

I. BACKGROUND

On March 8, 2016, Transit Mix Concrete Co. ("Applicant") filed an application with the Division for a 112c construction materials reclamation permit, file number M-2016-010 ("Application"). During the required period of notice of the Application filing, the Division received written comments and objections to the Application. On September 29, 2016, after issuing six adequacy reviews, the Division of Reclamation, Mining and Safety ("Division") issued its rationale and recommendation to approve the Application.

II. FORMAL PUBLIC HEARING

The Formal Public Hearing on this matter (unless noticed otherwise) will occur during the Board's regularly scheduled meeting on October 26-27, 2016.. The Formal Public Hearing is scheduled for October 26, 2016 at El Paso County Centennial Hall Facility, 200 South Cascade Avenue, Colorado Springs, Colorado 80903. The Board's meeting on October 26, 2016 (unless noticed otherwise) will begin at 9:00 a.m. If necessary, the Formal Public Hearing on this matter will continue on October 27, 2016 at Colorado Springs Marriott, 5580 Tech Center Drive, Colorado Springs, Colorado 80919. The Board's meeting on October 27, 2016 (unless noticed otherwise) will begin at 8:30 a.m.

The Formal Public Hearing in this matter concerns whether the Board should grant or deny Applicant's reclamation permit application in accordance with the Colorado Land Reclamation Act for the Extraction of Construction Materials (Article 32.5 of Title 34, C.R.S.; the "Act") and the Rules. The Board's resolution of this matter, including findings of facts and conclusions of law, will be based on the Board's review of the Application, testimony presented by the parties and Division at the hearing, and exhibits the Board admits into the record at this hearing.

In this matter, the Applicant bears the burden of proving that the Application meets the requirements set forth in the Act and Rules. If the Applicant meets this burden, any denial by the Board must be based upon one of the grounds provided in section 34-32.5-115(4), C.R.S.

III. PARTIES

The list of parties who retain party status by appearing at the prehearing conference are as follows:

Applicant: Transit Mix Concrete Co. Attn: Andre LaRoche

Objectors:

A number of objectors forfeited party status by failing to attend the prehearing conference in accordance with Rule 2.7.3, including:

M. Baker S. Bell R. Blair S. Boehr E. Bransby J. Cadigan R. Cadigan B. Chisnell M. Cook C. Cousineau G. Cousineau S. Diggs W. Diggs B. Donahue	C. Engelage S. Fentman S. Firks D. Harrell L. Harvey M. Harvey R.Hassell P. Heacock M. Henslee T. Hight S. Kay K. Kay D. Larrabee J. Lawrence	L. Louzon D. Martin L. Martin T. Melancon J. Miller K. Moore D. Murphy J. Murphy R. Nathan T. Offutt R. Pace B. Powell C. Ragan P. Ragan	L. Rogers S. Samson H. Sandler A. Sheaves A. Sickels B. Simmons S. Simmons M. Spoor D. Steen J. Townsend M. Turley K. Turley R. Welch
B. Donahue J. Enderson	J. Lawrence B. Louzon	P. Ragan P. Reinsma	

The remaining objectors are referred to herein as "Objectors."

The Division is advisory staff to the Board in this matter, not a party. As used herein, "party" or "parties" shall mean the Applicant, Objectors, or both, as the context indicates.

IV. ISSUES

Presentations to the Board by the parties and the Division shall be limited to the following issues:

- 1. <u>Right of Entry</u>. Whether the Application demonstrates that Applicant has a legal right of entry for the proposed use of Little Turkey Creek Road.
- 2. <u>Operations</u>. Whether the Application adequately addresses possible adverse impacts related to mining operations, including the impacts of blasting on the environment, geotechnical slope stability, public safety, and man-made structures (*i.e.*, wells, homes, and roads) with the proposed area of affected land and within two hundred feet (200') of the proposed permit boundary.
- 3. <u>Hydrologic Balance</u>. Whether the Application adequately demonstrates that any disturbances to the prevailing hydrologic balance of the proposed affected land and surrounding area, including both surface water and groundwater, will be minimized.

- a. Surface water issues include: stormwater management and flooding; interception of surface water in drainages; and adequacy of culvert design.
- b. Groundwater issues include: impacts to water quality and quantity within Red Rock Valley Estates Water District; potential contamination of groundwater; use of local aquifer for mining operations; and adequacy of the investigation into possible water resources.
- 4. <u>Wildlife</u>. Whether the Application adequately addresses possible adverse impacts on wildlife and natural resources in and around the Application area, including riparian resources.
- 5. <u>Reclamation Plan</u>. Whether the reclamation plan in the Application is sufficient and compliant with the Act and Rules, specifically including issues concerning exposure and content of topsoil; timing and content of proposed seeding; whether appropriate tree species and issues of aspect and plant diversity are considered in the revegetation plan; reclamation along waterways; chemicals proposed to be used on seedlings; weed management; disposal of refuse; and reclamation of highwalls.

V. WITNESSES AND EXHIBITS

Pursuant to Rule 2.6(2), all parties and the Division must exchange witness and exhibits at the prehearing conference. The Applicant, some Objectors, and the Division provided witness and exhibit lists during the prehearing conference as follows:

<u>Witnesses</u>

For Transit Mix Concrete Company:

- Jerry Schnabel, President, Transit Mix;
- John Crowley, Controller, Transit Mix;
- Robert Stabo, Principal, CMR Advisors, LLC;
- Paul Kos, Senior Geological Engineer, Norwest Corp.;
- Bandon Heser, Aggregates Engineer/Production Manager, Transit Mix;
- Andre Laroche, Permit Specialist, Transit Mix;
- Chris Sanchez, Principal Hydrogeologist, Bishop-Brogden Associates;
- Timothy Crawford, Senior Project Manager/Hydrologist, Bishop-Brogden Associates;
- Steven Boyle, Senior Scientist, BIO-Logic Inc.;
- James LeFevre, Wildlife Biologist, BIO-Logic Inc.;

- Alison McGrath, Plant Ecologist, BIO-Logic Inc.;
- Aleta Brown, Senior Environmental Specialist, Norwest Corp.;
- James Sorenson, Senior Geotechnical Engineer, Norwest Corp.;
- Thomas Suchoski, Senior Hydrologist, Norwest Corp.;
- Derek Loveday, Project Manager, Norwest Corp.;
- Leif Bang, Project Manager, CORE Consultants, Inc.;
- Daniel Maynard, Senior Ecologist, CORE Consultants, Inc.;
- S. Tosh McKetta, Principal Investigator, Registered Professional Archaeologist, Cultural Resource Analysts, Inc.;
- Cindi Almendinger, Property Owner, Hitch Rack Ranch
- Philip Cortney, Solid Minerals Leasing Manager, Colorado Department of Natural Resources;
- Larry Mirabelli, Senior Manager, Explosives and Blasting Technologies, Buckley Powder Co.;
- Corey Rutz, Attorney, Otten, Johnson, Robinson, Neff & Ragonetti;
- Alix LaSalle, Attorney, Otten, Johnson, Robinson, Neff & Ragonetti;
- Stuart MacGregor, Principal, Engineering Dynamics Inc.;
- Richard Muegge, Principal, Muegge & Associates, Inc.;
- Carman Skeehan, CEO, Temporal Geo Analytics Inc.; and
- Steve Spaulding, Consulting Forester, Steve Spaulding Consulting.

For Objector S. Mulliken and on behalf of Barbara Ingersoll Marital Trust:

- Charles H. Norris, Ph.D., Hydro Geologist, Geo-Hydro, Inc.;
- Jerry P. Moore;
- Jerald S. Fifield, Ph.D., CPESD, CISEC; Project Hydrologist, HydroDynamics Incorporated;
- Amy Luther, Ph.D., Louisiana State University, Department of Geology and Geophysics;
- Michael Menefee;
- John Sanderson, Ph.D., Director of Science, The Nature Conservancy in Colorado;
- Terri Schulz, Senior Conservation Ecologist, The Nature Conservancy in Colorado;
- Chris Pague, Senior Conservation Ecologist, The Nature Conservancy in Colorado;
- Hartmut Wright, Fire Chief, Southwestern Highway 115 Fire Protection District;
- James Enderson, Ph.D.;
- Steve Monson, Esq.;
- Chris Burnell;
- Warren Dean;
- Reece Eddy, Sr.;
- Weldon W. Flaharty;
- Tom Fellows;

- Paul G. Anderson, Esq.;
- Ted D. Kerr;
- Cheryl Kimble;
- Mark McClurg;
- Gary Kris McCowen;
- Kathie Rawson;
- Nancy Reed, Ph.D.; and
- William Sheaves.

For Objector Cheryl Kimble as represented by Alderman Bernstein, LLC:

- Jerald Schnabel, President, Transit Mix;
- Andre LaRoche, Permit Specialist, Transit Mix;
- Paul Kos, P.E., Norwest Corporation;
- Nancy E. Reed, Ph.D.;
- Cheryl L. Kimble;
- Hartmut Wright, Fire Chief, Southwestern Highway 115 Fire Protection District;
- Jerald S. Fifield, Ph.D., CPESD, CISEC; Project Hydrologist, HydroDynamics Incorporated; and
- Any other party to this matter; any witness identified by any other party in this matter.

For Objector Dr. Nancy Reed:

• Dr. Nancy Reed.

For the Division:

- Tony Waldron, Minerals Program Supervisor;
- Wally Erickson, Senior Environmental Protection Specialist;
- Amy Eschberger, Environmental Protection Specialist I;
- Peter Hays, Environmental Protection Specialist II;
- Tim Cazier, P.E., Environmental Protection Specialist II; and
- Any witness identified by any other party, whether called or not called by that party; any witness necessary for impeachment or rebuttal; and any witness necessary to lay a foundation for the introduction of an exhibit.

Exhibits

For Transit Mix Concrete Company:

- All permit application document in the public record submitted to the Colorado Department of Reclamation, Mining and Safety relating to the Hitch Rack Ranch Quarry;
- 3-D Model of the Proposed Quarry Site;

- Figure 1: Transit Mix, Hitch Rack Ranch, Community Well Investigation General Location Map;
- Table 1: Transit Mix, Hitch Rack Ranch, Community Wells Located Within Approximately Five Miles of Mining Area;
- Figure 2: Transit Mix, Hitch Rack Ranch, Map of Surface Geology;
- Figure 3: Transit Mix, Hitch Rack Ranch, Cross Section A-A; Relationship Between Little Turkey Creek, Mining Elevations, Well Constructions, and Ground Water Elevations;
- Figure 4: Transit Mix, Hitch Rack Ranch, Zone of Worst Case Drawdown if Ground Water Encountered;
- Well Permit for Permit No. 58506;
- Photographs Showing Abundant Wildlife at Transit Mix Quarry Sites.

For Objectors:

- Dr. Nancy Reed provided the following exhibits:
 - o PowerPoint slides for her testimony;
 - Documents within the Division Document Management System for Permit M2016010, including:
 - 2016-02-19, Permit File, (5) Application 3 of 4;
 - 2016-04-14, Permit File, Letter of Opposition;
 - 2016-04-15, General Documents, Letter of Concern;
 - 2016-04-19, General Documents, (4) Letter of Opposition;
 - 2016-06-14, Inspection, Inspection Report;
 - 2016-07-08, Permit File, (5) Letter of Objection;
 - 2016-07-21, Permit File, (3) Adequacy Response #2;
 - 2016-07-28, Permit File, Adequacy Response #3;
 - 2016-08-19, Permit File, Adequacy Response #4;
 - 2016-09-15, Permit File, Adequacy Review Response #5;
 - 2016-09-14, Permit File, (2) Objection Received;
 - 2016-09-29, Permit File, Decision Document.
- Alderman Bernstein, LLC identified and submitted the following exhibits on behalf of Cheryl Kimble:
 - 1968 El Paso County District Court Decree (attached to the April 18th Objection Letter at Exhibit 1);
 - February 19, 2016, Permit Application Package;
 - Objection letter submitted by Southwestern Highway 115 Protection District on April, 19, 2016;
 - o Objection letters submitted by Nancy Reed;
 - Objection letter submitted by the undersigned on behalf of Cheryl Kimble, April 18, 2016;
 - Objection letter submitted by Cheryl Kimble;

- o Division Adequacy Letters;
- Applicant's response to Division Adequacy Letters;
- Division Inspection Reports;
- Applicant's visual model as reference in Inspection Report in Photos 1, 5-9;
- Photographs of Little Turkey Creek Road;
- September 29, 2016, Division letter regarding Recommendation to Approve a 112c Permit Application with Objections;
- Reference to September 29, 2016 HydroDynamics Incorporated Hitch Rack Ranch Quarry-Hydrologic, Water Quality, and Reclamation Assessment;¹
- o Objection letters submitted by any other party; and
- Any exhibit introduced by any other party and any exhibit required for rebuttal purposes.
- Mulliken Weiner Berg and Jolivet, P.C. identified and submitted the following exhibits on behalf of the Barbara Ingersoll Marital Trust:
 - Letters and emails submitted to and received by the Division, including:
 - Letter from Robert Nathan, MD, dated 3/15/16;
 - Letter from Sara Harper, dated 3/15/16;
 - Letter from Reece Eddy, dated 3/31/16;
 - Letter from Reece Eddy, dated 2/31/16;
 - Letter from Weldon Flaharty, dated 4/4/16;
 - Email from Weldon Flaharty, dated 4/12/16;
 - Letter from James Enderson, dated 4/5/16;
 - Letter from Kathie & Stan Rawson, dated 4/9/16;
 - Letter from Richard Ruddock, dated 4/10/16;
 - Email and Letter from Edyn Jessup, dated 4/11/16;
 - Letter from Nancy Reed, dated 4/11/16;
 - Letter from Nancy Reed, with attachments, dated 4/11/16;
 - Letter from Warren Dean, dated 4/13/16;
 - Letter from Gary Kris McCowen, dated 4/13/16;
 - Email and letter from Jerry & Karen Moore, dated 4/14/16;
 - Letter from Hartmut, Wright, dated 4/14/16;
 - Letter from Cheryl Kimble, dated 4/15/16;
 - Letter from J. Michael & Karen Turley, dated 4/15/16;
 - Letter from Ted Kerr, dated 4/15/16;

¹ Cheryl Kimble, individually or through counsel, did not provide PHO Graves with a copy of the September 29, 2016 HydroDynamics Incorporated *Hitch Rack Ranch Quarry-Hydrologic, Water Quality, and Reclamation Assessment* at the prehearing conference.

- Letter from Nancy Reed, dated 4/15/16;
- Letter from Nancy Reed, Dated 7/2/16;
- Letter from Cheryl Kimble, dated 7/6/16;
- Letter from Nancy Reed, dated 9/9/16;
- Letter from Cheryl Kimble, dated 9/13/16;
- Exhibit 1, Excerpt Report of Joe Beidiemann RE: Aiken Canyon/Potato Mountain Area Bird Population;
- Exhibit 2, Excerpt El Paso County Planning Dept. Southwestern Highway 115 Area Plan;
- Exhibit 3, Excerpt El Paso County Parks Master Plan;
- Exhibit 4, Land Owner ship & Area Maps;
- Exhibit 5, That Nature Conservancy's Management Plan for Aiken Canyon Preserve;
- Exhibit 6, Memo from the Nature Conservancy RE: Science Evaluation of Impacts at Aiken Canyon of the Proposed Transit Mix Quarry;
- Exhibit 7, Curriculum Vitae of John Sanderson;
- Exhibit 8, Report of Charles Norris, PhD;
- Exhibit 9, Curriculum Vitae of Charles Norris, PhD;
- Exhibit 10, Report of Jerald Fifield, PhD, DPESC, CISEC;
- Exhibit 11, Curriculum Vitae of Jerald Fifield, PhD, DPESC, CISEC;
- Exhibit 12, Record Relating to Cross Sections and Geological Surface Interpretation from Amy Luther, PhD²;
- Exhibit 13, Curriculum Vitae of Amy Luther PhD²;
- Exhibit 14, Power Point Slides Prepared by Jerry Moore²;
- Exhibit 15, Newspaper Articles RE: Account of Impact of Construction of NORAD²;
- Exhibit 16, Curriculum Vitae of Jerry Moore²;
- Exhibit 17, Photographs and Videos of the Road and Site²;
- Exhibit 18, Excerpt Mexican Spotted Owl Recovery Plan, First Revision, US Fish and Wildlife Service;
- Exhibit 19, Excerpt Survey of Critical Biological Resources, El Paso County, Colorado Natural Heritage Program;
- Exhibit 20, Excerpt Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Mexican Spotted Owl; Final Rule, US Fish and Wildlife Service;
- Exhibit 21, Documents and exhibits submitted by other Objecting Parties.
- Hartmut Wright

² Exhibits 12, 13, 14, 15, 16, and 17 were not submitted to PHO Graves at the prehearing conference. Those exhibits are referenced as: "Will be Produced Upon Availability Pursuant to CDRMS Construction Material Rule 2.6(b)."

• Submitted excerpt copy entitled "Colorado Obstructing a Peace Officer (18-8-104)."

For the Division:

- Public Record for Division File No. M-2016-010, available on Laserfiche at <u>http://mining.state.co.us</u>; and
- Chronology of Review Process for a 112c Application Hitch Rack Ranch Quarry, File No. M-2016-010.

All documents and other materials admitted into evidence by the Board at the Formal Public Hearing will become part of the administrative record. Upon request, a party may recover any evidence introduced by that party.

VI. PROCEDURE

The Division, parties and members of the public shall make presentations in the following order for each issue identified in section IV. The time limits set out below are maximum limits; however, the Board, in its discretion, may allow additional time. The Board has the authority to limit any duplicative or irrelevant testimony. Objectors may appoint a spokesperson to present their information, or Objectors may present individually. In either event, time limitations noted below apply to the Objectors as a group.

All parties will be afforded an opportunity to conduct cross-examination of any witnesses that testifies during each presentation. Time used for cross-examination of a witness shall count against the time limit of the cross-examining party or Division. Time used to respond to questions by members of the Board shall not count against the time limit of the responding party or Division.

PHO Graves solicited and considered input from the parties and the Division at the prehearing conference regarding the time requested to make presentations at the hearing, and recommends the following procedure for approval by the Board:

A. Board Consideration and Adoption of the Prehearing Order:

The Board shall consider this draft Prehearing Order for adoption. The Board will hear any objections to the proposed Order at that time, and will make any necessary amendments prior to adopting the Order.

B. Division Introduction:

The Division shall have 20 minutes in which to present an overview of the application.

C. Issue 1: Legal Right of Entry

1. Applicant Presentation:

The Applicant shall have 10 minutes in which to make a presentation to the Board.

2. Objectors Presentation:

The Objectors shall have 10 minutes in which to make a presentation to the Board.

3. Division Presentation:

The Division shall have 10 minutes in which to make a presentation to the Board.

4. Rebuttal Statement – Objectors:

The Objectors shall have 5 minutes to make a rebuttal statement, and shall be limited to responding to issues addressed in the presentation of the other party.

5. Rebuttal Statement – Applicant:

The Applicant shall have 5 minutes to make a rebuttal statement, and shall be limited to responding to issues addressed in the presentation of the other party.

D. Issue 2: Operations

1. Applicant Presentation:

The Applicant shall have 55 minutes in which to make a presentation to the Board.

2. Objectors Presentation:

The Objectors shall have 55 minutes in which to make a presentation to the Board.

3. Division Presentation:

The Division shall have 30 minutes in which to make a presentation to the Board.

4. Rebuttal Statement – Objectors:

The Objectors shall have 15 minutes to make a rebuttal statement, and shall be limited to responding to issues addressed in the presentation of the other party.

5. Rebuttal Statement – Applicant:

The Applicant shall have 15 minutes to make a rebuttal statement and shall be limited to responding to issues addressed in the presentation of the other party.

E. Issue 3: Hydrologic Balance

1. Applicant Presentation:

The Applicant shall have 80 minutes in which to make a presentation to the Board.

2. Objectors Presentation:

The Objectors shall have 80 minutes in which to make a presentation to the Board.

3. Division Presentation:

The Division shall have 45 minutes in which to make a presentation to the Board.

4. Rebuttal Statement – Objectors:

The Objectors shall have 30 minutes to make a rebuttal statement, and shall be limited to responding to issues addressed in the presentation of the other party.

5. Rebuttal Statement – Applicant:

The Applicant shall have 30 minutes to make a rebuttal statement and shall be limited to responding to issues addressed in the presentation of the other party.

F. Issue 4: Wildlife

1. Applicant Presentation:

The Applicant shall have 30 minutes in which to make a presentation to the Board.

2. **Objectors Presentation:**

The Objectors shall have 30 minutes in which to make a presentation to the Board.

3. Division Presentation:

The Division shall have 20 minutes in which to make a presentation to the Board.

4. Rebuttal Statement – Objectors:

The Objectors shall have 15 minutes to make a rebuttal statement, and shall be limited to responding to issues addressed in the presentation of the other party.

5. Rebuttal Statement – Applicant:

The Applicant shall have 15 minutes to make a rebuttal statement and shall be limited to responding to issues addressed in the presentation of the other party.

G. Issue 5: Reclamation Plan

1. Applicant Presentation:

The Applicant shall have 15 minutes in which to make a presentation to the Board.

2. Objectors Presentation:

The Objectors shall have 15 minutes in which to make a presentation to the Board.

3. Division Presentation:

The Division shall have 10 minutes in which to make a presentation to the Board.

4. Rebuttal Statement – Objectors:

The Objectors shall have 5 minutes to make a rebuttal statement.

5. Rebuttal Statement – Applicant:

The Applicant shall have 5 minutes to make a rebuttal statement.

Dated this ____ day of October 2016.

BY:

____, Chairperson Mined Land Reclamation Board

CERTIFICATE OF SERVICE

Graves I. -

_____, hereby certify that on this 13^{++} day of 2016, I deposited a true copy of the foregoing Draft Prehearing

Order in the United States Mail, postage paid, addressed to the following:

Kenneth R. Baird 2335 Paseo Corta Colorado Springs, CO 80926

Chris Burnell Turkey Cañon Ranch Homeowners Association 15575 Henry Ride Heights Colorado Springs, CO 80926

Elizabeth W. Dean 3131 Little Turkey Creek Road Colorado Springs, CO 80926

Reece Eddy, Jr. 1285 Glenrock Drive Colorado Springs, CO 80926

Ann Gerber 11680 Valle Verde Dr. Colorado Springs, CO 80926

Mark Hodges 11440 Valle Verde Dr. Colorado Springs, CO 80926

Richard C. and Yvonne Bredee Holden 2109 Woodburn St. Colorado Springs, CO 80906

Ted D. Kerr Red Rock Valley Estates Water District 11145 Calle Corvo Colorado Springs, CO 80926

Jack and MaryAnn Koscove 15310 South Hwy 115 Colorado Springs, CO 80926

Chelsea Luttrall 2453 Gold Rush Drive, #4 Colorado Springs, CO 80906 Mark McClurg Highlands of Turkey Cañon Ranch Homeowners Association 15795 Phantom Canyon View Colorado Springs, CO 80926

Lisa Pecoraro 16230 Cala Rojo Drive Colorado Springs, CO 80926

Joseph Salazar, Jr. 11780 Valle Verde Dr. Colorado Springs, CO 80926

Lynn M. Steer 1125 Glenrock Drive Colorado Springs, CO 80926

Charles A. and Patricia L. Watkins 9580 State Hwy 115 Colorado Springs, CO 80926 And via Email to the following:

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10/13/16 and Date Signa