



COLORADO
Division of Reclamation,
Mining and Safety
Department of Natural Resources

January 30, 2023

Dean Bursch
3912 Needles Drive
Colorado Springs, CO 80908

**RE: HD and SE Trust Pond Project, Reference No. M-2023-003, DRMS Response to “Is It Mining?”
Questionnaire, No Permit Required**

Dear Mr. Bursch:

On January 26, 2023, the Division of Reclamation, Mining and Safety (DRMS) received your “Is It Mining?” questionnaire regarding a proposed pond project to remove sand and gravel from the bottom of six old ponds located on your farm in Elbert County. Less than 50,000 cubic yards of material will be removed from the bottom of the ponds using an excavator in order to get the ponds back below the water table. The excavated material will be bermed adjacent to the ponds and/or used to maintain roads on the farm. None of the excavated material will be hauled off site. Neither the landowner nor the mine site operator will receive any type of compensation from the proposed material extraction. Please use the reference number M-2023-003 regarding any correspondence or submittals for this site in the future.

The Mined Land Reclamation Board (MLRB) has requested DRMS to make determinations as to the need for a Mined Land Reclamation Permit. Based on the information provided in your questionnaire, DRMS has determined that **a permit is not required for the proposed activity**. Any significant deviation from the described activity could result in the review and possible reversal of this determination.

If you disagree with this decision, you may petition to appear before the MLRB during a formal public hearing for a Declaratory Order concerning this matter. Pursuant to Construction Materials Rule 2.5.2(1), this request must be submitted to the MLRB in writing and be received no later than 7 days prior to the hearing. The written request must contain all information required by Rule 2.5.2(2) (enclosed). The next available MLRB hearing will be held on February 22, 2023. All hearings are held at 1313 Sherman Street, Room 318, in Denver, Colorado 80203.

If you have any questions, you may contact me by telephone at 303-866-3567, ext. 8129 or by email at amy.eschberger@state.co.us.

Sincerely,

Amy Eschberger
Senior Environmental Protection Specialist

Encl: Construction Materials Rule 2.5 – Declaratory Orders

Cc: Russ Means, DRMS



2.2.3 Agenda Changes or Additions

Additions or changes to the agenda after the 10-day notification may be made regarding emergency situations, informational items, and Special Permits as outlined in Rules 1.4.4 and 1.7.3. In this event, the Board will endeavor to give notification, if possible, as outlined above, and will be required to notify any Operator or individual scheduled to be heard.

2.3 BOARD QUORUM

105(2)

- (1) Four (4) Board members shall constitute a quorum.
- (2) The Board shall act by majority vote of members present, except that four (4) affirmative votes are required for any amendment of these Rules.

2.4 RESERVED

2.5 DECLARATORY ORDERS (Section 24-4-105, C.R.S.)

2.5.1 Cause for Seeking a Declaratory Order

Any person who is or may be directly and adversely affected or aggrieved and whose interests are entitled to legal protection under the Act may petition the Board for declaratory order to terminate controversies or to remove uncertainties as to the applicability to the Petitioner of any statutory provision of or any rule or order of the Board made pursuant to the Colorado Land Reclamation Act For The Extraction Of Construction Materials (Section 34-32.5-101, C.R.S. et seq.).

2.5.2 Petition Submission

- (1) The petition must be submitted, at a minimum, seven (7) days prior to the Board meeting at which it is to be considered.
 - (a) At the regularly scheduled Board meeting, the Board will determine in its discretion and without notice to Petitioner, whether to rule upon any such petition.
 - (b) If the Board determines that it will not rule upon such a petition, the Board shall promptly notify the Petitioner of its action and state the reasons for such action.
- (2) Any petition filed pursuant to this rule shall set forth the following:
 - (a) the name and address of the Petitioner and whether the Petitioner is a Permittee pursuant to the Colorado Mined Land Reclamation Act;
 - (b) the statute, rule or order to which the petition relates;

- (c) a concise statement of all of the facts necessary to show the nature of the controversy or uncertainty and the manner in which the statute, rule or order in question applies or potentially applies to the Petitioner.

2.5.3 Consideration of Petition

In determining whether to rule upon a petition filed pursuant to this Rule, the Board will consider the following matters, among others:

- (a) whether a ruling on the petition will terminate a controversy or remove uncertainties as to the applicability to Petitioner of any statutory provision or rule or order of the Board.
- (b) whether the petition involves any subject, question or issue which is the subject of a formal or informal matter or investigation currently pending before the Board or a court involving one or more of the Petitioners.
- (c) whether the petition involves any subject, question or issue which is the subject of a formal or informal matter or investigation currently pending before the Board or a court, but not involving any Petitioner.
- (d) whether the petition seeks a ruling on a moot or hypothetical question or will result in an advisory ruling or opinion.
- (e) whether the Petitioner has some adequate legal remedy, other than an action for declaratory relief pursuant to Rule 57, Colorado Rules of Civil Procedure, which will terminate the controversy or remove any uncertainty as to the applicability to the Petitioner of the statute, rule or other in question.

2.5.4 Procedure for Consideration

If the Board determines that it will rule on the petition the following procedures shall apply:

- (a) The Board may, without further notice, rule upon the petition based solely upon the facts presented in the petition. In such a case, any ruling of the Board will apply only to the extent of the facts presented in the petition and any amendment to the petition.
- (b) The Board may order the petitioner to file a written brief, memorandum or statement of position.
- (c) The Board may set the petition, upon due notice to Petitioner, for a non-evidentiary hearing.
- (d) The Board may request the petitioner to submit additional facts, in writing. In such event, such additional facts will be considered as an amendment to the petition.
- (e) The Board may take administrative notice of facts pursuant to the administrative procedure act (Section 24-4-105(8), C.R.S.) and may utilize its experience, technical competence and specialized knowledge in the disposition of the petition.

- (f) If the Board rules upon the petition without a hearing, it shall within ten (10) working days notify the petitioner of its decision by deposit in the mail.
- (g) The Board may, in its discretion, set the petition for hearing upon due notice to Petitioner, for the purpose of obtaining additional facts or information or to determine the truth of any facts set forth in the petition or to hear oral argument on the petition. The notice to the Petitioner setting such hearing shall set forth, to the extent known, the factual or other matters into which the Board intends to inquire. For the purpose of such a hearing, to the extent necessary, the Petitioner shall have the burden of proving all of the facts stated in the petition, all of the facts necessary to show the nature of the controversy or uncertainty and the manner in which the statute, rule or order in question applies or potentially applies to the Petitioner and any other facts the Petitioner desires the Board to consider.

2.5.5 Party Status and Petition to Intervene

- (1) The Office shall be granted party status upon request.
- (2) Any other person may seek leave of the Board to intervene in such a proceeding, and leave to intervene will be granted at the sole discretion of the Board based upon the interest of the person and whether that interest is entitled to legal protection under the Act and how that person is affected or aggrieved by the petition for Declaratory Order.
- (3) A petition to intervene shall set forth a concise statement of the facts necessary to demonstrate the nature of its position, and the manner in which the statute, rule or order in question does or does not apply to the Petitioner.

2.5.6 Effect of a Declaratory Order

Any declaratory order or other order disposing of a petition pursuant to this Rule shall constitute agency action subject to judicial review pursuant to Section 24-4-106, C.R.S.

2.6 PRE-HEARING PROCEDURES - MOTIONS, WITNESS AND EXHIBIT LISTS

The provisions of this Rule 2.6 shall apply to the Applicant and any entity that has party status.

- (1) All motions, except those made during a hearing, or when the Board deems an oral motion to be appropriate, shall be in writing and shall state the grounds for the motion. Motions shall be received by the Board no later than two (2) Working Days following the Pre-hearing Conference. Any written response to a motion must be received by the Board no later than three (3) Working Days prior to the date of the Formal Board Hearing.
- (2) A party to a Formal Board Hearing may use witnesses or exhibits at the Formal Board Hearing. Parties shall provide a written list of all potential witnesses and exhibits at the Pre-hearing Conference in accordance with the following:
 - (a) The list of potential witnesses must include each witness' name, current address and phone number, area of expertise (if expert witness), and the subject matter of