

HARRISON
TEMBLADOR
HUNGERFORD
& JOHNSON

MINING
LAND USE
NATURAL RESOURCES

**COPY
RECEIVED**

JUL 10 2014
EB

COUNTY COUNSEL
COUNTY OF HUMBOLDT

980 9TH STREET
SUITE 1400
SACRAMENTO, CA 95814
TEL 916.382.4377
FAX 916.382.4380
WWW.HTHJLAW.COM

July 9, 2014

VIA E-MAIL & USPS

Rex Bohn, Chairperson
Humboldt County Board of Supervisors
County of Humboldt
825 5th Street
Eureka, CA 95501

RE: *Mercer Fraser Company
Comments on Draft Mineral Resource Element*

Honorable Chair Bohn:

On behalf of Mercer Fraser Company, Eureka Ready Mix, and other industry representatives, we thank you for the opportunity to comment on the draft County General Plan update regarding the Conservation and Open Space Elements. We write to provide the Board with comments specific to the Mineral Resource Element.

GENERAL COMMENT

We first provide the following general comment for the Board's consideration regarding the General Plan Update.

It should be made clear that the goals and policies outlined in the Updated General Plan will generally not apply to existing, established mining operations. It is a well-established principle of land use law that existing permitted or legal nonconforming mining operations are vested against subsequent changes in local land use law. (See, e.g., *Trans-oceanic Oil Corp. v. Santa Barbara* (1948) 85 Cal.App.2d 776; *Hansen Bros. Enterprises v. Nevada County* (1996) 12 Cal.4th 533; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188.)

With this general comment in mind, we now provide further specific comments on the draft Mineral Resource Element.

**SPECIFIC COMMENTS REGARDING MINERAL RESOURCES
IN THE OPEN SPACE AND MINERAL RESOURCE ELEMENTS**

Following are our specific comments on the draft Mineral Resource Element of the General Plan Update. Our suggestions for revisions to the language of the General Plan Update appear in red-line format.

Open Space Element Related to Mining

1. Mineral resources are essential for the County's well-being.

The last paragraph of the Open Space Action Program (§ 10.2.3) provides that the County, to maintain working landscapes, will "refrain from taking measures that reduce the economic viability of continued timber and agricultural operations" while lobbying for a more efficient application of existing standards. Mineral extraction, like timber production and agriculture, is essential to the County's economic well-being, as the draft General Plan states in the Mineral Resources Element. Due to the indispensability of mineral resource extraction to the County, the County should value the mineral resource industry in the same way it values timber production and agriculture.

We therefore respectfully request that the County revise the final paragraph in section 10.2.3 to read as follows:

To maintain working landscapes, the County will refrain from measures that reduce the economic viability of continued timber, mining, and agricultural operations and lobby for more efficient application of state and federal regulatory standards. The County will also work to improve the infrastructure and workforce necessary for the forest products, mining, and agriculture industries and help promote innovative forest, mining, and agriculture products.

Mineral Resource Element

1. Annual in-stream gravel extraction rates are protected by vested rights.

The Mineral Resource Element's Background section on page 10-24 provides that, through the CHERT process "the following agencies have input and can annually establish extraction quantities and permit restrictions for in stream gravel mining operations . . ." This policy is in contravention of the express permit terms of existing in-stream mining operations and cannot be imposed on these existing operations without violating their established vested rights. (See, e.g., *Trans-oceanic Oil Corp. v. Santa Barbara* (1948) 85 Cal.App.2d 776; *Hansen Bros. Enterprises v. Nevada County* (1996) 12 Cal.4th 533; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188.) Therefore, we respectfully request that the County modify the statement to add the language "*Subject to pre-existing vested permitted rights*" to acknowledge the rights of existing vested operations.

2. The Department of Conservation is not involved in the approval of reclamation plans and financial assurances.

The Mineral Resource Element's Background section on page 10-24 provides that "the California Department of Conservation is involved in the review **and approval** of reclamation plans and financial assurances." (emphasis added) This is an incorrect statement of the Department of Conservation's ("DOC") authority. The DOC is involved in the review of

reclamation plans and financial assurances, but has no authority to *approve* reclamation plans or financial assurances. Approval of reclamation plans and financial assurances rests with the lead agency. (See SMARA § 2774(c)-(d).) Therefore, we respectfully request that the County modify this statement to acknowledge the proper scope of the DOC's authority.

3. Mineral resources projects provide benefits that may outweigh environmental impacts.

Draft Goal MR-G1 appears to suggest that the County could no longer issue "statements of overriding consideration" under the CEQA. In particular, Goal MR-G1 calls for mining sites to be "permitted and operated to **prevent significant environmental impacts**" (emphasis added). In reality, not all environmental impacts from mineral resources projects, and many other types of projects, can be fully mitigated. Recognizing this fact, CEQA authorizes lead agencies to issue statements of overriding consideration acknowledging that some projects, such as local mineral resources projects, offer economic and regional environmental benefits that outweigh any significant unavoidable impacts. (See CEQA Guidelines, § 15093.) It is important that the County maintain its ability to issue statements of overriding considerations for mineral resources projects where not all environmental impacts can be prevented.

We respectfully request that the County revise Goal MR-G1 as follows:

***MR-G1. Long-Term Supply of Mineral Resources.** A geographically distributed inventory of mining sites protected from incompatible land uses, permitted and operated to prevent or minimize to the extent feasible significant environmental impacts and to satisfy long-term demand for mineral resources and construction materials.*

4. In-stream sand and gravel extraction is already subject to state and federal environmental regulation.

Draft Goal MR-G2 suggests that the County should establish threatened and endangered species protection that is different from or, potentially, in excess of existing state and federal law. Mining operations in the County are already subject to an array of environmental resource regulations including both the state and federal endangered species acts. Creating an additional or potentially inconsistent regulatory mandate at the County level will result in additional unnecessary burden on the industry and, as a practical matter, has the potential to result in less species protection due to confusing and inconsistent policies. Therefore, we respectfully request that the County revise Goal MR-G2 to expressly comply with existing state and federal environmental regulations while allowing such projects to provide ecological benefits where possible:

***MR-G2. In-stream Sand and Gravel Extraction.** Continued supplies of in-stream sand and gravel using extraction methods and rates that are consistent with state and federal endangered species regulations. Where possible, extraction can take place in a manner beneficial to endangered or threatened*

~~species. support threatened or endangered species recovery, protect riparian corridors, and preserve existing river bed elevations.~~

5. Annual in-stream gravel extraction rates are protected by vested rights.

Draft Policies MR-P4 and MR-P5 state that “annual gravel extraction prescriptions shall be based on . . . scientific estimate of Mean Annual Recruitment[.]” These policies are in contravention of the express permit terms of existing in-stream mining operations and, as noted above, cannot be imposed on these existing operations without violating their established vested rights. (*See, e.g., Trans-oceanic Oil Corp. v. Santa Barbara* (1948) 85 Cal.App.2d 776; *Hansen Bros. Enterprises v. Nevada County* (1996) 12 Cal.4th 533; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188.)

Therefore, we respectfully request that the County modify Policies MR-P4 and MR-P5 to include the clause “*Subject to pre-existing vested and permitted rights*” at the outset of both policies.

6. SMARA does not require complete environmental restoration.

Draft Policy MR-P7 provides that “mined lands shall be environmentally restored and reclaimed to a usable condition for the uses allowed by the site’s General Plan and zoning designation.” SMARA requires, among other things, that every surface mining operation have a lead agency-approved reclamation plan. (SMARA § 2770) The SMARA Guidelines provide for certain performance standards for reclamation, however, neither SMARA nor the SMARA Guidelines require environmental restoration as part of the reclamation plan. Oftentimes, restoring the site to its prior environment will be inconsistent with the site’s proposed end use. The SMARA Guidelines expressly provide, for example, that “[r]evegetation shall be part of the approved plan, unless it is not consistent with the approved end use.” (SMARA Guidelines § 3705) Here, by requiring complete environmental restoration, the draft language limits the range of end uses available for a reclaimed mine site. We respectfully request that the County revise Policy MR-P7 to read as follows:

MR-P7. Reclamation. Mined lands ~~subject to SMARA are shall be~~ environmentally restored and reclaimed consistent with proposed and/or potential uses identified in an approved Reclamation Plan pursuant to SMARA to a usable condition for uses allowed by the site’s General Plan and zoning designation.

7. Project conditions should reflect that mineral resources projects provide benefits that may outweigh environmental impacts.

Draft Policy MR-P11 requires that a mineral resource project be conditioned to reduce environmental impacts to a “less than significant” level. This policy, if implemented, would eliminate the Board’s authority under CEQA to issue statements of overriding consideration acknowledging that some projects, such as local mineral resources projects, offer economic and regional environmental benefits that outweigh any significant unavoidable impacts. (See CEQA Guidelines, § 15093.) As previously discussed, the County’s General Plan should ensure that the

County has the ability to issue a statement of overriding considerations to approve projects that may result in a significant effect on the environment but which cannot feasibly be avoided or substantially lessened. We respectfully request that the County revise Policy MR-P11 as follows:

***MR-P11. Permit Conditions to Reduce Impacts.** Permit conditions for mineral extraction operations shall address allowable dust and noise levels, hours of operation, fencing, traffic, access, setbacks, and other performance standards necessary to minimize ~~reduce~~ significant environmental impacts ~~to less than significant~~ and reduce conflicts with adjacent development land uses to the extent feasible. Split Vote: 4-3*

8. SMARA already provides a procedure for releasing financial assurances.

Draft Standard MR-S4 provides that reclamation may be ministerially approved if reclamation is consistent with the conditional use permit, CEQA, and the approved reclamation plan. We are unsure exactly what the County is attempting to accomplish, but we presume that the County was attempting to provide a standard for the “closing” of a mine site, meaning final certification that reclamation has been completed in accordance with the approved reclamation plan. If this is the County’s intent, the closing of a mining site is already subject to a procedure provided by SMARA Guidelines section 3805.5. Creating an additional and/or potentially inconsistent regulatory mandate at the County level will result in an additional and unnecessary burden on the mineral resource industry. Therefore, we respectfully request that the County revise Standard MR-S4 to expressly comply with existing state environmental regulations as follows:

***MR-S4. Reclamation Permit Plan Requirements** Release of Financial Assurances. ~~Reclamation of conditionally permitted mining operations may be ministerially approved if consistent with the Conditional Use Permit, CEQA evaluation, and approved Reclamation Plan~~ Release of Financial Assurances shall be as provided for in Title 14, California Code of Regulations section 3805.5.*

9. The County does not require a “Development Consultant” to review new mineral resources projects.

Draft Implementation Measure MR-IM3 permits the County to hire a consulting firm of the County’s choosing to advise the County on proposed mineral resources projects, and to be paid for by project developers. This is a holdover policy from the existing General Plan, which the County has not implemented, and which is no longer needed. Modern mineral resources projects are fully analyzed by surface mining experts as applicants design proposed projects and reclamation plans. Proposed projects are then fully reviewed by experts again during the County’s environmental review process, which project applicants must fund. It is unclear what role a separate mining consultant would serve in the project review process, other than result in substantial additional costs to project applicants. We respectfully request that the County delete draft Implementation Measure MR-IM3, or make it clear that there is no need for “double consulting contracts” in mining projects.

10. The County cannot impose a road impact fee on mining operations.

Draft Implementation Measure MR-IM6 provides that “the County shall research and establish haul road charges” on mining operations. The California Vehicle Code, however, already regulates heavy truck traffic by imposing fees that are deposited in the State’s Motor Vehicle Account and State Highway Fund, and used for, among other things, the “construction, improvement, maintenance, and operation of public streets and highways . . .” (Cal. Vehicle Code, §§ 9400.1(e), 42205; Cal. Const. Art. XIX, §§ 1(a), 2(b).) Local road impact mitigation fees are preempted by the California Vehicle Code and are invalid. *County San. Dist. v. County of Kern* (2005) 127 Cal.App.4th 1544, 1618-1623.)

CONCLUSION

Thank you again for the opportunity to comment on the draft Mineral Resource Element. We trust that the Board of Supervisors will find the above comments helpful in its review at the upcoming hearings. We look forward to continuing to participate in this ongoing process. Please do not hesitate to contact me if you have any questions.

Very truly yours,

HARRISON, TEMBLADOR,
HUNGERFORD & JOHNSON LLP

By



Mark D. Harrison

cc: Humboldt County Board of Supervisors
Justin Zabel, Mercer Fraser Company
Eureka Ready Mix