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October 27, 2021

Sent Via Email and DRMS Objection Intake Tool

Colorado Division of Reclamation, Mining and Safety
1313 Sherman Street, Room 215
Drms_info@state.co.us

Re: Protect the Hogback's Objection to Application to Convert Permit No. M1976-007UG and Petition for Hearing

To Whom It May Concern:

This law firm represents Protect the Hogback in connection with its opposition to the application submitted by Acme Brick Company to expand its mining operation just north of Golden, Colorado by converting its existing mining permit (DRMS Permit No. M1976-007UG) from a 110 Limited Impact Permit to a 112 Reclamation Permit to allow for such expanded operations (the "Application").

Protect the Hogback is a Colorado non-profit corporation that was formed by residents and business owners within the immediate vicinity of the hogback north of Golden and west of North Table Mountain to advocate for the protection and conservation of the area's many environmental, aesthetic, and recreational amenities. The Application seeks to dramatically expand the scope of Acme Brick Company's existing operation by nearly ten times and in a manner that directly threatens Protect the Hogback's interests and core mission. Accordingly, Protect the Hogback is "aggrieved" by the Application such that it is a "party" with respect to the Application as those terms are defined within Rule 1.1.¹

The purpose of this letter is twofold: (1) to set forth Protect the Hogback's objections to the Application for the reasons set forth herein; and (2) to petition for a hearing on the Application under Rules 1.4.9, 1.7.1, and 1.7.4 consistent with Protect the Hogback's rights as an aggrieved

¹ Unless otherwise noted, any references to the "Rules" or a "Rule" in this letter is intended to refer to the corresponding rule within the "Rules and Regulations of the Colorado Mined Land Reclamation Board for the Extraction of Construction Materials."

party who has now filed a timely objection to the Application. Each of these issues is addressed in turn below.

1. Protect the Hogback's Objections to the Application

Protect the Hogback objects to the Application because Acme Brick Company has failed to meet its burden with respect to at least three of the essential elements required for approval: (1) the Application is incomplete; (2) the proposed expanded mining operation is contrary to the land use laws of Jefferson County, Colorado, which are binding on the proposed use; and (3) the Application does not include a sufficiently detailed reclamation plan.

First, the Application is not complete and therefore does not satisfy Section 34-32.5-115(4)(a), C.R.S. Although DRMS Staff determined that the Application was “[a]dequate as submitted” on September 8, 2021, Staff’s September 27, 2021 letter to Acme Brick Company’s consultant identifies significant deficiencies and omissions throughout the Application. Rather than restating all of those defects here, Protect the Hogback expressly incorporates by reference all of the deficiencies identified in Staff’s September 27, 2021 letter. By way of example, the Application lacks critical and required information with respect to all of the following:

- The Application is internally inconsistent with respect to very basic information, such as the acreage that will be affected by the proposed expansion of operations and the frequency and extent of anticipated mining operations. Without this basic information, it is impossible to understand and evaluate Acme Brick Company’s proposed mining plan.
- The Application fails to describe the extent of proposed blasting and fails to include any geotechnical, vibration, or other engineering analysis which might possibly demonstrate that proposed blasting will not adversely affect off-site areas as required by Rule 6.5(4). This issue is of particular concern to Protect the Hogback given the steep slopes in the vicinity of the mine and the potential for landslides to affect properties far beyond the limits of the mine. Aerial photos of the site appear to show evidence of past landslides, which may or may not have been caused by past mining activity but regardless are evidence of unstable slopes.
- The Application fails to address whether the proposed expansion will encounter or impact any of the unreclaimed legacy mining operations and the associated contamination that continues to persist at the site.
- In addressing the potential wildlife impacts of its expanded operation, Acme Brick Company relies solely upon an obviously outdated June 13, 1977 letter from the Colorado Department of Wildlife, which Acme Brick Company did not even append to its Application. This is especially critical in light of the fact that Jefferson County previously identified the site as a “Potential Endangered Species Habitat”

for the prebles meadow jumping mouse. *See* Jefferson County Pre-Application Review Response, Case No. 20-106528PA, at 2 (attached hereto as **Exhibit A**).

- The Application also fails to thoroughly address basic—but critical issues—related to: (i) the timing and extent of the proposed mining operations; (ii) stormwater runoff, which appears to drain eastward from the existing operations and is unlikely to be absorbed into a clay mine; (iii) Acme Brick Company’s failure to reclaim past mining operations at the site; and (iv) the apparent proximity of groundwater to the surface given the admission that past underground mining operations were abandoned due to the high water table.

Each of these deficiencies provides an independent basis for denying the Application.

Second, the expansion contemplated by the Application would violate Jefferson County land use regulations and Acme Brick Company has not obtained the requisite “local permits, licenses, and approvals” required to expand its operation as required under Section 34-32.5-115(4)(d), C.R.S. The expanded mining operations contemplated by the Application are located in unincorporated Jefferson County on land that Jefferson County has zoned as “Agricultural-Two” (or “A-2”). Under the Jefferson County Zoning Resolution (hereinafter, the “Zoning Resolution”), Jefferson County’s Agricultural Zone Districts are “intended to provide for limited farming, ranching and agriculturally related uses while protecting the surrounding land from any harmful effects.” Zoning Resolution, § 33(A).² The Zoning Resolution does not permit any mining uses within the A-2 zone district. Any new or expanded mining operations in Jefferson County are only permitted on lands that have first been rezoned as a “Planned Development District for Mining.” *See generally* Zoning Resolution, § 29. This requires a considered and detailed rezoning process that must ultimately be approved by the Jefferson County Board of County Commissioners following a showing that the operation will comply with—among other things—Jefferson County’s “Mineral Extraction Policy Plan” as well as an additional “Mining Site Plan Review” approval process. *See generally* Zoning Resolution, § 44.

Here, Acme Brick Company has not sought any of these required “local permits, licenses, or approvals” from Jefferson County. While the legacy mining operations at the site might arguably have been allowed under prior iterations of the County’s Zoning Resolution, the current application seeks to expand that historic 9-acre operation to cover upwards of 85 acres in Jefferson County’s A-2 zone district, where mining is unambiguously prohibited. Jefferson County itself previously confirmed that Acme Brick Company would “need to Rezone to allow for an expansion of their requested mining land use. If the Rezoning is approved, then the applicant will need to complete the Mining Site Plan Review process to [*sic*] prior to the commencement of any mining

² The current version of Jefferson County’s Zoning Resolution may be accessed at <https://www.jeffco.us/2460/Zoning-Resolution>.

activity or topographical alteration.” Ex. A, at 1.³ Until these land use approvals and permits have been obtained, Acme Brick Company cannot satisfy its burden of proof to demonstrate that its proposed expanded mining operation will comply with all local land use laws as required under Section 34-32.5-115(4)(d), C.R.S.

Within the Application, Acme Brick Claims that the only Jefferson County permit that it intends to seek is under Jefferson County’s “Location and Extent” process. *See* Application, Ex. M. However, a review of the County’s Zoning Resolution confirms that this proposed process is inapplicable to these circumstances. *See generally* Zoning Resolution, § 8. As confirmed by Section 8 of the Zoning Resolution, Jefferson County’s Location and Extent process only applies to the siting of new roads, parks, and public utilities (*see* C.R.S. § 30-28-110), public schools (*see* C.R.S. § 22-32-124(1)), or charter schools (*see* C.R.S. § 22-32-124(1.5)(a)). Zoning Resolution, § 8(A)(1). Accordingly, this process is inapplicable to Acme Brick Company’s expanded mining operation and cannot legalize the proposed use which remains unlawful under the existing zoning of the site.

To the extent that Acme Brick Company may try to argue that some or all of the Jefferson County Zoning Resolution does not apply to its proposed expanded mining operation because the site is owned by the Colorado State Land Board, such an argument is unavailing. While the Zoning Resolution does exempt certain state-owned lands from its use restrictions, this exemption only applies to uses where state law does not require compliance with local land use laws and where the use “fulfill[s] a governmental (nonproprietary) function which the governmental owner/operator is legally authorized to provide.” Zoning Resolution, § 1(H). Acme Brick Company’s proposed expanded operation fails to meet each of these requirements. First, state law expressly provides that a mine operator must comply with the local land use rules of any political subdivision (like Jefferson County) which has adopted a mineral extraction plan. C.R.S. § 34-1-304; *see also* C.R.S. § 34-32.5-109(3) (“Any mining operator subject to this article shall also be subject to zoning and land use authority and regulation by political subdivisions as provided by law.”). It is well-settled that state law governing mining permits and providing for local control of land use regulations applies with equal force to lands that are controlled by Colorado’s State Land Board. *Colo. State Bd. of Land Comm’rs v. Colo. Mined Land Reclamation Bd.*, 809 P.2d 974, 985-87 (Colo. 1991). Second, Acme Brick Company’s proposed mine does not fulfill a governmental function and is instead for a proprietary use. Finally, the State Land Board is not legally authorized to operate mines, and Acme Brick Company’s proposal is for an exclusively private use.

Third, the Application does not include a detailed reclamation plan that is sufficient to satisfy the criteria set forth in Section 34-32.5-116, C.R.S., as required for approval under Section 34-32.5-115(4)(g), C.R.S. The reclamation plan included within the Application is vague and does not include any particular deadlines or coordination with mining operations—likely because the

³ Acme Brick Company initially sought a rezoning of the site with Jefferson County in or around December 2020, but those efforts were quickly abandoned in the face of significant public opposition.

timing and extent of the proposed mining operations are themselves so unclear on the face of the Application. Without any estimated timetable for this work, it is impossible to evaluate the viability and potential efficacy of the reclamation plan. In the interim, the still-unreclaimed operations will continue to create significant negative impacts for surrounding land users, including dust, noxious weeds, and potential environmental hazards from unprocessed waste and indefinitely stockpiled materials. The reclamation plan assumes that the waste piles and reclamation materials will be chemically inert and will not require any additional processing or cleanup, but there is no support for or discussion of these critical assumptions.

Protect the Hogback will present each of these objections in more detail at the Hearing requested below. Protect the Hogback reserves the right to further object to any additional information that Acme Brick Company might submit in support of its Application and/or in response to the many Staff comments that presently remain unresolved.

2. Protect the Hogback's Petition for Hearing

Protect the Hogback is a party to the Application because Acme Brick Company's proposed expansion threatens the environmental, aesthetic, and recreational amenities that Protect the Hogback was formed to protect through conservation. Furthermore, many of Protect the Hogback's supporters live and work in the immediate vicinity of the Acme Brick Company operation and will be directly impacted if the Application is approved. These impacts include but are not necessarily limited to economic impacts, including a negative impact on neighboring property values, and a direct threat to the conservational interests of Protect the Hogback and its many supporters. Accordingly, Protect the Hogback respectfully requests that the Board set this matter for hearing consistent with Rules 1.4.9, 1.7.1, and 1.7.4.

* * *

On behalf of Protect the Hogback, we thank the DRMS, including all Staff and the Board, for its careful consideration of these critical issues. Please contact me if there is anything further that we should discuss or if the Board requires any additional information in advance of its hearing on the Application.

Sincerely,



James R. Silvestro

Enclosure

Cc: Michael Cunningham (michaela.cunningham@state.co.us)
Camille Mojar (camille.mojar@state.co.us)
Eric Scott (eric.scott@state.co.us)

Exhibit A

Pre-Application
Review Response



100 Jefferson County Parkway
Suite 3550
Golden CO, 80419
303-271-8700
planning.jeffco.us

Case 20-106528PA
Process Rezoning
Pre-App Meeting Date April 29, 2020
Pre-App Response Date May 5, 2020

Case Manager
Justin Montgomery / 303-271-8792/ jmontgom@jeffco.us
Engineer
Laura Armstrong / 303-271-8715/ larmstro@jeffco.us

Summary of Request

Property Address and General Location

21506 West 56th Avenue, Golden, CO 80403 (PIN 30-163-00-001)
Situated southwest of the intersection of State Highway 93 and West 56th Avenue

Proposal

To Rezone from Planned Development (PD) and Agricultural-Two (A-2) to a new PD for mining on the approximately 159 acres.

Required Processes

The applicant will need to Rezone to allow for an expansion of their requested mining land use. If the Rezoning is approved, then the applicant will need to complete the Mining Site Plan Review process to prior to the commencement of any mining activity or topographical alteration. **This memo covers only the Rezoning aspect of this proposal.** Staff recommends an additional Pre-Application to address the Mining Site Plan Review process if the Rezoning is approved.

Items Submitted for Review

<input checked="" type="checkbox"/>	Cover Letter	<input type="checkbox"/>	Proof of Access
<input checked="" type="checkbox"/>	Vicinity Map	<input checked="" type="checkbox"/>	Proof of Water
<input checked="" type="checkbox"/>	Development Plan	<input checked="" type="checkbox"/>	Proof of Sanitation
<input checked="" type="checkbox"/>	Proposed Written Restrictions	<input type="checkbox"/>	Proof of Fire Protection
<input checked="" type="checkbox"/>	Current Deed or Title Commitment	<input type="checkbox"/>	Landscape Plan
<input type="checkbox"/>	Pre May 5, 1972 Deed		

Staff Findings

The information submitted for the Pre-Application has been reviewed by the Planning Division and other agencies on a one-week referral. The Pre-Application review is not a final and all-inclusive review and comments may change based on the submittal of additional information, changes to the proposal, the discovery of new, false or incomplete information and comments from referral agencies.

These initial case comments are based solely on the submitted Preliminary Application package and are intended to make the applicant aware of regulatory requirements at the time of application. Responses contained in this response are only valid until such time as the regulations are changed. Failure by staff to note any specific item does not relieve the applicant from conforming to all County regulations. Planning staff reserves the right to modify or add on to these comments.

Based on the limited information submitted for the Pre-Application review, staff makes the following preliminary findings:

<input type="checkbox"/>	Proposal in Conformance with the Comprehensive Master Plan (CMP)
<input type="checkbox"/>	Proposal in General Conformance with CMP
<input checked="" type="checkbox"/>	Proposal does not Conform with CMP

Please reference the Key Issues section of this response for specific information related to staff's position.

Final Decision

The staff findings on a Rezoning application are included in a report that will be presented at the required Planning Commission and Board of County Commissioners' Hearings. The Planning Commission will review the findings and other evidence and will make a recommendation to the Board of County Commissioners. The final decision on the Rezoning request will be made by the Board of County Commissioners.

Key Issues

- Potential Endangered Species Habitat (Prebles Meadow Jumping Mouse)
- Visual impacts on the Colorado Northern Front Range Mountain Backdrop
- Access through adjacent Jefferson County property and from State Highway 93 (subject to CDOT approval)
- Mineral Extraction Policy Plan

Rezoning Criteria

Should the applicant choose to pursue the Rezoning process, the proposal will be evaluated against specific criteria for approval of Rezoning cases. These criteria include but are not limited to:

1. The compatibility with existing and allowable land uses in the surrounding area.
2. The degree of conformance with applicable land use plans.
3. The ability to mitigate negative impacts upon the surrounding area.
4. The availability of infrastructure and services.
5. The effect upon the health, safety and welfare of the residents and landowners in the surrounding area.

Mineral Extraction Policy Plan

The Mineral Extraction Policy Plan (MEPP) provides a series of County goals and related policy guidelines for the extraction of commercial sand gravel, and quarry aggregate in unincorporated areas of the county. This Plan should be used in conjunction with the Comprehensive Master Plan.

This Plan establishes a point system for evaluating potential mining sites. The goals of the plan relate to visual impacts, air pollution, noise pollution, water quality and quantity, vegetation, wildlife, archaeological historic and geologic sites, site safety, blasting safety, truck traffic safety, reclamation, and economic impacts. The point scheme example starts on page 23. The applicant should expect to address all these items.

Comprehensive Master Plan recommendation

This property is located within the North Plains Area Plan. It is located within Area 17, which calls for Mineral Extraction. For this area, the Plan states that these areas appear to have several decades worth of resources remaining. Future land uses should be evaluated on a case-by-case basis, as the resources is exhausted, or the operations cease.

The proposed operation is a substantial increase in area; therefore, the applicant will need to also address things like buffers to adjacent property, light, odor, noise, dust, vibration and visual impacts. The buffer area should be clearly delineated on the ODP graphic. Currently, it is not clear where that buffer area is located, and it cannot contain adjacent property that is not subject to the Rezoning request.

Visual Resources

The CMP encourages protection of visual resources, including the Front Range Mountain Background. The changes proposed will impact visual resources. The applicant must address the following points in the Rezoning application and will be required to submit a visual analysis or photo simulations as a part of the application.

1. New development in areas with visual resources should attempt to integrate development into the natural environment.
2. Visually sensitive areas should be identified, and proposed mitigation should be determined at the time of Rezoning.

3. Existing vegetation and topography on site should be used to protect visual resources when possible.

A visual analysis showing the site at the peak of mining and then after reclamation should be submitted. The visual analysis should be from 3-5 locations with the locations agreed to by the applicant and the Case Manager, with input from interested citizens. A detailed and phased reclamation plan is recommended.

Uses

The requested mining land use is only currently permitted on 9.851 acres and the request is to increase it to 127.19 acres. The applicant should reduce this acreage to help mitigate the potential impacts or provide a much more detailed phasing and reclamation plan.

Access

The subject property is accessed from State Highway 93. The applicant will need to contact CDOT directly for their requirements. Since the access road crosses Jefferson County owned property, it is recommended that the applicant speak with Mark Danner, Facilities Management Director, for any changes needed to access easement agreements. Mr. Danner is aware of this proposal.

Water & Wastewater

The North Table Mountain Water and Sanitation District provided a letter dated March 11, 2020 stating public water can be provided in bulk to the proposed development. Applicant provided in cover letter that portable toilets will be available on property for sanitation services. Altitude Waste Solutions provided a letter dated April 3, 2020 stating sewer services will be provided by portable restrooms.

Hazardous Waste

Hazardous materials or industrial waste that is generated from this operation cannot be disposed of into the sanitary sewer system. Onsite disposal is prohibited. Any waste of this type must be recycled or disposed of at the proper waste disposal site, in accordance with local, state, and federal regulations.

Air

Certain manufacturing processes allowed under the proposed zoning for this site may require an Air Emissions Permit or an Air Pollutant Emissions Notice. The Colorado Department of Public Health and Environment will review plans for any future manufacturing process, to determine if the above permits are required.

If this proposal will include a fueling station, an Air Pollutant Emissions Notice (APEN) is required and must be submitted to the Colorado Department of Public Health and Environment Air Pollution Program for review and approval. It is requested that a copy of the APEN submittal be provided to this Department. Please contact Madison Pitts at 303.271.5759 for further information about this process.

Transportation Analysis

The amount and/or distribution of traffic generated from the proposed development needs to be determined. A Transportation Analysis is required with this rezoning case (Zoning Resolution Section 9.C.27.b). A Transportation Analysis is a computation of the traffic that is generated by a proposed development that is expected to generate less than 1000 average daily trips. The Analysis should address any off-site improvements that may be necessary to mitigate traffic impacts from the proposed development. Please review the Transportation Studies section of the Transportation Manual.

Rezoning Process

Please refer to the Rezoning and Community Meeting sections of the Zoning Resolution for complete requirements.

1. Community Meeting: The applicant will be required to hold a Community Meeting for the proposed development. The applicant will need to post signage provided by the case manager with the date and location of the Community Meeting on the subject property. Notification postcards will also be sent to surrounding property owners, registered Homeowners' Associations and Umbrella Groups by the case manager. Please contact the case manager to set up a time and place for the Community Meeting. Planning staff must be notified at least 21 days prior to the Community Meeting. Meeting locations must be ADA accessible.

- 2. Initial Submittal:** The initial submittal documents will be reviewed by the case manager to determine if they are acceptable for the referral process. The submittal documents should be submitted to staff electronically and the review time by staff may take up to 7 calendar days. If there are any modifications that need to be addressed, the applicant will be asked to revise the documents and resubmit. Once the documents are acceptable for the referral process, the application will be deemed accepted.
- 3. Community Notification:** Notification is required to be sent to surrounding property owners, any registered Homeowners' Associations and Umbrella Groups regarding submittal of a Rezoning application. The case manager will send the notification at the time of formal application acceptance. Sign(s) are required to be posted on the property.
- 4. Formal Submittal:** Within 5 calendar days of the formal submittal, the documents will be sent out on referral to various review agencies. The referred documents will be reviewed during a 21-calendar day period. After the referral process, the case manager will compile all the comments received from the various referral entities and forward them to the applicant within 7 calendar days.

When the documents are sent out on referral, the case manager will schedule tentative Planning Commission and Board of County Commissioners hearing dates in accordance with the process requirements. The hearing dates established at this time are tentative. These hearing dates will only be achieved if the applicant sufficiently addresses County and referral agency concerns within the allotted timeframes.
- 5. Preparation for Hearing:** Once the documents are acceptable or the applicant chooses to proceed forward without staff support, the case will be ready to be presented to the Planning Commission and then the Board of County Commissioners. The final documents must be submitted to the case manager no later than 21 days prior to the Planning Commission hearing. Proper community notification, sign posting, and publication must be completed in accordance with the process requirements.
- 6. Hearings:** The Planning Commission will review the case and testimony and will forward a recommendation to the Board of County Commissioners. The Board of County Commissioners will review the case, the Planning Commission Recommendation and testimony, and will approve or deny the application. Any approval conditions imposed on the application by the Board of County Commissioners will need to be satisfied prior to the final document being recorded in the Clerk and Recorder's Office.
- 7. Recording:** If the Rezoning case is approved, the zoning document, whether an Official Development Plan (ODP) or the resolution approving rezoning to a standard zone district, must be recorded following the BCC hearing.

Fees

Fees are typically updated on January 1 of each calendar year. If a formal application is made in the year(s) after a Pre-App is completed, please be aware that the fee schedules included in the response package may be outdated.

Application Form and Fees

A fully completed and executed application form and filing fee shall accompany the submittal. The current fee schedule is attached to this Pre-Application response. The Planning & Zoning portion of the pre-app fee can be credited if the formal development application is made within 1 year of the date of the Pre-App meeting.

The above application fee covers the 1st and 2nd referrals as defined in the process requirements. Developments that require additional referrals will be charged for any subsequent referrals based on the current fee schedule.

If a formal land use application is made within 1 year of the date of the Pre-Application meeting, the Planning & Zoning portion of the fee for this Pre-Application will be credited towards the processing fee for the land use application.

Outside Agency Review Fees

These fees will be determined during the initial review and will need to be submitted with the formal submittal that will be referred to outside agencies. Typical outside agency review fees come from Jefferson County Public Health and the local Fire District but may include others. Please follow up with those agencies for specific review fees.

Traffic Impact Fees

Traffic Impact Fees are required at the time of building permit application. The current fee schedule is attached to this Pre-Application response.

Items Provided to Applicant

<input checked="" type="checkbox"/>	Staff Comments
<input checked="" type="checkbox"/>	Development Application
<input type="checkbox"/>	Process Guide
<input checked="" type="checkbox"/>	Submittal Checklist
<input checked="" type="checkbox"/>	Environmental Questionnaire

<input type="checkbox"/>	Water Supply Summary Form
<input checked="" type="checkbox"/>	Current Traffic Impact Fee Schedule
<input type="checkbox"/>	Mineral Rights Notification Form
<input type="checkbox"/>	Red Lined Written Restrictions
<input checked="" type="checkbox"/>	Mineral Extraction Policy Plan

For related information including the Zoning Resolution, Land Development Regulation, Community Plans, Transportation Design & Construction Manual, Drainage Criteria, etc., please visit our web site at planning.jeffco.us.

Comments from Referral Agencies

Official comments from our referral agencies can be found attached.