



STATE MINING AND GEOLOGY BOARD

DEPARTMENT OF CONSERVATION

801 K Street • Suite 2015 • Sacramento, California 95814

PHONE: 916 / 322-1082 • FAX: 916 / 445-0738 • TDD: 916 / 324-2555 • INTERNET: conservation.ca.gov/smgb

GIDEON KRACOV, CHAIR

STEPHANIE LANDREGAN, VICE CHAIR

ZIA ZAFIR

BRIAN ANDERSON

NEGAR NOUSHKAM

GEORGE KENLINE

SANDRA POTTER

INITIAL STATEMENT OF REASONS

PROPOSED AMENDED REGULATIONS

DEPARTMENT OF CONSERVATION STATE MINING AND GEOLOGY BOARD

TITLE 14. NATURAL RESOURCES Division 2. Department of Conservation Chapter 8. Mining and Geology Subchapter 1. State Mining and Geology Board Article 15. Vested Rights Determinations and Article 16. Mining Ordinances

PROBLEM STATEMENT

The Legislature adopted the Surface Mining and Reclamation Act of 1975 (“SMARA,” Public Resources Code (PRC), section 2710 et seq.) in order to provide a comprehensive surface mining and reclamation policy with the regulation of surface mining operations to assure that adverse environmental impacts are minimized and mined lands are reclaimed to a usable condition. On April 18, 2016, Governor Brown signed Assembly Bill (AB) 1142 (Gray) into law with an effective date of January 1, 2017, and thereby enacted significant reforms to SMARA. In order to fully enact many of the revisions to SMARA, the State Mining and Geology Board (SMGB) must address certain changes by way of regulations.

One of the many changes to SMARA under AB 1142 (Gray), was an amendment to PRC section 2774.4, subdivision (a), which now removes the SMGB’s authority to conduct vested rights determinations, in addition to the SMGB’s lack of authority to issue mining permits, when the SMGB acts as a lead agency. Specifically, the revised section provides: “The board shall exercise some or all of a lead agency’s powers under this chapter pursuant to subdivision (c), except for permitting authority **and vested rights determinations**, if the board finds...” Emphasis added.

The Mission of the State Mining and Geology Board is to Provide Professional Expertise and Guidance, and to Represent the State’s Interest in the Development, Utilization and Conservation of Mineral Resources, the Reclamation of Mined Lands, and the Development and Dissemination of Geologic and Seismic Hazard Information to Protect the Health and Welfare of the People of California.

Prior to AB 1142 (Gray), and as determined by California's Third District Court of Appeals in *Calvert v. County of Yuba*, (2007) 145 Cal. App. 4th 613; 51 Cal. Rptr. 3d 797, the SMGB was deemed to have the implied authority to make vested rights determinations following assumption of a lead agency's powers under SMARA. Following the decision in *Calvert*, the SMGB adopted Article 15 of Title 14, Division 2, Chapter 8, Subchapter 1 of the California Code of Regulations (CCR), sections 3950 – 3965 to establish due process procedures for receipt and hearing of petitions to adjudicate vested rights claims where the SMGB had assumed lead agency authority pursuant to PRC section 2774.4.

In January of 2017, the SMGB submitted revisions of Article 15 to the Office of Administrative Law as a change without regulatory effect. The rationale behind the submission was that the revisions did not materially alter any requirement, right, or other regulatory element of any regulatory provision/s because the changes were based on deleting regulatory provisions for which all statutory or constitutional authority has been repealed pursuant to CCR Title 1, section 100(a)(3). The SMGB reasoned that AB 1142 (Gray) expressly repealed the statutory authority to make vested rights determinations when the SMGB acts as the lead agency.

Soon after the submission, it was withdrawn pursuant to Government Code section 11349.3(c). The SMGB determined that deletion of Article 15 alone did not provide sufficient clarity regarding the SMGB's authority to make vested rights determinations where it has assumed lead agency status. The SMGB can assume lead agency status in two different situations and Article 15 references only one. First, as addressed by the revision under AB 1142 (Gray) to PRC section 2774.4, subdivision (a), the SMGB may assume some or all of a lead agency's authority after conducting a review and hearing of a lead agency's administration of SMARA. In these cases, the lead agency has a certified mining ordinance and has been administering SMARA. After making certain findings related to a lead agency's administration of SMARA, the lead agency may "involuntarily" lose its status as a lead agency. The SMGB has assumed lead agency status following a review and hearing procedure, pursuant to 2774.4, subdivision (a), for two lead agencies, both of them county jurisdictions.

The second situation where the SMGB assumes lead agency status is simply by "default," or operation of law, pursuant to PRC section 2774, subdivision (a) and 2774.5. Under these provisions of statute, lead agencies that have one or more surface mining operations within their jurisdiction that do not have, or fail to pursue the adoption of, a certified mining ordinance through the SMGB do not act as lead agencies as defined by PRC section 2728. As a result, a review or hearing procedure is not required because PRC section 2774.5 gives the SMGB full authority for approving reclamation plans in the cases the lead agencies do not have a certified mining ordinance. Currently, the SMGB has assumed lead agency status by default over 8 lead agencies, all but one being a city. In these circumstances, the SMGB assumes all authorities of a lead agency except for permitting as prohibited by subdivision (d) of PRC section 2774.5, which provides: "Nothing in this section shall be construed as authorizing the board to issue a permit for the conduct of mining operations."

As a result of the SMGB's review of these provisions, the SMGB determined that additional regulatory language is needed. Specifically, to clarify the extent of authority the SMGB assumes where it acts as a lead agency by default under PRC sections 2774, subdivision (a) and 2774.5,

as well as the SMGB's lack of authority to conduct vested rights determinations where it assumes lead agency status by default.

The SMGB proposes to amend Article 15, sections 3950 – 3965, in order to clarify the SMGB's authority regarding vested rights determinations under any circumstances and amend Article 16, section 4000, to address the extent of authority for the SMGB when acting as a lead agency by default as explained above.

BENEFITS

The proposed regulatory action will meet the statutory goals of AB 1142 (Gray) to improve how the SMGB, the Department of Conservation (Department), and local lead agencies oversee and implement SMARA. The regulations would make specific that the issuance of mining permits or the recognition of vested mining rights remains with the local land-use decision making authority regardless if the SMGB acts as the lead agency. In addition, the amended regulatory language clarifies the SMGB's current process of assuming lead agency status in those jurisdictions that have at least one mining operation and the local lead agency does not have a certified mining ordinance. The amendments provide certainty for mining operators located in small local government jurisdictions that choose not to adopt a SMGB certified mining ordinance. The amendments provide certainty for lead agencies that have been administering SMARA pursuant to certified mining ordinances as they seek to amend their ordinances that may no longer be considered in accordance with state policy for whatever reason.

Additionally, the SMGB anticipates specific non-monetary benefits from the proposed action such as the prevention of discrimination, the promotion of fairness or social equity, and the increase in openness and transparency in business and government by clarifying the SMGB's authority to make vested right determinations in any and all cases the SMGB acts as the lead agency.

DETAILED STATEMENT OF SPECIFIC PURPOSE AND RATIONALE

§3950 is amended. This subsection makes specific that under any circumstance in which the SMGB acts as a lead agency and regardless of whether the SMGB exercises some or all of a lead agency's authorities, the SMGB will not conduct vested rights determinations. It clarifies that while PRC section 2774.4, subdivision (a), expressly prohibits the SMGB from conducting vested rights determinations when it assumes lead agency status involuntarily, the SMGB will also not conduct vested rights determinations where it assumes lead agency status by default pursuant to PRC section 2774.5.

§3951- 3965 are removed. These sections are necessary for removal completely because they provide procedural requirements for the SMGB to make a vested right determination. The amendment to section 3950 provides the SMGB will no longer conduct vested rights determinations in jurisdictions where the SMGB is the lead agency pursuant to either PRC sections 2774.4 or 2774.5.

§4000 (c) is added. This subsection is necessary to address the circumstance where a lead agency has no certified ordinance but has at least one mining operation within its jurisdiction. Specifically, this subsection provides that the SMGB is the lead agency until the local lead agency has their mining ordinance certified by the SMGB. If the local lead agency chooses not to certify an ordinance, then the SMGB remains the lead agency until an ordinance is certified. While PRC section 2774, subdivision (a), provides that local governments “shall adopt ordinances in accordance with state policy...,” they may “defer adopting an implementing ordinance” until they receive a permit application to conduct mining. This provision of PRC section 2774, subdivision (a), has not convinced all local governments to adopt a certified mining ordinance since the SMGB has assumed by default lead agency status for 8 local governments. Regardless, where a mining operation subject to SMARA exists in a jurisdiction without a certified mining ordinance, the SMGB is the appropriate entity to act as a lead agency with full authority to administer and take enforcement actions pursuant to SMARA. Without this clarification, the administration and enforcement of SMARA may be delayed or avoided by local governments through inaction or a challenge to authority by recalcitrant mining operators seeking to delay or avoid compliance with SMARA

§4000 (d) is added. This subsection is necessary to address the situation where circumstances have led a lead agency’s certified mining ordinance to no longer be in accordance with state policy. This would likely be due to a change in statute. In that case, lead agencies should be expected to seek SMGB certification of an amended mining ordinance or the SMGB could initiate a review of a lead agency’s previously certified mining ordinance under PRC section 2774.5, subdivision (a). During the SMGB’s review of the lead agency’s previously certified ordinance, it could be very problematic and overwhelming for the SMGB to assume the lead agency’s status. However, that would be the outcome under PRC section 2774.5, subdivision (a) should the SMGB determine a lead agency’s previously certified mining ordinance is actually not in accordance with state policy. In effect, the SMGB would be “de-certifying” a mining ordinance and under PRC section 2774.5, subdivision (c), the SMGB would assume lead agency status by “default.” To avoid this outcome, lead agencies, seeking to “re-certify” their mining ordinances or where the SMGB initiates a review of a lead agency’s certified mining ordinance, should remain the lead agency through the certification process under PRC section 2774.5. If the lead agency fails to adequately complete certification through PRC section 2774.5, then and only then, would the SMGB assume lead agency status

STATEMENT OF NECESSITY

Revisions to PRC section 2774.4, subdivision (a), caused by AB 1142 (Gray), remove statutory authority from the SMGB for making vested rights determinations. These regulations are needed to keep consistent with the Legislature’s intent that vested right determinations should be made at the local level, just as decisions to issue permits to operate a mining operation are. These regulations are also necessary to define the timing and extent of authority of the SMGB when it acts as the lead agency pursuant to PRC sections 2774.4 and 2774.5

IDENTIFICATION OF TECHNICAL / THEORETICAL / EMPIRICAL STUDIES, REPORTS, OR DOCUMENTS UPON WHICH THE SMGB HAS RELIED

While no technical studies or reports have been relied upon by the SMGB in preparing the proposed amended regulatory text, the SMGB notes the decision from the case of *Calvert v. County of Yuba*, (2007) 145 Cal. App. 4th 613; 51 Cal. Rptr. 3d 797, in its development of these regulations.

CEQA COMPLIANCE

The SMGB has determined that this rulemaking action is not a project as defined in Title 14, CCR, §15378, and that this activity is not subject to the requirements of the California Environmental Quality Act (CEQA).

ECONOMIC IMPACT ASSESSMENT

As determined by California's Third District Court of Appeals in *Calvert v. County of Yuba*, (2007) 145 Cal. App. 4th 613; 51 Cal. Rptr. 3d 797, any person seeking to establish a vested right to mine, and therefore avoid the necessity of seeking a permit from the local lead agency, must establish the nature and scope of the vested right in a public hearing before the local lead agency with notice and opportunity for public input. Any costs for persons petitioning local governments to seek establishment of a vested right to mine is a result of the requirements of due process as determined by the Court in the *Calvert* decision. The proposed amended regulation does not affect, by way of increase or decrease, those anticipated costs. Additionally, the recognition of the SMGB as the lead agency in those cases where mining operations exist in jurisdictions without certified mining ordinances do not add additional costs already established in SMARA. This is also true in cases where lead agencies have certified mining ordinances that are under review by the SMGB under the process set forth in PRC section 2774.5.

In accordance with Government Code Section 11346.3(b) the SMGB has made the following assessments regarding the proposed amended regulations:

The SMGB does not anticipate the proposed amended regulations would have an impact on the creation of new, or the elimination of existing, jobs within California.

The SMGB does not anticipate the proposed amended regulations would have an impact on the creation, expansion, or elimination of new or existing business within California.

The SMGB does not anticipate the proposed amended regulations would have an impact on the expansion of businesses currently doing business in California.

The SMGB anticipates non-monetary benefits from the proposed action such as the protection of public health and safety, worker safety, and the environment by ensuring that lead agencies maintain mining ordinances that are in accordance with state policy.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

Costs associated with a petition to establish a vested right to mine will likely vary from case to case depending on a number of factors that include the nature and extent of the evidence available to the petitioner, the size and scope of the claimed vested right, the size of the jurisdiction in which the petitioner claims the vested right, and the size of the population surrounding the area where the vested right is claimed. These costs are not imposed by the proposed amended regulations but instead result from the decision under *Calvert v. County of Yuba*, (2007) 145 Cal. App. 4th 613; 51 Cal. Rptr. 3d 797. Those costs are incurred by vested rights petitioners in any case. Similarly, mining operations subject to SMARA incur administrative costs resulting from SMARA regardless of whether the local government or the SMGB is the lead agency as defined by SMARA at PRC section 2728. The recognition of the SMGB as the lead agency in cases where mining operations exist in jurisdictions without certified mining ordinances do not add additional costs already established in SMARA. This is also true in cases where lead agencies have certified mining ordinances that are under review by the SMGB under the process set forth in PRC section 2774.5 where they would remain the lead agency until a mining ordinance is certified by the SMGB.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE SMGB'S REASONS FOR REJECTING THOSE ALTERNATIVES

Without amending CCR sections 3950 – 3965, a proposed alternative of taking no action would result in unnecessary and potentially confusing provisions of existing regulatory requirements remaining in publication and be contrary to newly amended PRC section 2774.4. Without amending CCR section 4000, a proposed alternative of taking no action would result in ambiguity of the SMGB's lead agency timing and extent of authority when acting as the lead agency pursuant to PRC section 2774.5.

No alternatives have been proposed that would lessen any adverse impact on small business.

DUPLICATION OR CONFLICTS WITH FEDERAL REGULATIONS

This regulation change does not duplicate or conflict with existing Federal statutes or regulations. Also, by Memorandum of Understanding with the Federal Bureau of Land Management, the U. S. Forest Service, the Department, and the SMGB, SMARA and its implementing regulations and federal law are coordinated to eliminate duplication.