

**STATE MINING AND GEOLOGY BOARD**

D E P A R T M E N T O F C O N S E R V A T I O N

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****Surface Mining Vested Rights Determinations and Ordinances****NOTICE OF PROPOSED RULEMAKING ACTION****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**

Notice Published: June 23, 2017

Office of Administrative Law Notice File Number: 2017-0613-02

NOTICE IS HEREBY GIVEN that the State Mining and Geology Board (SMGB) proposes to amend the regulations described below after considering all comments, objections, or recommendations regarding the proposed action.

PROPOSED REGULATORY ACTION

The SMGB proposes to amend sections 3950, 3951, 3952, 3953, 3954, 3955, 3956, 3957, 3958, 3959, 3960, 3961, 3962, 3963, 3964, 3965, and 4000 of Articles 15 and 16 of the California Code of Regulations (CCR), Title 14, Division 2, Chapter 8, Subchapter 1 pertaining to vested rights determinations and mining ordinances.

WRITTEN COMMENT PERIOD AND PUBLIC HEARING

Any person, or his or her authorized representative, may submit written statements, arguments, or comments related to the proposed regulatory action to the SMGB. Comments may be submitted by email to smgb@conservation.ca.gov or by mail to:

State Mining and Geology Board
801 K Street, MS 20-15
Sacramento, CA 95814
ATTN: Vested Rights Determinations and Mining Ordinances

The written comment period closes at 5:00 p.m. on August 17, 2017. The SMGB will only consider comments received at the SMGB office by that time.

The SMGB will hold a hearing if it receives a written request for a public hearing from any interested person, or his or her authorized representative, no later than 15 days before the close of the written comment period.

AUTHORITY AND REFERENCE

The SMGB proposes to amend sections 3950, 3951, 3952, 3953, 3954, 3955, 3956, 3957, 3958, 3959, 3960, 3961, 3962, 3963, 3964, 3965, and 4000 of Articles 15 and 16 of the CCR, Title 14, Division 2, Chapter 8, Subchapter 1 pursuant to the authority granted in the Surface Mining and Reclamation Act ("SMARA," Public Resources Code (PRC) section 2710 et seq., and specifically PRC section 2755) to implement, interpret, or make specific PRC sections 2774.4 and 2774.5.

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

Local governments, acting as lead agencies, have the primary responsibility to administer and enforce the provisions of SMARA. In two situations, the SMGB exercises or assumes some or all of a lead agency's powers to administer and enforce the provisions of SMARA pursuant to PRC sections 2774.4 and 2774.5. This rulemaking action clarifies and makes specific the timing and extent of authority of the SMGB when it assumes lead agency status pursuant to PRC sections 2774.4 and 2774.5.

SMARA was enacted to ensure that any significant adverse impacts of mining to the environment are prevented or mitigated and public health and safety are protected. Under SMARA, surface mining operators are required to submit to their respective lead agencies for approval a permit to engage in mining, a plan for reclaiming lands disturbed by mining activities, and proof of financial assurances to ensure that those disturbed lands are reclaimed in accordance with the approved reclamation plan. Mining operators that were mining at the time SMARA was enacted, may continue to operate pursuant to a vested right, avoiding the need to submit and obtain an approved permit. Lead agencies are responsible for ensuring their surface mining operators are in compliance with SMARA. Specifically, the lead agency approved permit, any conditions of approval that relate to the reclamation plan, the approved reclamation plan, and financial assurance requirements. The Department of Conservation (Department) and the SMGB provide lead agency assistance and oversight. Under procedures described in PRC section 2774.4, the SMGB may assume some or all of

a lead agency's powers, except for permitting authority and vested rights determinations, if it finds a lead agency has failed in its principal responsibilities to oversee SMARA in its jurisdiction. Under PRC section 2774.5, the SMGB assumes all of a lead agency's powers, except for permitting where the lead agency does not have a mining ordinance certified by the SMGB, and at least one mining operation exists within the jurisdiction of the lead agency. Currently, the SMGB acts as the lead agency under SMARA for 38 individual surface mining operations within 8 local governments by conducting annual inspections, reviewing and approving reclamation plans, plan amendments, financial assurance cost estimates, and undertaking compliance and enforcement actions when deemed necessary.

Regulations for any person claiming a vested right to conduct surface mining operations in a jurisdiction where the SMGB assumed lead agency status pursuant to PRC section 2774.4 are currently found in Article 15 of the CCR, Title 14, Division 2, Chapter 8, Subchapter 1.

Additionally, PRC section 2774, subdivision (a), requires all lead agencies to adopt mining ordinances that are in accordance with SMARA but allows a lead agency to defer adopting an ordinance until it receives a filing for a permit application. It requires the ordinance to establish procedures for at least one public hearing and the ordinance must be periodically reviewed by the lead agency to ensure it is continually in accordance with SMARA. PRC section 2774.3 requires the SMGB to review and certify lead agency ordinances to ensure the ordinance adequately meets, or exceeds, the requirements of SMARA. PRC section 2774.5 requires the SMGB to assume full authority for reviewing and approving reclamation plans if a lead agency's ordinance is not certified by the SMGB as being in accordance with SMARA. The SMGB retains this authority until the lead agency's ordinance is revised and certified in accordance with SMARA. Regulations associated with mining ordinances are found in Article 16 of the CCR, Title 14, Division 2, Chapter 8, Subchapter 1.

The proposed amended regulations would implement the Legislature's intent of AB 1142 (Gray) by removing the authority of the SMGB to make vested rights determinations under any circumstances when acting as the lead agency pursuant to PRC section 2774.4 or PRC section 2774.5. The proposed amended regulations would also clarify, interpret, and make specific the authority of the SMGB when it assumes full authority as the lead agency pursuant to PRC section 2774.5 when a lead agency fails to adopt a SMGB certified mining ordinance. Additionally, the regulations would allow lead agencies that have certified mining ordinances to retain their SMARA authorities if and when the SMGB reviews a proposed amendment to a previously certified ordinance pursuant to PRC section 2774.5 to determine if it is in accordance with SMARA pursuant to PRC section 2774.3.

Anticipated Benefits of the Proposed Regulation

The broad objective of the proposed amended regulatory language is to meet the statutory goals of AB 1142 (Gray) to improve how the SMGB, the Department, and local lead agencies oversee and implement SMARA, specifically in regards to vested rights determinations. 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 governments 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. This may be due in large part to significant changes to SMARA. The proposed amended regulations are intended to provide non-monetary benefits such as 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 in any and all cases the SMGB acts as the lead agency.

CONSISTENCY WITH FEDERAL STATUTE AND REGULATION

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 of Conservation, and the SMGB, SMARA and federal law are coordinated to eliminate duplication.

CONSISTENCY WITH EXISTING STATE REGULATIONS

The proposed amended regulatory language is not inconsistent or incompatible with existing regulations pertaining to vested right determinations and mining ordinances. After conducting a review for any regulations that would relate to or affect this area, SMGB has concluded that these are the only regulations that concern vested rights determinations and mining ordinances in California.

CEQA COMPLIANCE

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

DISCLOSURES REGARDING THE PROPOSED ACTION

The SMGB has made the following initial determinations:

Mandate on local agencies and school districts: None.

Cost or savings to any state agency: None. Previously, the petitioner assumed burden of proof for the vested right and all associated costs in all vested rights determinations presented to the SMGB. Additionally, the proposed regulations present no costs to the

SMGB when it takes on lead agency status as statute provides lead agencies authority to assess fees to cover associated costs, pursuant to PRC section 2207 (e).

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None.

Other nondiscretionary cost or savings imposed on local agencies: None.

Cost or savings in federal funding to the state: None.

Costs impacts on a representative private person or business: The SMGB is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed regulatory action.

Significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states: None.

Significant effect on housing costs: None.

Small business determination: Any person seeking to establish a vested right to mine 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 California's Third District Court of Appeals in *Calvert v. County of Yuba*, (2007) 145 Cal. App. 4th 613; 51 Cal. Rptr. 3d 797.

Additionally, pursuant to PRC section 2207 (e) lead agencies may impose a fee on each surface mining operation to administer SMARA. These costs vary from lead agency to lead agency, including when the SMGB acts as the lead agency, depending on the funding source and/or how the lead agency chooses to fund it. The varying costs to administer SMARA are provided by statute and not the regulation. Thus, the SMGB has determined the proposed regulatory action may not affect small businesses.

Business reporting requirement: None.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT/ANALYSIS

Creation or elimination of jobs within California: The SMGB does not anticipate the proposed amended regulations would create or eliminate jobs within California.

Creation of new businesses or the elimination of existing businesses within California: The SMGB does not anticipate the proposed amended regulations would create new businesses or eliminate existing businesses.

Expansion of businesses currently doing businesses within California: The SMGB does not anticipate the proposed amended regulations would lead to the expansion of businesses currently doing business within California.

Benefits to the health and welfare of California residents, worker safety, and the state’s environment: The SMGB anticipates the proposed amended regulations would benefit the health and welfare of California residents, worker safety, and the state’s environment by ensuring that lead agencies maintain mining ordinances that are in accordance with state policy and make specific that the issuance of mining permits or the recognition of vested mining rights remains with the local land-use decision making authority.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the SMGB must determine that no reasonable alternative it considered or that has otherwise been identified and brought to the attention of the SMGB would be more effective in carrying out the purpose for which the action is proposed, would be as effective as and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The SMGB invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations during the written comment period or at any hearing scheduled to take statements or arguments that are relevant to the proposed action.

CONTACT PERSONS

Inquiries concerning the substance of the proposed amended regulations should be directed to:

Nick Lash, Associate Governmental Program Analyst
State Mining and Geology Board
801 K Street, Suite 2015
Sacramento, California 95814
Phone: (916) 322-1082
Nicholas.Lash@conservation.ca.gov

OR

Amy Scott, Executive Assistant
State Mining and Geology Board
801 K Street, Suite 2015

Sacramento, CA 95814
Phone: (916) 322-1082
Amy.Scott@conservation.ca.gov

AVAILABILITY OF INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATION, AND RULEMAKING FILE

The SMGB will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office at the above address. As of the date this notice is published in the Notice Register, the rulemaking file consists of this notice, the proposed text of the regulation, the initial statement of reasons, and a standard form 399.

Please direct requests for copies of the proposed text (the “express terms”) of this regulation, the initial statement of reasons, the modified text of the regulation, if any, or other information upon which this rulemaking is based to Nick Lash at the above address.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After the written comment period and any hearing that may be conducted by the SMGB to accept comments and evidence regarding the adoption of the proposed amended regulation, the SMGB will consider all timely and relevant comments received. Thereafter, the SMGB may adopt the proposed regulation substantially as described in this notice. If the SMGB makes modifications that are sufficiently related to the original proposed text, it will make the modified text (with changes clearly indicated) available to the public for at least 15 days before the SMGB adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of Nick Lash at the address indicated above. The SMGB will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting Nick Lash at the above address.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the proposed amended text of the regulations can be accessed through our website at:

<http://www.conservation.ca.gov/smgb>