

## **DRAFT OF PROPOSED AB 3098 REGULATIONS**

The regulations contained in this article (a) specify standards by which the Department of Conservation (Department) determines placement on and removal from the list maintained by the Department pursuant to Public Resources Code Section 2717(b) (hereinafter, “the List”), and (b) set forth procedures for appeals to the State Mining and Geology Board (hereinafter, “the Board”) by any operator of a surface mining operation, a lead agency with jurisdiction over the mining operation, or affected persons dissatisfied with any decision of the Department regarding placement or continuation of the operator on or removal of the operator from the List. (All statutory references hereinafter made shall be to the Public Resources Code, unless otherwise specified)

a. The right to appeal a refusal by the Department to include an operation on the List, or to order an operation’s removal from the List, set forth in these regulations, where the Department’s action is based on enforcement action taken by the lead agency or by the Department pursuant to Section 2774.1, does not include, and the Board will not entertain in that appeal, any challenge to the enforcement action. Such challenges are governed by Section 2774.2, and the procedures set forth in that section are the exclusive means by which a mining operator may bring such a challenge. Evidence of any such enforcement proceedings shall be permissible in an appeal pursuant to these regulations, but

only to demonstrate the existence, relevance and outcome of the enforcement proceedings.

b. The right to appeal a refusal by the Department to include an operation on the List, or to order an operation's removal from the List, set forth in these regulations, where the Department's action is based on court proceedings affecting a mining operation's conformance to the Surface Mining and Reclamation Act, does not include, and the Board will not entertain in that appeal, any challenge to the court proceedings. Evidence of any such court proceedings shall be permissible in an appeal pursuant to these regulations, but only to demonstrate the existence, relevance and outcome of the court proceedings.

**1. Standards for inclusion on the List.** For a surface mining operation to be placed or retained on the List, the operator either must have an appeal pending before the Board pursuant to Section 2770(e), provided that the appeal shall not have been previously before the Board for more than 180 days, or must demonstrate, prior to the commencement of each calendar quarter, all of the following:

a. A current and complete annual report has been submitted to the Director of the Department in accordance with Section 2207(a).

b. A reclamation plan that addresses the entirety of the mined lands associated with the surface mining operation has been approved by the lead agency with jurisdiction to implement the requirements of the Surface Mining and Reclamation Act (Section 2710 et seq.).

c. Financial assurances, in accordance with Section 2773.1 and Article 11 of Title 14, California Code of Regulations, sec. 3800, et seq., which are sufficient to reclaim the mined lands in accordance with the approved reclamation plan, are posted with the lead agency and the Department.

d. Any required annual reporting fee has been submitted to the Department.

e. A current inspection notice, in accordance with Section 2774(b), has been provided to the Department, reflecting the lead agency's determination that the surface mining operation is in compliance with the approved reclamation plan and that financial assurances sufficient to reclaim the mined lands in accordance with that plan have been posted with the lead agency and the Department. If the inspection notice has not been timely submitted to the Department through no fault of the mine operator, the operator may otherwise demonstrate to the Department that the mine currently operates in conformance with the approved reclamation plan and that financial assurances sufficient to reclaim the mined lands in accordance with the plan and with Section 2773.1 and Article 11 of Title 14, California Code of Regulations, sec. 3800, et seq., are posted with the lead agency and the Department.

**2. Standards for rejection of placement on the List.** An application to the Department to place a surface mining operation on the List shall be rejected if any of the following exist:

a. A reclamation plan that addresses the entirety of the mined lands associated with the surface mining operation, consistent with the standards set

forth in Section 2773 and Article 11 of Title 14, California Code of Regulations, sec. 3700, et seq., has not been finally approved by the lead agency with jurisdiction to implement the requirements of the Surface Mining and Reclamation Act (Section 2710 et seq.). Non-substantial deviations between the existing condition of the mined lands and the approved reclamation plan shall not disqualify the operation from placement on the List. In the event of a deviation between the existing condition of the mined lands and the condition of such lands necessary for reclamation in accordance with the approved reclamation plan, the failure or refusal of the lead agency or the Department to issue a notice of violation in accordance with Section 2774.1(a) for that deviation shall be rebuttable evidence that the deviation is non-substantial for purposes of this provision.

b. Financial assurances, in accordance with Section 2773.1 and Article 11 of Title 14, California Code of Regulations, sec. 3800, et seq., which are sufficient to reclaim the mined lands in accordance with the approved reclamation plan, have not been posted with the lead agency and the Department.

c. The mining operation is idle as defined in Section 2727.1.

d. The mining operation is operating without a final valid land use permit issued by the local land use agency with jurisdiction over the operation, and has not been determined to possess a vested right in accordance with Section 2776 to operate in the manner reflected on the mined lands or in accordance with an approved reclamation plan. If the local land use agency with jurisdiction over the

operation has determined that the mining operation has a vested right to operate as stated herein, but such determination is challenged by legal proceedings, such challenge shall not disqualify the operation from inclusion on the List unless and until a court order to the contrary is in effect in such proceedings.

e. The lead agency or the Department is proceeding with unresolved enforcement efforts against the mining operation for alleged violation(s) of the Surface Mining and Reclamation Act and a Notice of Violation, Order To Comply or administrative penalties have issued in accordance with Section 2774.1.

**3. Standards for Removal from the List.** A surface mining operation shall be removed from the List if any of the following circumstances exist:

a. The mining operation does not have a reclamation plan finally approved by the lead agency with jurisdiction to implement the requirements of the Surface Mining and Reclamation Act (Section 2710 et seq.) that reflects the current condition of the mined lands as they existed on the date of the most recent inspection conducted by the lead agency or the Department. . Non-substantial deviations between the existing condition of the mined lands and the approved reclamation plan shall not disqualify the operation from placement on the List. In the event of a deviation between the existing condition of the mined lands and the condition of such lands necessary for reclamation in accordance with the approved reclamation plan, the failure or refusal of the lead agency or the Department to issue a notice of violation in accordance with Section 2774.1(a) for that deviation shall be rebuttable evidence that the deviation is non-substantial for purposes of this provision.

b. Financial assurances, in accordance with Section 2773.1 and Article 11 of Title 14, California Code of Regulations, sec. 3800, et seq., which are sufficient to reclaim the mined lands in accordance with the approved reclamation plan, have not been posted with the lead agency and the Department.

c. The mining operation is operating in violation of the applicable land use permit and the local land use agency with jurisdiction has verified the violation. Removal of the surface mining operation from the List under such circumstances shall remain in effect until an authorized representative of the local land use agency with jurisdiction declares to the Department, under penalty of perjury, that the permit violation has been cured. If the local land use agency has determined that the mining operation is operating in accordance with its land use permit, but such determination is challenged by legal proceedings, such challenge shall not disqualify the operation from inclusion on the List unless and until a court order or decision upholding the challenge is in effect in such proceedings.

d. An Order to Comply has issued in accordance with Section 2774.1(a) and has taken effect in accordance with Section 2774.1(b). Issuance of a Notice of Violation, by itself, shall not be grounds for removal from the List.

e. Administrative penalties, regardless of amount, have been assessed and rendered final in accordance with Section 2774.1(c), and remain unpaid.

#### **4. Procedures.**

a. Placement of a surface mining operation on the List.

(1). Any mining operator may file an application with the Department to have its surface mining operation placed on the List. The application must include a declaration, under penalty of perjury, prepared by an authorized representative of the lead agency with jurisdiction over the operation that states the surface mining operation meets the standards set forth in Section 1.

(2). The Department, within 30 days of receipt, shall determine whether the application is complete and, if the application is incomplete, shall notify the applicant in writing of all items necessary for submittal of a complete application.

(3). The Department, upon receipt of a complete application, shall evaluate the mining operation for eligibility for placement. The evaluation may include inspection of the operation, review of operator or lead agency records pertinent to eligibility, and examination of any other evidence relevant to the standards set forth in Section 1.

(4). Within 60 days after receipt of the complete application, unless extended by agreement with the mining operator, or otherwise for good cause, the Department shall determine the eligibility of the mining operation and notify the mining operator of its determination by certified mail. The notice shall include the reasoning and evidence upon which the Department's determination is based. Notice of the Department's determination shall also be posted on the Department's website, and mailed to the Board, to the lead agency with jurisdiction, and to any person who has requested notice of the determination.

b. Removal of a mining operation from the List.

(1). A lead agency, or any person, may file a written claim with the Department that asserts that a mining operation is not eligible to remain on the List. The claim shall include or describe the evidence upon which the claim is based. A copy of the claim shall be provided by the claimant to the operator of the subject mining operation by registered mail.

(2). Within 30 days of receipt of the claim, the mine operator shall submit to the Department and to the claimant any evidence that it wishes to be considered in the evaluation of the claim. The Department may grant the mine operator one extension of 30 days for good cause.

(3). The Department, upon receipt of such a claim and the response of the mining operator, shall evaluate the mining operation for eligibility to remain on the List. The evaluation may include inspection of the operation, review of lead agency records pertinent to eligibility, review of the evidence submitted, and examination of any other evidence bearing on the mining operation's current compliance with eligibility standards.

(4). Within 60 days after receipt of the complete application, unless extended by agreement with the claimant, or otherwise for good cause, the Department shall determine the eligibility of the mining operation to remain on the List and notify the claimant, the lead agency and the mining operator of its determination by registered mail. The notice shall include the reasoning and a summary of the

evidence upon which the Department's determination is based. Notice of the Department's determination shall also be posted on the Department's website, and mailed, by registered mail, to the Board and to any person who has requested notice.

c. Appeals.

(1). Determination of jurisdiction. The Chair of the Board or the Chair's designee (Board Member) on receipt of an appeal, shall determine whether any appeal under these provisions is within the jurisdiction of the Board for purposes of hearing the appeal and whether the appellant's appeal raises any substantial issue related to the Department's determination regarding a mining operation's placement on, removal from or denial of placement on or removal from the List. If the Chair or the Chair's designee finds, based on the criteria set forth herein, that the appeal is not within the jurisdiction of the Board and/or raises no substantial issues, the Chair or the Chair's designee shall refuse to grant a hearing on the appeal and the Department's decision shall therefore be deemed final for purposes of seeking judicial review of that decision by any party. The decision, however, shall not preclude any party from initiating new proceedings to be included on the List, to be maintained on the List, or to effect removal of a mining operation from the List, in accordance with these provisions and based on new or different circumstances than were determined by the Chair or the Chair's designee. In making such determinations of jurisdiction, the Chair or the Chair's designee shall consider the following:

(a). Whether the information presented with the appeal presents any dispute of the material fact or facts supporting the Department's determination.

(b). Whether the appeal is an attempt to challenge an enforcement decision or a court decision.

(c). Whether the appellant has standing.

(d). Whether the appeal is timely.

(e). Whether the facts constituting the basis for the appeal have been presented to the Department prior to the Department's determination that is the subject of the appeal.

(f). Whether any relevant circumstances exist that are not specifically identified herein but which, in the judgment of the Chair or the Chair's designee, preclude the allowance of the appeal.

(2) The affected mine operator may appeal to the Board a denial of eligibility by the Department or a determination by the Department that the mining operation is not eligible to remain on the List. To be effective, the appeal, made in writing on a form provided by the Board, must be received by the Board within 15 days of the operator's receipt of notice of the Department's determination. The Board shall promptly notify the Department and the lead agency that such a timely appeal has been received. Where the Board is the lead agency, such notice to the lead agency shall not be required. Notwithstanding a timely appeal, a mining operation seeking placement on the List shall not be placed on the List pending final outcome of the appeal; however, a mining operation timely

appealing the Department's removal of the operation from the List shall remain on the List pending the final outcome of that appeal.

(3). The lead agency with jurisdiction over the operation or any person who can demonstrate a sufficient connection to or direct impact from the operation of the mine at issue may appeal to the Board the Department's determination to place a mining operation on the List or to keep a mining operation on the List. To be effective, an appeal by the lead agency, made in writing on a form provided by the Board, must be received by the Board within 15 days of the lead agency's receipt of notice. An appeal by a person other than a lead agency, to be effective, must also be made in writing on a form provided by the Board, and received by the Board within 15 days of the determination being posted on the Department's website. Placement or retention of the mining operation on the List shall not be altered pending final outcome of such appeals.

(a). For a timely appeal by a lead agency to be valid, the lead agency, as part of its appeal, must demonstrate good cause for reversal of the declaration provided under Section 4.a.(1) herein.

(b). For a timely appeal by a person other than a lead agency to be valid, the appellant must demonstrate, as a necessary element of the appeal, a sufficient connection to or direct impact from the operation of the mine at issue.

(c). Where the lead agency is the Board, the Board may not appeal the decision of the Department to grant the petition, but may follow the specified procedures for removal of the mining operation from the List. Where

the Board is lead agency, the Board may hear any valid appeal by any party other than the lead agency.

(d). For a timely appeal by a lead agency or a person other than a lead agency to be valid, the appellant must demonstrate, as a necessary element of the appeal, that the facts or issues relevant to the appeal have been brought to the attention of the Department, and, within 90 days thereafter, the Department has taken no action in response. Action, in this context, shall mean initiation of formal proceedings pursuant to Section 2774.1 by the Department.

d. Hearing Procedures.

(1). The record on appeal. The record before the Board at the outset of the hearing should include any evidence obtained by the Department, including all submittals to the Department by any party, through the course of its evaluation and determination which is the subject of the appeal; the notice of the Department's determination; the documents constituting the appeal(s) before the Board; and any preliminary evaluation of the appeal by the Executive Officer of the Board and the Chair or the Chair's designee. Subject to the discretion of the Chair of the Board, additional written submittals by any party, the lead agency or the Department, may be included in the record in accordance with a schedule of submission determined in advance by the Chair. Notwithstanding the foregoing, no submittal of any written material shall be permitted unless delivered to the Board at least 15 days prior to the date scheduled for the Board to hear the appeal(s), unless the party offering the late submittal can demonstrate, to the satisfaction of the Board, that the substance of the submittal was not known or

available prior to the deadline. If the Board grants the late submittal, it may also grant permission to any other party to submit a response thereto, and to continue the appeal hearing. Such a continuance shall not extend the original deadline to allow additional submittals beyond those already permitted at the time of the continuance.

(2). The Board shall conduct a public hearing on each appeal which is determined, pursuant to Section 4.c, to be within the jurisdiction of the Board. Parties to the appeal shall include the mine operator, the Department, the lead agency (unless the Board is the lead agency, in which case it is not a party), and any other person who has filed a timely, valid appeal. which hearing should normally proceed in the following manner:

(a). Identification of the record, and opening statement by the Executive Officer and legal counsel of the Board.

(b). Statement on behalf of the appellant.

(c). Statement of the mine operator if the mine operator is not the appellant.

(d). Statement of the Department.

(e). Statement of the lead agency. Where the Board is the lead agency, no such statement will be made.

(f). Statements of the public.

(g). Closing statement by the Executive Officer and legal counsel of the Board.

(h). Closing statement of the appellant.

(i). Closing statement of the mine operator if the mine operator is not the appellant.

(3). The Chair or the Chair's designee (Board Member) may, in the exercise of discretion consistent with Section 4.d.(1) herein, determine a different order of proceeding, including allowance of additional statements or additions to the record by any party or by any person, and may continue the public hearing to a date certain.

(4). The Chair or the Chair's designee (Board Member) may impose time limits upon statements and presentations. Written statements may be accepted in lieu of oral statements, so long as the written material has been provided to the Board and to all parties to the appeal in accordance with Section 4.d.(1) herein.

(5). All statements of fact made at the hearing shall be under oath, administered by the Chair of the Board, or the Chair's designee.

(6). The Board may, in lieu of conducting the public hearing itself, delegate that task to an ad hoc Board committee of no less than three Board members, chaired by a Board member selected by the Board. The ad hoc committee shall conduct the appeal hearing in accordance with the procedures set forth herein, with the Chair of the ad hoc committee acting in the role of the Board Chair for procedural decisions. A majority of the ad hoc committee, upon hearing the appeal, may recommend a decision to the Board, or may recommend to the Board that the Board conduct its own hearing de novo of the appeal. A majority of the Board, in any event, must determine the outcome of the appeal,

and may only do so upon review of the entire record on appeal, including the record of any proceedings held by an ad hoc committee under this provision.

(7). All hearings of all appeals pursuant to these provisions shall be recorded electronically or by other appropriate means to ensure any party may have access to the complete record of proceedings.

(8). The Board, or an ad hoc committee of the Board, if delegated to hear the appeal, upon conclusion of the public hearing, may deliberate in executive session upon advice of legal counsel. However, any vote to determine the outcome of the appeal shall take place in public.

(9). The decision by the Board on an appeal shall be final for purposes of seeking judicial review of that decision by any party. The decision, however, shall not preclude any party from initiating new proceedings to be included on the List, to be maintained on the List, or to effect removal of a mining operation from the List, in accordance with these provisions and based on new or different circumstances than were determined in the appeal.