



**STATE MINING
AND GEOLOGY
BOARD**
EXECUTIVE OFFICER'S REPORT



ARNOLD
SCHWARZENEGGER
GOVERNOR

For Meeting Date: March 13, 2008

Agenda Item No. 5: Consideration of Administrative Procedure for Conduct of a Vested Rights Determination by the State Mining and Geology Board when Serving as a Lead Agency under SMARA for Western Aggregates (CA Mine ID #91-58-0001), Alan Strong (Agent), Western Aggregates, LLC. (Operator), Yuba County.

INTRODUCTION: The State Mining and Geology Board (SMGB) serves as a Lead Agency in the implementation of the Surface Mining and Reclamation Act of 1975 (SMARA) in Yuba County. At its Regular Business Meeting held on February 14, 2008, the State Mining and Geology Board (SMGB) adopted regulations pertaining to the administrative procedures for conduct of a vested rights determination when serving as a lead agency pursuant to the Surface Mining and Reclamation Act of 1975 (SMARA). Previously, at its February 8, 2007 Regular Business Meeting, Mr. Kerry Shapiro, attorney with Jeffer Mangels Butler & Marmaro, LLP (JMBM), and legal counsel for Western Aggregates, LLC (Western), forwarded to the SMGB a Notice of Intent to seek confirmation of their vested rights for their Yuba Goldfields operations. Although the adopted regulations have not to date been enacted into law, certain elements of the procedures can be further considered at this time by the SMGB as they pertain to the petition for determination by Western Aggregates.

BACKGROUND: In a recent court ruling, the California Court of Appeal, Third Appellate District, held that a proper notice and hearing was required for any vested rights determination, and suggested that when the SMGB is acting as the SMARA Lead Agency, the SMGB has the responsibility to conduct the public hearing and make the vested rights determination. At its February 8, 2007 Regular Business Meeting, the SMGB recognized its authority to conduct vested rights determinations (Resolution 2007-04), when serving as a Lead Agency under SMARA. At that same meeting, Mr. Kerry Shapiro, attorney with JMBM, and legal counsel for Western, forwarded to the SMGB a Notice of Intent to seek confirmation of their vested rights for their Yuba Goldfields operations.

Superior Court Ruling, 2005 (William Calvert, et al., v. County of Yuba et al.): In February 2000, Western filed with Yuba County its vested rights claim and submittals, which included a 6-page cover letter, 70-page brief, and nearly 370 exhibits. In May 2000, the Yuba County Community Development Director determined that Western had vested rights to mine aggregate on 3,430 acres in the Yuba Goldfields. This determination was made without



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notice to Western's adjacent neighbors or to the public, and without a public hearing. William Calvert and others subsequently sued Yuba County, the State (to include the SMGB and the Director of the Department of Conservation), and Western, challenging the County's vested rights determination. Five distinct claims were asserted in the suit, including a claim against the County and State for: 1) failure to take action against Western for violating SMARA; 2) failure to direct actions against Western for violating SMARA for not having a permit or vested rights; 3) failure to direct actions against Western for violating SMARA for not having a reclamation plan; 4) a claim against the State seeking to compel assumption of the County's lead agency role; and 5) a claim that the County violated due process requirements of notice and hearing in determining that Western has vested rights. The Court rejected all of these claims with exception of claim 5. The Superior Court concluded that a proper notice and hearing was necessary before Yuba County could make any vested rights determination as to Western's surface mining operation.

3rd District Court of Appeal (DCA) Ruling, 2006 (William Calvert et al. v. County of Yuba et al., 145 Cal.App.4th 613): The 3rd DCA, in its examination of this matter, agreed with the Superior Court. The 3rd DCA also remanded the matter back for due process, but directed Western to the SMGB for implementation of this process and determination. Notably, the ruling (pages 28 and 29 of the decision) states:

"If Western wants to continue its aggregate mining in the Yuba Goldfields, it will either have to prove its claim of vested rights in a public adjudicatory hearing before the Board, or obtain a permit to conduct such surface mining in a public adjudicatory hearing before the County. [citations omitted] This is because the Board has taken over the County's SMARA duties regarding Western. (Section 2774.2) Under section 2774.4 [of the Public Resources Code], when the Board takes over for a lead agency, it 'shall exercise' any of the powers of that lead agency except for permitting authority." [citation omitted]

In summary, the 3rd DCA, in essence, has placed upon the SMGB, the task of conducting a public hearing and making a determination of Western's vested rights should Western request such determination.

Notice of Intent to Seek Confirmation of Vested Rights: In correspondence dated February 8, 2007, Western forwarded to the SMGB a Notice of Intent to seek confirmation of its vested rights for the Yuba Goldfields operations.

SMGB Actions: In order to determine the range, diversity, and purpose of administrative procedures and funding mechanisms available to the SMGB as a lead agency, the SMGB conducted several public hearings between March 8, 2007, and September 14, 2007, to hear preliminary concerns and comments from various stakeholders. These preliminary



concerns and comments were reviewed by the SMGB and have been publicly available since March 8, 2007. The preliminary concerns and comments considered in this proposed regulation were publicly discussed at the SMGB's Policy and Legislation Committee meetings held on March 8, April 12, May 10, June 14 and September 7, 2007, and by the whole SMGB during its regular business meeting held on September 13, 2007. On February 14, 2008, the SMGB adopted its regulations for conduct of a vested rights determination upon request by a claimant when serving as a lead agency pursuant to SMARA.

CONSIDERATION OF ALTERNATIVES:

In anticipation of the SMGB conducting a vested rights determination in the matter of Western's operations in the Yuba Goldfields, the SMGB has several administrative procedural options before it to consider in regards to 1) who will administer its proposed hearing procedure, and 2) who will review the administrative record upon receipt and compile findings of fact for subsequent consideration by the SMGB.

Consideration No. 1 – Consideration of Hearing Administrator: Pursuant to Section 3506.11 of the SMGB's proposed regulations, several options are available to the SMGB as it considers how it wishes to conduct and administer the hearing for a vested rights determination:

- **Option No. 1 – A Delegated Committee of the SMGB:** A delegated Committee of the SMGB would have among its members, qualified and experienced individuals that could administer the hearing. Only the SMGB can make the final determination and the Committee, upon completing the hearing, would still have to inform the SMGB as to its determination and the rationale behind its decision. Thus, such action by the Committee would entail a significant amount of time and effort, and would not be an efficient use of the Committee's time considering the other board and committee responsibilities and obligations.
- **Option No. 2 - The SMGB:** The SMGB has among its members qualified and experienced individuals that could administer the hearing. Although administering the hearing would entail a significant amount of time and effort, such action would be efficient use of the individual board members since none of the board members would require briefing of a complicated record prior to considering a determination.
- **Option No. 3 – Administrative Hearing Officer:** A hearing officer would serve as a pro tempore part-time, administrative law judge before the SMGB for the sole purpose of serving as the administrative hearing officer for the SMGB. Use of an outside administrative law judge may result in lack of control over who it will be, and the individual will likely not have any mining background or expertise. Additionally, the



hearing process will be much more time consuming.

- Option No. 4 – Special Master: A “Special Master” is an attorney who is an active member of the California State Bar who, in accordance with the requirements of these Rules and Regulations, is qualified to conduct the searches and accompany peace officers in conducting searches for documentary evidence under the control of attorneys, physicians, psychotherapists and clergy members as described in Penal Code Section 1524. Use of a Special Master may result in lack of control over who it will be, and the individual will likely not have any mining background or expertise. Additionally, the hearing process will be much more time consuming.

Consideration No. 2 – Consideration of Administrative Record Review and Analysis:

Pursuant to Section 3506.11 of the SMGB’s proposed regulations, an extensive review and analysis of the administrative record, and a compilation of the finding of fact will need to be compiled and summarized, for each parcel in question. The Administrative Record is anticipated to be voluminous and require someone with adequate experience in geology, mining, and SMARA, and familiarity with the Yuba Goldfields. The SMGB has several options to consider:

- Option No. 1 – SMGB Staff (i.e., Executive Officer): The SMGB has a technical staff of two Certified Engineering Geologists: one who serves as its mine inspector, and the other who serves as its Executive Officer. Both individuals are qualified and have the necessary experience to review the Administrative Record and compile the findings of fact, and the time (i.e., costs) incurred in reviewing and compiling the findings of fact would be passed on to the claimant. However, a significant amount of time would be expended to perform this task, and it is a likely risk that other SMGB responsibilities and obligations will be negatively affected.
- Option No. 2 – Individual within the Department of Conservation California Geological Survey (CGS): The SMGB was successful in getting authorization to acquire two individuals to assist in its efforts to perform a vested rights determination: one certified engineering geologist and office technician. Costs incurred for these individuals would essentially be passed on to the claimant. CGS has among its staff qualified and experienced personnel who could provide this service to the SMGB. Use of CGS personnel would not present a conflict-of-interest since CGS does not participate in any enforcement or compliance related activities for mining operations within the State of California.
- Option No. 3: External Consultant: The SMGB could consider contracting with a consultant. SMGB staff would be required to adhere to state law, policy and guidelines for contracting with an individual or firm. This approach would be time intensive. In addition, this would be the most costly of options, and whether a



qualified consultant would be available and in a position to be responsive and dedicate itself to the task is uncertain.

- Option No. 4: The SMGB: Although the SMGB has among its members qualified and experienced individuals that could review the Administrative Record and determine the findings of fact, such action by the SMGB would entail a significant amount of time and effort, and likely would not be efficient use of the individual board members.
- Option No. 5 – A Delegated Committee of the SMGB: Although a delegated Committee of the SMGB would have among its members qualified and experienced individuals that could review the Administrative Record and determine the findings of fact, such action by the Committee would entail a significant amount of time and effort, and would not be an efficient use of the Committee's time.

EXECUTIVE OFFICER'S RECOMMENDATIONS:

In regards to assignment of conducting and administering the hearing for a vested rights determination, the Executive Officer recommends Option No. 2. It is the opinion of the Executive Officer, that Option No. 2 would provide a group of well qualified and experienced individuals to serve all stakeholders in a fair and unbiased manner during conduct of the hearing, and provide the most efficient and effective use of the SMGB's time.

In regards to assignment of the task of reviewing the Administrative Record, the Executive Officer recommends Option No. 2. It is the opinion of the Executive Officer that Option No. 2, use of an individual from CGS, would provide the SMGB well qualified and experienced technical support, in reviewing the Administrative Record and compiling unbiased finding of facts for the SMGB's consideration during conduct of the vested rights determination hearing.

SUGGESTED MOTION LANGUAGE: The Executive Officer offers the following motion language for the SMGB's consideration:

Motion for the SMGB to serve as administrator of the vested rights hearing:

Mr. Chairman, in light of the information before the SMGB today, I move that the Board serve as administrator, and direct the Executive Officer to coordinate with the SMGB in future scheduling of administrative hearings for the conduct of a vested rights determination, in the matter of Western Aggregates surface mining operation, located in Yuba County.



AND,

Motion to direct the Executive Officer to coordinate with CGS:

Mr. Chairman, in light of the information before the SMGB today, I move that the Board direct the Executive Officer to coordinate with the California Geological Survey for the purpose of providing technical support to the Board in the review and analysis of the Administrative Record, in the matter of the Board's vested rights determination of Western Aggregates surface mining operation located in Yuba County.

Respectfully submitted:

Stephen M. Testa
Executive Officer

