



STATE MINING AND GEOLOGY BOARD

EXECUTIVE OFFICER'S REPORT



ARNOLD
SCHWARZENEGGER
GOVERNOR

For Meeting Date: February 14, 2008

Agenda Item No. 3: Adoption of Regulatory Language Adding Section 3506 to Title 14, Division 2, Chapter 8, Subchapter 1, Article 1, California Code of Regulations, Providing an Administrative Procedure for the SMGB to Conduct a Vested Rights Determination When Acting as a Lead Agency Under the Surface Mining and Reclamation Act of 1975 (SMARA).

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. In a recent 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 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. This request was followed by requests from Mr. Scott Morris on behalf of the Big Cut Mine, and Ms. Christina Karla on behalf of the Citizens to End Activities of Snows Road Quarry Encroachment (CEASE) and in regards to the Snows Road Quarry, both sites located in El Dorado County.

Since receiving the request from Western, the SMGB directed the Executive Officer to work with the SMGB's legal counsel to coordinate development of regulatory language for the Policy and Legislation Committee's (Committee) consideration. The Committee met on five occasions to receive comments, and at the SMGB's Regular Business Meeting held on September 13, 2007, directed the Executive Officer to proceed with the 45-day notice to adopt regulations for the SMGB to perform vested rights determinations upon request when serving as a lead agency under the Surface Mining and Reclamation Act of 1975 (SMARA). The Notice of Proposed Rulemaking for this regulation was published in the California Regulatory Notice Register on October 26, 2007 (Notice File No. Z07-1016-01). This action commenced the 45-day public comment period. To assure that all interested parties received direct mailing of the proposed regulations, the comment period termination date was extended to December 24, 2007. All comments received have been considered, and the SMGB is considering adoption of permanent regulatory language adding Section 3506 to Title 14, Article 1 of the California Code of Regulations (CCR) for Administrative Procedures

for the State Mining and Geology Board to Conduct Vested Rights Determination Hearings when serving as a Lead Agency under SMARA.

BACKGROUND:

The Yuba Goldfields: Western Aggregates surface mining operation is situated in what is referred to as the Yuba Goldfields. The Yuba Goldfields occur along about 11 miles of the Yuba River between Yuba City-Marysville and Smartsville. The Goldfields are dominated by dredger tailings reworked from hydraulic mine waste that was deposited between 1852 and 1893 when the Caminetti Act was passed, ending hydraulic mining upstream. The Yuba Goldfields were the poster child of the agricultural lobby who brought the historic suit to put an end to hydraulic mining. This may have been the first significant victory of the environmental community in California. The construction of Englebright Dam in 1941 finally stopped the downstream migration of the old hydraulic tailings. Dredging of gold from the hydraulic waste began in 1902 near the town of Hammonton and by 1910, 15 dredges were operating in the lower Yuba River. The area has been dredged and re-dredged intermittently to progressively greater depths until the present time.

In 1988, the California Geological Survey classified the area MRZ-2 for construction aggregate and determined that almost 23 square miles of the goldfields, containing more than 2.25 billion tons of PCC-grade aggregate, were available. The area was never designated as a “regionally significant” mineral resource because the SMGB had put the designation process on hold in order to dedicate maximum funds to accelerate mineral land classification. Nonetheless, it is undoubtedly one of the most significant aggregate deposits in the entire state. At the time of the classification study, the entire area of the goldfields had been classified by Yuba County in their general plan as a mineral resource extraction land use area.

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 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”.

Notice of Intent to Seek Confirmation of Vested Rights: In correspondence dated February 8, 2007, Mr. Kerry Shapiro, attorney with Jeffer Mangels Butler & Marmaro, LLP., and legal counsel for Western Aggregates, LLC. (Western), forwarded to the SMGB their Notice of Intent to seek confirmation of their vested rights for their Yuba Goldfields operations. This request was subsequently followed by requests from Mr. Scott Morris on behalf of the Big Cut Mine, and Ms. Christina Karla on behalf of the Citizens to End Activities of Snows Road Quarry Encroachment (CEASE) and pertaining to the Snows Road Quarry, on May 14 and May 25, 2007, respectively. Both sites are located in El Dorado County.

The Policy and Legislation Committee (Committee) Activities: The Committee met on March 8, April 12, June 10, July 12 and September 7, to discuss the proposed regulatory language and receive preliminary comments. Each meeting's activities is summarized below.

March 8, 2007 Committee Meeting: At its March 8, 2007 Committee Meeting, three options were discussed:

- **Option No. 1:** Use existing regulations for appeals with some modification. This would expedite the process but because existing regulations deal with very specific appeals and are not

designed for this type of determination, they would be difficult to adapt to a new process where the administrative record has not been defined.

- Option No. 2: Develop new regulations through the rulemaking process. The new regulations would incorporate the notice and hearing requirements, including the notice to property owners, set forth in the 3rd DCA's ruling, and an open process in which the public would have full access. This approach would be more defensible, but the process of developing the regulations may be lengthy, depending on how much public comment is received.
- Option No. 3: Adopt the full judicial process set forth in the Administrative Procedures Act (APA), which would involve allowing discovery and depositions, using administrative law judges as hearing officers, and holding hearings which would include direct and cross-examination of witnesses. This option would be the most expeditious to establish, since the procedure is already laid out by the APA; however, the hearing process itself could be quite time-consuming and expensive.

Upon deliberation, the Committee directed the Executive Officer to work with legal counsel to develop draft regulatory text in accordance with Option No. 2, and to have such text available for committee review and discussion at its upcoming April 12, 2007 Meeting.

April 12, 2007 Committee Meeting: At its April 12, 2007 Committee Meeting, a preliminary draft of the administrative process for the SMGB to conduct a vested rights determination when the SMGB is serving as a Lead Agency under SMARA was distributed for general discussion, and public review and comment.

May 10, 2007 Committee Meeting: At its May 10, 2007 Meeting, the Committee and interested parties further discussed the proposed preliminary regulations. Following discussion by interested parties and among the Committee members, Committee moved that *“the Committee recommend to the whole SMGB to direct the Executive Officer to add additional revisions or modifications to the proposed procedures and regulatory language, and have a revised version available at the Committee’s next meeting in June 2007. The Committee may at such time recommend to the whole SMGB to direct the Executive Officer to proceed with the 45-day notice to adopt regulations for performing a vested rights determination.”*

June 14, 2007 Committee Meeting: The proposed procedures and regulatory language of an administrative process for the SMGB to conduct a vested rights determination when the SMGB serves as a Lead Agency under SMARA, were

revised in consideration of comments discussed by the Committee members during previous Committee meetings, and those received from interested parties.

July 12, 2007 Committee Meeting: No action was taken by the Committee. Since receiving Notice of Intent to Seek Confirmation of Vested Rights on February 8, 2007, written comments received by the SMGB's office, including those presented and previously discussed during prior Committee meetings, are:

- Kerry Shapiro, attorney with JMBM, dated March 1, 2007;
- Theodore Franklin, attorney with Weinberg, Rogers & Rosenfeld, dated April 10, 2007;
- Kerry Shapiro, attorney with JMBM, dated April 20, 2007;
- Mr. Stephen Bledsoe, President of California Construction and Industrial Materials Association (CalCIMA), dated April 20, 2007;
- Theodore Franklin, attorney with Weinberg, Rogers & Rosenfeld, dated May 7, 2007;
- Theodore Franklin, attorney with Weinberg, Rogers & Rosenfeld, dated May 21, 2007;
- Kerry Shapiro, attorney with JMBM, dated May 21, 2007;
- Mark Harrison, attorney with Diepenbrock-Harrison, dated May 31, 2007;
- Theodore Franklin, attorney with Weinberg, Rogers & Rosenfeld, dated July 10, 2007; and
- Kerry Shapiro, attorney with JMBM, dated August 24, 2007.

All comments provided prior to and during conduct of the July 12, 2007 Committee Meeting have been reviewed and considered by the SMGB's legal counsel, as appropriate. No additional comments have been received at the time this Executive Officer's report was prepared.

September 7, 2007 Committee Meeting: At the Policy and Legislation Committee's September 7, 2007 Meeting, issues previously discussed were reviewed, and the recommendation to the whole SMGB was to direct the Executive Officer to incorporate the revisions addressed during this meeting and commence the rulemaking process, and proceed with the 45-day notice to adopt regulations for performing a vested rights determination when serving as a lead agency under SMARA.

Acceptance of the SMGB's Regulatory Language: At its September 13, 2007 Regular Business Meeting, the SMGB heard from interested parties and received further comments, and subsequently moved to accept the proposed regulatory language, and directed the Executive Officer to proceed with the 45-day notice to adopt regulations for the SMGB to perform vested rights determinations upon

request when serving as a lead agency under SMARA. The Notice of Proposed Rulemaking for this regulation was published in the California Regulatory Notice Register on October 19, 2007. This action commenced the 45-day public comment period. To assure that all interested parties received direct mailing of the proposed regulations, the comment period termination date was extended to December 24, 2007.

DESCRIPTION OF REGULATORY LANGUAGE: SMARA provides for, in some instances, the SMGB to assume the role of lead agency for the administration of the Act when a local lead agency is not able to perform that role (PRC Sections 2774.4 and 2774.5). PRC Section 2776 specifically provides conditions for a lead agency to determine whether a person has a vested right to conduct surface mining operations. Since 1998, the SMGB has assumed the role of SMARA lead agency 49 times. Currently, the SMGB is the SMARA lead agency for 11 dredging operations in the San Francisco Bay Area, two counties, and 6 cities, encompassing 47 mines.

This section is necessary since it provides the administrative procedure for the SMGB to conduct of a vested right determination, which is to be established in a public proceeding wherein the Claimant shall assume the burden of proof, for any person claiming a vested right to conduct surface mining operations in a jurisdiction where the SMGB is lead agency pursuant to PRC Section 2774.4. The information in this section provides a definition of vested right, procedures for filing of a request for determination, review and determination fee, determination of jurisdiction, notice of pending determination, public hearing, selection of hearing officer if appropriate, hearing schedule and procedure, and effect of the determination.

In a 3rd District Court of Appeal's (DCA) Ruling in the matter of William Calvert et al. v. County of Yuba et al., 145 Cal.App.4th 613, the DCA placed upon the SMGB the task of conducting a public hearing and making a determination of vested rights for the Western Aggregates surface mining operation located in Yuba County. In correspondence dated February 8, 2007, a Notice of Intent to seek confirmation of Western Aggregate's vested rights was received by the SMGB. In addition, requests for a vested rights determination to be made by the SMGB for two surface mining operations located in El Dorado County have also been received by the SMGB. Without an administrative procedure to conduct such a hearing, there would be no procedure or a funding mechanism for which the SMGB could conduct such hearings when serving as a lead agency under SMARA as mandated by the DCA.

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 which were 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.

RECOMMENDATION OF THE EXECUTIVE OFFICER: The Executive Officer declares that the rulemaking process has been followed in accordance with the Administrative Procedure Act, and recommends that the SMGB approve the findings, determinations, and disclosures contained in this Report, and adopt this regulation adding Section 3506 to Title 14, Article 1 of the California Code of Regulations, which provides an administrative procedure for the SMGB to conduct vested rights determinations when petitioned by the claimant and while serving as a lead agency under SMARA.

CEQA COMPLIANCE: The SMGB has determined that this rulemaking process is either not a project under Title 14, CCR Section 15378 of the CEQA Guidelines, or is categorically Exempt under Title 14, CCR Section 15308 of the CEQA Guidelines.

DISCLOSURES REGARDING THE PROPOSED ACTION: The SMGB has made the following determinations:

Mandate on local agencies and school districts: The SMGB staff determined that adoption of this regulation does not impose any new mandates on local agencies or on local school districts.

Costs or savings to any State agency: The SMGB staff determined that this proposed regulation imposes no savings or additional expenses to state agencies.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code §§ 17500 through 17630: The SMGB staff determined this proposed regulation does not impose any additional cost obligations on local agencies or on local school districts.

Other non-discretionary costs or savings imposed upon local agencies: The SMGB staff determined that no other non-discretionary costs or savings to local agencies are imposed by the proposed regulations.

Cost or savings in Federal funding to the State: The SMGB staff determined that there are no costs or savings in Federal funding to the State.

Significant statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: The SMGB staff determined that no statewide adverse impacts

to California businesses result from the adoption of this proposed regulatory language.

Potential cost impact on private persons or directly affected businesses:

The SMGB staff has determined that the proposed regulatory language will not have a potential cost impact on private persons but will have an impact on directly affected businesses should a surface mine operator request a vested right determination.

Creation or elimination of jobs in California: The SMGB staff has determined that the adoption of these regulations will not:

- Create nor eliminate jobs within California;
- Create new nor eliminate existing businesses within California;
- Expand businesses currently doing business in California.

Significant effect on housing costs: The SMGB staff has determined that the adoption of these regulations will have no significant effect on housing costs.

Effects on small businesses: The SMGB staff has determined that the imposition of the proposed fee for consideration and conduct of a vested rights determination on a local mining operation (which may meet the criteria for a “small business”) may have a cost impact to that operation, but is not anticipated to have a cost impact on small businesses in general.

CONSIDERATION OF ALTERNATIVES:

The SMGB has determined that no reasonable alternative that it has 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 or would be as effective and less burdensome to affected private persons than the proposed action. SMGB staff has not identified any adverse impacts resulting from the proposed regulation.

No alternatives have been considered by the SMGB that would be more effective in carrying out the purpose for which the regulatory action is proposed, nor have any other alternatives been proposed that would be as effective and less burdensome to affected private persons, lead agencies, or small businesses.

CONFLICT WITH FEDERAL REGULATIONS: This regulation 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.

SUGGESTED MOTION LANGUAGE: At this time, the Executive Officer offers the following motion language for the SMGB's consideration.

Motion to permanently adopt the proposed language into regulation:

Mr. Chairman, in light of the information before the SMGB today, I move that the Board adopt the regulatory language adding Section 3506 Board's Vested Rights Determination to Title 14 Article 1 of the California Code of Regulations, as presented, to provide an administrative process for the Board to conduct a vested rights determination when serving as a lead agency under SMARA, in accordance with the legislative intent of the Surface Mining and Reclamation Act of 1975, and instruct the Executive Officer to file the adopted regulation with the Office of Administrative Law.

Respectfully submitted:

Stephen M. Testa
Executive Officer

REGULATION TEXT:

Section 3506. Vested Rights Determination

Section 3506.1. Purpose of Regulations.

No person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976 shall be required to secure a permit pursuant to Section 2770 of the Public Resources Code. Any person claiming a vested right to conduct surface mining operations in a jurisdiction where the State Mining and Geology Board (the Board) is lead agency pursuant to section 2774.4 of the Public Resources Code must establish such claim in a public proceeding under this article. In such a proceeding the Claimant shall assume the burden of proof.

Section 3506.2 Vested Right(s) - Definition.

A “vested right” is the right to conduct a legal nonconforming use of real property if that right existed lawfully before a zoning or other land use restriction became effective and the use is not in conformity with that restriction when it continues thereafter. A vested mining right, in the surface mining context, may include but shall not be limited to: the area of mine operations, the depth of mine operations, the nature of mining activity, the nature of material extracted, and the quantity of material available for extraction.

A person shall be deemed to have a vested right or rights to conduct surface mining operations if, prior to January 1, 1976, the person has, in good faith and in reliance upon a permit or other authorization, if the permit or other authorization was

required, diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary for the surface mining operations. Expenses incurred in obtaining the enactment of an ordinance in relation to a particular operation or the issuance of a permit shall not be deemed liabilities for work or materials.

Expansion of surface mining operations after January 1, 1976 may be recognized as a vested nonconforming use under the doctrine of “diminishing assets” as set forth in *Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533.

(Authority cited: Public Resources Code section 2776; *Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533.)

Section 3506.3 Filing of Request for Determination.

A claim of vested rights shall be initiated by filing a Request for Determination with the Board. At a minimum the Request for Determination shall include the following information:

- (1) Name, address, and telephone number (and name, address, and telephone number of any agent for contact or service of notice, if different) of Claimant;
- (2) Name, address, and telephone number of the property owner(s) if different than (1) above;
- (3) Name, address, and telephone number of any lessee, lien holder, or other potential claimant to the vested right(s) asserted;
- (4) A map indicating the exact location of the property upon which vested rights are asserted;

- (5) A legal description of such property including township and range, metes and bounds, parcel numbers, or other descriptive methods to specifically identify such property;
- (6) Copies of all documents which Claimant asserts establish title to such property;
- (7) Written statements, with supporting documentation, indicating the basis for claim of a vested right to conduct surface mining operations upon such property;
- (8) Written statements, with supporting documentation, identifying the scope or scale of the vested right claimed;
- (9) Copies of, or statements specifically identifying, all local land use or mining ordinances or regulations which either may presently, or have historically, governed conduct of surface mining operations upon such property;
- (10) The names and mailing addresses of the owners of all properties adjacent to property upon which a vested right is being asserted;
and
- (11) The name and address of any other governmental agency or entity having jurisdiction over the property or the surface mining operations on the property that may be affected by a determination of vested rights.

All information submitted pursuant to this section shall be accompanied by a declaration or affidavit attesting to the true and accurate nature of the materials provided.

Section 3506.4 Review and Determination Fee.

Two fees are to be paid by the claimant submitting a Request for Determination. Any person submitting a Request for Determination shall pay to the Board the following processing fee:

(a) A minimum processing fee of five thousand dollars (\$5,000) as compensation for the initial review and notification. Should the Request for Determination be denied, any funds not used will be refunded.

(b) A determination fee for conducting the vested rights determination will be established. The claimant will be provided with an estimate of the cost of conducting a vested rights determination. Any funds in excess of the amount actually needed for conducting the determination will be refunded to the claimant. Any uncollected funds must be submitted prior to the official release of the determination. The fees in this subdivision shall be paid to the Board prior to release of any vested rights determination.

(1) If the Board employs an administrative hearing officer or special master for, and in, making the determination, an additional fee of one hundred dollars (\$100) per hour for each full hour of time reasonably employed by such hearing officer or special master for drafting the findings and recommendation or proposed decision for the Board.

(2) If the Board employs a committee of its members for, and in, making the determination, an additional fee of one hundred dollars (\$100) per Board committee member per day of service (or part thereof);

(c) Upon a showing of good cause the Board may waive all but a minimum of one hundred dollars (\$100) of the fees imposed in subdivisions (a) and (b) above.

(d) Failure to submit the initial fee (identified in subsection (a) above) shall result in immediate rejection of the Request for Determination.

Section 3506.5 Determination of Jurisdiction.

The Chairman of the Board, or the Chairman's designee, based upon the information submitted pursuant to Section 3506.3 of this article, shall initially evaluate whether the Request for Determination is within the jurisdiction of the Board for purposes of making a vested rights determination and whether the Request for Determination contains the minimum information specified in Section 3506.2 of this article. The Chairman of the Board, or the Chairman's designee, shall make such initial determination within 15 business days of receipt of the Request for Determination. If the Chairman, or the Chairman's designee, determines that the Request for Determination is not within the Board's jurisdiction or does not contain the information required by the Board to evaluate the Request, the Request for Determination shall be rejected and the deficiencies in the Request specifically identified in correspondence to the claiming party.

Section 3506.6 Notice of Pending Determination.

Within 30 business days after the Chairman of the Board, or the Chairman's designee, concludes that the Request for Determination is within the Board's jurisdiction and contains the minimum information required by Section 3506.3, a notice of pending vested rights determination shall be mailed by the executive officer of the Board to every adjacent landowner identified in the Request for Determination and to the county, city, or regional agency originally holding lead agency status for the identified property and mining operation. A notice of pending vested rights determination shall also be provided to the person claiming vested rights for posting, within 5 days of receipt, upon the property in question in an open and conspicuous place that is reasonably visible to the public and at all points of entry to the property. The notice of pending vested rights determination shall identify the specific property upon which such vested rights are asserted and shall identify the Board as the agency which will be making the determination. The notice shall contain the Board's mailing and electronic addresses and a request that comments be forwarded to the Board. The notice shall remain posted as required through the conclusion of any hearing on the vested rights claim. The notice shall also be immediately noticed and placed on the Board's electronic website. Where the Board determines that additional notice is required, it may require the person claiming vested rights to provide such additional notice.

Section 3506.7 Public Hearing.

No vested rights determination will be made by the Board without a public hearing and an opportunity for the vested rights Claimant, the original lead agency, and the public to comment.

Section 3506.8 Selection of Hearing Officer.

The Board may delegate conduct of a vested rights public hearing to a committee of at least two Board members to be appointed for that hearing by the Chairman of the Board. The Board may also delegate conduct of a vested rights public hearing to an administrative hearing officer or special master.

As soon as practicable after the Chairman, or the Chairman's designee, concludes that the Request for Determination is within the Board's jurisdiction and contains the minimum information required by Section 3506.3, and in no event more than 45 business days from such conclusion, the Board, or a designee of the Board shall decide whether a vested rights public hearing will be conducted by the Board, a committee of the Board, an administrative hearing officer selected by the Board, or a special master selected by the Board.

Section 3506.9 Vested Rights Hearing - Schedule.

The Board, its delegated committee, administrative hearing officer or special master shall schedule and hold a public hearing on a vested rights determination no less than 90 business days after the notice of pending vested rights determination was mailed pursuant to Section 3506.7. In no case shall the hearing be scheduled more

than 180 business days after the Chairman, or the Chairman's designee, concludes that the Request for Determination is within the Board's jurisdiction and contains the minimum information required by Section 3506.3 unless such hearing schedule is agreed to by the party claiming vested rights. The hearing scheduled may be within the county where the vested right is claimed or within the county of the Board's offices (County of Sacramento).

Section 3506.10 Vested Rights Hearing Procedure – Notice/Submission of Written Materials.

- (a) At least 90 calendar days prior to a vested rights public hearing, the Board shall give further public notice as follows:
- (1) By mailing the notice to the Claimant and all parties receiving notice pursuant to Section 3506.7;
 - (2) By mailing the notice to any person who requests notice of the hearing;
 - (3) By mailing the notice to the Board's regular mailing list; and
 - (4) By posting of the notice in a place where notices are customarily posted in the city, or county, or regional jurisdiction within which the property is located or the surface mining operations are to take place (or both, if affected operations and affected property are in different jurisdictions.)
- (b) The notice of hearing shall include the following:
- (1) The name of the party claiming vested rights;

- (2) Identification of the surface mining operation, a brief description of the location of the operation and area of asserted vested rights by reference to any commonly known landmarks in the area, and a simple location map indicating the general location of the operation;
- (3) A statement inviting the party claiming vested rights, the original lead agency, and the public to make statements at the hearing regarding the vested rights asserted;
- (4) A request that any additional written materials submitted by the Claimant be delivered to the Board no less than 60 calendar days before the hearing and all other written materials be delivered to the Board no less than 45 calendar days before the scheduled hearing, and in no case will any written materials be submitted less than 30 calendar days prior to the hearing.
- (5) The time, date, and location of the public hearing.

Section 3506.11 Vested Rights Hearing Procedure - Record.

The initial record before the Board, its delegated committee, administrative hearing officer, or special master shall be all of the materials provided pursuant to Section 3506.3, and all other written materials and public comments provided in response to the notice of pending determination or received at the public hearing.

Section 3506.12 Vested Rights Hearing - Sequence.

- (a) The public hearing should normally proceed in the following manner:
 - (1) Identification of the record;
 - (2) Statements on behalf of the vested rights Claimant;



- (3) Statements on behalf of the agency originally holding lead agency status;
 - (4) Statements on behalf of the public;
 - (5) Rebuttal on behalf of the Claimant; and
 - (6) Motion to close the public hearing.
- (b) Notwithstanding the above, the Chairman of the Board or the delegated committee's selected chair, or the Board's designee for purposes of conducting the hearing may in the exercise of discretion, determine the order of the proceedings, provide for additional testimony, or provide for additional rebuttal.
- (c) The Chairman of the Board or the delegated committee's selected chair, or the Board's designee may impose reasonable time limits upon statements and presentations and may accept written statements in lieu of oral statements. Written statements must be submitted at least five business days prior to the hearing.
- (d) All statements of fact made at the hearing shall be under oath as administered by the Chairman of the Board or the delegated committee's selected chair, or the Board's designee.
- (e) The public hearing shall be recorded either electronically or by other convenient means.

Section 3506.13 Vested Rights Hearing Procedure - Continuance.

The public hearing may be continued from day to day as necessary to receive all of the statements, information, and testimony identified in Section 3506.12.



Section 3506.14 Vested Rights Hearing Procedure – Evidence

Relevant evidence in a proceeding for determination of a claim of vested rights shall be written or oral evidentiary statements or material demonstrating or delimiting the existence, nature and scope of the claimed vested right[s]. Such evidence shall include, but is not limited to, evidence of any permit or authorization to conduct mining operation on the property in question prior to January 1, 1976, evidence of mining activity commenced or pursued pursuant to such permit or authorization, and evidence of any zoning or land use restrictions applicable to the property in question prior to January 1, 1976.

As to any land for which Claimant asserts a vested right for expansion of operations, Claimant shall produce evidence demonstrating that the Claimant clearly intended to expand into such areas. Such evidence shall be measured by objective manifestations, and not subjective intent at the time of passage of the law, or laws, affecting Claimant's right to continue surface mining operations without a permit. (See, *Hansen Brothers Enterprises, Inc. v. Board of Supervisors of Nevada County* (1996) 12 Cal.4th 533.)

Section 3506.15 Vested Rights Hearing Procedure - Determination.

Following the public hearing, the Board, if the Board conducted the hearing, or its committee, administrative hearing officer, or special master shall determine whether the Claimant, by a preponderance of the evidence, has demonstrated a claim for vested rights pursuant to Public Resources Code Section 2776. The determination shall identify upon what specific property the vested rights are established and the scope and nature of surface



mining operations included within the established vested right or rights. If the public hearing was conducted by a committee of the Board or an administrative hearing officer or special master designated by the Board, the findings and recommendation or proposed decision of the committee of the Board, administrative hearing officer, or special master shall be presented to a quorum of the Board at a regular business meeting, no later than 60 business days after completion of the vested rights public hearing, for consideration and adoption by the full Board. The Board may adopt the recommendation or proposed decision or reject the recommendation or proposed decision and direct the matter back to its delegatee for further consideration in light of the discussion before the full Board. The Board may also modify the proposed decision based upon the record before it or make an alternative determination based upon the record or following receipt of additional evidence before the full Board. Following adoption of the Board's final determination notification shall be made by certified mail to the party claiming vested rights and to the local agency originally holding lead agency status. Notification of the final determination of the Board shall also be made by regular mail to any person who commented at, or participated in, the public hearing, any person who has requested such notice, and shall be immediately posted upon the Board's website.

Section 3506.16 Effect of Vested Rights Determination.

A final determination by the Board recognizing a claim of vested rights shall constitute acknowledgment that the specific surface mining operations as identified upon the specific



property or properties does not require a permit under Public Resources Code Section 2770 provided that no substantial change may be made in such mining operations. If any vested rights identified pursuant to this article are waived or abandoned the surface mining operations identified shall become subject to the permit requirements of the Surface Mining and Reclamation Act.

COMMENTS RECEIVED DURING THE 45-DAY PUBLIC COMMENT PERIOD:

The following letters of support for the adoption of the regulation were received during the public comment period between October 19, 2007 and December 24, 2007.

The following letters of support require responses to the comments:

Commentator 1 - Theodore Franklin, Attorney representing William Calvert:

Comment 1A: Commentator states that the proposed regulation misstates or is inconsistent with the law in its blanket statement that “*No person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976 shall be required to secure a permit pursuant to Section 2770 of the Public Resources Code.*” It is proposed that the following statement be added to the end of the first sentence in Section 3506.1 in order to bring the Section 3506.16 in line with the statute: “as long as the vested right continues and as long no substantial changes are made in the operation except in accordance with the Surface Mining and Reclamation Act of 1975.”

Response to Comment 1A: The SMGB has considered this request and did define vested rights, but did not see the need to reiterate the conditions for obtaining or considering vested rights in its proposed regulations in this section.

Comment 1B: It is stated that the proposed regulation does not adequately specify the duties of the SMGB in making a determination of vested rights. The general statement of the SMGB’s duties is not an adequate definition of the SMGB’s full responsibilities in making a vested rights determination. Specifically, it omits the SMGB’s duty to determine whether the vested right “continues” or subsequent activities constitute “a substantial change in the nature of the operation” within the meaning of



Public Resources Code Section 2776. If a vested right fails to “continue” or there is “a substantial change in the nature of the operation,” the exemption from permit requirements under SMARA can be lost.

Response to Comment 1B: Please refer to Comment 1A and, specifically, the language of Section 3506.15, which recognizes that the SMGB will be considering and acknowledging only those rights which are presently in existence, i.e., rights that have not been abandoned or waived.

Comment 1C: The commentator proposes Section 3506.3 to be amended to include “written statements identifying the type and amount of material, if any, extracted in each of the three preceding years.”

Response to Comment 1C: The proposed regulations under Section 3506.2 considers the quantity of material available for extraction, but the SMGB also realizes that the type and amount of materials extracted in each of the three preceding years may be irrelevant in the context of filing of a request for determination since the continued nature of a surface mining operation could be adversely impacted by factors outside of the mine operator’s control, such as short-term and episodic economic and market factors.

Comment 1D: The commentator proposed that the sentence “*A determination that a vested right exists must be supported by findings that the claimant established a vested right to conduct surface mining operations prior to January 1, 1976, that the vested right continues, and that no substantial changes have been made in the Claimant’s operation since January 1, 1976.*” be added before the second sentence of Section 3506.16.

Response to Comment 1D: Please refer to response to Comment 1B.

Comment 1E: The commentator proposes that the second sentence of Section 3506.15 be amended to read “A determination that the Claimant has vested rights to engage in surface mining shall identify upon what specific property the vested rights are established, the scope and nature of surface mining operations included within the established vested rights, and whether the current operations of the Claimant are within the established vested rights or require a permit under the Surface Mining and Reclamation Act.”



Response to Comment 1E: Whether the Claimant is within the established vested rights is determined, in part, by identification of the specific property, and the scope and nature of surface mining operations included within the established vested rights. SMARA currently provides a mechanism and administrative process for addressing surface mining operations that are operating outside their approved mining footprint, whether such footprint is defined by a vested rights granted by the lead agency or by permit issued by the lead agency.

Commentator 2 – John Williams, Williams Research:

Comment 2A: Commentator states that vesting determinations should include short and long term production limits over time. *“The SMGB’s currently proposed rules do not plainly spell out all of the requirements for vesting a mine’s rights, specifically how much a quarry is allowed to mine on an annual and short-term basis. The allowable amounts of materials to be mined is a key issue in determining a mine’s vested rights, according to the Department of Conservation...The SMGB’s rules should meet the DOC’s own interpretation of the correct scope of vested rights determinations and require that applicants, and vesting decisions, explicitly describe the vested amounts of mining production over time periods, allowing, of course, for appropriate incremental increases as described in the Hanson court decision...Lead agencies, mines, and the public need bright lines showing what activities are, or aren’t vested...the SMGB vested rights regulations should require the plain spelling out of the exact limits of any vested rights, even to the point of stating how many tons per year can be mined and how many acres of land can be excavated annually at a mine.”*

Response to Comment 2A: Please refer to response to Comment 1C.

Comment 2B: It is suggested that 3506.2 and 3506.3 be modified to explicitly state that vesting determinations include annual, monthly and daily limits of materials production.

Response to Comment 2B: A vested rights determination recognizes a right to mine in a specific location, or in a specific manner, but, like the permit process, has not, and cannot, be expected to define or regulate particular extraction rates or limits.

Comment 2C: The Commentator states that the claimants should include affected parties, and not be restricted to claimants who are mining



companies. Section 3506.3 should be amended to allow parties other than mine owners and operators to request vesting determinations.

Response to Comment 2C: The SMGB, as a lead agency, already has the responsibility to uphold and enforce SMARA, and ensure that a mining operator is meeting all the requirements of SMARA. The SMGB can take steps to notify the mining operator that it has received information that the mining operator is operating without either a permit or a vested rights, and request that the operator produce documents that support one or the other. If the mine operator can not produce documentation in support of its vested rights, the SMGB acting as a lead agency can require that the mine operator obtain a permit or file an application for a determination of its vested rights.

Comment 2D: Section 3506.4 should be amended so a more reasonable fee, other than the proposed \$5,000, is required from non-mining parties requesting a vesting determination.

Response to Comment 2D: Please refer to response to Comment 2C.

Comment 2E: It is suggested that Section 3506.3 *“be amended so that a non-mining party’s determination request is only required to provide a specific reference such as a street address for the mining location, the purported lead agency and approximate date of original vesting determination, if any, and a narrative describing the requesting party’s concerns and request, rather than the lengthy requirements required from a claimant, as set out in subsection 1 through 11 under 3506.3.”*

Response to Comment 2E: Please refer to response to Comment 2C.

Commentator 3 – Christina Karle, Citizens to End Activities of Snows Quarry Encroachment (CEASE):

Comment 3A: Commentator is requesting that the appropriate governmental body hold a public hearing to determine the vested mining rights of the Snows Road Quarry, as established by court decision in December 2006.

Response to Comment 3A: Please refer to response to Comment 2C.

Comment 3B: A request that CEASE members be given reasonable notice of dates and location, in order to be given an opportunity to be heard.



Response to Comment 3B: This consideration is addressed under Section 3506.7 of the proposed regulations which states that every adjacent landowner identified in the Request for Determination, and to the county, city, or regional agency originally holding lead agency status for the identified property and mining operation.

Commentator 4 – Karen Keene, Legislative Representative, California State Association of Counties:

Comment 4A: The Commentator states that the proposed regulations would intrude on local agencies' decision-making authority.

Response to Comment 4A: The proposed regulations do not intrude on local agencies' decision-making authority, but rather provides an administrative process for the SMGB when serving as a lead agency under SMARA to make a vested rights determination upon a request from a mine operator.

Comment 4B: It is also stated that the proposed regulations should not be applied statewide, and consideration should be given to limiting their scope.

Response to Comment 4B: The proposed regulations only apply to the SMGB when serving as a lead agency. It is recognized, however, that the proposed regulations, once enacted, may be used as a model by other lead agencies to follow.

Commentator 5 – Kerry Shapiro, attorney with Jeffer, Mangels, Butler & Marmaro LLP, representing Western Aggregates LLC (Western):

Comment 5A: The commentator states that that draft regulations must provide claimants with sufficient time to respond to written comments from the public in reference to Sections 3506.10(b)(4) and 3506.12(c).

Response to Comment 5A: 'Due process', as defined in law and applied to the proposed restriction of any property right, includes only a requirement for reasonable notice and the opportunity to comment for the affected party. It does not include, necessarily, an opportunity for some kind of written 'rebuttal'. Section 3506.12 of the proposed regulations provides a 'vested rights' Claimant significantly more, however, by giving the Claimant the last opportunity for rebuttal as to all comments, either written or oral.



Comment 5B: In regards to the selection and role of the hearing officer as referenced in Sections 3506.8 and 3506.15, Western is opposed to the use of special masters or administrative hearing officers by the SMGB, given that the SMGB and its staff are the most qualified parties to review claims of vested surface mining rights in the State, and offers revisions to Section 3506.9 to reflect qualifications to review the matters presented to them and be neutral and objective.

Response to Comment 5B: The SMGB decided to include the option of it considering use of a special master or administrative hearing officer since the SMGB has no life outside of a public meeting venue, and could be overwhelmed when a vested rights determination is requested for a complicated site with a voluminous administrative record. In addition, since the SMGB could be requested to participate for weeks at a time, a special master or administrative hearing officer could conceivably be used to review the facts and provide an initial assessment, and could serve solely a consultant, or can be much more – conduct the entire hearing if so desired. Furthermore, the special master or administrative hearing officer could incur the necessary time for review, and provide a reasonable assessment; however, the SMGB would make the decision. There are four ways a hearing can be conducted: a full board, a communicative board, an administrative board, or through a special master; all these options, at minimum, are available to the SMGB for consideration.

Comment 5C: Western believes the role of a special master or administrative hearing officer should be limited to hearing and collecting evidence, and then to present that evidence in the form of proposed findings to the SMGB. The SMGB can then make its own determinations and conclusion based on those findings, but could also reopen the record for further proceedings, or send the matter back to the special master or administrative hearing officer for further factual inquiries.

Response to Comment 5C: It is stated under Section 3506.15 of the proposed regulations states that only the SMGB will make the final determination of a vested rights claim. Should the SMGB decide to use a committee of the SMGB, an administrative hearing officer, or special master, to conduct a public hearing, the SMGB has the ultimate authority and 1) may adopt the recommendations or proposed decision, or 2) reject the recommendations or proposed decision, and direct the matter back to its delegee for further consideration. It is the SMGB that will make the final determination.



Comment 5D: Western believes in reference to Section 3506.16 that if the draft regulations keep a reference to “waiver” of vested rights, they must clarify that waiver must be “knowing” and “intentional”. Thus, Western opposes inclusion of “waived” in Section 3506.17.

Response to Comment 5D: The SMGB’s Policy and Legislation Committee, and the whole SMGB, considered this request and decided to delete the term lapse, but did maintain the terms waived or abandoned to reflect a mine operator’s suspended inactivity, or lack of action in accordance with SMARA. Also, please refer to response to Comment 1C.

Comment 5E: Western suggests that reference to the preponderance of the evidence standard referenced in Section 3506.15 be deleted.

Response to Comment 5E: The SMGB’s Policy and Legislation Committee and the whole SMGB discussed this issue on several occasions and several approaches were considered (i.e., substantial evidence, preponderance of evidence, and clear and convincing evidence). Substantial evidence was characterized as significant evidence in support of a position but not overwhelming or all in consideration of all evidence - not even 50% or 51%. A preponderance of the evidence was ultimately deemed as a more significant standard of evidence, that being, around 51%, and appropriate for this type of determination hearing.

Commentator 6 – Gary Hambly, President of the California Construction and Industrial Materials Association (CaCIMA):

Comment 6A: The commentator suggest that the preponderance of the evidence standard proposed in Section 3506.15 be deleted.

Response to Comment 6A: Please refer to response to Comment 5E.

Comment 6B: The Commentator states that the SMGB’s regulations are not limited, and that it should be under the Calvert vs. Yuba County decision, in order to apply to claims of vested rights arising under the diminishing asset doctrine.

Response to Comment 6B: The Court, in Calvert vs. Yuba County, did not limit public hearings for vested rights determinations solely to those mining operations involving diminishing assets. Even if the Court's determination could be read so narrowly, the SMGB may clearly recognize the need for a public hearing process whenever a 'vested rights determination' is made by the SMGB as lead agency. No rational



argument can be made that diminishing assets vested rights should be treated differently from all other kinds of vested rights in providing a public hearing determination process.

Comment 6C: In reference to Sections 3506.8 and 3506.15, CalCIMA disagrees that the SMGB will need to appoint a special master or administrative hearing officer to hear vested rights claims, and feel that it is more appropriate for the SMGB to undertake that activity itself. Should a special master or administrative hearing officer be used, then that individual should have experience with land use and entitlement processes, and knowledgeable regarding mining operations. Also, the claimant should be afforded input on the identification and selection of a special master or administrative hearing officer, and that the scope should be limited. A list of special masters and administrative hearing officers should be compiled that meet the aforementioned criteria.

Response to Comment 6C: Please refer to response to Comments 5A, 5B and 5C.

Comment 6D: In reference to Sections 3506.10 and 3506.12, additional clarity is suggested in regards to due process and timeline issues. CalCIMA believes the current language is unclear in order to ensure that the Claimant has a final opportunity to present detailed evidence to the SMGB in response to any opposition evidence opponents may submit.

Response to Comment 6D: In considering the overall process and timeline issues, the SMGB felt it was important to enhance ways to provide public notice since all business before the SMGB is performed in public.

Comment 6E: In reference to Section 3506.2, the definition of vested rights was expanded to suggest that a vested rights claim before the SMGB should address such issues as the allowable depth of mining, type of mining, etc, which was not reflected in the Calvert vs. Yuba County decision.

Response to Comment 6E: As pointed out in Section 3506.2 of the proposed regulations, a 'vested right' to conduct surface mining includes any nonconforming use as viewed against subsequently adopted, or currently existing, regulatory land use restrictions. The scope of legally acceptable land use restrictions, for example, restrictions as to hours of operation, methods of mining extraction, depth of mining operations, define the possible nature of an asserted or actual vested right. A



diminishing asset vested right is only one of many kinds of vested rights, although, as the Court pointed out in Calvert, its existence may be uniquely associated with surface mining operations.

Comment 6F: In reference to Section 3506.16, it is suggested that reference to the term “waived”, be deleted since abandonment was the key issue discussed in the Hanson case.

Response to Comment 6F: California law has long recognized that a vested property right can be 'waived' by action of the holder inconsistent with the assertion of such a vested right. The proposed regulations are intended by the SMGB to provide for all presently proposed vested rights determinations, and for any that may be presented to the SMGB in the future. These regulations are not simply designed to aid in conducting a hearing for the facts and circumstances asserted in the Calvert or the Hanson cases.

Comment 6G: In reference to Sections 3506.10 and 3506.12, CalCIMA states that there is no basis for the SMGB to confer equal standing to all members of the public to comment upon vested rights claims, and that this exceeds the scope of the Calvert vs. Yuba County decision.

Response to Comment 6G: Any person who has evidence relevant to an assertion of a 'vested right' to conduct a surface mining operation should be allowed to participate and present that information to the SMGB or its designee. The Court in Calvert vs. Yuba County speculated that adjacent property owners might have relevant information - information about property titles, mining activities, proposed mining activities, and past or present regulatory constraints on mining operations. The Court did not conclude that only these parties were privy to such information. Prior property owners of the actual mining property in question, prior adjacent landowners, present representatives or past representatives or staff of local land use regulatory agencies, official or unofficial local historians, and a host of other foreseeable persons may bring relevant information to the SMGB's hearing process when it is considering a vested rights petition. There is no reasonable basis to create a hierarchy of, or multiple classes of, participants in this proposed SMGB public hearing process.

