



STATE MINING AND GEOLOGY BOARD

EXECUTIVE OFFICER'S REPORT



For Meeting Date: September 11, 2008

Agenda Item No. 9: Consideration to Amend the Vested Rights Determination Procedures when the SMGB is serving as a Lead Agency under SMARA Pursuant to the California Code of Regulations Section 3959(b)(4).

BACKGROUND: 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. On August 14, 2008, the Office of Administrative Law approved the proposed regulations, and such regulations will be enacted on September 13, 2008. The SMGB is considering amending Section 3959(b)(4) to clarify the administrative procedure for submission of written and responsive materials to the SMGB.

BACKGROUND: CCR Section 3950, et seq. of the SMGB's regulations provides administrative procedures to conduct a vested rights determination when serving as a lead agency under SMARA. The SMGB intent for introduction of written evidence and argument is reflected in CCR Section 3959, in context with regulation 3952, to provide:

1. Section 3952 allows for a vested right claimant to file a Request for Determination with written supporting documentation indicating the basis for the claim and identifying the scope and scale of the claim. This submittal is in the nature of the claimant's **opening brief**.
2. Thereafter, Section 3954 requires the SMGB to make an initial determination of completeness and jurisdiction, within 15 business days of receipt of the Request for Determination.
3. Thereafter, Section 3955 requires a notice of pending vested rights determination within 30 business days to all interested parties.
4. Thereafter, Section 3958 requires a public hearing on a vested rights determination to commence no less than 90 business



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- days (i.e., approximately 126 calendar days) after the notice of pending vested rights determination; in no case shall the hearing be scheduled more than 180 business days (i.e., approximately 252 calendar days) after the conclusion that the Request for Determination is within the SMGB's jurisdiction.
5. Thereafter, section 3959(b)(4) requires that "*any additional written materials be delivered to the SMGB no less than 60 calendar days before the hearing.*" The SMGB interprets this provision as the time for receipt of public comment in response to the initial application, in the nature of an **opposition brief and opposing evidence**.
 6. Thereafter, section 3959(b)(4) requires that "*in no case will any responsive materials be submitted less than 45 calendar days prior to the hearing.*" The SMGB interprets this requirement as allowing the claimant to submit rebuttal materials, in the nature of a **reply brief**. Being in the nature of a reply brief, the materials submitted not less than 45 calendar days prior to the hearing should be responsive to issues raised by an opposition brief and opposing evidence, and not raise new issues or evidence.

Section 3959 specifically describes a notice the SMGB will prepare, mail and post, and describe the vested rights matter to be considered; the hearing date and time; an invitation to make statements; and a request concerning delivery or submission of additional written materials and any responsive materials. Although presented as a request, time limits for submission of the materials are described in the regulation.

It is specifically stated under Section 3959(b)(4) "*[t]he provisions that all additional materials be submitted by the public no less than 60 days before the hearing, and by the applicant no less than 45 days before the hearing, are necessary to allow the SMGB to timely consider the information submitted.*" Upon review from stakeholders and the Office of Administrative Law, this language could be interpreted to be in conflict with the intent of the SMGB when the language was under consideration and subsequently adopted. Notably, the language of CCR Section 3959(b)(4) does not distinguish between applicant and the public.

Since the language of Section 3959(b)(4) does not clearly distinguish between the applicant and the public, anyone can submit any additional materials up to 60 days before the hearing, and anyone can submit written material responding to material previously submitted in the period ending 60 days prior to the hearing, at least 45 days prior to the hearing.



The SMGB's intent was to have public written materials submitted 60 days prior to the hearing, and an applicant's responsive materials submitted 45 days prior to the hearing. However, this was not the only possible scenario under this regulation.

The regulation as adopted and soon to be enacted (effective September 13, 2008) could as well allow the applicant to submit additional written material up to 60 days before the hearing, and others to submit responses up to 45 days before. The current language could also be interpreted to allow anyone to submit "*any additional written materials*" up to 60 days before the hearing, and anyone to submit written material responding to material previously submitted in the period ending 60 days prior to the hearing, at least 45 days prior to the hearing.

OPTIONS FOR THE SMGB'S CONSIDERATION:

Option No. 1 – Leave as is: One option would be to leave the regulation as it is, and acknowledge that the 60-and 45-day time limit is a two-way street in regards to a response to comments. The Board would then apply the rule in this manner. Should this prove unwieldy, the SMGB could consider amending the language in a future rulemaking action.

Option No. 2 – Amend the Regulatory Language: The second option would be to amend the language of the regulation to make it clear that the 60 days prior to hearing time limit is for the public, and the 45 days prior to hearing time limit is for the applicant.

POLICY STATEMENT OVERVIEW: The proposed language in the amended regulation clarifies the administrative procedure for the public and claimant in the submission of written and responsive materials to the SMGB when acting as a lead agency under SMARA (PRC Sections 2755 and 2775) and *Calvert v. County of Yuba, (2007) 145 Cal. App. 4th 613*. This regulation is necessary in order to protect the California public by providing an administrative procedure to make a vested rights determination pursuant to SMARA when the SMGB is the operating lead agency.

CEQA COMPLIANCE: The SMGB has determined that this rulemaking process is 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: 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: 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: 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: 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: 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: 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: 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: 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: SMGB staff has determined that the adoption of these regulations will have no significant effect on housing costs.



Effects on small businesses: 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.

SPECIFIC PURPOSE: The proposed amended regulatory language is intended to clarify the administrative procedure for the public and claimant in the submission of written and responsive materials to the SMGB during conduct of a vested rights determination when acting as a lead agency under SMARA.

CCR Section 3959 – Vested Rights Hearing Procedure – Notice/Submission of Written Materials

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 amended Section 3959 is necessary since it provides the administrative procedure for a notice for the SMGB to prepare, mail and post; and describe the vested rights matter to be considered; the hearing date and time; an invitation to make statements; and a request concerning delivery or submission of additional written materials and any responsive materials. Although presented as a request, there are time limits for submission of the materials described in the regulation. The information in this section is required to clarify submissions from the public and responses from the claimant, and the time limits for such submissions and responses.

STATEMENT OF NECESSITY: 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.

IDENTIFICATION OF TECHNICAL / THEORETICAL / EMPIRICAL STUDY, REPORTS, OR DOCUMENTS UPON WHICH THE SMGB HAS RELIED: 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, and adopted by the SMGB on February 14, 2008. These results have not significantly changed since such time.

EXECUTIVE OFFICER RECOMMENDATION: Upon review and discussion, the SMGB may consider directing the Executive Officer to amend, or add additional revisions or modifications, to the proposed procedures and regulatory language, and direct the Executive Officer to proceed with the 45-day notice to adopt amended regulations to clarify the procedure and time limit for submittal of materials from the public and response materials from the claimant, when the SMGB is conducting a vested rights determination.



The Executive Officer recommends that the SMGB consider the change in regulatory language and direct the Executive Officer to commence the rulemaking process. The reason for this recommendation is twofold. First, should the SMGB not amend the regulation to clarify, then the process could be on-going with no means for the claimant to respond to all public comments, prior to commencement of the vested rights hearing,. Second, although the regulations serve the SMGB while acting in a lead agency capacity under SMARA, such regulations do not exist elsewhere, and thus, may be used by other lead agencies, as so desired. It is thus important that the regulations are clear.

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

Motion No. 1 - to direct the Executive Officer to amend regulation to clarify:

Mr. Chairman, in light of the information before the SMGB today, I move that the SMGB direct the Executive Officer to incorporate the changes to CCR Section 3959(b)(4), stating that a request that any additional written materials be delivered to the Board by the public no less than 60 calendar days before the hearing and in no case will any responsive materials be submitted by the claimant less than 45 calendar days prior to the hearing, which clarifies language for submittal and response materials when the Board is conducting a vested rights determination while serving as a lead agency pursuant to SMARA.

Motion No. 2 - to direct the Executive Officer to commence the rulemaking process:

Mr. Chairman, in light of the information before the SMGB today, I move that the Board approve the proposed regulatory language amending the Administration Fee pursuant to its authority under PRC Section 2755 and PRC Section 2775, and instruct the Executive Officer to commence the rulemaking process, and proceed with the 45-day notice to adopt amended regulations to clarify language for submittal and response materials when the Board is conducting a vested rights determination while serving as a lead agency pursuant to SMARA.



Respectfully submitted:

Stephen M. Testa
Executive Officer

PROPOSED REGULATION TEXT:

CCR Section 3959 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 3955;
 - (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 be delivered to the Board by the public no less than 60 calendar days before the hearing and in no case will any responsive materials be submitted by the claimant less than 45 calendar days prior to the hearing.
- (5) The time, date, and location of the public hearing.

NOTE

Authority: Sections 2755 and 2775, Public Resources Code. Reference: Calvert v. County of Yuba, (2007) 145 Cal. App. 4th 613.

