



INITIAL STATEMENT OF REASONS

PROPOSED REGULATORY ACTION

NATURAL RESOURCES AGENCY STATE MINING AND GEOLOGY BOARD

CALIFORNIA CODE OF REGULATIONS TITLE 14. NATURAL RESOURCES Division 2. Department of Conservation Chapter 8. Mining and Geology Subchapter 1. State Mining and Geology Board Article 14. Appeals of Orders to Comply with SMARA

INTRODUCTION AND BACKGROUND

The Legislature adopted the Surface Mining and Reclamation Act of 1975 (Public Resources Code (PRC), section 2710 et seq., hereinafter “SMARA”) to, in part, provide comprehensive surface mining and reclamation policy over surface mining operations to assure that adverse environmental impacts are minimized, and mined lands are reclaimed to a usable condition. Under SMARA, surface mining operators are required to submit to their respective local governments (lead agency) for approval, a plan for reclaiming lands disturbed by mining activities, as well as proof of financial assurances to ensure that those disturbed lands are reclaimed in accordance with the approved reclamation plan.

Lead agencies are responsible for ensuring that the surface mining operations within their jurisdictions follow SMARA’s requirements affecting the permitting, operations and final closure of the mining operation. The Division of Mine Reclamation (DMR) has secondary oversight of mining operations. The State Mining and Geology Board (hereinafter “SMGB” or “Board”) has oversight of lead agencies, acts as a lead agency itself, and acts as an appellate body in several areas associated with the administration of SMARA and has statutory authority to promulgate these regulations.

On April 18, 2016, and October 5, 2017, respectively, Governor Brown signed Assembly Bill (AB) 1142 (Gray) and Senate Bill (SB) 809 (Natural Resources Committee) into law and thereby enacted significant revisions to SMARA. This included changes to sections of SMARA that provide for the enforcement of SMARA by way of incremental enforcement actions that begin with the issuance of a Notice of Violation (NOV), Orders to Comply (OTC), and possibly followed by the assessment of administrative penalties. While lead agencies have primary enforcement jurisdiction, DMR can also initiate enforcement actions under certain circumstances.

To fully enact the changes to SMARA under AB 1142 and SB 809, the SMGB must conform existing regulatory processes to accommodate these changes. Specifically, the SMGB proposes to add

section 3940.5, and amend sections 3940, 3941, 3942, 3943, 3944, 3945, 3946, 3947, and, 3948 of Title 14 of the California Code of Regulations (CCR), Division 2, Chapter 8, Article 14.

BENEFITS

The SMGB anticipates that the proposed regulatory action will result in non-monetary benefits to public health, welfare and environmental safety by providing a clear and consistent appeals process to ensure a timely resolution of enforcement actions that accounts for appropriate due process for all relevant participants.

DETAILED STATEMENT OF SPECIFIC PURPOSE AND RATIONALE

Assembly Bill 1142 amended Public Resources Code section 2774.1, which provides authority to lead agencies, the Board when acting as a lead agency, and DMR to initiate enforcement actions in cases where a mining operation fails to comply with all aspects of SMARA, and in particular, when a mining operation fails to comply with its approved reclamation plan. Amendments under AB 1142 include, among other things, an option for operators to enter into stipulated Orders to Comply in cases where correction of the violation would extend beyond the 30-day compliance requirement of a NOV, as well as requiring operators to request an appeal of the OTC.

Prior to AB 1142, OTC could only become effective upon a noticed public hearing to review the basis of the OTC, without any affirmative action needed by the operator. Following AB 1142, mine operators must now affirmatively request an appeal of an OTC, otherwise, the OTC becomes effective after 30 days. In addition, and subsequent to passage of AB 1142, Senate Bill 809 amended PRC section 2774.1 to incorporate the establishment of the DMR and the Supervisor of Mine Reclamation (Supervisor). These changes to the enforcement process are reflected in the amendments to the procedures described in the regulations, beginning with section 3940, which are more fully explained below.

Sections 3940 – 3948 are amended to conform terminology by changing “director” to “supervisor,” and “department” to the “Division of Mine Reclamation” or “DMR.” The purpose of this change is to make specific and implement changes to SMARA pursuant to SB 809, to ensure all regulatory language found in these sections of the CCR match the statutory language in SMARA amended by SB 809.

These sections are also amended to conform terminology by changing “Chairman” to “Chair” when referring to the “Chairperson of the Board,” or deleting “his or her.” The purpose of the change is to make specific and implement PRC section 2774.1 and because this change is necessary to make the regulatory language gender neutral. In addition, the term “board” is capitalized when referring to the State Mining and Geology Board, and the term “director” is replaced with the term “supervisor” to make specific and implement SB 809 and the changes to Public Resources Code sections 607 and 2006.5 to incorporate the establishment of the DMR and the Supervisor of Mine Reclamation. Finally, citations to statutes are revised for conformity and clarity.

Section 3940 is amended by replacing “review” with “appeal to the Board” to conform to the requirement that operators must seek an appeal to the SMGB after service of an OTC. The purpose of this change is to make specific and implement PRC section 2774.1(a)(3)(B). This change is necessary as prior to AB 1142, OTCs could be issued by a lead agency or DMR, however, the OTC was not “effective” until a hearing based on the OTC was scheduled, and heard, without the operator

having to request an appeal. Finally, the section is amended to add reference to PRC 2774.5 which requires the SMGB to act as a lead agency where a local government fails to promulgate a mining ordinance, certified by the SMGB, and where there is at least one mining operation within the local government's jurisdiction that would be subject to SMARA.

Section 3940.5 is added to the CCR to further implement the changes made to PRC section 2774.1(a)(3)(B). As described above, prior to AB 1142, OTCs could be issued by a lead agency or DMR, however, the OTC was not "effective" until a hearing on the basis of the OTC was scheduled, and heard, without the operator having to request an appeal. Due to operators not being required to seek an appeal of an OTC, as the review of the OTC was essentially automatic, it was not necessary to include in the regulatory hearing procedure the process to request an appeal.

New section 3940.5 is therefore necessary to describe key elements of an appeal request. This includes a 30-day deadline by which an operator must file an appeal consistent with PRC section 2774.1(a)(3)(B). Importantly, the appeal must contain a written statement, "indicating specifically the basis for the appellant's challenge of the order to comply," along with all "documents and reports supporting the basis of the appeal." This establishes a complete record of the appellant's challenges allowing the Board to adequately assess the basis for the appeal.

Finally, the operator is required to provide the name and contact information of any attorney or other representative and is required to provide a copy of the appeal to DMR and the lead agency having jurisdiction over the mine. The purpose of these changes is to make specific and implement PRC section 2774.1(a)(3)(B). This change is necessary to ensure that operators have clear instructions as to when and how to seek an appeal with the SMGB.

Section 3941 is amended to address the Board's determination of whether it has jurisdiction to hear an appeal. Prior to AB 1142, an OTC did not become "effective" until a hearing to review the basis for its issuance was scheduled and heard. The mine operator did not have to file or seek an appeal upon receiving the OTC. Pursuant to changes made under AB 1142, operators must now affirmatively appeal the issuance of an OTC within 30 days of service, otherwise the OTC becomes effective. To accommodate this change as a procedural matter, this section must be amended to reflect the Board's determination as to whether the operator has submitted an appeal that complies with applicable statutory requirements, including whether the appeal provides a substantial basis to accept the appeal.

This section is amended to require the Board to review the appeal "based on the information required by Section 3940.5 of this article," which was added as discussed above. This section is amended to delete "review of the order" and insert a provision that requires the Board to "determine whether the appeal raises substantial issues related to the validity of the allegations contained in the order to comply." The Board is to make this determination based on certain criteria, so that if the Board finds that the "appeal raises no substantial issues with respect to the allegations supporting the order to comply, or has not been filed within statutory time limits," then "no hearing shall be scheduled and the appeal shall be denied." The criteria the Board is to use in making this determination includes two questions; The first is whether the "filing of the appeal with the Board is within the time limits provided for in PRC Section 2774.1(a)(3)(B), and the second is whether the "appeal specifically addresses the alleged violations contained in the order to comply, and together with any supporting documentation, is reasonably sufficient to substantiate the operator's appeal of the order to comply."

The phrase “he or she shall schedule a hearing of the order before the board, otherwise he or she shall refuse to grant a hearing” is deleted. The purpose of these changes is to make specific and implement PRC section 2774.1(a)(3)(B). The change is necessary to clarify that the Board will be reviewing the appeal to determine its timeliness as well as whether the appeal demonstrates a substantive challenge to the appeal so that a hearing is warranted, and the issues are substantially identified. To further accommodate these amendments, the phrase in subsection (a)(1) which provides that the “order addresses violations related to [SMARA] which have been confirmed by findings during an annual inspection or as the result of another physical site inspection of the mine” is deleted as well as the phrase in subsection (a)(2) which reads as the alleged violations “has extended beyond 30 days from the date of receipt by the operator of notification from the director or the board.”

Finally, in order to accommodate the additions as described above, the phrase “an appeal of an order to comply” is substituted for “issued by the supervisor,” and the phrase “an order issued by the director,” is deleted along with the phrase, “Where the board issues the order to comply pursuant to its lead agency authority under Public Resources Code Section 2774.4, no independent determination by the Chairman or the designee is required.”

Section 3942 describes the contents of the administrative record before the Board. The amendment includes a reference to PRC section 2207(a)(2), which requires operators to designate an agent for service of process on an annual basis. The purpose is to make specific and implement PRC section 2772(c)(1) and PRC section 2207(a)(2), since operators are required under SMARA to initially designate in the reclamation plan, an agent who will receive important documents on their behalf, and to update this information on an annual basis through the annual report required of all operators. This is necessary to establish a reasonably calculated method that will result of receipt of important notices and documents, including all notices associated with the appeal of the OTC.

Finally, subdivision (c) is amended to reference subdivisions (a)(1) and (a)(2) in CCR section 3940.5. These changes include, substitute the phrase “mining operation” for “surface mine’s,” and substitute “not in compliance” with the term “inconsistent.” The purpose of these minor changes is to make specific and implement PRC section 2774(b) relating to inspections of mining operations. The changes are necessary to provide additional clarity as to what constitutes the administrative record before the Board.

Section 3943 is amended to define when a hearing on an appeal of an OTC shall be scheduled and heard. The word “order” is replaced with “appeal” and the sentence fragment and full sentence “no sooner than 30 days from the date of issuance of the order. In no case shall the hearing be scheduled beyond 60 days after the issuance of the order,” are deleted. In its place, the phrase “pursuant to PRC section 2774.1(a)(3)(C).” is added. In addition, the phrase “Any mutually agreed upon scheduling of the hearing shall take into consideration the time provided the Board to determine jurisdiction under Section 3941 of this article, and the Board’s regular meeting schedule,” is added. The purpose of the change is to make specific and implement PRC sections 2774.1(a)(3)(B) and 2774.1(a)(3)(C). The change is necessary to clarify that the hearing on the appeal shall follow the scheduling in conformance with the statutory change provided by AB 1142, but that any agreed upon extension beyond the 45-day scheduling requirement should account for the Board’s regularly scheduled meetings and the fact that the Board is allowed 15 days to determine whether it will actually accept the appeal through the determination of jurisdiction requirements of Section 3941 of this article.

Section 3944 is amended to delete reference to the Board's "regular" business meeting. The purpose of the change is to make specific and implement PRC sections 2774.1(a)(3)(B) and 2774.1(a)(3)(C). The change is necessary to clarify that the hearing on the appeal can occur at any business meeting of the Board, as opposed to a "regular" business meeting.

Section 3945 is amended to substitute the term "appellant" for "operator," delete the reference to a "proposed" mining operation, and, use the term "identifying those" aspects of the operation "that are not in compliance with SMARA." The purpose of the change is to make specific and implement PRC sections 2774.1(a)(3)(B) and 2774.1(a)(3)(C). The change is necessary to clarify the contents of the Board's notice of the public hearing.

Section 3946 is not amended beyond the non-substantial change of capitalizing the letter "b," in the word Board.

Section 3947 is amended to replace the term "record" with "parties and appeal case number," change the reference of "operator" to the "appellant," require the hearing to be recorded by electronic means, and, to place the cost of a requested transcript on the party making the request. The purpose of the change is to make specific and implement PRC sections 2774.1(a)(3)(B) and 2774.1(a)(3)(C). The change is necessary to clarify what constitutes the identification of matter before the Board, that the recording of the hearing shall be done electronically, depending on the technology available, and that transcript costs rests with the party requesting a copy of the transcript.

Section 3948 is amended to delete the phrase "based on the record before it," and substitute it with the addition of "in light of the whole record." In addition, the section is amended to delete the phrase "substantially supports the basis for the order at the time it was issued" add the phrase "alleged violations cited in the supervisor's order to comply," and "are supported by substantial evidence...." The purpose of the change is to make specific and implement PRC sections 2774.1(a)(3)(B) and 2774.1(a)(3)(C). The changes reflect the amendments under AB 1142 which, as discussed above, prior to AB 1142, any OTC issued by the Board or DMR, was not effective until a hearing on the basis of the issuance of the OTC was conducted. Following AB 1142, operators must now affirmatively request an appeal to the Board on an OTC, otherwise, the OTC becomes effective 30 days after its service on the operator.

Finally, the phrase "The supervisor may agree to modify specific terms of the order to comply prior to the Board issuing its determination," is added. The purpose of the change is to make specific and implement PRC sections 2774.1(a)(3)(A) and 2774.1(a)(3)(B). Following hearings regarding the Supervisor's OTC, but before the Board makes any determination as to whether to uphold the OTC, it may become necessary to amend the OTC's terms and conditions to better ensure the operator's compliance with the OTC after the hearing. This statement provides clarity to the parties and the Board that when minor changes to the terms and conditions of the OTC might be necessary, they can be made during the hearing.

IDENTIFICATION OF TECHNICAL / THEORETICAL / EMPIRICAL STUDIES, REPORTS, OR DOCUMENTS UPON WHICH THE SMGB HAS RELIED

No studies or reports have been relied upon by the SMGB in preparing the proposed amendments to existing regulations.

CEQA COMPLIANCE

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

ECONOMIC IMPACT ASSESSMENT

PRC section 2770(a) provides that a person shall not conduct mining operations unless the lead agency approves a permit or other authorization for the mine, and a reclamation plan and supporting financial assurances are approved. To achieve compliance with these requirements, PRC section 2774.1 provides for the initiation of enforcement actions that begin with the issuance of a NOV, followed by the issuance of an OTC, and the assessment of administrative penalties where an operator fails to comply with an OTC.

Prior to AB 1142, an OTC did not become “effective” until a hearing to review the basis of its issuance occurred. The mine operator did not have to file or seek an appeal upon service of the OTC. Pursuant to changes made under AB 1142, operators must now affirmatively appeal the issuance of an OTC within 30 days of service, otherwise the OTC becomes effective. In any event, operators need to prepare a defense to the issuance of the OTC. Most importantly, AB 1142 provides operators with additional options to remedy potential violations before lead agencies initiate formal enforcement beginning with the issuance of a NOV. This includes the use of stipulated OTCs.

It is anticipated that the measures that promote cooperation between operators and regulatory agencies regarding the resolution of SMARA non-compliance will reduce the administrative costs of enforcement for both the regulators and the regulated operators. The procedural requirements for the conduct of a hearing on an OTC prior to AB 1142 are contained within sections 3940 – 3948 of Title 14, of the California Code of Regulations. Mine operators, lead agencies, the Board and the DMR have been subject to these procedural requirements prior to AB 1142 and will remain subject to the proposed amendments to these procedures as described above.

Thus, in accordance with Government Code Section 11346.3(b) the SMGB has made the following assessments regarding the proposed regulatory action:

The SMGB does not anticipate the proposed regulatory action would have an impact on the creation of new, or the elimination of existing, jobs within California. The SMGB does not anticipate the proposed regulatory action would have an impact on the creation, expansion, or elimination of new or existing business within California.

The SMGB does not anticipate the proposed regulatory action would have an impact on the expansion of businesses currently doing business in California.

The SMGB anticipates the proposed regulatory action would continue to benefit the health and welfare of California residents, and the state’s environment by ensuring the public that enforcement actions initiated by lead agencies or the DMR, would be timely and properly pursued while at the same time, the appropriate level of due process would be provided to the affected operators. The proposed regulatory action would also help to ensure that compliant mine operators are provided a level economic playing field as they navigate the requirements imposed under SMARA. The proposed regulatory action also conforms certain provisions of AB 1142 and SB 809 to the existing OTC

hearing process. Furthermore, the proposed regulatory action will meet the statutory goals of AB 1142 to improve how the Board, DMR, and local lead agencies oversee and implement SMARA, specifically regarding the enforcement process as envisioned under SMARA.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

As described above, SMARA's enforcement provisions have been amended through AB 1142. Prior to these amendments, the issuance of an OTC required a hearing before it became effective. Now, operators must request a hearing. In either case, it was necessary for the operator to prepare a defense, if the operator chose that option. AB 1142 promotes the use of stipulated OTCs and provides operators with additional options to resolve potential violations of SMARA. It is anticipated that these measures that promote cooperation between operators and regulatory agencies regarding the resolution of SMARA non-compliance will reduce the administrative costs of enforcement for both the regulators and the regulated operators. The proposed regulatory action also conforms terminology to changes enacted under AB 1142 and SB 809. Thus, the SMGB concludes the proposed regulatory action does not have a significant adverse economic impact directly affecting business.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE SMGB REASONS FOR REJECTING THOSE ALTERNATIVES

A proposed alternative of taking no action would result in unnecessary and potentially confusing provisions of existing regulatory requirements remaining in publication and be contrary to statute as revised by AB 1142 and SB 809.

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

DUPLICATION OR CONFLICTS WITH FEDERAL REGULATIONS

The proposed regulatory action does not propose new or additional requirements that duplicate or conflict with existing Federal statutes or regulations. By Memorandum of Understanding with the Federal Bureau of Land Management, the U.S. Forest Service, the Department, and the SMGB, SMARA and federal law are coordinated.