



NOTICE OF PROPOSED RULEMAKING 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

Notice Published: **November 1, 2019**

Office of Administrative Law Notice File Number: **Z-2019-1017-03**

NOTICE IS HEREBY GIVEN that the State Mining and Geology Board (hereinafter referenced as “SMGB” or “Board”) proposes to amend the regulation described below after considering all comments, objections, or recommendations regarding the proposed action.

PROPOSED REGULATORY ACTION

The SMGB proposes to amend sections 3940 – 3948 of Title 14 of the California Code of Regulations (CCR), Division 2, Chapter 8, Subchapter 1, Article 14, pertaining to appeals of orders to comply with the Surface Mining and Reclamation Act of 1975 (SMARA) as provided for in Public Resources Code (PRC) section 2774.1.

WRITTEN COMMENT PERIOD AND PUBLIC HEARING

Any person, or an authorized representative, may submit written statements, arguments, suggestions, or comments related to the proposed regulatory action to the SMGB. These may be submitted by email to smgb@conservation.ca.gov or by mail to:

State Mining and Geology Board
801 K Street, MS 20-15
Sacramento, CA 95814
ATTN: Appeals of Orders to Comply

The 45-day written comment period closes on December 16, 2019. The SMGB will only consider comments received at the SMGB office by that date.

Pursuant to Government Code (GC) section 11346.8, the SMGB will hold a public hearing if it receives a written request for a public hearing from any interested person, or an authorized representative, no later than 15 days before the close of the written comment period.

AUTHORITY AND REFERENCE

The SMGB is proposing to amend sections 3940 – 3948 of Title 14 of the CCR, Division 2, Chapter 8, Subchapter 1, Article 14 pursuant to the authority granted in SMARA, PRC section 2710 et seq., specifically PRC sections 2755 and 2759 to implement, interpret, and make specific PRC section 2774.1.

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

On April 18, 2016, Governor Brown signed Assembly Bill (AB) 1142 (Gray) into law and thereby enacted significant revisions to SMARA. To fully enact the revisions to SMARA, the SMGB must address these changes by way of amending regulations associated with these statutory changes.

SMARA was enacted in part to ensure that any significant adverse impacts of mining to the environment are prevented or mitigated and public health and safety are protected. 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 the surface mining operations within their jurisdictions follow SMARA's requirements, including permitting and conditions of approval that relate to the conduct of mining, the operation's reclamation plan, and financial assurance requirements.

The Department of Conservation's (DOC), Division of Mine Reclamation (DMR) and the SMGB respectively provide lead agency assistance and oversight. Currently, the SMGB administers certain lead agency responsibilities under SMARA for 38 individual surface mining operations by conducting inspections, reviewing and approving financial assurance cost estimates, and undertaking compliance and enforcement actions when necessary.

Existing Law

PRC Section 2207(e) explains that the lead agency, or the Board when acting as the lead agency, may impose a fee upon each mining operation to cover the reasonable costs incurred in implementing Section 2207(e) and SMARA.

PRC Section 2774.1(a)(1) provides the conditions for a lead agency, the Board acting as a lead agency, or the Division on Mine Reclamation (DMR) to initiate an enforcement action, beginning with the issuance of a notice of violation to a mine operator.

PRC Section 2774.1(a)(2) provides the circumstances for a mine operator and a lead agency, the Board acting as a lead agency or DMR, to enter into a stipulated order to comply. A stipulated order to comply must include a schedule and time for compliance that is determined to be reasonable after considering the actions and legal processes required to correct the noticed violation.

PRC Section 2774.1(a)(3)(A) provides the process of issuing an order to comply to mine operators that do not comply with a notice of violation issued by a lead agency, the Board acting as a lead agency, or DMR. If the noticed operator does not comply with the notice of violation or commit to enter into a stipulated order to comply within 30 days of being served the notice, the lead agency, the Board acting as a lead agency, or the Supervisor may issue an order to comply requiring the operator to comply with SMARA. Moreover, if the operator is found to not have an approved reclamation plan or financial assurance they shall cease all further surface mining activities.

PRC Section 2774.1(a)(3)(B) further provides that an order to comply shall take effect 30 days following the service of the order to comply unless within the 30-day time span the operator appeals the order and requests a hearing before the lead agency, if the lead agency issued the order, or the Board, if the Supervisor issued the order. An order to comply is required to include which aspects of the mine are inconsistent with SMARA, a time for compliance determined to be reasonable, and the actions and legal processes required to correct the alleged violation.

PRC Section 2774.1(a)(3)(C) explains that an appeal of an order to comply shall be noticed and heard at a public hearing within 45 days of the filing of the appeal or a longer period as may be mutually agreed upon by the operator.

PRC Section 2774.1(c) provides the process for when an operator fails to comply with an order to comply or fails to submit a report or pay annual fees to the supervisor or lead agency as required in PRC Section 2207. This includes, an administrative penalty of no more than \$5,000 a day may be imposed by the supervisor or the lead agency on the operator that fails to comply. The penalty may be imposed administratively and can be determined by the nature, circumstances, extent, and gravity of the violation or violations, etc. Penalties that are collected must be used for purposes that cover the reasonable costs incurred by the Division or lead agency in implementing SMARA.

PRC Section 2774.1(d) provides circumstances for operators that violate or fail to comply with an order to comply or stipulated order to comply to be removed from the 3098-list published by the Division of Mine Reclamation. Also, the operator shall be removed from the list 10 days following a denial of an appeal at a public hearing unless the operator enters into a stipulated order to comply with a lead agency or the Division.

PRC Section 2774.4 provides the process for the Board to assume a lead agencies' authority under SMARA. The section authorizes the Board to exercise some or all of a lead agency's powers under SMARA if the lead agency has approved reclamation plans that are inconsistent with SMARA, failed to inspect mining operations, failed to seek forfeiture of financial assurances when necessary, failed to take proper enforcement action, or intentionally misrepresented the results of inspections required under SMARA.

PRC Section 2774.5 provides the process for the Board to act as a lead agency by default. The section provides that where a lead agency has at least one mining operation within its jurisdiction, but has no mining ordinance certified by the Board, the Board shall assume all duties of a lead agency as specific under SMARA.

Proposed Action

Amend Title 14 of the CCR, Sections **3940 – 3948, Appeals of Orders to Comply with SMARA**

The proposed regulatory action ensures the process of appealing orders to comply with SMARA are clearly and plainly explained to reflect changes to statute resulting from AB 1142. The purpose of the amended regulation is to define the procedures governing the appeal to the Board of orders to comply with SMARA issued by the supervisor of DMR, or by the Board when acting in the capacity of lead agency pursuant to PRC Section 2774.4 and 2774.5. These sections govern the appeal process including filing the appeal, determining jurisdiction over the appeal, the content of the administrative record, and the various steps involved in the hearing procedures that accompany the appeal of an order to comply.

Anticipated Benefits of the Proposed Regulatory Action

The broad objective of the proposed regulatory action is to make procedural revisions and improvements to the appeals of orders to comply with SMARA process based primarily on statutory changes to PRC section 2774.1 caused by AB 1142. Furthermore, the proposed amended regulatory language is intended to ensure mine operator accountability in cases where their mining operation does not comply with SMARA.

The proposed regulation defines the appeals process of orders to comply with SMARA to ensure due process. The SMGB also anticipates that the proposed regulatory action will benefit the environment and protect public health by providing a clear and consistent appeals process to ensure that enforcement actions are heard fairly and timely when addressing allegations of non-compliance with SMARA and the mining operation's approved reclamation plan.

CONSISTENCY WITH FEDERAL STATUTE AND REGULATION

The proposed regulatory action does not duplicate or conflict with existing Federal statutes or regulations. By Memorandum of Understanding with the Federal Bureau of Land Management, the United States Forest Service, the Department, and the SMGB, SMARA and federal law are coordinated.

CONSISTENCY WITH EXISTING STATE REGULATIONS

The proposed regulatory action is not inconsistent or incompatible with existing regulations pertaining to appeals of orders to comply with SMARA. After conducting a review for any regulations that would relate to or affect this area, the SMGB has concluded that Article 14 of Title 14 of the CCR, Division 2, Chapter 8, Subchapter 1, contains the only regulations that concern appeals of orders to comply with SMARA.

CEQA COMPLIANCE

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

DISCLOSURES REGARDING THE PROPOSED ACTION

The SMGB has made the following initial determinations:

Mandate on local agencies and school districts: None.

Cost or savings to any state agency: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None.

Other nondiscretionary cost or savings imposed on local agencies: None.

Cost or savings in federal funding to the state: None.

Costs impacts on a representative private person or business: The SMGB is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states: The SMGB has determined that the proposed regulatory action will not have an adverse economic impact on businesses and individuals statewide, including small businesses. Surface mining operations are statutorily required to adhere to SMARA and can be the subject of an enforcement action upon discovery of the violation(s). If the operation does not correct the noticed violation(s) in a timely manner, the lead agency is statutorily allowed to issue an order to comply. The proposed regulations simply amend the procedures for an operator appealing an order to comply issued by a lead agency or DMR. The proposed changes to existing regulations may affect small mining business only if the operator fails to comply with SMARA.

Significant effect on housing costs: None.

Business reporting requirement: The SMGB finds that this regulation does not imposed reporting requirements on businesses.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT/ANALYSIS

Creation or elimination of jobs within California: The SMGB anticipates the proposed regulatory action will not have an impact on the creation of new, or the elimination of existing, jobs within California.

Creation of new businesses or the elimination of existing businesses within California: The SMGB anticipates the proposed regulatory action will not have an impact on the creation, expansion, or elimination of new or existing business within California.

Benefits to the health and welfare of California residents, worker safety, and the state's environment: The SMGB anticipates that the proposed regulatory action will result in non-monetary benefits to public health and welfare, worker safety, and environmental safety. Operators and lead agencies are already familiar with existing processes for appealing orders to comply.

The proposed regulatory action conforms existing procedural requirements with changes made to the underlying statutory procedures that were revised because of AB 1142, and includes a new section outlining the steps for filing the intent to appeal. Providing a specific and timely appeals process allows for due process for all parties and a thorough review of the grounds for the issuance of the

order to comply. This will add benefit to public health and the protection of the environment by ensuring timely resolution of alleged violations at mining operations found throughout the State.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5(a)(13), the SMGB must determine that no reasonable alternative it 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, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The alternative to the proposed regulatory amendments of producing no action would conflict with statutory requirements set forth by AB 1142 and could result in confusion by appellants of an order to comply attempting to reconcile existing public hearing procedures with the applicable revised statutory requirements. A public hearing is a statutory right for a mine operator that has been ordered to comply with a notice of violation but would like to appeal the decision.

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.

CONTACT PERSONS

Inquiries concerning the substance of the proposed regulatory action should be directed to:

Matthew Livers, Regulatory Specialist
State Mining and Geology Board
801 K Street, Suite 2015
Sacramento, California 95814
Phone: (916) 319-9032
[Matthew Livers Email](#)

Jeffrey Schmidt, Executive Officer
State Mining and Geology Board
801 K Street, Suite 2015
Sacramento, CA 95814
Phone: (916) 322-1082
[Jeffrey Schmidt Email](#)

Please direct requests for copies of the proposed text (the “express terms”) of this regulation, the Initial Statement of Reasons, the modified text of the regulation, if any, or other information upon which this rulemaking is based to Matthew Livers at the above address.

AVAILABILITY OF INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATION, AND RULEMAKING FILE

The SMGB will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office at the above address. Copies of the components of the rulemaking file may be obtained by contacting Matthew Livers at the address and phone number listed above.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After the written comment period and any hearing that may be conducted by the SMGB to accept comments and evidence regarding the proposed regulatory action, the SMGB will consider all timely and relevant comments received. Thereafter, the SMGB may adopt the proposed amended regulation

substantially as described in this notice. If the SMGB makes modifications that are sufficiently related to the original proposed text, it will make the modified text (with changes clearly indicated through a system of underlines and strikethroughs) available to the public for at least 15 days before the SMGB adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of Matthew Livers at the address indicated above. The SMGB will accept written comments on the modified text of the regulation for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting Matthew Livers at the above address.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Rulemaking Action, the Initial Statement of Reasons, and the proposed amended text of the regulation can be accessed through the SMGB website at:

www.conservation.ca.gov/smgb