



# FINAL STATEMENT OF REASONS

## STATE MINING AND GEOLOGY BOARD

### TITLE 14. NATURAL RESOURCES, CALIFORNIA CODE OF REGULATIONS Division 2. Department of Conservation, Chapter 8. Mining and Geology, Subchapter 1. State Mining and Geology Board Article 11.5. Forfeiture of Financial Assurance Mechanisms

#### UPDATE OF INITIAL STATEMENT OF REASONS

As authorized by Government Code section 11346.9, subdivision (d), the State Mining and Geology Board (Board) incorporates by reference the Initial Statement of Reasons prepared for this rulemaking.

At no time during the one-year period that the rulemaking record was open, including during public comment periods, did any member of the public request a public hearing on these matters.

In addition, the Board has the following updates to the Initial Statement of Reasons:

After the extended 45-day comment period held from November 1, 2019 to December 31, 2019, the Board made additional changes to the proposed regulatory language and documents. These changes were made also following an additional 15-day comment period, ending on April 5, 2020.

Initial changes and additions to the regulatory language and documents are designated by a single underline or a single strikeout. Amendments made to the language following the formal 45-day comment period are designated by a double-underline or a double-strikeout. The sets of changes are also listed in the header of the proposed final regulatory language.

Section 3811(b) is amended to remove the added phrase “PRC 2773.4(a)(1)” because that specific statute is not an applicable provision to the regulatory section. The removed phrase references a requirement of a lead agency and not of the mine operator. As the regulation section is discussing requirements of an operator, removing the phrase “PRC 2773.4(a)(1)” is a non-substantive change because it does not apply to the regulatory section.

Section 3811(d) is amended to add “Board, or supervisor” to the “lead agency” as organizations that can call for a forfeiture hearing if a mine site operator is unreachable after 90-days of a mine going idle. The addition of the Board to this list is due to the Board potentially serving as a lead agency if certain responsibilities of the lead agency are not being met pursuant to 2774.4 or 2774.5. The Board can absorb some or all the lead agency’s duties to approve financial assurances and reclamation plans, but the Board is statutorily restricted from taking over mine permitting powers from the local jurisdiction.

The authority note for section 3811 is amended to include PRC 2773.2 as a referenced statute for section 3811. The reference section will now read: Sections 2727.1, 2770, 2773.1 and 2773.2, Public Resources Code.

The Board also can act at the request of the supervisor. The “supervisor” is being added to the list because the supervisor is the new title for the head of the newly formed Division of Mine Reclamation (formerly the Office of Mine Reclamation with all current supervisor duties formerly being handled by the Director of the Department of Conservation) and plays an integral role in oversight over lead agencies statewide. The supervisor can call for a forfeiture hearing if necessary and needs to be included in the list.

Section 3815(c) is amended to require the mine site operator to provide sufficient evidence that they are financially capable of completing reclamation according to the approved reclamation plan for the site at a forfeiture hearing. The regulatory change is necessary to clarify that the plaintiff (lead agency, Board, or supervisor) has the burden of proof in proving the financial incapability of the mine operator. In the determination of financial incapability by the lead agency or the Board, the regulatory changes require the burden of proof to be a preponderance of the evidence.

As the lowest standard of proof, the preponderance of the evidence standard simply requires the plaintiff demonstrate their claim has a greater than 50% chance to be true. This level of proof is a reasonable choice in determining financial incapability of the operator because the Surface Mining and Reclamation Act of 1975 requires that the operator possess a financial assurance cost estimate (FACE) and financial assurance mechanisms (FAM) that equal the cost of reclaiming the mine site.

Section 3815(a) and (b) demonstrate that not having a FACE or FAMs are already cause for demonstrating financial incapability. In fact, without these instruments in place under SMARA, it is illegal to mine at all. If the operator possesses these financial instruments for the site but perhaps is becoming insolvent due to market conditions or other issues, proving financial incapability will have to use other information as evidence such as earning statements and debt to income ratios for the mine operator and site. Therefore, section 3815(c) is included in the list of reasons to prove financial incapability to allow other financial issues to be reason to prove incapability of an operator.

Lastly, the authority note for section 3817 is amended to remove “Article 12, California Code of Regulations.” This returns the authority note to its former and correct language as CCR sections are not to be included in regulatory reference sections.

### Changes to the Regulatory Language

Regulatory language for Title 14 of the California Code of Regulations (CCR), subdivision (d) of section 3811, is amended to remove the apostrophe and the letter ‘s’ from the word ‘mine’s’ for grammatical purposes.

Subdivision (b) of section 3813 is amended to put a hyphen between ‘30’ and ‘days’ for grammatical purposes. Furthermore, in subdivision (b)(1) of section 3813, the period at the end of the sentence is changed to a semicolon to signify that additional criteria exist in subsequent subdivisions. Subdivision (d) of section 3813 is amended to remove the apostrophe at the end of ‘30-days’.

Section 3815 is amended to change original subdivision (d) to subdivision (e), correcting a duplication of subdivision (d).

Subdivision (c) of section 3817 is amended to add the sentence, "Beginning on the date of determination of financial incapacity or abandonment, lead agencies shall provide annual status reports on the progress of reclamation to the supervisor and the Board, until reclamation is complete in accordance with the approved reclamation plan."

This additional requirement clarifies and makes specific the statutory requirement under subdivision (b)(2)(C) of Public Resources Code (PRC) section 2773.1, which requires lead agencies to conduct and complete reclamation in accordance with the approved reclamation plan following a financial assurance forfeiture hearing under subdivision (b)(1) of PRC section 2773.1.

This addition will ensure that the supervisor and the Board can monitor lead agency efforts to appropriately use the financial assurance mechanism and that reclamation is being conducted while not imposing a local mandate.

## **DETERMINATION OF LOCAL MANDATE**

Local agencies are required to implement portions of the Surface Mining and Reclamation Act of 1975 ("SMARA," Public Resources Code (PRC) section 2710 et. seq.) by requiring mining operations to obtain an approved reclamation plan, financial assurance cost estimate (FACE), and financial assurance mechanisms (FAM) as required by statute under PRC section 2770 and PRC section 2773.1. If a mining operator is determined to be financially incapable of reclaiming its mining operation, or has abandoned their operation, lead agencies are required to seize the financial assurance mechanism and conduct and complete reclamation in accordance with the operation's approved reclamation plan. The money set aside through the FAM provides lead agencies with the funds necessary to conduct reclamation of the site.

The proposed amended regulations primarily provide procedures for a lead agency to conduct hearing to determine whether it should seize a FAM in the case of financial incapability or abandonment of a mine. The revenue forfeited to the lead agency must be used to conduct and complete reclamation for the site. Therefore, the Board has determined that this new and amended regulatory language does not impose a mandate on local agencies or school districts.

## **STATEMENT OF ALTERNATIVES CONSIDERED**

The Board has determined that no reasonable alternatives it considered or that had otherwise been identified and brought to their attention would be more effective in carrying out the purpose for which the action is proposed. In addition, the Board determined that no alternative would be as effective and less burdensome to affected private persons than the adopted regulations or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

A reasonable alternative does not exist because existing legislative and regulatory requirements provide that a lead agency must require a reclamation plan, FACE, and FAM that is compliant with state policy under PRC 2770 and 2773.1. Pursuant to PRC section 2773.1(b)(1), if a specific lead agency, or the Board when acting as a lead agency, has evidence that an operator may be financially

incapable of completing reclamation in accordance with its approved reclamation plan or that the operator may have abandoned the surface mining operation without completing reclamation, the lead agency shall conduct a public hearing.

The hearing will determine whether the operator is financially capable of completing reclamation in accordance with the approved reclamation plan. If the lead agency determines the operator is incapable of completing reclamation, the lead agency can proceed to take appropriate action to secure the forfeited financial assurance mechanisms to pay for reclamation.

A proposed alternative of taking no action would result in ignoring recent statutory changes affecting the underlying statutory provisions of SMARA at PRC section 2773.1(b) regarding forfeiture of a mine operator's financial assurance mechanisms to their specific lead agency. This would result in confusion within the regulated community because the current circumstances leading to a hearing and the appeal process for operators would be inconsistent with existing statute.

## **DUPLICATION OR CONFLICTS WITH FEDERAL REGULATIONS**

This regulation change 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 its implementing regulations and federal law are coordinated.

## **SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE EXTENDED INITIAL 45-DAY NOTICE PERIOD OF NOVEMBER 1, 2019 THROUGH DECEMBER 31, 2019**

No comments were received during this comment period.

## **SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE MARCH 20, 2020 THROUGH APRIL 5, 2020 PERIOD THE MODIFIED TEXT WAS AVAILABLE**

No comments were received during this comment period.