



INITIAL STATEMENT OF REASONS

PROPOSED REGULATORY ACTION

NATURAL RESOURCE 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 11.5. Forfeiture of Financial Assurance

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 (SMGB) 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.

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 lead agencies or DMR with the authority to seek forfeiture of a mine operator’s financial assurance mechanisms. Financial assurance mechanisms (FAM or FAMs) are financial guarantees established by mine operators. These FAMs are based on annual cost estimates and are subject to forfeiture by lead agencies or DMR where the operator becomes financially incapable of reclaiming the mining operation in accordance with an approved reclamation plan, or where the operator has abandoned the mining operation.

To fully enact the changes to SMARA under AB 1142 and SB 809, the SMGB must address these changes by way of regulations. Specifically, the SMGB proposes to amend sections 3810, 3811, 3812, 3813, 3814, 3815, 3816, and 3817 of the California Code of Regulations (CCR), Title 14, Division 2, Chapter 8, Article 11.5, to conform the existing SMGB financial mechanism forfeiture process to account for those changes made by AB 1142 and SB 809.

BENEFITS

The SMGB anticipates that the proposed regulatory action will result in non-monetary benefits to public health, welfare and environmental safety by ensuring the public that the financial assurance forfeiture process provided for in regulations conforms to and is consistent with recent significant statutory changes under AB 1142 and SB 809. In addition, mine operators, lead agencies, and the Supervisor of Mine Reclamation will be adequately informed of the appeals process ensuring a level playing field and due process for all affected participants.

DETAILED STATEMENT OF SPECIFIC PURPOSE AND RATIONALE

Assembly Bill 1142 amended Public Resources Code section 2773.1(b), which provides authority to, and some of the process for, lead agencies, and the Board when acting as a lead agency, to seize financial assurance mechanisms. Amendments under AB 1142 required, among other things, a 30-day noticed public hearing. Additionally, financial capability must be measured against the cost to complete reclamation as opposed to merely commencing or starting reclamation and operators no longer have 60 days to commence reclamation following the public hearing where it has been determined that the operator has abandoned the mining operation or is financially incapable of completing reclamation in accordance with the operator's approved reclamation plan.

Following passage of AB 1142, Senate Bill 809 amended Public Resources Code section 2773.1(b) to incorporate the establishment of the DMR and the Supervisor of Mine Reclamation (Supervisor). These changes to the forfeiture process are reflected in the amendments to the procedures described in the regulations, beginning with section 3810, which are fully explained below.

Sections 3810 – 3817: The sections are amended to conform terminology by changing “financial assurances” to “financial assurance mechanism(s).” The purpose of this change is to make specific and implement newly added PRC section 2736. The change is necessary to ensure all regulatory language found in these sections of the CCR match the statutory language in PRC section 2736 added by AB 1142.

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 2770. 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 3810: The section is amended by replacing “commencing” with “completing” to conform the appeals process to the specific change to PRC section 2773.1(b)(2) which clarified that financial capability must be measured against the cost to complete reclamation as opposed to merely

commencing or starting reclamation. Finally, the section is amended to reference the forfeiture of the operator's financial assurance mechanism or bond, as opposed to referring generally to financial assurances. This is necessary because of the addition of Public Resources Code section 2736 following passage of AB 1142, which defined financial assurances as including the bonding mechanism and the financial assurance cost estimate.

Section 3811: The section describes what circumstances may trigger a hearing before the lead agency, or Board acting as a lead agency, to determine forfeiture of financial assurance mechanisms. Section 3811 is amended to add, "In addition to the lead agency, supervisor, or Board's obtaining 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," to reflect changes to PRC section 2773.1(b), clarifying that in addition to the two main circumstances that would trigger a hearing (financial incapacity and/or abandonment) specific circumstances would be grounds for conducting a forfeiture hearing. These specific circumstances include an operator's failure to provide the lead agency with a financial assurance cost estimate following the operation's annual inspection, the operator's failure to provide the financial assurance mechanism following a lead agency's approval of a financial assurance cost estimate, or that a financial assurance mechanism has lapsed.

Reference to PRC section 2773.4(e)(1) requirements replaces "within 30 days of notification by the lead agency of its approval of an adequate financial assurance amount," the term "revised" is deleted, and the phrase "as demonstrated by a currently approved financial assurance cost estimate" is added. The purpose of these changes is to make specific and implement PRC section 2773.2(e)(1). These changes are necessary to conform the hearing process to changes made to statute under AB 1142. The additional grounds for an appeal are reflected in the addition of the phrase "will lapse without adequate evidence from the operator that it can and will be replaced prior to its lapse" and the deletion of the phrase "within 30 days." The purpose of these changes is to make specific and implement the requirements of PRC section 2773.4 which requires mine operators to consistently maintain financial assurance mechanisms and to not let them lapse without an assurance by the mine operator that they would be replaced if a mechanism lapsed by its own terms. This change is necessary to ensure that there are no gaps between expired mechanisms and those established to replace them.

The term "mine's agent" is replaced with "operator's agent" to implement PRC sections 2772 and 2207 regarding the requirement that operators designate an agent for service of important papers relating to the operation. This change is necessary conform this language to statutory language. The phrase "or there is evidence that the operator has physically abandoned the mining operation" is added to subdivision (e) of this section to implement the requirements of AB 1142. The purpose of the change is to clarify that the physical abandonment of the mine site is indicative of or related to abandonment of the site based on a significant reduction of mineral production. Finally, the term "Submitting" is replaced with "Submittal", for grammatical purposes.

Section 3812: The section is amended to replace "commencing" with "completing." The purpose is to conform the regulatory process with statutory changes to PRC section 2773.1(b)(1) and (2) under AB 1142. The legislative change was to clarify that financial capability must be measured against the operator's ability to complete reclamation as opposed to commencing or starting reclamation. In addition, Section 3812 is amended to add the phrase "In cases where the Board committee conducts the hearing, and the financial assurance mechanism may lapse or expire before the full Board receives the committee's determination, the committee may take any immediate action necessary to

secure full seizure of the financial assurance mechanism(s).” The purpose is to implement PRC section 2773.1(b)(2)(B) which requires lead agencies to take appropriate action to forfeit or seize the financial assurance mechanism following the public hearing. This is necessary to clarify that when a committee of the Board conducts the forfeiture hearing as allowed under this section, that in cases where the mechanism may lapse or expire before the committee can report to the full Board, the committee can take immediate action to secure full seizure prior to the mechanism’s lapse. In cases where an operator has physically abandoned the site, time is of the essence in conducting a forfeiture hearing and seizing available mechanisms.

Section 3813: The section is amended to require the lead agency “provide at least 30-days” notice of the hearing, provide the notice “to the operator and the supervisor” and replace “accordance with the” provisions of the local ordinance with “in addition to any other” provisions of the lead agency’s local ordinances. The purpose is to make specific and implement PRC section 2773.1(b) and conform regulatory process with the statutory changes of AB 1142. The section is amended to add “from the lead agency, or the Board if the Board is the lead agency,” regarding who must send the notice of the hearing and the word “either” is added along with the phrase “or the abandonment of the surface mining operation, or both.” The purpose is to make specific and implement PRC section 2773.1(b). The changes are necessary to provide additional clarity as to what statement must be in the notice of the forfeiture hearing.

Finally, two subdivisions are added as follows: “(d) If the surface mining operation is located wholly or partly on federal land, at least 30-days’ notice shall also be given to the federal land management entity that has jurisdiction over the surface mining operation.” “(e) A 30-day notice shall also be given to any other state or federal governmental entity that holds a bond or other financial assurance guarantee related to the reclamation or remediation of any aspect of the surface mining operation.” The purpose of the change is to make specific and implement PRC sections 2773.1(a)(5) and (b). The change is necessary to include the relevant federal agencies that have jurisdiction over the mining operation because any number of federal agencies may an interested party and interested in coordinating reclamation and be additional beneficiaries on the financial assurance mechanisms that may be seized.

Section 3814: The section is amended to delete the phrase “name and address” of the operator as well as to delete the “name and address of any person designated by the operator as an agent for the service of process,” and instead insert the requirement that the administrative record would include the “annual reports for the three years immediately preceding the date of the hearing.” The purpose of the change is to make specific and implement PRC section 2773.1(b). The change is necessary to capture information relating to the operator’s current address and the operator’s designated agent for service of process. Annual reports required under PRC section 2207 include both the operator’s current addresses but also the operator’s designated agent for service of process. Relying upon the immediate three years of annual reports provides the lead agency with sufficient information as to the operator’s mailing address as well as the agent’s address and the operator’s intentions regarding the nature and status of the mining operation.

The section is amended by deleting the reference to a “detailed cost estimate provided by the operator...” “prepared by a qualified individual, such as a licensed grading contractor, licensed civil engineer, or a licensed geologist, who must be licensed in the state of California, and prepared not more than six months from the last annual inspection of the mined conducted by the lead agency.” The purpose of the change is to make specific and implement PRC section 2773.1 and to account for changes under AB 1142 which amended the time within which operators are required to submit for

review and approval, a financial assurance cost estimate. Under amendments to PRC section 2773.4(d)(1)(A) under AB 1142, operators are now required to submit a financial assurance cost estimate within 30 of annual inspection. It is anticipated that any assessment of the financial cost to reclaim an operation would be captured on an ongoing basis. It is not anticipated that an operator who has abandoned the operation or is experiencing financial stress, would be able to prepare an additional financial assurance cost estimate in light of the noticed hearing to assess financial capacity or abandonment. The change is necessary to clarify the inclusion of the most recently approved financial assurance cost estimate as part of the administrative record.

The additional inclusion into the administrative record of a catch-all provision for any other reports, analysis, documents and testimony from any governmental entity having jurisdiction over the mining operation is now included by the addition of subdivision (f) by adding “Any other report(s), analysis, testimony or documents from any local, state or federal agency having jurisdiction over the mining operation that contain relevant evidence relating to; the cost to complete reclamation in accordance with the operation’s approved reclamation plan; the operator’s financial capacity to complete reclamation in accordance with the operation’s approved reclamation plan; or, the abandonment of the surface mining operation.” The purpose of the change is to make specific and implement PRC sections 2773.1(b) which anticipates that to conduct a full and complete evidentiary hearing before seizing the financial assurance mechanism, any relevant report from relevant and appropriate governmental agencies is necessary.

Section 3815: The section is amended to add additional criteria for determining financial capacity and includes the following: “The operator is incapable of providing or fails to provide sufficient evidence of financial capability such that in light of all the evidence, it appears more likely than not that the operator cannot fully complete reclamation in accordance with the operator’s approved reclamation plan.” The purpose of the change is to make specific and implement PRC sections 2773.1(b). The change is necessary to clarify that the operator has the burden to provide relevant evidence regarding financial capacities and that the burden of proof is a preponderance of the evidence.

The section is also amended to add the phrase, “or there is sufficient evidence that the operator has physically abandoned the mining operation.” The purpose of the change is to make specific and implement PRC section 2773.1(b). This is necessary to clarify that in addition to an operation becoming abandoned under PRC section 2770(h)(6), which concerns the operation’s annual mineral production dropping below a specified range without the operator obtaining an approved interim management plan, actual physical abandonment is anticipated as grounds for seizing the operator’s financial assurance mechanism.

Section 3816: The section is amended to adjust the sequence of the appearance of each potential party to the forfeiture hearing. The phrases “Statements on behalf of the supervisor,” “Statements on behalf of any other state or federal governmental entity holding an interest in a financial guarantee related to the mining operation,” “Rebuttal on behalf of the supervisor,” and “Rebuttal on behalf of any other state or federal governmental entity holding an interest in a financial guarantee related to the mining operation” are added. The purpose of the change is to make specific and implement PRC section 2773.1(b) which requires a full and complete noticed hearing that includes all relevant parties that exercise jurisdiction over the mining operation.

Finally, the section is amended to increase the amount of time in advance of the hearing that a party or other participant must provide written statements to the SMGB from five to ten days in lieu of oral appearances.

Section 3817 is amended to replace “commencing” with “completing” to conform to the changes to section 3810 for the same reasons discussed above. In addition, the section is amended with the following additional notification requirement by adding: “The lead agency, or the supervisor in cases where the Board is the lead agency, shall notify any other state or federal governmental entity holding an interest in a financial guarantee related to the mining operation within 10 days of the date of determination of its intent to take appropriate actions to cause forfeiture of the operator’s financial assurances. Notification may be made by personal service or certified mail.” The purpose of the change is to make specific and implement PRC section 2773.1(a)(5). The change is necessary because other state and federal agencies that have jurisdiction over mining operations subject to financial assurance mechanism forfeiture are interested parties in cases where an operator may be financially incapable of reclaiming the operation or where the operator has abandoned the operation.

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 rule making 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

Public Resources Code section 2770(a) provides that a person shall not conduct surface mining operations unless a permit is obtained from, a reclamation plan has been submitted to and approved by, and financial assurances for reclamation have been approved by the lead agency for the operations. Pursuant to changes made under AB 1142, PRC section 2736 was added to define financial assurances as being the combination of a financial assurance cost estimate and an appropriate financial assurance mechanism. Pursuant to PRC section 2773.1, financial assurances are reviewed and approved each year to account for “new lands disturbed by surface mining operations, inflation, and reclamation of lands accomplished in accordance with the approved reclamation plan.”

Pursuant to PRC section 2773.1(b) financial assurance mechanisms are subject to seizure by the lead agency or the state through the Division of Mine Reclamation. Existing CCR sections 3810 – 3817 govern procedures for lead agencies or the DMR to seek forfeiture under certain specified conditions. The SMGB notes that the proposed regulatory action follows specific changes made by the Legislature, to Public Resources Code sections 2773.1(b) and 2736, regarding the public hearing process which is designed to provide due process for operators prior to seizing financial assurance mechanisms as discussed above. The proposed regulatory action does not establish substantially new or additional requirements regarding an operator’s burden of demonstrating they have the financial capacity to reclaim the operation or that they have not abandoned the operation. Additional

notification requirements to other state and federal agencies having jurisdiction over the operation have been added to ensure that all interested parties are invited to attend any scheduled hearing under PRC section 2773.1(b). 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 lead agencies or the state can quickly assess the financial health of mining operations or the intentions of the operators regarding ongoing mining operations. Under appropriate conditions, and only after operators are provided due process, lead agencies or the state may then seize the operator's financial assurance mechanisms and proceed to reclaim the operation in the absence of the operator, in accordance with the operations' approved reclamation plan. In addition, mine operators, lead agencies, the public, and the Supervisor of Mine Reclamation will be adequately informed of the financial mechanism forfeiture process ensuring a level playing field and due process for all affected participants.

The proposed regulatory action harmonizes certain provisions of AB 1142 and SB 809. Furthermore, the proposed regulatory action will meet the statutory goals of AB 1142 to improve how the SMGB, DMR, and local lead agencies oversee and implement SMARA, specifically regarding completion of reclamation of mined lands where the operator fails to complete reclamation as required by SMARA.

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

SMARA requires that a person shall not conduct surface mining operations unless a permit is obtained from, a reclamation plan has been submitted to and approved by, and financial assurances for reclamation have been approved by the lead agency for the operations. In addition, PRC section 2773.1 requires operators to post adequate financial assurance mechanisms to guarantee that lead agencies or the state will have sufficient funds to conduct and complete reclamation when operators fail to comply with statutory obligations.

The forfeiture hearing process outlined in this regulatory action is designed to provide operators with due process prior to forfeiting financial assurance mechanisms and notify other state and federal agencies having jurisdiction over the mining operation. The proposed regulatory action conforms terminology to changes enacted under AB 1142 and SB 809 and provides specific procedures for operators, DMR, the SMGB, and the lead agency to follow throughout the forfeiture process. No substantial changes are necessary to conform the specific forfeiture processes to the existing forfeiture process, which has been in effect since 2002. 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.