



# STATE MINING AND GEOLOGY BOARD

DEPARTMENT OF CONSERVATION

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## INITIAL STATEMENT OF REASONS

### PROPOSED AMENDED REGULATIONS

### DEPARTMENT OF CONSERVATION STATE MINING AND GEOLOGY BOARD

#### TITLE 14. NATURAL RESOURCES Division 2. Department of Conservation Chapter 8. Mining and Geology Subchapter 1. State Mining and Geology Board Article 11. Financial Assurance Mechanisms

### INTRODUCTION

As required by Section 11346.2(b) of the Government Code, the State Mining and Geology Board (SMGB) sets forth below the reasons for the adoption of a Financial Assurance Cost Estimate form. The SMGB proposes to add section 3805.1 to the California Code of Regulations, Title 14, Division 2, Chapter 8, Subchapter 1, Article 11. This change to the regulation is necessary to implement Assembly Bill 1142, Section 8, and specifically, Public Resources Code section 2773.1 (a)(4).

Public Resources Code (PRC) section 2773.1 was amended by Assembly Bill 1142 (Gray), and such amendment was signed into law by Governor Brown on April 18, 2016, with an effective date of January 1, 2017. PRC Section 2773.1(a)(4) states the following:

*“Financial assurance cost estimates shall be submitted to the lead agency for review on a form developed by the director and approved by the board. The form shall be subject to the requirements of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).”*

Under California’s Surface Mining and Reclamation Act, (Public Resources Code § 2710 et seq., hereinafter, “SMARA”), before a surface mining operation can begin mining, it must obtain local

governments' (lead agency) approval of a permit, a reclamation plan that outlines how the disturbed mined lands will be returned to a usable condition, and financial assurances "to ensure reclamation is performed in accordance with the surface mining operations' approved reclamation plan..." (See PRC section 2773.1(a)).

Financial assurances consist of the estimated costs to reclaim the disturbed mined lands in accordance with the approved reclamation plan and an appropriate instrument or mechanism such as a surety bond, letter of credit or cash deposited in a Certificate of Deposit.

Assembly Bill 1142 and Senate Bill 209, both becoming effective January 1, 2017, propose an overall package of reform measures to SMARA. In an effort to standardize the costs estimated to conduct reclamation of mined lands, the Legislature is now requiring that all cost estimates be submitted to lead agencies using a standardized form.

Three pre-rulemaking workshops were conducted by the SMGB on September 20<sup>th</sup>, 27<sup>th</sup>, and October 4<sup>th</sup>, 2016, to receive stakeholder input on the proposed form.

## **DETAILED STATEMENT OF SPECIFIC PURPOSE AND RATIONALE**

### **§ 3805.1. Financial Assurance Cost Estimate Form**

The purpose of section 3805.1 is to establish that financial assurance cost estimates shall be submitted to lead agencies for review using form FACE-1. This is necessary to meet the statutory requirements of PRC section 2773.1(a)(4) (AB 1142), which requires the SMGB to approve a financial assurance cost estimate form for use by each surface mining operation.

PRC section 2773(a) requires that reclamation plans "...shall be applicable to a specific piece of property or properties, shall be based upon the character of the surrounding area and such characteristics of the property as type of overburden, soil stability, topography, geology, climate, stream characteristics, and principal mineral commodities, and shall establish site-specific criteria for evaluating compliance with the approved reclamation plan, including topography, revegetation and sediment, and erosion control."

Current regulations further described and require performance standards to be applied to those aspects contained within a surface mining operation's reclamation plan as required by PRC section 2773(a) (See Cal. Code Regs., tit. 14, §§ 3700 through 3713).

Form FACE-1 is designed to receive information from the preparer regarding the surface mining operation's existing condition, performance standards of the approved reclamation plan, and the methods, effort, and direct expenses anticipated to achieve the performance standards and end use of the approved reclamation plan. In addition to receiving information regarding the surface mining operation's existing reclamation requirements, form FACE-1 has incorporated requirements for estimating the labor and administrative costs that would be associated with the lead agency or Department of Conservation managing the performance of reclamation by a third party.

The following will explain the purpose, necessity, and benefit of each non-statutory requirement of the FACE-1 form:

Wage Rates used in Cost Estimate: The purpose of this item is to require that cost estimates be calculated using prevailing wage rates for labor burden associated with reclamation. This is necessary to ensure a standardized approach that the lead agency or Department have sufficient monies to allow for third party contracting consistent with California Prevailing Wage law if financial assurances are seized from the operator. This requirement will benefit the State and local lead agencies by ensuring mined lands are reclaimed in accordance with their approved reclamation plans.

Lead agency representatives present at each pre-rulemaking workshop conducted by the SMGB expressed their understanding that prevailing wage laws were applicable to financial assurance cost estimates and that prevailing wage rates provided a means to standardize the preparation of financial assurance cost estimates and provide adequate monies for reclamation.

Equipment Rates used in Cost Estimate: The purpose of this item is to require the preparer to use a lead agency accepted rate or verifiable third party estimate to determine the cost of equipment needed to perform reclamation. This is necessary to ensure that the lead agency or Department have sufficient monies to allow for third party contracting if financial assurances are seized from the operator. This requirement will benefit the State and local lead agencies by ensuring mined lands are reclaimed in accordance with their approved reclamation plans.

Equipment Production Rates used in Cost Estimate: The purpose of this item is to require the preparer to use a lead agency accepted equipment production rate or verifiable third party estimate to determine the cost to perform reclamation. This is necessary to ensure that the lead agency or Department have sufficient monies to allow for third party contracting if financial assurances are seized from the operator. This requirement will benefit the State and local lead agencies by ensuring mined lands are reclaimed in accordance with their approved reclamation plans.

Supervision: The purpose of this item is to require the preparer to include a cost for lead agency or Department supervision of a third party contractor performing reclamation of mined lands. This is necessary to ensure that the lead agency or Department have sufficient monies for reimbursement of costs for supervision if financial assurances are seized from the operator. This requirement will benefit the State and local lead agencies by ensuring mined lands are reclaimed in accordance with their approved reclamation plans.

Profit and Overhead: The purpose of this item is to require the preparer to include a cost for profit and overhead of a third party contractor performing reclamation of mined lands. This is necessary to ensure that the lead agency or Department have sufficient monies to cover profit and overhead for a third party contractor conducting reclamation if financial assurances are seized from the operator. This requirement will benefit the State and local lead agencies by ensuring mined lands are reclaimed in accordance with their approved reclamation plans.

Contingencies: The purpose of this item is to require the preparer to include a cost for contingencies related to completing reclamation of mined lands. This is necessary to ensure that the lead agency or Department have sufficient monies to complete reclamation if financial assurances are seized from the operator. This requirement will benefit the State and local lead

agencies by ensuring mined lands are reclaimed in accordance with their approved reclamation plans.

Mobilization: The purpose of this item is to require the preparer to include a cost for mobilization of equipment necessary to complete reclamation of mined lands. This is necessary to ensure that the lead agency or Department have sufficient monies to complete reclamation if financial assurances are seized from the operator. This requirement will benefit the State and local lead agencies by ensuring mined lands are reclaimed in accordance with their approved reclamation plans.

Lead Agency Administrative Costs: The purpose of this item is to require the preparer to include a cost for lead agency administrative costs related to managing third party reclamation of mined lands. This is necessary to ensure that the lead agency or Department have sufficient monies to complete reclamation if financial assurances are seized from the operator. This requirement will benefit the State and local lead agencies by ensuring mined lands are reclaimed in accordance with their approved reclamation plans.

## **CEQA COMPLIANCE**

This proposed regulation and form follow statutory changes approved by the Legislature and signed into law by the Governor (AB 1142) on April 18, 2016. The proposed regulation and form will not result in direct or indirect physical changes to the environment. As such, 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 ANALYSIS**

Currently, surface mining operators are required to prepare a Financial Assurance Cost Estimate, on an annual basis, in the format of their choice. AB 1142 amends current statute to require that surface mining operators prepare annual Financial Assurance Cost Estimates on a form approved by the SMGB. The SMGB notes that the proposed regulation and form follow specific changes made to PRC section 2773.1 by the Legislature as discussed above – and does not establish additional requirements for operators. The proposed regulation and form will not allow for the creation of new jobs or businesses, nor will it directly cause for the elimination of existing jobs or businesses. Further, because the proposed regulation and form follow approved statutory changes, it will not cause or require expansion of businesses currently doing business in California.

The proposed regulation and form satisfy the SMGB's statutory mandate to approve a standardized form, to be used by each surface mining operator for the calculation of financial assurances. Further, Department and SMGB staff have determined that the proposed regulation and form will result in nonmonetary benefits such as protection of public health and safety, environmental safety, and transparency in business and government. Specifically, the benefits are as follows:

- Financial assurance amounts for each surface mine in the state will be calculated in the same format, providing consistency for operators that



work in multiple jurisdictions, and for lead agencies reviewing financial assurance cost estimates for multiple surface mining operations.

- The format of an operation's annual estimate will remain consistent and allow for the lead agency and Department to easily compare and contrast financial assurance cost estimates as the mine is expanded or reclaimed.

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

Current law requires surface mining operators to prepare a Financial Assurance Cost Estimate, on an annual basis, in the format of their choice. AB 1142 amends current statute to require that surface mining operators prepare annual Financial Assurance Cost Estimates on a form approved by the SMGB. No additional requirements for operators are established. The SMGB concludes that the proposed regulation and form do not have a significant adverse economic impact directly affecting business as the preparation of a financial assurance cost estimate is currently a statutory requirement.

## **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 form. The text of PRC Section 2773.1(a)(4), as added, and review of the existing SMGB Financial Assurance Guidelines, and example forms, were utilized by Department staff and SMGB staff in development of the proposed addition of CCR 3805.1 and financial assurance cost estimate form. The SMGB Financial Assurance Guidelines, and example forms are available on the SMGB's web page at <http://www.conservation.ca.gov/smgb/>.

At its November 10, 2016, regular business meeting, the SMGB considered initiation of the rulemaking process for the proposed regulation and financial assurance cost estimate form. A Staff Report for this agenda item was prepared and presented to the SMGB for their consideration. The Staff Report includes attachments that contain the proposed language of CCR 3805.1 and financial assurance cost estimate form and associated instructions. The Staff Report is available on the SMGB's web page at <http://www.conservation.ca.gov/smgb/> and at the SMGB office.

## **ALTERNATIVES CONSIDERED**

In accordance with Government Code section 11346.5, subdivision (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. In addition, the SMGB must determine that no alternative would be as effective as 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.

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 the

amendment of PRC Section 2773.1(a)(4), required by Assembly Bill 1142, which takes effect on January 1, 2017.

The SMGB invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations 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**

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, and the SMGB, SMARA and its implementing regulations and federal law are coordinated to eliminate duplication.