STATE OF CALIFORNIA, NATURAL RESOURCES AGENCY — EDMUND G. BROWN JR., GOVERNOR

**STATE MINING AND GEOLOGY BOARD**

**DEPARTMENT OF CONSERVATION**

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# FINAL 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 15. Vested Rights Determinations**

### UPDATE OF INITIAL STATEMENT OF REASONS

The SMGB has chosen not to move forward with the adoption of amendments to Article 16 of the California Code of Regulations (CCR), Title 14, Division 2, Chapter 8, Subchapter 1 pertaining to Mining Ordinances. Based on public comments received at its June 8, 2017, regular business meeting and public comments received during the 45-day formal comment period, the SMGB concludes that the proposed action of amending Article 16 deserves more opportunities for public comment. The SMGB will move forward only with the adoption of amendments made to Article 15, Vested Rights Determinations, to enact the revisions to SMARA following the passage of AB 1142 (Gray).

Public comments were submitted during the formal 45-day period voicing concerns with Article 16 and a public hearing was requested. However, the commenter that requested the public hearing is in full support of the adoption of the proposed amendments to Article 15. In response to the SMGB not moving forward with the adoption of proposed amendments to Article 16, on August 8, 2017, the commenter rescinded their request for a public hearing in order to ensure timely adoption of the revisions to Article 15. This was the only public hearing request received. The cancellation of the hearing request will allow the SMGB to dedicate the proper time and resources should it choose to modify Article 16 in the future. Various components of the original Initial Statement of Reasons have been updated below for clarity, spelling and grammatical

errors, to address the adoption of Article 15 alone, and revisions to the Economic Impact Statement.

PROBLEM STATEMENT
The Legislature adopted the Surface Mining and Reclamation Act of 1975 ("SMARA," Public Resources Code (PRC), section 2710 et seq.) in order to provide a comprehensive surface mining and reclamation policy with the regulation of surface mining operations to assure that adverse environmental impacts are minimized and mined lands are reclaimed to a usable condition. On April 18, 2016, Governor Brown signed Assembly Bill (AB) 1142 (Gray) into law with an effective date of January 1, 2017, and thereby enacted significant reforms to SMARA. In order to fully enact many of the revisions to SMARA, the State Mining and Geology Board (SMGB) must address certain changes by way of regulations.

One of the many changes to SMARA under AB 1142 (Gray), was an amendment to PRC section 2774.4, subdivision (a), which now removes the SMGB's authority to conduct vested rights determinations, in addition to the SMGB's lack of authority to issue mining permits, when the SMGB acts as a lead agency. Specifically, the revised section provides: "*The board shall exercise some or all of a lead agency's powers under this chapter pursuant to subdivision (c), except for permitting authority* ***and vested rights determinations****, if the board finds…"* Emphasis added.

Prior to AB 1142 (Gray), and as determined by California's Third District Court of Appeals in Calvert v. County of Yuba, (2007) 145 Cal. App. 4th 613; 51 Cal. Rptr. 3d 797, the SMGB was deemed to have the implied authority to make vested rights determinations following assumption of a lead agency's powers under SMARA. Following the decision in Calvert, the SMGB adopted Article 15 of Title 14, Division 2, Chapter 8, Subchapter 1 of the CCR, sections 3950 – 3965 to establish due process procedures for receipt and hearing of petitions to adjudicate vested rights claims where the SMGB had assumed lead agency authority pursuant to PRC section 2774.4. In January of 2017, the SMGB submitted revisions of Article 15 to the Office of Administrative Law as a change without regulatory effect. The rationale behind the submission was that the revisions did not materially alter any requirement, right, or other regulatory element of any regulatory provision/s because the changes were based on deleting regulatory provisions for which all statutory or constitutional authority has been repealed pursuant to CCR Title 1, section 100(a)(3). The SMGB reasoned that AB 1142 (Gray) expressly repealed the statutory authority to make vested rights determinations when the SMGB acts as the lead agency.

Soon after the submission, it was withdrawn pursuant to Government Code section 11349.3(c). The SMGB determined that deletion of Article 15 alone did not provided sufficient clarity regarding the SMGB's authority to make vested rights determinations where it has assumed lead agency status. The SMGB can assume lead agency status in two different situations and Article 15 references only one. First, as addressed by the revision under AB 1142 (Gray) to PRC section 2774.4, subdivision (a), the SMGB may assume some or all of a lead agency's authority after conducting a review and hearing of a lead agency's administration of SMARA. After making certain findings related to a lead agency's administration of SMARA, the lead agency may "involuntarily" lose its status as a lead agency. The SMBG has assumed lead agency status following a review and hearing procedure, pursuant to 2774.4, subdivision (a), for two lead agencies, both county jurisdictions. The second situation where the SMGB assumes lead agency status is by "default," pursuant to PRC section 2774.5. This provisions of statute provide

that the SMGB can assume full authority for reviewing and approving reclamation plans, except for permitting, in the cases where the local lead agencies do not have a certified mining ordinance. Currently, the SMGB has assumed lead agency status by default over 8 lead agencies, all but one being a city.

As a result of the SMGB's review of these provisions, the SMGB determined that additional regulatory language is needed to clarify, interpret, and make specific that the SMGB will not make Vested Rights Determinations under any circumstances when acting as the lead agency. The SMGB proposes to amend Article 15, sections 3950 – 3965, to remove the SMGB's authority to make vested rights determinations when it acts as the lead agency pursuant to PRC sections 2774.4 or 2774.5.

BENEFITS
The proposed regulatory action will meet the statutory goals of AB 1142 (Gray) to improve how the SMGB, the Department of Conservation (Department), and local lead agencies oversee and implement SMARA. The regulations would make specific that the issuance of mining permits or the recognition of vested mining rights remains with the local land-use decision making authority regardless if the SMGB acts as the lead agency.

DETAILED STATEMENT OF SPECIFIC PURPOSE AND RATIONALE
**§3950** is amended. This subsection makes specific that under any circumstance in which the SMGB acts as a lead agency the SMGB will not conduct vested rights determinations. It clarifies that while PRC section 2774.4 (a), expressly prohibits the SMGB from conducting vested rights determinations when it assumes lead agency status involuntarily, the SMGB will also not conduct vested rights determinations where it assumes lead agency status by default pursuant to PRC section 2774.5.

**§3951- 3965** are removed. These sections are necessary for removal completely because they provide procedural requirements for the SMGB to make a vested right determination. The amendment to section 3950 provides the SMGB will no longer conduct vested rights determinations in jurisdictions where the SMGB is the lead agency pursuant to either PRC sections 2774.4 or 2774.5.

STATEMENT OF NECESSITY
Revisions to PRC section 2774.4 (a), caused by AB 1142 (Gray), remove statutory authority from the SMGB for making vested rights determinations. These regulations are needed to keep consistent with the Legislature's intent that vested right determinations should be made at the local level, just as decisions to issue permits to operate a mining operation.

ECONOMIC IMPACT ASSESSMENT
The proposed amended regulations do not create any new regulatory requirements nor does it modify any existing regulatory programs. The proposed amended regulations merely shift the forum for holding vested rights determination hearings back to local governments (lead agencies) in those jurisdictions where the SMGB has assumed a lead agency's authorities related to administering SMARA pursuant to PRC section 2774.5. Additionally, there are no vested right determination petitions currently pending before the SMGB that would be

transferred to a local lead agency. The regulations should therefore have no initial or ongoing annual costs for small businesses, typical businesses, and individuals.

In its history, the SMGB has only made two vested right determinations when acting as the SMARA lead agency and can only make reference to the costs it imposed in each of those two cases. In 2008, The SMGB established petition and hearing process regulations that included hearing costs to be paid by any petitioner claiming a vested right. Prior to the establishment of the regulation outlining costs, the SMGB had never conducted a vested rights determination so the calculation of the cost was designed to be a site-specific estimate, not based on past hearing experience.

The regulation called for two costs associated with a vested rights hearing conducted by the SMGB. The first cost was an initial processing fee of $5,000 in response to the Request for Determination. This was necessary as compensation for the initial processing and review, confirmation that the request is within the SMGB's jurisdiction, and notification to the operator or the operator's representative that the request has been denied or accepted.

The second cost was a fee for conducting the actual vested right determination in its entirety. This fee was established on a case-by-case basis, depending on the size and scope of the proceeding, as identified from the information required in the Request for Determination. It included estimated labor costs for actual review of the administrative record, determination of findings of facts derived from review of the administrative record, public notification and conduct of public hearings, review and analysis of additional documents submitted during the course of the public hearing(s), and a determination by the SMGB. It also included a cost if the SMGB employed an administrative hearing officer, special master, or committee of board members. This fee was to be paid to the SMGB before it released a vested right determination. Both costs imposed on the petitioner as fees were onetime, not ongoing.

The total costs for each of the two vested right determinations made by the SMGB varied significantly as they were different in scope and nature. At its March 11, 2010, regular business meeting, the SMGB adopted its final decision on vested rights pertaining to the Western Aggregates, LLC surface mining operation located in Yuba County. The total estimated onetime cost for conducting this vested right determination was $140,466. This included the initial $5,000 processing fee and the estimated second determination fee broken down as follows: 1) $96,977 for California Geological Survey staff review of the administrative record, determination of findings, and presentation of such findings to the SMGB, 2) $33,617 for SMGB's legal counsel, and 3) $10,162 for SMGB member travel and SMGB staff time.

At its June 10, 2010, regular business meeting, the SMGB adopted its final decision on vested rights pertaining to the Big Cut Mine surface mining operation located in El Dorado County. The total estimated onetime cost for conducting this vested right determination was $16,000. This included the initial $5,000 processing fee and the estimated second determination fee broken down as follows: 1) $3,000 for SMGB staff time for review of the administrative record, determination of findings, and presentation of such findings to the SMGB, 2) $4,000 for SMGB's legal counsel, and 3) $4000 for Direct costs (copying, SMGB member and SMGB staff travel, etc.).

Out of the two vested right determinations mentioned above, the SMGB would consider the Big Cut Mine's determination and associated costs as a more typical vested rights determination a local lead agency might conduct as a result of the regulation. The SMGB would consider the Western Aggregates, LLC determination and associated costs as relatively high because of the significantly large administrative record associated with the claim as a result of California's Third District Court of Appeals decision in Calvert v. County of Yuba, (2007) 145 Cal. App. 4th 613; 51 Cal. Rptr. 3d 797.

A claimant of vested mining rights must petition their local governments, and not the SMGB, to establish the nature and scope of their claimed vested mining right through a public hearing as determined by the decision of California's Third District Court of Appeals in Calvert v. County of Yuba, (2007) 145 Cal. App. 4th 613; 51 Cal. Rptr. 3d 797. Any costs for petitioning local governments to seek establishment of a vested right to mine is a result of the requirements of due process as determined by the Court in the Calvert decision. The proposed amended regulation does not affect, by way of increase or decrease, those anticipated costs. Additionally, PRC section 2207 (e) provides statutory authority for lead agencies, or the SMGB when acting as the lead agency, to impose a fee upon each mining operation to cover the reasonable costs of implementing SMARA. If the local lead agency chooses to impose a onetime fee upon the small business, typical business, or individual to cover the reasonable costs of implementing SMARA, specifically making the vested rights determination, it may choose to do so in the same fashion as the SMGB. The SMGB can only provide the estimated costs of fees it imposed in the two cases mentioned above as a basis for local lead agencies to impose their own fees. The fees will likely vary across local lead agencies depending on the resources available to each agency. Thus, the SMGB is unable to determine the costs a small business, typical business, or individual may incur as a result of the regulation over its lifetime.

The regulation is intended to meet the statutory goals of AB 1142 (Gray) to improve how the SMGB, the Department, and local lead agencies oversee and implement SMARA. The regulation would make specific that recognition of vested mining rights (similar in nature to the issuance of mining permits) remains with the local land-use decision making authority regardless if the SMGB acts as the SMARA lead agency. This is especially true in light of the fact that currently, vested right determinations throughout the state are overwhelmingly made at the local level. This proposed regulation would create uniformity for the mining industry and vested rights claimants no matter where that right is claimed to exist.

The SMGB anticipates that shifting the forum for conducting vested rights determinations to the local governmental agency may lower overall hearing costs. In cases where the SMGB would conduct a hearing, it must travel to the jurisdiction where the vested right is claimed. That cost would be eliminated under this proposed regulation. In addition, local lead agencies may be able to assign their own staff and employees to review, gather, and assess evidence likely to be the subject of the hearing. The SMGB has only an Executive Officer and one geologist on staff who are already operating at full capacity and would therefore be a need for the SMGB to contract out for additional expertise. Those costs would be reduced under this proposal.

Therefore, in accordance with Government Code Section 11346.3(b) the SMGB has made the following assessments regarding the proposed amended regulations:

The SMGB does not anticipate the proposed amended regulations would have an impact on the

creation of new, or the elimination of existing, jobs within California.

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

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

The SMGB anticipates non-monetary benefits from the proposed action proposed action such as the prevention of discrimination, the promotion of fairness or social equity, and the increase in openness and transparency in business and government by shifting the hearing forum to the local lead agency where the petitioner resides and has been conducting the activity for which the vested right is claimed.

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

Total statewide costs that businesses and individuals may incur to comply with the regulation are difficult to predict and quantify due to the infrequent number of anticipated petitions for determination of vested mining rights. Moreover, the proposed regulation does not affect businesses and individuals on a statewide basis. The proposed regulation only affects potential claimants of vested mining rights within 7 local lead agencies for which the SMGB has assumed SMARA lead agency status pursuant to PRC section 2774.5. Those 7 local lead agencies are cities located throughout the state: City of Richmond, City of Marina, City of Jurupa Valley, City of Desert Hot Springs, City of Palm Springs, City of San Jose, and City of Santa Paula. In the remaining SMARA lead agencies (i.e. all counties and 61 cities) a claimant of vested mining rights must petition their local governments, and not the SMGB, to establish the nature and scope of their claimed vested mining right through a public hearing as determined by the decision of California's Third District Court of Appeals in Calvert v. County of Yuba, (2007) 145 Cal. App. 4th 613; 51 Cal. Rptr. 3d 797. Any costs for petitioning local governments to seek establishment of a vested right to mine is a result of the requirements of due process as determined by the Court in the Calvert decision. The proposed amended regulation does not affect, by way of increase or decrease, those anticipated costs.

Furthermore, vested rights petitioners would likely be incurring the same costs associated with a determination of their vested rights regardless of the forum within which their public hearing would occur. Costs associated with a petition to establish a vested right to mine vary from case to case depending on a number of factors that include the nature and extent of the evidence available to the petitioner, the size and scope of the claimed vested right, the size of the jurisdiction in which the petitioner claims the vested right, and the size and density of the population surrounding the area where the vested right is claimed.

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

Without amending CCR sections 3950 – 3965, 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 newly amended PRC section 2774.4.

No alternatives have been proposed that would lessen any adverse impact on small business.

## DETERMINATION OF LOCAL MANDATE

The proposed amended regulation merely shifts the forum for holding vested rights determination hearings back to local governments (lead agencies) in those jurisdictions where the SMGB has assumed a lead agency's authorities related to administering SMARA. As determined by California's Third District Court of Appeals in Calvert v. County of Yuba, (2007) 145 Cal. App. 4th 613; 51 Cal. Rptr. 3d 797, any person seeking to establish a vested right to mine, and therefore avoid the necessity of seeking a permit from the local lead agency, must establish the nature and scope of the vested right in a public hearing before the local lead agency with notice and opportunity for public input. Any costs for persons petitioning local governments to seek establishment of a vested right to mine is a result of the requirements of due process as determined by the Court in the Calvert decision. The proposed amended regulations do not affect, by way of increase or decrease, those anticipated costs.

PRC section 2207 (e) provides statutory authority for lead agencies, or the SMGB when acting as the lead agency, to impose a fee upon each mining operation to cover the reasonable costs of implementing SMARA. Additionally, Section 14 of AB 1142 (Gray) states, "No reimbursement is required by this act pursuant to Section 6 of Article XIIB of the California Constitution because a local agency or school district has the authority to levy service charge, fees, or assessments sufficient to pay for the program or level of service mandated by this act, within the meaning of Section 17556 of the Government Code."

Therefore, the SMGB has determined that this adopted amended regulatory language does not impose a mandate on local agencies or school districts.

## STATEMENT OF ALTERNATIVES CONSIDERED

The SMGB determined that no reasonable alternative it considered or that had 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 determined that no alternative would be as effective as and less burdensome to affected private persons than the adopted regulation, 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.

## 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 to eliminate duplication.

**SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL NOTICE PERIOD OF June 23, 2017 THROUGH August 17, 2017.**

**Commenter 1 – Larry Mosler**

**Comment:** I have a small rock in Ventura county. My quarry has been operating without any interruption since 1939. In 1976 when SMARA came into effect, the original owner "Bill Schmidt" wanted Vested Rights for the quarry. The county planning director had the county District Attorney file criminal charges against Schmidt for not getting a permit that he didn't have to get. I purchased the quarry in 2005 and found the court papers that Schmidt used in his defense in court. But he was being threatened with going to jail if he didn't get the CUP. He caved in to the threat of being put in jail, so he got the CUP. I have always thought the county used extortion against Schmidt.

My question to you is, how does the state look at a situation like this? This was and still is an out right case of extortion. I would like my Vested Rights for this quarry. What do I do about it?

**Response to Comment:** This comment is "irrelevant." Pursuant to Government Code Section 11346.9 (a)(3) a comment is irrelevant if it is not specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action.

**Commenter 2 – Joe Martori, MMAC Advisor and Rand Mining District BOD, Minerals and Mining Advisory Council (MMAC).**

**Comment:** You have not coordinated with any local mining districts in California about this so we will not be able to abide by these rules if they pass. If you would like to coordinate with the mining districts in California we are happy to sit down with you.

**Response to Comment:** Rejected. The SMGB followed all notice requirements set forth in Government Code sections 11346.2, 11346.4, 11346.5, and title 1, California Code of Regulations, section 5, including the Notice of Proposed Regulatory Action (NOPRA). The NOPRA is the announcement to the SMGB's regulated public about the proposed rulemaking and is an invitation for them to participate. The MMAC did receive the NOPRA as it responded directly to it with the comments above. The MMAC provided no additional comments in regards to the proposed amended regulatory language for Articles 15 or 16.

**Commenter 3 – Adam Harper, Director of Policy Analysis, California Construction and Industrial Materials Association (CalCIMA).**

**Comment 3A**: … it looks like you already have a hearing request. Please find our comment letter on proposed article 16 amendments.

**Response to Comment 3A:** See **Response to Comment 3C.**

**Comment 3B**: CalCIMA supports the adoption of the amendments to Article 15 of the Board's regulations implementing the Surface Mining and Reclamation Act (SMARA). These amendments would make clear that the authority to make vested rights determinations always remains with the local lead agency. Those amendments are consistent with, and indeed mandated by, the recent legislative amendments to SMARA contained in AB 1142 and SB 209.

**Response to Comment 3B:** Accepted. Additionally, see **Response to Comment 3C.**

**Comment 3C**: However, CalCIMA opposes the adoption of the proposed amendments to Article 16, concerning the Board's assumption of lead agency authority. In particular, CalCIMA opposes the proposed addition of subdivision (c) of 14 C.C.R. § 4000, which reads:

(c) In any jurisdiction in which the lead agency does not have a certified mining ordinance, the board assumes full authority of all lead agency's powers under Public Resources Code Sections 2710-2796 and Public Resources Code Section 2207 for all surface mining operations until the time the board certifies a lead agency's mining ordinance.

… this provision, which is a significant expansion of the Board's lead agency authority, is contrary to SMARA's language and intent and is unnecessary. We ask that the Board decline to adopt the Article 16 amendments (proposed subdivision 4000(d) is unnecessary if subdivision (c) is not adopted), or at the very least provide additional hearings and opportunities for public comment if it continues to consider them.

**Response to Comment 3C:** Accepted and rejected. The SMGB has chosen not to move forward with the adoption of amendments to Article 16 of the California Code of Regulations (CCR), Title 14, Division 2, Chapter 8, Subchapter 1 pertaining to mining ordinances. Based on public comments received at its June 8, 2017 regular business meeting and public comments received during the 45-day formal comment period, the SMGB agrees that the proposed action of amending Article 16 deserves more opportunities for public comment and workshops. The SMGB is not addressing the merits of the comments regarding Article 16. It will move forward only with the adoption of amendments made to Article 15, Vested Rights Determinations, to enact the revisions to SMARA following the passage of AB 1142.

The SMGB contacted CalCIMA in regards to their concerns with Article 16. The SMGB agreed that modifications to this article merit significantly more opportunities for public input, and communicated that it would not move forward with adoption of proposed amendments to Article 16. Though it had concerns with Article 16 and requested a public hearing (see **Comment 3A**) in response to the proposed changes, CalCIMA is in full support of the adoption of the proposed amendments to Article 15. In response to the SMGB not moving forward with the adoption of proposed amendments to Article 16, on August 8, 2017, CalCIMA rescinded its request for a public hearing in order to ensure timely adoption of the revisions to Article 15 (See **Comment 3I**). The cancellation of the hearing request will allow the SMGB to dedicate the proper time and resources should it choose to modify Article 16 in the future.

**Comment 3D**: **I. Subdivision 4000(c) is contrary to SMARA's language and intent.**

The proposed expansion of Board authority—to automatically become the SMARA lead agency where a local lead agency does not have a certified SMARA ordinance—represents a significant expansion of State lead agency authority and is contrary to SMARA's explicit language and delegations of authority.

The requirement that local lead agencies have a SMARA ordinance stems from Public Resources Code 2774(a), which prescribes both the minimum content of such ordinances and the date by which a lead agency must adopt such an ordinance:

(a) Every lead agency shall adopt ordinances in accordance with state policy that establish procedures for the review and approval of reclamation plans and financial assurances and the issuance of a permit to conduct surface mining operations, except that any lead agency without an active surface mining operation in its jurisdiction may defer adopting an implementing ordinance until the filing of a permit application. The ordinances shall establish procedures requiring at least one public hearing and shall be periodically reviewed by the lead agency and revised, as necessary, to ensure that the ordinances continue to be in accordance with state policy.

The highlighted language is critical to recognizing when a lead agency is obligated to develop an ordinance—that is, once a mine operator files a permit application with the lead agency. Thus, while every lead agency must at some point adopt a SMARA ordinance, it is only once a permit application is filed that the obligation to do so is formally triggered. However, the Board's proposed regulation (14 C.C.R. § 4000(c)) would provide as follows:

(c) In any jurisdiction in which the lead agency does not have a certified mining ordinance, the board assumes full authority of all lead agency's powers under Public Resources Code Sections 2710-2796 and Public Resources Code Section 2207 for all surface mining operations until the time the board certifies a lead agency's mining ordinance.

If this proposed provision becomes law, the Board will automatically and immediately assume SMARA lead agency authority in all cases where the lead agency has not yet adopted a SMARA ordinance.

There are at least three problems with this proposal. First, it is contrary to the Legislature's intent and SMARA's plain language, which is to allow lead agencies to retain SMARA authority without adopting a SMARA ordinance until they receive a permit application. Indeed, subdivision 4000(c) would provide lead agencies that currently lack a certified SMARA ordinance no window in which to adopt one before the Board assumes full authority. Consistent with California's Home Rule philosophy, SMARA plainly was designed to give local lead agencies most of the authority and obligations associated with regulating surface mining operations in the State.

Second, by assuming full authority under subdivision 4000(c), the Board would assume not only the authority but also the legal and fiscal obligations and liabilities of a lead agency. The Board would need to defend its assumption of lead agency authority as well as its

possible contravention of local land use authority. Such legal exposure is unnecessary given the availability of more targeted and appropriate enforcement mechanisms (see below).[1] In addition, the fiscal burdens associated with automatically assuming lead agency authority could be significant. And, with all due respect to the Board, we question whether the Board could, as a practical matter, effectively meet the obligations of multiple lead agencies if subdivision 4000(c) became law.

[1] The Article 16 amendments also could expose the Board to additional writ of mandamus actions. *See* Pub. Res. Code § 2716(a) (authorizing "any person" to bring a writ of mandamus "to compel the board, the State Geologist, or the director to carry out any duty imposed upon them pursuant to this chapter.").

Third, and perhaps most troubling, subdivision 4000(c) is not authorized by SMARA. Public Resources Code 2774.5 provides:

(a) If, upon review of an ordinance, the board finds that it is not in accordance with state policy, the board shall communicate the ordinance's deficiencies in writing to the lead agency. Upon receipt of the written communication, the lead agency shall have 90 days to submit a revised ordinance to the board for certification as being in accordance with state policy. The board shall review the lead agency's revised ordinance for certification within 60 days of its receipt. If the lead agency does not submit a revised ordinance within 90 days, the board shall assume full authority for reviewing and approving reclamation plans submitted to the lead agency until the time the lead agency's ordinances are revised in accordance with state policy.

(b) If, upon review of a lead agency's revised ordinance, the board finds the ordinance is still not in accordance with state policy, the board shall again communicate the ordinance's deficiencies in writing to the lead agency. The lead agency shall have a second 90-day period in which to revise the ordinance and submit it to the board for review. If the board again finds that the revised ordinance is not in accordance with state policy or if no revision is submitted, the board shall assume full authority for reviewing and approving reclamation plans submitted to the lead agency until the time the lead agency's ordinances are revised in accordance with state policy.

(c) In any jurisdiction in which the lead agency does not have a certified ordinance, no person shall initiate a surface mining operation unless a reclamation plan has been submitted to, and approved by, the board. Any reclamation plan, approved by a lead agency under the lead agency's ordinance which was not in accordance with state policy at the time of approval, shall be subject to amendment by the board or under the ordinance certified by the board as being in accordance with state policy.

(d) Reclamation plans approved by the board pursuant to this section shall not be subject to modification by the lead agency at a future date but may be amended by the board. Reclamation plans approved by the board shall be remanded to the lead agency upon certification of the lead agency's ordinance, and the lead agency shall approve the reclamation plan as approved by the board, except that a subsequent amendment as may be agreed upon between the operator and the lead agency may be made according to this chapter. No additional public hearing shall be required prior to the lead agency's

approval. Nothing in this section shall be construed as authorizing the board to issue a permit for the conduct of mining operations.

Under these provisions, the penalty for a lead agency not having a certified SMARA ordinance is that the Board *assumes the authority to approve reclamation plans submitted to the lead agency*. This provision does not contemplate or authorize the Board's full assumption of all lead agency authority in the absence of a certified ordinance.

Notwithstanding these clear limits, the Board has suggested that Public Resources Code 2728 justifies subdivision 4000(c). Section 2728 provides:

> "Lead agency" means the city, county, San Francisco Bay Conservation and Development Commission, or the board which has the principal responsibility for approving a reclamation plan pursuant to this chapter.

However, this provision only reiterates that the Board, acting as a "lead agency," has only the authority to approve reclamation plans; it does not expand (or purport to expand) the circumstances under which the Board may assume lead agency authority or the powers it acquires when doing so.

**Response to Comment 3D:** See **Response to Comment 3C.**

**Comment 3E**: **II. Subdivision 4000(c) is unnecessary.**

Based on the Board's Initial Statement of Reasons[2] and the comments of its counsel at the associated hearing, we understand that the Board believes subdivision 4000(c) is needed for two reasons: (1) to regulate unlawful surface mining operations, and (2) to reflect the current powers of lead agencies under SMARA. We respectfully disagree.

**A. Subdivision 4000(c) is not needed to address unlawful surface mining operations.**

[2] Available at http://www.conservation.ca.gov/smgb/Pages/SMARAReform/index.aspx.

The Board's first justification for subdivision 4000(c) is that it is needed to resolve disagreements or disputes between the Department of Conservation (DOC) and local governments about whether a particular activity is surface mining requiring approval under SMARA. See SMGB, Initial Statement of Reasons, at 4. This problem can arise where, for example, the Board believes that a local government has approved a surface mining operation under a local grading or land use ordinance without a SMARA permit or reclamation plan. However, SMARA already provides DOC sufficient, timely enforcement authority to address this and similar situations, and does not justify the Board assuming a lead agency's full authority in the absence of a certified SMARA ordinance.

A lawful mining surface mining operation requires a use permit or a vested right; an approved reclamation plan; and approved financial assurances. SMARA enables DOC to decline to approve reclamation plans absent a legal entitlement to operate (see, e.g., recent cases in El Dorado County), or to directly amend a non-compliant reclamation plan (see

Public Resources Code § 2774.5(c)). Moreover, where a permit, reclamation plan, or financial assurances are not approved or even filed, Section 2774.1 provides for the issuance of a notice of violation and then, following failure to comply with the notice, an order to cease and desist. The goal of this procedure is to move the operator from a notice of violation to the approval, by the lead agency, of the necessary entitlements, plans, and financial assurances on a specified timeline.

Specifically, Section 2774.1(g) provides:

> (g) (1) The lead agency has primary responsibility for enforcing this chapter and Section 2207. In cases where the board is not the lead agency pursuant to Section 2774.4, enforcement actions may be initiated by the director pursuant to this section only after the violation has come to the attention of the director and either of the following occurs:
>
> (A) The lead agency has been notified by the director in writing of the violation for at least 30 days, and has not taken appropriate enforcement action, which may include failing to issue an order to comply within a reasonable time after issuing a notice of violation.
>
> (B) The director determines that there is a violation that amounts to an imminent and substantial endangerment to the public health or safety, or to the environment.
>
> (2) The director shall comply with this section in initiating enforcement actions.

As these provisions make clear, as soon as the DOC Director believes an illegal mining operation is underway, he or she has the authority to direct the lead agency to take enforcement action against such mine. If the lead agency fails to do so, the Director may issue his or her own notice of violation. See also Public Resources Code 2774.1(a) (providing procedures for Director enforcement action). If the operator still does not comply, the Director may order the operator to comply with SMARA or, where the operator lacks an approved reclamation plan or financial assurances, may order the operator to "cease all further surface mining activities." Pub. Res. Code § 2774.1(a)(3)(A).[3] And if enforcement problems persist with a particular lead agency, the
Board may assume lead agency authority for the reasons, and pursuant to the procedures, set forth in Section 2774.4.

[3] The Director may also skip these enforcement procedures and seek assistance directly from the Attorney General. Id. § 2774(e) ("If the lead agency or the director determines that the surface mine is not in compliance with this chapter, so that the surface mine presents an imminent and substantial endangerment to the public health or the environment, the lead agency or the Attorney General, on behalf of the director, may seek an order from a court of competent jurisdiction enjoining that operation.").

In short, under Public Resources Code 2774.1, DOC, and by extension the Board, already has all the authority it needs to address a surface mine operating without an approved permit, reclamation plan, and/or financial assurances. Indeed, DOC may issue a cease and desist order against an illegal mining operation within 60 days of learning about it. However, as the Legislature and SMARA intends, such enforcement action first requires DOC to push the lead agency to take enforcement actions. There simply is no need for subdivision 4000(c) or any other proposal under which the Board automatically assumes full lead

agency authority in the absence of a certified SMARA ordinance, and existing provisions of law appropriately emphasize the primacy of local lead agencies.

**B. No update is needed or justified under SMARA.**

The Board's second concern, as we understand it, is that the Legislature adopted Section 2774 of SMARA more than thirty years ago, in 1986, and has not modified the law to reflect lead agencies' current practices and obligations. That is, the Board believes that a lead agency's authority includes not just the authority to approve reclamation plans, but also to conduct inspections, approve financial assurances, and so on. In the Board's view, the Board's regulations should be amended to explicitly confer upon the Board all of these powers when it assumes lead agency authority.

The problem with this argument is the one discussed above—it is inconsistent with the plain text of SMARA. In the absence of a certified ordinance, Section 2774.5 provides the Board the authority to review and approve reclamation plans, nothing more. The narrow scope of the Board's authority is not accidental. Periodic inspections of mines have been required of lead agencies, and of their SMARA ordinances, since SMARA was first enacted. For example, SB 756 (Nejeldy 1976) (attached), provided that:

> Every lead agency shall adopt ordinances establishing procedures for the review and approval of reclamation plans and the issuance of a permit to conduct surface mining operations. Such procedures shall require at least one public hearing and periodic inspections of surface mining operations, and may include provisions for liens, surety bonds, or other security to guarantee reclamation in accordance with the reclamation plan. Such ordinances shall be continuously reviewed and revised, as necessary, in order to ensure such ordinances are in accordance with state policy ….

Thus, when the Legislature amended Section 2774.5 in 1987 (see AB 747 (Sher 1987)), the Legislature was already aware of the many powers exercised by local lead agencies. Nonetheless, the Legislature chose to transfer to the Board only the authority to review and approve reclamation plans in cases where a lead agency failed to adopt a SMARA ordinance. Indeed, this choice likely was the result of, or at least occurred in tandem with, the Legislature's decision to lessen the requirements for SMARA ordinances (by, for example, deleting any reference to inspections).

For these reasons, we submit that both SMARA's text and legislative history undermine the idea that roles or powers beyond reclamation plan approval were expected of or granted to the Board where a local lead agency does not adopt a certified SMARA ordinance. The Board has included no analysis or information in the Initial Statement of Reasons or related documents that suggests otherwise.

**Response to Comment 3E:** See **Response to Comment 3C.**

**Comment 3F: III. Conclusion and recommendations**

We submit that, under SMARA, the local lead agency is the entity with the principal

responsibility for approving a reclamation plan, until such time as an operator has submitted a use permit to the lead agency for approval, and until the lead agency has had a reasonable period of time to adopt a certified SMARA ordinance. Subdivision 4000(c), by automatically transferring lead agency authority to the Board where such an ordinance is lacking, upends this careful division of authority between local lead agencies and the State.

Our opposition to the proposed Article 16 amendments does not mean that CalCIMA fails to recognize that there is room for more clarity in the relationship between local lead agencies and the State. However, as they are currently written, we believe the specific proposals the Board is considering are not authorized by SMARA, create significant legal and fiscal risks for the Board, and are unnecessary.

Amending Article 16 is a complex regulatory undertaking with many risks and considerations. Unlike the Article 15 amendments, the proposed amendments to Article 16 are not the pro forma implementation of the reforms in AB 1142 and SB 209. If the Board continues to pursue the Article 16 amendments, the Board should create a separate process with additional opportunities for public involvement and comment.

**Response to Comment 3F:** See **Response to Comment 3C.**

**Comment 3G: Adopt the proposed amendments to Article 15.** This is a simple pro forma incorporation of the AB 1142/SB 209 SMARA reforms.

**Response to Comment 3G:** Accepted. Additionally, see **Response to Comment 3C.**

**Comment 3H: Reject the proposed amendments (and indeed any modification) to Article 16.** Should the Board wish to adopt modifications to Article 16, the Board should conduct a separate regulatory process with public workshops and opportunities for further public comment.

**Response to Comment 3H:** Accepted. Additionally, see **Response to Comment 3C.**

**Comment 3I: Cancellation of request for hearing on Article 15 and 16**
We appreciate the consideration of our comments on article 16 and cancel our request for a hearing on Article 15 as a result of 16 not moving forward at this time.

Ensuring the timely adoption of article 15 as written is important and supported by CalCIMA.

**Response to Comment 3I:** Accepted. Additionally, see **Response to Comment 3C.**

**Commenter 4 – Mary Pitto, Regulatory Affairs Advocate, Rural County Representatives of California (RCRC).**

**Comment 4A:** Thank you for the opportunity to comment on the proposed regulatory language on vested rights determinations and mining ordinances. The Rural County

Representatives of California (RCRC) understands that the Board no longer intends to pursue amendments to Article 16 in this Vested Rights rulemaking package; however, we are submitting the following comments for the benefit of the Board's consideration should similar proposals be advanced at any time in the future

**Response to Comment 4A:** Accepted. Additionally, see **Response to Comment 3C.**

**Comment 4B:** RCRC concurs and supports the revisions proposed for Article 15, Vested Rights Determination, with the amendment to Section 3950 and the repeal of Sections 3951- 3965.

**Response to Comment 4B:** Accepted. Additionally, see **Response to Comment 3C.**

**Comment 4C:** RCRC believes that the proposed revisions to Article 16, Mining Ordinances, grants authority to the Board not authorized by statute and circumvents the existing notice and hearing requirements for the Board to assume full authority as the lead agency. We understand that the Board no longer intends to pursue amendments to Article 16 in this Vested Rights rulemaking package; however, we are submitting the following comments for the benefit of the Board's consideration should similar proposals be advanced at any time in the future.

**Response to Comment 4C:** See **Response to Comment 3C.**

**Comment 4D:** The proposed language in Section 4000(c) would grant full authority of all lead agency's powers under Public Resources Code (PRC) 2710-2796 when the Board finds that a lead agency's ordinance is not in accordance with state policy. Yet, PRC Section 2774.5 states that the Board shall assume full authority for reviewing and approving reclamation plans submitted to the lead agency, not full authority for all lead agency powers.

**Response to Comment 4D:** See **Response to Comment 3C.**

**Comment 4E**: The proposed language in Section 4000(c) appears to circumvent the notice and public hearing requirements applicable in all other circumstances where the Board proposed to exercise some or all of a lead agency's powers. Those provisions (i.e., PRC 277474(c)) serve the important function of providing "due process" and opportunity for input by the lead agency, affected mining operators, and the general public, which is equally valuable here.

**Response to Comment 4E:** See **Response to Comment 3C.**

**Comment 4F**: At the June 8, 2017 Board meeting, some Board Members inquired about the prospect of incorporating notice and hearing requirements, similar to those set forth in PRC 2774.4 into proposed Section 4000. The attached suggested amendments would achieve this objective.

Contents of attached document:

**§ 4000. Certification and Recertification of Mining Ordinances**

(a) Upon adoption of a new mining ordinance, or amendment of an existing mining ordinance, a lead agency shall, within 30 days of such action, provide written notice of the complete text of the resulting mining ordinance to the State Mining and Geology Board, to enable the Board to review the ordinance in accordance with Public Resources Code Sections 2774.3, 2774.5(a) and 2774.5(b).

(b) The Board may determine that a lead agency does not have a certified ordinance, as set forth in PRC Section 2774.3, in any of the following circumstances:

(1) Where the lead agency has failed to adopt an ordinance when required by PRC Section 2774(a);

(2) Where a lead agency has not provided the Board with timely notice of the complete text of its mining ordinance, consistent with subparagraph (a) herein; or

(3) Where the Board finds that the lead agency's ordinance is not in accordance with state policy pursuant to the process set forth in subdivisions (a) and (b) of PRC Section 2774.5.

~~, the mining ordinance shall not be considered to be in accordance with state policy until the mining ordinance is certified by the Board as being in accordance with state policy.~~

(c) (1) In any jurisdiction in which the lead agency does not have a certified ordinance, as set forth in subparagraph (b) herein, the board shall undertake proceedings to assume full authority for reviewing and approving reclamation plans in accordance with this subdivision.

(2) Proceedings under this subdivision may be commenced upon completion of the applicable review and revision periods set forth in PRC 2774.5(a) and (b), or at any time if the lead agency has failed to adopt an ordinance when required by PRC Section 2774(a).

(3) The board shall hold a public hearing within the lead agency's area of jurisdiction, upon a 45-day written notice given to the public in at least one newspaper of general circulation within the city or county and directly mailed to the lead agency and to all operators within the lead agency's jurisdiction who have submitted reports as required by Section 2207.

(4) At the hearing, the board shall determine if the lead agency has adopted an ordinance in accordance with state policy. If the board finds that the lead agency has not adopted an ordinance in accordance with state policy, the Board shall assume full authority for reviewing and approving reclamation plans submitted to the lead agency until the time the lead agency's ordinances are revised in accordance with state policy.

(5) Affected operators and interested persons have the right at the public hearing to present oral and written evidence on the matter being considered. At the public hearing, the board may place reasonable limits on the right of affected operators and interested persons to question and solicit testimony.

(6) (A) If the board decides to take action pursuant to this subdivision and assume full authority for reviewing and approving reclamation plans, the board, based on the record of the public hearing, shall adopt written findings that explain all of the following:

(i) The action to be taken by the board.

(ii) Why the board decided to take the action.

(iii) Why the action is authorized by and meets the requirements of this section and PRC 2774, 2774.5 and 2774.5, as applicable.

(B) In addition, the board's findings shall address the significant issues raised, or written evidence presented, by affected operators, interested persons, the lead agency, or the department. The transcript of testimony and exhibits, together with all papers and requests filed in the proceedings, shall constitute the exclusive record for decision by the board.

(7) The lead agency, any affected operator, or any interested person who has presented oral or written evidence at the public hearing before the board pursuant to subdivision (c)(5) may obtain review of the board's action taken pursuant to this subdivision by filing in the superior court a petition for writ of mandate within 30 days following the issuance of the board's decision. Section 1094.5 of the Code of Civil Procedure governs judicial proceedings pursuant to this subdivision.

~~assumes full authority of all lead agency's powers under Public Resources Code Sections 2710- 2796 and Public Resources Code Section 2207 for all surface mining operations until the time the board certifies a lead agency's mining ordinance.~~

(d) Nothing in this section shall be construed as authorizing the board to issue a permit for the conduct of mining operations or issue vested rights determinations.

(ed) ~~Notwithstanding subsection (c) of this Article, l~~Lead agencies with previously certified mining ordinances retain ~~lead agency authority~~ authority for reviewing and approving reclamation plans until completion of proceedings in accordance with subdivision (c).

**Response to Comment 4F:** See **Response to Comment 3C.**