



STATE MINING AND GEOLOGY BOARD

EXECUTIVE OFFICER'S REPORT



For Meeting Date: September 13, 2007

Agenda Item No. 6: Receipt, Consideration, and Possible Acceptance of the State Mining and Geology Board's Administrative Procedures in Conducting Vested Rights Determination Hearings as a Lead Agency under the Surface Mining and Reclamation Act of 1975 for Possible Circulation and Future Adoption.

BACKGROUND: The State Mining and Geology Board (SMGB) serves as a Lead Agency in the implementation of the Surface Mining and Reclamation Act of 1975 (SMARA) in Yuba County. In a recent ruling, the California Court of Appeal, Third Appellate District, held that a proper notice and hearing was required for any vested rights determination, and suggested that when the SMGB is acting as the SMARA Lead Agency, the SMGB has the responsibility to conduct the public hearing and make the vested rights determination. At its February 8, 2007 regular business meeting, the SMGB recognized its authority to conduct vested rights determinations (Resolution 2007-04), when serving as a Lead Agency under SMARA. At that same meeting, Mr. Kerry Shapiro, attorney with Jeffer Mangels Butler & Marmaro, LLP. (JMBM), and legal counsel for Western Aggregates, LLC. (Western), forwarded to the SMGB a Notice of Intent to seek confirmation of their vested rights for their Yuba Goldfields operations. At the April 12, 2007, Policy and Legislation Committee meeting, the preliminary draft of the proposed administrative process for conducting a vested rights determination was distributed for review and comment from Committee Members, stakeholders, and other interested parties. Since April 2007 the preliminary draft has been modified to reflect consideration of SMGB discussion and comments received from interested parties.

BACKGROUND:

The Yuba Goldfields: Western Aggregates surface mining operation is situated in what is referred to as the Yuba Goldfields. The Yuba Goldfields occur along about 11 miles of the Yuba River between Yuba City-Marysville and Smartsville. The Goldfields are dominated by dredger tailings reworked from hydraulic mine waste that was deposited between 1852 and 1893 when the Caminetti Act was passed, ending hydraulic mining upstream. The Yuba Goldfields were the poster child of the agricultural lobby who brought the historic suit to put an end to hydraulic mining. This may have been the first significant victory of the environmental community in California. The construction of Englebright Dam in 1941 finally stopped the downstream migration of the old hydraulic tailings. Dredging of gold from the hydraulic waste began in 1902 near the town of Hammonton and by 1910, 15 dredges were operating in the lower Yuba River. The area has been dredged and re-dredged intermittently to progressively greater depths until the present time.



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In 1988, the California Geological Survey classified the area MRZ-2 for construction aggregate and determined that almost 23 square miles of the goldfields, containing more than 2.25 billion tons of PCC-grade aggregate, were available. The area was never designated as a “regionally significant” mineral resource because the SMGB had put the designation process on hold in order to dedicate maximum funds to accelerate mineral land classification. Nonetheless, it is undoubtedly one of the most significant aggregate deposits in the entire state. At the time of the classification study, the entire area of the goldfields had been classified by Yuba County in their general plan as a mineral resource extraction land use area.

Superior Court Ruling, 2005 (William Calvert, et al., v. County of Yuba et al.): In February 2000, Western filed with Yuba County its “vested rights” claim and submittals, which included a 6-page cover letter, 70-page brief, and nearly 370 exhibits. In May 2000, the Yuba County Community Development Director determined that Western had “vested rights” to mine aggregate on 3,430 acres in the Yuba Goldfields. This determination was made without notice to Western’s adjacent neighbors or to the public, and without a public hearing. William Calvert and others subsequently sued Yuba County, the State (to include the SMGB and the Director of the Department of Conservation), and Western, challenging the County’s “vested rights” determination. Five distinct claims were asserted in the suit, including a claim against the County and State for: 1) failure to take action against Western for violating SMARA; 2) failure to direct actions against Western for violating SMARA for not having a permit or vested rights; 3) failure to direct actions against Western for violating SMARA for not having a reclamation plan; 4) a claim against the State seeking to compel assumption of the County’s lead agency role; and 5) a claim that the County violated due process requirements of notice and hearing in determining that Western has “vested rights”. The Court rejected all of these claims with exception of claim 5. The Superior Court concluded that a proper notice and hearing was necessary before Yuba County could make any vested rights determination as to Western’s surface mining operation.

3rd District Court of Appeal (DCA) Ruling, 2006 (William Calvert et al. v. County of Yuba et al., 145 Cal.App.4th 613): The 3rd DCA, in its examination of this matter, agreed with the Superior Court. The 3rd DCA also remanded the matter back for due process, but directed Western to the SMGB for implementation of this process and determination. Notably, the ruling (pages 28 and 29 of the decision) states:

“If Western wants to continue its aggregate mining in the Yuba Goldfields, it will either have to prove its claim of vested rights in a public adjudicatory hearing before the Board, or obtain a permit to conduct such surface mining in a public adjudicatory hearing before the County. [citations omitted] This is because the Board has taken over the County’s SMARA duties regarding Western. (Section 2774.2) Under section 2774.4 [of the



Public Resources Code], when the Board takes over for a lead agency, it 'shall exercise' any of the powers of that lead agency except for permitting authority." [citation omitted]

In summary, the 3rd DCA in essence has placed upon the SMGB the task of conducting a public hearing and making a determination of Western's "vested rights".

Notice of Intent to Seek Confirmation of Vested Rights: In correspondence dated February 8, 2007, Mr. Kerry Shapiro, attorney with Jeffer Mangels Butler & Marmaro, LLP., and legal counsel for Western Aggregates, LLC. (Western), forwarded to the SMGB their Notice of Intent to seek confirmation of their vested rights for their Yuba Goldfields operations.

March 8, 2007, Committee Meeting: At its March 8, 2007, meeting, three options were discussed:

- Option No. 1: Use existing regulations for appeals with some modification. This would expedite the process but because existing regulations deal with very specific appeals and are not designed for this type of determination, they would be difficult to adapt to a new process where the administrative record has not been defined.
- Option No. 2: Develop new regulations through the rulemaking process. The new regulations would incorporate the notice and hearing requirements, including the notice to property owners, set forth in the 3rd DCA's ruling, and an open process in which the public would have full access. This approach would be more defensible, but the process of developing the regulations may be lengthy, depending on how much public comment is received.
- Option No. 3: Adopt the full judicial process set forth in the Administrative Procedures Act (APA), which would involve allowing discovery and depositions, using administrative law judges as hearing officers, and holding hearings which would include direct and cross-examination of witnesses. This option would be the most expeditious to establish, since the procedure is already laid out by the APA; however, the hearing process itself could be quite time-consuming and expensive.

Upon deliberation, the Policy and Legislation Committee directed the Executive Officer to work with legal counsel to develop draft regulatory text in accordance with



Option No. 2, and to have such text available for committee review and discussion at its upcoming April 12, 2007, meeting.

April 12, 2007, Committee Meeting: At its April 12, 2007, meeting, a preliminary draft of the administrative process for the SMGB to conduct a vested rights determination when the SMGB is serving as a Lead Agency under SMARA was distributed for general discussion, and public review and comment.

May 10, 2007, Committee Meeting: At its May 10, 2007, meeting, the Committee and interested parties further discussed the proposed preliminary regulations. Following discussion by interested parties and among the Committee members, Committee moved that *“the Committee recommend to the whole SMGB to direct the Executive Officer to add additional revisions or modifications to the proposed procedures and regulatory language, and have a revised version available at the Committee’s next meeting in June 2007. The Committee may at such time recommend to the whole SMGB to direct the Executive Officer to proceed with the 45-day notice to adopt regulations for performing a vested rights determination.”*

June 14, 2007, Committee Meeting: The proposed procedures and regulatory language of an administrative process for the SMGB to conduct a vested rights determination when the SMGB serves as a Lead Agency under SMARA, were revised in consideration of comments discussed by the Committee members during previous Committee meetings, and those received from interested parties.

July 12, 2007, Committee Meeting: No action was taken by the Committee. Since receiving Notice of Intent to Seek Confirmation of Vested Rights on February 8, 2007, written comments received by the SMGB’s office, including those presented and previously discussed during prior Committee meetings, are:

- Kerry Shapiro, attorney with JMBM, dated March 1, 2007;
- Theodore Franklin, attorney with Weinberg, Rogers & Rosenfeld, dated April 10, 2007;
- Kerry Shapiro, attorney with JMBM, dated April 20, 2007;
- Mr. Stephen Bledsoe, President of California Construction and Industrial Materials Association (CalCIMA), dated April 20, 2007;
- Theodore Franklin, attorney with Weinberg, Rogers & Rosenfeld, dated May 7, 2007;
- Theodore Franklin, attorney with Weinberg, Rogers & Rosenfeld, dated May 21, 2007; and
- Kerry Shapiro, attorney with JMBM, dated May 21, 2007.



- Mark Harrison, attorney with Diepenbrock-Harrison, dated May 31, 2007.
- Theodore Franklin, attorney with Weinberg, Rogers & Rosenfeld, dated July 10, 2007.
- Kerry Shapiro, attorney with JMBM, dated August 24, 2007.

All comments provided prior to and during conduct of the July 12, 2007, Committee meeting has been reviewed and considered by the SMGB's legal counsel, as appropriate. No additional comments have been received at the time this Executive Officer's report was prepared.

CONSIDERATION BEFORE THE SMGB: Upon review and discussion, the SMGB may consider directing the Executive Officer to add additional revisions or modifications, to the proposed procedures and regulatory language, and direct the Executive Officer to proceed with the 45-day notice to adopt regulations for performing a vested rights determination.

EXECUTIVE OFFICER RECOMMENDATION: At this time, the Executive Officer offers the following motion for the SMGB's consideration.

Motion to direct the Executive Officer to commence the rulemaking process:

Mr. Chairman, in light of the information before the SMGB today, I move that the SMGB direct the Executive Officer to incorporate the changes discussed herein, as appropriate, and commence with the rulemaking process, and proceed with the 45-day notice to adopt regulations for performing a vested rights determination.

Respectfully submitted:

Stephen M. Testa
Executive Officer