

California Mining Update

AB 1142 and SB 209: What lead agencies need to know about SMARA Modernization

Changes will be effective January 1, 2017

Kerry Shapiro

Matthew J. Sanders

Jeffer Mangels Butler & Mitchell LLP

April 22, 2016

Kerry Shapiro

Kerry Shapiro leads the mining practice at Jeffer Mangels Butler & Mitchell LLP and has represented the mining, construction and building materials industries on mineral extraction and land development projects for more than 25 years. Kerry also serves as General Counsel to the California Construction and Industrial Materials Association (CalcIMA) and in that capacity participated extensively in the legislative debate on SMARA modernization reflected in AB 1142 and SB 209. Contact Kerry Shapiro at kshapiro@jmbm.com.

Matthew J. Sanders

Matthew Sanders is Of Counsel at Jeffer Mangels Butler & Mitchell LLP and a leading environmental and natural resources attorney. He represents the surface mining industry in a wide variety of permitting, counseling, and litigation matters. Contact Matthew Sanders at msanders@jmbm.com.

About CalcIMA

CalcIMA is a trade association for the construction and industrial materials industries in California, which includes aggregate, industrial mineral, and ready mixed concrete producers. In all there are about 70 producer member companies that include over 250 production sites in every county of California. Members also include over 70 supplier and service providers to the industry. For more information see www.calcima.org.

On April 18, 2016, Governor Jerry Brown signed into law two bills that together provide the most significant update to the California Surface Mining and Reclamation Act (SMARA) in 25 years. Assembly Bill (AB) 1142 (Gray) and Senate Bill (SB) 209 (Pavley) are the outgrowth of more modest changes in recent years, and of a promise by the Governor, in 2013, to reform SMARA from “top to bottom.” Although the bills are not effective until January 1, 2017, lead agencies and operators must be aware of their changes and start planning for their implementation.

Most important in the near term are changes to SMARA’s inspections process, financial assurance approval process, reclamation plan requirements, and inspector qualifications.

Inspections Process

Beginning in 2017, operators will request, on their annual reports, an inspection date within 12 months of their prior inspection. (For inspections conducted in 2016, the 12-month date will be triggered for 2017.) Lead agencies may reschedule inspections, and will have 90 days – not 30 days – to file Notices of Completion with the Department of Conservation (DOC). However, the additional time comes with a catch: lead agencies must use their Notices to describe any problems at operations and their plans for correcting them.

Financial Assurance Approval Process

The annual inspection date is the starting point for wholly new annual financial assurance review and approval processes. Note the plural – under AB 1142 and SB 209,

SMARA will now have (1) a process for financial assurance cost estimates (FACEs) for new or amended reclamation plans and (2) another process for annual FACE updates. Each process sets new steps and deadlines, tied to the annual inspection date. Both processes provide DOC a new right to formally consult with lead agencies and operators during the FACE review process, and also give DOC a new right to appeal a lead agency's approval of a FACE. Annual financial assurance review was already a SMARA requirement, but the new legislation formalizes the review process to provide greater clarity and transparency.

Reclamation Plan Requirements

Beginning in 2017, each new reclamation plan must be consolidated in a single document with all relevant charts, appendices, etc., and plan maps must be of higher quality and supported as necessary by surveys from licensed land surveyors or engineers. Following their approval of reclamation plans, lead agencies will be required to submit approved plans to DOC.

Inspector Qualifications

AB 1142 and SB 209 modify the qualifications required of inspectors. In particular, the new legislation makes clear that lead agencies may inspect their own facilities and allows lead agency employees, not just licensed professionals, to serve as inspectors. DOC will develop an inspection training program, which all inspectors must complete by January 1, 2020. (Lead agency employees will be allowed to conduct inspections without the training until DOC makes the training available.)

AB 1142 and SB 209 modernize SMARA in many other ways. These changes generally fall into two categories: (1) how lead agencies administer SMARA, and (2) how operators comply with it.

Administrative Changes

AB 1142 and SB 209:

- Re-organize the process by which the SMGB can assume control of a lead agency's authority to give the SMGB more options, short of a full takeover, to promote compliance.
- Provide lead agencies operating borrow pits more relaxed idle mine standards and less frequent inspections.
- Subject state-licensed inspectors to heightened qualifications, but relax their conflict-of-interest rules.
- Rename the Office of Mine Reclamation the "Division of Mine Reclamation" and establish as the Division's head a new "Supervisor of Mine Reclamation."
- Raise the maximum annual fee for operations from \$4,000 to \$10,000 (adjusted by the Social Security Cost-of-Living Adjustment (COLA)), with the increase to be phased in.

- Raise the total annual revenue cap for all reporting fees from \$3.5 to \$8 million per year (again, COLA-adjusted), and require the DOC Director to file a new fees report to the Legislature.
- As mentioned, add a new SMARA section that allows the DOC Director to appeal a lead agency's *approval* of a financial assurance cost estimate (FACE) to the State Mining & Geology Board (SMGB).
- Still allow lead agencies and the DOC to issue Notices of Violation, but require them to provide more information to the operator and allow operators two opportunities to enter into a stipulated Order to Comply. (Operators subject to stipulated compliance orders can remain on the SMARA § 2717 list.)

Compliance Changes

AB 1142 and SB 209 impose new requirements for more consolidated reclamation plans. As a result, plans will be easier to use and administer but more challenging and expensive to put together. Lead agencies should be prepared for operators' questions about what to include or not include in reclamation plans. Lead agencies must also understand and follow new steps and deadlines for reviewing and approving reclamation plans. On the financial assurance side, corporate self-bonding is now permitted for companies worth more than \$35 million, subject to regulations which will be approved by the SMGB. Finally, hearing and seizure requirements in cases of financial incapability or abandonment of a mine are streamlined, and lead agencies can now use forfeited assurances for "remediation" where they are insufficient for full reclamation.

Because AB 1142 and SB 209 represent a significant SMARA overhaul, lead agencies should become familiar with the new requirements and prepare to engage with operators who will have questions and concerns.

Education workshops for implementation of AB 1142 and SB 209 are in the planning stages. In the meantime, more information (including a handy presentation) is available on Jeffer Mangels' website: [2016 SMARA Modernization](#).