

**State of California
Office of Administrative Law**

In re:

State Mining and Geology Board

**Regulatory Action: Title 14
California Code of Regulations**

**Adopt sections: 3506.1, 3506.2, 3506.3,
3506.4, 3506.5, 3506.6,
3506.7, 3506.8, 3506.9,
3506.10, 3506.11, 3506.12,
3506.13, 3506.14, 3506.15,
3506.16**

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2008-0319-02 S

SUMMARY OF REGULATORY ACTION

The State Mining and Geology Board (“Board”) proposed changes to title 14 to establish the procedure for a public proceeding to be used by the Board when acting as the lead agency and determining whether a right to conduct mining on real property preceded zoning or another land use restriction when such use does not conform. Such rights are known as vested mining rights. On March 19, 2008, the proposed regulations were submitted to the Office of Administrative Law (“OAL”) for review in accordance with the Administrative Procedure Act (“APA”) and on May 1, 2008, OAL disapproved the regulations. This Decision of Disapproval explains the reasons for OAL’s action.

DECISION

OAL disapproved the proposed regulations because the rulemaking record does not meet the necessity standard; the proposed fee regulation is not clear; the Board made a substantial change to the text of section 3506.10 without making the change available for public comment; the Board’s estimate of fiscal impact does not include a signature indicating approval by the Resources Agency; the proposed regulations do not include citations of authority and reference; and the Board did not prepare a written response to some of the concerns of commenters.

DISCUSSION

A) NECESSITY NOT DEMONSTRATED

OAL reviews proposed regulations for compliance with the necessity standard pursuant to Government Code section 11349.1. The standard is defined in Government Code section 11349, subdivision (a):

“Necessity” means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

In the course of rulemaking under the APA, this evidence is first presented in the initial statement of reasons (“ISR”). The notice alerting the public of the proposed action includes information about the availability of the ISR for inspection so that interested persons may review and offer comments on the basis for the proposed action. The ISR prepared by the Board for these eleven pages of regulations is only a page and a half long. It describes in broad terms what the regulations do, and why it is necessary to have regulations to prescribe a procedure and a funding mechanism for the determination of vested rights.

OAL has a regulation that is intended to clarify the application of the necessity standard. California Code of Regulations, title 1, section 10, subdivision (b) provides:

In order to meet the “necessity” standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

- (1) A statement of the specific purpose of each adoption, amendment, or repeal; and
- (2) information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An “expert” within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.

The ISR prepared for this rulemaking by the Board does not include substantial evidence of the need for any of the specific provisions included in these regulations. To remedy this oversight, the Board may prepare a supplement to the statement of reasons that includes a discussion of all

the substantive provisions of these regulations and a description of the need for including them in the regulations. As provided in Government Code section 11346.8 (d), this supplement must be made available for at least 15 days of public comment pursuant to Government Code section 11347.1.

B) CLARITY – PROCESSING FEE

Proposed section 3506.4 provides for two fees to be paid when a request for determination is submitted to the Board. Concerning the first of these fees, subdivision (a) provides:

A minimum processing fee of five thousand dollars (\$5,000) as compensation for the initial review and notification. Should the Request for Determination be denied, any funds not used will be refunded.

This rule setting the minimum processing fee does not provide an adequate basis for determining the amount of the actual fee, and the regulation does not provide guidance for adjusting this fee upwards. Presumably the Board needs the flexibility to charge more when its costs of initial review and notification are significantly more than the minimum amount. If this is the case, the description of the activities covered by the fee and basis for increasing the amount should be added to the regulation so applicants will have a better indication of what these charges might be. For comparison, the second fee (the determination fee) is clearer, even though it is a flexible fee, because the regulation includes more information concerning its determination.

C) CHANGE WITHOUT OPPORTUNITY FOR COMMENT

Notice and an opportunity for public comment are two very important goals served by the APA's rulemaking procedure. The Board's originally proposed regulations were made available for at least 45 days of public comment, but after considering public comment, the Board made a change to the text of section 3506.10, subdivision (b), paragraph (4). This regulation establishes a procedure whereby the Board must give at least 90 days advance notice of a vested rights public hearing. Subdivision (b) specifies the content of the notice, and in paragraph (4), the originally noticed text provided as follows:

A request that any additional written materials submitted by the Claimant be delivered to the Board no less than 60 calendar days before the hearing and all other written materials be delivered to the Board no less than 45 calendar days before the scheduled hearing, and in no case will any written materials be submitted less than 30 calendar days prior to the hearing.

The final text adopted by the Board is different. It provides:

A request that any additional written materials be delivered to the Board no less than 60 calendar days before the hearing and in no case will any responsive materials be submitted less than 45 calendar days prior to the hearing.

The change in the contents of the notice eliminating the 30 day rule effectively prescribes an earlier cut-off date for filing documents for use in the determination of a claimed vested right. While this change is sufficiently related to the original proposal and can thus be made in this rulemaking, it is a change that affects the substance of the rule, and for this reason it must be made available for public comment before it is adopted. [See Government Code sections 11346.8 (c) and 11347.3(a)(9); CCR, title 1, section 44]. The notice and period for comment on this change to the text may be combined with the one that will be necessary for supplementation of the statement of reasons as described in (A) above. In addition, the change must be discussed in the final statement of reasons.

D) AUTHORITY AND REFERENCE CITATIONS OMITTED

Government Code section 11346.2, subdivision (a), paragraph (2) provides:

The agency shall include a notation following the express terms of each California Code of Regulations section, listing the specific statutes or other provisions of law authorizing the adoption of the regulation and listing the specific statutes or other provisions of law being implemented, interpreted, or made specific by that section in the California Code of Regulations.

Only one of the Board's proposed regulations (section 3506.2) includes a citation of authority and none of the regulations include a citation of reference. The statute and case cited for authority in section 3506.2 would actually make good references. Better citations for authority would be Public Resources Code sections 2755 and 2775, both of which expressly mention the need and authorization for rulemaking by the Board. Citations must be added after the text of each regulation.

E) FISCAL IMPACT ESTIMATE

The file of every rulemaking action must include an estimate of the fiscal impact of the proposed regulations that has been prepared in accordance with instructions of the Department of Finance [Government Code section 11346.5, subdivision (a)(6)]. These instructions are published in the State Administrative Manual, sections 6600 through 6680. Section 6680 provides, in part:

State agencies must include a completed STD. 399 form with each proposed regulation that is submitted to the OAL for publication in the California Regulatory Notice Register. The STD. 399 form must be approved and signed by the Agency Secretary.

The Board did prepare a 399 form and included it under tab 3 of the rulemaking record. It shows that the proposed regulations would have no fiscal impact, and it is signed by the Board's Executive Officer, Stephen Testa, however the estimate does not have a signature indicating approval by the Secretary of the Resources Agency.

F) RESPONSE TO PUBLIC COMMENTS

Six commenters asked the Board to make changes in the regulations. The Board adequately summarized their objections and recommendations, numbering the commenters and designating their comments with letters. In responding, it is the Board's obligation to change the proposed regulation to accommodate an objection, or explain the reason for making no change. [Government Code section 11346.9(a)(3)]. Several times the Board attempted to respond to additional comments by referring to its prior response to a different comment. While this approach can work when comments are repetitive or when the first response is comprehensive, the manner in which it was used here is not sufficient because the prior response does not always address the commenter's concerns.

For example, John Williams, who is designated as Commenter 2, asked for a more reasonable fee than \$5,000 for a non-mining party's determination request. The Board summarized this as comment 2D and answered by referring to its answer to 2C. Comment 2C asked the Board to include the opportunity for parties other than mine owners to request vesting determinations. The response to 2C discusses the Board's responsibility to enforce the Surface Mining and Reclamation Act and ensure that a mining operator is meeting all its requirements. The Board offered its assurance that it could determine whether the operator has a permit or documentation supporting vested rights. The implication may be that there is no procedure for persons other than mine operators to request a determination because there is no need for that, and there is no need for a lower fee for such a request because no such requests will be accepted. A direct response to the comment about the fee would be far better. In this regard we note that a more thorough ISR could have assisted greatly in helping interested persons understand who may initiate and participate in these proceedings, lessening the potential for such misunderstanding by a commenter.

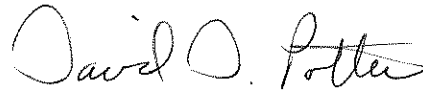
A commenter named Theodore Franklin wanted the Board to adopt rules that would call for specific findings concerning any vested right affirmed in a Board determination. He wanted to assure that a determination would include findings concerning the maximum amount of extraction authorized under the right. In order to assure that information which could be important in making that determination would be in the record, he asked that section 3506.3 be amended to require in every request for a determination, a written statement identifying the type and amount of material extracted in each of the three preceding years. In rejecting the suggestion, the Board stated that it does consider the amount of material available for extraction, but noted recent history might not be a good indicator of the amount allowable since extraction rates may change from year to year in response to market conditions. It's not OAL's role to question the Board's determination here, but the fact that the information might not be relevant in the circumstances described does not explain why it is not useful generally. A more thorough response is called for. Similarly, the cumulative responses to his other comments concerning continuation and substantial changes in rights, where D refers the reader to B and B refers to A resembles a puzzle as much as an explanation for rejecting these comments, and should be improved.

CONCLUSION

For the foregoing reasons, OAL disapproved the proposed regulations.

Although not grounds for disapproval, we also note that the numbering and placement of these regulations in title 14 of the California Code of Regulations might be improved. With the proposed numbering, they fall into Article 1, "Surface Mining and Reclamation Practice." The Board proposed section 3506 with the title "Vested Rights Determination," but it has no regulation associated with it, and no authority or reference citations. A section with no content would be an oddity in the CCR. On the other hand, this title would serve as a good article heading for the other sixteen regulations in this filing because it is more descriptive of their subject than the proposed location in Article 1. The Board should consider creating a new article for these regulations pertaining to the determination of vested rights and section numbering appropriate for that placement.

Date: May 8, 2008



David D. Potter
Senior Staff Counsel

For: SUSAN LAPSLEY
Director

Original: Stephen Testa, Executive Officer
Copy: Russell Hildreth, DAJ