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**SB 108:
A FIRST STEP IN SOLVING THE INTERIM MANAGEMENT PLAN PROBLEM**

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Background: What is the Interim Management Plan Problem?

SB 108 is designed to address some (but not all) of the problems existing in the current SMARA statutory scheme regulating so-called "idle" mines through the requirement of submitting an interim management plan ("IMP"). Having passed through the legislature without a single no vote, the bill was signed by Governor Jerry Brown on October 5, 2011 and will be effective on January 1, 2012. This presentation identifies the problems with the current regulation of idle mines through IMP requirements, explains SB 108, including its key terms and the limited window for mine operators to take advantage of SB 108's "change of status" provisions, and finally identifies IMP problems not addressed by SB 108 and proposes ideas for addressing such problems.

Defining an "Idle" Mine: Under existing law, a surface mining operation is considered "idle" when surface mining operations are curtailed by more than 90 percent of the operation's previous maximum annual mineral production for a period of one year or more, with the intent to resume those surface mining operations at a future date. SMARA Section 2727.1. [Note that a surface mine is not classified as idle if there is no intent to resume mining operations. In such a case, the mine is classified as active and undergoing reclamation, or considered abandoned.]

Submitting an Interim Management Plan: Within 90 days of the surface mining operation becoming "idle" under Section 2727.1, the operator must submit to the lead agency for review and approval an interim management plan ("IMP"). SMARA Section 2770(h)(1). Review and approval of an IMP is not considered a project for purposes of CEQA. Id. The approved IMP is considered an amendment to the surface mining operation's approved reclamation plan. Id.

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Failure to Timely Submit an Interim Management Plan: Unless review of an IMP (or an appeal) is pending before the lead agency, a surface mining operation which remains idle for over one year after becoming idle without obtaining approval of an IMP is considered "abandoned" and the operator must commence and complete reclamation in accordance with the approved reclamation plan. SMARA Section 2770(h)(6).

Problems With The Idle Mine Definition: The current definition of "Idle" creates several challenges for the industry. Some of the more important issues are identified and discussed below in the context of how they might be resolved or mitigated:

- **Application to Active Mines.** Counter-intuitively, a facility could be active and operating at a significant capacity yet still be "idle", e.g., an aggregate operation producing just less than 100,000 tons per year would be considered idle if it had previously produced one million tons per year. This application of the label of "idle" to a vigorously producing mine could be overlooked by operators who may not consider a downsized operation to be "idle."
- **What is "Mineral Production."** There is no clear definition of "mineral production" in SMARA or the SMARA Regulations, thereby creating considerable ambiguity in the use of the word "production" in the "idle" definition, e.g., does production include overburden? And does the mining and processing of ores imported from a neighboring property constitute "production"?
- **Idle Notwithstanding Substantial Expenditure for Operations.** Under some definitions of production, it would appear that a facility could be considered "idle" notwithstanding the expenditure of substantial sums of money to conduct a variety of important and necessary "surface mining activities" that do not result in the sale of product in the short-term, but will lead to increased future product sales, e.g., the removing of significant tonnages of waste rock during periods when new portions of the mine are being developed.
- **Rigid Mathematical Approach.** The rigid mathematical approach to label an operation as "idle" using percentage reductions in annual production provides no flexibility to account for temporary circumstances beyond the control of the operator, such as the current economic downturn which has substantially curtailed both excavation and sales at many facilities pending recovery from the deep recession in which we now find ourselves. Put another way, using an exclusively mathematical approach to determine whether an operation is "idle" or "abandoned" is an inflexible approach that ignores other factors that may in fact demonstrate the operation is not idle.

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- **Increases in Production Could Cause “idleness.”** Again counter-intuitively, increases (not decreases) in production could also lead to application of the “idle” or “abandoned” concept. Take, for example, the situation where a very large, local construction project causes a 12-fold increase in a mine’s annual production for two years. In the third and fourth years, when production returns to “normal” levels, the resultant 12-fold decrease in production could cause the mine to be classified as “idle” even though the mine has never operated below historical production levels. Such a mine would certainly not be considered “idle” by anyone in the mining business.

Problems With The IMP Requirements: In addition to the definition of “idle,” there are other problems with the current requirements to obtain an IMP.

- **Record Problems.** Mines can be in operation for many decades in some cases and change ownership over time leading some operators to be unaware of, or unable to document, their historic maximum annual production. For example, operators who may have been involved in complex vested rights proceedings are likely aware of the difficulties that can arise in demonstrating past production levels. This can result in an operator being unaware of when the operation has fallen below the 90 percent threshold, and thus, when the operation has become idle.

[Note: Local lead agencies only started receiving annual mineral production data after enactment of SB 668 in 2006 and may lack the records to properly evaluate compliance or warn operators of the need to file an IMP.]

- **Due Process Problems.** There are no requirements for lead agencies or OMR to notify operators that an operation has become “idle.” Also Section 2770(h)(6) does not provide any way for an operator whose operation has become mathematically “idle,” but who did not file an IMP within the time window provided in the statute, to correct the failure to file after-the-fact. Thus, an operator who was unaware that the operation had become mathematically “idle,” and who therefore failed to file an IMP in a timely manner, may have little or no administrative appeal options or other non-legal recourse from the failure to file and resulting statutory “abandonment.” Because findings of “idleness” or “abandonment” not only drive the timing of reclamation, but may also potentially impact entitlements and vested rights to operate, these provisions appear out of step with SMARA’s overall scheme to provide opportunities to cure violations, and may also violate legal due process.

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SB 108: What it Does

Revised Definition of "Idle": SB 108 addresses only one of the substantive issues discussed above, by changing the current definition of "Idle" in SMARA Section 2727.1 to look at the curtailment of production by more than 90 percent of the maximum annual production *within any of the last five years*, rather than by more than 90 percent of the previous historical maximum annual production. See SB 108 (a copy is attached to this paper). This avoids some of the record problems discussed above and likely limits the number of operations falling within the definition of idle.

Additional Renewals of IMPs: Currently SMARA allows for renewal of an IMP for an additional 5-year period. SB 108 clarifies that an IMP may be renewed for additional 5-year periods at the expiration of each 5-year period. SMARA Section 2770(h)(2)(A)

Limited Window to Change Mine Status: Although not a substantive change to address the overall IMP problem, perhaps the most significant and practical benefit of SB 108 is the change of status provision. SB 108 adds new SMARA Section 2777.5, to authorize operators to file amended annual reports for prior years in order to revise mineral production or to change mine status from active to idle. One impact of this is to allow mine operators that may have failed to timely file an IMP in prior years (and thus could be subject to claims by OMR of abandonment notwithstanding resumption of production in subsequent years) to either correct production numbers for prior years (thereby avoiding claims of past idleness and failure to prepare a timely IMP) or to properly identify, i.e., change the status of the mine as having been idle in prior years and allow for the filing of a "retrospective" or "late" IMP (thereby avoiding potential claims of abandonment).

SB 108: Factors to Consider

The foregoing opportunity to avoid classification as "idle" or "abandoned" arising out of past production reporting problems, or to reclassify an operation as "idle" is a welcome change. However, it should be emphasized that the bill provides a limited window of time for the filing of missing, corrected or modified reports and for obtaining approval of such a "retrospective" or "late" IMP. Such corrections must be made on or before July 1, 2013 in connection with the filing of the 2012 Annual Report. See [Proposed] Section 2775(a). The opportunity to correct a past, inaccurate classification for an operation that was, or *might have been*, idle under the pre-SB 108 statute, and to seek approval of an IMP for the period of such idleness in order to obtain the benefit of SB 108 requires a review and a decision by operators concerning whether and how to amend past reports.

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For operations that may have been idle and did not apply for IMPs, operators should note that the need for such a benefit was not eliminated by increases in production in subsequent years, as such operations could still be the subject of lead agency or OMR investigation of past failures (for example, OMR has done this on occasion as leverage to seek upgrades to existing older reclamation plans). Such decisions could be complicated as they require an analysis of past operations and a definition of “mineral production.”

In light of the various ambiguities and due process flaws of the existing IMP statute, decisions concerning filings to change status or otherwise modify past annual reports could be complicated and may require balancing of the benefits of a change of status against risks of voluntarily engaging in a retrospective Idle/IMP process.

SB 108: Who is Affected?

The SMGB recently provided statistics on a number of mines that either were reported as idle without IMPs, or reported as active when they might have in fact been idle. According to the SMGB’s summary of the 2009 annual reports, there were 97 mines reported as “idle” in the SMARA database. All but six of these mines had production in the last ten years. If true, an approved IMP theoretically should be on file for all of these idle mines. According to SMGB, only 35 of the 91 “idle” mines with production reported an approved IMP in 2009. Thus, potentially 56 mines that failed to file an IMP could have run afoul of the abandoned definition in the statute. Additionally, the SMGB Executive Officer believes lead agencies may have incorrectly approved IMPs for mines that were abandoned under statutory definitions. SMGB Information Report 2010-07, p. 12-13.

In addition to the 97 mines listed as idle, another 180 mines were reported as “active” with no production.¹ Under statutory definitions, it is possible that a number of these mines are misreported, and should actually be reported as “idle”. One hundred of these mines had no production in either 2008 or 2009, and SMGB may believe they are possibly deemed “abandoned” by statute. SMGB Information Report 2010-07, p. 13.

Many of these mines identified by the SMGB Information Report as being idle without IMPs, or reported as active when they were in fact idle, theoretically could benefit from the limited window to correct reports and/or seek a change of status that would be provided in SB 108, if enacted.

¹ Also, SMGB noted that 66 mines were identified as “Closed – No intent to Resume” in the OMR database but have not yet been reclaimed. See SMGB Information Report 2010-07, p. 12-13.

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Moreover, these recent SMGB findings appear consistent with earlier OMR research. At the March 8, 2007 meeting of the SMGB's Surface Mining Standards Committee, OMR reported the following:

- For 2005, 277 idle mines reported active status;
- 53 mines reported low (idle) production in 2005, but high (active) production in 2004;
- 224 mines reported low (idle) production in both 2004 and 2005; and,
- 133 mines reported zero production in both 2004 and 2005.

In May 2007, OMR informed the SMGB Committee that that production information for 1,029 mines that reported an "active" status in 2005 was reviewed. Approximately 316 of these "active" mines reported production levels that might suggest an "idle" status, and OMR was considering at that time practical steps that could be taken to ensure (1) idle mines have approved IMPs in place and (2) abandoned mines be required to commence and complete reclamation. SMGB Executive Officer's Report, July 12, 2007, p. 4. One approach OMR considered at that time in situations where significant mining was occurring but at levels below the statutory trigger was to look at a five-year average annual production rather than the previous maximum annual production. *Id.* p. 4. Using this alternative approach (similar to the 5-year look-back language in SB 108) OMR believed the list of 316 "active" mines in 2005 that might have been "idle" back then would have been reduced to 154 mines.

SB 108: Unresolved Problems and Ideas to Address Them

1. Application to Active Mines. It is arguably inappropriate to designate as "idle" an operation that is generating returns that seem adequate to support continuing operation and defray ultimate reclamation costs. One solution might be to establish a minimum annual quantity of production as a so-called "safe harbor" to qualify a mine as "active" without regard to changes in historical production level. After all, why should a mine be classified as "idle" simply because it now produces less than it used to? Future legislation could establish a minimum quantity of annual production as a "safe harbor" from classifications of "idle" or "abandoned."

2. Lack of Definition of Production. Ambiguity in the definition of "mineral production" raises a number of issues, including:

- Does the processing of ore from a stockpile constitute production?
- Does the processing of ore from an off-site source constitute production?
- Does stripped overburden constitute production?
- Does excavation and processing for future sale constitute production in the absence of

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current sales?

- Is production measured by the amount of material excavated or product sold, e.g., if 50,000 tons of rock are excavated, and 25,000 tons of sized material are sold from it, how much "production" was there?

By addressing these existing ambiguities, a clear definition in future legislation or regulation may provide greater clarity, practicality, and fairness to the determination of "idle."

3. Idle Notwithstanding Substantial Expenditure for Operations. "Idleness" seems inappropriate where the operator continues to invest substantial money for capital expenditures or operating costs because such investment is the best gauge of whether the operation is likely to continue. Future legislation that factors minimum expenditures into the equation of "idle" or "active" could vastly improve the current, rigid, mathematical formula for mineral "production."

4. Rigid Mathematical Approach. It seems that exclusive reliance on any one mathematical formula is too inflexible. There are many reasons why matters that are really beyond the control of the operator may produce an involuntary curtailment of production that sheds little or no light on the future of the mine or the timing of ultimate reclamation, including, for example, depressed economic conditions; business or title disputes; lack of, or litigation over, entitlements; labor disputes; and Acts of God. Future legislation could address this through additional provisions that permit the operator to demonstrate on a case-by-case basis to the lead agency that curtailment is the result of conditions beyond the operator's control that are not appropriate for a determination of "idle" or "abandoned."

5. Increases in Production Could Cause "idleness." Short-term spikes or increases in production should not be the cause of "idleness" or "abandonment." In fact, spikes in production demonstrate that a mine is still viable and not in need of special treatment in the reclamation process. One way to smooth out the inequity of using short-term increases would be to adopt rolling production averages (as opposed to peaks) of 5 or 10 year periods as the basis for any determinations of idleness based on curtailment of production.

6. Due Process Problems. SB 108 does not address a key problem under the current law, namely, that classification of operations as "idle," and then, absent filing of a timely IMP, as "abandoned," continues to be self-executing in that it occurs without any notice to the operator, and does not allow the operator a remedy for being unaware that the operation became "idle" and for having failed to file an IMP in a timely manner. Future legislation or regulation should require such notice and provide operators with an opportunity to cure, particularly where classifications of "idle" or "abandoned" threaten an injustice.

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[Note: putting aside potential future legislative changes, better application of current law could minimize potential due process problems. For example, SMARA Section 2770(c) requires OMR to notify operators of deficiencies in a SMARA annual report within 90 days of receipt. If OMR provided such notice to operators incorrectly filing an annual report as active and requested the report be corrected to identify the operation as idle, many future abandonment problems could be avoided.]

Please Contact Us

We welcome the opportunity to discuss SB 108 and how it might affect your business.

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