SMARA Modernization Update:
Financial Assurances & Reclamation Plans

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CSAC / CalCIMA / RCRC Webcast
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Overview

• **AB 1142 and SB 209**: Major changes to...
  
  – **Financial assurances**
    • Substantive requirements
    • Approval process
    • Appeals process
  
  – **Reclamation plans**
    • Contents
    • Approval process
    • Appeals process
Overview

- **New/significantly amended SMARA sections**

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Financial Assurances
Financial Assurances

- **Substantive changes**
  - **Annual FACE adjustments**
    - FAM adjustment only required for increases  
      - § 2773.1(a)(3)
  - **FAM release**
    - Requires LA and DOC written consent  
      - §§ 2773.1(a)(5), 2773.1(c)
      - (conforms statute to regulation)
  - **New FACE form** (under development)  
    - § 2773.1(a)(4)
  - **Corporate self-bonding** (to be developed)  
    - § 2773.1.5
    - Based on financial tests
    - Allowed only for companies with net worth ≥ $35 million
      - (more later)
Financial Assurances

• Substantive changes (con’t)  ➞ § 2773.1
  – FAM forfeiture
    • If LA (or SMGB acting as LA) has “evidence” that an operator is financially incapable or has abandoned, LA/SMGB holds hearing  ➞ § 2773.1(b)(1)
    • Streamlined hearing and seizure requirements:
      – 60-day period to “commence” reclamation eliminated
      – LA/DOC reclaims (or remediates if bond is inadequate to fully reclaim)  ➞ § 2773.1(b)(2)(C)
  – In cases of sale or transfer…  ➞ § 2773.1(c)
    • Within 15 days, new owner signs new statement of reclamation responsibility
    • Within 90 days, buyer submits FAM to LA and DOC
      – Can be new FAM or transfer of existing FAM
Financial Assurances

• Corporate self-bonding
  – **Allowed per new § 2773.1.5 (exception to § 2773.1(e))**
    • SMGB must first adopt regulation assessing financial status
  – **Criteria**
    • Net worth at least $35 million (adjusted annually per CPI);
    • Income and U.S. assets; and
    • Liabilities, including “other environmental assurances”
  – **Other requirements/provisions**
    • Self-bonding limited to 75% of FACE (especially for companies with multiple operations)
    • Annual review/approval required by LA and DOC
    • Multiple operations can combine FACEs to pass financial test
    • Must provide independent assessment by certified accountant
    • Regulation will give LA/DOC “additional measures” to recover costs “associated with the full collection and satisfaction” of FAMs
  – **Note:** DOC or LA can disallow self-bonding (i.e., self-bonding will not be required, but may not allowed)

§ 2773.1.5

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Financial Assurances

• FACE approval process

  – Now two separate processes
    1) FACE for new or amended Rec Plan
    2) Annual FACE review/update

  – Significant changes that apply to both processes
    • New process for DOC to determine that FACE submittal is incomplete and remand for revisions
    • New DOC “consultation” with LA/operator if DOC’s comments not adopted
    • New DOC has right to appeal FACE approvals to SMGB
      – More on this in moment
    • New deadlines, especially for annual FACE reviews (designed to create accountability and ensure approval)
    • Must submit FAM within 30 days of FACE approval (15-day review period for sufficiency of FAM submittal)

§ 2773.4 (was § 2774)

§ 2773.4(a)-(c)

§ 2773.4(d)

§ 2770(e)-(g)
Financial Assurances

- **Existing FACE approval process (new + annual)**

**Existing Annual Financial Assurance Cost Estimate (FACE) Timeline**

1. **Step 1:** Annually – No Trigger™
   - Local Lead Agency Submits Operator FACE to Department of Conservation (DOC) for Comment

2. **Step 2:** 45 Days of FACE Receipt
   - DOC Comments on FACE to Local Lead Agency

3. **Step 3:** Within a Reasonable Amount of Time
   - Operator FACE to Department of Conservation (DOC) for Comment

4. **Step 4:** 30 Days PRIOR to Approval
   - Local Lead Agency Responds to DOC Comments 30 Days Prior to Approval

5. **Step 5:** 30 Days After Approving
   - Provide DOC with Final Comments on DOC’s Comments

6. **Step 6:** Unspecified Time
Financial Assurances

- **New** Annual FACE approval process

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**AB 1142 Annual Financial Assurance Cost Estimate Timeline**

**Hypothetical October 15th Inspection Date**

1. October 15, XXXX
2. 30 days after Inspection
   - Operator Submits Financial Assurance Cost Estimate (FACE) to Local Lead Agency
3. 15 days after receiving FACE
   - DOC determines if inadequate
4a. 45 days after receipt of complete FACE
   - DOC may request consultation
4b. 15 days after receipt of response
   - DOC Comments on FACE if desired
5. Lead Agency responds to directors comments and provides director 30 day notice of approval
6. 60 days of director’s comments
7. 30 Days After denial of FACE
8a. 30 Days After Acceptance of FACE
   - Operator Files Bond with Local Lead Agency and DOC.
   - DOC and Lead Agency review if mechanism is proper.
8b. 15 days after receipt of mechanism
9. Director may appeal Approval to SMGB if Comments rejected.
   - PRC 2770 (e)2

Lead agency, director and operator
- Within 30 days consultation occurs
- Lead Agency Approves or denies FACE to step 8a or b above

Lead Agency Approves or denies FACE unless consultation requested
- Operator Appeals or files Revised FACE as Directed by Local Lead Agency (step 2)

Within 60 days of consultation

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Financial Assurances

New FACE review for RP/amended RP

§ 2773.4(a)-(c)
Red = differences from new FACE review

Annual FACE review

§ 2773.4(d)
**Financial Assurances**

- **FACE Appeals**
  - Operators can continue to appeal LA FACE denial (or failure to act)
    - SMGB has discretion to refuse appeal due to “no substantial issues” or untimeliness
  - But DOC may now appeal FACE approvals by LAs
    - DOC must first comment on FACE under § 2773.4
    - SMGB must hear appeals by Director
    - SMGB to adopt/revise appeals regulations accordingly
  - Required financial assurances during appeals
    - New/amended Rec Plan: Must provide FAM pending appeal
    - FACE update: Must maintain existing FAM pending appeal
  - Standard of review/remand
    - Does FACE “substantially” meet applicable requirements?
      - “Substantially” = “actual compliance in respect to the substance and form requirements essential to the objectives of this chapter”
    - SMGB hearing w/in 45 days of appeal filing (or longer if agreed)
    - If SMGB upholds DOC appeal at hearing:
      - Within 10 days, SMGB provides notice of adequate cost estimates for each deficiency
      - Operator submits revised FACE (30 days or longer), which LA “shall” approve
Reclamation Plans
• Reclamation plan content
  
  – Rec Plan content consolidated into one document

  – Rec Plan must include a chart identifying where content is located (page number, chapter, appendix, etc.)

  – Maps, calculations, etc. must, where relevant, be stamped by licensed engineers, geologists, land surveyors, etc.

  – Clarifies manner in which all or part of use permit application or CEQA documents, such as mitigation measures, may be included by reference into Rec Plan

  § 2772
  § 2772(b)
  § 2772(c)(5)(F)
  § 2772(d)
Reclamation Plans

• Approval process

  – Similar to existing law but with more steps and revised timelines
  – Process now consolidated into single, separate SMARA section
  – LA submits Rec Plan/amendment for Director review “as early as practicable”
    to facilitate CEQA review
  – Then:

    • LA certifies Rec Plan complete, complies with SMARA and mining ordinance
    • Director must notify LA of incomplete submission within 30 days
    • Director then has at least 30 days to comment on Rec Plan
    • LA must then:
      – Review Director’s comments “within a reasonable amount of time”
      – At least 30 days before the “intended approval” of the Rec Plan, LA must send written
        response to the Director explaining what changes it will adopt in response to Director’s
        comments
      – Must provide 30 days’ notice of hearing (or intended approval date)
    • Following approval, LA must send to Director:
      – Notice of approval within 30 days of hearing/approval
      – Official copy of Rec Plan within 60 days of approval, including:
        » Final index updating locations of all incorporated documents (permit conditions,
          mitigation, etc.)
        » All indexed documents in appendix that form part of reclamation obligation,
          annual inspections, etc.

\[\text{§ 2772.1 (was § 2774)}\]
**Reclamation Plans**

**Rec Plan ("RP") process (new & amendments)**

§ 2772.1

- LA receives RP from operator

- LA submits to DOC:
  1. RP; and
  2. Certification RP is complete/in compliance

- DOC prepares written comments (if so chooses)

- LA submits to DOC:
  1. Responses to any DOC comments, and
  2. Notice of hearing/intent

- LA approves RP (with or without hearing)

- LA provides DOC Notice of Approval

- LA provides DOC:
  1. Certified copies of maps, calculations, etc.; and
  2. Official copy of RP

- DOC notifies LA that RP submission is incomplete

- Operator/LA prepare and resubmit RP

- LA approves RP (with or without hearing)

- LA denies RP (or fails to timely act)

- Operator appeals (§ 2770(e))

- SMGB hearing (if SMGB agrees to hear appeal)

**Timeframes:**

- 30 days
- "as early as practicable"
- "reasonable period of time"
- 30 days MÍNÍMUM
- no deadline
- no deadline specified – 30 days?
Reclamation Plans

• **Appeals**

  – **Remain mostly unchanged for Rec Plans**
  – **Operators can continue to appeal LA Rec Plan denials (or inaction)**
    - SMGB has discretion to refuse appeal due to “no substantial issues” or untimeliness
  – **Unlike FACEs, Director may not appeal Rec Plan approvals**
    - New § 2770(e)(2) limited to FACEs
  – **Standard of review**: Same for FACE—i.e., SMGB determines if Rec Plan “substantially” meets applicable requirements
    - “Substantially” = “actual compliance in respect to the substance and form requirements essential to the objectives of this chapter”
  – **If SMGB denies operator appeal at hearing:**
    - SMGB must hold hearing within 45 days of appeal filing (or longer if agreed)
    - Within 10 days, SMGB provides operator and LA with notice of determination, and returns Rec Plan with notice of deficiencies; operator has 30 days (or longer if agreed) to submit revised Rec Plan to LA for “review and approval”

§ 2770(e)(1), (f)-(g)
Key Points

• What new State agency rules and guidance are expected as a result of AB 1142 and SB 209?
  
  – Explicitly required by the bills:
    • Revised annual FACE form
      – No deadline, but draft issued Sept. 7, 2016
      – Workshops 9/27 (Redding) and 10/4 (Santa Ana)
    • Revised FAM form (by July 1, 2018)
      – SMGB develops and approves
    • Training for SMARA inspectors (by Dec. 31, 2017)
    • Regulation for corporate self-bonding
  
  – Implicitly required:
    • Modified FACE appeal regulations (14 C.C.R. §§ 3680-3690), including new regulation for appeals by DOC of FACE approvals

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Key Points

• What can you do to prepare? Among other things:
  – Participate in the SMGB rulemaking and regulatory guidance process
  – Understand the revised interface points with DOC (including timelines)
  – Know the technical and organizational requirements for “complete” FACEs and Rec Plans
  – Anticipate questions about these topics, timing with annual inspections, and corporate self-bonding
For more information

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