

The Next California Gold Rush?

An Update on the Regulatory Environment for Metallic Mines in California

By Michael Sherman and Tom Henry

California's gold production peaked in 1852 at nearly 4 million troy ounces. Fast forward to the present day and gold production in California has dropped to less than 4 percent of that high. This decline can be traced, in part, to an unfriendly regulatory environment for metallic mines. In particular, the most recent attack on the industry came through California's adoption of backfilling requirements for open pit metallic mines in 2002 and 2003. However, a renewed interest in the backfilling requirement by California's State Mining and Geology Board (SMGB) could finally address the unintended consequences resulting from the adoption of the backfilling requirements.

The statutory backfilling requirement only applies on certain federal lands in the Southern California desert, whereas the regulatory backfilling requirement applies to **all private, state and federal lands** in California.

A Brief History: Killing a Mosquito with an Atomic Bomb

In December 2002, the SMGB adopted emergency regulations requiring the backfilling of open pits at metallic mines. While the SMGB principally justified the emergency regulation based on aesthetics issues with unreclaimed open pits, their action was commonly understood to be in reaction to the Imperial Project, a proposed open pit gold mine located in eastern Imperial County.

The SMGB's regulations require all open pit excavations for metallic mines to be backfilled to the original surface elevation and any excess materials to be graded to create a final surface that is consistent with the original topography, but the resulting topography may not exceed the pre-mining surface elevation by more than 25 feet.¹ Existing mines with an approved reclamation plan

and financial assurance as of December 18, 2002 were grandfathered from this regulatory backfilling requirement.

The State Legislature also took action in April 2003 to require backfilling, but in narrower circumstances. The statute requires backfilling and grading of excess materials to "[a]chieve the approximate original contours of the mined lands prior to mining."² However, this requirement only applies to land within one mile of any Native American sacred site and located in an area designated as Class C or Class L lands or an Area of Critical Environmental Concern under the California Desert Conservation Area (CDCA) Plan.³ The statute also exempts surface mining operations in existence on January 1, 2003 (with an approved reclamation plan and financial assurance prior to September 1, 2002) and amended reclamation plans and financial assurances for the continued operation or expansion of those pre-existing mines.

The Aftermath: an Inhospitable Environment for All Metallic Mines

As expected, the statutory and regulatory backfilling requirements ended the Imperial Project. Other mining projects have not been proposed due to the high costs associated with backfilling. Further, once backfilled, deeper ore bodies cannot be mined if commodity prices increased in the future. Consequently, only one open pit gold mine has been permitted in California since 2002.

The new backfilling requirements also created uncertainty for existing mines that were supposedly exempt from those requirements.

Although the statute expressly exempts expansions of mines existing prior to January 1, 2003, the SMGB’s regulations do not contain a similar express exemption for expansions. Instead, the (now former) Executive Officer for the SMGB has opined that “[i]n most instances of major ‘expansion,’ the existing surface mining operations may have been changed substantially and would trigger inclusion of the ‘backfill’ requirement.”⁴ The line between a “major” expansion triggering backfilling and a “minor” expansion not triggering backfilling has not been clearly set for grandfathered mines.

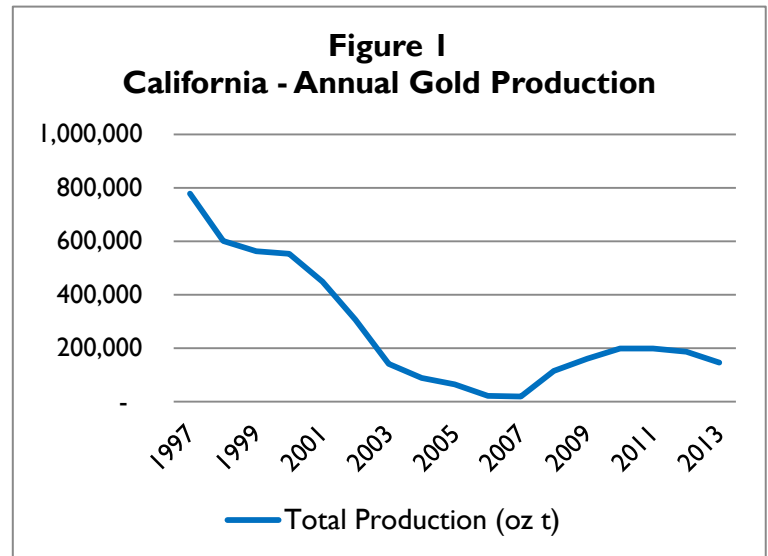
The end result of the backfilling requirement has been clear: gold production in California has continued to decline since 2002 as shown in Figure I (California-Annual Gold Production).

The Law of Unintended Consequences

The statutory and regulatory backfilling requirements were principally aimed at improving aesthetics issues with open pit excavations by returning mined land to its original condition (or as close as possible). However, this focus on aesthetics ignores air quality, water quality and biological impacts associated with backfilling and grading excess materials.

Moving mined material twice -- first when mining and again when backfilling or grading -- results in unnecessary air pollution, including an increase in greenhouse gas (GHG) emissions and other types of air pollutants (e.g., dust/PM10). GHG was not a central issue when permitting mines in 2002; however, California now has significant policies in place to reduce GHG emissions.

Backfilling requirements also extend to materials in heap leach pads, which are constructed to minimize infiltration from surface water and to control erosion to protect water quality. Constructing a system to minimize infiltration and control erosion within a pit may not be feasible or



as environmentally protective as grading and capping heap leach pads in place.

Even if not used to backfill a pit, the regulatory requirement to grade any excess materials to an elevation within 25 feet of the original surface elevation could require excess material to be spread on previously undisturbed land. Many mines are located on or near suitable habitat for special status or sensitive species, which could be impacted if larger areas are disturbed due to this grading requirement.

The Future: Reforming the Regulatory Backfilling Requirement

In June 2015, the Mineral Conservation and Reclamation Committee of the SMGB heard testimony from Rick Kiel and Ken Haskell from Golder Associates Inc. and Tom Henry from Stoel Rives LLP on proposed changes to the backfilling regulations and the unintended consequences associated with the current requirements. The Committee is comprised of four of the nine members of the SMGB and would be principally responsible for proposing changes to the backfilling regulations.

Proposed changes to the backfilling regulations that were discussed included: (1)

modifying the regulation to create more flexible standards for backfilling based on site-specific factors; and (2) incorporating the decision to require backfilling into the environmental review process under the California Environmental Quality Act, which would allow a lead agency to weigh the environmental benefits and impacts of backfilling on a project-by-project basis.

Generally, the Committee members understood that reclamation cannot be a “one size fits all” approach as currently required by the backfilling regulation. Backfilling may or may not be appropriate depending on local site conditions and other environmental factors. At the conclusion of the hearing, the Committee directed the Executive Officer of the SMGB to reach out to other interested stakeholders for further testimony before the Committee. That additional testimony has not occurred yet due to the recent resignation of the SMGB’s Executive Officer; however, further action is expected once the SMGB hires a new Executive Officer in 2016.

The Future: Surface Mining Law Reform

Adopted in 1975, the California Surface Mining and Reclamation Act (SMARA) vests control over permitting and reclamation of surface mines in local lead agencies, e.g., cities and counties. However, the State -- acting through the Office of Mine Reclamation (OMR) and the SMGB -- sets the minimum standards for reclamation and retains oversight on reclamation issues.

In adopting an amendment in 2013 to interim management plans required under SMARA, Governor Brown called for broad reform to SMARA. The beginning of the 2015 to 2016 Legislative session saw two competing bills for SMARA reform. Assembly member Adam Gray (D-Merced) sponsored the industry supported bill, AB

1142. Senator Fran Pavley (D-Agoura Hills) sponsored an opposition bill, SB 209. Although AB 1142 passed in the Assembly, a stalemate resulted in the Senate with both bills being placed in the inactive file.

In the second half of the Legislative session, the competing interests appear to have reached a compromise as to the framework for SMARA reform. Specific language has not been circulated yet, but key elements were discussed at the SMGB meeting in February 2016. If adopted, the new SMARA reform bill would create a Division of Mine Reclamation with a Supervisor of Mines. This new Division would have enhanced oversight for financial assurances and reclamation plans. Further, the Division would be charged with training local lead agencies in proper inspections, which are required annually under SMARA.

These key reforms would strengthen the State’s oversight and control of reclamation for surface mines, which could be a mixed bag for

“This interim leniency is only acceptable as we take the time to reform the Surface Mining and Reclamation Act -- from top to bottom.”
-Governor Brown, Sept. 28, 2013

industry. OMR has been criticized for not adequately supervising lead agencies. However, lead agencies have

also been criticized for not having the technical expertise to regulate surface mines. A stronger state agency for SMARA oversight could fill in this technical expertise gap, but this may be at the expense of local control over surface mining.

¹ See 14 Cal. Code Regs., § 3704.1 for the regulatory backfilling requirements.
² See Cal. Public Resources Code § 2773.3 and 2773.5 for the statutory backfilling requirements.

³ Class C generally includes areas suitable for wilderness designation. Class L generally includes areas with sensitive, natural, scenic, ecological or cultural resource values.

⁴ SMGB, Executive Officer’s Report, p. 12-13 (April 10, 2003).

For further information, contact the California Mining Group at Stoel Rives LLP:
Tom Henry: thomas.henry@stoel.com
Michael Sherman: michael.sherman@stoel.com
(916) 447-0700