STOEL RIVES LLP
ATTORNEYS AT LAW

500 Capitol Mall, Suite 1600
Sacramento, CA 95814
main 916.447.0700
fax 916.447.4781
www.stoel.com

THOMAS A. HENRY
Direct (916) 319-4667
thomas.henry@stoel.com

June 4, 2015

VIA EMAIL

George Kenline, Chairman
Mineral Conservation and Reclamation Committee
California State Mining and Geology Board
801 K Street, Suite 2015
Sacramento, CA 95814

Dear Mr. Kenline:

We are writing to request that the State Mining and Geology Board ("SMGB") consider modifications to its metallic mines pit backfill regulations as set out in California Code of Regulations section 3704.1. As more fully described in the presentation by Rick Kiel and Ken Haskel of Golder Associates, application of the regulations has, and will in the future, result in adverse environmental impacts not anticipated when the SMGB adopted the regulations in 2002. While other states have, in some instances, required the backfilling of mined pits, these requirements have only been applied on a case-by-case basis, when it has made sense to do so based on environmental considerations. To our knowledge, California is the only state that requires the backfilling of all metallic mined pits without consideration of the environmental impacts associated with backfilling. Accordingly, we urge the Committee to consider changes to the regulations, so that lead agencies would be able to approve alternative methods of reclamation where these alternatives have been examined during the project's environmental review under the California Environmental Quality Act ("CEQA") and found to be environmentally superior to backfilling.[1] A change in the regulations would not, of course, change other statutory requirements for backfilling adopted by the State Legislature to apply to specific areas within California.

[1] We have referred to all of the requirements of section 3704.1, generally, as the "backfill requirements." As described in the Golder Associates presentation, the regulations encompass other requirements, such as those relating to the grading of materials not used in the backfilling of the pits.

Alaska California Idaho
Minnesota Oregon Utah Washington
and Washington, D.C.

A. The statutory and regulatory backfill requirements were adopted over concern with a proposed gold mine in Imperial County. These concerns have been addressed by the State Legislature.

The backfill regulatory requirements resulted from concerns related to a single planned mine on Federal property in Imperial County proposed by Glamis Gold, Ltd. The proposed mine, known as the Imperial Project, attracted considerable public attention due to the fact that the mining rights were near a Native American area of special concern.

Glamis had applied to the United States Department of Interior, Bureau of Land Management ("BLM") for approval of its mining operations. In January 2001, during the last days of the Clinton administration, the BLM issued a record of decision denying the project. The BLM cited several key factors in reaching its decision, including:

1. the proposed project was located in an area determined to have significant Native American values, and would cause unavoidable adverse impacts to these resources;
2. unavoidable adverse visual impacts, and;
3. the project was inconsistent with the federally designated California Desert Conservation Area ("CDCA").

(BLM, Record of Decision for the Imperial Project Gold Mine Proposal (Jan. 17, 2001) p. 9.)

This January 2001 decision was later reversed by the BLM during the Bush administration, and the mine plan was approved by the BLM. (*See* Secretary Gale A. Norton, Rescission of Record of Decision for the Imperial Project Gold Mine Proposal (Nov. 23, 2001).) In response to the BLM's decision, the State of California took steps to prevent the company from mining the Imperial Project under the plan approved by the BLM.

First, on December 18, 2002, the SMGB adopted emergency backfill regulations under its mandate to "adopt regulations that establish state policy for the reclamation of mines lands." (Pub. Resources Code, § 2755.) These emergency regulations were later adopted as permanent regulations and are essentially the regulations in place today.

Second, in April 2003, following approval of the emergency regulations by the SMGB, Governor Gray Davis signed Senate Bill 22, an urgency statute with a considerably narrower application, that required the backfilling of metallic mine pits only when "located on, or within one mile of

any Native American sacred site and [which are] located in an area of special concern" within the CDCA. (Pub. Resources Code, § 2773.3.) Importantly, the statute applies to the area of the planned Imperial Project. Accordingly, a regulatory amendment would not change the fact that backfilling would continue to be required in this area.

B. There are significant differences between the backfill regulations and the narrowly drafted statutory backfill requirements in Public Resources Code section 2773.3.

As stated above, the regulations go well beyond the limitations placed on metallic mineral mines by Public Resources Code section 2773.3. Section 2773.3 has a very narrow scope, requiring the backfilling of metallic mineral mines located within one mile of any Native American sacred site and within an area of special concern within the CDCA. (Pub. Resources Code, § 2773.3.) The regulations, however, require *all* new metallic mineral mines in California to be backfilled. (Cal. Code Regs., § 3704.1.)

The statute and the regulations also differ in other respects:

- As noted above, the statute gives special consideration to proximity to Native American sacred sites, while this is not a consideration under the regulations.
- The statute requires backfilling and grading of excess materials to achieve the "approximate contours of the mined lands prior to mining," while the regulations specify that the resulting topography cannot exceed the pre-mining surface contour elevations by more than 25 feet.
- The regulations provide that where there is an insufficient amount of material, backfill would only need to occur to the extent of the materials on hand; also, no backfill is required for slopes in excess of 2:1; the statute does not provide for these exceptions.

C. The backfill regulations effectively thwart the purposes of CEQA by elevating a few potential concerns above all other environmental considerations.

As noted above, the regulations were enacted in response to cultural and aesthetic concerns related to the proposed Imperial Mine, a project that was initially disapproved by the BLM on those grounds. However, by mandating backfill and regrading to the original contours *in all situations,* no matter the characteristics of the mine site, the regulations effectively contravene the purposes of CEQA, which requires state and local agencies to follow a protocol of analysis of environmental impacts of proposed projects and to adopt all feasible measures to mitigate those

impacts. One of the basic purposes of CEQA is to "prevent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures." (Cal. Code Regs., § 15002, subd. (a)(3).)

As set out in the accompanying presentation from Golder Associates, the application of the backfill and grading requirements in all situations, while not taking into account any local conditions, can lead to significant unavoidable impacts, including impacts to water quality and air quality. The regulations also do not allow flexibility as other environmental concerns come into focus over time. For example, the backfill regulations were adopted prior to the passage of a variety of laws to address greenhouse gas emissions. As described in the Golder presentation, a requirement to backfill may result in a significant increase in greenhouse gas emissions for a project. Accordingly, the backfill regulations conflict with the basic purposes of CEQA by effectively raising a limited number of environmental concerns, (e.g., aesthetics) above all others that may come into focus as part of the site-specific CEQA process.

D. The current regulations acknowledge that reclamation standards are subject to CEQA; however there has been no legal review of this provision, making it uncertain how this requirement would be applied.

The current regulations provide that the reclamation standards, including the backfill requirements, may be changed based on the CEQA evaluation. However, it is unclear how these provisions would be applied.

In particular, section 3700(a) of the regulations provides that all of the following reclamation standards set out in Article 9, including the pit backfill regulations, shall apply to each surface mining operation to the extent that:

> (1) they are consistent with required mitigation identified in conformance with the California Environmental Quality Act, provided that such mitigation is at least as stringent as the standards; and (2) they are consistent with the planned or actual subsequent use or uses of the mining site.[2]

[2] 14 Cal. Code of Regulations section 3700(b) specifically does not apply to the backfill regulations as set out at 14 Cal. Code of Regulations section 3704.1.

While this regulation states that the reclamation standards will only apply to the extent that they are consistent with mitigation measures identified as part of CEQA review, it is unclear what type of mitigation would be "at least as stringent as the [reclamation] standards." Given this ambiguity, mine operators have been reluctant to argue that pit backfill provisions should not apply even when environmental impacts associated with the backfill could be mitigated to a less than significant level by not requiring backfilling.

E. The regulations should be modified to allow approval of partial or no backfill alternatives when warranted by a CEQA analysis, and to address potential environmental issues that may apply in all situations relating to mining waste.

We believe the SMGB should consider at least two amendments to the current regulations based on the concerns described above and in the Golder Associates presentation.

First, because of the potential problems associated with mining waste, a problem that could apply throughout the State, we recommend the following:

> (j) This section does not apply to mining waste units classified as Group A or Group B (including surface impoundments, waste piles, and tailings ponds) as defined by Title 27, California Code of Regulations, Division 2, Chapter 7, Subchapter 1, Mining Waste Management, Section 22480, which receive Waste Discharge Requirements and require more stringent management to accommodate site specific and regional goals.

Second, based on the above described concerns that the backfilling requirements may prevent a lead agency from otherwise approving an environmentally superior alternative identified as part of the CEQA process, we recommend the following:

> (k) Except as provided in Public Resources Code section 2773.3, a lead agency may approve a reclamation plan that does not comply with this section if the lead agency has identified that reclamation plan as an environmentally superior alternative pursuant to Title 14, California Code of Regulations, Division 6, Chapter 3, Article 9, section 15126.6, and provided that the alternatives analysis encompasses a range of partial backfill and no backfill alternatives.

These modifications would allow lead agencies to approve reclamation plans with backfilling standards that would be appropriate to the site. This change would also not affect the backfill standards set out in Public Resources Code section 2773.3.

Very truly yours,

Thomas A. Henry
TAH:jmw

cc: Stephen Testa, Executive Officer of the California State Mining and Geology Board
Members of the Mineral Conservation and Reclamation Committee
Gideon Kracov, Chairman, SMGB
Ken Haskell, Golder Associates Inc.
Rick Kiel, Golder Associates Inc.
Michael Sherman, Stoel Rives LLP