

July 31, 2013

Michael P. Krug  
Senior Staff Counsel  
CA Dept of Conservation  
801 K Street MS 24 03  
Sacramento, CA 95814

Re: Your Request for Informal Assistance  
**Our File No. I-13-095**

Dear Mr. Krug:

This letter responds to your request for advice on application of the Political Reform Act's (the "Act")<sup>1</sup> conflict-of-interest provisions to Tom Ferrero, an employee in the Department of Conservation's Office of Mine Reclamation. Because your request is general in nature and does not apply to a specific governmental decision in which Mr. Ferrero may participate, we are treating the request as one for informal assistance. (Regulation 18329(b)(2)(B) and (c).<sup>2</sup>

In addition, please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090.

### QUESTION

If, based on the Facts below, the Department of Conservation ("Department") confines Mr. Ferrero's making or participation in the Department's decisions to just surface and in-stream mines, and shields him from making or participating in decisions on underground mines, would he avoid a conflict of interest under the Act relating to Miriah Mining Company because the decisions would not have a "reasonably foreseeable" financial effect on the company?

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity set forth in either Section 83114(a) or (b). (Regulation 18329(c)(3).)

## CONCLUSION

Based on the Facts below, it seems reasonable to assume that, in most cases, Department decisions on just surface and in-stream mines in which Mr. Ferrero participates will not have a reasonably foreseeable financial effect on Miriah Mining Company. In general, this approach should minimize the possibility for conflicts of interest. Of course, Mr. Ferrero will still need to be alert for the unusual case such as a decision on a surface mine or in-stream mine located near the Miriah mine which might have a reasonably foreseeable financial effect on Miriah Mining Company.

## FACTS

Mr. Ferrero is a public official, serving as a Senior Engineering Geologist in the Compliance Unit of the Department's Office of Mine Reclamation ("OMR"), a state agency. OMR is the division in the Department that implements and administers the State Surface Mining and Reclamation Act. Mr. Ferrero is a designated employee in OMR. He has reported interests on his Form 700, described below, that could create a conflict of interest as a result of the OMR's oversight of the state's mines.

In 1975, the Legislature passed the Surface Mining and Reclamation Act (Public Resources Code Section 2710 et seq.; "SMARA"). The legislation, as described in Public Resources Code Sections 2711 and 2712, focuses on both the conservation of and the "production and development of local mineral resources" balanced with the "reclamation of mined lands" being necessary to prevent or minimize "adverse effects on the environment and to protect the public health and safety." (Pub. Resources Code Sections 2712(b) and 2711(a).) Mineral conservation and development is promoted under SMARA through a process involving the assessment of geographical areas containing minerals that are of regional and statewide significance. The assessment is performed by the California Geological Survey ("CGS"), housed within the Department. The assessment may lead to a formal designation of importance of those geographical areas by the State Mining and Geology Board ("SMGB"), also housed within the Department. Local governments are required to establish mineral resource management policies that incorporate this information into their city or county general plans. More importantly, once areas are classified by CGS or designated by the SMGB as significant in mineral resources, local governments must justify approving development that precludes exploitation of those minerals, now or in the future.

Reclamation of mined lands is addressed through the approval of permits and reclamation plans. Before a mining operation can begin, the following must first be obtained from the local government: a valid permit or vested mining rights determination, a reclamation plan, and appropriate financial assurances sufficient for the lead agency or the Department to complete reclamation under the approved reclamation plan. (Pub. Resources Code Section 2710 et seq.; Cal. Code Regs., Title 14, Section 3500 et seq.)

In adopting SMARA, the Legislature intended to create and maintain an effective surface mining and reclamation policy to prevent or minimize adverse environmental effects, reclaim mined lands to a usable condition that is adaptable to alternative uses, and encourage the production and conservation of minerals, while giving consideration to values relating to recreation, watershed, wildlife, range and forage, aesthetic enjoyment, and eliminating residual hazards to public health and safety. (Pub. Resources Code Section 2712.) Under SMARA (at Public Resources Code Sections 2728 and 2774.1(f)), the Legislature designated local governments as the “lead agencies” with primary responsibility to enforce SMARA. This includes administrative matters such as the approval of permits, reclamation plans and financial assurances. Reclamation plans and financial assurances are essentially what their names imply. Reclamation plans are crafted based upon the operations’ individual environmental setting with a corresponding financial assurance for the benefit of the lead agency or the Department to carry out the terms of an approved reclamation plan should the mine operator abandon the site or become financially unable to reclaim the site.

Under SMARA (at Public Resources Code Section 2774.1(a)), lead agencies may take enforcement actions against recalcitrant mine operators based upon either annual inspections under Public Resources Code Section 2774(b) or other inspections and may issue notices of violations and orders to comply where the noted violations are not corrected within prescribed time periods. Failure to comply with an order to comply may result in the administrative assessment of penalties. (Pub. Resources Code Section 2774.1(c).) The Department’s role under SMARA is that of a “backstop” to enforcement. The Department is provided the opportunity to review and comment on reclamation plans and corresponding financial assurances under Public Resources Code Section 2774(c) prior to lead agency approvals. Ultimate authority to approve these items rests with lead agencies. Where lead agencies fail to take appropriate enforcement actions against mining operations, the Department may initiate an enforcement action only after providing the lead agency an opportunity to act first. (See Pub. Resources Code Section 2774.1(f).) If the lead agency fails to act upon notification, the Department may take the same steps to enforce SMARA as the lead agency with respect to investigations, inspections and the issuance of notices of violations, orders to comply, and the assessment of administrative penalties. (Pub. Resources Code Section 2774.1(f); *Department of Conservation v. El Dorado County* (2005) 36 Cal. 4th 971, at p. 990.) The adjudication of appeals for enforcement actions occurs before the lead agencies’ quasi-judicial bodies for lead agency-initiated actions or before the SMGB for enforcement actions initiated by the Department. (Pub. Resources Code Section 2774.1(b).) Decisions by lead agencies or the SMGB are subject to writ procedures through California’s Code of Civil Procedure Section 1094.5 under Public Resources Code Section 2774.2(e). SMARA designates mines into three distinct categories: surface mines, underground mines, and in-stream mines.

In his position with OMR, Mr. Ferrero supervises the work of a team of engineering geologists employed by the Department responsible for administering and enforcing SMARA. In his role, he supervises or personally conducts reviews of the operation and reclamation of mines in California for compliance with SMARA. As a Senior Engineering Geologist with OMR, Mr. Ferrero must disclose his financial interests on his Statement of Economic Interests in

accordance with the Department's conflict of interest code, disclosure categories #2 and #3, which are:

*Disclosure Category 2:* A designated employee in this category, must report all income (including gifts, loans, and travel payments) from any business entity that provides services, supplies, materials, machinery, or equipment of the type used by the Department of Conservation. These employees must also report all investments and business positions in any business entity that provides services, supplies, materials, machinery, or equipment of the type used by the Department of Conservation.

*Disclosure Category 3:* A designated employee in this category must report real property that may be affected by or subject to any provisions, guidelines, rules, regulations, or policies adopted, enforced or promulgated by the California Geological Survey, the Office of Mine Reclamation or the State Mining and Geology Board. A designated employee in this category must also report all investments and business positions in, and income (including gifts, loans, and travel payments) from, any business entity of the type that may be affected by or subject to any provisions, guidelines, rules, regulations, or policies adopted, enforced or promulgated by the California Geological Survey, the Fair Political Practices Commission, Office of Mine Reclamation, or the State Mining and Geology Board. This includes, but is not limited to, business entities of the type that are regularly engaged in: real estate development, mining, quarrying, mineral refining or smelting operations, logging operations, geothermal and petroleum development, or public utility facility development; or the manufacturing, distribution, sale, repair, or advertising of products for use in exploration, development and design criteria, and construction of facilities; or projects involving siting investigations or land use.

Pursuant to his reporting responsibility, Mr. Ferrero has disclosed economic interests in a business entity that owns an underground gold mine. This business entity is the Miriah Mining Company, for which he is the vice president and secretary/treasurer and in which he owns 601 shares of stock. He does not currently receive any income from Miriah Mining and owns less than a 10 percent interest in the company. Miriah Mining owns a currently inactive historic gold mine, which actually consists of four gold mines, located in Siskiyou County. Miriah Mining has no other business activities. Miriah Mining's principle owner and various investors own the balance of the 10,000 shares of the corporation. Although the mine is currently inactive, the corporation intends, and has taken steps, to reopen and operate the mine.

An underground mine is one of the three types of mines overseen by OMR. The other types of mines are surface mines and in-stream mines; these mines primarily produce sand and gravel and other minerals. A gravel pit is an example of a surface mine. An in-stream mine is a mine located in or adjacent to a waterway (stream or river). Generally speaking, an underground mine is a system of mine shafts that are accessed via one or more entrances. To the lay person,

these entrances and systems resemble caves; as a result, they differ from the other types of mines overseen by OMR in that the disturbance of the earth's surface by an underground mine is greatly less than the other types of mines. Miriah Mining is a corporation owned by the owners of the 10,000 shares issued by Miriah Mining. Those investors include three adult children of Mr. Ferrero.

### **ANALYSIS**

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's interests as set forth in Section 87103. (Section 87103; Regulation 18700(a).) As you are aware, the Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (See Regulations 18700 - 18709.)

You indicate in the Facts that the Department regulates three types of mines and the general authority the Department has over these mines. The three types of mines are: surface mines, in-stream mines and underground mines. You also indicate that Mr. Ferrero is the vice president and secretary/treasurer of, and owns 601 shares presumably worth \$2,000 or more in, the Miriah Mining Company, which operates only an underground mine in California and is subject to the Department's jurisdiction. Since Mr. Ferrero is an officer in Miriah Mining and the value of his stock in the company is presumably \$2,000 or more, the company qualifies as a potentially disqualifying interest for him subject to Section 87100. (Section 87103(a) and (d).) Your request, therefore, applies the eight-step conflict-of-interest analysis to correctly conclude that Mr. Ferrero's making or participation in Department decisions affecting the Miriah Mining Company could give rise to a potential conflict of interest for him under Section 87100.

As you noted, because of his interests in Miriah Mining Company, Mr. Ferrero is disqualified from any decision directly affecting Miriah Mining Company. And if a decision indirectly affects Miriah Mining Company, he is disqualified if it would affect Miriah's gross revenues in a fiscal year by \$20,000 or more, would result in an increase or decrease in the value of Miriah's assets or liabilities by \$20,000 or more, or would result in Miriah's avoiding or incurring expenses for a fiscal year of \$5,000 or more. (Regulation 18705.1(c)(4).)

In order to avoid potential conflicts of interest for Mr. Ferrero, your request has focused on Step 6 (see Regulation 18700(b)(6)) of the conflict of interest analysis, which provides that a public official has a conflict of interest under Section 87100 only if it is "reasonably foreseeable" that a governmental decision in which the official participates will have a financial effect on the official's own financial interest. (Section 87103; Regulation 18706(a).) Your request asks us to confirm that, if the Department confines Mr. Ferrero's making and participation in Department decisions to only those concerning surface and in-stream mines and not concerning underground

mines, it will not be reasonably foreseeable the decisions will have a financial effect on Miriah Mining Company, which, as mentioned, operates an underground mine.

For a governmental decision to have a “reasonably foreseeable” financial effect on an official’s interest, the effect need not be certain or even substantially likely that it will happen. However, the financial effect must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.) While the Commission regulations provide a non-exclusive list of guidelines that can be considered when making this analysis (see Regulation 18706(b)), it is apparent that the list is not exclusive because each consideration of the “reasonably foreseeable” issue rests on the particular circumstances of the governmental decision, including the nature and scope of the decision, and its unique impact, if any, on the official’s financial interest. As such, it is nearly impossible to state as a general proposition that no part of a particular class of governmental decisions will ever have a reasonably foreseeable financial effect on a specific company or other type of financial interest listed under Section 87103.

Certainly, however, the Department’s proposal to have Mr. Ferrero make and participate in decisions on surface and in-stream mines, but not on underground mines, will greatly reduce the possibility for him to have a conflict of interest relating to his interests in Miriah Mining Company. Although much less likely to occur, Mr. Ferrero will also have to refrain from participating in a decision on a surface or in-stream mine that is in the geographic area of the Miriah mine or that for some other reason could have some indirect though foreseeable financial impact on Miriah Mining Company at the materiality thresholds cited above. Should Mr. Ferrero be presented with a governmental decision in the future that raises any of the issues noted herein, we would be happy to advise you further.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Scott Hallabrin  
Counsel, Legal Division

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