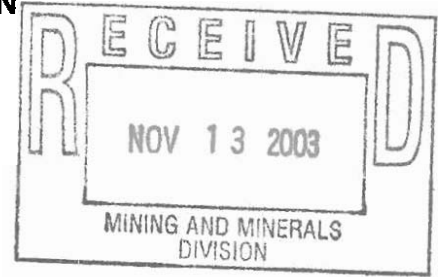


**STATE OF NEW MEXICO
COAL SURFACE MINING COMMISSION**

**IN THE MATTER OF PETITION FOR THE
AMENDMENT OF CERTAIN REGULATIONS**

ORDER



THIS MATTER came before the New Mexico Coal Surface Mining Commission (the "Commission") for public hearing on October 24, 2003 on a petition for the revision of certain regulations by the Mining & Minerals Division of the Energy, Minerals and Natural Resources Department ("MMD"). Notice of the subject, time and place of hearing, the manner in which any interested persons could present their views, and the method by which the public could obtain copies of the proposed revisions was published and mailed as required by NMSA 1978, § 69-25A-6. All interested persons and the general public were provided with a reasonable opportunity to present their views and to examine witnesses testifying at the hearing. The hearing was transcribed and the transcript is in the custody of the Energy, Minerals and Natural Resources Department, Mining and Minerals Division.

I. Proposed Amendments

Petitioner MMD in its petition requested that the Commission consider amending (1) Coal Surface Mining Rule 19.8.5 NMAC Subpart 506, Permit and Exploration Fees, to increase all fees collected from operators, including increasing the maximum limit for annual fees and increasing the fees for a revision; (2) Coal Surface Mining Rule 19.8.12 NMAC Subpart 1200,

Administrative Review by the Director, to create an appeal process for modifications; (3) Coal Surface Mining Rule 19.8.13 NMAC Subpart 1300, Director's Review of Outstanding Permits, to grant to the Director discretion to request permit revisions at anytime outside of the normal midterm review; (4) Coal Surface Mining Rule 19.8.1 Subpart 7, Definitions, to include definitions for permit modification, permit revision, and temporary cessation of operations; (5) Coal Surface Mining Rule 19.8.13 Subpart 1301, Permit Revisions, to create a process for review and approval of modifications, including a new provision for public notice of all modification actions; and (6) Coal Surface Mining Rule 19.8.20 Subpart 2073, Cessation of Operations: Temporary, to grant to the Director discretion to require an operator to take reasonable steps to protect public safety and the environment and to require an operator to justify a temporary cessation of operations beyond an existing permit term.

II. Statement of Reasons

The Commission deliberated on the proposed rule amendments at the close of the hearing.

The Commission found that many of the proposed amendments were reasonable and consistent with the Coal Surface Mining Act, the Coal Surface Mining Rules, and MMD's ongoing role in permit compliance and enforcement activities. The Commission further found that the proposed amendments were necessary to make clear the Director's discretion to require certain actions.


The Commission therefore voted unanimously to approve the following proposed revisions:

- (1) 19 NMAC 8.1 Subpart 7, as proposed by MMD, adding certain definitions;
- (2) 19 NMAC 8.5 Subpart 506, as proposed by MMD, increasing all fees;
- (3) 19 NMAC 8.12 Subpart 1200, as proposed by MMD and modified by the Commission, creating an appeal process for permit modifications but removing language referring to the outcome of an informal meeting;
- (4) 19 NMAC 8.13 Subpart 1300, as proposed by MMD, granting the Director discretion to request permit revisions at anytime outside of the normal midterm review;
- (5) 19 NMAC 8.13 Subpart 1301, as proposed by MMD and modified by the Commission, creating a process for review and approval of permit modifications; and
- (6) 19 NMAC 8.20 Subpart 2073, as proposed by MMD and modified by the Commission, authorizing the Director to require an operator temporarily ceasing operations to protect the public safety and environment, to justify a TCO beyond an existing permit term, including why reclamation should be delayed for an indefinite period, and to demonstrate that the mining operation has a reasonable expectation of continuing operations.

The amendments approved by the Commission on October 24, 2003 are attached hereto as Exhibit A and incorporated by reference.

IT IS THEREFORE ORDERED THAT MMD's petition for the amendment of certain regulations, 19 NMAC 8, be and is hereby **GRANTED**, as noted in the foregoing Order.

**NEW MEXICO COAL SURFACE
MINING COMMISSION**

By: 
Robert Q. Rogers, Jr., Chairman

Dated: December 13, 2003

Exhibit A

19.8.1.7. P. Definitions beginning with the letter "P"

(1) **PARENT CORPORATION** - means a corporation which owns or controls the applicant.

(2) **PASTURELAND OR LAND OCCASIONALLY CUT FOR HAY** - means land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or occasionally cut and cured for livestock feed. Land used for facilities in support of pastureland or land occasionally cut for hay which is adjacent to or an integral part of these operations is also included.

(3) **PERENNIAL STREAM** - means a stream or part of a stream that flows continuously during all of the calendar year as a result of ground water discharge or surface runoff. The term does not include intermittent stream or ephemeral stream.

(4) **PERFORMING ANY FUNCTION OR DUTY UNDER THIS ACT** - means those decisions or actions, which if performed or not performed by an employee, affect the programs under the Act.

(5) **PERMANENT DIVERSION** - means a diversion remaining after surface coal mining and reclamation operations are completed which has been approved for retention by the Director and other appropriate State and Federal agencies.

(6) **PERMIT** - means a permit to conduct surface coal mining and reclamation operations issued pursuant to Laws 1972, Chapter 68, as amended, or by the Director pursuant to the Act.

(7) **PERMIT AREA** - means the area of land and water within the boundaries of the permit which are designated on the permit application maps, as approved by the Director. This area shall include, at a minimum, all areas which are or will be affected by the surface coal mining and reclamation operations during the term of the permit. The permit area shall not include roads, not otherwise within the permit boundary, infrequently used to monitor remote facilities or environmental resources, or for exploration or surveying purposes, if the Director approves such use of such roads, after determining that such use will not result in a significant adverse affect upon the environment.

(8) **PERMIT MODIFICATION** - means an alteration of the terms or requirements of a permit, which alteration is not a permit revision.

(9) **PERMIT REVISION** - means a significant alteration of the terms or requirements of a permit, as identified in 19.8.13.1301.A NMAC.

(~~8~~)**10** **PERMITTEE** - means a person holding or required by the Act and 19.8 NMAC Parts 1-35 to hold a permit to conduct surface coal mining and reclamation operations issued by the Director pursuant to the Act and 19.8 NMAC Parts 1-35.

(~~9~~)**11** **PERSON** - means an individual, Indian tribe when conducting surface coal mining and reclamation operations on non-Indian lands, partnership, association, society, joint venture, joint stock company, firm, company, corporation, cooperative or other business organization and any agency, unit, or instrumentality of Federal, State or local government including any publicly owned utility or publicly owned corporation of Federal, State or local government.

([10]12) PERSON HAVING AN INTEREST WHICH IS OR MAY BE ADVERSELY AFFECTED OR PERSON WITH A VALID LEGAL INTEREST - shall include any person:

(a) who uses any resource of economic, recreational, aesthetic, or environmental value that may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Secretary of the U.S. Department of Interior or the Director or,

(b) whose property is or may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Secretary of the U.S. Department of Interior or the Director.

([11]13) PRECIPITATION EVENT - means a quantity of water resulting from drizzle, rain, snow, sleet, or hail in a limited period of time. It may be expressed in terms of recurrence interval. As used in 19.8 NMAC Parts 1-35, a precipitation event also includes that quantity of water emanating from snow cover as snowmelt in a limited period of time.

([12]14) PREVIOUSLY MINED AREA means land affected by surface coal mining operations prior to August 3, 1977, that has not been reclaimed to the performance standards of SMCRA, the Act, and the New Mexico regulatory program.

([13]15) PRIME FARMLAND - means those lands which are defined by the Secretary of the U.S. Department of Agriculture in 7 CFR 657 (Federal Register Vol. 4 No. 21) and which have historically been used for cropland as that phrase is defined in 19.8 NMAC Parts 1-35.

([14]16) PROHIBITED FINANCIAL INTEREST - means any direct or indirect financial interest in any coal mining operation.

([15]17) PROPERTY TO BE MINED - means both the surface and mineral estates on and underneath lands which are within the permit area.

([16]18) PUBLIC BUILDING - means any structure that is owned by a public agency or used principally for public business, meetings or other group gatherings.

([17]19) PUBLIC OFFICE - means a facility under the direction and control of a governmental entity which is open to public access on a regular basis during reasonable business hours.

([18]20) PUBLIC PARK - means an area dedicated or designated by any Federal, State, or local agency for public recreational use, whether or not such use is limited to certain times or days, including any land leased, reserved or held open to the public because of that use.

([19]21) PUBLIC ROAD - means all roads and highways except private roads, established pursuant to any law of the United States or the State of New Mexico, and roads dedicated to the public use, that have not been vacated or abandoned, and such other roads as are recognized by the corporate authorities of any county in New Mexico.

19.8.1.7. T. Definitions beginning with the letter "T"

(1) **TANGIBLE NET WORTH** - means net worth minus intangibles such as goodwill and rights to patents or royalties.

(2) **TEMPORARY CESSATION OF OPERATIONS** - means cessation of mining or reclamation operations for more than thirty days and where a reasonable expectation of the continuation of mining can be demonstrated by the permittee.

([2]3) **TEMPORARY DIVERSION** - means a diversion of a stream or overland flow which is used during coal exploration or surface coal mining and reclamation operations and not approved by the Director to remain after reclamation as part of the approved postmining land use.

([3]4) **TON** - means 2000 pounds avoirdupois (.90718 metric tons).

([4]5) **TOPDRESSING** - means topsoil or other suitable material that has the capability of sustaining desirable vegetation for the approved postmining land use.

([5]6) **TOPSOIL** - means the "A" soil horizon layer of the three major soil horizons or other surface soil material of suitable texture and pH, and lacking concentrations of elements toxic to plants.

([6]7) **TOXIC-FORMING MATERIALS** - means earth materials or wastes which if acted upon by air, water, weathering or microbiological processes, are likely to produce chemical or physical conditions in soils or water that are detrimental to biota or uses of water.

([7]8) **TOXIC MINE DRAINAGE** - means water that is discharged from active or abandoned mines or other areas affected by coal exploration or surface coal mining and reclamation operations, which contains a substance that through chemical action or physical effects is likely to kill, injure, or impair biota commonly present in the area that might be exposed to it.

([8]9) **TRANSFER, ASSIGNMENT, OR SALE OF RIGHTS** - means a change in ownership or other effective control over the right to conduct surface coal mining operations under a permit issued by the Director.

Summary: The proposed amendment to 19.8.5.506 NMAC increases all fees collected from operators. Some of the proposed changes include increasing the maximum limit for Annual Fees, our primary source of State matching funds, from \$11,000 to 17,500, and increasing the fees for a revision from a maximum of \$2500 to a formula based either on a charge of \$25 for disturbed acres, similar to the fees charged for a new permit. A flat fee of \$4,000 is included to cover revisions with limited or no surface disturbance such as changing the method of mining from surface stripping to underground or highwall mining. These types of revisions take as much or more time to review and process.

The MMD Coal Program is funded through a federal grant administered by the Office of Surface Mining. The state is required to provide match for the federal funds. With a budget of approximately \$1,000,000 the State match, based on OSM's funding formula, is 28%. Currently about \$100,000 of this match is raised through fees charged permittees, primarily from annual fees pursuant to 19.8.5.506.B. The remaining \$180,000 is from general fund appropriations.

19.8.5.506 Permit and Exploration Fees

Each application, pursuant to the Act and 19.8 NMAC Parts 1-35 shall be accompanied by a fee determined under the following schedule:

~~[A. — Original permit filing fee shall be \$1,000 plus \$15 per acre for estimated area to be disturbed during the first year of mining.]~~

A. Original permit filing fee shall be \$2,500 plus \$25 per acre for estimated area to be disturbed during the first year of mining.

~~[B. — Commencing the second year the annual permit fee shall be \$1,000. In addition, there shall be an acreage fee of \$15.00 per acre of disturbed permit area for which the bond has not been released, provided that \$10,000 per year acreage fee is the maximum charge per year for all disturbance. The maximum annual fee will therefore be:~~

~~Permit fee = \$ 1,000~~

~~Acreage fee = \$10,000~~

~~Max. Total = \$11,000~~

~~The annual fee is to be submitted with the annual report.]~~

B. Commencing the second year the annual permit fee shall be \$2,500. In addition, there shall be an acreage fee of \$25.00 per acre of disturbed permit area for which the bond has not been released, provided that \$15,000 per year acreage fee is the maximum charge per year for all disturbance. The maximum annual fee will therefore be:

Permit fee = \$ 2,500

Acreage fee = \$15,000

Max. Total = \$17,500

The annual fee is to be submitted with the annual report.

C. Pending further study, the initial annual acreage fee shall not be collected for acres classified as disturbed, when disturbance is due to subsidence associated with underground mining, unless it is determined by the Director that such subsidence causes significant environmental damage to the surrounding area.

~~{ D. The fee for transferring a permit shall be \$500. }~~

D. The fee for transferring a permit shall be \$1,000.

~~[E. For each revision, the fee will be on a sliding scale from \$0 to \$2,500, depending upon significance of the revision. The Director will determine the amount of the fee for each revision.]~~

E. For revision applications expanding the size of the permit the fee shall be \$4000 plus \$25 per acre for the estimated area to be disturbed during the first year of mining in the expansion area. For all other revision applications the fee shall be \$4000.

~~[F. The fee for filing a notice of intention to explore under 19.8.6.601 NMAC shall be \$50.00.]~~

F. The fee for filing a notice of intention to explore under 19.8.6.601 NMAC shall be \$100.00.

~~[G. The fee for filing an application for approval under 19.8.6.602 NMAC shall be \$100.00.]~~

G. The fee for filing an application for approval under 19.8.6.602 NMAC shall be \$200.00.

[11-29-97; 19.8.5.506 NMAC - Rn, 19 NMAC 8.2.5.506, 9-29-2000; A, 1-15-2001]

Summary: The purpose of this proposed amendment is to create an appeal process for modifications, because the exclusion of modifications from the administrative appeals process has been the subject of controversy in the past. 19.8.12.1200.A is changed to allow for an Administrative Review of modifications. A request for a review must be submitted to the Director in writing. The addition of the last sentence in 1200.A. was included to give the agency and other parties a sense of what issues are in the appeal and to discourage frivolous appeals.

19.8.12.1200 Administrative Review by the Director

A. Within 30 days after the applicant or permittee is notified of the final decision of the Director concerning the application for a permit, revision or renewal thereof, application for transfer, sale, or assignment of rights, or concerning an application for coal exploration, or pursuant to 19.8.13.1301.E(2) NMAC a decision regarding a permit modification, the applicant, permittee or any person with an interest which is or may be adversely affected may request a hearing on the reasons for the final decision in accordance with this Section. Such request shall be in writing and state with reasonable specificity the reasons for the request and objections to the Director's decision.

B.

(1) The Director shall commence the hearing within 30 days of such request. This hearing shall be of record, adjudicatory in nature, and no person who presided at an informal conference under 19.8.11.1103 NMAC shall either preside at the hearing or participate in the decision following the hearing, or in any administrative appeal therefrom.

(2) The Director may, under such conditions as he may prescribe, grant such temporary relief as he deems appropriate, pending final determination of the proceeding, if:

- (a) all parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief;
- (b) the person requesting that relief shows that there is substantial likelihood that he will prevail on the merits of the final determination of the proceeding;
- (c) the relief is not to affect adversely the public health or safety, or cause significant, imminent environmental harm to land, air, or water resources; and
- (d) the relief sought is not the issuance of a permit where a permit has been denied, in whole or in part, by the Director.

(3)

(a) For the purpose of such hearing, the Director may administer oaths and affirmation, subpoena witnesses, written or printed materials, compel attendance of witnesses or production of those materials, compel discovery, and take evidence, including, but not limited to, site inspections of the land to be affected and other surface coal mining and reclamation operations carried on by the applicant in the general vicinity of the proposed operations.

(b) A verbatim record of each public hearing required by this Section shall be made, and a transcript made available on the motion of any party or by order of the Director.

(c) Ex parte contacts between representatives of the parties before the Director and the Director shall be prohibited.

(4) Within the time period specified by Section 69-25A-29 NMSA 1978 of the Act after the close of the record, the Director shall issue and furnish the applicant, and each person who participated in the hearing, with the written findings of fact, conclusions of law, and order of the Director with respect to the appeal.

(5) The burden of proof at such hearings shall be on the party seeking to reverse the decision of the Director.

[11-29-97; 19.8.12.1200 NMAC - Rn, 19 NMAC 8.2.12.1200, 9-29-2000]

Summary: MMD proposes to remove the clause "After the review, the" from 19.8.1300.B. The proposed amendment will allow the Director to require "reasonable" changes to permits to ensure they comply with the CSMC regulations. The way the regulation is currently written it is not clear if the Director has the discretion to request a permit revision outside of the normal midterm review process.

19.8.13.1300 Director's Review of Outstanding Permits

A.

(1) The Director shall review each permit issued and outstanding during the term of the permit. This review shall occur not later than the middle of the permit term and as required by 19.8.10.1000, 1001, 1003 and 1005 NMAC.

(2) For permits of longer than five year terms, a review of the permit shall be no less frequent than the permit midterm or every five years, whichever is more frequent.

(3) Each permit which authorizes the use of an experimental practice shall be reviewed in its entirety by the Director at a frequency set forth in the approved permit, but no less frequently than every 2 1/2 years. Copies of the decision of the Director shall be sent to the permittee and shall be subject to the provisions for administrative and judicial review of 19.8.12 NMAC.

B. ~~[After this review, the]~~ The Director may, by order, require reasonable revisions or modification of the permit provisions to ensure compliance with the Act and 19.8 NMAC.

C. Copies of the decision of the Director shall be sent to the permittee.

D. Any order of the Director requiring revision or modification of permits shall be based upon written findings and shall be subject to the provisions for administrative and judicial review of decisions in 19.8.12 NMAC.

[11-29-97; 19.8.13.1300 NMAC - Rn, 19 NMAC 8.2.13.1300, 9-29-2000]

Summary: Neither the Act nor the Rules define or include provisions for permit modifications. For a number of years, MMD has used modifications as a convention to change permits in all instances that are not a permit revision. For the sake of clarity we propose to define both terms in 19.8.1.7.P NMAC. The proposed changes to 19.8.13.1301 NMAC create a clear process for review and approval of modifications, with stringent timeframes. In the history of our program only one modification has been challenged. Based on our experience, requests to review modifications will be rare.

19.8.13.1301 Permit Revisions

A. A revision to a permit shall be obtained:

(1) for changes in the surface coal mining or reclamation operations described in the original application and approved under the original permit, when such changes constitute a significant departure from the method of conducting mining or reclamation operations contemplated by the original permit. Significant departures as used herein include, but are not limited to:

(a) significant changes in the permit boundary;

(b) changes in the method of extracting coal from the earth (e.g. change from surface to underground mine);

(c) experimental practices as that term is used in 19.8.10 NMAC and Section 69-25A-33 NMSA 1978 of the Act;

- NMAC;
- (d) changes which would require a variance under 19.8.10.1003
 - (e) changes which may have an adverse effect on the environment of a nature not originally covered by the approved permit; or
 - (f) changes which may have an effect on performance bond requirements.
- (2) when required by an order issued under 19.8.13.1300 NMAC;
 - (3) in order to continue operation after the cancellation or material reduction of the liability insurance policy, capability or self-insurance performance bond, or other equivalent guarantee upon which the original permit was issued; or
 - (4) [h]as otherwise required by the Act and 19.8 NMAC.

B. A permit modification shall be obtained for all other changes to a permit that are not classified as a permit revision.

C. The operator may not implement any permit revision or permit modification before obtaining the Director's written approval.

[B]D. The application for revision shall be filed in accordance with the following:

- (1) The permittee shall submit the application to the Director within the time provided for in 19.8.5.504.B(2) NMAC;
- (2) Applications for all types of revisions of a permit shall contain:
 - (a) an identification of the permit by permit number or other appropriate reference which is the subject of the revision;
 - (b) a specific description of the requested change in the terms of the permit;
 - (c) a specific description of any changes in the mining and reclamation operation which may have an effect on performance bond requirements; and
 - (d) such other information as may be deemed necessary to the Director to determine if the proposed revision will comply with the Act and 19.8 NMAC.

E. Hearing and notice requirements:

([3]1) Permit revision. Any application for a revision [which] that propose[d]s significant alterations in the operations described in the materials submitted in the application for the original permit under 19.8.7 NMAC, 19.8.8 NMAC, 19.8.9 NMAC, or 19.8.10 NMAC, or in the conditions of the original permit, shall, at a minimum, be subject to the requirements of 19.8.11 NMAC and 19.8.12 NMAC.

(2) Permit modification.

(a) Within 10 days after the filing of a complete application for a permit modification, the Director shall issue a decision approving or denying the application in whole or in part. A written copy of the decision shall be promptly provided to the permittee and to interested parties.

(b) Within 30 days after the decision notification required by 19.8.1301.E(2)(a) NMAC, the permittee or any person may request a formal hearing in regard to the Director's decision, in accordance with 19.8.12.1200 NMAC.

[C]F. An application for a permit revision shall be reviewed by the Director to determine whether a new or updated determination of the probable hydrologic consequences as described in 19.8.9.907.C NMAC or a new or updated assessment of the probable cumulative impacts as described in 19.8.11.1106.C NMAC shall be required.

[D]G. Any revisions which propose significant departures in the experimental practice shall, at a minimum, be subject to the requirements of 19.8.11 NMAC and 19.8.12 NMAC and concurrence by the Director of the Office of Surface Mining. Revisions that do not propose significant departures in the experimental practice shall not require concurrence by the Director of the Office of Surface Mining.

[E]H. The Director shall approve or disapprove the complete application for revision, in accordance with the requirements of 19.8.11 NMAC and 19.8.5.504.B NMAC.

[F]I. Any extensions to the area covered by a permit, except for incidental boundary revisions, shall be made by application for a new permit and shall not be approved under this part.

Summary: The proposed amendment adds a definition, 19.8.1.7.T(2), and four new paragraphs (19.8.20.2073.C, D, E and F NMAC). The new paragraphs allow the Director to require the operator to protect public safety and the environment, and requires the operator to justify a TCO beyond an existing permit term.

19.8.20.2073 Cessation of Operations: Temporary

A. Each person who conducts surface coal mining operations shall effectively secure surface facilities and support and maintain any surface access openings to underground operations in areas in which there are no current operations, but in which operations are to be resumed under an approved permit. Temporary abandonment shall not relieve a person of his obligation to comply with any provisions of the approved permit.

B. Before temporary cessation of mining and reclamation operations for a period of thirty days or more, or as soon as it is known that a temporary cessation will extend beyond 30 days, persons who conduct surface coal mining operations shall submit to the Director a notice of intention to cease or abandon mining and reclamation operations. This notice shall include a statement of the exact number of acres, and for underground mines the horizontal and vertical extent of subsurface strata which will have been affected in the permit area, prior to such temporary cessation, the extent and kind of reclamation of those areas which will have been accomplished and identification of the backfilling, regrading, revegetation, environmental monitoring, underground opening closures, and water treatment activities that will continue in the temporary cessation.

~~C.~~ [Reserved]

C. At the Director's discretion, the permittee may be directed to take other reasonable actions consistent with 19.8 NMAC to ensure the protection of public safety and the environment while the operation is under temporary cessation.

D. No temporary cessation of mining and reclamation operations shall extend beyond the current permit term, unless the Director approves an extension of the temporary cessation during the permit renewal process conducted in accordance with 19.8.13 NMAC.

E. To continue under a temporary cessation beyond an existing permit term, the permittee must demonstrate that the mining operation has a reasonable expectation of continuing operations.

F. A temporary cessation may not be used to justify a lengthy delay to final reclamation or to preserve facilities beyond what may be considered appropriate for its use in association with an existing permit.

[11-29-97; Rn, 19 NMAC 8.2.20.2071, 12-15-99; 19.8.20.2073 NMAC - Rn, 19 NMAC 8.2.20.2073, 9-29-2000]