

## NEW MEXICO MINING COMMISSION

In re matter of

PETITION FOR THE REVISION OF  
REGULATIONS 19 NMAC 10.2  
SUBPART 2 – FEES  
NEW MEXICO MINING ACT RULES SECTION 202

No. 00-02

### FINAL ORDER AND STATEMENT OF REASONS

This matter is before the New Mexico Mining Commission (the Commission) by a petition for rulemaking submitted by the New Mexico Energy, Minerals, and Natural Resources Department, Mining and Minerals Division (the Division), proposing changes to the New Mexico Mining Act Rules, 19 NMAC 10.2. A public hearing was held on August 2, 2000, and was continued on October 6, 2000, before the Commission.

On August 2, 2000, the Commission deliberated and voted to approve the regulatory changes reflected in the amended regulations 105, 107.DD, 107.W.1.c, 301.D, 502.D, 505.C, 506, 602.D, 608.C, 1102, 1110, 1111, and 1208.D.8, as set forth below in relevant part for the reasons that follow. On October 6, 2000, the Commission deliberated and voted to approve the regulatory changes reflected in the amended regulations 505.B, 406.C, 608.D, 1208.D.7.a.2, 1208.D.7.a.3, 1208.D.7.b.2, and 1208.D.7.b.3, as set forth below in relevant part for the reasons that follow.

## A. AMENDED REGULATIONS:

### SUBPART 1

#### Rule 105 Objective

The objective of Subparts 1-14 of Chapter 10 Part 2 is to establish regulations to implement the New Mexico Mining Act as directed in NMSA 69-36-7A. These regulations are designed to ensure proper reclamation through permitting for operations subject to the Mining Act, in accordance with provisions and standards outlined in the Mining Act.

#### Rule 107.W.1.c.

Located in an area with cultural resources listed on either the National Register of Historic Places or the State Register of Cultural Properties;

#### Rule 107.DD

“Permittee” is the person or entity issued the permit by the Director, or required to have a permit under the Mining Act. [7-12-94, 2-15-96]

### SUBPART 3

#### Rule 301.D

An application for a general permit shall be on the form approved by the Director and will include the following:

### SUBPART 4

#### Rule 406.C

Revisions are modifications that require public notice and an opportunity for public hearing pursuant to Subpart 9. The Director shall review each request for a permit modification to determine whether it must be processed as a revision.

1. The Director shall consider the following factors and their level of impact to determine whether a permit modification would have a significant environmental impact:
  - (a) Whether the proposed change would authorize an expansion of disturbed area beyond that currently authorized by the permit that:
    - (1) Would be located in or is expected to have a direct surface impact on wetlands, springs, perennial or intermittent streams, lakes, rivers, reservoirs or riparian areas.
    - (2) Is expected to have a direct impact on ground water that has a total dissolved solids concentration of less than 10,000 mg/l.

- (3) Is expected to result in point or non-point source surface or subsurface releases of acid or other toxic substances from the permit area.
  - (4) Would be located in designated critical habitat areas as determined in accordance with the federal Endangered Species Act of 1973 or in areas determined by the Department of Game and Fish likely to result in an adverse impact on an endangered species designated in accordance with the Wildlife Conservation Act, Sections 17-2-37 through 17-2-46 NMSA 1978 or by the State Forestry Division for the Endangered Plants Act, Section 75-6-1 NMSA 1978.
  - (5) Would adversely impact cultural resources listed on either the National Register of Historic Places or the State Register of Cultural Properties.
  - (6) Would be located in a known cemetery or other burial ground.
  - (7) Would be located in an area designated as a Federal Wilderness Area, Wilderness Study Area, Area of Critical Environmental Concern, or an area within the National Wild and Scenic River System.
- (b) Whether the proposed change would result in a significant increase in the amount of financial assurance as determined by the Director; or
  - (c) Whether the proposed change would significantly depart from the nature or scale of the original exploration permit.
2. An application for a permit modification or revision shall be accompanied by sufficient information for the Director to determine whether any of the factors listed in this subsection are present.
  3. The Director shall consult with the Department of Environment, the Department of Game and Fish, State Forestry, applicable state or federal land management agency, or the State Historic Preservation Office if factors listed in this section are present relevant to the agency's area of expertise.

## SUBPART 5

### Rule 502.D

Each application under this Subpart shall be in a format acceptable to the Director and shall contain the following:

### Rule 505.B

Revisions are modifications that require public notice and an opportunity for public hearing pursuant to Subpart 9. The Director shall review each request for a permit modification to determine whether it must be processed as a revision.

1. The Director shall consider the following factors and their level of impact to determine whether a permit modification would have a significant environmental impact:
  - (a) Whether the proposed change would authorize an expansion of design limits beyond that currently authorized by the permit that:
    - (1) Would be located in or is expected to have a direct surface impact on wetlands, springs, perennial or intermittent streams, lakes, rivers, reservoirs or riparian areas.
    - (2) Is expected to have a direct impact on ground water that has a total dissolved solids concentration of less than 10,000 mg/l.
    - (3) Is expected to result in point or non-point source surface or subsurface releases of acid or other toxic substances from the permit area.
    - (4) Would be located in designated critical habitat areas as determined in accordance with the federal Endangered Species Act of 1973 or in areas determined by the Department of Game and Fish likely to result in an adverse impact on an endangered species designated in accordance with the Wildlife Conservation Act, Sections 17-2-37 through 17-2-46 NMSA 1978 or by the State Forestry Division for the Endangered Plants Act, Section 75-6-1 NMSA 1978.
    - (5) Would adversely impact cultural resources listed on either the National Register of Historic Places or the State Register of Cultural Properties.
    - (6) Would be located in a known cemetery or other burial ground.
    - (7) Would be located in an area designated as a Federal Wilderness Area, Wilderness Study Area, Area of Critical Environmental Concern, or an area within the National Wild and Scenic River System.
  - (b) Whether the proposed change would result in a significant increase in the amount of financial assurance as determined by the Director; or
  - (c) Whether the proposed change would significantly depart from the nature or scale of the permit.
2. An application for a permit modification or revision shall be accompanied by sufficient information for the Director to determine whether any of the factors listed in this subsection are present.
3. The Director shall consult with the Department of Environment, the Department of Game and Fish, State Forestry, applicable state or federal land management agency, or the State Historic Preservation Office if factors listed in this section are present relevant to the agency's area of expertise.

#### **Rule 505.C**

An application for a permit modification or revision shall be in a format acceptable to the Director. A permit modification or revision shall be required for any changes in the approved closeout plan. [7-12-94, 2-15-96]

### **Rule 506 Closeout Plans**

Six copies of an application for a permit revision shall be submitted, in a format acceptable to the Director, pursuant to Section 69-36-7G of the Act for the incorporation of an approved closeout plan or closeout plan for a portion of the mine if a closeout plan or closeout plan for a portion of the mine was not approved as part of the original permit application. If the original permit application includes a proposed closeout plan or closeout plan for a portion of the mine, the contents, review and approval of the closeout plan or closeout plan for a portion of the mine shall be in accordance with this Subpart. [7-12-94, 2-15-96]

## **SUBPART 6**

### **Rule 602.D**

Each application under this Subpart shall be in a format acceptable to the Director, and shall contain the following:

### **Rule 608.C**

An application for a permit modification or revision shall be in a format acceptable to the Director. A permit modification or revision will not be granted unless the Director determines that the proposed modification or revision meets the requirements of Subpart 6.

### **Rule 608.D**

Revisions are modifications that require public notice and an opportunity for public hearing pursuant to Subpart 9. The Director shall review each request for a permit modification to determine whether it must be processed as a revision.

1. The Director shall consider the following factors and their level of impact to determine whether a permit modification would have a significant environmental impact:
  - (a) Whether the proposed change would authorize an expansion of design limits beyond that currently authorized by the permit that:
    - (1) Would be located in or is expected to have a direct surface impact on wetlands, springs, perennial or intermittent streams, lakes, rivers, reservoirs or riparian areas.
    - (2) Is expected to have a direct impact on ground water that has a total dissolved solids concentration of less than 10,000 mg/l.
    - (3) Is expected to result in point or non-point source surface or subsurface releases of acid or other toxic substances from the permit area.
    - (4) Would be located in designated critical habitat areas as determined in accordance with the federal Endangered Species Act of 1973 or in areas determined by the Department of Game and Fish likely to result in an adverse impact on an endangered species designated in

accordance with the Wildlife Conservation Act, Sections 17-2-37 through 17-2-46 NMSA 1978 or by the State Forestry Division for the Endangered Plants Act, Section 75-6-1 NMSA 1978.

- (5) Would adversely impact cultural resources listed on either the National Register of Historic Places or the State Register of Cultural Properties.
  - (6) Would be located in a known cemetery or other burial ground.
  - (7) Would be located in an area designated as a Federal Wilderness Area, Wilderness Study Area, Area of Critical Environmental Concern, or an area within the National Wild and Scenic River System.
- (b) Whether the proposed change would result in a significant increase in the amount of financial assurance as determined by the Director; or
- (c) Whether the proposed change would significantly depart from the nature or scale of the permit.
2. An application for a permit modification or revision shall be accompanied by sufficient information for the Director to determine whether any of the factors listed in this subsection are present.
  3. The Director shall consult with the Department of Environment, the Department of Game and Fish, State Forestry, applicable state or federal land management agency, or the State Historic Preservation Office if factors listed in this section are present relevant to the agency's area of expertise.

## SUBPART 11

### Rule 1102.A Cessation Order

1. When the Director determines that a condition, practice or violation exists at any operation that violates the Act, this Part, a permit, or order and which condition, practice or violation also creates an imminent danger to the health or safety of the public or will cause significant imminent environmental harm, the Director shall immediately order a cessation of the operation or the portion of that operation relevant to the condition, practice, or violation. Factors to be considered by the Director in determining significant imminent environmental harm include but are not limited to:
  - a) whether there is a violation of Mining Act requirements that creates a reasonable probability of serious or widespread adverse environmental impact; or
  - b) whether mining activities threaten important habitat, important wildlife, or domestic animals.

2. When the Director determines that mining is conducted in violation of the Act, this Part, or a permit because the mining is conducted either (a) without a permit, (b) outside of a permit area, or (c) on previously undisturbed land within a permit area but where mining is not authorized by the permit, the Director may issue a cessation order with respect to activities in the area where the unauthorized mining occurs.
3. The permittee shall advise the Director when the condition, practice or violation has been abated. Within 10 days of receiving such information the Director shall determine if the condition, practice or violation has been abated.
4. The cessation order shall remain in effect until the Director determines that the condition, practice, or violation has been abated or until modified, vacated or terminated by the Director or the Commission. [7-12-94, 2-15-96]

#### **Rule 1102.B Notices of Violation**

1. When the Director determines that an owner or operator is in violation of a requirement of the Act, this Part, a permit, or order but such condition or practice does not create an imminent danger to the health or safety of the public or will not cause significant imminent environmental harm, the Director shall issue a notice of violation, ordering abatement and fixing a reasonable time, not to exceed 60 days unless extended for good cause shown, for the abatement of the condition or practice. Such an order may be appealed to the Commission pursuant to Section 69-36-15 of the Act.
2. If, upon expiration of the period of time fixed for abatement, the Director finds that the condition or practice has not been abated, the Director shall order a cessation of operations or a portion thereof. The permittee shall advise the Director when the condition or practice has been abated. Within 10 days of receiving such information the Director shall determine if the condition or practice has been abated. The cessation order shall remain in effect until the Director determines that the condition or practice has been abated. [7-12-94, 2-15-96]

#### **Rule 1102.C Order to Show Cause**

When the Director determines that a pattern of violations of the Act, this Part, or the permit exists or has existed, and if the Director also finds that such violations are caused by the unwarranted failure of the permittee to comply with the Act, this Part, or the permit or that such violations are willfully caused by the permittee, the Director shall issue an order to the permittee to show cause as to why the permit should not be suspended or revoked. The order shall be in writing, signed by the Director and shall set forth: the nature of the violations, including a citation to the Act, this Part, or the permit allegedly violated; and set a hearing before the

Director on these issues. Following the hearing, the Director may dismiss the action or issue a final order suspending or revoking the permit. Such an order may be appealed to the Commission pursuant to Section 69-36-15 of the Act. [7-12-94, 2-15-96]

#### **Rule 1102.D Effective Date of Orders, Conferences, and Appeals**

1. Unless otherwise stated in the order, each order issued pursuant to this section shall be effective upon service pursuant to Rule 1104.B.
2. A permittee who is served with a notice of violation or a cessation order may request a conference pursuant to Rule 1111. A request for conference shall not operate as a stay. A request for a conference may include a request for the director to extend the time for abatement or cessation of operations, subject to the Director's approval, pending completion of the conference.
3. A permittee who is served with a notice of violation or a cessation order may file a petition for review with the Commission pursuant to NMSA 1978, § 69-36-15 and Part 14 without first requesting a conference pursuant to Rule 1111.

#### **Rule 1110 Procedure for Penalty Assessment**

1110.B The Director shall serve a copy of the proposed penalty assessment and of the worksheet showing the computation of the proposed penalty on the permittee, in the manner prescribed in section 1104.B. The Director shall serve the proposed penalty assessment no later than 30 days after the date set for abatement of the violation or issuance of the cessation order. Failure by the Director to serve the proposed penalty within 30 days shall not be grounds for dismissal of all or part of such violation or penalty unless the permittee:

1. proves actual prejudice as a result of the delay; and
2. makes a timely objection to the delay. An objection shall be timely only if made in the normal course of administrative and judicial review. [7-12-94, 2-15-96]

#### **1111 Procedure for Conference**

1111.A A permittee who receives a notice of violation or a cessation order pursuant to section 1102 or a proposed penalty assessment may request a conference for a review of the Director's action by submitting a written request to the Director within 15 days from the date of service. The Director shall arrange for a conference if a timely request for a conference is made. The Director, in his sole discretion, may arrange for a conference if a late request for a conference is made.



1. If the permittee requests a conference, the Director may assign a conference officer to hold the conference. This person shall not be the inspector signing the notice or order. The conference shall be informal in nature and not be governed by the rules of evidence for adjudicatory hearings. The conference shall be held within 30 days from the date of issuance of the notice of violation, cessation order, or proposed penalty assessment unless the Director grants an extension for good cause shown.
2. The conference officer shall consider all relevant information. The conference officer shall make his recommendation to the Director to affirm, modify or vacate the notice of violation or cessation order or affirm, decrease or vacate the proposed penalty, if any. [7-12-94, 2-15-96]

1111.B The Director, within 30 days after the conference, shall serve the permittee with his order regarding the violation and penalty. When a conference is held, the period for filing a petition for review of the director's action pursuant to § 69-36-15 NMSA 1978 shall run from the date of service of the director's order pursuant to this subsection. [7-12-94, 2-15-96]

1111.C When the permittee notifies the Director that the violation has been abated, the permittee may request a reduction of points under Rule 1106.D. The Director may reduce any penalty by awarding points for good faith compliance.

1111.D All penalties must be paid within 30 days after the penalty assessment, or any Director's order issued following a conference held pursuant to Rule 1111. [7-12-94, 2-15-96]

## **SUBPART 12**

### **Rule 1208.D.2**

The Third Party Guarantee shall be signed by an authorized representative, and legal counsel of the guarantor shall certify that the guarantor can legally engage in the guarantee and shall certify the amounts and names of beneficiaries of all other guarantees for which the guarantor is obligated.

#### **Rule 1208.D.7.a.2**

Guarantor's tangible net worth and working capital are each equal to or greater than six (6) times the sum of the proposed financial assurance and all other guarantees for environmental permits issued in the U.S. for which the guarantor is obligated;

#### **Rule 1208.D.7.a.3**

Guarantor's assets located in the United States amount to at least ninety percent (90%) of its total assets or its total assets in the United States are at least six (6) times the sum of

the proposed financial assurance and all other guarantees for environmental permits issued in the U.S. for which the guarantor is obligated.

**Rule 1208.D.7.b.2**

The guarantor has a tangible net worth that is at least \$10 million dollars and is greater than six (6) times the sum of the proposed financial assurance and all other guarantees for environmental permits issued in the U.S. for which the guarantor is obligated; and

**Rule 1208.D.7.b.3**

Guarantor's assets located in the United States amount to at least ninety percent (90%) of its total assets or its total assets in the United States are at least six (6) times the sum of the proposed financial assurance and all other guarantees for environmental permits issued in the U.S. for which the guarantor is obligated.

**Rule 1208.D.8**

The Director may require monitoring of the guarantor's financial condition by a contractor with the state during the time that a Third Party Guarantee is used for financial assurance. The costs of such monitoring shall be paid by the permittee. The frequency of such monitoring shall be determined by the Director.

**B. STATEMENT OF REASONS:**

1. The Commission has the authority to approve this petition.
2. The Division has met all procedural requirements necessary for the approval of this petition.
3. These revisions comport with the New Mexico Mining Act, NMSA 1978, Section 69-36-1 et seq. ("the Act") and address all regulatory requirements of the Act.
4. These revisions will lead to better administration of the Act's provisions.
5. These revisions will clarify the applicable administrative processes.
6. These revisions correct typographical and clerical errors.
7. These revisions more fairly govern permitting and modification procedures.
8. These revisions better insure adequate financial assurance by operators and reclamation.
9. These revisions more accurately reflect the economic and environmental effects of mining operations.

**C. FINAL ORDER**

This petition is approved as of October 5, 2000.

  
Terry L. Fletcher, Chair  
New Mexico Mining Commission