

STATE OF NEW MEXICO

BEFORE THE NEW MEXICO MINING COMMISSION

**IN THE MATTER OF PETITION NO. 08-02
FOR THE REVISION OF REGULATIONS,
19 NMAC 10 Part 2 – FEES;
NMAC 19.10 Part 3 – MINIMAL IMPACT OPERATIONS;
NMAC 19.10 Part 4 – EXPLORATION;
NMAC 19.10 Part 12 – FINANCIAL ASSURANCE REQUIREMENTS**

PARTIAL FINAL ORDER

THIS MATTER came before the New Mexico Mining Commission (the “Commission”) for public hearing on a Petition for the Revision of Regulations, NMAC 19.10 Part 2 – Fees; NMAC 19.10 Part 3 – Minimal Impact Operations; NMAC 19.10 Part 4 – Exploration; and NMAC 19.10 Part 12 – Financial Assurance Requirements filed on November 14, 2008 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, § 69-36-8(C), and NMAC 19.10 Part 9.

In accordance with Section 303 of the Commission’s Guidelines, the Haaku Water Office of the Pueblo of Acoma, Amigos Bravos, and the Gila Resources Information Project (herein referred to collectively as “GRIP”), as well as MMD, timely filed a Notice of Intent to Present Technical Testimony. The Commission commenced the public hearing on February 17, 2009. All interested persons and the general public were and will be provided with a reasonable opportunity to present their views and to cross-examine witnesses testifying at the hearing. The hearing was digitally recorded and

the recording is in the custody of the Energy, Minerals and Natural Resources Department, Mining and Minerals Division.

Preliminary Matters

Before hearing direct testimony on the proposed regulatory changes, the Commission heard a motion from the floor by MMD, echoed by various agencies, members of the public and industry representatives, to strike certain portions of GRIP's proposed amendments to NMAC 19.10 Part 3 – Minimal Impact Operations; NMAC 19.10 Part 4 – Exploration; and NMAC 19.10 Part 12 – Financial Assurance Requirements. See GRIP's *Proposed Revisions to NMAC 19.10 Parts 3, 4, and 12*, attached to GRIP's *Notice of Intent to Present Technical Testimony*. As grounds for its motion, MMD argued that certain portions of GRIP's proposed revisions are not "recommended modifications" to the proposed regulatory change contemplated by Section 303(A)(4) of the Commission's Guidelines, but are instead "whole cloth" amendments to the Commission's regulations that require the same public notice required for an original petition for regulatory change.

In particular, MMD objected to GRIP's proposed amendment to NMAC 19.10.3.302.D, which contains a new section 7 (requiring an applicant for a minimal impact operation permit to collect baseline groundwater quality data consistent with the procedures of a new section (14) in NMAC 19.10.4.402.D, also proposed by GRIP) and a new NMAC 19.10.302.N (allowing the Director to reject a minimal impact exploration permit application if the applicant, among other things, is in violation of the terms of another permit or any substantial environmental law or regulation at a mining operation in the United States). MMD also objected to GRIP's proposed amendments to NMAC

19.10.4.402 governing exploration permit application requirements, including a new portion of NMAC 19.10.4.402.D(5) (adding requirement that applicants identify cultural and archaeological sites after consultation with affected Indian Tribes or Pueblos to maps submitted with application), a new section NMAC 19.10.4.402.D(14) (adding requirement that applicants submit a plan for gathering groundwater quality data in accordance with outlined procedures), and a new section NMAC 19.10.4.402.G (allowing the Director to reject an exploration permit application if the applicant, among other things, is in violation of the terms of another permit or any substantial environmental law or regulation at a mining operation in the United States).

In support of MMD's motion, the New Mexico Environment Department ("NMED") and industry representatives argued that portions of GRIP's proposed amendments to NMAC 19.10 Parts 3 and 4 were not a logical outgrowth of the regulatory changes proposed by MMD. NMED and industry representatives further noted that GRIP filed its Notice of Intent to Present Technical Testimony ("NOI") on the last possible day for filing NOIs and argued that had they been provided adequate notice of GRIP's proposed amendments, they also would have filed NOIs. GRIP responded that its proposed amendments were related to MMD's proposed revisions. It further argued that a decision by the Commission not to consider all of its proposed amendments would be tantamount to the Commission allowing interested persons and the public to recommend only minor grammatical and stylistic changes to any proposed regulatory change.

At issue are fundamental fairness and adequate public notice of the Commission's possible decisions on the proposed regulatory changes. MMD's Petition states that its

proposed revisions to Parts 3 and 4 are driven by the increased interest in mining, particularly uranium mining, as evidenced by increased minimal impact and exploration operation applications. MMD explains in its Petition that it anticipates that the revisions would provide “more clarity and specificity in determining the types of operations that fall into the minimal impact category, as well as with respect to reclamation requirements for both minimal impact exploration and regular exploration operations.” See Petition 08-02, at p. 3. MMD’s explanation and the proposed revisions attached to its Petition give no indication that the Commission would consider adding a new requirement relating to groundwater quality to its minimal impact exploration operation or regular exploration permit applications or that it might consider expressly giving the Director discretion to reject minimal impact exploration operation or regular exploration permit applications under certain circumstances. For these reasons, the Commission granted MMD’s motion to strike portions of GRIP’s proposed amendments to MMD’s proposed revisions to NMAC 19.10 Part 3 – Minimal Impact Operations; NMAC 19.10 Part 4 – Exploration; and NMAC 19.10 Part 12 – Financial Assurance Requirements.

The Commission subsequently heard testimony from MMD and public comment on MMD’s proposed revisions. The Commission shall continue the hearing on March 23, 2009 to provide an opportunity for GRIP to present testimony on its proposed amendments, as limited by the Commission’s ruling on MMD’s Motion to Strike, for other interested persons to present technical testimony with respect to GRIP’s proposed amendments, and for additional public comment.

Having heard evidence and comment from the parties and the public, the Commission now issues this Partial Order with respect to MMD's Petition for the Revision of Regulation NMAC 19.10 Part 2 – Fees.

I. Proposed Amendments

Petitioner MMD in its Petition requested, in part, that the Commission consider revising Mining Act Rule, 19 NMAC 10.2 Subpart 2 – Fees to extend the sunset provision for the annual fee collections to March 31, 2012. MMD also requested that the Commission amend the permit application fees for exploration permits and new mine permits by changing the minimal impact exploration permit fees from \$100 to \$500; by changing the regular exploration permit fees from \$250 to \$1000; the fee for minimal impact mine application from \$350 to \$1000; the fee for non-minimal impact modification from \$500 to \$1000; the base fee for a new mine permit application from \$3000 to \$5000; and the acreage fee for a new mine application from \$100 to \$200 an acre for the first 50 acres.

II. Statement of Reasons

The Commission finds that the three-year extension to the sunset provision for the annual collection of fees is reasonable and consistent with the Mining Act, the Mining Act Rules, and MMD's ongoing role in mining permit compliance and enforcement activities, approval of closeout plans and reclamation activities, mine site inspections, permit modifications and revisions, and financial assurance oversight. The Commission also finds that increased permit application fees for new mining operations and for new minimal impact mining operations are reasonable and necessary based on the relative higher costs of administration, implementation, enforcement, investigation, and

permitting, as well as the renewed interest in mining and the accompanying environmental and cultural permitting issues.

By a vote of 4 to 2, the Commission voted to approve the revisions to 19 NMAC 10.2 Subpart 2 proposed by MMD because these are consistent with the purposes and intent of the Mining Act. The revisions approved by the Commission on February 17, 2009 are attached hereto as Exhibit A and incorporated by reference.

IT IS THEREFORE ORDERED THAT

- (A) Petition No. 08-02 for the Revision of Regulations, NMAC 19.10 Part 2 – Fees; NMAC 19.10 Part 3 – Minimal Impact Operations; NMAC 19.10 Part 4 – Exploration; and NMAC 19.10 Part 12 – Financial Assurance Requirements, is hereby **GRANTED with respect to NMAC 19.10 Part 2 – Fees only**, with the hearing on the revisions to Parts 3, 4, and 12 to be continued;
- (B) At or related to its hearing on Petition 08-02, the Commission shall not consider or hear evidence on the amendments requested in GRIP's NOI regarding the following sections of NMAC: NMAC 19.10.3.302.D(7); NMAC 19.10.3.302.N; and any and all portions of NMAC 19.10.10.4.

NEW MEXICO MINING COMMISSION

By: 
JON GOLDSTEIN, Chairman

Dated: February 24, 2009

TITLE 19 NATURAL RESOURCES AND WILDLIFE
CHAPTER 10 NON-COAL MINING
PART 2 FEES

19.10.2.1 ISSUING AGENCY: New Mexico Mining Commission.
[19.10.2.1 NMAC - N, 05-15-2001]

19.10.2.2 SCOPE: All persons subject to the New Mexico Mining Act NMSA 1978, Section 69-36-1 et. seq.
[19.10.2.2 NMAC - N, 05-15-2001]

19.10.2.3 STATUTORY AUTHORITY: NMSA 1978, Section 69-36-1 et. seq.
[19.10.2.3 NMAC - N, 05-15-2001]

19.10.2.4 DURATION: Permanent.
[19.10.2.4 NMAC - N, 05-15-2001]

19.10.2.5 EFFECTIVE DATE: February 15, 1996, unless a later date is cited at the end of a section.

A. All references to the Mining Act Parts 1-13 in any other rule shall be understood as a reference to 19.10 NMAC.

B. The amendment and replacement of The Mining Act Parts 1-13 shall not affect any administrative or judicial enforcement action pending on the effective date of this amendment nor the validity of any permit issued pursuant to the Mining Act Parts 1-13.
[19.10.2.5 NMAC - N, 05-15-2001]

19.10.2.6 OBJECTIVE: The objective of Parts 1-14 of 19.10 NMAC 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.
[19.10.2.6 NMAC - N, 05-15-2001]

19.10.2.7 DEFINITIONS: [RESERVED]
[19.10.2.7 NMAC - N, 05-15-2001]
[Definitions for this part can be found in 19.10.1.7 NMAC.]

19.10.2.8 - 19.10.2.200 [RESERVED]
[19.10.2.8 - 19.10.2.200 NMAC - N, 05-15-2001]

19.10.2.201 APPLICATION FEES: Applications filed with the director shall be accompanied by a fee determined under the following schedule:

A. The permit application fee for an existing mining operation shall be determined by adding:

- (1) \$1,000.00 base fee;
- (2) \$15.00 per acre for the first 50 acres of land expected to be disturbed over the life of the mine (design limits) for surface disturbance, plus \$5.00 per acre for all such land over 50 acres;
- (3) a fee determined in accordance with 19.10.2.203 NMAC; and
- (4) if a closeout plan is submitted with the initial application, an additional fee will be assessed in accordance with Subsection K of 19.10.2.201 NMAC.

B. The permit application fee for a new mining operation shall be determined by adding:

- (1) \$5,000.00 base fee;
- (2) \$200.00 per acre for the first 50 acres of land expected to be disturbed over the life of the mine (design limits) for surface disturbance, plus \$40.00 per acre for all such land over 50 acres;
- (3) a fee determined in accordance with 19.10.2.203 NMAC; and
- (4) in addition, any cost associated with the preparation of an environmental evaluation by a third party shall be paid for by the applicant.

C. The initial application fee for an existing minimal impact mining operation is \$250.00. If a closeout plan is submitted with the initial application, an additional fee of \$250.00 will be assessed.

- D. The initial application fee for a new minimal impact mining operation is \$1,000.00.
- E. The fee for an exploration permit is \$1,000.00.
- F. The fee for a minimal impact exploration permit is \$500.00.
- G. The fee for transferring a permit is \$250.00.
- H. The fee is \$1,000.00 for a non-minimal impact operation permit modification which is not a revision.
- I. The fee for a minimal impact operation modification is \$250.00.
- J. The fee for each permit revision, excluding revisions for closeout plans, is \$5,000.00.
- K. The fee for a permit revision for a closeout plan for an existing mining operation shall be determined by the following table. Acreage calculations must be based on total existing and proposed disturbance as described in the closeout plan.

(1)	> 0 to 10 acres	\$750
(2)	> 10 to 30 acres	\$1,500
(3)	> 30 to 100 acres	\$3,000
(4)	> 100 to 300 acres	\$4,500
(5)	> 300 to 3,000 acres	\$6,000
(6)	> 3,000 to 10,000 acres	\$7,500
(7)	> 10,000 acres	\$9,000
- L. The fee for a permit modification for a closeout plan for a minimal impact existing mine is \$250.00.
- M. The fee for each application for a variance is \$500.00.
- N. The director may waive application fees for a variance, modification, revision, or transferring a permit that requires little or no cost for investigation and issuance.
- O. The application fee to determine whether a mine or a portion of a mine qualifies for prior reclamation is \$250.00. The fee shall be paid at the time an inspection is requested.
[7-12-94, 11-15-95, 12-15-95, 2-15-96; 19.10.2.201 NMAC - Rn, 19 NMAC 10.2.2.201, 05-15-2001; A, 03-16-09]

19.10.2.202 ANNUAL FEES

- A. The annual fee for an existing mining operation shall be determined by adding:
 - (1) \$800.00 base fee;
 - (2) \$15.00 per acre for the first 50 acres of currently disturbed surface land plus \$3.00 per acre for all disturbed land over 50 acres;
 - (3) a fee determined in accordance with 19.10.2.203 NMAC;
 - (4) a surcharge of 75% shall be added to the total annual fees for mining operations that have 500 acres or more disturbed area in their permit as defined in Paragraph (2) of Subsection D of 19.10.1.7 NMAC; substantially reclaimed acreage as defined in Paragraph (1) of Subsection F of 19.10.2.202 NMAC will not be counted as disturbed acreage for purposes of this paragraph;
 - (5) a surcharge of 50% shall be added to the total annual fees for existing mining operations that did not obtain an extension in accordance with Subsection D of 19.10.5.501 NMAC and have not obtained closeout plan approval; and
 - (6) the annual fee shall be calculated each year based on cumulative acreage disturbed as of December 31st of the prior year, and shall be due on or before April 30th of each year until all Mining Act requirements are met.
- B. The annual fee for the new mining operation shall be determined by adding:
 - (1) \$1,000.00 base fee;
 - (2) \$30.00 per acre for the first 50 acres of currently disturbed surface land plus \$10.00 per acre for all disturbed land over 50 acres;
 - (3) a fee determined in accordance with 19.10.2.203 NMAC; and
 - (4) the annual fee shall be calculated each year based on cumulative acreage disturbed as of December 31st of the prior year, and shall be due on or before April 30th of each subsequent year following initial submittal of a permit application.
- C. The annual fee for a minimal impact existing mining operation shall be \$250.00. This fee shall be due on or before April 30th of each year following initial submittal of permit application.
- D. The annual fee for a minimal impact new mining operation shall be \$250.00. This fee shall be due on or before April 30th of each year following initial submittal of permit application.

E. The provisions in Subsection A through D of 19.10.2.202 NMAC and Subsection F of 19.10.2.202 NMAC shall not be applicable to any fees due after March 31, 2012.

F. Formula for Reducing Fees for Substantially Reclaimed Acreage.

(1) For the purposes of 19.10.2 NMAC, "Substantially Reclaimed" means financial assurance has been released pursuant to 19.10.12.1210 NMAC except the amount to establish revegetation pursuant to Subsection A of 19.10.12.1204 NMAC.

(2) For the purposes of 19.10.2 NMAC, the total annual pre-reclamation fee is the total annual fee calculated assuming no reclamation has taken place.

(3) Base fees, disturbance fees and facility fees calculated pursuant to Subsection A of 19.10.2.202 NMAC or Subsection B of 19.10.2.202 NMAC shall be reduced in proportion to the area substantially reclaimed as compared to the total pre-reclamation fee but shall not be reduced to less than 60 percent of the total annual pre-reclamation fee. Formula for fee calculation: Fee owed = Pre-reclamation Fee - (AR/AT) * (Pre-reclamation Fee), where AT = Total Acreage and AR = Reclaimed Acreage.

[7-12-94, 11-15-95, 2-15-96, 5-31-97, 6-30-99, 12-29-2000; 19.10.2.202 NMAC - Rn, 19 NMAC 10.2.2.202, 05-15-2001; A, 05-31-2001; A, 04-30-03; A, 12-30-05; A, 03-16-09]

19.10.2.203 ASSESSMENT OF FACILITY-RELATED FEES

A. The following table is used to calculate the portion of the fee based on certain types of facilities. These tables reflect the complexity of an operation. A facility fee in each applicable category will be assessed based on total acreage for all facilities of that type.

B. This portion of permit application and annual fees for existing and new mining operations shall be the sum of the costs within each of the following categories of fees applicable to the operation: Application Fees. For existing and new mine initial application fees, when determining acreages of facilities in the following categories, the total acreage identified as current and future sites (design limits) of these facilities is counted. Annual Fees. For existing and new mine annual fees, when determining acreages of facilities in the following categories, cumulative acreage disturbed up to June 30 of the current fee year will be counted.

Facility	Fee
(1) Open Pit Mine	
(a) > 0 to 4 acres	\$500
(b) > 4 to 10 acres	\$1,000
(c) > 10 to 50 acres	\$2,500
(d) > 50 to 100 acres	\$5,000
(e) > 100 acres	\$7,500
(2) Tailings	
(a) > 0 to 4 acres	\$500
(b) > 4 to 10 acres	\$1,000
(c) > 10 to 50 acres	\$2,500
(d) > 50 to 100 acres	\$5,000
(e) > 100 acres	\$7,500
(3) Waste Dumps	
(a) > 0 to 4 acres	\$500
(b) > 4 to 10 acres	\$1,000
(c) > 10 to 50 acres	\$2,500
(d) > 50 to 100 acres	\$5,000
(e) > 100 acres	\$7,500
(4) Plant Site	
(a) > 0 to 4 acres	\$500
(b) > 4 to 10 acres	\$1,000
(c) > 10 to 50 acres	\$2,500
(d) > 50 to 100 acres	\$5,000
(e) > 100 acres	\$7,500
(5) Leach Piles	
(a) > 0 to 4 acres	\$500
(b) > 4 to 10 acres	\$1,000
(c) > 10 to 50 acres	\$2,500
(d) > 50 to 100 acres	\$5,000

(e) > 100 acres \$7,500
[7-12-94, 11-15-95, 2-15-96; 19.10.2.203 NMAC - Rn, 19 NMAC 10.2.2.203, 05-15-2001]

19.10.2.204 PAYMENT

A. Payments shall be in cash or check made payable to the Mining and Minerals Division and received by the Division on or prior to the date due. The Division shall deposit the payment with the state treasurer in the Mining Act Fund.

B. This fee schedule applies to all permit applications submitted after July 12, 1994. Permit fees submitted pursuant to Subsection A of 19.10.2.201 NMAC filed July 12, 1994 shall satisfy the requirement of Subsection A of 19.10.2.201 NMAC. Previously submitted fees exceeding those required under Subsection A of 19.10.2.201 NMAC shall be credited to annual fees for that operation.
[7-12-94, 12-15-95, 2-15-96; 19.10.2.204 NMAC - Rn, 19 NMAC 10.2.2.204, 05-15-2001]

19.10.2.205 SURCHARGE FOR DEPARTMENT OF GAME AND FISH ACTIVITIES

A. To compensate the Department of Game and Fish for its costs required to implement its involvement in implementing the Act, a percentage surcharge shall be added in the same percentage to each of the above application and annual fees. This surcharge shall be 4.5 percent of fees collected in FY 96 to be used in FY 97 and FY 98. This surcharge shall be 4.2 percent of fees collected in FY 98 and FY 99, to be used in FY 99 and FY 2000. This surcharge shall be 3.2 percent of fees collected in FY2000 to be used in FY 2001. No percentage surcharge shall be assessed in FY 2001 or FY 2002; instead, the balance of the surcharges assessed during FY 1996 through FY 2002 shall be used in FY 2002, FY 2003, FY 2004, FY 2005 and FY 2006.

B. Payment. On a quarterly basis, the Director shall reimburse the Department of Game and Fish, only from this surcharge, for its reasonably necessary costs incurred under the Department's involvement with implementation of the Act.

[11-15-95, 12-15-95, 2-15-96, 5-31-97, 6-30-99; 19.10.2.205 NMAC - Rn, 19 NMAC 10.2.2.205, 05-15-2001; A, 12-28-01; A, 04-30-03]

HISTORY of 19.10.2 NMAC:

Pre-NMAC History: Material in the part was derived from that previously filed with the commission of public records - state records center and archives: Rule 2, New Mexico Mining Act - Fees, filed 07-12-94; Rule 2, New Mexico Mining Act - Fees, filed 11-02-95; Rule 2, New Mexico Mining Act - Fees, filed 12-01-95.

History of Repealed Material: [Reserved]

Other History: Rule 2, New Mexico Mining Act - Fees, filed 12-01-95 renumbered and reformatted into 19 NMAC 10.2, Mining Act Implementation - Subpart 2, Fees, filed 01-31-96.
19 NMAC 10.2, Mining Act Implementation - Subpart 2, Fees, filed 01-31-96; renumbered and reformatted to 19.10.2 NMAC, Fees, effective 05-15-2001.