

BEFORE THE NEW MEXICO MINING COMMISSION

In re the Appeal of

Nº 97-02

AGRONICS, INC. from
Notice of Violation N96-4-12

FINDINGS AND CONCLUSIONS

THIS MATTER was heard by the Commission at a regular meeting on March 4, 1997, at Mabry Hall in the State of New Mexico Education Building, 300 Don Gaspar, Santa Fe, New Mexico. The Commission, after consideration of the testimony and exhibits, makes the following findings and conclusions.

FINDINGS**a. Jurisdictional Findings.**

1. Appellant owns an open-pit humate mine at NW¼ of §9, T19N, R1W N.M.P.M., Sandoval County, New Mexico, (all references to Sections, Townships and Ranges will be in Sandoval County, New Mexico unless otherwise stated) called the Clodbuster Mine, which mine has been operational more than two years since 1970.

2. On April 23, 1996, the New Mexico Energy, Minerals & Natural Resources Department, Mining and Minerals Division (MMD) mailed, by certified mail, a Notice of Violation N96-4-12 to Appellant.

3. Notice of Violation N96-4-12 ordered Appellant to abate his violation of permit SA008MN within 60 days, to wit: conducting a new mining operation at SE¼ of §27, T20N, R1W N.M.P.M., without a permit for a new mining operation.

4. Appellant's Petition for Review was untimely.

A. On November 8, 1996, MMD mailed, by certified mail, a letter to Appellant stating that MMD was upholding the Notice of Violation and fine of \$500.

B. On January 22, 1997, Appellant filed a Petition for Review of Penalty Assessment of November 8, 1996.

C. In a January 9, 1997, letter MMD represented to Appellant that his last day to appeal the Director's November 8, 1996, letter decision was January 23, 1997.

5. On March 4, 1997, the Commission timely heard this matter within 60 days of the filing of the Petition for Review.

b. Substantive Findings.

6. Appellant failed to submit information necessary for processing of a permit application for a new unit to an existing mine.

A. Appellant filed a June 30, 1994, site assessment for the Clodbuster Mine at NW¼ of §9, T19N, R1W N.M.P.M., which MMD received on July 6, 1994;

B. Subsequent to Appellant's filing of a site assessment on the §9 site, a series of communications ensued between Appellant and MMD that indicated Appellant wanted to add a site to the original §9 site for permitting purposes, but that Appellant was confused about the exact location of the additional site;

C. Appellant demonstrated a right to access to the SW¼ of §27, T20N, R1W, N.M.P.M., but not the SE¼ of §26, T20N, R1W;

D. MMD site inspections revealed that the ground disturbance for Appellant's proposed new unit was at SE¼ of §26, R1W, T120, N.M.P.M.

7. Appellant never applied for a permit modification to operation the §26 site as a new unit to the §9 site.

8. Appellant never applied for a permit to operate the §26 site as a new mining operation.

9. Appellant never applied for a permit to operate an existing mine for the §26 site or the SW¼ of §27 site.

10. Appellant did not appeal MMD's cessation order.

11. Appellant refused to pay the annual permit fee because, in part, he believed the permit application requirements are too uncertain for compliance.

CONCLUSIONS OF LAW

1. NMSA 1978, Section 69-36-15(A) (Repl. Pamp. 1993), creates jurisdiction for the Commission to consider this Petition for Review.

2. NMSA 1978, Section 69-36-15(A) (Repl. Pamp. 1993), and 19 NMAC 10.2.907.A, allow a party 60 days from the date of notice of any order, penalty assessment or issuance or denial of a permit to file a petition for review with this Commission.

3. Consistent with Govich v. North Am. Sys., 112 N.M. 226, 230, 814 P.2d 94, 98 (1991), the timely filing of a notice of appeal before this Commission is a mandatory precondition to the Commission's consideration of the appeal, but the Commission has

discretion to consider untimely appeals when unusual circumstances warrant it.

4. Consistent with the law of estoppel as applied to administrative agencies found in Wing Pawn Shop v. Taxation and Revenue Dep't for the State of New Mexico, 111 N.M. 735, 742, 809 P.2d 649, 735 (1991), MMD's January 9, 1997, letter to Appellant is sufficient reason for this Commission to consider this appeal in spite of Appellant's untimely filing of the petition for review.

5. Old Abe Co. v. New Mexico Mining Comm'n, 121 N.M. 83, 908 P.2d 776 (Ct. App.), cert. denied 120 N.M. 828, 907 P.2d 1009 (1995), does not limit the requirement that an operator pay permit fees only to those situations where the granting of a permit is likely; the fees offset bureaucratic costs of both granting and denying permits.

6. The Commission's regulations implementing the Mining Act information submission requirements, 10 NMAC 2.501, are specific enough to be susceptible to common understanding, as that term is described in Old Abe Co., 121 N.M. at 93-94, 907 P.2d at 786-787.

7. The absence of proof of Appellant's access to the \$26 area of operation and the absence of other information that would allow MMD to consider whether the \$26 operation could be an additional mining operation to the \$9 site are, together, sufficient omissions to justify MMD's act of not granting Appellant a permit for the \$26 site.

8. The absence of any application from Appellant to permit the \$26 site as an existing mine, a new mining operation, or a new

unit to the existing site at the SW¼ of §27, are sufficient omissions to justify MMD's act of not granting Appellant any such permits.

9. NMSA 1978, Section 69-36-5(B) (Repl. Pamp. 1993), clearly requires the Commission to adopt the information gathering rules at 19 NMAC 10.2.502.

10. Circularity is a term that describes a flaw in a logical reasoning construct of one or more assumptions leading to a conclusion, and as neither the Mining Act nor its regulations are reasoning constructs with assumptions and conclusions, they cannot be circular.

11. The Commission has properly adopted, pursuant to NMSA 1978, Section 69-36-8 (Repl. Pamp. 1993), each regulation to which MMD has subjected Appellant.

12. The Mining Act nowhere states that the Administrative Procedures Act applies to the Commission, so pursuant to NMSA 1978, Section 12-8-23 (Repl. Pamp. 1988), the latter act does not apply to the Commission.

13. MMD's requirements for specific information beyond the express but general requirements of the Mining Act and its implementing regulations are legitimate interpretations of MMD's informational needs as recognized in Wilson Corp. v. State ex rel. Udall, 121 N.M. 677, 682, 916 P.2d 1344, 1349 (Ct. App.), cert. denied 121 N.M. 644, 916 P.2d 844 (1996), and Environmental Improvement Div. of the New Mexico Health and Environment Dep't v.

Bloomfield Irrigation Dist., 108 N.M. 691, 694, 778 P.2d 438, 441 (Ct. App.), cert. denied 108 N.M. 681, 777 P.2d 1325 (1989).

14. MMD's requirement that permit application information be complete before the granting of the permit is not beyond statutory authority, but is consistent with Section 69-36-5(A), which requires "a site assessment pursuant to the Mining Act" as a condition to MMD's granting of a permit.

15. As the information Appellant provided to MMD was inadequate for MMD's consideration of how to treat the §27 site, MMD had a legally insufficient record to exercise its discretion to either approve or deny the site as an existing mining operation, a new mine or a new unit to an existing mine.

16. Consistent with Perez v. Gallegos, 87 N.M. 161, 162, 530 P.2d 1155, 1156 (1974), Appellant's bare assertion that MMD's submission of additional regulations for the Commission's consideration somehow proves the inadequacy of existing regulations, absent reference to how specific proposals reveal particular inadequacies of specific regulations, is insufficient to demonstrate error in the penalty assessment under review.

17. The Court of Appeals, in Old Abe Co., 121 N.M. at 90-91, 908 P.2d at 783-784, has decided that though the Commission's 19 NMAC 10.2.107C definition of "affected area" is distinct from the Mining Act definition of the same term, the Commission's definition is appropriate.

18. The only distinction between NMSA 1978, Section 69-36-7(Q) (Repl. Pamp. 1993), and 19 NMAC 10.2.1205.A.3 and .4, is that

the former prohibits MMD from requiring financial assurance redundant of federal requirements and the latter prohibits MMD from requiring financial assurance redundant of any federal or state requirements, and as the distinction protects Appellant from one additional redundant requirement, Appellant suffers no prejudice by the distinction.

19. Environmental hazard determinations occur in the context of 19 NMAC 10.2.1102.B.1 notices of violation, not penalty assessments such as the one under review here, so any issue Appellant has with said determination is resolved against Appellant under the law of the case rule as found in Gallegos v. Citizens Ins. Agency, 108 N.M. 722, 728, 779 P.2d 99, 105 (1989), because Appellant did not appeal his notice of violation.

ORDER

After due consideration, it is the Order, Judgment and Decree of the New Mexico Mining Commission that the Notice of Violation N96-4-12, together with the \$500 penalty be, and hereby is, **AFFIRMED.**

DATED April 16, 1997.

BY:


ART MONTANA, Chairman 4/16/97
NEW MEXICO MINING COMMISSION

BEFORE THE NEW MEXICO MINING COMMISSION

In re the Appeal of

Nº 97-02

AGRONICS, INC. from
Notice of Violation N96-4-12

ORDER SUPPLEMENTING RECORD

THIS MATTER was heard by the Commission at a regular meeting on March 4, 1997, at Mabry Hall in the State of New Mexico Education Building, 300 Don Gaspar, Santa Fe, New Mexico. The Commission closed the record at the end of the hearing. However, because the Commission must aid the determination of its own jurisdiction, the Commission must sua sponte reopen the record for admission of one exhibit. Accordingly, after being duly apprised, the Commission, by and through its Chairman and Hearing Officer in this matter, hereby

ORDERS that a letter dated January 9, 1997, from Holland Shepherd to Tom Taylor, attached to this order as Comm'n Exh. A be, and hereby is, admitted to the record of this matter.

DATED April 16, 1997.

BY:


ART MONTANA, Chairman
NEW MEXICO MINING COMMISSION