

**DRAFT**  
**NEW MEXICO COAL SURFACE MINING COMMISSION**  
**RULE MAKING HEARING AND PUBLIC MEETING**

June 24, 2010

*Note: Draft minutes subject to review and approval by the Commission*

The New Mexico Coal Surface Mining Commission held a Public Meeting on June 24, 2010. The hearing was in Secretary's Conference Room 3<sup>rd</sup> Floor of the Wendell Chino Building, 1220 South St. Francis Drive, Santa Fe, New Mexico.

Chairman Bailey called the meeting to order at 1:00 P.M.

**1. Roll call**

The Chairman directed Mr. O'Hara to call the roll.

The following members were present:

Chairman Jami Bailey	State Land Office
Ms. Gretchen Hoffman	NM Bureau of Geology and Mineral Resources
Mr. Michael Johnson	State Engineer's Office
Dr. Steven Loring, Ph.D.	NMSU – Agricultural Experiment Station
Mr. Craig Walling	Public Member
Ms. Sarah Cottrell	NM Environment Department
Dr. Matthew Wunder, Ph.D.	NM Department of Game and Fish

The following members were absent:

Mr. Charlie Sanchez	Soil and Water Conservation Commission
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The Second At-Large Position is currently Vacant

Also present:

Mr. James O'Hara	CSMC Clerk/Coal Program Manager
Mr. Bill Brancard	Director, MMD
Ms. Chuck Thomas	Bureau Chief, MMD
Mr. Dave Clark	Chief Inspector-Coal Program, MMD
Ms. Sally Malave	CSMC Counsel, Assistant Attorney General

Mr. O'Hara noted a quorum was present. The Chairman began the proceedings.

**2. Approval of the agenda**

Chairman Bailey asked if there were any comments or changes needed for the agenda. No changes were requested. Commissioner Walling made the motion and Commissioner Loring provided a second. The motion to adopt the Agenda was approved by unanimous voice vote.

### **3. Adoption of minutes of November 1, 2007 New Mexico Coal Surface Mining Commission Rule Making Hearing Meeting**

Chairman Bailey asked if there were any changes needed for the minutes of November 1, 2007. No changes to the minutes were identified. A Motion to approve the minutes was proposed by Dr. Loringl, seconded by Ms. Hoffman. The motion to approve the November 1, 2007 minutes passed unanimously on a voice vote.

### **4. Public Hearing on Proposed Amendments to the Coal Surface Mining Commission (CSMC) Rule 19.8**

Chairman Bailey opened the rule making public hearing. The Mining and Minerals Division (MMD) petitioned the CSMC for a Rule making Hearing, pursuant to NMSA 1978, Section 69-25A-7, in response to an OSM 732 letter dated October 2, 2009. Witnesses Brancard, Clark and O'Hara were sworn in by Chairman Bailey. MMD Director Bill Brancard began the presentation, by discussing the 732 process and pointing out that we are responsible for changing our regulations as specified by OSM because of changes they had promulgated to 30 CFR Parts 701, 773, 774, 778, 840, 843 and 847. The issues concern "ownership and control" a part of the regulations that requires a permittee to identify whom has a controlling interest in a coal mining operation. OSM has changed these rules three times over the past fifteen years in response to litigation. MMD made amended its regulations in the late 1990s in response to an earlier version of the federal rules. MMD's rules are more effective in some instances than the current federal rules. Amendments are proposed where MMD's rules are less effective. OSM reviewed these amendments earlier this year and informally determined them to adequately address the 732 issues. Mr. Brancard then asked Mr. David Clark of the Coal Program to describe the amendments.

Before Mr. Clark began, Chairman Bailey asked the Commission how it would like to proceed with consideration of the amendments. A general consensus was reached to have Mr. Clark organize his presentation into Subparts, describe the amendments, allow the Commission to ask questions and then Chairman Bailey put the amendments to a vote.

#### First Presentation

- 19.8.1 NMAC Subpart 7 by adding a new definition for "Knowing or Knowingly."
- 19.8.1 NMAC Subpart 7 by updating the definition of "Owned or Controlled and Owns and Controls." This definition is different from OSM's by removal of ownership or control being defined by owning a 50% interest to retain our existing provision for it being ownership of a 10% interest. MMD believes this provision will eliminate long term attempts to avoid being an owner by having a 49.9% interest.

Commissioner Hoffman asked how a person or entity owning a 10% interest could refute it has a controlling interest. Mr. Clark responded that there is a process in the regulation that creates a process whereby someone could claim an exemption. There were no further questions.

Chairman Bailey asked for a motion. Commissioner Walling moved for approval of additions of definitions to 19.8.1 Subpart 7. The motion was seconded by Commissioner Johnson. The Commission approved the motion unanimously.

#### Second Presentation

- 19.8.7 Subpart 701 to include a requirement for persons who own or control a permit to provide telephone number and to amend cross-reference from Subsection "D" to Subsection "C" of 19.8.11.1120.

There were no questions. Chairman Bailey asked for a motion. Commissioner Loring moved for approval of changes to 19.8.7 Subpart 701. The motion was seconded by Commissioner Wunder. The Commission approved the motion unanimously.

#### Third Presentation

- 19.8.11 Subpart 1105, Subsection E to correct a cross-reference to “19.8.12.1200 NMAC,” and Subsection F to require Director to request an AVS compliance report not more than 5 business days prior to permit issuance.

There were no questions. Chairman Bailey asked for a motion. Commissioner Craig moved for approval of changes to Subpart 1105. The motion was seconded by Commissioner Loring. The Commission approved the motion unanimously.

#### Fourth Presentation

- 19.8.11 to add a new Subpart 1119 pertaining to post-permit issuance requirements pertaining to ownership, control and violation information.

There were no questions. Chairman Bailey asked for a motion. Commissioner Johnson moved for approval of changes to Subpart 1119. The motion was seconded by Commissioner Loring. The Commission approved the motion unanimously.

#### Fifth Presentation

- 19.8.11 to add a new Subpart 1120 pertaining to post-permit issuance information requirements for permittees.
- 19.8.11 to add a new Subpart 1121 pertaining to certifying and updating existing permit application information.

Mr. Johnson raised a questions about the use of the pronoun “you” in 19.8.11.1121.A.2. He thought the use of “you” is difficult to define in this context. Mr. Clark responded the feds now use these pronouns, but also include a table identifying references for the pronouns. Mr. Clark said he had copied the language from the federal regulations and had replaced most of the pronouns, but this one had slipped through. Both Ms. Malave and Mr. Brancard agreed the pronouns were confusing and recommended the Commission replace “you” with wording specific to the meaning in the regulation. In this case “the applicant or operator submitted” was deemed appropriate.

Chairman Bailey asked for a motion. Mr. Johnson recommended approval of 1120 and the following change to 19.8.11.1121.A.2:

(2) if part of the information in AVS is missing or incorrect, the applicant or operator must submit to the director the necessary information or corrections and swear or affirm, under oath and in writing, that *the information the applicant or operator submitted* is accurate and complete;

The motion was seconded by Commissioner Hoffman. The Commission approved the motion unanimously.

#### Sixth Presentation

- 19.8.20 Subpart 2010 to eliminate outdated language concerning the retention of sedimentation ponds.

There were no questions. Chairman Bailey asked for a motion. Commissioner Loring moved for approval of changes to Subpart 2010. The motion was seconded by Commissioner Johnson. The Commission approved the motion unanimously.

#### Seventh Presentation

- 19.8.30 Subpart 3000 to delete reference to Subsection D of 19.9.11.1113 and add reference to Subsection F of 19.8.11.1119 NMAC as the source of owner or controller identities to be notified by the Director.

There were no questions. Chairman Bailey asked for a motion. Commissioner Craig moved for approval of changes to Subpart 3000. The motion was seconded by Commissioner Wunder. The Commission approved the motion unanimously.

#### Eighth Presentation

- 19.8. 31 Subpart 3109 to amend Subsection A and delete definition and reference to of “Knowingly” and “Willfully.”
- (13) 19. 8.31 NMAC to add a new Subpart 3113 to allow the Director to pursue criminal penalties against persons who willfully and knowingly violate the Surface Mining Act (69-25A NMSA).

Mr. Brancard pointed out “Criminal Penalties” are in the statute but never made it into the rules. OSM is directing us to remedy that omission.

Commissioner Bailey asked about the Sunset provision of the Act and how that sunset would affect civil penalties. Mr. Brancard responded MMD had gone to the legislature in 2004 and requested and obtained a change to statute to provide for sunset of the Commission and not the rules, as is the normal practice.

Mr. Brancard suggested a change to 3109 to reference subsection E, F and G of the Statute. Ms. Malave suggested removing the reference to the subsections and merely referencing the section of the Act pertaining to Civil Penalties.

Chairman Bailey asked for a motion. Commissioner Craig moved for approval of Subpart 3109 and amendment to Subpart 3113 to remove the phrase “Subsections E and G”. The first sentence of Subpart 3113 would now read:

***19.8.31.3113 CRIMINAL PENALTIES:** Under 69-25A-22 NMSA 1978, the director may request the attorney general to pursue criminal penalties against any person who:*

The motion was seconded by Commissioner Johnson. The Commission approved the motion unanimously.

#### Ninth Presentation

- 19. 8.34 NMAC Subpart 3402 to amend reference from “19.9.12.1201 NMAC” to “19.8.12.1200 NMAC” relating to administrative review.
- 19. 8.34 NMAC Subpart 3408 to amend reference from “19.9.12.1201 NMAC” to “19.8.12.1200 NMAC” relating to administrative review.
- 19. 8.35 NMAC Subpart 35.13 to delete reference 19.8.12.1201 NMAC relating to administrative and judicial review.

There were no questions. Chairman Bailey asked for a motion. Commissioner Craig moved for approval of additions of definitions to Subpart 3402, 3408 and 35.13. The motion was seconded by Commissioner Wunder. The Commission approved the motion unanimously.

### Tenth Presentation

The final proposed amendments corrected cross-references or grammatical error identified in the regulations in 19.8.11 NMAC Subpart 1114, 19.8.30 NMAC Subpart 3003 and, 3004, and 19.8.31 NMAC Subpart 3103.

There were no questions. Chairman Bailey asked for a motion. Commissioner Craig moved for approval of additions of definitions to Subpart 1114, 3003 and 3004 and 3103. The motion was seconded by Commissioner Loring. The Commission approved the motion unanimously.

### **5. Action on Rule Making**

Chairman Bailey announced the proposed CSMC rule amendments are adopted with minor changes and closed the Public Hearing on the Rule amendments.

### **6. Consideration of Open Meetings Resolution**

The Chairman asked if there were any changes to the resolution from the last time it was approved. Ms. Malave noted the law had not changed. Mr. O'Hara noted all he had done was change the date from the last version of the resolution.

Commissioner Cottrell asked if 24 hours of notice to a change in the agenda was enough time to notify the public. Ms. Malave noted the resolution indicated the Agenda was posted at least 10 days prior to the meeting. The Resolution indicated an agenda item could be changed up to 24 twenty-four hours before the meeting. Mr. Brancard pointed out the Agenda was posted on our web page at least 10 days prior to the meeting. Commissioner Cottrell proposed a change to the Resolution indicated the web site would be used for posting the proposed agenda:

*A proposed agenda will be available from the New Mexico Energy, Minerals and Natural Resources Department and posted on the Coal Surface Mining Commission's web site during the week before the meeting.*

Commissioner Craig seconded the motion to change OMR paragraph #2. The motion was passed unanimously on a voice vote.

Chairman Bailey asked for a motion on approval of the amended OMR. Commissioner Loring motioned for approval of the OMA as amended. The motion was seconded by Commissioner Wunder. The motion for the Commissioners to adopt the amended Open Meetings Resolution passed unanimously on a voice vote.

### **7. Other Business**

Mr. Brancard began the discussion with a summary of recent proposals to combine the CSMC with the Mining Commission. A Task Force was currently looking at that and other changes such as combining EMNRD with the Environment Department.

Mr. Brancard went on to discuss several Federal rule changes proposed by OSM including the stream buffer provisions, mountain top removal and geomorphic reclamation. He also touched on a recent proposal but EPA to regulation Coal Combustion By-products and the provision in their current rule making that would exempt mine fill. OSM would be responsible for rule-making dealing with that.

Mr. Brancard's presentation moved to the Sierra Club law suit on CCB disposal and water quality filed against the San Juan Generating Station and the San Juan Mining Company.

Mr. O'Hara gave a brief summary of MMD plans to enter into contracts with the USGS and UNM to obtain additional back ground information on the effects Coal Combustion By-product disposal may have on water resources short term and long term. This information would augment and provide an independent analysis of documentation provided to MMD by San Juan Coal Company since the early 1980s.

Finally, Mr. Brancard summarized the new OSM oversight efforts being employed by OSM including independent oversight inspections.

## **8. Adjourn**

Having reached an end to the discussion of other business, Chairman Bailey asked for a motion to adjourn. Commissioner Walling supplied the motion, which was seconded by Commissioner Hoffman. The motion passed unanimously on a voice vote and the meeting was adjourned, at approximately 2:25 P.M.

Approved:

Minutes by:

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Jami Bailey, Chairman

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Date

\_\_\_\_\_  
James O'Hara  
Commission Clerk