

STATE OF NEW MEXICO

MINING COMMISSION

IN THE MATTER OF
PROPOSED MINING
ACT RULES

STATEMENT OF REASONS FOR ADOPTION OF REGULATIONS

THIS MATTER came before the New Mexico Mining Commission ("Commission") for 12 days of public hearings between May 12 and May 26, 1994. During meetings held June 13 through June 17, and July 11, 1994, the Commission reviewed the record, deliberated and voted to adopt the Mining Act Rules for the reasons set forth below.

This Statement of Reasons is intended by the Commission to fulfill the requirement that rulemaking bodies "must give some indication of their reasoning and of the basis upon which the regulations were adopted". New Mexico Mun. League, Inc. v. New Mexico Env'tl. Improvement Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App. 1975). See also Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n, 93 N.M. 546, 603 P.2d 285 (1979); Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n, 107 N.M. 469, 760 P.2d 161 (Ct. App. 1987). In accord with Tenneco, this Statement of Reasons was reviewed and adopted by the Commission prior to the filing of the Mining Act Rules. 107 N.M. at 474.

Due to the length and complexity of the hearings and record, this Statement of Reasons does not, and could not, address every issue and proposed regulatory wording raised during the rulemaking proceeding. Instead, the Statement outlines the statutory background, the process, the proposed rules, and some of the major issues to provide a context for the Commission's action. The summary of the Commission's deliberation should be read in conjunction with the Minutes of the June 13-17, 1994 and July 11, 1994 Commission meetings which list the specific actions taken by the Commission.

I. Mining Act

The New Mexico Mining Act, NMSA 1978 Sections 69-36-1 to 69-36-20 ("Act"), was adopted by the New Mexico Legislature during the 1993 Legislative Session (Laws 1993, Chapter 315) and became effective on June 18, 1993. The Act states that its purposes "include promoting responsible utilization and reclamation of lands affected by exploration, mining or the extraction of minerals that are vital to the welfare of New Mexico". Section 69-36-2. Under the Act, all new and existing mining operations and exploration are required to be permitted. Sections 69-36-7.A(2), -11, -12, and -13.

The Act creates a mining commission, consisting of 7 voting and 4 non-voting (including 2 alternates) members, to serve as the rulemaking and administrative review body under the Act. Sections 69-36-6, -7, -8 and -15. The Director of the Mining and Minerals Division of the Energy, Minerals and Natural

Resources Department ("MMD") is required to enforce and administer the Act. Section 69-36-9.

The Commission is mandated to adopt, within one year of the effective date of the Act, regulations that implement the Act. Section 69-36-7.A. The Legislature also specified a number of areas in which the Commission must provide rules including:

- require permitting and annual reporting (69-36-7.A)
- allow use of expert for review (69-36-7.B)
- issuance and renewal of permits; terms; compliance schedule (69-36-7.C)
- permit modifications (69-36-7.D)
- permits for standby status (69-36-7.E)
- closeout plan requirements for existing mining operations (69-36-7.F)
- permit issuance process for existing mining operations(69-36-7.G)
- permit and reclamation requirements for new mining operations (69-36-7.H)
- permit application process for new mining operations (69-36-7.I)
- coordination of roles of permitting agencies (69-36-7.J)
- public notice and participation (69-36-7.K)
- permits for minimal impact mining operations (69-36-7.L)
- annual administrative and permit fees (69-36-7.M)
- periodic review of mining and reclamation practices (69-36-7.N)
- variances (69-36-7.O)
- determination of compliance with environmental standards (69-36-7.P)
- financial assurance (69-36-7.Q)
- release of financial assurance (69-36-7.R)
- procedures for inspection and enforcement (69-36-7.S)
- ~~permit transfer (69-36-7.T)~~
- approval of prior reclamation (69-36-7.U)
- permit application requirements for existing mining operations(69-36-11.A)
- exploration map requirements (69-36-13.D)
- other regulations necessary and appropriate to carry out the Act (69-36-7.V)

The Act requires that the Commission conduct a public hearing in Santa Fe prior to adopting any regulation. The

Commission must provide notice of the hearing by publishing in a newspaper of general circulation and in the New Mexico Register and by mailing to those who have requested notice at least 30 days prior to the hearing date. At the Hearing, the Commission "shall allow all interested persons a reasonable opportunity to submit arguments and to examine witnesses testifying at the hearing". Section 69-36-8.

This rulemaking proceeding is the first under the Act.

II. Process

In February 1994, MMD petitioned the Commission to hold public hearings on the adoption of regulations proposed by MMD to implement the Act ("MMD Proposal"). At a meeting on February 24, 1994, the Commission voted to hold a hearing on the MMD Proposal. (On the day before the meeting, two other petitions for adoption of regulations were submitted by Concerned Citizens del Norte and the Sierra Club Rio Grande Chapter, and by the New Mexico Mining Association. The Commission did not act on these Petitions and they were later withdrawn.)

The hearing was to be conducted in accordance with the requirements of the Act and with the Guidelines for Rulemaking adopted by the Commission. Public notice of the hearing, which included publishing in newspapers that in combination distribute copies to every county in the state and mailing to persons on the Commission mailing list, was provided at least 60 days in advance of the hearing. Notice was also published in the New Mexico Register.

The notice required persons who intended to present "technical testimony" at the hearing to provide the Commission notice of their intent at least 10 working days prior to the hearing. Notices of intent, many of which included proposed revisions to the MMD Proposal, were received from:

MMD,
New Mexico Mining Association ("NMMA"),
Phelps Dodge Mining Company,
Quivira Mining Company,
Centex American Gypsum Company,
U.S. Trust Company,
Cobre Mining Company,
Southwestern Minerals Exploration Association,
Santa Fe Pacific Gold Corporation,
Grubstake Mining and Exploration,
Copar Pumice Co.,
Molycorp, Inc.,
Frank Kottowski,
Concerned Citizens del Norte, The Rio Grande Chapter
of the Sierra Club, and the New Mexico Wilderness
Study Committee (collectively, the "Community
Groups"),
Southwest Research and Information Center,
Jon Klingel,
Western Environmental Law Center,
Amigos Bravos,
New Mexico Environment Department ("ED"),
New Mexico Office of the Natural Resource Trustee,
New Mexico Department of Game & Fish ("Game & Fish"),
and
New Mexico Attorney General's Office.

On May 5, 1994, the Commission held a meeting to consider additional procedures to conduct the hearing. The approved procedures included using Commissioners as hearing officers, establishing a general order of direct testimony, allowing post-hearing written comments, and allowing parties with multiple witnesses to have their witnesses be questioned collectively after the party's direct testimony was complete.

Public hearings began on May 12, 1994 in Santa Fe and continued for 12 full days until May 26, 1994. A quorum of the Commission was present throughout the hearing, and all Commissioners attended at least part of the hearing. Individual Commissioners acted as hearing officers.

At the hearing, all persons who wished to present written or oral comments or to question witnesses were allowed to do so. In addition to testimony from the technical parties listed above, the Commission provided a period every day for comments from the general public, and provided a Saturday session and evening sessions in an effort to facilitate public participation.

The hearings began with testimony from MMD witnesses who provided evidence in support of their Proposal. After MMD, the Commission heard testimony from other state agencies; the state agencies were followed by industry and then environmental groups. Each witness was subject to cross-examination by any other person present. The order of testimony was interrupted numerous times when the Commission accommodated a witness who had an availability problem.

At the end of the hearing, the Commission left the record open until June 6 to allow hearing participants to submit their final proposed amendments to the MMD Proposal, and until June 8 to submit their closing arguments. The Commission also specifically requested that MMD review all proposed revisions to the MMD Proposal and accept or reject the revisions by June 6.

The Commission also encouraged the parties that submitted numerous revisions to review their proposals, decide if any amendments could be dropped and prioritize the remainder.

On June 6, MMD submitted a revised Proposal that included changes based on amendments proposed by other participants and on testimony presented during the hearing. Despite the requests of the Commission, over 1000 amendments were submitted to the Commission by other parties, along with written arguments.

Copies of the hearing transcript, the revised MMD Proposal and amendments thereto, and other post-hearing comments were provided to the Commissioners prior to the deliberation.

On June 13, 1994, the Commission began deliberations on the MMD Proposal and all evidence in the record. The Commission considered several requests to reopen the record. The Commission allowed the record to be reopened for the purpose of accepting a "Joint Notice" by NMMA, ED and the Community Groups which listed a number of sections in the MMD Proposal that were not "in serious controversy" among those parties.

The deliberations continued for 5 days during which the Commission reviewed the MMD Proposal page by page, and also considered numerous amendments to the MMD Proposal. Ten of the 11 Commissioners, and all voting members, were present during the deliberations. The Commission adopted and amended the MMD Proposal, and then met on July 11 to review and revise the Rules

prior to filing and to review, edit and adopt this Statement of Reasons.

III. MMD Proposal

The Director of MMD is required under the Act to develop proposed regulations. Section 69-36-9.D. According to their testimony, MMD began the process of developing regulations soon after the enactment of the Act by forming a technical advisory committee ("TAC") in accordance with Section 69-36-9.C of the Act. The TAC and its working groups met numerous times across the state in an effort to receive input and develop consensus on regulations. Little consensus was reached on the content of regulations, but some agreement was reached on the format of the regulations. The format of the MMD proposal places almost all permitting for a particular class of mining operations, e.g., existing mining operations, together under a separate rule. (Lingo direct testimony "DT").

MMD then developed a draft regulation which was first circulated to state agencies and then made available for public comment. The consultation with other agencies was intended to fulfill the requirements of Sections 7.J and 9.D of the Act. (Lingo DT). MMD held public meetings around the state on the draft regulation (MMD Exh. 4-6), and solicited written comments (MMD Exh. 7). Based on the input, MMD revised its draft regulation several times before bringing the MMD Proposal to the Commission.

At the Commission hearing, MMD presented witnesses who, through their written direct testimony (submitted with the MMD Notice of Intent to Present Technical Testimony) and their oral testimony at the hearing, outlined the wording of, and the reasoning behind, the MMD Proposal. In addition, several additional MMD witnesses, who were involved in the drafting of the MMD Proposal, were available at the hearing to answer questions.

In response to the Commission's directions during and at the end of the hearing, MMD reviewed the proposed amendments to the MMD Proposal, and the evidence supporting those amendments, offered by other parties at the hearing, and submitted a revised MMD Proposal to the Commission on June 6. The revised MMD Proposal included a number of amendments based either on amendments or testimony introduced at the hearing, including concerns raised by Commissioners. MMD also provided brief written justifications for the changes, as well as reasons for not adopting other proposed amendments.

The MMD Proposal is divided into 13 Rules:

1. Definitions
2. Fees
3. Minimal Impact Operations
4. Exploration
5. Existing Mining Operations
6. New Mining Operations
7. Standby
8. Permit Transfers
9. Public Participation
10. Variances
11. Inspection, Enforcement and Penalties
12. Financial Assurance Requirements
13. Process of Review of Mining and Reclamation Practices

The MMD Proposal was designed to implement the specific requirements of the Act.

<u>Act</u>	<u>Rule</u>	<u>Issue</u>
69-36-7.A(1)	thruout	economic, environmental effects
7.A(2)	3,4,5,6	require permitting
7.A(3)	5.9,6.10	annual reporting
7.B	6.2	expert review
7.C	5,6,5.1,6.7	permits, schedule, term
7.D	4.6,5.5,6.8	modifications
"	5.7C	new units at existing mines
7.E	7	standby
7.F	5.6	closeout plans
7.G	5	existing mine permit
7.H	6	new mine permit and reclamation
7.I	6	new mine permit
7.J	thruout	coordination
7.K	9	public participation
7.L	3	minimal impact
7.M	2	fee schedule
7.N	13	continuing review process
7.O	10	variances
7.P	6.2,6.6	other permits, environmental standards
7.Q	12	financial assurance
7.R	12.10	release of financial assurance
7.S	11	inspection, enforcement
7.T	8	permit transfer
7.U	5.10,6.9	prior reclamation
7.V	thruout	other necessary regulations
10	4.2,5.2,6.2	confidentiality
11	5	existing mining operations
12	6	new mining operations
13	4	exploration permit
17	11	civil penalties

Under the MMD Proposal, Rule 1 (Definitions) includes definitions contained in the Act, but adds many more. The Act requires regulations concerning a number of concepts that are used but not defined in the Act, such as "post-mining land use", "self-sustaining ecosystem", "wildlife", "minimal impact mining operation", etc. To effectuate coordination among agencies, a number of definitions are taken from other state regulations (e.g., "ephemeral stream", "ground water", "intermittent

stream", "perennial stream"), or are based on recommendations from other agencies such as ED and Game & Fish.

MMD made a number of changes to its original definitions based on comments and proposals of other parties, particularly NMMA, Community Groups, Game & Fish and ED.

Rule 2 (Fees) is designed to implement Section 7.M of the Act that requires the Commission to "establish by regulation a schedule of annual administrative and permit fees, which shall equal and not exceed the estimated costs of administration, implementation, enforcement, investigation and permitting pursuant to the provisions of the New Mexico Mining Act. The size of the operation, anticipated inspection frequency and other factors deemed relevant by the commission shall be considered in the determination of the fees...".

MMD began by developing a cost estimate for a regulatory program to implement the Mining Act Rules as proposed by MMD. MMD added the costs of other agencies involved in implementing the Act. Using information supplied by mining operators under the Act, MMD developed estimates of the number, type and size of operations to be regulated under the MMD Proposal and use those estimates to develop both the budgetary needs and a schedule of fees designed to match the budget. The fee schedule divides operations by type (new, existing and exploration) and by size (minimal impact and acreage). The schedule combines flat fees with scaled fees based on the acreage of the operation. The

result is higher fees for the larger facilities that require increased effort in permit review and inspection. (Bland DT).

Based on testimony at the hearing, MMD revised the proposed fee schedule by attempting to bring fees closer to the actual costs for administration; MMD reduced fees for existing, underground and exploration operations and increased new mining operation fees.

Rules 3, 4, 5 and 6 establish the permitting and reclamation requirements and review processes for the categories of mining operations established by the Act: new, existing, exploration and minimal impact. The Act requires that all new, existing and exploration operations be permitted. Sections 69-36-7.A, -11, -12 and -13. The Act provides direction as to the timing, content, review of permit applications.

The MMD Proposal follows the Act in requiring greater detail in permitting and reclamation requirements for new mining operations than for existing and exploration operations. MMD made a policy decision, however, to limit the detail in performance and reclamation standards for all types of operations. Given the varied types of mining operations regulated under the Act and the unknowns of starting a new regulatory program, MMD chose to build significant flexibility and discretion into the Rules. (Lingo DT). The flexibility may also increase the ability of the Director to coordinate and avoid duplication with other agencies. Section 69-36-7.J.

Rule 4 (Exploration) primarily follows the requirements of Section 13 of the Act. Section 13 requires persons wanting to engage in exploration operations to obtain a one year renewable permit. The applicant must describe the exploration, provide an exploration map and agree to reclaim any disturbed surface area. Under the Act and the MMD Proposal, the operator may designate an exploration map or other location information as confidential. Section 69-36-10. Rule 4 also allows the applicant to use information from permits issued by other agencies and allows other agencies to comment on the application. (Guranich DT).

Rule 5 (Existing Mining Operations) incorporates the more flexible treatment of existing mines found in the Act. An application for an existing mining operation is due by December 31, 1994. Section 69-36-11.A; Rule 5.1A. However, the closeout plan for the mine may be submitted with the permit application or later as a permit modification. Sections 69-36-7.G and 11; Rules 5.1, 5.3, 5.6. The closeout plan is based on site-specific characteristics, requires the reestablishment of a self-sustaining ecosystem, unless conflicting with an approved post-mining land use, and allows the Director to waive the requirement for a self-sustaining ecosystem or post-mining land use if shown to be not feasible for an open pit or waste unit. Sections 69-36-7.F and 11.B; Rule 5.6.

Rule 5 lists the information to be included in an application, as required by the Section 69-36-11.A, and allows

an application to use information previously submitted in a site assessment (see Section 69-36-5) or contained in other relevant permits. Rule 5.2. The Director must act on a completed application within 6 months. Section 69-36-11.A; Rule 5.3E. MMD proposed that a permit be in effect until financial assurance is released and required that the Director periodically review the permit and the financial assurance. Sections 69-36-7.Q and 9.B; Rule 5.4.

The performance and reclamation standards for an existing mining operation are very general (Rule 5.7A) unless the operation adds a new discrete processing, leaching, excavation, storage or stockpile unit. As required by Section 7.D of the Act, the new unit must comply with most of the permit and reclamation requirements of a new mining operation. Rule 5.7C. Rule 5 also includes a procedure that allows an existing mining operation to request an inspection and review of prior reclamation measures. Section 69-36-7.U; Rule 5.10. (Sanderford DT).

Rule 6 (New Mining Operations) provides the greater level of detail in permitting and reclamation requirements than is required by the Act for new mining operations. Before the Director can act on a new mining operation application, the Director must review one year of baseline data and prepare an environmental evaluation analyzing the impacts of the proposed mining activities. Sections 69-36-7.I, -9.F, -9.G and -12.A.

The MMD Proposal requires the submittal of a sampling and analysis plan for the baseline data collection and provides a detailed list of the types of baseline data required. Rules 6.2D.12 and 6.2D.13. MMD, however, choose not to propose rules outlining the contents of an environmental evaluation because the Act does not require the Commission to adopt such rules.

MMD proposed detailed performance and reclamation standards to meet the goals and requirements of the Act. Section 69-36-7.H; Rule 6.3. The rules attempt to ensure the operation and reclamation of the facility in a manner that protects human health, environment, wildlife and domestic animals, and results in effective reclamation. (Shephard DT).

Minimal impact operations are handled in Rules 1 and 3. The Act requires the Commission to provide permits for "mining operations that have minimal impact on the environment." These permits must have reduced permitting requirements, only require general plans and can be approved without public notice and hearing. Section 69-36-7.L.

MMD proposed to create three categories of minimal impact permits: minimal impact exploration, minimal impact existing mining operation and minimal impact new mining operation. To qualify for a minimal impact permit, an operation must fall within the disturbance parameters provided for each category in Rule 3, and also meet the general requirements under the definition of "minimal impact mining operation" in Rule 1. The Rule 1 definition established a number of characteristics that

created the likelihood of more than a minimal environmental impact and therefore could disqualify the operation from minimal impact status. The Director, however, could waive some of these characteristics.

Reduced permitting requirements for minimal impact operations include a streamlined permit approval process that does not require public notice and an opportunity for a hearing, and involves shorter time frame for application submittals (e.g. Rule 3.2B) and for review by a other agencies (Rules 3.2 G, 3.3I, 3.4H). Applications need only include general maps and descriptions of the mining operations and plans for reclamation and closeout (Rules 3.2D, 3.3E, 3.4D).

Financial assurance for minimal impact operations is simplified by a standard formula for the amount based on experience in New Mexico and other states. (Rules 3.3F, 3.4E). MMD also proposed to eliminate financial assurance for minimal impact exploration due to the small amount of disturbance needed to be reclaimed and the relatively high amount of transaction costs for the applicant and the agency. (Guranich DT, Sanderford DT, Shepherd DT).

Rule 7 (Standby) is designed to comply with Section 69-36-7.E which mandates regulations "that require new and existing mining operations to obtain and maintain permits for standby status". The Act does not define "standby status". MMD proposed that a standby status permit is required when a mining

operation temporarily ceases operation for more than 180 days. Rule 7.1A. MMD treats the standby status permit as a permit revision. The application must demonstrate compliance with the requirements provided in Section 69-36-7.E; Rule 7.1B. The term of standby status is set by the Act. MMD, based on testimony by ED and the Attorney General's Office, limited the availability of standby status to mines that have met all other requirements for a permit including closeout plan approval and financial assurance. Rule 7.1H. (Sanderford DT).

Rule 8 (Permit Transfer) is designed to implement Section 69-36-7.T that mandates regulations allowing the transfer of a permit and its obligations when such obligations are assumed by a successor operator. MMD proposed that Section 7.T be implemented by requiring the successor operator apply to the Director for approval. Rules 8.1 and 8.2. When the Director determines that the transferee has provided financial assurance, agreed to comply with the permit terms and meets the eligibility requirements of the Act, the transfer will be approved. Rule 8.2D. (Sanderford DT).

Rule 9 (Public Participation) implements Section 69-36-7.K that requires notice and an opportunity for public hearing on applications for various types of permits under the Act. The types of permitting actions covered by Rule 9 are listed in Rule 9.1 and are further implemented by requirements under the specific permitting rules. (e.g., Rules 4.5B.7, 5.3F.5, 6.6B.11, 7.1C and 10.3). MMD proposed rules on the contents of

the public notice (9.2), on how the notice is published and distributed (9.3), on how persons may request a hearing or submit written comments (9.4), and on how a hearing will be conducted and recorded (9.5 and 9.6). Pursuant to the Commission's direction, MMD also added the statutory provisions allowing appeals of a permitting decision. (Rule 9.7). (Russell DT).

Rule 10 (Variances) implements the requirement of Section 69-36-7.0 for regulations "governing the provision of variances issued by the director." MMD interpreted the Act to only allow the Director to grant variances from the Rules and not the Act itself. Rule 10.1. MMD anticipates that, due to the flexibility throughout the rules, there will be few variance applications. (Bland DT). The Rule provides for the contents of the application (10.2), the provision of notice (10.3) and the requirements for approval (10.4). (Bland DT).

Rule 11 (Inspection, Enforcement and Penalties) is intended to implement both Section 69-36-7.S that requires regulations on inspections and enforcement actions and Section 69-36-17 that requires the Commission to determine penalty amounts. Rule 11.1 provides for the statutory minimum inspection frequency and provides for coordinated procedures and the right to enter operations without prior notice. MMD modeled the enforcement procedures on those used in the state and coal program. (Russell DT). The types of actions (cessation orders, notices

of violations, order to show cause) are taken directly from the Act. Section 69-36-7.S(3),(4) and (5); Rule 11.2. The definitions of "willful violations", "unwarranted failure to comply" and "pattern of violations" are taken from the state Surface Coal Mining Regulations, CSMC Rule 80-1. Rule 11.3.

The Act lists 3 factors to be considered in determining the amount of the penalty and allows the Commission to include other relevant factors. Section 69-36-17.C. MMD proposed to use a point system similar to that used in the coal regulations, CSMC Rule 80-1, to determine the amount of the penalty. The dollar amounts differ from the coal regulations due to the higher maximum penalty under the Act. Rule 11.7. MMD proposed procedures for notifying the permittee, offering an informal conference and appealing an order to the Commission. Rule 11.10, 11.11 and 11.12. (Russell DT).

Rule 12 (Financial Assurance Requirements) implements the Commission's obligation to enact regulations that require financial assurance for permits and that establish a mechanism for the release of financial assurance. Sections 69-36-7.Q. Rule 12 establishes the requirement for financial assurance, the determination of the amount, the types allowed and the length of coverage.

Rule 12.1 follows the requirement of the Act that financial assurance must be provided prior to the issuance of a permit. Section 69-36-7.Q. Based on the goals and requirements of other statutory provisions, MMD proposed two exceptions: permits for

existing mining operations and for minimal impact exploration operations.

Considering the minimal environmental disturbance of a minimal impact exploration and the likelihood that the administrative costs in maintaining and possibly forfeiting the financial assurance could exceed the cost of reclamation, MMD proposed to waive the financial assurance requirement for minimal impact exploration. (Shepherd DT, Guranich DT)

Existing mining operations may delay the providing of financial assurance until they modify their permit to incorporate a closeout plan. Sections 7.G, 11.A and 11.B of the Act indicate that an existing mining operation can obtain a permit first and then later modify the permit to add the required closeout plan; these sections also link the financial assurance to the closeout plans. Presumably, an estimate of the financial assurance amount cannot be made until the closeout plan is drafted. Financial assurance must be provided prior to approval of the closeout plan.

The Act does not state what forms of financial assurance are acceptable; instead the Act does not allow "any type or variety of self-guarantee or self-insurance." Section 69-36-7.Q. MMD initially proposed 4 forms: cash, surety bonds, letters of credit and collateral bonds. Rule 12.3. According to MMD, these are commonly accepted forms of financial assurance that are available to applicants and can be monitored and

forfeited, if necessary, without an overly burdensome administrative effort by MMD.

Rule 12 requires the Director to determine the amount of the financial assurance and requires the Director to reevaluate and adjust the amount when necessary. Rules 12.5 and 12.6. The financial assurance must be maintained until the Director releases it in accordance with the Act and the Rules. Section 69-36-7.R; Rules 12.4 and 12.10. Procedures are also provided for when a financial provider fails, a permittee seeks to replace financial assurance and MMD seeks to forfeit the financial assurance. Rules 12.7E, 12.9 and 12.11. (Shephard DT).

Rule 13 (Process of Review of Mining and Reclamation Practices) is intended to fulfill the Commission's obligation to periodically review mining and reclamation practices and review and amend the regulations. Sections 69-36-7.A(3) and 7.N. MMD proposes to submit an annual report to the Commission describing mining and reclamation and proposing amendments. Rule 13.1 and 13.2.

The requirements in the Act to adopt regulations that coordinate the roles of agencies relating mining, that avoid duplicative and conflicting and administration, that ensure agencies are notified of permitting actions and that establish coordinated and non-duplicative inspections are implemented by provisions found throughout the MMD Proposal. Sections 69-36-7.J, -7.S and -9.B.

Relevant provisions include requirements for MMD to either deliver applications to other agencies or notify the agencies that an application has been submitted (Rules 3.2G, 3.3I, 3.4H, 4.2F, 5.3C, 5.6E, 6.5C, 6.2D.12, 7.1E, 8.2C, 10.3B, 12.10A), for approval or acknowledgement of government landowners (Rules 3.2F, 3.3H, 3.4G, 4.5B.6, 6.6B.10), for compliance with laws of other agencies (Rules 4.4, 5.8, 6.4), for maintaining permits and authorizations of other agencies (Rules 4.4C, 4.5A, 5.4F, 5.8C, 6.4C, 6.7F), for allowing applicants to use information from other permits or submitted to other agencies (Rules 3.2C, 3.3D, 3.4C, 4.2E, 5.2D, 5.2E, 6.2D.7), for coordinating inspections and allowing joint powers agreement (Rule 11.1D) and for not duplicating financial assurance required by other agencies (Rule 12.5A).

IV. Deliberation and Decision

The Commission began its deliberation by reviewing the MMD Proposal. The Commission found that the MMD Proposal addressed the rulemaking requirements of the Act, and adopted the MMD Proposal but provided that the Commission review the MMD Proposal and amend it as necessary. The Commission then began a page-by-page review of the MMD Proposal to consider amendments. Each Commissioner (including non-voting and alternate members) was allowed to raise issues and propose amendments to the MMD Proposal. The amendments proposed by Commissioners were based largely on amendments proposed by parties during the rulemaking process.

In Rule 1, the Commission amended the definitions of "acid/acid drainage", "contaminated", "important wildlife", "post-mining land use", "quarry rock used as aggregate in construction", "riparian area", "sensitive wildlife species", and "wetlands", and added a definition of "permit by rule" proposed by ED. A number of other existing or proposed definitions were discussed but not amended or added (e.g., "location work", "owner", "operator", "self-sustaining ecosystem" and "toxic").

Several changes were designed to clarify the scope of the terms, particularly when the terms impacted on areas regulated by other agencies (e.g., "important wildlife", "riparian area", "post-mining land use", "sensitive wildlife species", "wetlands"), or when the Commission determined the term needed to be more reasonable in its scope. (e.g., "acid")

The definition of "quarry rock used as aggregate in construction" was controversial during the hearings. In the Act, the term is listed as an exempted category of mineral and therefore not subject to the Act. The Act, however, does not define the term. MMD sought to both define the term and to list several examples in the definition. The examples, particularly gypsum, drew controversy.

The Commission found that the record contains conflicting, and sometimes insupportable, claims about the meaning of words such as "aggregate". After considering deleting the definition entirely, the Commission deleted portions of the definition,

such as the examples, that the Commission found insupportable or not in accord with the Act. The remaining definition provides guidance to MMD to determine whether a particular material falls within this category on a case-by-case basis.

Rule 2 was the subject of considerable discussion at the hearing and by the Commission. The Commission considered a number of the issues raised during the hearing including whether large facilities were paying a disproportionate share of the fees, whether small facilities should pay lesser fees because of the greater potential economic impacts on their operations, whether the fees should cover the costs of all agencies involved in permitting or just MMD, and whether all costs of MMD should be covered by permit fees. NMMA argued that the Act required that fees be proportional to the costs of MMD at each facility, that only MMD's costs be covered and that not all costs of implementing the Act be paid for through fees.

In reviewing the fee schedule, the Commission considered the need to fund the implementation of the Act along with the economic impacts of the fees on small operations and the reasonableness of fees for larger operations. The Commission found that the costs proposed by MMD for implementing the program may be overestimated and that more accurate information is needed. The Commission also determined that the acreage fee proposed by MMD for non-minimal impact operations resulted in fees that may far exceed the cost of implementing the Act for large facilities.

The Commission then considered NMMA's proposed Rule 2 that bases fees on the complexity of the facility and provides for caps on fees for all operations. Fees for minimal impact operations are below the cost of implementing the Act at that facility due to the potential economic impact of fees on small operations. The Commission found it necessary to increase the caps on non-minimal impact operations in the NMMA proposal in order to approximate the overall costs of implementing the Act while maintaining fees proportional to the costs associated with each facility.

The Commission found that, in the light of the information now available, NMMA Rule 2, with increases of caps for non-minimal impact operations, provided a reasonable starting point for fees that could potentially equal the costs of administration, implementation, enforcement, investigation and permitting under the Act. The NMMA proposal reduced the economic impact on smaller facilities, while providing more reasonable fees for larger facilities. The Commission voted to replace MMD Rule 2 with NMMA Rule 2, as amended during deliberation, and to require that the Commission review the fee schedule by the end of the year based on further information gathered by MMD.

The Commission then reviewed the permitting and other requirements proposed by MMD for the various types of operations in light of the statutory requirements, the need to consider

economic and environmental effects and the reasonableness of the provision.

Minimal impact operations (Rule 3) were the subject of considerable debate during the hearings. Proposals from industry parties sought to expand the category of minimal impact operations and to reduce the permitting and reclamation requirements for these operations. (Industry parties also argued for reduced fees for minimal impact operations; see discussion of the Commission fee reduction under Rule 2). Community Groups argued that allowing the Director to waive certain criteria for minimal impact status would result in arbitrary decisions. They also argued that the Act only allows the Commission to reduce permitting requirements, and not performance standards, for minimal impact operations. Section 69-36-7.L.

The Commission focused on the scope of the minimal impact category. The Act only refers to operations that have "minimal impact on the environment", and offers no definition. MMD defined minimal impact so as to include two-thirds of all existing mines in the category. The Commission left the MMD definition generally intact, but, based on agency concerns, modified the types of environmental impacts that would not be considered minimal and eliminated the Director's ability to waive such impacts. The Commission also tightened provisions that would allow a small miner to qualify for a permit-by-rule even when the miner is operating in a stream or riparian area. Rule 3.1B.2,3.

The Commission also considered the economic effect of the MMD Proposal and enlarged the qualifications for minimal impact exploration (Rule 3.2A), and clarified some permitting requirements that were potentially burdensome (Rules 3.2D.1, 3.3E.1, and 3.4D.1). At the request of ED, the Commission increased coordination by requiring ED to submit a written determination of compliance, but limited ED to a 20 day response period. (Rules 3.3K.5, 3.4J.6).

The Commission debated whether to eliminate or substantially reduce the financial assurance requirements for minimal impact mining operations. MMD proposed a flat fee plus a per acre fee with the ability to vary the formula based on evidence of actual costs of reclamation; MMD testified during the hearing that the amounts in the formula were based on experience in New Mexico and other states. Testimony was presented both as to the difficulty of obtaining certain types of assurance and to the importance of having adequate assurance for small mining operations. Based on the requirements of the Act and the record, the Commission upheld the MMD provisions.

In reviewing Rules 4, 5 and 6, the Commission addressed a number of issues that overlapped sections in each of these Rules. An overriding concern was the consideration of economic and environmental effects of the Rules' implementation. Section 69-36-7.A(1). The parties at the hearings, particularly NMMA and Community Groups, introduced hundreds of amendments to the MMD Proposal based on these concerns.

In general, Community Groups sought to enhance the environmental effects of the Rules by proposing more detailed permitting requirements and performance standards. NMMA generally sought to lessen the economic effects of the Rules by proposing to qualify many requirements to allow increased flexibility and to delete some requirements NMMA claimed were not mandated by the Act. A number of changes proposed by the parties were incorporated into the MMD Proposal.

The Commission found that the MMD Proposal did generally provide a reasonable balance between the economic and environmental interests advanced by the Act. The Commission did consider and made a number of amendments to the MMD Proposal for economic and environmental purposes. The Commission also strived for consistency among the requirements for exploration, existing and new mining operations, while maintaining legitimate and necessary distinctions in treatment.

Among the changes made to advance environmental concerns were additions to provisions that required information on, and minimized disturbance of, springs, wetlands and riparian areas. Rules 4.2D.5, 4.3F, 5.7C.2.h, and 6.3C.8. The Commission also applied limits on blasting in exploration operations, Rule 4.3L, and clarified the surface and ground water baseline data to be collected for a new mine. Rule 6.2D.13.g.

Changes that were made in consideration of the economic effects of the Rules fell into 2 categories. The Commission

deleted some requirements that appeared both burdensome and unnecessary. Rules 4.3E, 5.2D.3, 5.4B, 5.5F and 6.8F. The Commission also made a number of wording changes that were designed to either provide needed clarity or added flexibility for the applicant or permittee. Rules 4.2D.5, 5.1C, 5.2D, 5.7C.2, 5.7C.2.g, 5.7C.3.b, 5.7C.4.f, 5.7C.5, 6.2D.15.k, 6.3C, 6.3C.7, 6.3D.3, 6.3E.2, 6.3F.6 and 6.3G.1 (see also discussion on wildlife).

Another issue was confidentiality. The provisions concerning confidentiality in the MMD Proposal follow closely the wording of Section 69-36-10. Concerns raised during the hearing and in deliberations related to how MMD and a permittee can respond to a request for public review of confidential documents, how MMD will comply with both this Act and the Inspection of Public Records Act, Sections 14-2-1 et seq., and how MMD will determine exactly which documents are confidential.

The Commission added provisions that require the applicant to clearly indicate and separate confidential material, and that require the Director to immediately notify, possibly by phone or fax and definitely by certified mail, the operator when a request for public review of confidential material is made. The immediate notice will allow the operator to respond to the request, and assist the Director in complying with the Inspection of Public Records Act. Rules 4.2, 5.2 and 6.2.

Another issue was the protection of wildlife. The Act includes requirements to "assure protection of ... wildlife". Section 69-36-7.H(2). During the hearing testimony was presented by government agencies, industry, environmental groups and interested citizens on the meaning of the Act's requirements. Much of the language contained in the wildlife provisions of the revised MMD Proposal came from Game & Fish.

The Commission found that the MMD approach was a reasonable implementation of the statutory goals; the Commission focused on clarifying the language to establish understandable and workable requirements. The definitions of "important wildlife" and "sensitive wildlife species" were clarified at the request of Game & Fish. The provisions on wildlife protection were reworded to produce a reasonable and attainable level of protection. See Rules 4.3G, 5.7C.2.b, 6.2D.13.d(4) and 6.3C.2. In addition, the Commission revised MMD's emergency planning and reporting requirement to focus on impacts to wildlife. Rule 6.2D.15.d.

The issues of agency coordination and avoidance of duplication were discussed by the Commission throughout the deliberation. The Act is somewhat unique in requiring regulations that promote coordination and avoid duplication; the Act also requires concurrence by the Secretary of Environment in regulations that impact ED programs. Section 69-36-9.D. During the hearing, other agencies, such as ED, requested additional

coordination on permitting reviews, while industry parties argued for more specific rules on avoidance of duplication.

MMD added several provisions on coordination and duplication, and the Commission made a few changes. As discussed earlier, the Commission added the ED compliance determination required by the Act, Sections 69-36-7.P(2) and 69-36-11.B(4), into the minimal impact section but allowed ED only a brief period in which to render the determination. Rules 3.3K.5 and 3.4J.6. The Commission deleted new limits placed on the ED compliance determination by MMD as unnecessary and not concurred with by the Secretary of Environment. Rules 5.6J.5, 6.6B.3 and 7.1F. The Commission also reduced the emergency planning requirements to eliminate duplication. Rule 6.2D.15.d. (see also discussion of duplication and coordination under Rule 13).

The debate on Rule 7 focused largely on the scope of the term "standby status" and on public participation in the permitting process for the status. MMD proposed that standby status be triggered by a temporary cessation of mining operations for 180 days which would require a permit revision that includes an opportunity for public participation. Returning to operating status would require a permit revision or modification.

Industry parties argued that the concerns of the Act, and therefore the requirement for a standby permit, are only triggered by a suspension of reclamation activities, and not by

a shutdown of operations that does not affect reclamation. However, the suspension of reclamation may not have significant environmental impacts and therefore not need public notice; no public notice should be required when a mine returns to operation. The community groups testified on the impacts of mines in standby status and argued for more specific environmental standards and for the need for public input at the beginning and end of standby.

The Commission debated the meaning of standby status under the Act. The Commission considered the emphasis on reclamation in the Act and MMD's added requirement that a permittee must have an approved reclamation or closeout plan and financial assurance prior to receiving standby status. The Commission agreed with NMMA that standby status would only be triggered when a permittee who ceases operation also wishes to suspend reclamation. Rule 7.1A. The Commission, however, maintained MMD's 180 day cessation trigger.

The Commission also determined that the Act contemplated an opportunity for public participation in the decision to grant standby status. Sections 69-36-7.E (requirement to "obtain...a permit for standby status") and 69-36-7.K (requirement for public notice of application for "issuance, renewal or revision of a permit for...standby status"). Returning to operating status may or may not involve significant environmental impacts, and the Director can determine whether public notice is necessary. Rule 7.1H.

The Commission reviewed Rules 8, 9 and 10 (Permit Transfer, Public Participation and Variances) and found that the MMD Proposal was reasonable and relatively non-controversial. In response to comments, MMD adopted a number of changes proposed by NMMA, ED, community groups and the Commission. Rules 8.1, 8.2C, 9.3B, 9.3C, 9.3E, 9.3H, 9.4A, 9.4D, and 9.7. The Commission made a few changes to clarify the language and intent of MMD. Rules 9.1A, 9.3B and 9.3E.

The Commission considered a number of changes to Rule 11. Several sections were modified to bring the language into compliance with the language of the Act. Rules 11.2A.3, 11.2B.1, 11.2C and 11.4A. The Commission reviewed the penalty amounts proposed in Rule 11.7 and compared them to the NMMA proposal which was modeled on the coal regulations. MMD's final proposal has lower amounts than the NMMA proposal for minor offenses, due to the deletion of the presumption against imposing any penalty for a minor violation, and higher for serious violations due to the higher maximum penalty set by the Act. Section 69-36-17.B. The Commission voted to uphold MMD's penalty schedule as reasonable under the Act.

The Commission then considered the factors used to determine the amount of the penalty. The Act requires the Commission to consider the seriousness of the violation, efforts to comply, recent history of violations "and other relevant factors as determined by the Commission". Section 69-36-17.C. MMD's proposal adopts the point system and factors used in the

coal regulations. Rule 11.6. In determining whether to assess penalties for each day of the violation, the Director may also consider the economic benefit gained as a result of the violation. Rule 11.8A. The Commission determined that, based on the testimony in the record and the Commission's authority under the Act, the factor of economic benefit should be considered for all violations, not just multi-day violations. Rule 11.9A.

The forms of financial assurance allowed under Rule 12 were debated at length by the Commission. During the hearing, some parties, including NMMA, testified that the limited number of acceptable forms were often difficult and costly to obtain, and therefore proposed adding a number of other forms, such as parent guarantees, third party guarantees and government and other securities to provide greater flexibility and reduce the economic burden on the regulated community. Other parties testified that some of the forms proposed by both MMD and NMMA were risky and difficult for the agency to administer.

MMD reviewed these arguments and proposed to add third party guarantees as another acceptable form. Rules 12.3A.5 and 12.8D. MMD added further provisions to address concerns raised at the hearing. These include obtaining information on other guaranties pledged by the guarantor, allowing the Director to obtain monitoring of the guarantor's financial condition and to have the permittee pay for the costs, and requiring the permittee to obtain replacement financial assurance if the guarantor no longer qualifies. Rule 12.8D.2, .8 and .9.

The Commission reviewed proposed Rule 12 and focused most of its discussion on the acceptability of third party guarantees. The Commission found that adding guarantees as an acceptable form of financial assurance provided greater flexibility and possibly avoided economic problems for the regulated community. The Commission, however, was concerned about whether guarantees could be given by closely related entities in violation of the Act's prohibition of "any type or variety of self-guarantee or self-insurance". Section 69-36-7.Q. The Commission determined that Rule 12.3 provided the Director with sufficient discretion to review proposed forms of financial assurance, and required the Director to reject any form that would constitute a self-guarantee or self-insurance.

The Commission made additional changes to Rule 12 to clarify its intent. Guarantors were added to the list of financial providers whose failure would trigger a requirement to obtain replacement financial assurance. Rule 12.7. Language was added to clarify that guarantors could be incorporated outside the U.S.; the guarantee provision already provided that sufficient assets of the guarantor must be located within the U.S. Rules 12.8D.3 and .7. Rule 12.10B was also amended to remove a potential duplication of agency responsibility; MMD had added a new provision for notifying other agencies.

The Commission focused on two issues concerning Rule 13: public participation and duplication. Parties proposed substantial additions to MMD's annual reporting requirements

under Rule 13. MMD resisted the additional burdens and instead suggested greater interaction with the public during the annual review process. The Commission took this idea one step further and required a public meeting with opportunity for public comment on the annual report. Rule 13.1.

The issue of avoidance of duplication was raised again under Rule 13. The Commission considered NMMA's proposed Rule 13.3; MMD had rejected this proposal on the grounds that duplication is covered by specific provisions in the Rules and that the proposal only provides a defense to an enforcement proceeding. The Commission found that the mandatory provisions in the NMMA proposal were unworkable, but the proposal did offer goals for generally avoiding duplicative requirements. The Commission reworded and adopted NMMA Rule 13.3 to provide direction to MMD and other agencies in avoiding duplication.

The Commission reviewed proposed Rule 14 offered by Community Groups. Rule 14 would provide additional performance and development standards for operations that use solution processes. The Commission considered adopting these standards for only new mining operations, but found that there was not sufficient evidence in the record to support adoption. The Commission stated that it would consider holding a hearing on a regulation covering this topic if a petition was presented to the Commission.

V. Conclusion

After deliberation, the Commission adopted the Mining Act Rules ("Rules") at its meeting of June 13-17, 1994, and then reviewed the Rules, ratified its decision and adopted this Statement of Reasons at a meeting on July 11, 1994.

In addition to the specific reasons set out above, the Commission adopted the Rules for the following reasons applicable to all Rules:

1. The process followed in adopting the Rules complied with all procedural requirements;

2. The Rules are supported by substantial evidence in the record, and are reasonable regulations that are consistent with the purposes and intent of the Act, that are necessary to implement the Act, and that consider the economic and environmental effects of their implementation:

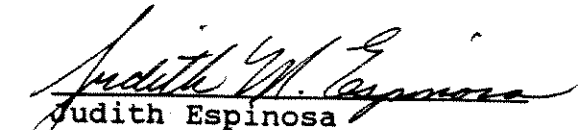
- a. The Rules implement the substantive rulemaking requirements of the Act;

- b. The Rules require permitting of all new, existing and exploration mining operations, and require reclamation of lands affected by exploration and mining; and

- c. The Rules are flexible to account for different types of regulated activities and for site-specific characteristics, and to allow for the establishment of a new regulatory program.

Adopted: July 11, 1994

MINING COMMISSION


Judith Espinosa
Chairperson