

TITLE 19 NATURAL RESOURCES AND WILDLIFE
CHAPTER 8 COAL MINING
PART 12 ADMINISTRATIVE AND JUDICIAL REVIEW OF DECISIONS

19.8.12.1 ISSUING AGENCY: New Mexico Coal Surface Mining Commission.
[19.8.12.1 NMAC - N, 9-29-2000]

19.8.12.2 SCOPE: All persons subject to the New Mexico Surface Mining Act, NMSA 1978, Sections 69-25A-1 et. Seq. (1979).
[19.8.12.2 NMAC - N, 9-29-2000]

19.8.12.3 STATUTORY AUTHORITY: NMSA 1978, Sections 69-25A-1 et. seq. (1979).
[19.8.12.3 NMAC - N, 9-29-2000]

19.8.12.4 DURATION: Permanent.
[19.8.12.4 NMAC - N, 9-29-2000]

19.8.12.5 EFFECTIVE DATE: November 29, 1997, unless a later date is cited at the end of a section.
[19.8.12.5 NMAC - N, 9-29-2000]

19.8.12.6 OBJECTIVE: The objective of Parts 1 - 35 of Chapter 8 is to establish regulations to implement the New Mexico Surface Mining Act as directed in NMSA 1978, Section 69-25A-5 (1979). These regulations are intended to ensure proper reclamation through permitting for operations subject to the New Mexico Surface Mining Act, in accordance with provisions and standards outlined in the New Mexico Surface Mining Act.
[19.8.12.6 NMAC - N, 9-29-2000; A, 1-15-2002]

19.8.12.7 DEFINITIONS: [RESERVED]
[19.8.12.7 NMAC- N, 9-29-2000]
[Definitions for this part can be found in 19.8.1.7 NMAC.]

19.8.12.8 - 19.8.12.1199 [RESERVED]
[19.8.12.8 - 19.8.12.1199 NMAC - N, 9-29-2000]

19.8.12.1200 ADMINISTRATIVE REVIEW BY THE DIRECTOR:

A. Within 30 days after the applicant or permittee is notified of the final decision of the director concerning the application for a permit, revision or renewal thereof, application for transfer, sale, or assignment of rights, or concerning an application for coal exploration, or pursuant to Paragraph (2) of Subsection E of 19.8.13.1301 NMAC a decision regarding a permit modification, the applicant, permittee or any person with an interest which is or may be adversely affected may request a hearing on the reasons for the final decision in accordance with this section. Such request shall be in writing and state with reasonable specificity the reasons for the request and objections to the director's decision.

B. The director shall commence the hearing within 30 days of such request. This hearing shall be of record, adjudicatory in nature, and no person who presided at an informal conference under 19.8.11.1103 NMAC shall either preside at the hearing or participate in the decision following the hearing, or in any administrative appeal therefrom.

(1) The director may, under such conditions as he may prescribe, grant such temporary relief as he deems appropriate, pending final determination of the proceeding, if:

(a) all parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief;

(b) the person requesting that relief shows that there is substantial likelihood that he will prevail on the merits of the final determination of the proceeding;

(c) the relief is not to affect adversely the public health or safety, or cause significant, imminent environmental harm to land, air, or water resources; and

(d) the relief sought is not the issuance of a permit where a permit has been denied, in whole or in part, by the director.

(2) For the purpose of such hearing, the director may administer oaths and affirmation, subpoena witnesses, written or printed materials, compel attendance of witnesses or production of those materials, compel discovery, and take evidence, including, but not limited to, site inspections of the land to be affected and other surface coal mining and reclamation operations carried on by the applicant in the general vicinity of the proposed operations.

(a) A verbatim record of each public hearing required by this section shall be made, and a transcript made available on the motion of any party or by order of the director.

(b) Ex parte contacts between representatives of the parties before the director and the director shall be prohibited.

(3) Within the time period specified by section 69-25A-29 NMSA 1978 of the act after the close of the record, the director shall issue and furnish the applicant, and each person who participated in the hearing, with the written findings of fact, conclusions of law, and order of the director with respect to the appeal.

(4) The burden of proof at such hearings shall be on the party seeking to reverse the decision of the director.

[11-29-97; 19.8.12.1200 NMAC - Rn, 19 NMAC 8.2.12.1200, 9-29-2000; A, 7-30-2004]

19.8.12.1201 [RESERVED]

[11-29-97; 19.8.12.1201 NMAC - Rn, 19 NMAC 8.2.12.1201, 9-29-2000; Repealed, 4-28-2006]

19.8.12.1202 JUDICIAL REVIEW:

A. A party to a proceeding before the director who is aggrieved by a director's decision issued after a hearing may obtain a review of that decision by an appeal to the district court pursuant to Section 39-3-1.1 NMSA 1978.

B. A person who is or may be aggrieved by a rule or an amendment or repeal of a rule the commission adopts may appeal to the court of appeals for review pursuant to Subsection B of 69-25A-30 NMSA 1978.

[11-29-97; 19.8.12.1202 NMAC - Rn, 19 NMAC 8.2.12.1202, 9-29-2000; A, 4-28-2006]

19.8.12.1203 FORMAL REVIEW OF NOTICES OF VIOLATION, CESSATION ORDERS AND SHOW CAUSE ORDERS BY THE DIRECTOR:

A. Upon receipt of a notice of violation, civil penalty assessment or cessation order pursuant to 19.8.30.3000, 19.8.30.3001 or 19.8.31 NMAC, or any such notice or order's modification, vacation or termination, a permittee or any person having an interest that such order or notice does or may adversely affect may apply to the director for review of the notice or order within 30 days of the notice or order's receipt or within 30 days of its modification, vacation or termination.

B. The application for review shall be in writing, setting forth the applicant's name, address and telephone number; the applicant's interest and, if the applicant is not the operator, how the order or notice to be reviewed adversely affects it; and generally, the grounds alleged and the relief requested.

C. If the permittee or other interested party does not apply for review in writing, they waive the right to review.

D. The filing of an application for review shall not stay the order or notice, or any order or notice's modification, vacation or termination. Pending the review's completion, the applicant may file with the director a written request that the director grant temporary relief in accordance with Subsection D of Section 69-25A-29 NMSA 1978.

E. The review pursuant to Subsection A of 19.8.12.1203 NMAC shall include such investigation as the director deems appropriate and an opportunity for a hearing at the capitol (or such other place as the applicant may agree), at the applicant's request and within 30 days after receiving the request, to enable the applicant to present information relating to the order or notice's issuance, continuance, modification, vacation or termination.

F. The director or his authorized representative shall hold a hearing at the capitol (or such other place as the permittee may agree) within 30 days after actual notice to the permittee of an order to show cause's issuance pursuant to 19.8.30.3002 NMAC.

G. The director or his authorized representative shall give the operator, permittee or other interested persons written notice of the time, place and date of any hearing this rule requires at least five days prior to the hearing, except that the director or his authorized representative shall give at least 15 days notice for hearings that Subsection F of 19.8.12.1203 NMAC requires. Any times for holding a hearing may be extended by the parties' agreement.

H. All hearings this section requires shall be of record, stenographically recorded, adjudicatory in nature and conducted in accordance with 19.8.12.1200 NMAC. The inspector issuing or causing to be issued the cessation order, notice of violation or order to show cause shall not participate, directly or indirectly, in the decision making process. A party may not introduce as evidence or use to impeach a witness statements another party makes or evidence another party produces at an informal hearing or conference held pursuant to 19.8.30.3004 NMAC, or at an assessment conference held pursuant to 19.8.31.3106 NMAC.

I. The director, or his authorized representative serving as hearing officer, may hold pre-hearing conferences to facilitate stipulation of facts, delineation of the issues, order of presentation or other appropriate procedural rules and settlement.

J. The director shall issue, and serve upon the parties, a written decision and order, including his reasons and findings of fact, as follows:

(1) within 30 days (unless the director has granted temporary relief pursuant to Subsection D of Section 69-25A-29) of a hearing, and after receiving the report of such investigation conducted pursuant to Subsection B of 19.8.12.1203 NMAC, vacating, affirming, modifying or terminating the issuance, continuance, modification, vacation or termination of the order or notice; and

(2) within 60 days of the hearing held pursuant to Subsection F of 19.8.12.1203 NMAC, quashing, in whole or in relevant part, the order to show cause or suspending or revoking, in whole or relevant part, the permit.

K. The district court may review the director's decision pursuant to Subsection A of Section 69-25A-30 NMSA 1978 and 19.8.12.1202 NMAC.

L. The director may consolidate any hearing this rule requires, to the extent practicable without prejudicing the rights of the person to whom a notice, cessation order or order to show cause is directed, with any other hearing provided for by these rules.

[11-29-97; 19.8.12.1203 NMAC - Rn, 19 NMAC 8.2.12.1203, 9-29-2000; A, 4-28-2006]

19.8.12.1204 PETITIONS FOR AWARD OF LEGAL COSTS AND EXPENSES:

A. Who may file. A person may file a petition for award of costs and expenses including attorneys' fees that person has reasonably incurred as a result of his participation in an administrative review under the act that results in the director issuing a final order pursuant to 19.8.12.1200 or 19.8.12.1203 NMAC.

B. Where to file; time for filing. The person seeking an award for costs and expenses shall file a petition for an award of costs and expenses including attorneys' fees with the director within 45 days after such order's receipt. A person who fails to timely file the petition may waive the right to such an award.

C. Contents of petition. A petition filed under this section shall include the person's name from whom costs and expenses are sought with the following submitted in support of the petition:

(1) an affidavit setting forth in detail all costs and expenses including attorneys' fees the person reasonably incurred for, or in connection with, the person's participation in the proceeding;

(2) receipts or other evidence of such costs and expenses; and

(3) where attorneys' fees are claimed, evidence concerning the hours expended on the case, the customary commercial rate of payment for such services in the area and the individual's performing the services experience, reputation and ability.

D. Answer. Any person served with a copy of the petition shall have 30 days from the petition's service within which to file an answer to the petition.

E. Who may receive an award. The director may award appropriate costs and expenses including attorneys' fees as follows:

(1) from the permittee to any person if the person initiates or participates in any administrative proceeding reviewing enforcement actions upon a finding that a violation of the act, rules or permit has occurred, or that an imminent hazard existed, and the district court or director determines that the person made a substantial contribution to the issues' full and fair determination, except that a person's contribution who did not initiate a proceeding must be separate and distinct from the contribution a person initiating the proceeding made;

(2) from the mining and minerals division to a person, other than the permittee or his representative, who initiates or participates in a proceeding under the act, prevails in whole or in significant part and achieves at least some degree of success on the merits, upon a finding that such person substantially contributed to the issues' full and fair determination, except that a person's contribution who did not initiate a proceeding must be separate and distinct from the contribution a person initiating the proceeding made;

(3) from the mining and minerals division to a permittee where the permittee demonstrates that the director issued an order of cessation, a notice of violation or an order to show cause why the director should not suspend or revoke the permit in bad faith and for the purpose of harassing or embarrassing the permittee;

(4) from a person to a permittee where the permittee demonstrates that the person initiated a proceeding or participated in such a proceeding in bad faith for the purpose of harassing or embarrassing the permittee; or

(5) from a person to the mining and minerals division where it demonstrates that a person applied for review or any party participated in such a proceeding in bad faith and for the purpose of harassing or embarrassing the mining and minerals division.

F. Awards. An award under these sections may include all costs and expenses, including attorneys' fees and expert witness fees, a party reasonably incurred as a result of initiation or participation in a proceeding under the act; and all costs and expenses, including attorneys' fees and expert witness fees, a party reasonably incurred in seeking the award.

G. Appeals. Any person aggrieved by a director's decision concerning the award of costs and expenses in an administrative proceeding under this act may appeal such award to the district court as set forth in 19.8.12.1202 NMAC.

[19.8.12.1204 NMAC - N, 4-28-2006]

HISTORY OF 19.8.12 NMAC:

Pre-NMAC History:

The material in Part 12 was derived from that previously filed with the State Records Center and Archives under: SB 73-1 Regulations of the State of New Mexico Coal Surfacing Commission, filed 1-10-73 and its amendment filed 8-4-76

SB 78-1 (Rule 78-1) Regulations of the State of New Mexico Coal Surfacing Commission, filed 8-31-78

SB 79-1 (Rule 79-1) New Mexico Coal Surfacing Regulations, filed 7-11-79

CSMC Rule 80-1 (Rule 80-1) Surface Coal Mining Regulations, filed 9-24-80; and all amendments to CSMC Rule 80-1, filed 7-29-82, 11-10-83, 3-5-84, 7-19-84, filed 8-6-84, 8-23-84, 3-28-89, 6-15-90, 9-18-90, 2-15-91, 5-8-91, 8-26-91, 10-4-91, 7-28-92, 1-25-93, 11-1-94, 3-10-95, 4-12-95, 12-21-95.

Other History:

Renumbered and reformatted CSMC Rule 80-1, Surface Coal Mining regulations (filed 9-24-80) to 19 NMAC 8.2, Coal Surface mining, effective 11-29-97.

Renumbered 19 NMAC 8.2 Subpart 12 Administrative and Judicial Review of Decisions (filed 11-13-97), to 19.8.12 NMAC Administrative and Judicial Review of Decision, effective 09-29-2000.