

TITLE 19 NATURAL RESOURCES AND WILDLIFE
CHAPTER 8 COAL MINING
PART 31 PENALTIES

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

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

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

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

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

19.8.31.6 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.
[19.8.31.6 NMAC - N, 9-29-2000; A, 1-15-2002]

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

19.8.31.8 - 19.8.31.3099 [RESERVED]
[19.8.31.8 - 19.8.31.3099 NMAC - N, 9-29-2000]

19.8.31.3100 CIVIL PENALTIES: ASSESSMENT:

A. The director shall review each notice of violation and cessation order in accordance with the assessment procedures described in this part to determine whether a civil penalty will be assessed, the amount of the penalty and whether each day of a continuing violation will be deemed a separate violation for purposes of the total penalty assessed.

B. The director shall assess a penalty for each cessation order.

C. The director may assess a penalty for each violation. In determining whether to assess a penalty, the director shall consider the factors listed in 19.8.31.3101 NMAC. Normally, a penalty will be assessed when a violation is assigned 31 points or more.

[11-29-97; 19.8.31.3100 NMAC - Rn, 19 NMAC 8.2.31.3100, 9-29-2000]

19.8.31.3101 POINT SYSTEM FOR PENALTIES:

A. The director shall use the point system described in this section to determine the amount of the penalty, and, in the cases of notices of violation, whether a mandatory penalty should be assessed as provided in 19.8.31.3100 NMAC.

B. Points shall be assigned as follows.

(1) History of previous violations. The director shall assign up to 25 points based on the history of previous violations. One point shall be assigned for each past violation contained in a notice of violation. Five points shall be assigned for each violation (but not a condition or practice) contained in a cessation order. The history of previous violations, for the purpose of assigning points, shall be determined and the points assigned with respect to a particular coal exploration or surface coal mining operation. Points shall be assigned as follows:

(a) a violation shall not be counted, if the notice or order is the subject of pending administrative or judicial review or if the time to request any administrative or judicial decision has not expired, and thereafter it shall be counted for only one year;

(b) no violation for which the notice or order has been vacated shall be counted; and

(c) a violation, not resulting in a civil penalty assessment shall not receive more than 50% of the points than would have been assigned if the violation had resulted in an assessment.

(2) Seriousness. The director shall assign up to 25 points based on the seriousness of the violation, as follows:

(a) Foreseeability of occurrence. The director shall assign up to 10 points based on the foreseeability of the occurrence of the event which a violated standard is designed to prevent. Points shall be assessed according to the following schedule:

Foreseeability of Occurrence	Points
None	0
Insignificant	1-2
Unlikely	3-5
Likely	6-9
Clearly	10

(b) Extent of potential or actual damage. The director shall assign up to 15 points, based on the extent of the potential or actual damage, in terms of area and impact on the public or environment, as follows:

(i) if the damage or impact which the violated standard is designed to prevent would remain within the coal exploration or permit area, the director shall assign zero to seven points, depending on the duration and extent of the damage or impact;

(ii) if the damage or impact which the violated standard is designed to prevent would extend outside the coal exploration or permit area, the director shall assign eight to fifteen points, depending on the duration and extent of the damage or impact.

(c) Alternative. In the case of a violation of an administrative requirement, such as a requirement to keep records, the director shall, in lieu of Subparagraphs (a) and (b) of Paragraph (2) of Subsection B of 19.8.31.3101 NMAC, assign up to 10 points for seriousness, based upon the extent to which enforcement is obstructed by the violation.

(3) Negligence.

(a) The director shall assign up to 25 points based on the degree of fault of the person to whom the notice or order was issued in causing or failing to correct the violation, condition, or practice which led to the notice or order, either through act or omission. Points shall be assessed as follows:

(i) a violation which occurs through no negligence shall be assigned no penalty points for negligence;

(ii) a violation which is caused by negligence shall be assigned 12 points or less, depending on the degree of negligence; or

(iii) a violation which occurs through a greater degree of fault than negligence shall be assigned 13 to 25 points, depending on the degree of fault.

(b) In determining the degree of negligence involved in a violation the number of points to be assigned, the following definitions apply:

(i) no negligence means an inadvertent violation which was unavoidable by the exercise of reasonable care;

(ii) negligence means the failure of a permittee to prevent the occurrence of any violation of his permit or any requirement of the act or 19.8 NMAC due to indifference, lack of diligence, or lack of reasonable care, or the failure to abate any violation of such permit, the act or 19.8 NMAC due to indifference, lack of diligence, or lack of reasonable care;

(iii) a greater degree of fault than negligence means reckless, knowing, or intentional conduct.

(c) In calculating points to be assigned for negligence, the acts of all persons working on the coal exploration or surface coal mining and reclamation site shall be attributed to the person to whom the notice or order was issued unless he establishes, by clear and convincing evidence, that the acts were not within the scope of employment or agency.

(4) Good faith in attempting to achieve compliance.

(a) The director shall add points based on the degree of good faith of the person to whom the notice or order was issued in attempting to achieve rapid compliance after notification of the violation. Points shall be assigned as follows:

Degree of Good Faith	Points
Rapid compliance	-1 to -15
Use of additional equipment or labor	-1 to -25
Normal compliance	<u>0</u>
(Total not to exceed -25)	

(b) The following definitions shall apply under Subparagraph (a) of Paragraph (4) of Subsection B of 19.8.31.3101 NMAC:

(i) rapid compliance means that the person to whom the notice or order was issued took extraordinary measures to abate the violation in the shortest possible time and that abatement was achieved before the time set for abatement;

(ii) use of additional equipment or labor means rapid compliance and the employment of equipment and/or labor in amounts and at a cost greater than would normally be employed;

(iii) normal compliance means the person to whom the notice or order was issued abated the violation within the time given for abatement.

(c) If the consideration of these criteria is impractical because of the length of the abatement period, the assessment may be made without considering this criterion and shall be reassessed after the violation has been abated.

[11-29-97; 19.8.31.3101 NMAC - Rn, 19 NMAC 8.2.31.3101, 9-29-2000]

19.8.31.3102 DETERMINATION OF PENALTY AMOUNT: The director shall determine the amount of any civil penalty by converting the total number of points assigned under 19.8.31.3101 NMAC to a dollar amount which falls within the range of penalties contained in the following schedule:

<u>Points</u>	<u>Dollars</u>	<u>Points</u>	<u>Dollars</u>
1	10-30	37	1700-1800
2	30-50	38	1800-1900
3	50-70	39	1900-2000
4	70-90	40	2000-2100
5	90-110	41	2100-2200
6	110-130	42	2200-2300
7	130-150	43	2300-2400
8	150-170	44	2400-2500
9	170-190	45	2500-2600
10	190-210	46	2600-2700
11	210-230	47	2700-2800
12	230-250	48	2800-2900
13	250-270	49	2900-3000
14	270-290	50	3000-3100
15	290-310	51	3100-3200
16	310-330	52	3200-3300
17	330-350	53	3300-3400
18	350-370	54	3400-3500
19	370-390	55	3500-3600
20	390-410	56	3600-3700
21	410-430	57	3700-3800
22	430-450	58	3800-3900
23	450-470	59	3900-4000
24	470-500	60	4000-4100
25	500-600	61	4100-4200
26	600-700	62	4200-4300
27	700-800	63	4300-4400
28	800-900	64	4400-4500
29	900-1000	65	4500-4600
30	1000-1100	66	4600-4700

31	1100-1200	67	4700-4800
32	1200-1300	68	4800-4900
33	1300-1400	69	4900-5000
34	1400-1500	70 and above	5000
35	1500-1600		
36	1600-1700		

[11-29-97; 19.8.31.3102 NMAC - Rn, 19 NMAC 8.2.31.3102, 9-29-2000]

19.8.31.3103 ASSESSMENT OF SEPARATE VIOLATION FOR EACH DAY:

A. The director may assess separately a civil penalty for each day from the date of issuance of the notice of violation or cessation order to the date set for abatement of the violation. In determining whether to make such an assessment, the director shall consider the factors listed in 19.8.31.3101 NMAC and may consider the extent to which the person to whom the notice or order was issued gained any economic benefit as a result of a failure to comply. For any violation which continues for two or more days and which is assigned more than 70 points, the director shall assess a civil penalty for a minimum of two separate days.

B. Whenever a violation contained in a notice of violation or cessation order has not been abated within the abatement period set in the notice or order, a civil penalty of not less than \$750 shall be assessed for each day, not exceeding thirty (30) days for each such violation, during which such failure continues, except that, if the person to whom the notice or order was issued initiates review proceedings with respect to the violation, the abatement period shall be extended as follows:

(1) if suspension of the abatement requirements of the notice or order is ordered in a temporary relief proceeding under Subsection D of 69-25A-29 NMSA 1978 of the act, after a determination that the person to whom the notice or order was issued will suffer irreparable loss or damage from the application of the requirements, the period permitted for abatement shall not end until the date on which the director issues a final order with respect to the violation in question; and

(2) if the person to whom the notice or order was issued initiated review proceedings under Section 69-25A-30 NMSA 1978 of the act with respect to the violation, in which the obligations to abate are suspended by the court pursuant to Subsection B of Section 69-25A-30 NMSA 1978 of the act, the daily assessment of a penalty shall not be made for any period before entry of a final order by the court not subject to appeal.

[11-29-97; 19.8.31.3103 NMAC - Rn, 19 NMAC 8.2.31.3103, 9-29-2000; A, 08-31-2010]

19.8.31.3104 WAIVER OF USE OF FORMULA TO DETERMINE CIVIL PENALTY:

A. The director, upon his own initiative or upon written request received with 15 days of service of a notice of civil penalty assessment, may waive the use of the formula contained in 19.8.31.3101 NMAC to set the civil penalty, if he determines that, taking into account exceptional factors present in the particular case, the penalty is demonstrably unjustified. However, the director shall not waive the use of the formula or reduce the proposed assessment on the basis of an argument that a reduction in the proposed penalty could be used to abate violations of the act, 19.8 NMAC or any conditions of any permit or exploration approval. The basis of every waiver shall be fully explained and documented in the records of the case.

B. If the director waives the use of the formula, he shall use the criteria set forth in Subsection A of Section 69-25A-22 NMSA 1978 of the act, to determine the appropriate penalty. When the director has elected to waive the use of the formula, he shall give a written explanation of the basis for the assessment made to the person to whom the notice or order was issued.

[11-29-97; 19.8.31.3104 NMAC - Rn, 19 NMAC 8.2.31.3104, 9-29-2000]

19.8.31.3105 PROCEDURE FOR CIVIL PENALTY ASSESSMENT:

A. Within 15 days of service of a notice or order, the person to whom it was issued may submit written information about the violation to the director and to the inspector who issued the notice of violation or cessation order. The director or his authorized representative shall consider any information so submitted in determining the facts surrounding the violation and the amount of the penalty.

B. The director shall serve a copy of the proposed assessment and of the worksheet showing the computation of the proposed assessment on the person to whom the notice or order was issued, by certified mail, within 30 days of the issuance of the notice or order. If the mail is tendered at the address of that person set forth in the sign required under Subsection C of 19.8.20.2000 NMAC or at any address at which that person is in fact located, and he refuses to accept delivery of or to collect such mail, the requirements of this subsection shall be deemed to have been complied with upon such tender. Failure by the director to serve any proposed assessment

within 30 days shall not be grounds for dismissal of all or part of such assessment unless the person against whom the proposed penalty has been assessed:

- (1) proves actual prejudice as a result of the delay; and
- (2) makes a timely objection to the delay; an objection shall be timely only if made in the normal course of administrative and judicial review.

C. Unless a conference has been requested, the director or his representative shall review and reassess any penalty if necessary to consider facts which were not reasonably available on the date of issuance of the proposed assessment because of the length of the abatement period. The director shall serve a copy of any such reassessment and of the worksheet showing the computation of the reassessment in the manner provided in Subsection B of 19.8.31.3105 NMAC within 30 days after the date the violation is abated.

D. Consolidation of hearings. If the director proposes an assessment or reassessment prior to the running of the time for requesting an informal hearing pursuant to 19.8.30.3004 NMAC, any conference requested pursuant to 19.8.31.3106 NMAC may be consolidated with such informal hearing procedure upon a determination by the director that consolidation is appropriate.

[11-29-97; 19.8.31.3105 NMAC - Rn, 19 NMAC 8.2.31.3105, 9-29-2000; A, 12-31-2007]

19.8.31.3106 PROCEDURE FOR ASSESSMENT CONFERENCE:

A. The director shall arrange for a conference to review the proposed assessment or reassessment, upon written request of the person to whom the notice or order was issued, if the request is received within 15 days from the date of the proposed assessment or reassessment is served.

B. Conference format and timing.

(1) The director shall assign a conference officer to hold the assessment conference who shall not be the inspector signing the notice or order. The conference shall be informal in nature and not be governed by the rules for adjudicatory hearings found in 19.8.12 NMAC. The assessment conference shall be held within 60 days from the date of issuance of the proposed assessment or the end of the abatement period, whichever is later. A failure by the director to hold such conference within 60 days shall not be grounds for dismissal of all or part of an assessment unless the person against whom the proposed penalty has been assessed proves actual prejudice as a result of the delay.

(2) The director shall post notice of the time and place of the conference at his office at least five (5) days before the conference. Any person shall have a right to attend and participate in the conference.

(3) The conference officer shall consider all relevant information in the violation. Within 30 days after the conference is held, the conference officer shall either:

(a) settle the issues, in which case a settlement agreement shall be prepared by the conference officer and signed by the director and by the person assessed; or

(b) affirm, raise, lower or vacate the penalty.

(4) An increase or reduction of a proposed civil penalty assessment of more than 25 percent and more than \$500 shall not be final and binding until approved by the director.

C. The conference officer shall promptly serve the person assessed with a notice of his action in the manner provided in Subsection B of 19.8.31.3105 NMAC and shall include a worksheet if the penalty has been raised or lowered. The reasons for the conference officer's action shall be fully documented in the file.

D. Settlement agreements.

(1) If a settlement agreement is entered into, the person assessed will be deemed to have waived all rights to further review of the violation or penalty in question, except as otherwise expressly provided for in the settlement agreement. The settlement agreement shall contain a clause to this effect.

(2) If full payment of the amount specified in the settlement agreement is not received by the director within 30 days after the date of signing, the director shall order the civil penalty fixed at an amount determined to be appropriate, in light of the criteria set forth in 19.8.31.3101 NMAC and relevant information received at any assessment conference.

E. The conference officer may terminate the conference when he determines that the issues cannot be resolved or that the person assessed is not diligently working toward resolution of the issues.

F. The conference officer may, if persuaded by the information presented, modify or vacate a notice of violation, with the approval of the director.

G. At formal review proceedings under 69-25A-29 NMSA 1978 of the act no evidence as to statements made or evidence produced by one party at a conference shall be introduced as evidence by another party or to impeach a witness.

[11-29-97; 19.8.31.3106 NMAC - Rn, 19 NMAC 8.2.31.3106, 9-29-2000; A, 12-31-2007]

19.8.31.3107 REQUEST FOR HEARING:

A. The person charged with the violation may contest the proposed penalty or the alleged violation by submitting a petition and an amount equal to the proposed penalty, or, if a conference has been held, the reassessed or affirmed penalty to the director to be held in escrow as provided in Subsection B of 19.8.31.3107 NMAC within 30 days from receipt of the proposed assessment or reassessment or 30 days from the date of service of the conference officer's action, whichever is later. The fact of the violation may not be contested, if it has been decided in a review proceeding commenced under 19.8.31.3108 NMAC.

B. All funds submitted under Subsection A of 19.8.31.3107 NMAC shall be held in escrow pending completion of the administrative and judicial review process, at which time the director shall disburse them as provided 19.8.31.3108 NMAC.

C. The request for hearing and any hearing procedure shall be governed by 19.8.12.1203 NMAC and any contest of a proposed penalty may, unless inconsistent with the timing of a hearing on a notice of violation or cessation order, be combined with any such proceeding under 19.8.12.1203 NMAC.

[11-29-97; 19.8.31.3107 NMAC - Rn, 19 NMAC 8.2.31.3107, 9-29-2000; A, 1-15-2002]

19.8.31.3108 FINAL ASSESSMENT AND PAYMENT OF PENALTY:

A. If the person to whom a notice of violation or cessation order is issued fails to request a hearing as provided in 19.8.31.3107 NMAC, the proposed assessment shall become a final order of the director and the penalty assessed shall become due and payable upon expiration of the time allowed to request a hearing.

B. If any party requests judicial review of a final order of the director, the proposed penalty shall continue to be held in escrow until completion of the review. Otherwise, subject to Subsection C of 19.8.31.3108 NMAC, the escrowed funds shall be released to the director in payment of the penalty, and the escrow shall end.

C. If the final decision in the administrative and judicial review results in an order reducing or eliminating the proposed penalty assessed, the director shall within 30 days of receipt of the order refund to the person assessed all or part of the escrowed amount, with interest from the date of payment into escrow to the date of the refund at the rate of 6 percent or at the rate established by the U.S. department of treasury pursuant to Section 6621(b) of the internal revenue code, whichever is greater.

D. If the review results in an order increasing the penalty, the person to whom the notice or order was issued shall pay the difference to the director within 15 days after the order is mailed to such person.

[11-29-97; 19.8.31.3108 NMAC - Rn, 19 NMAC 8.2.31.3108, 9-29-2000; A, 12-31-2007]

19.8.31.3109 INDIVIDUAL CIVIL PENALTIES:

A. Except as provided in Subsection B of 19.8.31.3109 NMAC, the director may assess an individual civil penalty against any corporate director, officer or agent of a corporate permittee who knowingly and willfully authorized, ordered or carried out a violation of a permit condition, or a failure or refusal to comply with any order issued under the act.

B. The director shall not assess an individual civil penalty in situations resulting from a permit violation by a corporate permittee until a cessation order has been issued by the director to the corporate permittee for the violation, and the cessation order has remained unabated for 30 days.

[11-29-97; 19.8.31.3109 NMAC - Rn, 19 NMAC 8.2.31.3109, 9-29-2000; A, 08-31-2010]

19.8.31.3110 AMOUNT OF INDIVIDUAL CIVIL PENALTY:

A. In determining the amount of an individual civil penalty assessed under 19.8.31.3109 NMAC, the director shall consider the criteria specified in Section 69-25A-22 NMSA 1978, including:

(1) the individual's history of authorizing, ordering or carrying out previous violations, failures or refusals at the particular surface coal mining operations;

(2) the seriousness of the violation, failure or refusal (as indicated by the extent the environment and any hazard to the health or safety of the public; and

(3) the demonstrated good faith of the individual charged in attempting to achieve rapid compliance after notice of the violation, failure or refusal.

B. The penalty shall not exceed \$5,000 for each violation. Each day of a continuing violation may be deemed a separate violation and the director may assess a separate individual civil penalty for each day the violation, failure or refusal continues, from the date of service of the underlying notice of violation, cessation order or other order incorporated in a final decision issued by the director until abatement or compliance is achieved.

[11-29-97; 19.8.31.3110 NMAC - Rn, 19 NMAC 8.2.31.3110, 9-29-2000; A, 12-31-2007]

19.8.31.3111 PROCEDURE FOR ASSESSMENT OF INDIVIDUAL CIVIL PENALTY:

A. The director shall serve on each individual to be assessed an individual civil penalty a notice or proposed individual civil penalty assessment, including a narrative explanation of the reasons for the penalty, the amount to be assessed, and a copy of any underlying notice of violation and cessation order.

B. The notice of proposed individual civil penalty assessment shall become a final order of the director 30 days after service upon the individual unless:

(1) the individual files within 30 days of service of the notice of proposed individual civil penalty assessment a petition for review in accordance with 19.8.12.1203 NMAC; or

(2) the director and the individual or responsible corporate permittee agree within 30 days of service of the notice or proposed individual civil penalty assessment to a schedule or plan for the abatement or correction of the violation, failure or refusal.

C. Service. For purposes of this section, service is sufficient if it would satisfy SCRA 1986, 1-004 for service of a summons and complaint.

[11-29-97; 19.8.31.3111 NMAC - Rn, 19 NMAC 8.2.31.3111, 9-29-2000]

19.8.31.3112 PAYMENT OF PENALTY:

A. If a notice of proposed individual civil penalty assessment becomes a final order in the absence of a petition for review or abatement agreement, the penalty shall be due upon issuance of the final order.

B. If an individual named in a notice of proposed individual civil penalty assessment files for review in accordance with 19.8.12.1203 NMAC, the penalty shall be due upon issuance of a final administrative order affirming, increasing or decreasing the proposed penalty.

C. Where the director and the corporate permittee or individual have agreed in writing on a plan for the abatement of or compliance with the unabated order, an individual named in a notice of proposed individual civil penalty assessment may postpone payment until receiving either a final order from the director stating that the penalty is due on the date of such final order, or written notice that abatement or compliance is satisfactory and the penalty has been withdrawn.

[11-29-97; 19.8.31.3112 NMAC - Rn, 19 NMAC 8.2.31.3112, 9-29-2000]

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

A. willfully and knowingly violates a condition of the permit;

B. willfully and knowingly fails or refuses to comply with:

(1) any order issued under 69-25A-25 or 69-25A-30 NMSA 1978; or

(2) any order incorporated into a final decision issued by the director under the act (except for those orders specifically excluded under Subsection E of 69-25A-22 NMSA 1978); or

C. knowingly makes any false statement, representation, or certification, or knowingly fails to make any statement, representation, or certification in any application, record, report, plan, or other document filed with or required to be maintained by the director, or any order or decision issued by the director under the act.

[19.8.31.3113 NMAC - N, 08-31-2010]

HISTORY OF 19.8.31 NMAC:

Pre-NMAC History:

The material in Part 31 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 11-29-1997.

Renumbered 19 NMAC 8.2 Subpart 31 Civil Penalties (filed 11-13-97) to 19.8.31 NMAC, Civil Penalties, effective 9-29-2000.