

TITLE 19 NATURAL RESOURCES AND WILDLIFE
CHAPTER 10 NON-COAL MINING
PART 11 INSPECTION, ENFORCEMENT AND PENALTIES

19.10.11.1 ISSUING AGENCY: New Mexico Mining Commission.
[19.10.11.1 NMAC – N, 05-15-2001]

19.10.11.2 SCOPE: All persons subject to the New Mexico Mining Act NMSA 1978, Section 69-36-1 et. seq.
[19.10.11.2 NMAC – N, 05-15-2001]

19.10.11.3 STATUTORY AUTHORITY: NMSA 1978, Section 69-36-1 et. seq.
[19.10.11.3 NMAC – N, 05-15-2001]

19.10.11.4 DURATION: Permanent.
[19.10.11.4 NMAC – N, 05-15-2001]

19.10.11.5 EFFECTIVE DATE: February 15, 1996, unless a later date is cited at the end of a section.
A. All references to the Mining Act Parts 1-13 in any other rule shall be understood as a reference to 19.10 NMAC.
B. The amendment and replacement of The Mining Act Parts 1-13 shall not affect any administrative or judicial enforcement action pending on the effective date of this amendment nor the validity of any permit issued pursuant to the Mining Act Parts 1-13.
[19.10.11.5 NMAC – N, 05-15-2001]

19.10.11.6 OBJECTIVE: The objective of Parts 1-14 of 19.10 NMAC is to establish regulations to implement the New Mexico Mining Act as directed in NMSA 69-36-7A. These regulations are designed to ensure proper reclamation through permitting for operations subject to the Mining Act, in accordance with provisions and standards outlined in the Mining Act.
[19.10.11.6 NMAC – N, 05-15-2001]

19.10.11.7 DEFINITIONS: [RESERVED]
[19.10.11.7 NMAC – N, 05-15-2001]
[Definitions for this part can be found in 19.10.1.7 NMAC.]

19.10.11.8 - 19.10.11.1100 [RESERVED]
[19.10.11.8 - 19.10.11.1100 NMAC – N, 05-15-2001]

19.10.11.1101 INSPECTIONS:

A. The Director shall conduct on-site inspections on an irregular basis according to the following schedule:

- (1) at least two per year at each active existing and new mining operation;
- (2) at least one per year at each inactive existing and new mining operation;
- (3) at least one per year following completion of all significant reclamation activities, but prior to release of financial assurance; and
- (4) at least one within the initial permit year and subsequently as determined by the Director for each minimal impact mining operation and for each exploration operation.

B. When the Director determines that a mining operation is conducting significant reclamation, the inspection must be on an irregular basis averaging not less than one inspection per month.

C. Inspections shall occur without prior notice to the permittee or its agents or employees except for necessary on-site meetings with such persons.

D. To avoid duplication and assist in coordination with other state and federal agencies, the Director is authorized to allow other state and federal regulatory agencies to conduct the required inspections or for the Division to conduct inspections for other agencies if the Division has entered into a joint powers agreement with the agencies. The joint powers agreement shall provide that the enforcement action for violations noted during such inspection shall be conducted by the agency charged with the responsibility under the applicable state or federal law.

E. The Director or his authorized representative, without advance notice, shall:

(1) have the right of entry to, upon or through any mineral exploration, mining operation, or reclamation operation at any time to determine if the permittee is in compliance with the permit requirements and conditions; and

(2) at reasonable times, and without delay, have access to and copies of any records associated with permitting and compliance required by the Act, 19.10 NMAC, or the permit.

[7-12-94, 2-15-96, 7-31-97; 19.10.11.1101 NMAC – Rn, 19 NMAC 10.2.11.1101, 05-15-2001]

19.10.11.1102 ENFORCEMENT:

A. Cessation Orders

(1) When the Director determines that a condition, practice or violation exists at any operation that violates the Act, 19.10 NMAC, a permit, or order and which condition, practice or violation also creates an imminent danger to the health or safety of the public or will cause significant imminent environmental harm, the Director shall immediately order a cessation of the operation or the portion of that operation relevant to the condition, practice or violation. Factors to be considered by the Director in determining significant imminent environmental harm include but are not limited to:

(a) whether there is a violation of Mining Act requirements that creates a reasonable probability of serious or widespread adverse environmental impact; or

(b) whether mining activities threaten important habitat, important wildlife, or domestic animals.

(2) When the Director determines that mining is conducted in violation of the Act, 19.10 NMAC, or a permit because the mining is conducted either (a) without a permit, (b) outside of a permit area, or (c) on previously undisturbed land within a permit area but where mining is not authorized by the permit, the Director may issue a cessation order with respect to activities in the area where the unauthorized mining occurs.

(3) The permittee shall advise the Director when the condition practice or violation has been abated. Within 10 days of receiving such information the Director shall determine if the condition practice or violation has been abated.

(4) The cessation order shall remain in effect until the Director determines that the condition practice or violation has been abated or until modified, vacated or terminated by the Director or the Commission.

B. Notices of Violation

(1) When the Director determines that an owner or operator is in violation of a requirement of the Act, 19.10 NMAC, a permit, or order but such condition or practice does not create an imminent danger to the health or safety of the public or will not cause significant imminent environmental harm, the Director shall issue a notice of violation, ordering abatement and fixing a reasonable time, not to exceed 60 days unless extended for good cause shown, for the abatement of the condition or practice. Such an order may be appealed to the Commission pursuant to Section 69-36-15 of the Act.

(2) If, upon expiration of the period of time fixed for abatement, the Director finds that the condition or practice has not been abated, the Director shall order a cessation of operations or a portion thereof. The permittee shall advise the Director when the condition or practice has been abated. Within 10 days of receiving such information the Director shall determine if the condition or practice has been abated. The cessation order shall remain in effect until the Director determines that the condition or practice has been abated.

C. Order to Show Cause When the Director determines that a pattern of violations of the Act, 19.10 NMAC, or the permit exists or has existed, and if the Director also finds that such violations are caused by the unwarranted failure of the permittee to comply with the Act, 19.10 NMAC, or the permit or that such violations are willfully caused by the permittee, the Director shall issue an order to the permittee to show cause as to why the permit should not be suspended or revoked. The order shall be in writing, signed by the Director and shall set forth: the nature of the violations, including a citation to the Act, 19.10 NMAC, or the permit allegedly violated; and set a hearing before the Director on these issues. Following the hearing, the Director may dismiss the action or issue a final order suspending or revoking the permit. Such an order may be appealed to the Commission pursuant to Section 69-36-15 of the Act.

D. Effective Date of Orders, Conferences, and Appeals

(1) Unless otherwise stated in the order, each order issued pursuant to this section shall be effective upon service pursuant to Subsection B of 19.10.11.1104 NMAC.

(2) A permittee who is served with a notice of violation or a cessation order may request a conference pursuant to 19.10.11.1111 NMAC. A request for conference shall not operate as a stay. A request for a conference

may include a request for the director to extend the time for abatement or cessation of operations, subject to the Director's approval, pending completion of the conference.

(3) A permittee who is served with a notice of violation or a cessation order may file a petition for review with the Commission pursuant to NMSA 1978, Section 69-36-15 and 19.10.14 NMAC without first requesting a conference pursuant to 19.10.11.1111 NMAC.

[7-12-94, 2-15-96, 12-29-2000; 19.10.11.1102 NMAC – Rn, 19 NMAC 10.2.11.1102, 05-15-2001]

19.10.11.1103 PERMIT SUSPENSION OR REVOCATION: For purposes of determining the propriety of an order to show cause why a permit should not be suspended or revoked, the following definitions shall apply:

A. Willful violation means an act or omission which violates the Act, 19.10 NMAC, the permit or an order committed by a person who intends the act or omission which occurs.

B. Unwarranted failure to comply means the failure of the permittee to prevent the occurrence of any violation of the Act, 19.10 NMAC, the permit or an order because of indifference, lack of diligence, lack of reasonable care or the failure to abate any violation of the Act, 19.10 NMAC, the permit or an order because of indifference, lack of diligence or lack of reasonable care. Violations by any person conducting mining, exploration or reclamation operations on behalf of the permittee shall be attributed to the permittee.

C. The Director may determine that a pattern of violations exists or has existed, based upon:

(1) the number and seriousness of violations cited on more than one occasion of the same or related requirements of the Act, 19.10 NMAC, the permit or an order;

(2) the number and seriousness of violations cited on more than one occasion of different requirements of the Act, 19.10 NMAC, the permit or an order; and

(3) the extent to which the violations are isolated departures from lawful conduct.

[7-12-94, 2-15-96; 19.10.11.1103 NMAC – Rn, 19 NMAC 10.2.11.1103, 05-15-2001]

19.10.11.1104 SERVICE:

A. A notice of violation shall be in writing, signed by the Director and shall set forth:

(1) the nature of the violation, including a citation to the requirement allegedly violated;

(2) time for abatement;

(3) description of the portion of the operation to which the notice applies; and

(4) a notice of the opportunity to submit information in response and to request a conference under 19.10.11.1110 NMAC and 19.10.11.1111 NMAC.

B. A notice of violation, cessation order, order to show cause or final order suspending or revoking a permit shall be served promptly after issuance as follows:

(1) By tendering a copy at the operation to the designated agent or to the individual who, based upon reasonable inquiry by the Director, appears to be in charge of the operation referred to in the notice or order. If no such individual can be located at the site, a copy may be tendered to any individual at the site who appears to be a supervisory employee or agent of the permittee to whom the notice or order is issued. Service shall be complete upon tender of the notice or order and shall not be deemed incomplete because of refusal to accept.

(2) As an alternative, service may be made by sending a copy of the notice or order by certified mail, return receipt requested, or by hand to the permittee to whom it is issued or to his designated agent. Service shall be complete upon tender of the notice or order to the mail and shall not be deemed incomplete because the permittee refuses to accept the certified mail.

C. The Director shall cause copies of notices and orders to be furnished to the owner of the permit area, a corporate officer of the permittee or the financial assurance company when so requested in writing.

[7-12-94, 2-15-96; 19.10.11.1104 NMAC – Rn, 19 NMAC 10.2.11.1104, 05-15-2001]

19.10.11.1105 PENALTY 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 may assess a penalty for each violation. In determining whether to assess a penalty, the Director shall consider the factors listed in this Part.

C. The Director shall assess a penalty for each cessation order.

[7-12-94, 2-15-96; 19.10.11.1105 NMAC – Rn, 19 NMAC 10.2.11.1105, 05-15-2001]

19.10.11.1106 POINT SYSTEM FOR PENALTIES:

A. 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. Five points shall be assigned for each violation 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 mining, exploration or reclamation operation activity. Points shall be assigned as follows:

(1) a violation shall not be counted if the violation is the subject of pending administrative or judicial review, or if the time to request such review or to appeal any administrative or judicial decision has not expired. Thereafter, it shall be counted for only 12 months following the date of final disposition of the violation;

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

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

B. Seriousness The Director shall assign up to 25 points based on the seriousness of the violation, as follows:

(1) 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
(a) Not foreseeable	0
(b) Unlikely	1-5
(c) Likely	6-9
(d) Almost certain	10

(2) 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:

(a) If the damage or impact which the violated Section is to prevent remains within the permit area, the Director shall assign zero to seven points, depending on the duration and extent of the damage or impact.

(b) If the damage or impact which the violated Section is to prevent extends outside the permit area, the Director shall assign eight to fifteen points, depending on the duration and extent of the damage or impact.

(3) Alternative. In the case of a violation of an administrative requirement such as a requirement to keep records or submit reports, the Director shall, in lieu of subparagraphs a. and b. above, assign up to 10 points for seriousness.

C. Negligence

(1) The Director shall assign up to 25 points based on the degree of fault of the permittee in causing or failing to correct the condition or practice which led to the notice or order, either through act or omission. Points shall be assessed as follows:

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

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

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

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

(a) No negligence means an inadvertent violation which was unavoidable by the exercise of reasonable care.

(b) Negligence means the failure of a permittee to prevent the occurrence of any violation because of indifference, lack of diligence or lack of reasonable care, or the failure to abate any violation because of indifference, lack of diligence or lack of reasonable care.

(c) A greater degree of fault than negligence means reckless, willful, or intentional conduct.

(3) In calculating points to be assigned for negligence, the acts of all persons working on the permit area shall be attributed to the permittee.

D. Good faith in attempting to achieve compliance

(1) The Director may reduce points based on the degree of good faith of the permittee in attempting to achieve rapid compliance after notification of the violation. Points shall be assigned as follows:

Degree of Good Faith	Points
(a) Rapid compliance	-1 to -15

- (b) Use of additional equipment or labor -1 to -25
 - (c) Normal compliance 0
- (total not to exceed -25)

(2) The following definitions shall apply for Paragraph 1 of Subsection D of 19.10.11.1106 NMAC:

- (a) Rapid compliance means that the permittee took extraordinary measures to abate the violation in the shortest possible time and that abatement was achieved before the time set for abatement.
- (b) 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.
- (c) Normal compliance means the permittee abated the violation within the time given for abatement.

[7-12-94, 2-15-96; 19.10.11.1106 NMAC – Rn, 19 NMAC 10.2.11.1106, 05-15-2001]

19.10.11.1107 DETERMINATION OF AMOUNT OF PENALTY:

The Director shall determine the dollar amount of any civil penalty by using the following schedule:

[19.10.11.pdf – Table]

Points	Dollars	Points	Dollars
1	25	36	3200
2	25	37	3400
3	25	38	3600
4	25	39	3800
5	25	40	4000
6	25	41	4200
7	25	42	4400
8	25	43	4600
9	25	44	4800
10	25	45	5000
11	100	46	5200
12	100	47	5400
13	100	48	5600
14	100	49	5800
15	100	50	6000
16	500	51	6200
17	500	52	6400
18	500	53	6600
19	500	54	6800
20	500	55	7000
21	1000	56	7200
22	1000	57	7400
23	1000	58	7600
24	1000	59	7800
25	1500	60	8000
26	1500	61	8200
27	1500	62	8400
28	1500	63	8600
29	1500	64	8800
30	1500	65	9000
31	2200	66	9200
32	2400	67	9400
33	2600	68	9600
34	2800	69	9800
35	3000	70 and above	10000

[7-12-94, 2-15-96; 19.10.11.1107 NMAC – Rn, 19 NMAC 10.2.11.1107, 05-15-2001]

19.10.11.1108 ASSESSMENT OF SEPARATE PENALTY FOR EACH DAY:

A. The Director may assess a separate penalty for each day from the date of the violation to the date of abatement of the violation. In determining whether to make such an assessment, the Director shall consider the factors listed in 19.10.11.1106 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 penalty for a minimum of two separate days.

B. Any penalty assessed shall not exceed \$10,000 per day of noncompliance for each violation.
[7-12-94, 2-15-96; 19.10.11.1108 NMAC – Rn, 19 NMAC 10.2.11.1108, 05-15-2001]

19.10.11.1109 WAIVER OF USE OF FORMULA TO DETERMINE PENALTY:

A. The Director may waive the use of the formula contained in this Part to set the penalty, if he determines that, taking into account factors present in the particular case, the penalty is unjustified. However, the Director shall not waive the use of the formula or reduce the proposed penalty simply because reduction in the proposed penalty would provide more resources to abate violations of the Act, 19.10 NMAC, the permit or an order. In no event shall the Director assess or accept a penalty of less than the economic benefit realized as a result of a failure to comply. 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, the criteria set forth in Section 69-36-17 of the Act shall be used to determine the appropriate penalty. When the Director elects to waive the use of the formula, a written explanation of the basis for the assessment made shall be provided to the permittee.
[7-12-94, 2-15-96; 19.10.11.1109 NMAC – Rn, 19 NMAC 10.2.11.1109, 05-15-2001]

19.10.11.1110 PROCEDURE FOR PENALTY ASSESSMENT:

A. The permittee may submit written and oral information about the alleged violation to the Director and to the inspector who issued the notice of violation or cessation order. The Director shall consider any information so submitted in determining the facts surrounding the alleged violation and the amount of the penalty.

B. The Director shall serve a copy of the proposed penalty assessment and of the worksheet showing the computation of the proposed penalty on the permittee, in the manner prescribed in Subsection B of 19.10.11.1104 NMAC. The Director shall serve the proposed penalty assessment no later than 30 days after the date set for abatement of the violation or issuance of the cessation order. Failure by the Director to serve the proposed penalty within 30 days shall not be grounds for dismissal of all or part of such violation or penalty unless the permittee:

- (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.

[7-12-94, 2-15-96, 12-29-2000; 19.10.11.1110 NMAC – Rn, 19 NMAC 10.2.11.1110, 05-15-2001]

19.10.11.1111 PROCEDURE FOR CONFERENCE:

A. A permittee who receives a notice of violation or a cessation order pursuant to 19.10.11.1102 NMAC or a proposed penalty assessment may request a conference for a review of the Director's action by submitting a written request to the Director within 15 days from the date of service. The Director shall arrange for a conference if a timely request for a conference is made. The Director, in his sole discretion, may arrange for a conference if a late request for a conference is made.

(1) If the permittee requests a conference, the Director may assign a conference officer to hold the conference. This person shall not be the inspector signing the notice or order. The conference shall be informal in nature and not be governed by the rules of evidence for adjudicatory hearings. The conference shall be held within 30 days from the date of issuance of the notice of violation, cessation order, or proposed penalty assessment unless the Director grants an extension for good cause shown.

(2) The conference officer shall consider all relevant information. The conference officer shall make his recommendation to the Director to affirm, modify or vacate the notice of violation or cessation order or affirm, decrease or vacate the proposed penalty, if any.

B. The Director, within 30 days after the conference, shall serve the permittee with his order regarding the violation and penalty. When a conference is held, the period for filing a petition for review of the director's action pursuant to Section 69-36-15 NMSA 1978 shall run from the date of service of the director's order pursuant to this subsection.

C. When the permittee notifies the Director that the violation has been abated, the permittee may request a reduction of points under Subsection D of 19.10.11.1106 NMAC. The Director may reduce any penalty by awarding points for good faith compliance.

D. All penalties must be paid within 30 days after the penalty assessment, or any Director's order issued following a conference held pursuant to 19.10.11.1111 NMAC.

[7-12-94, 2-15-96, 12-29-2000; 19.10.11.1111 NMAC – Rn, 19 NMAC 10.2.11.1111, 05-15-2001]

19.10.11.1112 APPEAL OF ORDER [RESERVED]

[7-12-94, 2-15-96, R 6-30-99; 19.10.11.1112 NMAC – Rn, 19 NMAC 10.2.11.1112, 05-15-2001]

[Material previously under this Section was repealed effective 6-30-99]

History of 19.10.11 NMAC:

Pre-NMAC History:

Material in this part was derived from that previously filed with the commission of public records - state records center and archives as:

Rule 11, Inspection, Enforcement and Penalties, filed 07-12-94.

History of Repealed Material: [Reserved]

Other History:

Rule 11, Inspection, Enforcement and Penalties, filed 07-12-94, renumbered and reformatted as Subpart 11 of 19 NMAC 10.2, New Mexico Mining Act Implementation, filed 01-31-96.

19 NMAC 10.2, Subpart 11, Inspection, Enforcement and Penalties, filed 01-31-96 was renumbered and reformatted to 19.10.11 NMAC, effective 05-15-2001.