

**JOINT POWERS AGREEMENT  
BETWEEN THE  
NEW MEXICO ENERGY, MINERALS AND  
NATURAL RESOURCES DEPARTMENT,  
AND  
THE NEW MEXICO ENVIRONMENT DEPARTMENT**

**THIS AGREEMENT** is made and entered into by the New Mexico Energy, Minerals and Natural Resources Department (EMNRD) and New Mexico Environment Department (NMED) pursuant to the Joint Powers Agreements Act, Sections 11-1-1, et seq. NMSA 1978.

EMNRD and NMED are public agencies and are authorized by law to enter into this Joint Powers Agreement.

**PURPOSE:** To establish cooperative procedures for implementing financial assurance requirements of the New Mexico Mining Act, NMSA 1978, Sections 69-36-1 *et seq.*, (hereinafter "Mining Act") and the Water Quality Act, NMSA 1978, Section 74-6-1 *et seq.*, (hereinafter "Water Quality Act") in order to utilize each agency's resources more efficiently and to streamline the financial assurance process for operators subject to the requirements of both Acts.

**WHEREAS,** EMNRD and NMED desire to enter into this Agreement for administrative efficiency; and

**WHEREAS,** Section 9(B) of the Mining Act provides the Director of the Mining and Minerals Division (Director) with authority to enter into agreements with appropriate federal and state agencies for coordinating review and issuance of all necessary



permits to conduct new and existing mining operations and exploration in New Mexico;  
and

**WHEREAS**, Sections 7.J and 7.S of the Mining Act mandate that the roles of permitting agencies be coordinated to avoid duplicative and conflicting requirements, and that procedures be established to avoid duplication in the inspection, monitoring and sampling of air, soil and water; and

**WHEREAS**, Section 9.D of the Mining Act requires the Director of the Mining and Minerals Division of EMNRD to confer and cooperate with NMED in administering the Act; and

**WHEREAS**, Section 11 of the Mining Act requires the operator to provide adequate financial assurance before the Director may approve a closeout plan for an existing mining operation; and

**WHEREAS**, Section 12 of the Mining Act requires the operator to provide adequate financial assurance before the Director may approve a permit for a new mining operation; and

**WHEREAS**, Section 506 of the Mining Act Rules (19.10.2 NMAC) requires the submittal of a financial assurance proposal as part of the closeout plan for an existing mining operation, and the provision of adequate financial assurance prior to the Director's approval of a closeout plan; and

**WHEREAS**, Section 606 of the Mining Act Rules requires the provision of adequate financial assurance prior to the Director's approval of a permit for a new mining operation; and

**WHEREAS**, Section 1101.D of the Mining Act Rules states, "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"; and

**WHEREAS**, Subpart 12 of the Mining Act Rules requires the provision of adequate financial assurance necessary for a third party to re-establish vegetation for exploration operations, existing and new mining operations; and

**WHEREAS**, pursuant to Section 74-6-5.G of the Water Quality Act, the Water Quality Control Commission has adopted regulations for the operation and maintenance of permitted facilities, including requirements for financial responsibility; and

**WHEREAS**, pursuant to Section 20.6.2.3107.A.10 of the Water Quality Control Commission Regulations (20.6.2 NMAC) the Secretary of NMED may require a discharge plan to include contingency plans to cope with failure of the discharge plan or system; and

**WHEREAS**, pursuant to Section 20.6.2.3107.A.11 of the Water Quality Control Commission regulations the Secretary of NMED may require a discharge plan to include a closure plan to prevent the exceedence of standards of Section 20.6.2.3103 or the presence of a toxic pollutant in ground water after the cessation of operation which includes a description of closure measures, maintenance and monitoring plans,

post-closure maintenance and monitoring plans, financial assurance, and other measures necessary to prevent and/or abate such contamination; and

**WHEREAS**, it is the intent of the agencies to provide permittees with the option to provide a joint financial assurance to meet the requirements of both programs in order to meet the intent of the Mining Act and the Water Quality Act; and

**WHEREAS**, the agencies will work together to minimize duplication of financial assurance requirements.

**NOW, THEREFORE, IT IS MUTUALLY AGREED BETWEEN THE PARTIES THAT THE METHOD BY WHICH THIS PURPOSE SHALL BE ACCOMPLISHED IS AS FOLLOWS:**

**I. DEFINITIONS**

- A. "Agencies" means the Mining and Minerals Division of the Energy, Minerals and Natural Resources Department (EMNRD) and the Ground Water Quality Bureau of the Environment Department (NMED).
- B. "Approval" means the process by which both EMNRD and NMED receive a financial assurance proposal, conduct technical and legal review of the proposal, request additional information from the permittee and approve the proposal according to the requirements of both agencies.
- C. "Closeout plan" means a detailed description of how the permit area will be reclaimed to meet the requirements of Section 69-36-11(B)(3) of the Mining Act and the performance and reclamation standards and requirements of Subpart 5 of the Mining Act Rules.

- D. "Closure plan" means a plan to prevent the exceedence of standards under Water Quality Control Commission (WQCC) Regulation Sections 20.6.2.3101 through 3114 NMAC or the presence of a toxic pollutant in ground water after the cessation of operation which includes: a description of closure measures, maintenance and monitoring plans, post-closure maintenance and monitoring plans, financial assurance, and other measures necessary to prevent and/or abate such contamination.
- E. "Financial assurance provider" means the surety company, bank, guarantor or other entity providing financial assurance for a permitted facility to the agencies.
- F. "Forfeiture" is the event or process to secure funds for closure/closeout or reclamation when the permittee refuses or is unable to conduct or complete the reclamation, closeout, or closure plan; when the terms of the permit are not met; or when the permittee defaults on the condition under which the financial assurance was accepted.
- G. "Maintenance" means the periodic review of approved financial assurance instruments; safe-keeping of financial assurance documents; cost adjustments to the financial assurance instrument; phased-release of financial assurance obligations; site inspections related to financial assurance requirements; or the coordination of correspondence between the agencies, the permittee and the financial provider.

- H. "Permittee" means the holder of a Mining Act Permit and a Ground Water Discharge Permit.
- I. "point of contact" means the agency that assumes the role of coordinator between the permittee and agencies for financial assurance requirements.
- J. "Proposal" means a financial assurance proposal, including a cost estimate, financial assurance mechanism and financial assurance language, which is intended to meet the requirements of both agencies.
- K. "Reclamation plan" means a detailed description of how the permit area will be reclaimed to meet the requirements of Section 69-36-12(B)(3) of the Mining Act and the performance and reclamation standards and requirements of Subpart 6 of the Mining Act Rules.
- L. "Release" is the event or process when the permittee completes all or a portion of the reclamation, closeout, or closure plan; completes all the terms of the permit; or completes all conditions under which the financial assurance was accepted.

## **II. AGENCY RESPONSIBILITIES**

- A. The agencies shall make every effort to coordinate the processing of the closeout/ reclamation plan, closure plan and the financial assurance requirements under the Mining Act and the Water Quality Act in order to achieve the objectives of both programs.

The agencies agree to:

1. form inter-departmental teams to facilitate the approval, maintenance, forfeiture and release of joint financial assurance and closeout/reclamation plans and closure plans when the operator proposes a joint financial assurance or a joint closeout/reclamation and closure plan;
  2. provide the permittee with the option to provide a joint financial assurance instrument to meet the requirements of both programs and prepare joint financial assurance forms, when appropriate;
  3. work together to develop one financial assurance cost estimate for joint financial assurance instruments that can be applied to both the Mining Act permit and Ground Water Discharge Permit;
  4. designate a point of contact for each financial assurance instrument; and
  5. negotiate in good faith the allocation of funds in the event of a forfeiture to best achieve the requirements of both programs.
- B. Upon closure of a facility, EMNRD shall have primary responsibility for:
1. reclamation measures necessary to achieve a self-sustaining ecosystem or approved post-mining land use;
  2. reclamation to assure safeguarding of mine features for health and human safety;
  3. reclamation of roads, utility corridors, rail spurs and removal of structures; and

4. reclamation of any portion of a mining operation not covered under a Ground Water Discharge Permit.
- C. Upon closure of a facility, NMED shall have primary responsibility for:
1. protection of ground water and surface water quality during and after cessation of mining;
  2. surface, vadose and ground water monitoring pursuant to a Ground Water Discharge Permit or other applicable NMED standards or programs;
  3. assessment and remediation of existing and potential future soil, vadose zone and surface and groundwater contamination;
  4. handling, treatment and disposal of contaminated materials including long-term treatment of seeps and other discharges; and
- D. Closure measures necessary to fulfill both agencies' objectives shall be the joint responsibility of the agencies.

### **III. APPROVAL OF JOINT FINANCIAL ASSURANCE INSTRUMENTS**

- A. The point of contact will be responsible for coordinating distribution, agency review and agency responses to submittals by the permittee and/or the financial assurance provider, and assuring financial assurance is approved in a timely manner. Any correspondence with the permittee or the financial assurance provider regarding the financial assurance mechanism, terms or amount will be for signature by both agencies.



- B. The financial assurance instrument must be jointly approved by both agencies.

#### **IV. MAINTENANCE OF FINANCIAL ASSURANCE INSTRUMENTS**

- A. The Point of contact shall be responsible for coordinating the periodic review of approved financial assurance instruments; ensuring that both agencies have current original documents for safe-keeping; coordinating the review of and implementing cost adjustments to the financial assurance instrument; upon receiving written concurrence of the other agency, coordinating the phased-release of financial assurance obligations; coordinating joint site inspections related to financial assurance requirements; coordinating correspondence among the agencies, the permittee and the financial provider; and obtaining the approval or concurrence, where appropriate, of the other agency, the financial assurance provider and the permittee.
- B. Upon an agency's receipt of an application to adjust the financial assurance, that agency will submit a full copy of the document to the other agency within 2 working days.
- C. Any adjustment to the financial assurance must be jointly approved by both agencies.
- D. If either agency is concerned about the viability of the permittee, the financial assurance provider or the adequacy of the financial assurance amount, that agency will notify the other agency within 2 working days.

**V. FORFEITURE OF JOINT FINANCIAL ASSURANCE INSTRUMENTS**

- A. If either agency has determined the financial assurance provider or the permittee may not have the ability to fulfill the obligations or requirements of the applicable permit, law or regulation(s), the determining agency will notify the second agency. The agencies will begin the process of coordinating appropriate steps to bring the permittee or financial assurance provider into compliance, coordinating enforcement action, declaring a forfeiture of the financial assurance, or obtaining an alternate financial assurance instrument.
- B. In the event that one agency finds it necessary to proceed for forfeiture of all or a portion of the financial assurance according to that agency's applicable permit, law or regulation(s), the agency, prior to taking any formal forfeiture action, shall notify the second agency and then proceed with forfeiture. The second agency will have the opportunity to join with the agency taking forfeiture action according to the second agency's permits, laws and regulations.
- C. Where forfeiture of financial assurance is solely under one agency's jurisdiction, that agency will complete closure or closeout/reclamation according to that agency's permits, laws and regulations and will notify and update the second agency. Where forfeiture of financial assurance is under the jurisdiction of both agencies, the agencies will designate an inter-departmental team to obtain forfeiture of the financial assurance in

order to meet both agencies' permits, laws and regulations. The team's work will include, but not be limited to, work necessary to achieve forfeiture of the financial assurance, allocation of costs to complete the closeout/reclamation and closure plans, generation of a request for proposals, selection of a contractor, and oversight of the closeout/reclamation and closure work.

- D. In cases where the forfeited amount is insufficient to cover the closeout/reclamation and closure costs of both agencies, the team will allocate the financial assurance in order to best achieve the requirements of both agencies' permits, laws and regulations.

#### **VI. RELEASE OF FINANCIAL ASSURANCE**

- A. If the permittee applies for final release of financial assurance from both agencies, the financial assurance shall not be released without the written concurrence of both agencies.
- B. If one agency's obligations have been met, the financial assurance shall be amended to remove that agency from the financial assurance.

#### **VII. DISPUTE RESOLUTION**

- A. Every reasonable effort shall be made to resolve disputes within 3 months. Team members will make every reasonable effort to resolve disputes to meet the requirements and objectives of both programs within 1 month. If team members are unable to resolve a dispute within 1 month, the Division Directors will attempt to agree to a resolution of the

dispute consistent with the requirements of the Mining Act and Water Quality Act within 1 month of notification by the team members of the unresolved dispute. If the Division Directors do not reach resolution within this time frame, the Directors will mutually agree upon a third party mediator and will make every reasonable effort to resolve the dispute within 1 additional month. The agencies will equally share the cost of the third party mediator.

#### VIII. OTHER TERMS

- A. Effective date and term of Agreement: THIS AGREEMENT SHALL NOT BECOME EFFECTIVE UNTIL APPROVED BY THE SECRETARY OF THE NEW MEXICO DEPARTMENT OF FINANCE AND ADMINISTRATION. It shall expire on December 31, 2006 unless earlier terminated pursuant to Paragraph B., below.
- B. Termination: This Agreement may be terminated by either party upon delivery of a written notice to the other at least 30 days prior to the intended date of termination. By such termination, neither party may nullify or avoid any rights vested or duties owed prior to termination.
- C. Equal Opportunity Compliance: The agencies agree to abide by all federal rules and regulations pertaining to equal opportunity. In accordance with those laws and the regulations issued pursuant thereto, the agencies agree to assure that no person in the United States shall, on the grounds of race, color, national origin, sex, age or handicap, be

excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination in performance of this Agreement.

- D. **Amendment:** This Agreement shall not be altered, changed, or amended except by instrument in writing executed by the parties hereto and approved by the Secretary of the New Mexico Department of Finance and Administration.
- E. **Agency Costs:** Each agency shall be responsible for its own costs of implementing this Agreement.
- F. **Limitations:** This Agreement is not intended to modify, in any way, the respective duties, obligations, rights, privileges, or immunities of the parties. Nothing contained herein shall require either party to expend money in excess of appropriations authorized by law.
- G. **Payment, Appropriations and Subcontracting:** No money is being exchanged through this Agreement. Therefore the general provisions regarding payment, appropriations and subcontracting are not applicable.
- H. **Strict Accountability for Receipts and Disbursements:** NMED and EMNRD shall be strictly accountable for receipts and disbursements relating hereto and shall make all relevant financial records available to EMNRD, DFA, the New Mexico State Auditor, and the federal funding agency upon request, and shall maintain all such records for three (3) years after this Agreement has expired or

has been terminated.

I. Disposition, Division or Distribution of Property; Return of

Surplus Funds: Upon expiration or termination of this Agreement, if either party has property or funds in its possession belonging to the other, the same shall be returned in proportion to the parties' original contribution.

IN WITNESS WHEREOF, the parties have hereinbelow set their hand.

FOR:

FOR:

STATE OF NEW MEXICO  
ENERGY, MINERALS and NATURAL  
RESOURCES DEPARTMENT

STATE OF NEW MEXICO  
ENVIRONMENT DEPARTMENT

By: [Signature]

By: Peter Maggioro

Title: Secretary

Title: Secretary

Date: 3/20/01

Date: 3/14/01

This Agreement has been approved by:

STATE OF NEW MEXICO  
DEPARTMENT OF FINANCE AND  
ADMINISTRATION

By: [Signature] 3/21/01  
Date: 3/21/01