

GROUND WATER

MAR 29 2016

BUREAU

MEMORANDUM OF UNDERSTANDING
Between The
NEW MEXICO ENVIRONMENT DEPARTMENT
And The
U.S. BUREAU OF LAND MANAGEMENT
NEW MEXICO STATE OFFICE

This **MEMORANDUM OF UNDERSTANDING** ("MOU") is hereby made and entered into by and between the New Mexico Environment Department ("NMED"), and the U.S. Bureau of Land Management, New Mexico State Office ("BLM"), pursuant to Section 307(b) of the Federal Land Policy and Management Act of 1976, 90 STAT 2766, 43 USC 1737 *et seq.* and the Organic Administration Act of June 4, 1897 (30 STAT 36, 16 USC 478 and 551). This MOU supersedes all previous versions, and becomes effective as of the date it is signed by the parties ("Effective Date").

PURPOSE: To establish cooperative procedures for implementing financial assurance requirements under Federal mining laws and the New Mexico Water Quality Act, NMSA 1978, §§ 74-6-1 *et seq.* (hereinafter "Water Quality Act"), in order to (1) utilize each agency's resources more efficiently, (2) streamline the financial assurance process for operators and permittees subject to both federal and state financial assurance requirements, and (3) minimize duplication of financial assurance requirements.

RECITALS

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

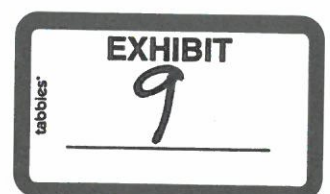
WHEREAS, pursuant to Section 20.6.2.3107.A.10 of the Water Quality Control Commission Regulations (20.6.2 NMAC) the Secretary of NMED may require a discharge plan to include contingency plans to cope with failure of the discharge plan or system; and

WHEREAS, pursuant to Section 20.6.2.3107.A.11 and Section 20.6.7.33 of the Water Quality Control Commission regulations the Secretary of NMED requires a discharge plan to include a closure plan to prevent the exceedance of standards of Section 20.6.2.3103 or the presence of a toxic pollutant in ground water after the cessation of operation, which closure plan 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, pursuant to Title 43 of the Code of Federal Regulations, Subparts 3802 and 3809, "Surface Management Under the General Mining Laws", operators are required to submit and obtain approval from the BLM, a Plan of Operations including a reclamation plan and reclamation cost estimate; and

WHEREAS, Pursuant to 43 CFR 3809.500, operators are required to provide a financial guarantee that covers the estimated cost for BLM to contract with a third party to reclaim their operations, including construction and maintenance costs of treatment facilities that meet Federal and State environmental standards; and

WHEREAS, it is the intent of the BLM and NMED to give operators and permittees the option to provide a joint financial assurance that meets the requirements of both programs; and



NOW, THEREFORE, in consideration of the foregoing premises, the parties hereto mutually agree to the following terms and conditions as the method by which the purpose of this MOU shall be accomplished:

I. DEFINITIONS

"Agencies" means the United States Department of Interior, Bureau of Land Management (BLM) and the Ground Water Quality Bureau of the New Mexico Environment Department (NMED).

"Approval" means the process by which both BLM 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.

"Closure Plan" means a plan to prevent the exceedance of standards under Water Quality Control Commission (WQCC) Regulation section 20.6.2.3103 NMAC and to prevent the presence of a toxic pollutant in ground water after the cessation of operations 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.

"Financial Assurance Provider" means the surety company, bank, guarantor or other entity providing financial assurance for a permitted facility to the Agencies.

"Forfeiture" is the event or process to secure funds for closure or reclamation when a permittee/operator refuses or is unable to conduct or complete a reclamation or closure plan; when the terms of a permit are not met; or when a permittee/operator defaults on a condition under which financial assurance was accepted.

"Maintenance" means the periodic review of approved financial assurance instruments; safe-keeping of financial assurance documents; cost adjustments to financial assurance instruments; phased-release of financial assurance obligations; site inspections related to financial assurance requirements; or coordination of correspondence between the Agencies, permittees/operators and financial assurance providers.

"Operator" means an individual, lessee, firm, corporation, association, partnership, trust or joint venture proposing to conduct mining operations on public lands including development, extraction and processing of mineral deposits locatable or leasable under the Federal mining laws.

"Permittee" means the holder of a Ground Water Discharge Permit.

"Point of Contact" means the lead for each agency that assumes the role of coordinator between a permittee/operator and the Agencies for financial assurance requirements.

"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.

"Reclamation Plan" means a detailed description of how an area subject to a federal mining permit will be reclaimed to meet the requirements of 43 CFR 3809.401 and 3809.420.

"Release" is the event or process by which a permittee/operator completes all or a portion of a reclamation or closure plan; completes all the terms of a permit; or otherwise completes all conditions under which a financial assurance was accepted.

II. AGENCY RESPONSIBILITIES

- A. The Agencies shall make every effort to coordinate the processing of reclamation plans, closure plans and financial assurance requirements under Federal mining law and the Water Quality Act in order to achieve the objectives of both programs.

The Agencies agree to:

1. Designate a point of contact to facilitate the approval, maintenance, forfeiture and release of reclamation plans and closure plans and associated joint financial assurance when permittee/operator proposes a joint financial assurance or a joint reclamation and closure plan;
 2. Provide permittees/operators with the option to submit a joint financial assurance instrument to meet the requirements of both Agencies, and prepare joint financial assurance forms when appropriate;
 3. Work together to develop a single financial assurance cost estimate for joint financial assurance instruments that will satisfy both federal and NMED requirements; and
 4. Negotiate in good faith the allocation of funds in the event of forfeiture to best achieve the requirements of both programs.
- B. Upon closure of a facility, BLM shall have primary responsibility for insuring reclamation of a mining operation in accordance with applicable federal requirements.
- C. Upon closure of a facility, NMED shall have primary responsibility for insuring reclamation in accordance with applicable requirements of the Water Quality Act.
- D. Closure measures necessary to fulfill both Agencies' objectives shall be the joint responsibility of both 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 permittees/operators and/or financial assurance providers. Any correspondence with permittees/operators or financial assurance providers regarding financial assurance mechanisms, terms or amounts will be distributed for signature by both Agencies.
- B. Financial assurance instruments must be jointly approved by both agencies.

- C. The agency first contacted (NMED or BLM) by a permittee/operator will advise the permittee/operator:
 - 1. That NMED and the BLM may have different thresholds for financial assurance;
 - 2. That if one agency requires financial assurance and the other does not, financial assurance will be obtained that meets that agency's requirements;
 - 3. That if both affected agencies require financial assurance, financial assurance that covers both agencies' requirements will be necessary.
- D. If financial assurance is required under both NMED rules and BLM regulations, a single financial instrument is preferred.
- E. Financial assurance, held as one instrument and intended to fulfill both federal and Water Quality Act requirements (joint financial assurance) must comply with the following terms:
 - 1. Financial assurance must meet both BLM and NMED requirements as to amount, type, term and conditions, and be redeemable by both the BLM and NMED;
 - 2. The amount, type, terms and conditions shall be jointly approved by NMED and BLM;
 - 3. The amount, type, terms and conditions may not be adjusted without concurrence of both Agencies.

IV. MAINTENANCE OF FINANCIAL ASSURANCE INSTRUMENTS

- A. Each agency's designated 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 financial assurance instruments; 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 between the Agencies, permittees/operators and financial providers; and obtaining the approval or concurrence, where appropriate, of the other agency, financial assurance providers and permittees/operators.
- B. Upon an agency's receipt of an application to adjust financial assurance, that agency will submit a full copy of the document to the other agency within 5 working days.
- C. Any adjustment to financial assurance must be jointly approved by both Agencies.
- D. If either agency is concerned about the viability of a permittee/operator, a financial assurance provider or the adequacy of a financial assurance amount, that agency will notify the other agency within 5 working days.

V. FORFEITURE OF JOINT FINANCIAL ASSURANCE INSTRUMENTS

- A. If either agency has determined that a financial assurance provider or a permittee/operator 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 other agency. The Agencies will then begin the process of coordinating appropriate steps to bring the permittee/operator 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 with forfeiture of all or a portion of a 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 prior to proceeding with forfeiture. The second agency shall 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 insure completion of 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-agency team to obtain forfeiture of the financial assurance in order to meet both agencies' permits, laws and regulations. The inter-agency team's tasks will include, but not be limited to, securing forfeiture of the financial assurance, allocating costs to complete the closeout/reclamation and closure plans, generating a request for proposals, selecting a contractor, and overseeing the reclamation and closure work.
- D. In cases where the forfeited amount is insufficient to cover the reclamation and closure costs of both agencies, the inter-agency team will allocate the financial assurance in order to best achieve the requirements of both agencies' permits, laws and regulations.
- E. If a permittee/operator has financial assurance with only one agency or holds separate financial assurance instruments with more than one agency, and an agency finds it necessary to proceed with forfeiture of all or a portion of that agency's financial assurance, the agency, prior to taking any formal action, shall notify the other agency.

VI. RELEASE OF FINANCIAL ASSURANCE

- A. If the permittee/operator applies for complete or partial 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

Every reasonable effort shall be made to resolve disputes within 3 months. The Points of Contact will make every reasonable effort to resolve disputes to meet the requirements and objectives of both programs within 1 month. If the Points of Contact are unable to resolve a dispute within 1 month, the Water Protection Division Director and BLM State Director will attempt to agree to a resolution of the dispute consistent with the federal requirements and the Water Quality Act within 30 days of notification by the Points of Contact. If the 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 an additional 30 days. The Agencies will equally share the cost of the third party mediator.

VIII. OTHER TERMS

- A. **Effective date and term of MOU:** This MOU shall be effective as of the date it is signed by the Secretary of NMED and the BLM New Mexico State Director, and shall be permanent in duration unless terminated pursuant to Paragraph B., below.
- B. **Termination:** This MOU may be terminated by either party upon delivery of a written notice to the other party 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 MOU.
- D. **Amendment:** This MOU shall not be altered, changed, or amended except by written instrument executed by both of the parties hereto.
- E. **Agency Costs:** Each agency shall be responsible for its own costs of implementing this MOU.
- F. **Limitations:** This MOU is not intended to modify in any way the respective duties, obligations, rights, privileges, or immunities of the Agencies. Nothing contained herein shall require either agency to expend money in excess of appropriations authorized by law.
- G. **Payment, Appropriations and Subcontracting:** No money is being exchanged through this MOU. Therefore the general provisions regarding payment, appropriations and subcontracting are not applicable.
- H. **Strict Accountability for Receipts and Disbursements:** The Agencies shall be strictly accountable for receipts and disbursements relating hereto, and shall make all relevant financial records available to the New Mexico State Auditor, and the federal funding agency upon request, and shall maintain all such records for three (3) years after this MOU has expired or has been terminated.
- I. **Disposition, Division or Distribution of Property; Return of Surplus Funds:** Upon expiration or termination of this MOU, if either party has property or funds in its possession belonging to the other, the same shall be returned in proportion to the Agencies' original contribution.
- J. **Exceptions:** An exception may be allowed to any part of this MOU if approved in writing by the signatories of the Agencies.
- K. **Non-binding Agreement:** This MOU creates no right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity. The parties shall manage their respective resources and activities in a separate, coordinated and mutually beneficial manner to meet the purposes of this MOU. Nothing in this MOU authorizes either of the parties to obligate or transfer funds. Specific projects or activities that involve the transfer of funds, services or property between the parties


require execution of separate agreements and are contingent upon the availability of appropriated funds. Such activities must be independently authorized by statute, and this MOU does not provide that authority. Negotiation, execution and administration of such agreements must comply with all applicable law. Each party operates under its own laws, regulations, and policies, subject to the availability of appropriated funds. Nothing in this MOU is intended to alter, limit, or expand the each Agency's respective statutory and regulatory authority.

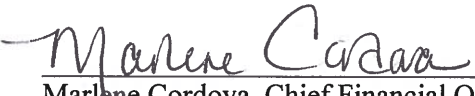
IX. AUTHORITIES

- A. NMED is authorized to enter into and implement this MOU pursuant to the New Mexico Environmental Improvement Act (Section 74-1-6(C), NMSA 1978).
- B. BLM is authorized to enter into and implement this MOU pursuant to Title 43 of the Code of Federal Regulations, Subparts 3802 and 3809, "Surface Management Under the General Mining Laws."

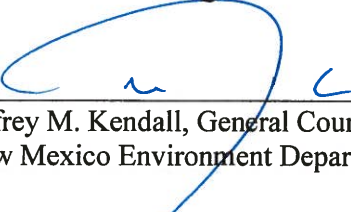
THE PARTIES HERETO HAVE EXECUTED THIS MOU:

STATE OF NEW MEXICO, ENVIRONMENT DEPARTMENT

By:  _____ Date: 3/11/16
Ryan Flynn, Secretary
New Mexico Environment Department

By:  _____ Date: 3/3/16
Marlene Cordova, Chief Financial Officer
New Mexico Environment Department

Approved as to Form and Legal Sufficiency:

By:  _____ Date: 3/10/16
Jeffrey M. Kendall, General Counsel
New Mexico Environment Department

U.S. BUREAU OF LAND MANAGEMENT

By:  _____ Date: 3.22.16
Amy Lueders, New Mexico State Director
U. S. Bureau of Land Management