

Proposed

Statements of Basis, Purpose, and Specific Statutory Authority

for the

Proposed Revisions

to the

Rules and Regulations
of the

Colorado Mined Land Reclamation Board
for
Coal Mining

April 11, 2011

REVISED SEPTEMBER 22, 2011

STATEMENTS OF BASIS, SPECIFIC STATUTORY AUTHORITY, AND PURPOSE

Revisions to the Rules of the Colorado Mined Land Reclamation Board for Coal Mining

Rule amendments and revisions to regulations implementing the Colorado Surface Coal Mining Reclamation Act, Colorado Revised Statutes (CRS) Sections 34-33-101 et seq., C.R.S. 1973 as amended.

This statement sets forth the basis, specific statutory authority, and purpose for changes and corrections to the Rules of the Colorado Mined Land Reclamation Board for Coal Mining, 2 CCR 407-2 ("Rules"). These Rules implement the Colorado Surface Coal Mining Reclamation Act, Sections 34-33-101 et seq., C.R.S. 1973 as amended ("the Act"). This statement is hereby incorporated by reference in the adopted Rules.

These changes to the regulations, if adopted by the Board in total or in part, are being adopted under the provisions of the Act and the State Administrative Procedure Act ("APA"), Section 24-4-103, C.R.S. The proposed rules, as adopted by the Board, will be effective twenty (20) days after publication in the *Colorado Register*.

The changes include minor edits and corrections to errors and omissions, as well as substantive amendments and revisions to several sections of the Rules that address protection of the hydrologic balance; subsidence; valid existing rights determinations to mine lands designated unsuitable for mining; roads; coal exploration; technical revisions to a permit; performance bonds; blasting; backfilling and grading; revegetation; petitions to designate lands unsuitable for coal mining; permit application review; permit eligibility; application information; applicant, operator, and permittee information; automated information entry and maintenance; permit suspension and rescission; ownership and control findings and challenge procedures; transfer, assignment, or sale of permit rights; and alternative enforcement. The rules are being proposed to be no less effective than the Federal counterparts at 30 CFR Part 700 to end. Revisions are also being proposed to clarify existing rules and correct typographical errors.

SUMMARY OF THE RULE-MAKING PROCESS

Informal Review Process

During the monthly Mined Land Reclamation Board (Board) meeting, which commenced on November 17, 2010, the Coal Program of the Office of Mined Land Reclamation of the Colorado Division of Reclamation, Mining and Safety (Division, DRMS, or Office) discussed its intention to petition the Board to initiate the rule-making process.

The Division held a public meeting to discuss the proposed rule revisions on November 30, 2010, at 9:00 am in Room 518 of 1313 Sherman Street, Denver, Colorado, 80203. Another meeting was held February 8, 2011 at 9:00 a.m. in Room 318 of 1313 Sherman Street, Denver, Colorado, 80203.

The Division received written comments from the Colorado Mining Association on January 25, 2011, and February 23, 2011. The comments received are discussed by rule, below. CMA had a general comment requesting that the Division bifurcate the rulemaking into those rules required by the Office of Surface Mining (OSM), as discussed in the Basis and Purpose section

of this document, and those initiated within the Division. Because of the limited resources available to the Division and the considerable expense of the rulemaking process, the Division did not elect to conduct two separate rulemaking processes.

The proposed rules were submitted to OSM for informal review on March 30, 2009, March 12, 2010, and February 28, 2011. Comments and required revisions by OSM were incorporated into the proposed rules and this Statement of Basis, Purpose, and Specific Statutory Authority.

Formal Program Amendment

The Division has considered comments received during the Board discussion, OSM informal review, and public meetings prior to submitting a formal program amendment to the Office of Surface Mining. The proposed Rules were submitted to OSM as a Formal Program Amendment on April 11, 2011.

ON SEPTEMBER 21, 2011, THE DIVISION RECEIVED NOTICE FROM OSM THAT AN AMENDMENT TO THIS STATEMENT OF BASIS, PURPOSE, AND SPECIFIC STATUTORY AUTHORITY WOULD BE REQUIRED. IN RESPONSE TO COMMENTS RECEIVED BY OSM DURING THE FORMAL PROGRAM AMENDMENT PUBLIC COMMENT PERIOD, OSM REQUIRED THE DIVISION TO CLARIFY (SEE ITEM 26, RULE 1.04(111)(D), BELOW) THAT THE DIVISION WOULD NOT ASSERT JURISDICTION OVER NATIONAL FOREST SYSTEM ROADS.

Formal State Rulemaking Process

Upon approval of the formal program amendment, the Division will petition the Board to initiate rulemaking. Should the Board grant the Division's request, the Division will (in compliance with the APA) provide notice to the public through its monthly bulletin and through direct mailing. The Division will also submit, to the Secretary of State for publication in the *Colorado Register*, the formal notice of a rulemaking hearing to be held by the Board. Notice of the proposed rulemaking hearing will also be published in the *Denver Post*.

The proposed rule revisions will also be submitted to the Office of Regulatory Reform within the Department of Regulatory Agencies, in accordance with Senate Bill 03-121, which requires state agencies to submit copies of all proposed rules to the Department of Regulatory Agencies (DORA). DORA reviews each rule to determine whether it will negatively impact economic competitiveness or small business in Colorado. If DORA determines this to be the case, DORA may request that the submitting agency complete a cost-benefit analysis before proceeding with the rule. DORA may then inform the public of the results of their review process.

STATUTORY AUTHORITY

The general authority for promulgating these amendments and revisions to these rules is Section 34-33-108(1), C.R.S., which states that the board shall develop "reasonable rules and regulations respecting the administration and enforcement of this article and, in conformance therewith, shall promulgate such reasonable rules and regulations pursuant to the provisions of Section 24-4-103 CRS." The specific statutory provisions relating to the changes to each rule are discussed below in the Basis and Purpose Section, and the entire rule-making process is being carried out in conformity with the rule-making requirements of the APA, Section 24-4-103, C.R.S. The revisions proposed have been reviewed by the Division and we have determined that they do not represent any mandates on local governments.

BASIS AND PURPOSE OF CHANGES

Basis

The Basis for these revisions is the Colorado Surface Coal Mining Reclamation Act, Colorado Revised Statutes (CRS) Sections 34-33-101 et seq., C.R.S. 1973 as amended.

Purpose

The primary purpose for the majority of these proposed revisions is to conform to requirements set forth by the Director of the Office of Surface Mining (OSM), as a result of deficiencies identified by OSM in its ongoing review of the Rules.

The Division of Reclamation, Mining, and Safety (DRMS) has received letters (“732 letters”), under 30 CFR 732.17(c) of SMCRA (P.L. 95-87), notifying us that amendments to our program are required to be consistent with new or revised federal regulations. Proposed revisions to the Rules that were mandated by the OSM are identified as being no less effective than federal regulations in the revision explanations below. Detailed explanations of the purpose of each of the new or revised rules can be found in the federal preambles for the proposed federal rules, as published in the *Federal Register*. Where available, reference to the specific *Federal Register* publication is provided. Referenced *Federal Register* publications are available for review on the Division’s web site (www.mining.state.co.us).

The Division is resolving issues from the following 732 letters which are available for review at the Division office:

May 7, 1986 – Lands Unsuitable for Surface Coal Mining Operations

During the course of a regulatory reform review, OSM found the state rules to be less effective than the federal rules in the requirements for petitions to designate areas unsuitable for surface coal mining activities. The proposed revisions described below and referenced as “*LANDS UNSUITABLE FOR SURFACE COAL MINING OPERATIONS*” are necessary under the requirements of Section 732 of SMCRA in order for the Division’s regulations to remain consistent with the Federal requirements. The preamble for these changes was published in Volume 56, Number 138 of the *Federal Register* on July 18, 1991.

June 5, 1996 – Subsidence

OSM promulgated regulations implementing Section 720 of SMCRA after the passage of the Energy Policy Act of 1992. Section 720 requires, among other things, the prompt replacement of drinking, domestic, and residential water supplies that have been contaminated, diminished, or interrupted by underground mining operations conducted after October 24, 1992. See 60 Fed. Reg. 38491 (July 27, 1995) Id. The changes described below and referenced as “*SUBSIDENCE*” are necessary under the requirements of Section 732 of SMCRA in order for the Division’s regulations to remain consistent with the Federal requirements. The preamble for these changes was published in Volume 58, Number 184 of the *Federal Register* on September 24, 1993; Volume 60, Number 62 of the *Federal Register* on March 31, 1995; and Volume 64, Number 245 of the *Federal Register* on December 22, 1999.

June 19, 1997 – Thin and Thick Overburden

On January 16, 1992, OSM amended its regulations for backfilling and grading and approximate original contour. The proposed revisions described below and referenced as “*THIN AND THICK OVERBURDEN*” are necessary under the requirements of Section 732 of SMCRA in order for the Division’s regulations to remain consistent with the Federal requirements. The preamble for these changes was published in Volume 56, Number 242 of the *Federal Register* on December 17, 1991.

April 2, 2001 and February 1, 2008 – Valid Existing Rights (VER)

On December 17, 1999, OSM promulgated final regulations implementing Section 522(e) of SMCRA, providing an interpretation and rules regarding Valid Existing Rights (VER) determinations. The rules were challenged and ensuing litigation ended with the rules being upheld by the United States Court of Appeals for the District of Columbia Circuit (See National Mining Association v. Kempthorne, 512 F.3d 702 (D.C. Cir. 2008)). On February 1, 2008, the Division was directed by OSM to respond to the April 2, 2001 732 letter. The proposed revisions described below and referenced as “*VER*” are necessary under the requirements of Section 732 of SMCRA in order for the Division’s regulations to remain consistent with the Federal requirements. The preamble for these changes was published in Volume 56, Number 138 of the *Federal Register* on July 18, 1991; and Volume 64, Number 242 of the *Federal Register* on December 17, 1999.

May 11, 1989, January 13, 1997, and October 2, 2009 - Ownership and Control (O&C)

On October 28, 1994, December 19, 2000, and December 3, 2007, OSM promulgated final rules pertaining to review of applications; permit eligibility; application information; applicant, operator, and permittee information; automated information entry and maintenance; permit suspension and rescission; ownership and control findings and challenge procedures; transfer, assignment, or sale of permit rights; and alternative enforcement. OSM sent the Division two 732 letters (May 11, 1989 and January 12, 1997) concerning ownership and control, but because of ongoing litigation, advised the Division to delay response to the letters until all litigation was completed. On October 2, 2009, OSM notified the Division that litigation had concluded and a Division response to the 732 letters would be required. The proposed revisions described below and referenced as “*O&C*” are necessary under the requirements of Section 732 of SMCRA in order for the Division’s regulations to remain consistent with the Federal requirements. The preamble for these changes was published in Volume 59, Number 208 of the *Federal Register* on October 28, 1994; Volume 65, Number 244 of the *Federal Register* on December 19, 2000; and Volume 72, Number 231 of the *Federal Register* on December 3, 2007.

These proposed revisions are also in response to required program amendments codified at 30 CFR 906.16(f) and (h), pertaining to roads. The revisions responding to required program amendments are described below and referenced as “*ROADS*”.

Minor Clarifications

Any changes in the proposed rules that are not explained in detail below are not considered substantive changes, and are being made for the purpose of general, grammatical, typographical, organizational, or numbering clarification; of bringing new and existing provisions into conformity with each other; and for correcting any cross-referencing errors. Throughout the entire body of the Rules, the term “Section” will be replaced by the term “Rule” for consistency,

and the term “Rule” will be inserted where no identifier appears before a rule reference; these instances of correction have not been individually itemized herein.

Explanation and Rationale of Revisions

1. **Rule 1.03.2(4)** is revised to reflect the current name of the Colorado Department of Public Health and Environment.
2. **Rule 1.04:** Several rules (1.04(1a), (17a), (20a), (22a), (31a), (31b), (31c), (43a), (46a), (47a), (63a), (70a), (71a), (83b), (86a), (93a), (103a), (108a), (135a), and (137a)) have been renumbered for clarity.
3. **Rule 1.04(5)** is revised to reflect the current name of the Division of Reclamation, Mining and Safety, formerly known as the Division of Minerals and Geology, and prior to that as the Mined Land Reclamation Division. The name of the division was most recently changed by the legislature with Senate Bill 06-140, passed March 31, 2006, and became effective August 7, 2006.
4. **Rule 1.04(11.1)** is added, consistent with 30 CFR 701.5. The new rule defines the applicant/violator system that is administered by OSM. – O&C
5. **Rule 1.04(20.1)** is revised to correct an incorrect rule reference, and to remove language differentiating a certified blaster from a shot firer. The rule currently states that a shot firer does not have blast design responsibilities, yet CRS 34-22-109(3), which addresses the certification of shot firers, requires knowledge in “the proper placement of drill holes made for the purpose of breaking or dislodging coal and rock.”

CRS 34-21-116, which was repealed in 1988, included provisions for the certification of shot firers but did not define the term. The current statute (34-22-109(3)) references shotfirers, without defining the term, and requires training and certification similar to that of a certified blaster as defined in the federal rules. There are no definitions of shot firers in the federal rules (OSM or MSHA). Our research indicates that the term shot firer is commonly used to refer to an individual certified to design and carry out underground mine blasts; a certified blaster refers to an individual who designs and implements surface mine blasts. The federal rule (30 CFR 850.13) does not mention shot firers, and requires that all blasting operations be implemented by a certified blaster, the requirements for which are similar to those requirements of 34-22-109(3). To avoid this ambiguity, the rule will be limited to the definition of a certified blaster, consistent with 30 CFR 850.15.
6. **Rule 1.04(27)** is revised to be consistent with the proposed revisions to Rule 1.04(79) described below.
7. **Rule 1.04(30.1)** is added, consistent with 30 CFR 701.5. A definition for “control” or “controller” is added to support proposed revisions to Rules 2.01.3, 2.03.4, and 2.03.5, and 2.08. Specific statutory authority for this rule is in CRS 34-33-110(2)(c) and (e) which require applicants for permits to provide information detailing control of the applicant. – O&C
8. **Rule 1.04(38)** is revised to reflect the current name of the Division of Reclamation, Mining and Safety.

9. **Rule 1.04(39.1)** is added to define drinking, domestic or residential water supply consistent with 30 CFR 701.5. Specific statutory authority for this rule is in CRS 34-33-121(1), which directs the Board to promulgate rules and regulations directed toward the surface effects of underground mining. This definition is necessitated by new Rule 4.05.15(2) which requires replacement of any protected drinking, domestic, or residential water supply interrupted by underground mining activities. - *SUBSIDENCE*
10. **Rule 1.04(41)** is revised to accommodate proposed Rule 1.07.
11. **Rule 1.04(56)** is amended to correct a typographical error.
12. **Rule 1.04(70a)** is revised, consistent with 30 CFR 701.5. The definition is revised for consistency with its use elsewhere in the rules, and has also been renumbered. – *O&C*
13. **Rule 1.04(71)** is amended to correct a typographical error.
14. **Rule 1.04(71)(c), the definition of rangeland**, is revised to consider the new definition of grazingland in Rule 1.04(71)(j), and to allow operators to maintain this land use on existing permitted operations with a currently approved postmining land use of rangeland. The Division received comments during the informal review process that were critical of this revised definition. The commenter noted that there are differing success standards for grazingland and fish and wildlife habitat, and that designated rangeland as a combination of the two land uses would be contradictory. The Division acknowledges that the success standards for the two land uses differ. There are, however, several approved operations that have a postmining land use of rangeland that includes land use combinations falling under the new definition of grazingland and the existing definition of fish and wildlife habitat. The Division has retained this definition of rangeland to enable operations with approved reclamation plans to continue with the approved plan. Operations with a currently approved postmining land use of rangeland include some lands subject to the grazingland standard and some lands subject to the fish and wildlife standard and would have to be revised if the rangeland land use category is removed. By retaining the rangeland definition, no revision of currently approved reclamation plans would be required, and the currently approved success standards would remain valid. If an operator chooses, however, he/she could request revision of his/her permit to change the postmining land use to either grazingland or fish and wildlife habitat.
15. **Rule 1.04(71)(i)** is amended to define the term “developed water sources” consistent with its usage elsewhere throughout the rules.
16. **Rule 1.04(71)(j)** was originally proposed for deletion. The Division has elected to retain this definition based on comments received during the informal revision process. The retained definition is consistent with 30 CFR 701.5.
17. **Rule 1.04(71)(k) (new)** is added. This proposed change would more closely correspond to land use definitions in the Federal regulations, and would more clearly allow for land use based discrimination with regard to applicable revegetation success criteria, as allowed by Federal regulations (e.g. herbaceous production criteria would apply to *grazingland*, but not to *fish and wildlife habitat*.)

18. **Rule 1.04(71.2)** is added to define material subsidence damage, consistent with 30 CFR 701.5, and to clarify that the definition pertains specifically to the use of the term “material subsidence damage” in Rules 2.05.6 and 4.20, pertaining to subsidence. Specific statutory authority for this rule is in CRS 34-33-121(1), which directs the Board to promulgate rules and regulations directed toward the surface effects of underground mining. This definition is necessitated by the proposed revisions to Rules 2.05.6 and 4.20.3(3). –*SUBSIDENCE*
19. **Rule 1.04(77)** is deleted as a negative definition and redefined in the affirmative as Rule 1.04(118.1).
20. **Rule 1.04(77)** will now define a non-commercial building consistent with 30 CFR 701.5. Specific statutory authority for this rule is in CRS 34-33-121(1), which directs the Board to promulgate rules and regulations directed toward the surface effects of underground mining. This definition is necessitated by the proposed revisions to Rules 2.05.6(6)(a)(ii), (iii), and (iv). –*SUBSIDENCE*
21. **Rule 1.04(79)** is revised to define an occupied residential dwelling consistent with 30 CFR 701.5. Specific statutory authority for this rule is in CRS 34-33-121(1), which directs the Board to promulgate rules and regulations directed toward the surface effects of underground mining. This definition is necessitated by the proposed revisions to Rules 2.05.6(6)(a)(ii), (iii), and (iv) and 4.20.3(2)(b). –*SUBSIDENCE*
22. **Rule 1.04(81)** is deleted. The term “other minerals” does not appear anywhere else in the Rules. This definition was previously required when the Rules allowed an exemption from the requirements of the Rules for the extraction of coal incidental to the extraction of other minerals. The 1992 revision of the Coal Act removed this exemption (although the definition of “other minerals” remains in the act), and the Rules were subsequently revised accordingly, eliminating the exemption provision and thus negating the need for this definition.
23. **Rule 1.04(83a)** is revised, consistent with 30 CFR 701.5. The definition is revised so that “own”, “owner”, and “ownership” are defined separately from “control” or “controller”. Specific statutory authority for this rule is in CRS 34-33-110(2)(c) and (e) which require applicants for permits to provide information detailing ownership of the applicant. The rule has also been renumbered.– *O&C*
24. **Rule 1.04(95)** is revised to reflect the current name for the Natural Resources Conservation Service (formerly the Soil Conservation Service).
25. **Rule 1.04(110.1)** is added to define replacement of water supply consistent with 30 CFR 701.5. Specific statutory authority for this rule is in CRS 34-33-121(1), which directs the Board to promulgate rules and regulations directed toward the surface effects of underground mining. This definition is necessary because of the proposal to add new Rule 4.05.15. –*SUBSIDENCE*
26. **Rule 1.04(111)(d)** is added to include the definition of a public road. The amended rule differs from but is no less effective than the corresponding road definition of 30 CFR 701.5. This amendment is in response to a required amendment codified at 30 CFR 906.16(h). In addition to this rule change, the Division is clarifying, in this Statement of

Basis, Purpose, and Statutory Authority, that the following implementing policy is adopted with this rule change.

- a. The Division will exercise jurisdiction over public roads if:
 1. Such roads are constructed or improved by the operator, and the Division determines that the primary purpose of such construction or improvement is to facilitate mine access or operations; or
 2. Such roads are public road segments, which provide access to the permit area, and either terminate at the permit boundary or are subject to controlled access by the permittee within the permit area, unless the operator demonstrates that such mine related use of the road segment has a minor effect on the roadway and is a minor source of off-site impacts.
- b. The jurisdictional status of road segments which do not fit into either of the categories described above will be determined by the Division on a case-by-case basis, with the primary consideration being the extent of mine related impacts. The road will not fall under the jurisdiction of the Division if mine related use has a minor effect on the roadway and is a minor source of off-site impacts.

C. THE DIVISION WILL NOT EXERCISE JURISDICTION OVER DESIGNATED NATIONAL FOREST SYSTEM ROADS.

DURING THE COMMENT PERIOD FOR THE FORMAL PROGRAM AMENDMENT REVIEW WITH OSM, THE UNITED STATES FOREST SERVICE (USFS) EXPRESSED CONCERN WITH THE POSSIBILITY THAT THE DIVISION COULD ATTEMPT TO EXERCISE JURISDICTION OVER NATIONAL FOREST SYSTEM ROADS THAT ARE MANAGED BY THE USFS. OSM REQUIRED THAT THE DIVISION MODIFY THIS STATEMENT OF BASIS, PURPOSE, AND SPECIFIC STATUTORY AUTHORITY TO CLARIFY THAT THE DIVISION WOULD NOT USURP THE AUTHORITY OF THE USFS BY EXERCISING JURISDICTION OVER A NATIONAL FOREST SYSTEM ROAD. Specific statutory authority for this rule is in CRS 34-33-114(2)(g) and CRS 34-33-103(26)(b). - ROADS

27. **Rule 1.04(117)** is amended to make the defined term (significant environmental harm) consistent with its usage elsewhere in the Rules.
28. **Rule 1.04(118.1)** is added to define significant recreational, timber, economic, or other values incompatible with surface coal mining operations, consistent with 30 CFR 761.5. The definition is necessary to clarify existing rule 2.07.6(2)(d)(iii)(D). –VER
29. **Rule 1.04(120)** is revised to reflect the current name for the Natural Resources Conservation Service (formerly the Soil Conservation Service).
30. **Rule 1.04(125)** is amended to correct a typographical error.
31. **Rule 1.04(128)** is amended to make the defined term (substantial legal and financial commitments) consistent with its usage elsewhere in the Rules.
32. **Rule 1.04(132)** is amended with a new paragraph “(c)” added to clarify that subsidence due to underground coal mining is not included in the definition of surface coal mining

operations. This change is consistent with 30 CFR 761.200, and was initiated as a result of comments received during the informal review process. The rule was further revised during the informal review process to ensure consistency with the federal rule. The federal preamble makes clear that all subsidence impacts are regulated under 30 CFR 516, 720, 784, and 817, (counterparts to Rules 2.05.6 and 4.20), and not in the rules pertaining to areas protected by 30 CFR 761 (counterpart to Rule 2.07.6(2)(d)).

33. **Rule 1.04(135)** is amended to make the defined terms (suspended solids and non-filterable residue) consistent with their usage elsewhere in the Rules.
34. **Rule 1.04(140)** is amended to make the defined term (toxic drainage) consistent with its usage elsewhere in the Rules.
35. **Rule 1.04(141)** is revised, consistent with 30 CFR 701.5. The revision clarifies that a transfer, assignment, or sale of rights occurs with a change of permittee, and not as a result of a change in ownership of a permittee. – O&C
36. **Rule 1.04(146)** is amended to make the defined term (unwarranted failure) consistent with its usage elsewhere in the Rules.
37. **Rule 1.04(148)** is amended to correct a typographical error.
38. **Rule 1.04(149)** is revised to define valid existing rights consistent with 30 CFR 761.5. Specific statutory authority for this rule is in CRS 34-33-114(2)(g) which makes permission for certain activities dependent upon a demonstration of valid existing rights. The definition is necessary to clarify existing Rule 2.07.6(2)(d). The proposed definition was revised as a result of comments received during the informal review process. The Division had inadvertently asserted that the federal definition of valid existing rights would apply to non-federal lands within national forests, contrary to 30 CFR 761.16. In addition, paragraph (a)(i) was rearranged as a result of comments during the informal review process. The commenter felt it was important to clarify that existing operations are protected in the event that lands on which mining has been approved later come under the protection of Rule 2.07.6(2)(d). The rule was rearranged for this emphasis. –VER
39. **Rule 1.04(149.1)** is added, consistent with 30 CFR 701.5. The new rule defines the term “violation” to clarify what information needs to be provided so the Division can determine permit eligibility. Specific statutory authority for this rule is in CRS 34-33-110(2)(f) which requires applicants for permits to provide information detailing the compliance history of the applicant. – O&C
40. **Rule 1.04(149.2)** is added, consistent with 30 CFR 701.5. The new rule defines the term “violation, failure or refusal” in the context of the assessment of individual penalties. Specific statutory authority for this rule is in CRS 34-33-123(10) which authorizes the assessment of individual penalties. – O&C
41. **Rule 1.04(152)** is deleted, as there is no longer a federal counterpart to this rule. The term “willful violation” does not need to be specifically defined, since its meaning can be ascertained with the revisions proposed at Rules 1.04(149a) and 1.04(152). Specific statutory authority for this rule is in CRS 34-33-123, enforcement and penalties, and

CRS 34-33-108(2), which requires that any rule or regulation promulgated by the board that is required by a federal law, rule, or regulation shall become repealed when said federal rule or regulation is deleted or withdrawn.

42. **Rule 1.04(153)** is revised to be consistent with 30 CFR 701.5. The definition of “willful” or “willfully” is edited to be more concise. Specific statutory authority for this rule is in CRS 34-33-123(7), which sets forth the actions required by the Division when a permittee has willfully caused a violation. – O&C

43. **Rule 1.07** is added to provide provisions for the determination of valid existing rights on non-federal lands, and to clarify that valid existing rights determinations on federal lands will be made by the Secretary of the Interior, consistent with 30 CFR 761.16. Specific statutory authority for this rule is in CRS 34-33-114(2)(g). That section is identical to the relevant portions of Section 522(e) of SMCRA, 30 U.S.C §1272(e). 30 CFR 761.16, the federal rule, is based upon §1272(e). That rule was challenged and upheld in the United States Court of Appeals for the District of Columbia Circuit. See National Mining Association v. Kempthorne, 512 F.3d 702 (D.C. Cir. 2008). -VER

Existing **Rules 1.07 through 1.15** are renumbered to accommodate the addition of proposed new Rule 1.07.

44. **Rule 2.01.3(1)** is revised, consistent with 30 CFR 773.4(a). The rule is revised to clarify that obligations established under a permit will continue regardless of whether the permit is expired, or has been terminated, revoked, or suspended. – O&C

45. **Rule 2.02.2(1)** is amended to clarify that exploration of 250 tons or less of coal on lands designated as unsuitable for coal mining would be subject to the requirements of Rule 2.02.3, which calls for additional and more detailed baseline data, a more detailed operation and reclamation plan, and broader public notice. This is consistent with 30 CFR 772.11. Statutory authority for this amendment is in CRS 34-33-114(2)(g) and 34-33-117. – VER AND LANDS UNSUITABLE FOR SURFACE COAL MINING ACTIVITIES

46. The title of **Rule 2.02.3** is amended to emphasize that the rule also applies to coal exploration in areas designated as unsuitable for surface coal mining operations, as stated in the existing introductory paragraph of the rule. Statutory authority for this amendment is in CRS 34-33-114(2)(g) and 34-33-117. - VER AND LANDS UNSUITABLE FOR SURFACE COAL MINING ACTIVITIES

47. **Rules 2.02.3(1)(c)(vi)** is amended for clarity.

48. **Rule 2.02.3(1)(e)** is amended to be consistent with the proposed revisions to Rule 1.04(79).

49. **Rule 2.02.3(1)(g)** is added to be consistent with 30 CFR 772.12(b)(14). This rule will require coordination between the person who intends to conduct exploration and the agency with jurisdiction over the land, and ensure that exploration activities are conducted to preserve the value for which the lands to be explored were deemed unsuitable for surface coal mining. Statutory authority for this amendment is in CRS 34-33-114(2)(g) and 34-33-117. The Colorado statute and the revised state rule are substantively identical to Section 522(e) of SMCRA and the federal rule, which was challenged and upheld in the United States Court of Appeals for the District of Columbia

Circuit. See National Mining Association v. Kempthorne, 512 F.3d 702 (D.C. Cir. 2008).
- VER

50. The title of **Rule 2.02.4** is amended to clarify that the rule also applies to coal exploration in areas designated as unsuitable for surface coal mining operations, as stated in the existing introductory paragraph of Rule 2.02.3. This will ensure that the Division finds, in writing, that the exploration operations will not interfere with the values causing those lands to be deemed unsuitable for surface coal mining. This rule is consistent with 30 CFR 772.12(d). - VER
51. **Rule 2.02.4(3)(d)** is added to be consistent with 30 CFR 772.12(d)(2)(iv). This rule will require coordination between the person who intends to conduct exploration, the Division, and the agency with jurisdiction over the land, and ensure that exploration activities are conducted to preserve the value for which the lands to be explored were deemed unsuitable for surface coal mining. Statutory authority for this amendment is in CRS 34-33-114(2)(g) and 34-33-117. The Colorado statute and the revised state rule are substantively identical to Section 522(e) of SMCRA and the federal rule, which was challenged and upheld in the United States Court of Appeals. Id. - VER
52. The title of **Rule 2.02.5** is amended to clarify that the rule also applies to coal exploration in areas designated as unsuitable for surface coal mining operations, as stated in the existing introductory paragraph of Rule 2.02.3. This rule will ensure that notice is provided and opportunities for comments and hearings are afforded for exploration operations on lands deemed unsuitable for surface coal mining. CRS 34-33-117 provides statutory authority for this change. - VER
53. **Rule 2.03.3(4)** is revised to correct the address for the American Public Health Association.
54. **Rule 2.03.3(10)** is added to be consistent with 30 CFR 773.7(b). The rule is revised to clarify that it is the applicant's responsibility to demonstrate that an application satisfies all of the requirements of the Rules and the Act. Specific statutory authority for this rule is in CRS 34-33-114(1), which states that the applicant for a permit or revision shall have the burden of establishing that the application is in compliance with all the requirements of the Act. - O&C
55. **Rules 2.03.4 and Rule 2.03.4(2)** are revised to be consistent with 30 CFR 778.11(a)(2). The requirement to include a social security number is replaced by the requirement to submit the entity's taxpayer identification number. - O&C
56. **Rule 2.03.4(2)(b)** is added, and the remainder of the rule renumbered, to be consistent with 30 CFR 778.11(b)(3). The rule now specifies that identifying information must be included in the application for any operator, if the operator is different from the applicant. Specific statutory authority for this rule is in CRS 34-33-110(2)(b)(IV), which requires inclusion, in the application, of the name and address of the operator if he/she is a person different from the operator. - O&C
57. **Rule 2.03.4(2)(c)** is deleted, and a new rule is added consistent with 30 CFR 778.11(b)(4). The requirement to furnish the name of the person who will pay the abandoned mine land reclamation fee is deleted, as there is no longer a federal counterpart. The new rule lists all entities within an applicant's or operator's

organizational structure for which identifying information must be provided. Specific statutory authority for this rule is in CRS 34-33-110(2)(e), which requires the application to include information for every officer, partner, director or person performing a function similar to a director, of the applicant, and for any person owning of record ten percent or more of any of any class of voting stock of the applicant. – O&C

58. **Rule 2.03.4(3)** is deleted and a new rule is added to be consistent with 30 CFR 778.12(a). The rule requires submittal of a list of all names under which the applicant and operator and their partners or principal shareholders previously operated a coal mining operation within the preceding five year period. Specific statutory authority for this rule is in CRS 34-33-110(2)(e), which requires the applicant to submit the names under which the applicant, partner, or principal shareholder previously operated a surface coal mining operation. – O&C
59. **Rule 2.03.4(3)(a)** is added, consistent with 30 CFR 778.12(a). The rule will require identifying information for each of the names provided under revised Rule 2.03.4(3). Specific statutory authority for this rule is in CRS 34-33-110(2)(e), which requires the application to include information for every officer, partner, director or person performing a function similar to a director, of the applicant, and for any person owning of record ten percent or more of any of any class of voting stock of the applicant. – O&C
60. **Rule 2.03.4(3)(b)** is revised, consistent with 30 CFR 778.12(b). The rule is revised to clarify that the information on other pending permits is required for both the applicant and the operator, if the operator is different from the applicant. – O&C
61. **Rule 2.03.4(4)** is amended for clarity and to be consistent with 30 CFR 778.12(c). The rule is revised to list the entities within an applicant's or operator's organizational structure for which identifying information is required. Specific statutory authority for this rule is in CRS 34-33-110(2)(e), which requires the application to include information for every officer, partner, director or person performing a function similar to a director, of the applicant, and for any person owning of record ten percent or more of any of any class of voting stock of the applicant. – O&C
62. **Rule 2.03.4(4)(a)** is revised, consistent with 30 CFR 778.11(c). The rule is revised to require the application to include the telephone number of entities being named as owners or controllers. – O&C
63. **Rule 2.03.4(4)(c)** is added, consistent with 30 CFR 778.11(d)(3). The rule is revised to require that the date an owner or controller began functioning in their position be included in the application. – O&C
64. **Rule 2.03.4(6)(b)** is amended for clarity.
65. **Rule 2.03.4(8)** is revised, consistent with 30 CFR 778.13(d). The rule clarifies that MSHA numbers must be provided for the operation itself and any structures that require approval by MSHA. – O&C
66. **Rule 2.03.4(10)** is deleted, and a new rule is added to be consistent with 30 CFR 778.11(e). The deleted rule was redundant. The new rule clarifies that the Division

does not need to make a finding of permanent ineligibility as required by proposed Rule 2.07.9(3) before entering into AVS the information provided by the applicant, because listing a person in AVS does not create a presumption or constitute a determination of ownership or control of a surface coal mining operation. Listings in AVS are subject to challenge, as set forth in proposed Rule 2.11. – O&C

67. **Rule 2.03.4(11)** is added to be consistent with 30 CFR 773.8. The new rule specifies the information that will be entered into AVS by the Division. – O&C
68. **Rule 2.03.4(12)(a)** is added to be consistent with 30 CFR 773.9. The new rule clarifies that the Division will rely on information submitted by the operator and any other information available to the Division to review the permittee's and operator's organizational structure and ownership and control relationships, compliance history, and mining experience. The rule further states that the review must be conducted before the Division can make a permit eligibility determination. Specific statutory authority for this rule is in CRS 34-33-114(3), which states that the Division cannot issue a permit until it finds that the applicant does not own or control any operation with a demonstrated pattern of willful violations. – O&C
69. **Rule 2.03.4(12)(b)** is added to be consistent with 30 CFR 773.10. The new rule clarifies that in reviewing the permittee's and operator's permit history and previous mining experience, the Division will rely on information submitted by the operator and any other information available to the Division. Specific statutory authority for this rule is in CRS 34-33-114(3), which states that the Division cannot issue a permit until it finds that the applicant does not own or control any operation with a demonstrated pattern of willful violations. – O&C
70. **Rule 2.03.5(1)(a)** is renumbered and revised to be consistent with 778.14(a). The rule is revised to expand the list of entities for which compliance information must be submitted, and to clarify that the required information regarding forfeited bonds, as with suspension or revocation information, must cover the five year period prior to the date of submission of the application. Specific statutory authority for this rule is in CRS 34-33-110(2)(f), which states that the information provided regarding prior permit suspensions or revocations must be provided for the applicant, any subsidiary, affiliate, or person controlled by or under common control with the applicant. Rule 2.03.5 has been renumbered in its entirety. – O&C
71. **Rule 2.03.5(2)** is renumbered (now Rule 2.03.5(1)(b)) and new **subparagraph (ii)** is added to be consistent with 778.14(b)(2), and the rest of the rule is renumbered to accommodate the addition. The rule is added to require the applicant to provide the date of any suspension, revocation, or forfeiture in its compliance history. Specific statutory authority for this rule is in CRS 34-33-110(2)(f), which requires a brief explanation of the facts involved in a prior permit revocation or suspension. – O&C
72. **Rule 2.03.5(2)** is added to be consistent with 30 CFR 773.11. The rule is added to make clear that the Division will use the violation information furnished by the applicant

and any other information available to the Division to review the permittee's and operator's compliance history. Specific statutory authority for this rule is in CRS 34-33-110(2)(f), application for permit, application for permit, and CRS 34-33-114(3), which states that the Division cannot issue a permit until it finds that the applicant does not own or control any operation with a demonstrated pattern of willful violations. – O&C

73. **Rule 2.03.5(3)** is added to be consistent with 30 CFR 778.9. The rule is added to establish procedures for updating information provided by the applicant for entry in AVS. – O&C
74. **Rule 2.03.7(2)** is revised to directly reference the requirements of proposed new Rule 1.07, procedures for determining valid existing rights, and to clarify that the requirements of Rule 1.07 must be fulfilled to support an assertion of valid existing rights . Specific statutory authority for this revision exists in CRS 34-33-114(2)(g) which prohibits surface coal mining operations on lands designated unsuitable for mining. - VER
75. **Rule 2.03.7(3)** is amended to be consistent with proposed revisions Rule 1.04(79), and to correct a typographical error.
76. **Rules 2.04.5(1)(a), (b), and (c)** are amended and renumbered for clarity.
77. **Rule 2.04.6(2)(b)(iv)** is revised to change the referenced rule which will be renumbered to accommodate proposed new Rule 1.07.
78. **Rule 2.04.6(3)(a)** is amended for clarity.
79. **Rule 2.04.12** is revised throughout the rule to reflect the current name for the Natural Resources Conservation Service (formerly the Soil Conservation Service).
80. **Rule 2.04.12(2)(g)** is revised to be consistent with 30 CFR 785.17(d), which acknowledges the delegation of authority of the Secretary of Agriculture to the State Conservationist regarding prime farmland determinations. Specifically, 30 CFR 785.7(d) states:

(d) Consultation with Secretary of Agriculture.

(1) The Secretary of Agriculture has responsibilities with respect to prime farmland soils and has assigned the prime farmland responsibilities arising under the Act to the Chief of the U.S. Soil Conservation Service. The U.S. Soil Conservation Service shall carry out consultation and review through the State Conservationist located in each State.
81. **Rule 2.04.13(1)** is revised for clarity.
82. **Rule 2.04.13(3)** is added to require operators of underground mines to include, in the annual report, a map showing the extent of underground workings. For some mines, when no revisions are requested, it can be as long as five years before the Division receives this information with a renewal application, as part of the information required by Rule 4.20.1(3). In order to ensure that mining is occurring as planned for the projected impacts of subsidence, to better analyze ground water monitoring and

subsidence data, and to ensure compliance with public notice requirements (Rule 4.20.2), the Division needs updated maps of the extent of underground mining. These updated maps are readily available at the mine sites, as updates to underground mining maps are required, at a minimum, on a semiannual basis by MSHA (30 CFR 75.1200 and 75.1202-1). This rule was revised during the informal comment period, based on comments received during the informal review process. The map requirements are now specific to the information that would be necessary to ascertain where and when underground mining has occurred for the purpose of verifying compliance with the performance standards of the Rules pertaining to subsidence. This revised rule does not require submittal of a revision with all of the information required by Rule 4.20.1(3) and/or Rule 2.10.3(k); the required information is limited to a map of the current extent of underground workings to be included in the annual reclamation report. The rule was further revised during the informal review process to retain the provision for confidentiality if the required map includes information subject to the confidentiality provisions of Rule 2.07.5(1)(b). Specific statutory authority for this revision exists in 34-33-110(2)(o), which requires that applications include maps showing the location and extent of known workings of any underground mines; 34-33-121(1), which directs the Division to promulgate rules and regulations directed toward the surface effects of underground coal mining. The Board finds that this revision is necessary for the protection of public safety.

83. **Rule 2.05.3(3)(c)(ii)** is amended to remove reference to Rules 4.03.1(1)(e) and 4.03.2(1)(e), which are proposed to be deleted.
84. **Rule 2.05.3(4)** is revised throughout the rule to reflect the current name for the Natural Resources Conservation Service (formerly the Soil Conservation Service).
85. **Rule 2.05.3(8)** is amended to be consistent with the definitions of coal mine waste and coal processing waste located in Rules 1.04(22a) and 1.04(24), respectively, and to reflect the current name for the Natural Resources Conservation Service (formerly the Soil Conservation Service).
86. **Rule 2.05.4(2)(c)** is revised to require a design for portal or shaft closure in accordance with the proposed revisions to Rule 4.07.3. This will ensure that the plan proposed by the operator will be reviewed by the Division to ensure that it includes the requirements of Rule 4.07.3 which will in turn affect long term stability for backfilled mine openings. Specific statutory authority for this revision exists in 34-33-121(1), which directs the Division to promulgate rules and regulations directed toward the surface effects of underground coal mining.
87. **Rule 2.05.6(4)(a)** is revised to be consistent with 30 CFR 761.11(c), which extends protection from the adverse effects of coal mining to both privately owned and publicly owned sites listed on the National Register of Historic Places, as directed by the U.S. District Court for the District of Columbia in In re: Permanent Surface Mining Regulation Litigation 620 F. Supp. 694 (D.D.C. 1985), reversed on other grounds, 839 F.2d 694 (D.C. Cir. 1988). Specific statutory authority is in CRS 34-33-114(2)(g)(III), which provides for protection of places listed on the National Register of Historic Places; CRS 34-33-105, which provides the Board and Office jurisdiction over private property when necessary for enforcement of the Act. - VER

88. **Rule 2.05.6(6)(a)** is revised to be consistent with 30 CFR 784.20(a) and (b). The revision will ensure that subsidence surveys, monitoring and control plans include an inventory of water supplies. The statutory authority for this revision is in CRS 34-33-111(1)(m), which requires a detailed description of measures to be taken to assure the protection of the rights of water users; CRS 34-33-121(1), which directs the Board to promulgate rules and regulations directed toward the surface effects of underground mining; and CRS 34-33-121(2)(j) which requires offsite areas be protected from damages which may result from underground mining activities. - *SUBSIDENCE*
89. **Rule 2.05.6(6)(b)** is revised to be consistent with 30 CFR 784.20(b). The revision will require that an assessment of the worst consequences of subsidence also addresses any effects on water supplies. The statutory authority for this revision is in CRS 34-33-111(1)(m), which requires a detailed description of measures to be taken to assure the protection of the rights of water users; CRS 34-33-121(1), which directs the Board to promulgate rules and regulations directed toward the surface effects of underground mining; and CRS 34-33-121(2)(j) which requires offsite areas be protected from damages which may result from underground mining activities. - *SUBSIDENCE*
90. **Rule 2.05.6(6)(c)** is revised to be consistent with 30 CFR 784.20(b)(4). The revision will require monitoring of water supplies in the subsidence monitoring plan. The statutory authority for this revision is in CRS 34-33-111(1)(m), which requires a detailed description of measures to be taken to assure the protection of the rights of water users; CRS 34-33-121(1), which directs the Board to promulgate rules and regulations directed toward the surface effects of underground mining; and CRS 34-33-121(2)(j) which requires offsite areas be protected from damages which may result from underground mining activities. - *SUBSIDENCE*
91. **Rule 2.05.6(6)(d)** is revised to be consistent with 30 CFR 784.20(b)(5). The revision will include the interruption, diminution, or contamination of water supplies as a cause for the Division to require a subsidence control plan. The statutory authority for this revision is in CRS 34-33-111(1)(m), which requires a detailed description of measures to be taken to assure the protection of the rights of water users; CRS 34-33-121(1), which directs the Board to promulgate rules and regulations directed toward the surface effects of underground mining; and CRS 34-33-121(2)(j) which requires offsite areas be protected from damages which may result from underground mining activities. - *SUBSIDENCE*
92. **Rules 2.05.6(6)(d)(ii), 2.05.6(6)(e)(i)(F)(III), and 2.05.6(6)(e)(ii)** are amended for clarity and to correct typographical errors.
93. **Rule 2.05.6(6)(e)(iii)** is revised to clarify that the required subsidence survey must include structures, renewable resource lands, and drinking, domestic, or residential water supplies; the requirement is no longer limited to the land surface. The statutory authority for this revision is in CRS 34-33-111(1)(m), which requires a detailed description of measures to be taken to assure the protection of the rights of water users; CRS 34-33-121(1), which directs the Board to promulgate rules and regulations directed toward the surface effects of underground mining; and CRS 34-33-121(2)(j) which requires offsite areas be protected from damages which may result from underground mining activities. - *SUBSIDENCE*
94. **Rule 2.05.6(6)(e)(iv)** is revised to be consistent with 30 CFR 784.20(b). The revision will require a subsidence control plan if the pre-subsidence survey indicates there may be a

diminution, interruption, or contamination of a water supply. The statutory authority for this revision is in CRS 34-33-111(1)(m), which requires a detailed description of measures to be taken to assure the protection of the rights of water users; CRS 34-33-121(1), which directs the Board to promulgate rules and regulations directed toward the surface effects of underground mining; and CRS 34-33-121(2)(j) which requires offsite areas be protected from damages which may result from underground mining activities. - *SUBSIDENCE*

95. **Rule 2.05.6(6)(f)(iii)** is revised to be consistent with 30 CFR 784.20(b)(5). The revision will require a description of measures to be taken to prevent material subsidence damage to structures, renewable resource lands and water supplies; the requirement is no longer limited to the land surface. The statutory authority for this revision is in CRS 34-33-111(1)(m), which requires a detailed description of measures to be taken to assure the protection of the rights of water users; CRS 34-33-121(1), which directs the Board to promulgate rules and regulations directed toward the surface effects of underground mining; and CRS 34-33-121(2)(j) which requires offsite areas be protected from damages which may result from underground mining activities. - *SUBSIDENCE*
96. **Rule 2.05.6(6)(f)(iv)** is revised to be consistent with 30 CFR 784.20(b)(8). The revision will require a description of measures to be taken to mitigate the effects of material subsidence damage to structures, renewable resource lands and water supplies; the requirement is no longer limited to the land surface. The statutory authority for this revision is in CRS 34-33-111(1)(m), which requires a detailed description of measures to be taken to assure the protection of the rights of water users; CRS 34-33-121(1), which directs the Board to promulgate rules and regulations directed toward the surface effects of underground mining; and CRS 34-33-121(2)(j) which requires offsite areas be protected from damages which may result from underground mining activities. - *SUBSIDENCE*
97. **Rule 2.05.6(6)(f)(v)** is revised to be consistent with 30 CFR 784.20(b)(4). The revision will require a description of measures to be taken to determine the degree of material subsidence damage to structures, renewable resource lands and water supplies; the requirement is no longer limited to the land surface. The statutory authority for this revision is in CRS 34-33-111(1)(m), which requires a detailed description of measures to be taken to assure the protection of the rights of water users; CRS 34-33-121(1), which directs the Board to promulgate rules and regulations directed toward the surface effects of underground mining; and CRS 34-33-121(2)(j) which requires offsite areas be protected from damages which may result from underground mining activities. - *SUBSIDENCE*
98. **Rule 2.05.6(6)(f)(vi)** is revised to be consistent with 30 CFR 784.20(b)(2). The revision will require the mapping of renewable resource lands and water supplies in addition to underground workings, surface facilities, and structures which are already required to be mapped. The statutory authority for this revision is in CRS 34-33-111(1)(m), which requires a detailed description of measures to be taken to assure the protection of the rights of water users; CRS 34-33-121(1), which directs the Board to promulgate rules and regulations directed toward the surface effects of underground mining; and CRS 34-33-121(2)(j) which requires offsite areas be protected from damages which may result from underground mining activities. - *SUBSIDENCE*

99. **Rule 2.06.6(2)(a)(i)** is revised to delete the outdated web address for the Natural Resources Conservation Service, and instead refer generically to the Service's web site. This will preclude the need for rulemaking if the web address should change again in the future.
100. **Rule 2.06.6(3) and (4)** are revised to correct a typographical error and to be consistent with 30 CFR 785.7(d), which acknowledges the delegation of authority of the Secretary of Agriculture to the State Conservationist regarding prime farmland determinations.
101. **Rule 2.06.8(1)** is amended to correct a typographical error.
102. **Rule 2.06.8(5)(b)(ii)(B)** is amended for clarity.
103. **Rule 2.07.1** is revised to include, in the scope of the rule, the proposed rules regarding improvidently issued permits and the post-permit issuance requirements of the Division and permittee. – O&C
104. **Rule 2.07.3(2)** is revised for clarity.
105. **Rule 2.07.3(3)(a)** is amended to remove technical revisions from the list of revisions requiring written notification of receipt of the application; the hearing and notice requirements for a technical revision will be outlined in revised Rule 2.08.4(6)(b). Specific statutory authority for this revision is in CRS 34-33-116(4), which requires that the Board promulgate regulations providing for adequate public notice of technical revision applications.
106. **Rules 2.07.4(2) and (3)** are amended organizationally for clarity.
107. **Rule 2.07.4(2)(e)** is revised to establish a deadline for submittal of a performance bond after the Division's approval of a permit. If a performance bond has not been submitted within three years of the Division's approval, the Division will review the permit to determine whether to reaffirm the approval or require revised or additional information from the applicant. If the Division determines that additional information is required, and the applicant has not submitted the requested information within 90 days of the Division's request, the approval will be rescinded and the Division will issue a proposed decision to deny the permit. The rule would only apply to the approval of permits on or after the effective date of the rule.

This rule change is necessary, since as Rule 2.07.4(2)(e) is currently written, an applicant could wait an indefinite time to submit a performance bond, and then automatically be issued the previously approved permit upon submittal. This is somewhat contrary to Section 34-33-109(6) of the Act, which states that a permit shall terminate if the permittee has not commenced surface coal mining operations covered by such permit within three years after issuance of the permit. Additionally, for permits that have been issued, under Rule 2.08.3, the Division is required to review the application and determine whether any revision or modification of the permit is necessary. These reviews are conducted, at a minimum, every 2½ years. Unless the permit has been issued, the Division does not have the authority to undertake periodic reviews of the application or require any necessary revisions. If a permit were to be issued more than three years after the Division has reviewed the initial application and proposed to approve it, it is possible that changes will have occurred in baseline site

conditions, right of entry, ownership and control information, compliance history, relationships to areas designated unsuitable for mining, etc. This proposal assures that the required written findings the Division would have made at the time of the original approval would still be relevant when a permit is issued, and ensures that the performance bond amount is adequate to complete the approved reclamation plan. The Board finds that this revision is necessary for the protection of public safety and the environment.

108. **Rule 2.07.4(2)(f)** is added; this rule is moved from Rule 2.07.4(3)(g).
109. **Rule 2.07.4(3)(d)(iv)** is revised to be consistent with 30 CFR 775.11(b)(2)(iv). The rule is revised to clarify that temporary relief may be granted when a party wishes to continue operating under a valid existing permit issued under Section 114 of the Act. – O&C
110. **Rule 2.07.4(3)(f)** is added, and the rest of the rule renumbered to accommodate its addition, to be consistent with 30 CFR 775.11(b)(3)(iii). The rule prohibits contact between the Board and parties appearing before the Board in an adjudicatory hearing if all parties are not present. – O&C
111. **Rule 2.07.4(3)(g)** is deleted and the text moved to Rule 2.07.4(2)(f)
112. **Rule 2.07.4(3)(h)** is revised to renumber a rule reference, since the referenced rule is proposed for change.
113. **Rule 2.07.6(1)(a)(i)** is revised for clarity.
114. **Rule 2.07.6(1)(b)** is revised to be consistent with 30 CFR 773.12(a). The rule is revised to refer to the review of information provided in Rules 2.03.4 and 2.03.5, identification of interests and compliance information, as the basis for permit eligibility. The rule previously described the information that would be reviewed; that description is now detailed in the proposed revisions to Rules 2.03.4 and 2.03.5 instead. Specific statutory authority for this rule is in CRS 34-33-114(3), which states that the Division cannot issue a permit until it finds that the applicant does not own or control any operation with a demonstrated pattern of willful violations. – O&C
115. **Rule 2.07.6(1)(b)** is further revised with the addition of **subparagraphs (i) and (ii)**, to be consistent with 30 CFR 773.12(a)(1) and (2). The rule is revised to clarify that permit denial will be based on any unabated violations at operations directly owned or controlled by the applicant, or for operations indirectly owned or controlled by the applicant, for violations cited after November 2, 1988. – O&C
116. **Rule 2.07.6(1)(c)** is added to be consistent with 30 CFR 773.12(b), and the rest of Rule 2.07.6(1) is renumbered to accommodate the change. The rule states that the Division will not issue a permit to an applicant or operator that is permanently ineligible to receive a permit. The rule is also revised to change the referenced rule which is renumbered with these proposed revisions. – O&C

117. **Rule 2.07.6(1)(d)** is added to be consistent with 30 CFR 773.12(d), and the rest of Rule 2.07.6(1) is renumbered to accommodate the change. The new rule requires the Division to send written notification, including an explanation of the reasons for the ineligibility and notice of the applicant's appeal rights, to an applicant that has been deemed ineligible for a permit. Specific statutory authority for this rule is in CRS 34-33-114(1), which requires the Division to notify the applicant in writing of its proposed decision. – O&C
118. **Rule 2.07.6(1)(f)** is revised to be consistent with 30 CFR 773.12(c). The revised rule clarifies that the Division cannot issue a permit until the applicant has provided updated ownership, control, and compliance information or certified that previously submitted information remains current; and the Division has again requested a compliance history report from AVS. – O&C
119. **Rule 2.07.6(1)(g)** is added to be consistent with 30 CFR 773.14. The new rule establishes procedures for provisionally issued permits where the applicant has been issued a violation resulting in the applicant being ineligible to receive a permit. Specific statutory authority for this rule is in CRS 34-33-114(3), which allows the Division to approve a permit application for an applicant who would otherwise be ineligible if an applicant submits proof that a violation has been corrected or is in the process of being corrected. – O&C
120. **Rule 2.07.6(2)(d)** is amended consistent with 30 CFR 761.12 and 773.15(c)(2). Statutory authority for this amendment is in CRS 34-33-114(2)(g). The Colorado statute and the revised state rule are identical to the relevant portions of Section 522(e) of SMCRA, 30 U.S.C. § 1272(e) and the federal rule, which was challenged and upheld in the United States Court of Appeals for the District of Columbia Circuit. See National Mining Association v. Kempthorne, 512 F.3d 702 (D.C. Cir. 2008).

The rule is changed to specify that valid existing rights must exist as of August 3, 1977 or at the time the land came under the protection of Rule 2.07.6(d), in the event that the land comes under protection after August 3, 1977, but there exist circumstances that would demonstrate valid existing rights to conduct surface coal mining operations on the protected lands. - VER

121. **Rule 2.07.6(2)(d)(iii)(A)** is revised to include study rivers and study river corridors in the lands within which surface mining activities may not be approved. The revised rule is consistent with 30 CFR 773.15. Statutory authority for this amendment is in CRS 34-33-114(2)(g). - VER
122. **Rule 2.07.6(2)(d)(iii)(D)(II)** is revised to be consistent with 30 CFR 773.15, and now includes the Federal Coal Leasing Amendments Act of 1975, 30 U.S.C. 181 et seq.; and the National Forest Management Act of 1976, 16 U.S.C. 1600 et seq. in the list of laws with which a surface coal mining operation on forest lands must comply. Statutory authority for this amendment is in CRS 34-33-114(2)(g). - VER
123. **Rule 2.07.6(2)(d)(iii)(D)(III)** is added to reference the procedure for obtaining Secretarial (Secretary of the United States Department of the Interior) approval to conduct surface coal mining operations on any federal lands within the boundaries of any national forest

(sub-subparagraph (D)), and clarifies (in Item 3 of sub-subparagraph (D)) that no permit shall be issued or boundary revision approved before the Secretary makes the findings required by Rule 2.07.6(2)(d)(iii)(D). The requirement for the Secretarial approval is currently in Rule 2.07.6(2)(d), but the procedure for obtaining the required approval from the Secretary was not referenced. The statement that no permit shall be issued or boundary revision approved prior to the Secretarial finding is being relocated; it is currently in Rule 2.07.6(2)(e)(iii). - VER

124. A typographical error at **Rule 2.07.6(2)(d)(iv)** has also been corrected.
125. **Rule 2.07.6(2)(d)(v)** is revised to be consistent with 30 CFR 773.15, and clarifies when a subsequent purchaser of lands mined will have been deemed to have obtained constructive knowledge of a waiver involving proposed surface coal mining operations. Statutory authority for this amendment is in CRS 34-33-114(2)(g). - VER
126. **Rule 2.07.6(2)(d)(vi)** was revised to be consistent with 30 CFR 761.11(c), which extends protection to both privately owned and publicly owned sites listed on the National Register of Historic Places, as directed by the U.S. District Court for the District of Columbia in In re: Permanent Surface Mining Regulation Litigation 620 F. Supp. 694 (D.D.C. 1985), reversed on other grounds, 839 F.2d 694 (D.C. Cir. 1988).

Specific statutory authority is in CRS 34-33-114(2)(g)(III), which provides for protection of places listed on the National Register of Historic Places; CRS 34-33-105, which provides the Board and Office jurisdiction over private property when necessary for enforcement of the Act. - VER

127. **Rule 2.07.6(2)(e)** is deleted and (e)(i) is renumbered consistent with the proposed revisions to Rule 2.07.6(2)(d). Rules 2.07.6(2)(f) through (o) are renumbered to accommodate this deletion.
128. **Rule 2.07.6(2)(e)(iii)** is deleted. This rule prohibited issuance of a permit on federal lands which have been deemed unsuitable for mining unless jointly approved by all affected agencies with jurisdiction over the park or historic site. Since new Rule 2.07.6(2)(d)(iii)(D)(III) asserts that all decisions on federal lands deemed unsuitable for mining are contingent on the Secretary making the findings required by Rule 2.07.6(2)(d)(iii)(D), this prohibition is no longer necessary. - VER
129. **Rule 2.07.6(2)(g)** is revised to include a reference to revised Rules 2.03.4(11) and (12), 2.03.5(2), and 2.07.4(2)(b), and 2.07.6(1); and is renumbered to (f).
130. **Rule 2.07.6(2)(j)** is amended for clarity and to correct a typographical error.
131. **Rule 2.07.6(2)(o)** is added to be consistent with 30 CFR 773.15(h). The new rule specifies that the permit applicant must satisfy all of the applicable requirements for Special Categories of Mining prior to permit approval. – O&C
132. **Rule 2.07.6(2)(p)** is added to be consistent with 30 CFR 773.15(i). The new rule clarifies that the Division is allowed to grant exceptions to certain revegetation requirements (diversity, permanence, production, liability period) when the proposed postmining land use will be long-term intensive agricultural use (cropland). Specific

statutory authority for this rule is in 34-33-120(2)(t), which allows the Division to grant exceptions to the liability period and revegetation success standards when the postmining land use is long-term intensive agricultural use. – O&C

133. **Rule 2.07.7(3)(b)** is revised to accommodate proposed new Rule 1.07.
134. **Rule 2.07.8(1)** is added to be consistent with 30 CFR 773.21. The new rule outlines the steps the Division must take when it finds that a permit has been improvidently issued as a result of the applicant not being eligible for that permit due to unabated or uncorrected violations. – O&C
135. **Rule 2.07.8(2)** is added to be consistent with 30 CFR 773.22. The new rule sets forth the notification requirements for the Division when it finds that a permit has been improvidently issued. – O&C
136. **Rule 2.07.8(3)** is added to be consistent with 30 CFR 773.23. The new rule outlines the suspension or rescission requirements for the Division when it finds it has improvidently issued a permit. – O&C
137. **Rule 2.07.9** is added to be consistent with 30 CFR 774.11. The new rule outlines requirements for the Division to update AVS when a new or revised permit is issued or when there are changes to a permittee's status; determine whether enforcement action should be taken in the event of a permittee owning or controlling an operation with an unabated violation; and make preliminary findings as to permanent permit ineligibility in the case of a permittee owning or controlling an operation with a pattern of willful violations or when violations result in irreparable damage to the environment as a result of an applicant or operator's intent not to comply with the Act, the Rules, and/or the approved permit. – O&C
138. **Rule 2.07.10** is added to be consistent with 30 CFR 774.12. The new rule requires the permittee to update information for persons identified in Rule 2.03.4(3) (ownership and control) within 60 days of any change to that information. – O&C
139. **Rule 2.08.4(5)** is amended to correct a typographical error.
140. **Rule 2.08.4(6)** is revised to clarify that permit revisions are subject to all of the requirements of Rule 2.07; not just the provisions pertaining to hearing and notice requirements. – O&C
141. **Rule 2.08.4(6)(b)(i)** is amended for clarity and to include the notification requirements for a technical revision previously found at Rule 2.07.3(3)(a). This change is being made so that government entities are notified of changes only when they have jurisdiction over or an interest in the affected area or subject matter of the technical revision. The rules previously required blanket notifications of all agencies, resulting in confusion on the part of the notified agencies as to why they were being notified when no changes were proposed that would pertain to their agency. Specific statutory authority for this revision is in CRS 34-33-116(4), which requires that the Board promulgate regulations providing for adequate public notice of technical revision applications.

142. **Rule 2.08.5(1)(b)** is revised to be consistent with 30 CFR 774.15(b)(4). The rule clarifies that a permit renewal application that includes proposed revisions to the permit must identify the proposed revisions, and that the revision will be subject to the requirements of the Rules pertaining to revisions of permits. Specific statutory authority for this rule is in CRS 34-33-109(7)(c), which states that the portion of a renewal which addresses any new land areas shall be subject to the full standards applicable to new applications . – O&C
143. **Rule 2.08.5(1)(d)** is revised to corrected a typographical error.
144. **Rule 2.08.6(4)(a)** is revised to correct rule references.
145. **Rule 2.11** is added to provide for challenges to ownership or control listings and findings, consistent with 30 CFR 773.25 through 773.27. – O&C
146. **Rule 2.11.1** is added to be consistent with 30 CFR 773.25. The new rule identifies who may challenge ownership and control listings and findings. – O&C
147. **Rule 2.11.2** is added to be consistent with 30 CFR 773.26. The new rule describes how to challenge ownership and control listings and findings. – O&C
148. **Rule 2.11.3** is added to be consistent with 30 CFR 773.27. The new rule establishes the burden of proof requirements for challenges to ownership and control listings and findings. – O&C
149. **Rule 2.11.4** is added to be consistent with 30 CFR 773.28. The new rule sets forth requirements for the Division to issue written decisions and findings on challenges to ownership and control listings and findings; establishes means of service of those findings to the challenger; outlines appeal procedures for the challenger; and requires the Division to update AVS when ownership and control listings become final. – O&C
150. **Rule 3.03.2(1)** is amended to ensure that any government agencies with jurisdiction over or an interest in a permit area are notified of a pending bond release application. Specific statutory authority for the revision is in CRS 34-33-125(1). - VER
151. **Rule 4.03.1(1)(e)** is deleted to clarify that the Division would not approve alternatives to all of the haul road design and construction criteria presented in Rule 4.03.1(3), as is implied. Within Rule 4.03.1(3), for each standard, the existing Rules specify whether alternatives to design and construction criteria may be approved by the Division, rendering paragraph (e) redundant and unclear. The revised rule is no less effective than 30 CFR 816.150 and 817.150, and 30 CFR 816.151 (a), (c), (d), and (e), and 817.151 (a), (c), (d), and (e). This amendment is in response to a required amendment codified at 30 CFR 906.16(f). The remainder of Rule 4.03.1(1) is renumbered to reflect the deletion. - ROADS
152. **Rules 4.03.1(3) and (3)(e)(vi)** are amended for clarity and to correct a typographical error.
153. **Rule 4.03.1(3)(a)** is revised to allow for alternatives, subject to Division review and approval, to the vertical alignment criteria for haul roads, provided the alternative design

is prepared by a qualified registered professional engineer and will meet accepted industry standards for safety.

154. **Rule 4.03.1(3)(e)(vii)** is revised to reflect the current name of the Division of Reclamation, Mining and Safety, formerly known as the Division of Minerals and Geology, and prior to that as the Mined Land Reclamation Division.
155. **Rule 4.03.2(1)(e)** is proposed for deletion to clarify that the Division would not approve alternatives to all of the access road design and construction criteria presented in Rule 4.03.2(3), as is implied. Within Rule 4.03.2(3), for each standard, the existing Rules specify whether alternatives to design and construction criteria may be approved by the Division, rendering paragraph (e) redundant and unclear. The revised rule is no less effective than 30 CFR 816.150 and 817.150. This amendment is in response to a required amendment codified at 30 CFR 906.16(f). The remainder of Rule 4.03.2(1) is renumbered to reflect the deletion. - *ROADS*
156. **Rules 4.03.2(3) and 4.03.2(3)(e)(v)** are amended for clarity and to correct a typographical error.
157. **Rule 4.03.2(3)(a)** is revised to allow for alternatives, subject to Division review and approval, to the vertical alignment criteria for access roads, provided the alternative design is prepared by a qualified registered professional engineer and will meet accepted industry standards for safety.
158. **Rule 4.03.3(3)(a)** is revised to allow for alternatives, subject to Division review and approval, to the vertical alignment criteria for light use roads, provided the alternative design is prepared by a qualified registered professional engineer and will meet accepted industry standards for safety.
159. **Rule 4.05.3(6)** is amended to correct a typographical error.
160. **Rule 4.05.9** is amended throughout to reflect the current name for the Natural Resources Conservation Service (formerly the Soil Conservation Service).
161. **Rule 4.05.9(4)** is amended to correct a typographical error.
162. **Rule 4.05.13(1)(a)** is amended to correct typographical errors.
163. **Rule 4.05.15(1)** is revised for clarity to confirm that replacement of water supply shall be conducted in accordance with existing Rule 2.04.7(3). - *SUBSIDENCE*
164. **Rule 4.05.15(2)** is added to be consistent with 30 CFR 817.41(j). The revision requires the prompt replacement of any protected water supply that is diminished, contaminated, or interrupted by mining activities. The rule was further revised as a result of comments received during the informal review process. The commenter requested that the Division clarify, consistent with Section 121(2)(a)(III) of the Act and Section 720(a)(2) of SMCRA, that the rule shall not be construed to interrupt or prohibit underground mining

operations. Specific statutory authority for this rule is in CRS 34-33-111(1)(m), which requires a detailed description of measures to be taken to assure the protection of the rights of water users; CRS 34-33-121(1), which directs the Board to promulgate rules and regulations directed toward the surface effects of underground mining; and CRS 34-33-121(2)(j) which requires offsite areas be protected from damages which may result from underground mining activities. The language in the statute is substantively identical to similar provisions in Section 720 of SMCRA, upon which 30 CFR 817.41(j), is based. 30 C.F.R. 817.41(j) was challenged and upheld in the United States Court of Appeals for the District of Columbia Circuit. See National Mining Association v. Kempthorne, 512 F.3d 702 (D.C. Cir. 2008).

Rule 2.05.6(3)(b)(iv), the requirement for a hydrological protection plan, specifically requires identification of monitoring site locations, points of compliance, parameters, sampling frequency, and a description of how these data will be used to determine the impact on the hydrologic balance. With regard to a determination of whether a water supply has been contaminated, diminished, or interrupted by mining activities, Rule 4.05.15 states that this baseline information and the approved hydrological protection plan will be used to determine the impact of mining activities upon the water supply. The Division does not intend for the baseline information to be the exclusive basis for determining such impacts, and other relevant information may be considered. -
SUBSIDENCE

165. **Rule 4.06.4(2)(a)** is amended to correspond to the recent Federal regulation change to 816/817.22(d)(1)(i). This rule explicitly allows for variable soil replacement thickness (or variable topsoil substitute or supplemental material), based on postmining land use objectives and revegetation goals. The final sentence of the proposed rule change is included to protect against potential abuses, by ensuring that the permit application includes a well defined and justified plan for soil replacement. Inclusion of the requirement for a defined soil replacement plan is consistent with the intent of the final Federal rule change (Federal Register Volume 71, No. 168, 8/30/06). The cited federal register publication includes language indicating that the permit applicant must clearly set forth the justification for any non-uniform redistribution, that all removed topsoil must be redistributed on disturbed areas, and that the application should specify the amount of variability allowable and the minimum acceptable topsoil replacement thickness. Specific statutory authority for this rule is in CRS 34-33-120(2)(f), which requires restoration of topsoil or best available subsoil which best able to support vegetation.
166. **Rule 4.06.4(3)** is added for clarity. This rule is identical to the currently approved topsoil redistribution requirement that was previously located in Rule 4.14.2(5), which pertains to grading requirements. Since the requirement is specific to topsoil replacement, it is probably best located in the topsoil redistribution requirements section of the rules.
167. **Rule 4.07.3** is revised to require complete backfill against bulkhead portal seals, to specify the method of backfill placement, and to require that closure completions be certified by a registered professional engineer. The rule is also revised to specify the

Mine Safety and Health Administration (MSHA) shaft closure requirements that were only referenced in the currently approved rule; the current rules require that closures be consistent with the closure requirements of MSHA. The Division has observed, at forfeiture sites that the backfill has settled away from the entrance, allowing access to the mine along the roof. One of the failures observed was in an entry that had been sealed with a bulkhead with backfill placed at the entrance to the tunnel. The roof area then settled, allowing access to the bulkhead, where methane had pooled. Rules in place at the time of that closure did not require certification, by a registered professional engineer, that the opening was backfilled consistent with MSHA standards. Consultation with personnel from the Inactive Mines Program of the Division indicates that backfills have not settled when they have been able to verify that the backfill is solid (within three (3) inches of the roof). Specific statutory authority for this rule is in CRS 34-33-121(2)(b) which requires the sealing of all underground entrances when no longer necessary for their intended use. The proposed rule was revised, based on comments received during the informal review process, to clarify that the requirement for the innermost three feet of backfill to consist of material at least 2' in diameter would only apply when no bulkhead seal is installed. The Board finds that this revision is necessary for the protection of public safety. In addition to the revisions described, the remainder of the rule is renumbered to accommodate the new sections.

168. **Rule 4.08.1(4)(a)(i)** is amended to be consistent with the proposed revisions to Rule 1.04(79).
169. **Rules 4.08.2(1) and (2)** are amended to be consistent with proposed revisions to Rule 1.04(79).
170. **Rule 4.08.4(4)** is amended for clarity and for consistency with proposed revisions to Rule 1.04(79).
171. **Rule 4.08.4(6)(a)** is amended to be consistent with proposed revisions to Rule 1.04(79).
172. **Rule 4.08.4(7)(a)** is amended to be consistent with proposed revisions to Rule 1.04(79).
173. **Rule 4.08.4(8)** is amended for consistency with proposed revisions to Rule 1.04(79) and to prohibit flyrock being cast into areas beyond the topsoil stripping area where topsoil resource loss would occur. This rule was revised during the informal review process, based on comments requesting that the Division clarify that flyrock resulting in topsoil resource contamination would be prohibited. The commenter was concerned that, "taken to the extreme, the Division would spend time looking through the brush for one or two inch rock." The intent of the rule is to protect topsoil resources from loss. This rule change is necessary to ensure that all areas where flyrock is cast and any subsequent disturbance would be subject to the performance standards and bonding requirements of the Rules. Specific statutory authority for this revision is in CRS 34-33-120(2)(j), (u), and (x). The Board finds that this revision is necessary for protection of the environment.

174. **Rule 4.08.4(10)** is amended for clarity and for consistency with the proposed revisions to Rule 1.04(79).
175. **Rule 4.08.4(10)(c)(i)** is also amended for clarity and for consistency with the proposed revisions to Rule 1.04(79).
176. **Rule 4.08.5(4)** is amended for clarity and for consistency with the proposed revisions to Rule 1.04(79).
177. **Rule 4.09.1(12)** is revised to correct a typographical error.
178. **Rule 4.09.3(1)** is revised to correct a typographical error.
179. **Rules 4.10.2(1) and (2)(a)** are amended to correct typographical errors, and (paragraph (1)) to remove the requirement that the Division approve the designation of an individual under the direction of a registered professional engineer who would perform an inspection of a coal mine waste bank. Since a report of the inspection is certified by a registered professional engineer, liability for the report would be with the engineer who certified the report, thus negating the need for the Division to approve the engineer's designation of an inspector.
180. **Rule 4.10.4** is amended for clarity and to correct typographical errors.
181. **Rule 4.11.3** is amended to correct a typographical error.
182. **Rule 4.11.5(3)(a)(i)** is amended to reflect the current name for the Natural Resources Conservation Service (formerly the Soil Conservation Service).
183. **Rule 4.14.2(5)** is revised for clarity by removing a portion of the rule that pertains to topsoil replacement. Since Rule 4.14 pertains to backfilling and grading, the portion of the rule addressing topsoil replacement is moved to Rule 4.06.4, Topsoil Redistribution.
184. **Rule 4.14.4(1)** is revised and Rules 4.14.4(1)(a) and (b) are proposed for addition to define thin overburden. The revised rule is no less effective than 30 CFR 816.104(a). The specific requirement of 80% of the initial volume is omitted in favor of a more general reference that thin overburden occurs where the overburden thickness times the swell factor, plus the thickness of other available waste materials, is less than the combined thickness of the overburden and coal bed prior to removing the coal. Specific statutory authority for this rule is in CRS 34-33-120(2)(c), which allows a variance from the requirement to achieve approximate original contour in areas where the volume of overburden is small relative to the thickness of the coal deposit. The rule was revised based on comments received during the informal review process that questioned the use of the "entire permit area" in determining the availability of spoil material. A review of the federal preamble to the rule (56 FR 65633) indicates that the federal rule would not require excavation of an additional pit for the sole purpose of obtaining material to backfill the original pit. The preamble further states that the only practical difference

between the general performance standards for backfilling and grading and those for thin overburden is that the thin overburden rules establish priority for the use of spoil and waste material in reclamation. The rule requires the operator to use all available spoil and waste material from the entire permit area, but does not require additional excavation. The revised state rule clarifies that only available spoil and waste material that resulted from surface mining operations would be used to backfill areas of thin overburden. - *THIN AND THICK OVERBURDEN*

185. **Rule 4.14.5(1)** is revised and Rules 4.14.5(1)(a) and (b) are proposed for addition to define thick overburden. The revised rule is no less effective than 30 CFR 816.105(a). The specific requirement of 120% of the initial volume is omitted in favor of a more general reference that thick overburden occurs where the overburden thickness times the swell factor is more than the combined thickness of the overburden and coal bed prior to removing the coal. Specific statutory authority for this rule is in CRS 34-33-120(2)(c), which allows a variance from the requirement to achieve approximate original contour in areas where the volume of overburden is large relative to the thickness of the coal deposit. The rule was revised based on comments received during the informal review process that questioned the use of the “entire permit area” in determining the availability of spoil material. A review of the federal preamble to the rule (56 FR 65634) indicates that there are only two practicable differences between the general performance standards for backfilling and grading and those for thick overburden. The thick overburden rules differ in that they require that after approximate original contour is restored, the permittee may continue to use any remaining spoil and other waste materials to attain the lowest practicable grade, but not more than the angle of repose; and the permittee must dispose of any excess spoil in accordance with §816.71 through 816.74 (federal rules governing disposal of excess spoil).- *THIN AND THICK OVERBURDEN*
186. **Rule 4.15.1(2)(b)** is revised for clarification.
187. **Rule 4.15.7(2)(d)(ii)** is revised to correspond to amended Federal Rule 816/817.116(a)(1). The proposed rule deletes the requirement that technical documents, upon which success standards are based, must be approved by the Director (i.e. approved by OSM within a formal program amendment). Specifically, the proposed rule ensures that the permit applicant will be able to choose only from among available technical document based success standards approved by the State, identified in writing, and made available to the public. Specific statutory authority for this rule is in CRS 34-33-108 which requires that any rule or regulation promulgated by the board which is required by a federal law, rule, or regulation shall become repealed when said federal rule or regulation is deleted or withdrawn.
188. **Rule 4.15.7(5)** is revised to allow for increased flexibility with respect to the allowable time frame for demonstrating revegetation success, and is consistent with revised Federal Rule 816/817.116(c)(3)(i). The rule was further revised during the informal review process to include “undeveloped land” in the list of land uses that are subject to the requirement to provide success demonstrations in any year following year nine of the

liability period. Specific statutory authority for the change is CRS 34-33-120(2)(s), which requires the establishment of a diverse, effective, and permanent vegetative cover...at least equal in extent of cover to the natural vegetation of the area; and CRS 34-33-120(2)(t) which describes the revegetation liability period.

189. **Rule 4.15.7(5)(b)** is revised to reflect the current name of the Division of Reclamation, Mining and Safety, formerly known as the Division of Minerals and Geology, and prior to that as the Mined Land Reclamation Division.
190. **Rule 4.15.7(5)(e)** is revised to allow for interseeding as a normal husbandry tool for pastureland stand rejuvenation, or to enhance specific forage components, with justification and restrictions patterned after that specified for rangeland or wildlife habitat interseeding, in 4.15.7(5)(g). Specific statutory authority for the change is CRS 34-33-120(2)(s), which requires the establishment of a diverse, effective, and permanent vegetative cover...at least equal in extent of cover to the natural vegetation of the area.
191. **Rule 4.15.7(5)(g)**, is revised to be consistent with proposed land use category changes at Rule 1.04(71)(c). The rule was further revised, based on comments received during the informal process, to retain rangeland as a land use that would incorporate interseeding as a normal husbandry practice. This change was necessary because the Division has retained a revised definition for rangeland in the rules (see Item 14).
192. **Rule 4.15.8** is revised, adding subsection (2) to more closely correspond to comparable Federal regulations regarding success criteria applicable to specific land uses. The remaining subsections of the rule are renumbered to accommodate the new subsection. Specific statutory authority for the change is CRS 34-33-120(2)(s), which requires the establishment of a diverse, effective, and permanent vegetative cover...at least equal in extent of cover to the natural vegetation of the area. The rule was further revised based on comments received during the informal process. Paragraph (d) was added, to provide applicable success criteria that would apply to rangeland; and species diversity was removed from the criteria for (a) grazingland or pastureland, and (c) forestry. The rule was further revised (subparagraph "b") during the informal review process to include "undeveloped land" in the list of land uses that would require a success demonstration for vegetation cover, production, and woody plant density.
193. **Rule 4.15.8(2)** is renumbered as 4.15.8(3) and is revised to be consistent with the proposed new subsection 4.15.8(2).
194. **Rule 4.15.8(4)** is renumbered as 4.15.8(5) and is revised to be consistent with proposed revisions to Rules 1.04(71)(c) and 4.15.11(1). The rule was further revised, based on comments received during the informal process, to retain rangeland as a land use that would require sampling for herbaceous production. This change was necessary because the Division has retained a revised definition for rangeland in the rules (see Item 14).
195. **Rule 4.15.8(7)** is renumbered as 4.15.8(8) and is revised to be consistent with proposed

revisions to Rules 1.04(71)(c). The rule was further revised, based on comments received during the informal process, to retain rangeland as a land use that would require sampling for woody plant density. This change was necessary because the Division has retained a revised definition for rangeland in the rules (see Item 14). One commenter requested that the Division replace “rangeland” with “grazingland” in this rule. The Division has not made this change, consistent with the discussion in Item 14, above, so that currently approved reclamation plans will stay in compliance with this revised rule. The commenter also referred to and requested that the Division include language stating that the primary land use standards would prevail when there is a primary and secondary approved postmining land use. This language originates in the General Performance Standards of the Initial Program Regulations (30 CFR Subchapter B), but was not adopted in the Permanent Program Performance Standards (30 CFR Subchapter K). The suggested language would not be consistent with or as effective as the current federal rules, as required by 30 CFR 730.5, and has therefore not been proposed.

196. **Rule 4.15.9** is revised to explicitly allow for total harvest method, and to better conform to statistical method provisions of Rule 4.15.11 (e.g. accommodate use of the reverse null demonstration). Specific statutory authority for the change is CRS 34-33-120(2)(s), which requires the establishment of a diverse, effective, and permanent vegetative cover...at least equal in extent of cover to the natural vegetation of the area.
197. **Rule 4.15.11(1)** is revised to explicitly allow for total harvest method. Specific statutory authority for the change is CRS 34-33-120(2)(s), which requires the establishment of a diverse, effective, and permanent vegetative cover...at least equal in extent of cover to the natural vegetation of the area.
198. **Rule 4.15.11(2)(c)** is revised to clarify the appropriate use of the statistical method set forth in the rule. Specific statutory authority for the change is CRS 34-33-120(2)(s), which requires the establishment of a diverse, effective, and permanent vegetative cover...at least equal in extent of cover to the natural vegetation of the area.
199. **Rule 4.15.11(2)** is revised to add new subparagraph (d) which would include additional or alternative non-parametric statistical techniques that may be applicable to cover, production, or woody plant density in sections corresponding to 4.15.11(2) or solely for woody plant density, in sections corresponding to 4.15.11(3). The May 28, 2003 document *Evaluation and Comparison of Hypothesis Testing Techniques for Bond Release Applications*, prepared by McDonald, Howlin, Polyakova, and Bilbrough, for the Wyoming Abandoned Coal Mine Lands Research Program, contains techniques applicable to success demonstration in Colorado, and it may be appropriate to reference the document in whole or in selected parts, for inclusion in the Colorado Rules.
200. **Rule 4.15.11(3)(b)(i)** is incorporated into an amended 4.15.11(3)(b). There is no longer a need for a separate subsection (i).
201. **Rule 4.15.11(3)(b)(ii)** is revised to delete the sample adequacy approach and

hypothesis test approach associated with Stabilization of the Running Mean. **Rule 4.15.11(3)(c)**, the companion hypothesis test is also proposed for deletion.

This approach is not well documented in the literature, and has not proven to be useful during the 5 years since it was included in the rules. With the additional flexibility to be provided by inclusion of non-parametric approaches described in the publication by McDonald et.al., removal of the Stabilization of the Running Mean from the regulations is reasonable and prudent.

Specific statutory authority for the change is CRS 34-33-120(2)(s), which requires the establishment of a diverse, effective, and permanent vegetative cover at least equal in extent of cover to the natural vegetation of the area.

202. **Rule 4.16.3(6)** is revised for consistency with proposed revisions Rule 1.04(71)(c). The rule was further revised, based on comments received during the informal process, to retain rangeland as a premining land use that may be changed to a postmining land use of cropland. This change was necessary because the Division has retained a revised definition for rangeland in the rules (see Item 14).
203. An extraneous editor's note is removed between **Rules 4.17 and 4.18**.
204. **Rule 4.18(5)(k)** is amended to be consistent with the land use definitions presented in proposed Rule 1.04(71).
205. **Rule 4.20.1(1)** is amended to be consistent with 30 CFR 817.121(a). The revision requires that underground mining activities be conducted to prevent material subsidence damage, to the extent technologically and economically feasible, to structures, renewable resource lands, and water supplies; the requirement is no longer limited to surface lands. Specific statutory authority for this rule is in CRS 34-33-111(1)(m), which requires a detailed description of measures to be taken to assure the protection of the rights of water users; CRS 34-33-121(1), which directs the Board to promulgate rules and regulations directed toward the surface effects of underground mining; and CRS 34-33-121(2)(j) which requires offsite areas be protected from damages which may result from underground mining activities. The language in the statute is substantively identical to similar provisions in Section 720 of SMCRA, upon which 30 CFR 817.121(a), upheld in the United States Court of Appeals, is based. The rule was further revised as a result of comments received during the informal review process. The commenter requested that the Division clarify, consistent with Section 121(2)(a)(III) of the Act and Section 720(a)(2) of SMCRA, that the rule shall not be construed to interrupt or prohibit underground mining operations. - *SUBSIDENCE*
206. **Rule 4.20.3(1)** is amended to be consistent with 30 CFR 817.121(a). The revised rule will require subsidence prevention, minimization, and/or compensation for material subsidence damage to structures, renewable resource lands, and water supplies; the requirement is no longer limited to surface lands. Specific statutory authority for this rule is in CRS 34-33-111(1)(m), which requires a detailed description of measures to be

taken to assure the protection of the rights of water users; CRS 34-33-121(1), which directs the Board to promulgate rules and regulations directed toward the surface effects of underground mining; and CRS 34-33-121(2)(j) which requires offsite areas be protected from damages which may result from underground mining activities. The language in the statute is substantively identical to similar provisions in Section 720 of SMCRA, upon which 30 CFR 817.121(1), upheld in the United States Court of Appeals, is based. - *SUBSIDENCE*

207. **Rule 4.20.3(1)** is further amended to allow an exception to the requirement to prevent or minimize material subsidence damage to structures in cases where the permittee has obtained written consent from the owner of the structure, or when the costs to prevent damage exceed the costs of repair. The exception does not relieve the permittee from any obligations to repair, replace, or otherwise compensate owners for material subsidence damage, and would not apply if there were a threat to health or safety. Specific statutory authority for this rule is in CRS 34-33-121(1), which directs the Board to promulgate rules and regulations directed toward the surface effects of underground mining; and CRS 34-33-121(2)(j) which requires offsite areas be protected from damages which may result from underground mining activities. The language in the statute is substantively identical to similar provisions in Section 720 of SMCRA, upon which 30 CFR 817.121(1), upheld in the United States Court of Appeals, is based. - *SUBSIDENCE*
208. **Rule 4.20.3(2)** is amended consistent with 30 CFR 817.121(b). The rule is revised to include structures, renewable resource lands, and water supplies in the list of resources which would require repair, rehabilitation, replacement, or compensation if materially subsidence damaged. Specific statutory authority for this rule is in CRS 34-33-111(1)(m), which requires a detailed description of measures to be taken to assure the protection of the rights of water users; CRS 34-33-121(1), which directs the Board to promulgate rules and regulations directed toward the surface effects of underground mining; and CRS 34-33-121(2)(j) which requires offsite areas be protected from damages which may result from underground mining activities. The language in the statute is substantively identical to similar provisions in Section 720 of SMCRA, upon which 30 CFR 817.121(b), upheld in the United States Court of Appeals, is based. - *SUBSIDENCE*
209. **Rule 4.20.3(3)** is added consistent with 30 CFR 817.121(c) and 817.41(j). **Rule 4.20.3(2)(c)** is renumbered to accommodate the new rule. The revised rule will require operators to post bond in the amount of the estimated cost of the repairs if the permittee will be repairing, or in the amount of the decrease in value if the permittee will be compensating the owner, or in the amount of the estimated costs to replace the protected drinking, domestic or residential water supply, if the permittee will be replacing the water supply, until the repair, compensation, or replacement is completed.

Specific statutory authority for this rule is in CRS 34-33-111(1)(m), which requires a detailed description of measures to be taken to assure the protection of the rights of

water users; CRS 34-33-121(1), which directs the Board to promulgate rules and regulations directed toward the surface effects of underground mining; and CRS 34-33-121(2)(j) which requires offsite areas be protected from damages which may result from underground mining activities. The language in the statute is substantively identical to similar provisions in Section 720 of SMCRA, upon which 30 CFR 817.41(j), upheld in the United States Court of Appeals, is based. - *SUBSIDENCE*

210. **Rule 4.20.4(1) and (3)** are amended for clarity and for consistency with proposed revisions to Rule 1.04(71b).
211. **Rule 4.20.4(4)** is revised to reflect the current name of the Mine Safety and Training Program of the Colorado Division of Reclamation, Mining and Safety (formerly the Division of Mines).
212. **Rule 4.22.4(1)(b)** is revised to correct a typographical error.
213. **Rule 4.25.2(3)** is revised to correct typographical errors.
214. **Rule 4.25.3 and 4.25.3(2)** are revised to correct a typographical error and to be consistent with 30 CFR 785.7(d), which acknowledges the delegation of authority of the Secretary of Agriculture to the State Conservationist regarding prime farmland determinations.
215. **Rule 4.25.5(3)(b)** is revised to reflect the current name for the Natural Resources Conservation Service (formerly the Soil Conservation Service).
216. **Rule 4.25.5(3)(d)** is revised to be consistent with proposed Rule 4.15.11(1) and to reflect the current name for the Natural Resources Conservation Service (formerly the Soil Conservation Service).
217. **Rule 4.30.1(2)(b)** is revised to correct a typographical error.
218. **Rule 5.02.2(4)(a)** is revised to be consistent with 30 CFR 840.11(f).
219. **Rule 5.02.2(8)(a)(v)** is revised to be consistent with revised Rule 1.04(79).
220. **Rules 5.03.2(2)(e), 5.03.2(4)(a)(ii), 5.03.2(4)(b)(ii), and 5.03.2(5)(c)** are revised for clarity to correct typographical errors.
221. **Rule 5.03.2(5)(e)** is added to be consistent with 30 CFR 843.11(d). The new rule requires the continuation of reclamation obligations and activities intended to protect the public health and safety and environment during the period of any cessation order, unless otherwise noted in the order. – O&C
222. **Rule 5.03.5(1)(d)** is revised to correct a rule reference that will change with these proposed revisions.

223. The title of **Rule 5.04** is revised to clarify that the rule governs civil penalties. Proposed revisions to the rules will separate rules for civil penalties, individual civil penalties, and alternative enforcement. – O&C
224. **Rule 5.04.3(5)(a)** is revised to correct a typographical error.
225. **Rule 5.04.7** is renumbered to become Rule 5.05, and the title is revised to clarify that the rule governs individual civil penalties. Subparagraphs of previous Rule 5.04.7 are renumbered under the new designation of Rule 5.05, and titles are added consistent with 30 CFR 846. – O&C
226. **Rule 5.04.8** is renumbered to become Rule 5.06.4, consistent with 30 CFR 847.16. – O&C
227. **Rule 5.05.1** is added to identify the scope of Rule 5.05. – O&C
228. **Rule 5.06** is added, consistent with 30 CFR 847. The new rule adds general provisions for alternative enforcement, provides for criminal penalties, and incorporates existing provisions for injunctive relief. – O&C
229. **Rule 5.06.1** is added, consistent with 30 CFR 847.1, to outline the scope of Rule 5.06. – O&C
230. **Rule 5.06.2** is added, consistent with 30 CFR 847.2. The revisions include a requirement for the Division to update AVS when a person has been convicted or a judgment has been entered against him/her under the alternative enforcement provisions; clarification that the status of the performance bond cannot be used as the sole basis for determining whether alternative enforcement is warranted; and a statement that nothing in the alternative enforcement provisions will eliminate or limit any additional enforcement rights or procedures available under federal or state law. – O&C
231. **Rule 5.06.3** is added to be consistent with 30 CFR 847.11. The new rule sets forth provisions for the pursuit of criminal penalties against any person who willfully and knowingly violates a condition of the permit or refuses to comply with Division or Board orders; who knowingly makes a false statement, representation or certification or other document required to be maintained by the Division or Board; or who knowingly fails to make a statement, representation or certification or other document required to be maintained by the Division or Board. Specific statutory authority for this new rule is in 34-33-123(9) which states that any operator who willfully and knowingly violates a condition of a permit or fails or refuses to comply with any order issued by the Division or Board under the Act shall, upon conviction, be punished by a fine, imprisonment, or both. – O&C
232. **Rule 5.06.4(2)** is added, consistent with 30 CFR 847.16(b). The new rule clarifies what constitutes a civil action for relief. – O&C

233. **Rule 5.06.4(3)** is added, consistent with 30 CFR 847.16(c). The new rule states that temporary restraining orders will be issued in accordance with the Colorado Rules of Civil Procedure. Existing paragraph (2) is renumbered to (4) to accommodate the additions of paragraphs (2) and (3). – O&C
234. **Rule 6.01.1** is revised to correct an incorrect rule reference. The referenced Rule should be 2.05.3(6)(a). The rule is further revised to remove language explaining the difference between a certified blaster and a shot firer. The definition of a certified blaster is addressed at Rule 1.04(20a).
235. **Rule 6.01.3(3)** is revised to reflect the current name of the Mine Safety and Training Program of the Colorado Division of Reclamation, Mining and Safety (formerly the Division of Mines).
236. **Rule 6.04(1)(f)** is revised to correct a typographical error (at Rule 6.04(1)) and to reflect the current name of the Mine Safety and Training Program of the Colorado Division of Reclamation, Mining and Safety (formerly the Division of Mines).
237. **Rule 7.06.2(1)** is revised to require the notarized signature of the petitioner seeking to designate lands unsuitable for coal mining. The revised rule is no less effective than 30 CFR 764.13(b)(1)(i). The requirement for notarized signatures will prevent the inclusion of unauthorized names on a petition. Specific statutory authority for this amendment is CRS 34-33-126(2)(a) which addresses requirements for petitions to designate lands unsuitable for all or certain types of surface coal mining operations. – *VER AND LANDS UNSUITABLE FOR SURFACE COAL MINING*
238. **Rule 7.06.3(1)** is revised to require the notarized signature of the petitioner seeking to terminate a previous designation that lands are unsuitable for coal mining. The revised rule is no less effective than 30 CFR 764.13(c)(1)(i). The requirement for notarized signatures will prevent the inclusion of unauthorized names on a petition. Specific statutory authority for this amendment is CRS 34-33-126(2)(a) which addresses requirements for petitions to designate lands unsuitable for all or certain types of surface coal mining operations. – *VER AND LANDS UNSUITABLE FOR SURFACE COAL MINING*

Specific Findings Required Under CRS 34-33-108(1)

CRS 34-33-108(1) states that Rules and Regulations promulgated pursuant to the Act shall be no more stringent than required to be as effective as the federal "Surface Mining Control and Reclamation Act of 1977" as amended, and the federal regulations thereunder, unless the Board makes a specific finding that either protection of the public safety or the environment requires a more stringent regulation. Accordingly, the Colorado Mined Land Reclamation Board finds that Rules 2.04.13(3), 2.07.4(2)(e), 4.07.3, and 4.08.4(8) as amended on *(date)* are necessary for the protection of the public safety and/or the environment. The basis for each specific finding is set forth in the Statement of Basis, Purpose, and Specific Statutory Authority prepared for these rule revisions.

(Name)
Chair, Mined Land Reclamation Board

Date

Note: These specific findings will be made and this document will be signed at the time of adoption of the proposed rules by the Mined Land Reclamation Board.