

MEMORANDUM OF AGREEMENT
FOR THE IMPLEMENTATION OF SB 181 AMENDMENTS
TO THE COLORADO WATER QUALITY CONTROL ACT (25-8-101, et seq.)
PERTAINING TO THE REGULATION OF COAL MINES

THIS MEMORANDUM OF AGREEMENT (MOA) is entered into this 28th day of August, 1990, by and between the Colorado Department of Health, Water Quality Control Commission (WQCC), Water Quality Control Division (WQCD), the Colorado Department of Natural Resources (DNR), the Mined Land Reclamation Board (MLRB) and the Mined Land Reclamation Division (MLRD).

Section 1. BACKGROUND

For many years there has been a spirit of cooperation between the WQCD and the MLRD. The staffs of each agency have frequently met to discuss issues where their responsibilities to the people of Colorado coincide. The WQCD administers and implements the water quality programs adopted by the WQCC. The MLRD's responsibility is to allow for the continued development of coal mining operations in an environmentally acceptable manner while ensuring that the affected land is reclaimed so it may be put to a beneficial use.

The MLRD administers and enforces the Colorado Surface Coal Mining Reclamation Act (Coal Law) which conforms to the Federal Surface Mining Control and Reclamation Act of 1977 (SMCRA) as provided for by Section 503 of the Federal Act. State primacy for the administration of the Federal program on non-federal lands was granted on December 15, 1980, and was amended on December 12, 1982 to allow for state regulation on federal lands. Program approval followed review by the Federal Office of Surface Mining Reclamation and Enforcement (OSMRE) to ensure compliance with 30 CFR parts 700-707 and 730-865. Other Federal agencies concerned with, or having special expertise in, the Colorado program reviewed the state program. The Administrator of the Environmental Protection Agency (EPA) made a finding that the Colorado Surface Coal Mining Reclamation Act and regulations promulgated thereunder ensured compliance with all aspects of the Clean Water Act as amended (33 U.S.C. 1151-1175) on September 16, 1980.

Furthermore, the coal program is subjected to rigorous program oversight by OSMRE to ensure that all aspects of the approved program are administered properly. All regulatory changes proposed by the coal program are subject to review and approval by both OSMRE and the EPA for compliance with other state, federal and local environmental statutes and regulations, which includes the Clean Water Act.

The Mined Land Reclamation Board reviews the administration of the Coal Law and associated regulations by the Coal Section of the MLRD, and promulgates regulations as necessary to uphold those statutes. The Board acts as a body of formal review in hearings on decisions issued by the MLRD.

Currently, relative to the Coal Law, two agreements between the Colorado Department of Health (CDH) and the MLRD exist. In 1985, the MLRD, CDH and the WQCD were signatories to a Memorandum of Agreement (MOA) to coordinate activities on ground water. The objective of this MOA is to protect the

quality of ground water resources to maximize beneficial uses and protect public health. In 1984, the CDH and the MLRD conducted a series of meetings to establish areas of responsibility and lines of communication for the regulation of sediment control and water treatment facilities for coal mining operations. This resulted in a Memorandum of Understanding which outlined joint review procedures for permit review of such facilities, water sampling activities by the MLRD, and coordination in enforcement actions. The MLRD pursues enforcement actions related to the design and maintenance of structures utilized to minimize disturbance to the hydrologic balance, while the WQCD is responsible for enforcing water quality control standards at the point of discharge. This Memorandum of Understanding was signed on January 21, 1985.

Subsection 25-8-202(7) of the 1989 amendments to the state Water Quality Control Act (SB 181) restates and clarifies existing law, and provides a procedure for coordination between state agencies vested with responsibilities to implement water quality protection of state waters. Key among the provisions is the requirement that the WQCC and the WQCD recognize the water quality responsibilities of the following entities, referred to in the subsection as the "implementing agencies": the Mined Land Reclamation Division; the State Engineer; the Oil and Gas Conservation Commission; and the state agency responsible for activities related to the federal "Resource Conservation and Recovery Act of 1976" as amended. Currently, this is the Hazardous Material and Waste Management Division located in the state Health Department.

The WQCC is to remain solely responsible for the adoption of water quality standards and classifications for state waters. Each implementing agency is to apply these water quality standards and classifications adopted by the WQCC through their own programs after consultation with the WQCC and the WQCD. Generally, application of the standards and classifications would be limited to nonpoint surface discharges and to sub-surface discharges, as the WQCD remains solely responsible for the issuance and enforcement of permits for point source discharges into state surface waters. The implementing agencies are to specify applicable points of compliance for groundwater discharges. The points of compliance are to be adopted in accordance with criteria established through public rulemaking following consultation with the WQCC and the WQCD.

By requiring the implementing agencies to apply the standards and classifications established by the WQCC, the legislature has attempted to clarify the primary regulatory authorities responsible for assuring uniform water quality protection for all waters of the state.

In acknowledging the water quality responsibilities of the implementing agencies cited in the act, the amendments further specify that the WQCC and the WQCD shall not require permits for, or otherwise regulate, activities subject to the jurisdiction of the implementing agencies unless the WQCC finds, pursuant to § 25-8-202(7) (b) (II), and after notice and public hearing, that such regulation is necessary to assure compliance with the federal Clean Water Act, the water quality requirements contained in the Colorado water rights statutes, or water quality classifications and standards; to protect present and future beneficial uses of water; to avoid the imposition of a disproportionate burden on other dischargers, or classes of dischargers; or in the event an implementing agency fails to

provide reasonable assurance that compliance has been obtained through its own programs.

In the event the WQCC must take regulatory action to ensure compliance, WQCC action shall be undertaken solely through the adoption of control regulations under section 25-8-205, or through the permit regulations under section 25-8-501. The WQCD may enforce such regulations.

Section 2. PURPOSE

This agreement is being entered into by the above-mentioned parties for the following purposes:

- 2.1 To recognize the responsibilities of each agency for protecting water quality within the State of Colorado;
- 2.2 To formalize the previous informal cooperative working relationships between the parties; and,
- 2.3 To provide procedures for communication, exchange of information, and resolution of problems as necessary to carry out the provisions of Senate Bill 181.

Section 3. AUTHORITY

The principal authority for this agreement is contained in the Water Quality Control Act, section 25-8-101, et seq., C.R.S. (1989) as amended by S.B. 181, and the Colorado Surface Coal Mining Reclamation Act, section 34-33-101 et seq., C.R.S. (1984 & 1989 Supp.).

Section 4. DEFINITIONS

- 4.1 "Designated Official" means a person representing one of the parties to this agreement appointed to implement this agreement and to negotiate on behalf of that party. The designated official for the MLRB shall be the Chairman of the MLRB or the Director of the MLRD; the designated official for the MLRD shall be the Director of the MLRD; the designated official of the WQCC shall be its Administrator; and the designated official for the WQCD shall be the Director of the WQCD.
- 4.2 "Implementing Agency" means any of the state agencies referred to in section 25-8-202(7), C.R.S. whose water quality responsibilities the WQCC and the WQCD are to recognize. For purposes of this agreement, the implementing agency is the Mined Land Reclamation Division.
- 4.3 "Points of Compliance" means one or more points or locations at which compliance with applicable groundwater standards must be achieved.

Section 5. RESPONSIBILITIES

The responsibilities of the Water Quality Control Commission (WQCC), the Water Quality Control Division (WQCD), the Mined Land Reclamation Division

(MLRD) and the Mined Land Reclamation Board (MLRB), as they relate to the mandates of SB 181, are presented below.

5.1 Mined Land Reclamation Division:

- a. The MLRD shall recognize that the WQCC is solely responsible for the adoption of water quality standards and classifications for state waters in accordance with section 25-8-202(7).
- b. The MLRD shall recognize that the WQCD is solely responsible for issuance and enforcement of permits authorizing all point source discharges to surface waters of the state as well as enforcing any control or permit regulation adopted by the WQCC under section 25-8-202(7)(b)(III).
- c. The MLRD has been designated an implementing agency through the provisions of Senate Bill 181. As such, the MLRD is responsible for implementing standards and classifications for discharges other than point source discharges to surface water, through its own regulatory programs after consultation with the WQCC and the WQCD. The MLRD is specifically mandated to require coal mining and reclamation operations to minimize the disturbances to the prevailing hydrologic balance at the mine site and in associated off-site areas and to the quality and quantity of water in surface and ground water systems both during and after coal mining operations.
- d. The MLRD is responsible for adopting applicable points of compliance for statewide and site-specific standards and classifications for discharges into state waters other than surface waters, in accordance with criteria established through rulemaking after public hearing and consultation with the WQCC and the WQCD. Such points of compliance shall be established so as to protect present and future beneficial uses of water.
- e. The MLRD will provide reasonable assurance to the WQCC and the WQCD that compliance with section 25-8-202(7) has been obtained through the Coal Program. Reasonable assurance will be provided through adoption of WQCC established standards and classifications as the basis for setting enforceable performance standards; the adoption of rules and regulations to establish points of compliance for discharges to state waters other than point source discharges to surface waters; the establishment of adequate monitoring requirements to confirm compliance with applicable surface and ground water classifications and standards; the reporting of MLRD activity as described in paragraph 5.1(h) of this subsection; and making available for review at MLRD offices the records associated with each reclamation permit.
- f. In the event that the MLRD receives written notice from the WQCC or the WQCD that circumstances exist which may result in a basis for WQCC action in accordance with section 25-8-202(7)(b)(II)(A), (B) or (C), the MLRD shall respond, in writing, to the notice within 15 working days. The MLRD, through its designated official, will meet informally with the designated officials of the WQCC and the WQCD through one or more meetings to attempt to resolve the concern.

- g. In the event that the MLRD receives notification from the WQCC of its intent to publish a Notice of Public Hearing to consider the adoption of control regulations or permit regulations for one or more of the water quality responsibilities currently within the jurisdiction of the MLRD, the MLRD shall respond to such notification within 30 days. The response from the MLRD will provide information to the WQCC that demonstrates that there is no basis for WQCC action in accordance with section 25-8-202(7)(b)(II)(A), (B) and (C), or if such a basis may exist, identifies the action(s), if any, to be undertaken by MLRD to address the situation.
- h. Within 90 days following the execution of this Memorandum of Agreement, the MLRD shall provide to the WQCC and the WQCD a written report that describes how its programs will assure compliance with water quality standards and classifications for activities subject to MLRD jurisdiction, including identification of any relevant proposed or existing regulations. This written report shall be updated annually by the MLRD. The annual update shall be limited to changes made by the MLRD during the course of the year and will include an annual summary of the activities and concerns of the MLRD relative to the implementation of standards and classifications.

5.2 Water Quality Control Division:

- a. The WQCD shall recognize the water quality responsibilities of the MLRD and its designation as an implementing agency in accordance with section 25-8-202(7).
- b. The WQCD shall be solely responsible for the issuance and enforcement of permits authorizing point source discharges into surface waters of the State. See §§ 25-8-501, 503 and 504, C.R.S. (1989).
- c. The WQCD shall not require permits for, or otherwise regulate, activities subject to the jurisdiction of the MLRD unless such regulation is promulgated by the WQCC as provided under section 5.3. e. and f. below.
- d. In the event that the WQCD has reason to believe that circumstances exist which may result in a basis for WQCC action in accordance with section 25-8-202(7)(b)(II)(A), (B) or (C), the designated official from the WQCD shall notify the Director of the MLRD, in writing, of such circumstances. The notice shall specify the circumstances which may result in a basis for WQCC action, and provide an explanation of the basis for the WQCD's concern(s) including any supporting documentation. Copies of this correspondence shall be forwarded to the WQCC. The designated official of the WQCD will attempt to resolve the concern(s) informally with the designated officials of the WQCC and the MLRD through one or more meetings. All reasonable efforts will be made, at the agency level, to resolve the concern(s) identified.
- e. In the event that the WQCD determines that the circumstances identified in accordance with subsection (d) above cannot be remedied through informal discussions at the agency level it shall so notify the WQCC.

- f. The Director of the WQCD shall annually report to the MLRB at a regular MLRB meeting on the activities and concerns of the WQCD and the WQCC relative to the implementation of the provisions of § 25-8-202(7). The date of such report shall coincide as nearly as possible to the date that the MLRD reports to the WQCC.

5.3 Water Quality Control Commission:

- a. The WQCC shall recognize the water quality responsibilities of the MLRD and its designation as an implementing agency in accordance with section 25-8-202(7).
- b. The WQCC shall be solely responsible for adoption of water quality standards and classifications for all state waters.
- c. In adopting water quality standards and classifications for state waters other than surface waters, the WQCC shall not specify points of compliance applicable to discharges regulated by the MLRD. Such points of compliance shall be adopted by the MLRD in accordance with criteria established through rulemaking as provided under Section 5.1.d of this agreement.
- d. In the event the WQCC has reason to believe that circumstances exist which may result in a basis for WQCC action in accordance with section 25-8-202(7)(b)(II)(A), (B) or (C), it shall proceed in the following manner:
 - i. Unless the WQCD has previously provided such notice as specified under paragraph 5.2(d) of this memorandum, the WQCC, or its designated official, shall notify the Director of the MLRD, in writing, of such circumstances. A copy of such notice shall be provided to the WQCD. The notice shall specify the circumstances which may result in a basis for WQCC action and provide an explanation of the basis for the WQCC's concern(s), including supporting documentation.
 - ii. The WQCC shall direct its designated official to meet with the designated officials of the MLRD and the WQCD to attempt to resolve the concern(s) informally. All reasonable efforts will be made to resolve the concern(s) at the agency level. Any such resolution shall be presented to the full WQCC for its approval.
 - iii. If the MLRD, WQCC and WQCD are unable to reach agreement regarding the implementation of water quality responsibilities as outlined in section 25-8-207 (7)(a), the directors of the Department of Health and the Department of Natural Resources will address the issues in dispute, after consultation with the Attorney General's Office and, if possible, recommend a resolution to the WQCC and the MLRD for their consideration.
- e. In the event that the WQCC determines that the circumstances identified in accordance with subsection (d) above cannot be remedied through informal discussions, it shall notify the MLRD of its intent to publish a Notice of Public Hearing to consider the adoption of control regulations or permit

regulations for the activities subject to the jurisdiction of the MLRD which are the subject of concern. Such notification to the MLRD shall precede the publication of the WQCC's Notice of a Public Hearing by no less than forty-five (45) days, unless the WQCC determines that an emergency rulemaking must be initiated to assure compliance with either the federal Clean Water Act or the Colorado Water Quality Control Act. In such event, the WQCC shall give the MLRD as much advance notice as possible. If the WQCC receives information from the MLRD pursuant to § 5.1(g), the WQCC shall not proceed with the publication of the Notice of Public Hearing unless the WQCC has determined that the proposed rulemaking is still necessary after it has reviewed the information at the next WQCC public meeting.

- f. The WQCC shall adopt appropriate control regulations or permit regulations to address one or more of the water quality responsibilities within the jurisdiction of the MLRD only if it makes a written finding, after public hearing that:
 - i. Such regulation is necessary to assure compliance with the Federal Clean Water Act, the provisions of Articles 80 to 93 of Title 37, C.R.S., or water quality standards and classifications adopted for State waters, or to protect present and future beneficial uses of water; or
 - ii. Such regulation is necessary to avoid the imposition of a disproportionate burden on other dischargers or classes of dischargers to the affected State waters who are subject to the requirements of this article; or
 - iii. The MLRD fails to provide a reasonable assurance that compliance with standards and classifications has been obtained through its own programs.
- g. The WQCC shall provide to the MLRD rulemaking and informational hearing notices and agendas and allow participation in formal proceedings addressing the establishment of standards and classifications, or any other matter which could have an impact on the MLRD operations, and informal proceedings in which MLRD has expressed an interest.
- h. The WQCC shall schedule a presentation by the MLRD to discuss the annual report prepared and submitted by the MLRD at a regular public meeting, and shall provide the public with notice and an opportunity to comment on such report.

5.4 Responsibilities of the Mined Land Reclamation Board:

- a. The MLRB shall promulgate rules to establish criteria for the selection of points of compliance pursuant to § 25-8-202(7)(a), C.R.S. Prior to adoption of any water quality related regulation, the MLRB shall notify the WQCC and the WQCD and allow their participation in MLRB meetings where such proposals are to be discussed.
- b. The MLRB shall promulgate any rule changes necessary to ensure the proper implementation of water quality standards and classifications

through the administration of the Colorado Surface Coal Mining Reclamation Act. Prior to the adoption of any water quality related regulation by the MLRB, the MLRB shall notify the WQCC and the WQCD and allow their participation in any MLRB meetings or hearings where such proposals are to be discussed.

Section 6. SPECIAL PROVISIONS

6.1 Access to Records:

Each agency shall, to the extent allowed by law, make available to the other, information within its possession. Requests for information shall not impose an unreasonable resource burden on either agency.

6.2 Effect on Prior Agreement:

When executed, this agreement shall supercede any prior agreement on the implementation of S.B. 181 whether written or implied.

6.3 Effective Date and Termination:

This agreement shall become effective on the date of execution by the last signatory party. It may be amended upon the mutual agreement of the WQCC, the WQCD and the MLRD, and may be terminated upon 30 days written notice to the other parties by the WQCC or the WQCD or the MLRD.

Section 7. APPROVALS

Department of Natural Resources
Health
Mined Land Reclamation Board

Colorado Department of

Executive Director
Department of Natural Resources
Commission

Chairman
Water Quality Control

Director
Mined Land Reclamation Division
Division

Director
Water Quality Control

Dated August, 1990

AG Alpha No. EL WQ IBAHO
AG File No. DNR9000381/CW

