



---

## M-1992-117-CMCs Response to Motion to Strike by DRMS

1 message

John Henderson <jrhcolaw@comcast.net>

Tue, Sep 10, 2019 at 3:31 PM

Reply-To: John Henderson <jrhcolaw@comcast.net>

To: Jeff Fugate <Jeff.Fugate@coag.gov>, Scott Schultz <Scott.Schultz@coag.gov>, "Cunningham - DNR, Michael" <michaela.cunningham@state.co.us>, amy.eschberger@state.co.us, Camille Mojar <camille.mojar@state.co.us>, charles.kooyman@coag.gov

Cc: Cyndi Kennedy <ctk@kennedylawyer.com>, Mark Steen <goldtontine@gmail.com>, "Mike Bynum (mike@berez.com)" <mike@berez.com>, John Ramsey <john@flyredtail.com>

All:

Please find attached CMC's Response to the Motion to Strike filed by DRMS. Hard copies were mailed to the State parties today.

CMC continues to work on its 5th Adequacy Response with required attachments.

Regards, John Henderson

John Richard Henderson  
Law Office of John R. Henderson, P.C.  
308 E. Simpson Street, Suite 103  
Lafayette, CO 80026  
Office: 720.512.2953  
Cell: 720.971.7063  
<https://landwaterlaw.co>  
[jrhcolaw@comcast.net](mailto:jrhcolaw@comcast.net)



CMCs Response to Motion to Strike.pdf  
239K

BEFORE THE MINED LAND RECLAMATION BOARD  
STATE OF COLORADO

Violation No. MV-2019-018

---

**COLORADO MILLING COMPANY LLC'S RESPONSE TO DRMS'S MOTION  
TO STRIKE CMC'S MOTION FOR RECONSIDERATION OR FOR  
REDUCTION OF CIVIL PENALTY**

---

IN THE MATTER OF A POSSIBLE VIOLATION BY COLORADO MILLING  
COMPANY, LLC, CEASE AND DESIST ORDER, CORRECTIVE ACTIONS, AND  
CIVIL PENALTIES FOR FAILING TO COMPLY WITH THE CONDITIONS OF A  
BOARD ORDER ISSUED FOR VIOLATION No. MV-2017-036, File No. M-1994-117

---

On or about August 21, 2019, Colorado Milling Company, LLC ("CMC") filed its "Motion for Reconsideration of Civil Penalty or for Reduction of Civil Penalty" ("Motion"). On September 4, DRMS ("Division") filed its "Motion to Strike" ("Motion to Strike") CMC's original Motion. CMC had sought reconsideration of or reduction of the civil penalty assessed at the June 26 Board meeting for the reasons detailed in its Motion.

**CMC'S RESPONSE TO MOTION TO STRIKE**

1. DRMS has argued two basic grounds for the Motion to Strike: Alleged non-compliance with Hard Rock Rule 2.9.1(2), and, a further alleged failure to comply with the Board's Order of June 26, 2019.

2. The second ground may be immediately disposed of. In its Order of August 3, 2019, the Board stated:

"C. Operator has ninety days from the Board's June 26, 2019 meeting to resolve the remaining adequacy issues to the Division's satisfaction; and.."

Division has requested that CMC's Fifth Adequacy Response be filed no later than September 17, 2019 to allow adequate time for review.

CMC is still working on its Fifth Adequacy Response in a form, and, suitably responsive, that it should meet with Division's approval. Such work includes working with its surveyor to perform new field work to adequately establish the boundaries of the permit amendment area, and to resolve discrepancies or reductions literally hundredths of an acre in size. CMC is also working

with its engineering/water experts to develop full and complete responses to several of Division's adequacy concerns regarding pump testing.

CMC has also worked with Division and the BLM in July 2019 to ascertain that BLM has no concerns about pump testing or drawdown activity on private lands not affecting federal property, or BLM permitting concerns on federal lands.

On July 17, 2019, Division provided CMC with a letter offering guidance as to the list of deadlines provided at the June 26, 2019 hearing, and the more specific requirements of Division in meeting those deadlines.

CMC's response is not overdue, and therefore not out of compliance with the Board's Order.

3. CMC has complied with Hard Rock Rule 2.9.1 (2). The original proposal by Division for a maximum civil penalty for the period from May 21 to June 26, 2019 was made without awareness by the Board that Division had committed to remove this matter from the enforcement calendar if a request by CMC was made for extension by June 6, 2019, which it did. *Had this matter been removed from the enforcement calendar, the matter before the Board would have been CMC's request for a 30-day extension, which would not involve the assessment of civil penalties.*

4. The civil penalty proposed at the hearing was for non-compliance with the Board's prior Order, and a proposal for maximum penalties infers a willful non-compliance.

5. In reality, CMC continued to work on its 4<sup>th</sup> Adequacy Response on the written understanding that if it filed a request for extension prior to June 6 (it did, on June 5) there would be no enforcement hearing. That 4<sup>th</sup> Adequacy Response was ultimately filed on June 24, 2019, prior to the hearing. Division had issued its 4<sup>th</sup> Adequacy Letter on May 21, 2019, the deadline date.

6. As noted carefully in the Motion, rather than remove the matter from the enforcement calendar, Division, on June 12, denied the AM-1 request, and stopped processing the application entirely.

7. Division had issued its 4<sup>th</sup> Adequacy Response letter on May 21, 2019, the deadline originally approved by the Board for obtaining Division's approval. Put simply, since Division still had concerns with the adequacy of the AM-1 submittals by CMC, the issuance by Division *ipso facto* made compliance with the Board's Order (to have Division approval by May 21,

2019) impossible. Any concerns or reservations which might have been expressed by Division on May 21, 2019 would have placed CMC in violation, whether or not they were substantial, and whether or not CMC had responded adequately to the Division. (As one Board member correctly noted, a permittee is in no position to force Division approval, or to force Division to have no further concerns or comments on permittee submittals).

8. *But, Division understood this timing issue and indicated approval for an extension request by CMC, clearly and in writing. CMC complied, and continued working on its Fourth Adequacy Response.*

9. Thus, the Board was unaware that CMC was caught in a procedural trap not of its own making; CMC, for its part, had no reason to believe that it would be incurring civil penalties, much less maximum penalties, for non-compliance, having timely submitted the extension request, at the urging of Division. The cessation of processing on June 12, 2019 made compliance impossible.

10. Civil penalties are appropriate to punish and to deter non-compliance with permit conditions and Orders of the Board.

11. Here, far from wishing to be non-compliant, CMC continued to work on its 4<sup>th</sup> Adequacy Response believing that Division had offered an extension, which it would support, to allow CMC to respond to its May 21<sup>st</sup> 4<sup>th</sup> Adequacy Letter.

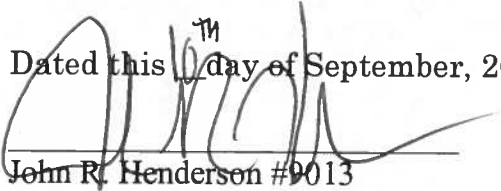
12. For the reasons stated in the Motion, the imposition of civil penalties for non-compliance with the Board's Order are not appropriate.

13. In the alternative, civil penalties should be reduced in amount and for a time period to reflect, at worst, a procedural mis-understanding concerning Divisions commitment to support a 30-day extension and removal of this matter from the enforcement agenda.

14. In any of assessment of civil penalties, the precise conduct being punished and deterred should be clear from the record. Here, there is no relationship between the civil penalty being assessed and any particular conduct or omission of CMC. The Board, in accord with the governing statute and common sense, should eliminate or reduced the civil penalties assessed.

**WHEREFORE**, CMC respectfully requests that the civil penalties in this matter be withdrawn or abated, or, in the alternative, reduced to a penalty of \$50.00 per day from May 21 until June 12, 2019, more in line with a procedural violation or misunderstanding rather than a willful violation of the Board's Order.

Dated this 10<sup>th</sup> day of September, 2019

  
John R. Henderson #9013  
Cynthia T. Kennedy #11668  
308 E. Simpson St.  
Lafayette, CO 80026

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within "Colorado Milling Company, LLC's Response to DRMS's Motion to Strike CMC's "Motion For Reconsideration of Civil Penalty Or For Reduction of Civil Penalty" " upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 10<sup>th</sup> day of September, 2019 addressed as follows:

*By US mail and electronic mail to:*

Amy Eschberger  
Division of Reclamation, Mining & Safety  
1313 Sherman Street, Room 215  
Denver, CO 80203

*By US Mail and electronic mail to:*

Charles J. Kooyman  
Senior Assistant Attorney General  
Department of Law  
Business and Licensing Section  
Ralph L. Carr Colorado Judicial Center  
1300 Broadway, 8<sup>th</sup> floor  
Denver, CO 80203

By US Mail and electronic mail to:

Michael Cunningham  
Division of Reclamation, Mining and  
Safety  
1313 Sherman Street, Room 215  
Denver, CO 80203

By US Mail and electronic mail to:

Jeff Fugate  
First Assistant Attorney General  
Colorado Department of Law  
Natural Resources Section  
Ralph L. Carr Colorado Judicial Center  
1300 Broadway, 10<sup>th</sup> Floor  
Denver, CO 80203

By US mail and electronic mail to:

Scott Schultz  
Assistant Attorney General  
Natural Resources Section  
Ralph L. Carr Colorado Judicial Center  
1300 Broadway, 10<sup>th</sup> Floor  
Denver, CO 80203

By US mail to:

Colorado Mined Land Reclamation Board  
c/o Camie Mojar  
1313 Sherman Street, Room 215  
Denver, CO 80203

By: \_\_\_\_\_

