



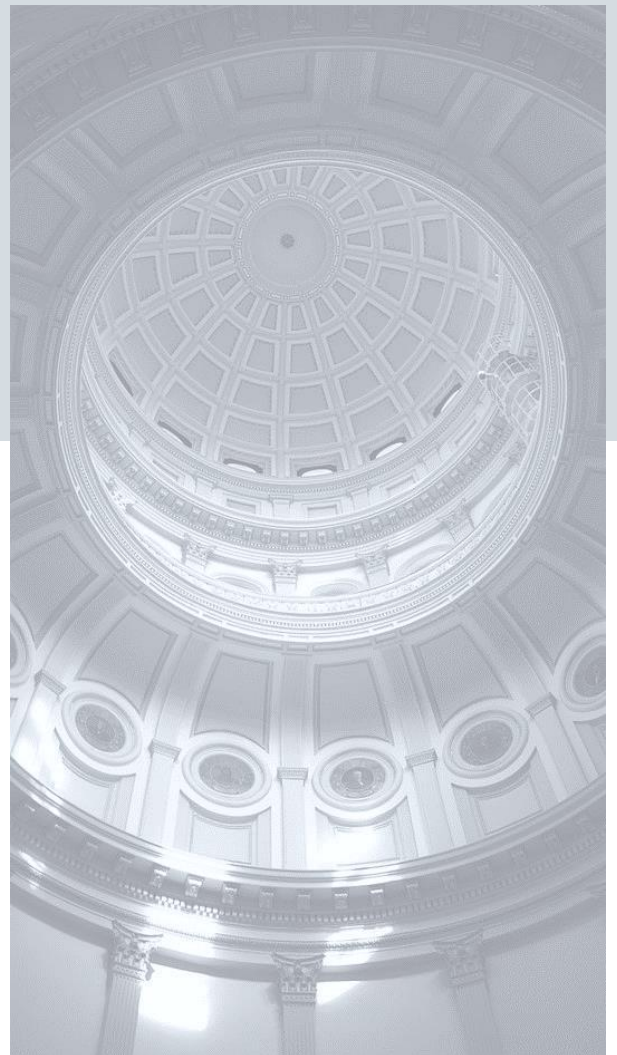
COLORADO

**Department of
Regulatory Agencies**

Colorado Office of Policy, Research &
Regulatory Reform

2019 Sunset Review

Colorado Coal Mine Board of Examiners



October 15, 2019



COLORADO

**Department of
Regulatory Agencies**

Executive Director's Office

October 15, 2019

Members of the Colorado General Assembly
c/o the Office of Legislative Legal Services
State Capitol Building
Denver, Colorado 80203

Dear Members of the General Assembly:

The Colorado General Assembly established the sunset review process in 1976 as a way to analyze and evaluate regulatory programs and determine the least restrictive regulation consistent with the public interest. Since that time, Colorado's sunset process has gained national recognition and is routinely highlighted as a best practice as governments seek to streamline regulation and increase efficiencies.

Section 24-34-104(5)(a), Colorado Revised Statutes (C.R.S.), directs the Department of Regulatory Agencies to:

- Conduct an analysis of the performance of each division, board or agency or each function scheduled for termination; and
- Submit a report and supporting materials to the Office of Legislative Legal Services no later than October 15 of the year preceding the date established for termination.

The Colorado Office of Policy, Research and Regulatory Reform (COPRRR), located within my office, is responsible for fulfilling these statutory mandates. Accordingly, COPRRR has completed the evaluation of the Colorado Coal Mine Board of Examiners (Board). I am pleased to submit this written report, which will be the basis for COPRRR's oral testimony before the 2020 legislative committee of reference.

The report discusses the question of whether there is a need for the regulation provided under Article 22 of Title 34, C.R.S. The report also discusses the effectiveness of the Board and the Division of Reclamation, Mining, and Safety in carrying out the intent of the statutes and makes recommendations for statutory and administrative changes in the event this regulatory program is continued by the General Assembly.

Sincerely,

Patty Salazar
Executive Director





COLORADO

Department of Regulatory Agencies

Colorado Office of Policy, Research &
Regulatory Reform

2019 Sunset Review

Colorado Coal Mine Board of Examiners

SUMMARY

What is regulated?

The Colorado Department of Natural Resources' Coal Mine Board of Examiners (DNR and Board respectively) administers the federally mandated coal mine certification program in Colorado. The Board examines and certifies the candidates for which certification is mandatory under federal law.

Why is it regulated?

Coal mining is dangerous. Dust, gas, and structural integrity all effect the well-being and safety of mine workers. Danger can be mitigated by ensuring that the people working in that environment have been trained to avoid hazardous conditions and how to react when problems do occur.

Who is regulated?

The Board is authorized to certify employees in underground and surface coal mines, including:

- Mine foreman, who supervises the day-to-day workforce in their jobs;
- Assistant mine foreman, who supports the mine foreman (This position no longer exists in the mines. Therefore, no examinations are currently held to certify the position.);
- Mine Examiner, who is known as the "Fireboss" in the statutes, examines the mine prior to miners entering;
- Electrician, who installs and maintains electrical systems;
- Methane and oxygen deficiency tester;
- Underground shot-firer, who assembles, positions and detonates explosives in underground mines;
- Surface blaster, who fills blast holes with explosives and detonates explosives; and
- Surface shot-firer, who fills blast holes with explosives and detonates explosives in surface mines.

How is it regulated?

The Board has two main charges:

- Certifying professionals to work in mines, including developing criteria for certification; and
- Taking disciplinary action under the Act when it is deemed necessary.

What does it cost?

During fiscal year 17-18, the program expended \$107,608 and allotted 1.0 full-time equivalent employee to Board activities. Board activities are funded through a combination of examination fees, DNR appropriations, and federal Blaster Certification Grant dollars.

What disciplinary activity is there?

There were no complaints reported or disciplinary actions taken during the period studied for this sunset review.

KEY RECOMMENDATIONS

Continue the Coal Mine Board of Examiners and certification program for nine years, until 2029.

Because of the danger presented in coal mines, it is important that the individuals who work in the mines be qualified and certified. Given that the majority of coal mined in Colorado comes from underground mines and that the U.S. Mine Safety and Health Administration does not have the resources necessary to take on the additional responsibilities of examining and certifying underground mine staff, the Board should be reauthorized to administer the certification program.

METHODOLOGY

As part of this review, Colorado Office of Policy, Research and Regulatory Reform staff attended Board meetings, interviewed program staff and Board members; interviewed officials with the federal Mine Safety and Health Administration and state and national professional associations; and reviewed records, Colorado statutes and rules, and the laws of other states.

MAJOR CONTACTS MADE DURING THIS REVIEW

U.S. Mine Safety and Health Administration
Peabody Energy
Twentymile Coal
Colorado Mining Association
Office of the Colorado Attorney General
Department of Natural Resources, Division of Reclamation, Mining and Safety

What is a Sunset Review?

A sunset review is a periodic assessment of state boards, programs, and functions to determine whether they should be continued by the legislature. Sunset reviews focus on creating the least restrictive form of regulation consistent with protecting the public. In formulating recommendations, sunset reviews consider the public's right to consistent, high quality professional or occupational services and the ability of businesses to exist and thrive in a competitive market, free from unnecessary regulation.

Sunset Reviews are prepared by:
Colorado Department of Regulatory Agencies
Colorado Office of Policy, Research and Regulatory Reform
1560 Broadway, Suite 1550, Denver, CO 80202
www.dora.colorado.gov/opr



Table of Contents

Background	1
Introduction.....	1
Types of Regulation.....	3
Licensure	3
Certification.....	4
Registration	4
Title Protection.....	4
Regulation of Businesses	5
Sunset Process	5
Methodology	5
Profile of the Profession	6
Legal Framework.....	8
History of Regulation	8
Legal Summary	8
Mine Safety and Health Administration	9
The Board.....	9
Certification.....	10
Board Disciplinary Actions.....	12
Program Description and Administration	14
Certification	15
Examinations.....	16
Complaint and Disciplinary Activity	20
Collateral Consequences - Criminal Convictions.....	20
Analysis and Recommendations.....	21
Recommendation 1 - Continue the Coal Mine Board of Examiners and certification program for nine years, until 2029.	21
Recommendation 2 - Require the Executive Director of the Department of Natural Resources to establish examination fees based on examination administration. ...	23
Recommendation 3 - Define “Commissioner” as used in section 34-22-102(2)(e), C.R.S.	23
Recommendation 4 - Repeal references to assistant mine foreman in section 34-22-112, C.R.S.	24
Recommendation 5 - Make technical changes to the law.	24

Administrative Recommendation 1 - The Division should actively recruit Board members to volunteer for Board membership from all operating mines. 24

Administrative Recommendation 2 - The Board should ensure that all certification examinations are psychometrically validated every five years or whenever the Board develops a new examination. 25

Background

Introduction

Enacted in 1976, Colorado's sunset law was the first of its kind in the United States. A sunset provision repeals all or part of a law after a specific date, unless the legislature affirmatively acts to extend it. During the sunset review process, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) within the Department of Regulatory Agencies (DORA) conducts a thorough evaluation of such programs based upon specific statutory criteria¹ and solicits diverse input from a broad spectrum of stakeholders including consumers, government agencies, public advocacy groups, and professional associations.

Sunset reviews are based on the following statutory criteria:

- I. Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation;
- II. If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;
- III. Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices and any other circumstances, including budgetary, resource and personnel matters;
- IV. Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;
- V. Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;
- VI. The economic impact of regulation and, if national economic information is not available, whether the agency stimulates or restricts competition;
- VII. Whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;
- VIII. Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;

¹ Criteria may be found at § 24-34-104(6)(b), C.R.S.

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- IX. Whether the agency through its licensing or certification process imposes any sanctions or disqualifications on applicants based on past criminal history and, if so, whether the sanctions or disqualifications serve public safety or commercial or consumer protection interests. To assist in considering this factor, the analysis prepared pursuant to subsection (5)(a) of this section must include data on the number of licenses or certifications that the agency denied based on the applicant's criminal history, the number of conditional licenses or certifications issued based upon the applicant's criminal history, and the number of licenses or certifications revoked or suspended based on an individual's criminal conduct. For each set of data, the analysis must include the criminal offenses that led to the sanction or disqualification; and
- X. Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

Sunset reports are organized so that a reader may consider these criteria while reading. While not all criteria are applicable to all sunset reviews, the various sections of a sunset report generally call attention to the relevant criteria. For example,

- In order to address the first criterion and determine whether a particular regulatory program is necessary to protect the public, it is necessary to understand the details of the profession or industry at issue. The Profile section of a sunset report typically describes the profession or industry at issue and addresses the current environment, which may include economic data, to aid in this analysis.
- To ascertain a second aspect of the first sunset criterion--whether conditions that led to initial regulation have changed--the History of Regulation section of a sunset report explores any relevant changes that have occurred over time in the regulatory environment. The remainder of the Legal Framework section addresses the third sunset criterion by summarizing the organic statute and rules of the program, as well as relevant federal, state and local laws to aid in the exploration of whether the program's operations are impeded or enhanced by existing statutes or rules.
- The Program Description section of a sunset report addresses several of the sunset criteria, including those inquiring whether the agency operates in the public interest and whether its operations are impeded or enhanced by existing statutes, rules, procedures and practices; whether the agency performs efficiently and effectively and whether the board, if applicable, represents the public interest.
- The Analysis and Recommendations section of a sunset report, while generally applying multiple criteria, is specifically designed in response to the tenth criterion, which asks whether administrative or statutory changes are necessary to improve agency operations to enhance the public interest.

These are but a few examples of how the various sections of a sunset report provide the information and, where appropriate, analysis required by the sunset criteria. Just

as not all criteria are applicable to every sunset review, not all criteria are specifically highlighted as they are applied throughout a sunset review.

Types of Regulation

Consistent, flexible, and fair regulatory oversight assures consumers, professionals and businesses an equitable playing field. All Coloradans share a long-term, common interest in a fair marketplace where consumers are protected. Regulation, if done appropriately, should protect consumers. If consumers are not better protected and competition is hindered, then regulation may not be the answer.

As regulatory programs relate to individual professionals, such programs typically entail the establishment of minimum standards for initial entry and continued participation in a given profession or occupation. This serves to protect the public from incompetent practitioners. Similarly, such programs provide a vehicle for limiting or removing from practice those practitioners deemed to have harmed the public.

From a practitioner perspective, regulation can lead to increased prestige and higher income. Accordingly, regulatory programs are often championed by those who will be the subject of regulation.

On the other hand, by erecting barriers to entry into a given profession or occupation, even when justified, regulation can serve to restrict the supply of practitioners. This not only limits consumer choice, but can also lead to an increase in the cost of services.

There are also several levels of regulation.

Licensure

Licensure is the most restrictive form of regulation, yet it provides the greatest level of public protection. Licensing programs typically involve the completion of a prescribed educational program (usually college level or higher) and the passage of an examination that is designed to measure a minimal level of competency. These types of programs usually entail title protection - only those individuals who are properly licensed may use a particular title(s) - and practice exclusivity - only those individuals who are properly licensed may engage in the particular practice. While these requirements can be viewed as barriers to entry, they also afford the highest level of consumer protection in that they ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Certification

Certification programs offer a level of consumer protection similar to licensing programs, but the barriers to entry are generally lower. The required educational program may be more vocational in nature, but the required examination should still measure a minimal level of competency. Additionally, certification programs typically involve a non-governmental entity that establishes the training requirements and owns and administers the examination. State certification is made conditional upon the individual practitioner obtaining and maintaining the relevant private credential. These types of programs also usually entail title protection and practice exclusivity.

While the aforementioned requirements can still be viewed as barriers to entry, they afford a level of consumer protection that is lower than a licensing program. They ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Registration

Registration programs can serve to protect the public with minimal barriers to entry. A typical registration program involves an individual satisfying certain prescribed requirements - typically non-practice related items, such as insurance or the use of a disclosure form - and the state, in turn, placing that individual on the pertinent registry. These types of programs can entail title protection and practice exclusivity. Since the barriers to entry in registration programs are relatively low, registration programs are generally best suited to those professions and occupations where the risk of public harm is relatively low, but nevertheless present. In short, registration programs serve to notify the state of which individuals are engaging in the relevant practice and to notify the public of those who may practice by the title(s) used.

Title Protection

Finally, title protection programs represent one of the lowest levels of regulation. Only those who satisfy certain prescribed requirements may use the relevant prescribed title(s). Practitioners need not register or otherwise notify the state that they are engaging in the relevant practice, and practice exclusivity does not attach. In other words, anyone may engage in the particular practice, but only those who satisfy the prescribed requirements may use the enumerated title(s). This serves to indirectly ensure a minimal level of competency - depending upon the prescribed preconditions for use of the protected title(s) - and the public is alerted to the qualifications of those who may use the particular title(s).

Licensing, certification and registration programs also typically involve some kind of mechanism for removing individuals from practice when such individuals engage in enumerated proscribed activities. This is generally not the case with title protection programs.

Regulation of Businesses

Regulatory programs involving businesses are typically in place to enhance public safety, as with a salon or pharmacy. These programs also help to ensure financial solvency and reliability of continued service for consumers, such as with a public utility, a bank or an insurance company.

Activities can involve auditing of certain capital, bookkeeping and other recordkeeping requirements, such as filing quarterly financial statements with the regulator. Other programs may require onsite examinations of financial records, safety features or service records.

Although these programs are intended to enhance public protection and reliability of service for consumers, costs of compliance are a factor. These administrative costs, if too burdensome, may be passed on to consumers.

Sunset Process

Regulatory programs scheduled for sunset review receive a comprehensive analysis. The review includes a thorough dialogue with agency officials, representatives of the regulated profession and other stakeholders. Anyone can submit input on any upcoming sunrise or sunset review on COPRRR's website at: www.dora.colorado.gov/opr.

The functions of the Colorado Coal Mine Board of Examiners (Board) as enumerated in Article 22 of Title 34, Colorado Revised Statutes (C.R.S.), shall terminate on July 1, 2020, unless continued by the General Assembly. During the year prior to this date, it is the duty of COPRRR to conduct an analysis and evaluation of the Board pursuant to section 24-34-104, C.R.S.

The purpose of this review is to determine whether the currently prescribed regulation should be continued and to evaluate the performance of the Board and the Department of Natural Resources' Division of Reclamation, Mining, and Safety. During this review, the Board and staff must demonstrate that the program serves the public interest. COPRRR's findings and recommendations are submitted via this report to the Office of Legislative Legal Services.

Methodology

As part of this review, COPRRR staff attended Board meetings, interviewed program staff and Board members; interviewed officials with the federal Mine Safety and Health Administration and state and national professional associations; and reviewed records, Colorado statutes and rules, and the laws of other states.

Profile of the Profession

In a sunset review, COPRRR is guided by the sunset criteria located in section 24-34-104(6)(b), C.R.S. The first criterion asks whether regulation by the agency is necessary to protect the public health, safety, and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less, or the same degree of regulation.

In order to understand the need for regulation, it is first necessary to understand what the profession does, where they work, who they serve and any necessary qualifications.

The sixth sunset criterion requires COPRRR to evaluate the economic impact of regulation. One way this may be accomplished is to review the projected growth in the profession. In evaluating the need for regulation, COPRRR also takes into consideration regulation in other states.

The U.S. Energy Information Administration informs that the U.S. has three geographical coal regions and Colorado is part of the western coal region. In 2017, the western region produced 56 percent of the coal mined in the U.S. Ninety-one percent of the coal mined in the western region and 65 percent of all of the coal mined in the U.S. comes from surface mines.² However, in 2019, only two of the six producing coal mines in Colorado were surface mines. This is far below both the national and regional averages for surface mines. Additionally, those mines produced approximately 26 percent of Colorado's coal.³ Again, this is far below the national and regional averages.

During the early 1920s, there were more than 860,000 miners employed in U.S. coal mines. That number has steadily decreased and approximately a century later, in 2017, there were only 82,843 working coal miners. From January 2017 through September 2018, Colorado coal mines employed slightly more than 1,100 miners.⁴

Because mining can be extremely dangerous. The Mine Safety and Health Administration Act of 1977 (Mine Act) created, in the U.S. Department of Labor, the Mine Safety and Health Administration (MSHA). The Mine Act merged federal mining health and safety regulation implementation into one agency and under one law. The year the Mine Act passed, there were 139 deaths (approximately 6 deaths for every 10,000 coal miners). In 2017, that number had dropped by two-thirds when there

² U.S. Energy Information Administration. *Where Our Coal Comes From*. Retrieved December 4, 2018, from https://www.eia.gov/energyexplained/index.php?page=coal_where

³ Colorado Division of Reclamation, Mining, and Safety. *Monthly Coal Summary Report, Period 1/2017 through 12/2017*. Retrieved January 11, 2019, from file:///G:/2019/Coal%20Mines/MiningSummary2017.pdf

⁴ The average is taken from the monthly reports by the Colorado Division of Reclamation, Mining, and Safety. Retrieved January 11, 2019, from <https://mining.state.co.us/Reports/Reports/Pages/Coal.aspx>

were 15 deaths (approximately 2 deaths for every 10,000 coal miners).⁵ During 2017, there were two Colorado coal mine fatalities reported.⁶

The Board is responsible for compliance with MSHA requirements. Employing MSHA prerequisites as guidance, the Board sets standards, examines, trains, and certifies coal miners employed in underground mines as a mine foreman, surface and underground, (supervises the day-to-day workforce in their jobs), fire boss (examines for the presence of dangerous gases and monitors underground air quality to make sure it is safe⁷), mine electrician (installs and maintains the electrical systems⁸), shot-firer—surface and underground, (shot-firer assembles, positions and detonates explosives⁹), and hoistman (operates a lift that moves materials up and down the mine shaft). For surface mines the Board certifies blasters (fill blast holes with explosives and detonate explosives to dislodge coal¹⁰) and electricians.¹¹ It also has the authority to certify other positions that may be required under federal law.¹² The Board meets and conducts certification examinations quarterly.¹³

⁵ U.S. Department of Labor, Mine Safety and Health Administration. *Coal Fatalities for 1900 Through 2017*. Retrieved December 4, 2018, from <https://arlweb.msha.gov/stats/centurystats/coalstats.asp>

⁶ Colorado file:///G:/2019/Coal%20Mines/MiningSummary2017.pdf. *Monthly Coal Summary Report, Period 1/2017 through 12/2017*. Retrieved January 11, 2019, from file:///G:/2019/Coal%20Mines/MiningSummary2017.pdf

⁷ Chegg, CareerMatch. *Fire Boss*. Retrieved July 19, 2019, from <https://www.careermatch.com/job-prep/career-insights/profiles/fire-boss/>

⁸ Chron. *How to Become a Coal-Mining Electrician*. Retrieved July 19, 2019, from <https://work.chron.com/become-coalmining-electrician-24634.html>

⁹ iMINCO. *Shotfirer in Mines*. Retrieved July 19, 2019, from <http://iminco.net/shotfirer-in-the-mines/>

¹⁰ Careers in Construction. *Driller/Blaster*. Retrieved July 19, 2019, from <https://www.careersinconstruction.ca/en/career/drillerblaster>

¹¹ § 34-22-105(3), C.R.S.

¹² § 34-22-105(4), C.R.S.

¹³ Colorado Division of Reclamation, Mining and Safety. *Coal Mine Board of Examiners*. Retrieved December 12, 2018, from <http://mining.state.co.us/Board/Examiners/Pages/Examiners.aspx>

Legal Framework

History of Regulation

In a sunset review, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) is guided by the sunset criteria located in section 24-34-104(6)(b), Colorado Revised Statutes (C.R.S.). The first sunset criterion questions whether regulation by the agency is necessary to protect the public health, safety, and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less, or the same degree of regulation.

One way that COPRRR addresses this is by examining why the program was established and how it has evolved over time.

The Coal Mine Board of Examiners' (Board) authorizing statutes, Article 22 of Title 34, C.R.S. (Act), have not changed substantially over the years. The original set of statutes was repealed and re-codified in 1988.

In 1995 and again in 2005, the Board underwent sunset review. The resulting changes were generally not fundamental or substantive, rather the changes modernized provisions of the Act.

Legal Summary

The second and third sunset criteria question

Whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms, and whether agency rules enhance the public interest and are within the scope of legislative intent; and

Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures, and practices and any other circumstances, including budgetary, resource, and personnel matters.

A summary of the current statutes and rules is necessary to understand whether regulation is set at the appropriate level and whether the current laws are impeding or enhancing the agency's ability to operate in the public interest.

Mine Safety and Health Administration

The mission of the U.S. Department of Labor's Mine Safety and Health Administration (MSHA) is to enforce the Federal Mine Safety and Health Act of 1977 (Mine Act). The Mine Act requires inspections, protects miner's rights, ensures that training is in place, and requires that rescue teams are available at all underground mines.¹⁴ In 2006, the Mine Act was amended to require:¹⁵

- Mine-specific emergency response plans in underground coal mines,
- New regulations regarding mine rescue teams and sealing of abandoned areas,
- Prompt notification of mine accidents, and
- Enhanced civil penalties.

MSHA's Coal Mine Safety and Health program implements the Mine Act for all U.S. coal mines. Enforcement activities include:¹⁶

- Conducting inspections, including:
 - Quarterly inspections of all underground coal mines, and
 - Semiannual inspections of surface coal mines and facilities;
- Investigating fatal and serious nonfatal accidents;
- Issuing citations and orders for violations;
- Conducting health sampling of breathable dust and noise;
- Monitoring toxic materials and harmful physical agents;
- Investigating complaints of hazardous conditions reported by miners;
- Investigating criminal violations;
- Examining complaints of discrimination reported by miners;
- Approving roof control, ventilation, and training; and
- Conferring with mine operators concerning violations.

Inspectors have the authority to order activities to stop in an area when conditions pose an immediate threat to miner safety and health.¹⁷

The Board

The fifth sunset criterion questions whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates.

One way that COPRRR addresses this is by examining the composition of the Board.

¹⁴ U.S. Department of Labor, MSHA. *History, The Mine Act: Creation of MSHA, 1977*. Retrieved January 30, 2019, from <https://www.msha.gov/about/history>

¹⁵ U.S. Department of Labor, MSHA. *History, The Mine Act: Creation of MSHA, 2006*. Retrieved January 30, 2019, from <https://www.msha.gov/about/history>

¹⁶ U.S. Department of Labor, MSHA. *Coal Mine Safety and Health*. Retrieved January 30, 2019, from <https://www.msha.gov/about/program-areas/coal-mine-safety-and-health>

¹⁷ *ibid.*

The Board is housed in and staffed by the Department of Natural Resources' Division of Reclamation, Mining and Safety (Division). The Board is composed of four voting members and one *ex officio* member. The four voting members are appointed by the Governor, approved by the Senate, and serve terms of four years.¹⁸

Three of the four voting members must be “actively engaged” in Colorado coal mines. Two represent underground coal mining: one must be a coal miner and the other must be a coal mine owner, operator, manager or other mine official. The third must be a representative from a surface coal mine who is an owner, operator, manager or other mine official. The fourth voting member must be an engineer with coal mining experience. The final, *ex officio*, member of the Board is the Commissioner of Mines or a Commissioner's designee.¹⁹

The Board members who are not state employees are to be compensated \$50 per day for each day of service. They also receive actual travel and other expenses incurred in the performance of their duties.²⁰

The Board has two main charges:²¹

- Certifying qualified professionals to work in mines, including developing criteria for certification; and
- Taking disciplinary action under the Act when it is deemed necessary.

Certification

The certification provisions in the Act are highly prescriptive and the certificates are voided if a certificate holder is not actively employed in the industry for five years.²² The Board has the ability to recognize certification by another state if requirements are substantially similar to those in the Act. The term of a reciprocal certification will be determined by the Board.²³

Anyone who wishes to become certified must pass an examination,²⁴ undergo eyesight and hearing assessments,²⁵ and be qualified by MSHA as a methane and oxygen deficiency tester.²⁶ The fee for any examination is capped at \$25.²⁷ Notice of a pending examination must be posted at each coal mine for the six months prior to the examination and the conditions of eligibility must be fully stated in the posting. The date and location is required to be announced at least 30 days prior to the

¹⁸ §§ 34-22-102(2) and 102(3), C.R.S.

¹⁹ § 34-22-102(2), C.R.S.

²⁰ § 34-22-103, C.R.S.

²¹ § 34-22-102(1), C.R.S.

²² § 34-22-108, C.R.S.

²³ § 34-22-106, C.R.S.

²⁴ § 34-22-109(1), C.R.S.

²⁵ § 34-22-112(1), C.R.S.

²⁶ 2 CCR 407-5 § 3.2(1), Coal Mine Health and Safety Rules.

²⁷ § 34-22-111, C.R.S.

examination.²⁸ The Office of Active and Inactive Mines in the Division must provide the mathematical formulas to use on the examination²⁹ and keep all passing examinations with a list of questions and their correct solutions for two years following the examination.³⁰

MINE FOREMAN AND FIRE BOSS

If a person wishes to be certified as a mine foreman or fire boss in an underground mine, he or she must have an understanding of coal mining; mechanical equipment; the different systems of working and ventilating coal mines; the nature and properties of noxious, explosive, poisonous gases of mines; and the nature and properties of coal dust.³¹ A mine foreman or assistant mine foreman must have three years of experience in the type of mine in which he or she intends on working: underground or surface.³² A person with a college engineering degree and one year of experience may also qualify.³³

A fire boss must have worked at least three years in gassy underground mines and one of the years must be in an underground coal mine.³⁴

SHOT FIRER

A shot-firer must have an understanding of explosives, breaking agents, blasting accessories used in coal mines, the proper placement of drill holes, the flame safety lamp and its use in detecting inflammables and noxious gases, and proper ventilation in the working places of coal mines.³⁵ Staff explained that the flame safety lamp is no longer in use and has been replaced by the digital gas detector.

The Board has authority for determining the experience qualifications for shot-firers³⁶ and hoistmen. However, the MSHA may also determine experience and training qualifications for hoistmen.³⁷

²⁸ § 34-22-110(1), C.R.S.

²⁹ § 34-22-110(2), C.R.S.

³⁰ § 34-22-110(3), C.R.S.

³¹ § 34-22-109(2), C.R.S.

³² § 34-22-112(2), C.R.S.

³³ § 34-22-112(3), C.R.S.

³⁴ § 34-22-112(4), C.R.S.

³⁵ § 34-22-109(3), C.R.S.

³⁶ § 34-22-112(6), C.R.S.

³⁷ § 34-22-112(7), C.R.S.

ELECTRICIAN

To become a certified mine electrician, a candidate must have at least one year of electrical experience and be:³⁸

- Qualified as a coal mine electrician by another state with an equivalent qualification or program approved by the U.S. Secretary of Labor;
- Qualified by the U.S. Secretary of Labor as a coal mine electrician; or
- Qualified by training, education, and experience to perform electrical work, maintain electrical equipment, and conduct examinations and tests of electrical equipment.

If an electrician chooses to work in an underground coal mine, the year of experience must be in an underground mine.³⁹

The Board also has the authority to certify belt examiners, cable splicers, and lamp and gas attendants.⁴⁰

Board Disciplinary Actions

The Act grants the Board the authority to investigate complaints and take disciplinary action against a certificate holder for any violation of any provision of the Act.⁴¹ The Board may act upon its own motion or based on a written complaint.⁴² The disciplinary actions the Board is empowered to take include:⁴³

- Denying the renewal of, suspending, or revoking a certification;
- Issuing a letter of admonition;
- Placing a person on probation;
- Imposing work conditions or limitations; and
- Issuing cease and desist orders.

All disciplinary actions must be taken in accordance with the State Administrative Procedures Act⁴⁴ and all Board actions and orders are subject to judicial review.⁴⁵

Unless an action is reckless or is conduct that exhibits a disregard for health and safety, the respondent must be given the facts in writing, given an option to reply, and given a “reasonable opportunity” to comply with the Act.⁴⁶ A hearing must be

³⁸ § 34-22-112(5)(a), C.R.S.

³⁹ § 34-22-112(5)(b), C.R.S.

⁴⁰ § 34-22-102(1)(e), C.R.S.

⁴¹ §§ 34-22-102(1)(c), and 107(2) C.R.S.

⁴² § 34-22-107(2), C.R.S.

⁴³ § 34-22-102(1)(C), C.R.S.

⁴⁴ § 34-22-107(1), C.R.S.

⁴⁵ § 34-22-107(8), C.R.S.

⁴⁶ § 34-22-107(3), C.R.S.

held within 30 days of the written charges.⁴⁷ A written decision must be delivered to the respondent and his or her employer within 10 days.⁴⁸

The Act prescribes that a certificate may only be revoked by the Board for:⁴⁹

- Reckless disregard of applicable mining law,
- Reckless disregard of compliance with health and safety standards,
- Demonstrated incompetence in the mine which endangers life or property, or
- Intentional withholding or altering of mine examination information or reports where life and property is endangered.

If a certificate is revoked, the Board may decide, on a case-by-case basis, whether the certificate may be reissued and the duration of the revocation period. This decision must be written into the revocation notice.⁵⁰

⁴⁷ § 34-22-107(5), C.R.S.

⁴⁸ § 34-22-107(7), C.R.S.

⁴⁹ § 34-22-107(6), C.R.S.

⁵⁰ § 34-22-107(9), C.R.S.

Program Description and Administration

In a sunset review, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) is guided by sunset criteria located in section 24-34-104(6)(b), Colorado Revised Statutes (C.R.S.). The third, fourth and fifth sunset criteria question:

Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures, and practices and any other circumstances, including budgetary, resource, and personnel matters;

Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively; and

Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates.

In part, COPRRR utilizes this section of the report to evaluate the agency according to these criteria.

Federal law requires an employee of a coal mine to be certified. The Colorado Department of Natural Resources' Coal Mine Board of Examiners (DNR and Board, respectively) administers the certification program in Colorado. Colorado and Utah are the only western region states that administer their own certification programs. The federal Mine Safety and Health Administration (MSHA) certifies coal mine employees in the remainder of the region.

The Board consists of four voting members who are appointed by the Governor and serve terms of four years.⁵¹ Three of the four voting members must be "actively engaged" in Colorado coal mines. Two represent underground coal mining: one must be a coal miner and the other must be a coal mine owner, operator, manager or other mine official. The third must be a representative from a surface coal mine who is an owner, operator, manager or other mine official. The fourth voting member must be an engineer with coal mining experience. The final, *ex officio*, member of the Board is the Commissioner of Mines or a Commissioner's designee.⁵² The Executive Director of DNR has assigned the task of determining the Commissioner to the Director of the Division of Reclamation, Mining, and Safety (Division).

⁵¹ § 34-22-102(3), C.R.S.

⁵² § 34-22-102(2), C.R.S.

Board meetings are open to the public and are required to be conducted annually. However, as a matter of practice the Board meets quarterly. The portions of the meetings concerning examination preparation and evaluation are conducted during executive session, which are closed to the public.

The program established to implement the certifications is funded through a combination of examination fees, DNR appropriations, and federal Blaster Certification Grant dollars. Because the fees are capped at \$25, a substantial amount must come from the other sources. For example, in fiscal year 17-18, 97.2 percent of the total program expenditures, were not covered by the examination fees. Table 1 reports the program’s budgetary information for the period examined for this sunset review.

Table 1
Program Expenditures
Fiscal Years 13-14 through 17-18

Fiscal Year	Total Program Expenditures	FTE
13-14	\$117,446	0.9
14-15	\$130,846	1.1
15-16	\$135,290	1.0
16-17	\$132,002	1.0
17-18	\$107,608	1.0

Table 1 shows that there is little variation in the costs of program operation. Board members are compensated \$50 per day for each day of actual service on the Board. What varies are direct expenses incurred by the Board for travel, room and board, and the like.⁵³

The full-time equivalent employee is split among two positions: an Environmental Specialist IV, who is the program director, and a Program Assistant II, who handles all administrative duties.

Certification

The eighth sunset criterion questions whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action.

In part, COPRRR utilizes this section of the report to evaluate the program according to this criterion.

⁵³ § 34-22-103, C.R.S.

The Board certifies several classifications of employees for both underground and surface coal mines, including:⁵⁴

- Mine foreman, who supervises the day-to-day workforce in their jobs;
- Assistant mine foreman, who supports the mine foreman (This position no longer exists in the mines. Therefore, no examinations are currently held to certify the position.);
- Mine Examiner, who is known as the “Fireboss” in the statutes, examines the mine prior to miners entering;
- Electrician, who installs and maintains electrical systems;
- Methane and oxygen deficiency tester;
- Underground shot-firer, who assembles, positions and detonates explosives in underground mines;
- Surface blaster, who fills blast holes with explosives and detonates explosives; and
- Surface shot-firer, who fills blast holes with explosives and detonates explosives in surface mines.

With the exception of the surface shot-firer, all certifications are required by MSHA. The surface shot-firer certification is only required under Colorado law.⁵⁵ Additionally, the Board is empowered to issue certifications to belt examiners, cable splicers, hoistmen, and lamp and gas attendants but these are no longer active occupations in Colorado coal mines.

Electrician certification must be renewed each year and surface blasters must renew every five years. Otherwise, certification remains valid unless a person is not actively employed in the coal mining industry for more than five years or has had a certification suspended or revoked.⁵⁶

Examinations

The eighth sunset criterion questions whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action.

In part, COPRRR utilizes this section of the report to evaluate the program according to this criterion.

To apply for certification, a candidate must pay a \$25 fee; submit a complete and accurate application; have completed mine safety training including first aid; and verify qualifications and references including practical experience, training, and education.⁵⁷ On a case-by-case basis, a college mining degree may satisfy a portion of

⁵⁴ 2 CCR 407-5 § 1.4(14), Coal Mine Health and Safety Rules.

⁵⁵ *ibid.*

⁵⁶ 2 CCR 407-5 § 2.3, Coal Mine Health and Safety Rules.

⁵⁷ 2 CCR 407-5 § 3.1, Coal Mine Health and Safety Rules.

required mining experience for surface or underground mine foreman and assistant mine foreman certifications.⁵⁸

A candidate must submit an application which includes an agreement to abide by all policies governing the certification process. The application must also include documentation of the candidate’s experience and qualifications on his or her present employer’s letterhead signed by a company official who knows and can confirm the candidate's experience and qualifications to take the examination. Once received, the Division staff reviews the application for completeness. If the application is complete, it is forwarded to the Board to determine if the candidate is qualified to take the examination for which he or she applied.

Written examinations are developed by the Board and are required for electricians, mine foremen, underground shot-firers, and surface blasters only, not the other positions. Examinations in each category are given in sections that test different competencies and may include a practical portion.⁵⁹ If an applicant fails a section(s), that section(s) may be taken again, one time, during the ensuing 12 months.⁶⁰ Additionally, if an applicant is seeking a promotion or an upgrade of a current position, portions of the examination may be retaken to achieve a better score to meet requirements for that position.⁶¹

The tables below list the macro examination data for the periods listed. They include data for all certification examinations offered by the Board.

**Table 2
Electrician Examination
Surface and Underground Mines**

Fiscal Year	Examination Attendees	Passed Examination (First Attempt)	Passed Examination (Retake)	Percent Passing
13-14	35	5	4	25.7
14-15	45	9	8	37.7
15-16	10	0	1	10.0
16-17	19	5	3	42.1
17-18	31	7	6	41.9

Table 2 notes fluctuation in the number of people taking the examination. Staff explained that the numbers are variable often because of conditions that exist in a mine. For example, a portion of, or an entire mine, may have to be closed for a period of time because of the existence of water or gas in the mines. This may affect

⁵⁸ 2 CCR 407-5 § 3.2(4), Coal Mine Health and Safety Rules.

⁵⁹ 2 CCR 407-5 § 3.3(1) Coal Mine Health and Safety Rules.

⁶⁰ 2 CCR 407-5 § 3.3(2) Coal Mine Health and Safety Rules.

⁶¹ 2 CCR 407-5 § 3.3(4) Coal Mine Health and Safety Rules.

the number of people needed for certain positions or overall employment at a specific site. Notwithstanding, there is a pass rate consistently below 50 percent.

**Table 3
Foreman Examination
Surface Mine**

Fiscal Year	Examination Attendees	Passed Examination (First Attempt)	Passed Examination (Retake)	Percent Passing
13-14	14	9	3	85.7
14-15	16	11	1	75.0
15-16	9	0	1	11.1
16-17	10	10	0	100.0
17-18	11	11	0	100.0

Table 3 shows that typically more than 75 percent of the examinees pass the surface mine foreman examination. However, fiscal year 15-16 had a pass rate of only 11.1 percent. Staff explained that this was an outlier and the candidates had not sufficiently prepared.

**Table 4
Foreman Examination
Underground Mine**

Fiscal Year	Examination Attendees	Passed Examination (First Attempt)	Passed Examination (Retake)	Percent Passing
13-14	67	18	14	47.8
14-15	83	20	17	44.6
15-16	45	9	11	44.4
16-17	30	3	5	26.7
17-18	32	3	16	59.4

Table 4 indicates that after the first three fiscal years reviewed, the pass rate dropped drastically. This drop was also noticed by staff who suggested that the Board reach out to the mining companies. Round table discussions ensued and changes were made to the training and examination which raised the passing rate without compromising mine safety. However, the overall pass rate remains very low, in only one year was it above 50 percent.

**Table 5
Shot-Firer
Underground Mine**

Fiscal Year	Examination Attendees	Passed Examination (First Attempt)	Passed Examination (Retake)	Percent Passing
13-14	12	10	0	83.3
14-15	4	4	0	100.0
15-16	9	9	0	100.0
16-17	2	2	0	100.0
17-18	5	5	0	100.0

Table 5 shows that most people who take the shot-firer examination, pass it. Thirty-two individuals took the examination during the period examined for this sunset review and two failed to pass. This amounts to a 93.8 percent passing rate.

**Table 6
Blaster
Surface Mine**

Fiscal Year	Examination Attendees	Passed Examination (First Attempt)	Passed Examination (Retake)	Percent Passing
13-14	0	0	0	Not Applicable
14-15	0	0	0	Not Applicable
15-16	2	0	1	50.0
16-17	0	0	0	Not Applicable
17-18	0	0	0	Not Applicable

Table 6 shows that few people seek to be qualified as blasters. Two people sat for the examination, with one passing, during the entire cohort examined for this sunset review. The demand for qualified blasters in surface mines is not high.

Reciprocal Certifications

The Board may issue temporary reciprocal certifications to mine foremen, electricians, and underground hoistmen. Temporary certifications expire two weeks after the date of the next examination for that position, and are not renewable. Additionally, the Board may recognize a certification issued by MSHA for electricians and hoistmen. Reciprocity is considered on a case-by-case basis and based on employment history and qualifications. During the period examined for this sunset review, staff reported issuing 12 electrician and 4 surface blaster certifications through reciprocity.

Complaint and Disciplinary Activity

The seventh sunset criterion requires COPRRR to examine whether complaint, investigation, and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession.

A certification may only be suspended or revoked for good cause after considering the facts and allowing the certificant “reasonable opportunity” to comply with regulations.⁶² Notwithstanding, the Director of the Division may take immediate action, pending a Board hearing, if there is a deliberate and willful violation of mining law or when issues of health and safety warrant it.⁶³

There were no complaints reported or disciplinary actions taken during the period studied for this sunset review.

Collateral Consequences - Criminal Convictions

The ninth sunset criterion requires COPRRR to examine whether the agency under review, through its licensing processes, imposes any sanctions or disqualifications based on past criminal history, and if so, whether the disqualifications serve public safety or commercial or consumer protection interests.

In part, COPRRR utilizes this section of the report to evaluate the program according to this criterion.

There are no such disqualifications in the program’s authorizing statutes at this time.

⁶² 2 CCR 407-5 §§ 5.1(1) and (2), Coal Mine Health and Safety Rules.

⁶³ 2 CCR 407-5 § 5.1(3), Coal Mine Health and Safety Rules.

Analysis and Recommendations

The final sunset criterion questions whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest. The recommendations that follow are offered in consideration of this criterion, in general, and any criteria specifically referenced in those recommendations.

Recommendation 1 - Continue the Coal Mine Board of Examiners and certification program for nine years, until 2029.

Coal mining is extremely dangerous. Dust, gas, and structural integrity all effect the well-being and safety of mine workers. Danger can be mitigated by ensuring that the people working in that environment have been trained to avoid hazardous conditions and how to react when problems do occur. The federal Mine Safety Health Administration (MSHA) requires employees who work in coal mines to receive basic and annual refresher training. It also requires that certain positions be certified.

The Colorado Department of Natural Resources' Coal Mine Board of Examiners (Board) administers the certification program in Colorado. MSHA informed the Colorado Office of Policy, Research, and Regulatory Reform (COPRRR) that Colorado and Utah are the only states in the western region, MSHA District 9, that operate their own certification programs. District 9 encompasses 22 western states including Alaska and Hawaii.⁶⁴

According to statute, the primary responsibility of a sunset review is to assist the General Assembly in determining if a program is necessary to protect the public's health, safety, and welfare. In this case, the public amounts to those individuals who work in Colorado's coal mines and their families. It follows that if training can save lives and MSHA mandates that training and certification, then the training and certification is necessary.

However, beyond that primary responsibility, a sunset review must also consider whether a program represents the least restrictive option consistent with the public interest. Given that Colorado is one of the only two states in District 9 that has its own certification program, the next question must be, "What would happen if Colorado sunset its certification program?" MSHA administers certification programs in 20 of the 22 states in the region, including Wyoming, which is the largest coal producer in the nation. It therefore seems reasonable to infer that the least restrictive regulation consistent with protecting public interest is to have MSHA administer the Colorado program.

⁶⁴ United States Department of Labor. *Coal Mine Safety and Health*. Retrieved July 31, 2019, from <https://www.msha.gov/about/program-areas/coal-mine-safety-and-health>

Consider the geology of the 22 states in District 9. First, not every state in District 9 has an operating coal mine. Only Arizona, Colorado, Montana, New Mexico, North Dakota, Utah and Wyoming have operating coal mines.⁶⁵ Therefore, while MSHA is responsible, on paper, for administering certifications in 20 states, in reality, MSHA does not. If a mine were to open in a state without a program, then MSHA would be responsible for administering a program.

A second and more significant issue concerns the type of mining conducted in Colorado versus other western region states. Wyoming is by far the largest coal producing state in the nation. It produces 41 percent of all coal mined in the U.S. and 73 percent of all of the coal mined in the region.⁶⁶ The vast majority of Wyoming coal comes from surface mines. In Colorado, during the first quarter of 2019, only about one-quarter of the state's coal production came from surface mines.⁶⁷

Danger from fire, flood, toxic gas, and collapse is present in all mines but it is even more accentuated in the close confines of a subsurface versus surface mine. The margin of error when a safety issue presents itself is less in an underground operation than in a surface operation. The danger demands specialized training. In the west, only Colorado and Utah operate their own certification programs and they are the states with a majority underground coal mines. In the mining regions east of the Mississippi River, there are more state-administered certification programs. In those states, there are also more underground mines which require customized preparation for employees.

Another issue to consider is the potential effect of transferring certification responsibilities to MSHA.

COPRRR contacted MSHA regarding the transfer of responsibilities. MSHA explained that to perform the examination and certification duties, it would have to use existing personnel resources. This would entail taking safety inspectors out of the mines to perform those duties. It also would mean that the examinations that occur quarterly today may not occur on such a regular basis. Put another way, there would be less safety monitoring in the mines and fewer people being qualified to work in the mines if the program was sunsetted and MSHA assumed responsibility.

Because of the danger presented in coal mines it is important that the individuals who work in the mines be qualified and certified. Given that the majority of coal mined in Colorado comes from underground mines which is not the Region 9 norm and that MSHA does not have the resources necessary to take on the additional responsibilities of examining and certifying underground mine staff, the Board should be reauthorized to administer the certification program. Because there are no recommendations to

⁶⁵ United States Department of Labor. *Coal District 9*. Retrieved July 31, 2019, from

<https://www.msha.gov/about/program-areas/coal-mine-safety-and-health/offices/coal-district-9>

⁶⁶ U.S. Department of Energy. *Coal Explained Where Our Coal Comes From*. Retrieved May 20, 2019, from https://www.eia.gov/energyexplained/index.php?page=coal_where

⁶⁷ Colorado Division of Reclamation, Mining, and Safety. *Monthly Coal Summary Report Period 1/2019 through 4/2019*. Retrieved June 14, 2019, from <https://mining.state.co.us/SiteCollectionDocuments/04Summary19.pdf>

substantially change the structure of the program for which the General Assembly would need to examine operations sooner, the General Assembly should continue the Board and certification program for nine years, until 2029.

Recommendation 2 - Require the Executive Director of the Department of Natural Resources to establish examination fees based on examination administration.

The third sunset criterion directs analysis to consider if agency operations operate in the public interest or are impeded by issues such as budgetary issues.

According to section 34-22-111, Colorado Revised Statutes (C.R.S.), the fees for examinations administered under the Act are capped at \$25.

In certification programs of this nature, program activities are generally cash-funded. Cash-funding means the fees are intended to cover the direct and indirect costs of administering activities. However, in this instance, it appears that the fees are intended to cover costs associated with examination administration.

Rather than having a hard fee in statute, the more common practice is for the law to allow the regulator the flexibility to adjust fees as necessary in order to approximate the direct and indirect costs of examination administration.

Therefore, the General Assembly should require the Executive Director of the Department of Natural Resources to establish examination fees based on examination administration.

Recommendation 3 - Define “Commissioner” as used in section 34-22-102(2)(e), C.R.S.

Section 34-22-102(2)(e), C.R.S., states that the Commissioner or a Commissioner’s designee is an *ex officio*, nonvoting member of the Board. However, “Commissioner” is not defined in the Act. The assumption is that it is the Commissioner of Mines, defined in section 34-21-102, C.R.S. However, that should be explicitly spelled out in the Act so as not to create further confusion or an erroneous assumption.

The tenth sunset criterion asks if changes are necessary to improve operations and enhance public interest. Technical changes, such as this, clarify the law and therefore enhance the public interest. To enhance the public interest the General Assembly should define “Commissioner” as used in section 34-22-102(2)(e), C.R.S.

Recommendation 4 - Repeal references to assistant mine foreman in section 34-22-112, C.R.S.

Section 34-22-112, C.R.S., addresses the qualifications an applicant must have to become certified. Sections 34-22-112(2) and 112(3), C.R.S., speak to mine foreman and assistant mine foreman qualification. An assistant mine foreman is no longer a position in coal mines and consequently the Board does not hold examinations for assistant mine foremen.

The tenth sunset criterion asks if changes are necessary to improve operations. Repealing obsolete language improves operations. Therefore, the General Assembly should repeal references to assistant mine foreman.

Recommendation 5 - Make technical changes to the law.

The tenth sunset criterion asks the General Assembly to consider if changes are necessary to improve agency operations and promote the public's interest.

The law contains instances of obsolete language that can be removed. These changes are technical in nature, meaning they have no substantive impact on certification.

The General Assembly should make the following technical change:

- Section 34-22-109(3), C.R.S. - the flame safety lamp used in detecting gas has been replaced by the digital gas detector.

Administrative Recommendation 1 - The Division should actively recruit Board members to volunteer for Board membership from all operating mines.

Often, it is not easy to fill positions on state regulatory boards and commissions. The Board is no different; there was one application to fill the last vacancy. Still, first-hand industry expertise and diversity of opinion are often cited as reasons for empowering a board or commission with regulatory authority rather than an individual. Broad perspectives and capability are desired traits.

The Board consists of four voting members and one non-voting member. Three of the four voting members must be "actively engaged" in Colorado coal mines. Two represent underground coal mining: one must be a coal miner and the other must be a coal mine owner, operator, manager or other mine official. The third must be a representative from a surface coal mine who is an owner, operator, manager or other mine official. The fourth voting member must be an engineer with coal mining

experience. The final, *ex officio*, member of the Board is the Commissioner of Mines or a Commissioner's designee.⁶⁸

The current four-member Board has two members who are employed by the same company. That half of the voting members have a common interest has raised a concern among some stakeholders. Sunset criterion IV asks,

Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates[.]

The Division acts as the administrative arm of the Board and receives applications for Board membership. While COPRRR has no reason to believe there has been any impropriety, the state has six producing coal mines from which it may recruit individuals. Ultimately, the Governor makes any decision regarding who is seated as a Board member but a larger applicant pool could lead to greater diversity of membership. Therefore, the Division should actively recruit Board members to volunteer for Board membership from all operating mines.

Administrative Recommendation 2 - The Board should ensure that all certification examinations are psychometrically validated every five years or whenever the Board develops a new examination.

The Board develops certification examinations. The tables on pages 12 through 14 of this report note that the examination pass rates vary and are often quite low. When the rates are too high or too low, the Board discusses developing new examinations and at times does develop new examinations. As a state agency, the Board must be sure that it is actually measuring the aptitude of the person taking the examination only as it pertains to the skills needed for the job.

Psychometric validity is crucial to a state licensing or certification program. Psychometric validity helps to ensure, statistically, that test items are neither too difficult nor too easy, and that test items actually test for what they purport to test. In other words, psychometric validity helps to ensure that an examination is defensible should a candidate ever challenge the examination. Considering the due process implications of certification examinations, psychometric validity is crucial.

The examinations developed by the Board have not been psychometrically validated.

The second sunset criterion directs the General Assembly to contemplate whether regulation establishes the least restrictive regulation consistent with the public interest. Since the certification examinations administered by the Board are not

⁶⁸ § 34-22-102(2), C.R.S.

psychometrically validated, there is no way to determine if, in fact, the examinations protect the public interest or, conversely, unnecessarily restrict entry into these positions.

Therefore, the Board should establish a procedure to ensure that all certification examinations are psychometrically validated every five years or whenever the Board develops a new examination.