

TITLE 19 NATURAL RESOURCES AND WILDLIFE
CHAPTER 8 COAL MINING
PART 34 EXEMPTION FOR COAL EXTRACTION INCIDENTAL TO THE EXTRACTION OF
OTHER MINERALS

19.8.34.1 ISSUING AGENCY: New Mexico Coal Surface Mining Commission.
[19.8.34.1 NMAC - N, 9-29-2000]

19.8.34.2 SCOPE: All persons subject to the New Mexico Surface Mining Act, NMSA 1978, Sections 69-25A-1 et. Seq. (1979).
[19.8.34.2 NMAC - N, 9-29-2000]

19.8.34.3 STATUTORY AUTHORITY: NMSA 1978, Sections 69-25A-1 et. seq. (1979).
[19.8.34.3 NMAC - N, 9-29-2000]

19.8.34.4 DURATION: Permanent.
[19.8.34.4 NMAC - N, 9-29-2000]

19.8.34.5 EFFECTIVE DATE: November 29, 1997, unless a later date is cited at the end of a section.
[19.8.34.5 NMAC - N, 9-29-2000]

19.8.34.6 OBJECTIVE: The objective of Parts 1 - 35 of Chapter 8 is to establish regulations to implement the New Mexico Surface Mining Act as directed in NMSA 1978, Section 69-25A-5 (1979). These regulations are intended to ensure proper reclamation through permitting for operations subject to the New Mexico Surface Mining Act, in accordance with provisions and standards outlined in the New Mexico Surface Mining Act.
[19.8.33.6 NMAC - N, 9-29-2000; A, 1-15-2002]

19.8.34.7 DEFINITIONS: [RESERVED]
[19.8.34.7 NMAC - N, 9-29-2000]
[Definitions for this part can be found in 19.8.1.7 NMAC.]

19.8.34.8 - 19.8.34.3399 [RESERVED]
[19.8.34.8 - 19.8.34.3399 NMAC - N, 9-29-2000]

19.8.34.3400 SCOPE: This part implements the exemption contained in Paragraph (1) of Subsection P of Section 69-25A-3 NMSA 1978 concerning the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 percent of the total tonnage of coal and other minerals removed for purposes of commercial use or sale.
[11-29-97; 19.8.34.3400 NMAC - Rn, 19 NMAC 8.2.34.3400, 9-29-2000; A, 12-31-2007]

19.8.34.3401 DEFINITIONS: As used in this part, the following terms have the meaning specified, except where otherwise indicated:

A. Cumulative measurement period means the period of time over which both cumulative production and cumulative revenue are measured.

(1) For purposes of determining the beginning of the cumulative measurement period, subject to approval by the director, the operator must select and consistently use one of the following:

(a) for mining areas where coal or other minerals were extracted prior to August 3, 1977, the date extraction of coal or other minerals commenced at that mining area or August 3, 1977, or

(b) for mining areas where extraction of coal or other minerals commenced on or after August 3, 1977, the date extraction of coal or other minerals commenced at that mining area, whichever is earlier.

(2) For annual reporting purposes pursuant to 19.8.34.3409 NMAC, the end of the period for which cumulative production and revenue is calculated is either:

(a) for mining areas where coal or other minerals were extracted prior to October 1, 1995, and every October 1 thereafter; or

(b) for mining areas where extraction of coal or other minerals commenced on or after October 1, 1995, the last day of the calendar quarter during which coal extraction commenced, and each anniversary of that day thereafter.

B. Cumulative production means the total tonnage of coal or other minerals extracted from a mining area during the cumulative measurement period. The inclusion of stockpiled coal and other mineral tonnages in this total is governed by 19.8.34.3407 NMAC.

C. Cumulative revenue means the total revenue derived from the sale of coal or other minerals and the fair market value of coal or other minerals transferred or used, but not sold, during the cumulative measurement period.

D. Mining area means an individual excavation site or pit from which coal, other minerals and overburden are removed.

E. Other minerals means any commercially valuable substance mined for its mineral value, excluding coal, topsoil, waste and fill material.

[11-29-97; 19.8.34.3401 NMAC - Rn, 19 NMAC 8.2.34.3401, 9-29-2000; A, 12-31-2007]

19.8.34.3402 APPLICATION REQUIREMENTS AND PROCEDURES:

A. New operations.

(1) Any person who plans to commence or continue coal extraction after October 1, 1995, in reliance on the incidental mining exemption shall file a complete application for exemption with the director for each mining area.

(2) No person may commence coal extraction based upon the exemption until the director approves such application, except as provided in Paragraph (3) of Subsection E of 19.8.34.3402 NMAC.

B. Existing operations. Any person who has commenced coal extraction at a mining area in reliance upon the incidental mining exemption prior to October 1, 1995, may continue mining operations for 60 days after October 1, 1995. Coal extraction may not continue after such 60 day period unless that person files an administratively complete application or exemption with the director. If an administratively complete application is filed within 60 days the person may continue extracting coal in reliance on the exemption beyond the 60-day period until the director makes an administrative decision on such application.

C. Additional information. The director shall notify the applicant if the application for exemption is incomplete and may at any time require submittal of additional information.

D. Public comment period. Following publication of the newspaper notice required by Subsection I of 19.8.34.3403 NMAC, the director shall provide a period of no less than 30 days during which time any person having an interest which is or may be adversely affected by a decision on the application may submit written comments or objections.

E. Exemption determination.

(1) No later than 90 days after filing of an administratively complete application, the director shall make a written determination whether, and under what conditions, the persons claiming the exemption are exempt under this part, and shall notify the applicant and persons submitting comments on the application of the determination and the basis for the determination.

(2) The determination of exemption shall be based upon information contained in the application and any other information available to the director at that time.

(3) If the director fails to provide an applicant with the determination as specified in Paragraph (1) of Subsection E of 19.8.34.3402 NMAC, an applicant who has not begun may commence coal extraction pending a determination on the application unless the director issues an interim finding, together with reasons therefore, that the applicant may not begin coal extraction.

F. Administrative review.

(1) Any adversely affected person may request administrative review of a determination under Subsection E of 19.8.34.3402 NMAC within 30 days of the notification of such determination in accordance with procedures established under 19.8.12.1200 NMAC.

(2) A petition for administrative review filed under 19.8.12.1200 NMAC shall not suspend the effect of a determination under Subsection E of 19.8.34.3402 NMAC.

[11-29-97; 19.8.34.3402 NMAC - Rn, 19 NMAC 8.2.34.3402, 9-29-2000; A, 12-31-2007; A, 08-31-2010]

19.8.34.3403 CONTENTS OF APPLICATIONS FOR EXEMPTION: An application for exemption shall include at a minimum:

A. the name and address of the applicant;

- B.** a list of the minerals sought to be extracted;
- C.** estimates of annual production of coal and the other minerals within each mining area over the anticipated life of the mining operation;
- D.** estimated annual revenues to be derived from bona fide sales of coal and other minerals to be extracted within the mining area;
- E.** where coal or the other minerals are to be used rather than sold, estimated annual fair market values at the time of projected use of the coal and other minerals to be extracted from the mining area;
- F.** the basis for all annual production, revenue, and fair market value estimates;
- G.** a description, including county, township if any, and boundaries of the land, of sufficient certainty that the mining areas may be located and distinguished from other mining areas;
- H.** an estimate to the nearest acre of the number of acres that will compose the mining area over the anticipated life of the mining operation;
- I.** evidence of publication in a newspaper of general circulation in the county of the mining area, of a public notice that an application for exemption has been filed with the director (the public notice must identify the persons claiming the exemption and must contain a description of the proposed operation and its locality that is sufficient for interested persons to identify the operation);
- J.** representative stratigraphic cross-section(s) based on test borings or other information identifying and showing the relative position, approximate thickness and density of the coal and each other mineral to be extracted for commercial use or sale and the relative position and thickness of any material, not classified as other minerals, that will also be extracted during the conduct of mining activities;
- K.** a map of appropriate scale which clearly identifies the mining area;
- L.** a general description of mining and mineral processing activities for the mining area;
- M.** a summary of sales commitments and agreements for future delivery, if any, which the applicant has received for other minerals to be extracted from the mining area, or a description of potential markets for such minerals;
- N.** if the other minerals are to be commercially used by the applicant, a description specifying the use;
- O.** for operations having extracted coal or other minerals prior to filing an application for exemption, in addition to the information required above, the following information must also be submitted:
 - (1) any relevant documents the operator has received from the director documenting its exemption from the requirements of 69-25A-1 through 35 NMSA 1978;
 - (2) the cumulative production of the coal and other minerals from the mining area; and
 - (3) estimated tonnages of stockpiled coal and other minerals; and
- P.** any other information pertinent to the qualification of the operation as exempt.
[11-29-97; 19.8.34.3403 NMAC - Rn, 19 NMAC 8.2.34.3403, 9-29-2000; A, 12-31-2007]

19.8.34.3404 PUBLIC AVAILABILITY OF INFORMATION:

- A.** Except as provided in Subsection B of 19.8.34.3404 NMAC, all information submitted to the director under this part shall be made immediately available for public inspection and copying at the local offices of the director until at least three years after expiration of the period during which the subject mining area is active.
- B.** The director may keep information submitted under this part confidential if the person submitting it requests in writing, at the time of submission, that it be kept confidential and the information concerns trade secrets or is privileged commercial or financial information of the persons intending to conduct operations under this part.
- C.** Information requested to be held as confidential under Subsection B of 19.8.34.3404 NMAC shall not be made publicly available until after notice and opportunity to be heard is afforded persons both seeking and opposing disclosure of the information.
[11-29-97; 19.8.34.3404 NMAC - Rn, 19 NMAC 8.2.34.3404, 9-29-2000; A, 12-31-2007]

19.8.34.3405 REQUIREMENTS FOR EXEMPTIONS:

- A.** Activities are exempt from the requirements of 69-25A-1 through 35 NMSA 1978 if all of the following are satisfied:
 - (1) the cumulative production of coal extracted from the mining area determined annually as described in this subsection does not exceed 16 2/3 percent of the total cumulative production of coal and other minerals removed during such period for purposes of bona fide sale or reasonable commercial use;

(2) coal is produced from a geological stratum lying above or immediately below the deepest stratum from which other minerals are extracted for the purposes of bona fide sale or reasonable commercial use;

(3) the cumulative revenue derived from the coal extracted from the mining area determined annually shall not exceed 50 percent of the total cumulative revenue derived from the coal and other minerals removed for purposes of bona fide sale or reasonable commercial use; if the coal extracted or the minerals removed are used by the operator or transferred to a related entity for use instead of being sold in a bona fide sale, then the fair market value of the coal or other minerals shall be calculated at the time of use or transfer and shall be considered rather than revenue.

B. Persons seeking or that have obtained an exemption from the requirements of the act shall comply with the following:

(1) each other mineral upon which an exemption under this part is based must be a commercially valuable mineral for which a market exists or which is mined in bona fide anticipation that a market will exist for the mineral in the reasonably foreseeable future, not to exceed twelve months from the end of the current period for which cumulative production is calculated; a legally binding agreement for the future sale of other minerals is sufficient to demonstrate the above standard;

(2) if either coal or other minerals are transferred or sold by the operator to a related entity for its use or sale, the transaction must be made for legitimate business purposes.

[11-29-97; 19.8.34.3405 NMAC - Rn, 19 NMAC 8.2.34.3405, 9-29-2000; A, 12-31-2007]

19.8.34.3406 CONDITIONS OF EXEMPTION AND RIGHT OF INSPECTION AND ENTRY: A person conducting activities covered by this part shall:

A. maintain, on-site or at other locations available to the authorized representative of the director and the secretary of the interior, information necessary to verify the exemption including, but not limited to, commercial use and sales information, extraction tonnages, and a copy of the exemption application and exemption approved by the director;

B. notify the director upon the completion of the mining operation or permanent cessation of all coal extraction activities; and

C. conduct operations in accordance with the approved application or when authorized to extract coal under Subsection B of 19.8.34.3402 NMAC or Paragraph (3) of Subsection E of 19.8.34.3402 NMAC prior to submittal or approval of an exemption application, in accordance with the standards of this part.

D. Authorized representatives of the director and the secretary of the interior shall have the right to conduct inspections of operations claiming exemption under this part.

E. Each authorized representative of the director and the secretary of the interior conducting an inspection under this part:

(1) shall have a right of entry to, upon, and through any mining and reclamation operations without advance notice or a search warrant, upon presentation of appropriate credentials;

(2) may, at reasonable times and without delay, have access to and copy any records relevant to the exemption; and

(3) shall have a right to gather physical and photographic evidence to document conditions, practices or violations at a site.

F. No search warrant shall be required with respect to any activity under Subsections D and E of 19.8.34.3406 NMAC, except that a search warrant may be required for entry into a building.

[11-29-97; 19.8.34.3406 NMAC - Rn, 19 NMAC 8.2.34.3406, 9-29-2000; A, 12-31-2007]

19.8.34.3407 STOCKPILING OF MINERALS:

A. Coal. Coal extracted and stockpiled may be excluded from the calculation of cumulative production until the time of its sale, transfer to a related entity or use:

(1) up to an amount equaling a 12-month supply of the coal required for future sale, transfer or use as calculated based upon the average annual sales, transfer and use from the mining area over the two preceding years; or

(2) for a mining area where coal has been extracted for a period of less than two years, up to an amount that would represent a 12-month supply of the coal required for future sales, transfer or use as calculated based on the average amount of coal sold, transferred or used each month.

B. Other minerals.

(1) The director shall disallow all or part of an operator's tonnages of stockpiled other minerals for purposes of meeting the requirements of this part if the operator fails to maintain adequate and verifiable records of

the mining area of origin, the disposition of stockpiles or if the disposition of the stockpiles indicates the lack of commercial use or market for the minerals.

(2) The director may only allow an operator to utilize tonnages of stockpiled other minerals for purposes of meeting the requirements of this part if:

(a) the stockpiling is necessary to meet market conditions or is consistent with generally accepted industry practices; and

(b) except as provided in Paragraph (3) of Subsection B of 19.8.34.3407 NMAC, the stockpiled other minerals do not exceed a 12-month supply of the mineral required for future sales as approved by the director on the basis of the exemption application.

(3) The director may allow an operator to utilize tonnages of stockpiled other minerals beyond the 12-month limit established in Paragraph (2) of Subsection B of 19.8.34.3407 NMAC if the operator can demonstrate to the director's satisfaction that the additional tonnage is required to meet future business obligations of the operator, such as may be demonstrated by a legally binding agreement for future delivery of the minerals.

(4) The director may periodically revise the other mineral stockpile tonnage limits in accordance with the criteria established by Paragraphs (2) and (3) of Subsection B of 19.8.34.3407 NMAC based on additional information available to the director.

[11-29-97; 19.8.34.3407 NMAC - Rn, 19 NMAC 8.2.34.3407, 9-29-2000; A, 12-31-2007]

19.8.34.3408 REVOCATION AND ENFORCEMENT:

A. Responsibility of the director. The director shall conduct an annual compliance review of the mining area utilizing the annual report submitted pursuant to 19.8.34.3409 NMAC, an on-site inspection and any other information available to the director.

B. If the director has reason(s) to believe that a specific mining area was not exempt under the provisions of this part at the end of the previous reporting period, is not exempt, or will be unable to satisfy the exemption criteria at the end of the current reporting period, the director shall notify the operator that the exemption may be revoked and the reason(s) therefor. The exemption will be revoked unless the operator demonstrates to the director within 30 days that the mining area in question should continue to be exempt.

C. Director's finding and administrative review.

(1) If the director finds that an operator has not demonstrated that activities conducted in the mining area qualify for the exemption, the director shall revoke the exemption and immediately notify the operator and intervenors. If a decision is made not to revoke an exemption, the director shall immediately notify the operator and intervenors.

(2) Any adversely affected person may request administrative review of a decision whether to revoke an exemption within 30 days of the notification of such decision in accordance with procedures established under 19.8.12.1200 NMAC.

(3) A petition for administrative review filed under 19.8.12.1200 NMAC shall not suspend the effect of a decision whether to revoke an exemption.

D. Direct enforcement.

(1) An operator mining in accordance with the terms of an approved exemption shall not be cited for violations of these regulations which occurred prior to the revocation of the exemption.

(2) An operator who does not conduct activities in accordance with the terms of an approved exemption and knows or should know such activities are not in accordance with the approved exemption shall be subject to direct enforcement action for violations of these regulations which occur during the period of such activities.

(3) Upon revocation of an exemption or denial of an exemption application an operator shall stop conducting surface coal mining operations until a permit is obtained and shall comply with the reclamation standards of these regulations with regard to conditions, areas and activities existing at the time of revocation or denial.

[11-29-97; 19.8.34.3408 NMAC - Rn, 19 NMAC 8.2.34.3408, 9-29-2000; A, 12-31-2007; A, 08-31-2010]

19.8.34.3409 REPORTING REQUIREMENTS:

A. Annual report.

(1) Following approval by the director of an exemption for a mining area, the person receiving the exemption shall, for each mining area, file a written report annually with the director containing the information specified in Subsection B of 19.8.34.3409 NMAC.

(2) The report shall be filed no later than 30 days after the end of the 12-month period as determined in accordance with the definition of "cumulative measurement period" in 19.8.34.3401 NMAC.

(3) The information in the report shall cover:

(a) annual production of coal and other minerals and annual revenue derived from coal and other minerals during the preceding 12-month period; and

(b) the cumulative production of coal and other minerals and the cumulative revenue derived from coal and other minerals.

B. For each period and mining area covered by the report, the report shall specify:

(1) the number of tons of extracted coal sold in bona fide sales and total revenue derived from such sales;

(2) the number of tons of coal extracted and used or transferred by the operator or related entity and the estimated total fair market value of such coal;

(3) the number of tons of coal stockpiled;

(4) the number of tons of other commercially valuable minerals extracted and sold in bona fide sales and total revenue derived from such sales;

(5) the number of tons of other commercially valuable minerals extracted and used or transferred by the operator or related entity and the estimated total fair market value of such minerals; and

(6) the number of tons of other commercially valuable minerals removed and stockpiled by the operator.

[11-29-97; 19.8.34.3409 NMAC - Rn, 19 NMAC 8.2.34.3409, 9-29-2000; A, 12-31-2007]

HISTORY OF 19.8.34 NMAC:

Pre-NMAC History:

The material in Part 34 was derived from that previously filed with the State Records Center and Archives under: SB 73-1 Regulations of the State of New Mexico Coal Surfacing Commission, filed 1-10-73 and its amendment filed 8-4-76

SB 78-1 (Rule 78-1) Regulations of the State of New Mexico Coal Surfacing Commission, filed 8-31-78

SB 79-1 (Rule 79-1) New Mexico Coal Surfacing Regulations, filed 7-11-79

CSMC Rule 80-1 (Rule 80-1) Surface Coal Mining Regulations, filed 9-24-80; and all amendments to CSMC Rule 80-1, filed 7-29-82, 11-10-83, 3-5-84, 7-19-84, filed 8-6-84, 8-23-84, 3-28-89, 6-15-90, 9-18-90, 2-15-91, 5-8-91, 8-26-91, 10-4-91, 7-28-92, 1-25-93, 11-1-94, 3-10-95, 4-12-95, 12-21-95.

Other History:

Renumbered and reformatted CSMC Rule 80-1, Surface Coal Mining Regulations (filed 9-24-80) to 19 NMAC 8.2, Coal Surface Mining, effective 11-29-1997.

Renumbered 19 NMAC 8.2 Subpart 34 Exemption for Coal Extraction Incidental to the Extraction of Other Minerals (filed 11-13-97) to 19.8.34 NMAC Exemption for Coal Extraction Incidental to the Extraction of Other Minerals, effective 9-29-2000.