

**PART 702 -- EXEMPTION FOR COAL EXTRACTION INCIDENTAL TO THE EXTRACTION
OF OTHER MINERALS**

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Sec. 702.11 Application requirements and procedures.

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(a) (1) Any person who plans to commence or continue coal extraction after April 1, 1990, under a Federal program or on Indian lands, or after the effective date of counterpart provisions in a State program, in reliance on the incidental mining exemption shall file a complete application for exemption with the regulatory authority for each mining area.

(2) Following incorporation of an exemption application approval process into a regulatory program, a person may not commence coal extraction based upon the exemption until the regulatory authority approves such application, except as provided in paragraph (e) (3) of this section.

(b) Existing operations. Any person who has commenced coal extraction at a mining area in reliance upon the incidental mining exemption prior to April 1, 1990, in a State with a Federal program or on Indian lands, or prior to the effective date of counterpart provisions in a State program, may continue mining operations for 60 days after such effective date. Coal extraction may not continue after such 60-day period unless that person files an administratively complete application for exemption with the regulatory authority. 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 regulatory authority makes an administrative decision on such application.

(c) Additional information. The regulatory authority 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 Sec. 702.12(g), the regulatory authority 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 regulatory authority 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 regulatory authority at that time.

(3) If the regulatory authority fails to provide an applicant with the determination as specified in paragraph (e) (1) of this section, an applicant who has not begun may commence coal extraction pending a determination on the application unless the regulatory authority 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 paragraph (e) of this section within 30 days of the notification of such determination in accordance with procedures established under 43 CFR 4.1280 when OSM is the regulatory authority or under corresponding State procedures when a State is the regulatory authority.

(2) A petition for administrative review filed under 43 CFR 4.1280 or under corresponding State procedures shall not suspend the effect of a determination under paragraph (e) of this section.

Sec. 702.12 Contents of application for exemption.

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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 regulatory authority (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 regulatory authority documenting its exemption from the requirements of the Act;

(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.

Sec. 702.13 Public availability of information.

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(a) Except as provided in paragraph (b) of this section, all information submitted to the regulatory authority under this part shall be made immediately available for public inspection and copying at the local offices of the regulatory authority having jurisdiction over the mining operations claiming exemption until at least three years after expiration of the period during which the subject mining area is active.

(b) The regulatory authority may keep information submitted to the regulatory authority 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 paragraph (b) of this section 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.

Sec. 702.14 Requirements for exemption.

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(a) Activities are exempt from the requirements of the Act if all of the following are satisfied:

(1) The cumulative production of coal extracted from the mining area determined annually as described in this paragraph 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 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.

Sec. 702.15 Conditions of exemption and right of inspection and entry.

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A person conducting activities covered by this part shall:

(a) Maintain on-site or at other locations available to authorized representatives of the regulatory authority and the Secretary 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 regulatory authority;

(b) Notify the regulatory authority 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 Sec. 702.11(b) or Sec. 702.11(e) (3) prior to submittal or approval of an exemption application, in accordance with the standards of this part for Federal programs and on Indian lands or in accordance with counterpart provisions when included in State programs.

(d) Authorized representatives of the regulatory authority and the Secretary shall have the right to conduct inspections of operations claiming exemption under this part.

(e) Each authorized representative of the regulatory authority and the Secretary 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 paragraphs (d) and (e) of this section, except that a search warrant may be required for entry into a building.

Sec. 702.16 Stockpiling of minerals.

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(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 regulatory authority 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 regulatory authority may only allow an operator to utilize tonnages of stockpiled other minerals for purposes of meeting the requirements of this part if:

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

(ii) Except as provided in paragraph (b) (3) of this section, the stockpiled other minerals do not exceed a 12-month supply of the mineral required for future sales as approved by the regulatory authority on the basis of the exemption application.

(3) The regulatory authority may allow an operator to utilize tonnages of stockpiled other minerals beyond the 12-month limit established in paragraph (b) (2) of this section if the operator can demonstrate to the regulatory authority'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 regulatory authority may periodically revise the other mineral stockpile tonnage limits in accordance with the criteria established by paragraphs (b) (2) and (3) of this section based on additional information available to the regulatory authority.

Sec. 702.17 Revocation and enforcement.

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(a) Regulatory authority responsibility. The regulatory authority shall conduct an annual compliance review of the mining area, utilizing the annual report submitted pursuant to Sec. 702.18, an on-site inspection and any other information available to the regulatory authority.

(b) If the regulatory authority has reason to believe that a specific mining area was not exempt under the provisions of this part or counterpart provisions of the State regulatory program 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 regulatory authority shall notify the operator that the exemption may be revoked and the reason(s) therefore. The exemption will be revoked unless the operator demonstrates to the regulatory authority within 30 days that the mining area in question should continue to be exempt.

(c) (1) If the regulatory authority finds that an operator has not demonstrated that activities conducted in the mining area qualify for the exemption, the regulatory authority shall revoke the exemption and immediately notify the operator and intervenors. If a decision is made not to revoke an exemption, the regulatory authority 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 43 CFR 4.1280 when OSM is the regulatory authority or under corresponding State procedures when a State is the regulatory authority.

(3) A petition for administrative review filed under 43 CFR 4.1280 or under corresponding State procedures 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 the regulatory program 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 the regulatory program 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 the applicable regulatory program with regard to conditions, areas and activities existing at the time of revocation or denial.

Sec. 702.18 Reporting requirements.

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(a) (1) Following approval by the regulatory authority of an exemption for a mining area, the person receiving the exemption shall, for each mining area, file a written report annually with the regulatory authority containing the information specified in paragraph (b) of this section.

(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 Sec. 702.5 of this part.

(3) The information in the report shall cover:

(i) Annual production of coal and other minerals and annual revenue derived from coal and other minerals during the preceding 12-month period, and

(ii) 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.