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NMAC Transmittal Form

Volume: Issue: Publication date: Number of pages: (ALD Use Only) Sequence No.

Issuing agency name and address: Agency DFA code:

Contact person's name: Phone number: E-mail address:

Type of rule action: New Amendment Repeal Emergency Renumber (ALD Use Only) Most recent filing date:

Title number: Title name:

Chapter number: Chapter name:

Part number: Part name:

Amendment description (If filing an amendment): Amendment's NMAC citation (If filing an amendment):

Are there any materials incorporated by reference? Yes No Please list attachments or Internet sites if applicable:

If materials are attached, has copyright permission been received? Yes No Public domain

Concise Explanatory Statement For Rulemaking Adoption:

Specific statutory or other authority authorizing rulemaking:

Pursuant to Section 18-6-10 and 18-6-11 NMSA 1978 of the Cultural Properties Act, the Cultural Properties Review Committee repealed and replaced 4.10.14 NMAC, Cultural Properties on Private Land and Mechanical Excavation Permits, effective January 1, 2019.

Notice date(s): Hearing date(s): Rule adoption date: Rule effective date:

Findings required for rulemaking adoption:

- Findings MUST include:
- Reasons for adopting rule, including any findings otherwise required by law of the agency, and a summary of any independent analysis done by the agency;
 - Reasons for any change between the published proposed rule and the final rule; and
 - Reasons for not accepting substantive arguments made through public comment.

4.10.14 NMAC, Cultural Properties on Private Land and Mechanical Excavation Permits is adopted as proposed. Substantive comments received on Subsection D of 4.10.14.12 NMAC were discussed at the Cultural Properties Review Committee meeting on December 7, 2018 and the Committee decided no changes were necessary.

Findings required for rulemaking adoption:
continued

[Empty box for findings]

Issuing authority (If delegated, authority letter must be on file with ALD):

Name:

Michelle Ensey

Check if authority has been delegated

Title:

Deputy State Historic Preservation Officer and State Archaeologist

Signature: (BLACK ink only)

[Handwritten signature]

Date signed:

12/14/18

STATE OF NEW MEXICO
STATE HISTORICAL ARCHIVES

2018 DEC 14 PM 12:20

On December 7, 2018, the Cultural Properties Review Committee repealed 4.10.14 NMAC, Cultural Properties on Private Land and Mechanical Excavation Permits, filed 10/1/2005, and replaced it with 4.10.14 NMAC, Cultural Properties on Private Land and Mechanical Excavation Permits, effective January 16, 2019.

Transmittal Form

STATE OF NEW MEXICO
 2019 DEC 19 PM 10:24

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Name:

Michelle Ensey

Check if authority has been delegated

Title:

Deputy State Historic Preservation Officer and State Archaeologist

Signature: (BLACK ink only)

[Handwritten signature]

Date signed:

12/14/18

7/1/2019
STATE OF NEW MEXICO
ADOPTED IN REGULAR

TITLE 4 CULTURAL RESOURCES
CHAPTER 10 CULTURAL PROPERTIES AND HISTORIC PRESERVATION
PART 14 CULTURAL PROPERTIES ON PRIVATE LAND AND MECHANICAL EXCAVATION PERMITS

4.10.14.1 ISSUING AGENCY: Cultural Properties Review Committee. Contact State Historic Preservation Division, Department of Cultural Affairs.
[4.10.14.1 NMAC - Rp, 4.10.14.1 NMAC, 01/16/2019]

4.10.14.2 SCOPE: This rule applies to all public and private entities proposing to excavate, with the aid of mechanical earth-moving equipment, an archaeological site on private land. This rule does not apply to state or federal lands or to lands held in trust for an Indian tribe by the federal government.
[4.10.14.2 NMAC – Rp, 4.10.14.2 NMAC, 01/16/2019]

4.10.14.3 STATUTORY AUTHORITY: Section 18-6-10 NMSA 1978 and Section 18-6-11 NMSA 1978 of the Cultural Properties Act.
[4.10.14.3 NMAC – Rp, 4.10.14.3 NMAC, 01/16/2019]

4.10.14.4 DURATION: Permanent.
[4.10.14.4 NMAC – Rp, 4.10.14.4 NMAC, 01/16/2019]

4.10.14.5 EFFECTIVE DATE: January 16, 2019, unless a later date is cited at the end of a section.
[4.10.14.5 NMAC – Rp, 4.10.14.4 NMAC, 01/16/2019]

4.10.14.6 OBJECTIVE: This rule describes procedures used to assist owners to preserve cultural properties situated on privately owned land and the procedures and standards to excavate an archaeological site on private land using mechanical earth-moving equipment.
[4.10.14.6 NMAC – Rp, 4.10.14.4 NMAC, 01/16/2019]

4.10.14.7 DEFINITIONS:

A. "Agent" means an individual who is authorized by a written agreement with a private landowner to act on behalf of the landowner and who works under the landowner's personal and direct supervision.

B. "Archaeological investigation" means the study of archaeological sites, isolates and areas of historic and scientific interest including without limitation survey and inventory, examination, collection, limited tests, test excavation, excavation and monitoring.

C. "Archaeological site" or "site" means a location where there exists material evidence of the past life and culture of human beings in the state and is the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined or vanished, where the location itself maintains historical or archaeological value regardless of the value of any existing structure. An archaeological site typically is 50 or more years old. Examples of archaeological sites include without limitation campsites, habitation sites, ruins of buildings and structures, artifact scatters, resource procurement or processing areas, agricultural fields, locales with one or more features in association with other cultural materials.

D. "Committee" or "CPRC" means the cultural properties review committee, created pursuant to Section 18-6-4 NMSA 1978 of the Cultural Properties Act.

E. "Cultural property" means a structure, place, site or object having historic, archaeological, scientific, architectural or other cultural significance.

F. "Excavation" means to systematically dig up artifacts, deposits or material remains within the boundaries of an archaeological site, isolate or area of historic and scientific interest using hand tools or mechanical earth-moving equipment.

G. "Historic preservation division" or "HPD" means the division within the department of cultural affairs created pursuant to Subsection A of Section 18-6-8 NMSA 1978 of the Cultural Properties Act.

H. "Human burial" or "unmarked human burial" means a human body or human skeletal remains and includes any funerary object, material object or artifact buried, entombed or sepulchered with that human body or skeletal remains.

I. "Individual unmarked human burial excavation permit" is a permit issued by the CPRC with the concurrence of the state archaeologist and the SHPO for the excavation of unmarked human burials on state or

private land. Individual unmarked human burial permits are submitted with an application for a project-specific permit for excavation and when unmarked human burials are known to exist within the project area.

J. "Material remains" means any tangible evidence of past human life or activities. Such evidence includes without limitation:

(1) naturally occurring objects or raw materials extracted for use in the production of human-made objects or for other uses by humans that can be found within an archaeological site, or another context from which intended or actual human use can be reasonably inferred;

(2) items manufactured or modified by humans, including whole or fragmentary tools, implements, containers, and other objects such as pottery, ceramics, basketry, cordage, weavings, textiles, glassware, flaked stone, ground stone, pecked stone, worked bone, metal, wood, hide, feathers and pigments;

(3) byproducts, waste products and debris resulting from the manufacture or use of human-made items or from the human use of natural materials;

(4) organic material deposited through human actions, organic material remaining from the decay of perishable objects manufactured or modified by humans, and organic material deposited through natural processes when found within an archaeological site including without limitation soil or sediment samples, botanical and animal remains and coprolites; or

(5) human remains including without limitation bone, mummified flesh, teeth, the remains of cremations, any associated artifacts and objects, and the soil, sediments, or other matrix in which the human skeletal or mummified remains and associated artifacts and objects were deposited or are now associated.

K. "Mechanical earth-moving equipment" means any motorized machine or device that is capable of displacing, disturbing or moving earth, soil, dirt or other deposits or materials from including without limitation trenchers, backhoes, graders, scrapers, bulldozers and front-end loaders.

L. "Mechanical Excavation Permit" is a permit issued by the CPRC with the concurrence of the state archaeologist and the SHPO for the excavation of archaeological sites on private land using mechanical earth-moving equipment by someone other than the landowner or his agent.

M. "Permit" means the written authorization required for all public and private entities to conduct archaeological investigations of a particular kind, within a defined geographic location and for a specified period of time.

N. "Preservation" means sustaining the existing form, integrity, material or vegetative cover of a cultural property and includes protective maintenance or stabilization.

O. "Protection" means safeguarding the physical condition or environment of an archaeological site or historic structure or building from deterioration or damage caused by weather or other natural, animal or human intrusions.

P. "Restoration" means recovering the general historic appearance of a cultural property or the form and details of an object or structure by removing incompatible natural or human-caused accretions and replacing missing elements as appropriate.

Q. "State archaeologist" means the archaeologist designated pursuant to Section 18-6-15 NMSA 1978 of the Cultural Properties Act.

R. "State historic preservation officer" or "SHPO" means the individual appointed pursuant to Section 18-6-8 NMSA 1978 of the Cultural Properties Act who serves as the director of the HPD.

S. "State register" means the New Mexico register of cultural properties maintained by the CPRC for the purpose of recording cultural properties deemed worthy of preservation.

T. "Unmarked burial ground" means a location where there exists a burial or burials of any human beings that are not visibly marked on the surface of the ground in any manner traditionally or customarily used for marking burials and includes any funerary object, material object or artifact associated with the burial or burials. [4.10.14.7 NMAC – Rp, 4.10.14.7 NMAC, 01/16/2019]

4.10.14.8 PRESERVATION OF CULTURAL PROPERTIES ON PRIVATE LAND:

A. The CPRC and the SHPO offer technical assistance to owners of cultural properties on private land with the purpose to:

- (1) identify and register cultural properties worthy of preservation on the state register;
- (2) provide advice to owners interested in the protection, rehabilitation, restoration or maintenance of cultural properties on private land, including but not limited to, state and federal income tax credit programs, the state historic preservation loan fund and conservation easement programs; and

(3) ensure that archaeological investigations on private land meet the highest professional standards; when requested by an owner, the CPRC or the SHPO will review a proposal to conduct archaeological investigations on private land and offer written comments.

B. If evidence of a human burial or unmarked burial ground is discovered on private land, local law enforcement shall be notified pursuant to 4.10.11 NMAC. The state archaeologist provides technical assistance to landowners on notification and protection.

[4.10.14.8 NMAC – Rp, 4.10.14.8 NMAC, 01/16/2019]

4.10.14.9 PROCEDURES FOR A MECHANICAL EXCAVATION PERMIT: The CPRC issues, with the concurrence of the state archaeologist and the SHPO, permits to use mechanical earth-moving equipment in the excavation of an archaeological site on private land when a public or private entity other than the landowner or the agent of the landowner proposes to conduct excavation. An individual unmarked human burial excavation permit shall be obtained concurrently with a mechanical excavation permit unless the site is historic and burials are unlikely. Individual unmarked human burial permits are issued under 4.10.11 NMAC.

A. For purposes of this rule, the CPRC or the SHPO may require an individual who purports to be a landowner's agent to provide a copy of the written agreement with the landowner indicating that the individual is authorized to act on the behalf of the landowner, and that the individual works or will work under the landowner's personal and direct supervision. The CPRC or the SHPO may request additional information from the landowner or the individual regarding the individual's authority and the landowner's right to control the individual's activities. The CPRC and the SHPO will use all this information to determine whether the relationship between the landowner and the individual who is using or will be using mechanical earth-moving equipment to excavate on private land, is one of principal and agent.

B. Any public or private entity may obtain mechanical excavation permit application forms and instructions for filing the application and attachments from HPD's website or may request them from HPD. The application shall contain the following information:

(1) applicant name, mailing address, telephone number and email address; and

(2) signature of the applicant, title of the applicant and date, which may be submitted with original signature, signature transmitted by facsimile, or a scanned application with the original signature transmitted by email; by virtue of the submission of the application, the applicant certifies agreement to abide by all the rules, terms and conditions of the permit. Applications lacking a signature shall be considered incomplete.

C. The applicant shall complete the application and attachments and provide the following items consistent with the instructions provided by HPD:

(1) written authorization for the proposed excavation from the owner of the land on which the archaeological site is located;

(2) a research design consistent with the standards in 4.10.21 NMAC and the methods to be used during the mechanical excavation consistent with 4.10.14.12 NMAC.;

(3) a staff roster that lists the names of the principal investigator, project director, field supervisor and crew chief who are listed in the SHPO directory and will be working in the field during the permitted excavation;

(4) a written acknowledgment by the applicant that a final report on the results of the excavation shall be submitted to HPD; and

(5) an estimated date of completion for a final report on the results of the excavation.

D. An approved application shall list special stipulations imposed by the CPRC, if any, and shall list the term of the permit and the permit number; the term of the permit shall be one year from the date of approval by the CPRC unless the applicant proposes a later date that is approved by the CPRC.

E. An approved application shall have the signature of the chair of the CPRC indicating approval of the permit and signatures of the state archaeologist and the SHPO indicating their concurrence with the issuance of the permit.

[4.10.14.9 NMAC – Rp, 4.10.14.9 NMAC, 01/16/2019]

4.10.14.10 REVIEW AND APPROVAL OF APPLICATIONS:

A. HPD shall receive permit applications including attachments and maintain current files for each individual or firm who has a mechanical excavation permit.

B. HPD shall review all information submitted in support of the application for completeness, accuracy, and conformance with all qualifying requirements. When requested, the applicant shall remedy any inaccuracies or inadequacies specified by HPD before further review or processing of the permit application

proceeds. HPD shall submit all completed applications for consideration at the next scheduled CPRC meeting. HPD may recommend to the CPRC that an application be tabled or rejected if the applicant fails to meet minimum qualifying criteria either upon initial receipt or through failure to respond adequately to a request for information.

C. The CPRC shall review and consider all completed applications for approval, approval with special stipulations, or denial, with the concurrence of the state archaeologist and the SHPO. The CPRC may table applications to be discussed at a future meeting pending receipt of additional information necessary to make a decision on the permit.

D. Any special stipulations attached to a permit by the CPRC, the state archaeologist, or the SHPO shall be specified in writing on the permit.

E. HPD shall notify the applicant in writing of the approval, approval with stipulations or denial of the permit by CPRC, with the concurrence of the state archaeologist and the SHPO.

F. Any applicant who has been denied a permit by the CPRC, the state archaeologist, or the SHPO shall have the right to appeal the decision pursuant to 4.10.8.24 NMAC.

[4.10.14.10 NMAC – Rp, 4.10.14.10. NMAC, 01/16/2019]

4.10.14.11 MECHANICAL EXCAVATION PERMIT STIPULATIONS:

A. Permittees shall abide by all stipulations contained in this rule and any special stipulations imposed by the CPRC, the state archaeologist, the SHPO or the owner of the land on which the site is located. These additional stipulations shall be set out in writing on the permit.

B. Permittees shall determine the land status and ownership of the land on which the archaeological investigation will occur to insure the work will not be in trespass and that they are in compliance with local, state or federal laws.

C. All costs incurred in the execution of the activities conducted under a permit shall be borne by the permittee or its client.

D. The permittee shall comply with all laws, rules, ordinances and requirements in all matters and things affecting the premises and operations therein pertaining to the permit, archaeological site and the land where the site is located.

E. All activities conducted under the permit shall be carried out so as to prevent erosion of the land, pollution of water resources and any other damage to the natural environment. Any sites or locations, disturbed in the course of the archaeological investigations conducted under the permit shall be restored to their original condition insofar as possible. The areas of limited tests, test excavations and excavation shall be backfilled. All areas examined under the permit shall be left in a state that will not create hazard to life nor endanger livestock or other property, nor contribute to the deterioration of the site or location or adjacent lands by natural forces, unless other provisions are specifically arranged in the permit application.

F. If human burials are discovered during the excavation, local law enforcement shall be notified pursuant to 4.10.11 NMAC. If the human burial cannot be left in place, excavations shall be carried out in conformance with 4.10.11 NMAC.

G. All material remains collected or removed from the site as a result of the excavation conducted under the permit shall be the property of the owner of the land on which the site is located, with the exception of unmarked human burials and any funerary object, material object or artifact buried, entombed or sepulchered with the human burial or burials, which shall be the subject of consultation in accordance with 4.10.11 NMAC. The permittee may encourage the landowner to donate the material remains to a public institution that curates such material.

H. If the excavation is delayed as a result of unforeseen circumstances and cannot be completed within the permit period, the permittee shall notify HPD in writing to request an extension to the term of the permit. This request shall be received by HPD within 10 working days prior to the expiration date of the permit in order to be considered. The request for the extension shall be accompanied by an interim report summarizing the status of the excavations, a proposed date for when the excavations will be completed and proposed date for when the final report will be submitted. HPD may approve one extension of the permit term not to exceed one year from the expiration date of the original permit. Additional requests for an extension will be reviewed by the CPRC.

I. If the archaeological investigation is discontinued and cannot be completed as a result of unforeseen circumstances, the permittee shall notify HPD in writing to request a cancellation of the permit. Disposition of material remains collected under the permit and copies of all written and photographic records resulting from a discontinued investigation will be in accordance with the provisions of this section.

J. If fieldwork has not been initiated within the permit period or an extension has not been requested, the permit shall become void at the end of the permit period.

K. Failure by a permittee to comply with the standard or special stipulations set forth in this rule and on the permit may be cause for the CPRC's denial of future permits to the permittee in conformance with 4.10.8.23 NMAC.

[4.10.14.11 NMAC – Rp, 4.10.14.11 NMAC, 01/16/2019]

4.10.14.12 STANDARDS FOR THE USE OF MECHANICAL EQUIPMENT: All permitted excavations using mechanical equipment shall conform to the following standards.

A. Mechanical excavation may be used to define stratigraphy, locate subsurface features and cultural deposits and remove sterile overburden.

B. Controlled surface collection of artifacts shall be accomplished using a grid system or by point provenience prior to excavation of trenches or stripping or scraping areas with mechanical earth-moving equipment.

C. For each trench:

(1) document the location, depth, soil profile, artifact yield and other pertinent information;

(2) clean at least one complete profile with a shovel or trowel and inspect the profile for

material remains;

(3) document the cleaned profile in narrative, profile drawing and photographs;

(4) examine the excavated area after the removal of each extracted bucket load;

(5) examine back dirt for the presence of artifacts; and

(6) conform depths and configurations of mechanical excavation trenches to OSHA

standards for excavation safety (29 CFR 1926, Subpart P).

D. Stratigraphic profiles shall be recorded by scale diagram, photographs and narrative descriptions. Deposit descriptions include but are not limited to sediment color, texture, moisture, content, nature of inclusions, organic content and an inventory of cultural material. The color shall be described using Munsell terminology.

E. Mechanical stripping or scraping may be employed following hand excavations or mechanical trenching unless depth of cultural deposits has been determined from surface observations. The stripping serves the purpose of revealing features that were not previously identified and provides a check on the reliability of the excavation sampling design. Features exposed during the mechanical stripping shall be mapped in relation to the site datum. All features shall be fully excavated unless a sampling strategy is included in the approved research design and excavation plan.

[4.10.14.12 NMAC – Rp, 4.10.14.12 NMAC, 01/16/2019]

4.10.14.13 REPORTING STANDARDS:

A. The permittee may submit to HPD one copy of a preliminary report on the results of the excavation including relevant maps, drawings, photographs and other documents for review and acceptance by HPD prior to construction and when a final report cannot be completed before construction.

B. A final report and associated records, including but not limited to archaeological site records, list of collections, and photographs, on the excavations shall be submitted to HPD within one year of the completion of the excavations or the date approved by the CPRC. If HPD has not received a copy of the report within the permit period, HPD shall contact the permittee. If the excavations are part of a larger project that includes sites on state land, the final report shall be prepared consistent with 4.10.16.14 NMAC for test excavation projects or 4.10.21.12 NMAC for excavation projects.

C. All reports shall be reviewed by HPD for technical accuracy and completeness.

(1) If HPD review reveals that the proposed investigations were not completed consistent with the application and stipulations contained on the approved permit, HPD will notify the permittee of the deficiencies and request that the permittee amend the report to correct the deficiencies and resubmit the report.

(2) Failure by the permittee to conduct the permitted investigation according to standards or stipulations or to submit required reports in a timely manner or to amend report deficiencies as identified by HPD shall be documented as unacceptable performance pursuant to 4.10.8.21 NMAC.

[4.10.14.13 NMAC – Rp, 4.10.14.13 NMAC, 01/16/2019]

4.10.14.14 DEVIATIONS: The CPRC, SHPO and state archaeologist reserve the right to waive or deviate from this rule or any parts of this rule under circumstances deemed necessary by the CPRC, SHPO and state archaeologist. Any waiver or deviance from this rule shall occur while maintaining the spirit, intent and objective of this rule and the Cultural Properties Act.

[4.10.14.14 NMAC – Rp, 4.10.14.14 NMAC, 01/16/2019]

HISTORY OF 4.10.14 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the state records center and archives under:

CPRC 82-R1, Regulations Pertaining to the Issuance of Permits to Conduct Archaeological Investigations, filed 5-28-82.

CPRC Rule 87-8, Regulations Pertaining to the Issuance of Permits to Conduct Archaeological Investigations, filed 3-26-87.

History of Repealed Material: Rule 4 NMAC 10.8, Regulations Pertaining to the Issuance of Permits to Conduct Archaeological Investigations (filed 11/03/97), repealed 10/01/05.

4.10.14 NMAC, Cultural Properties on Private Land and Mechanical Excavation Permits, filed 10/01/05, repealed 01/16/2019.

Other History:

CPRC Rule 87-8, Regulations Pertaining to the Issuance of Permits to Conduct Archaeological Investigations (filed 3-26-87) was renumbered and reformatted to 4 NMAC 10.8, Regulations Pertaining to the Issuance of Permits to Conduct Archaeological Investigations, effective 11/15/97.

That applicable portion of Rule 4 NMAC 10.8, Regulations Pertaining to the Issuance of Permits to Conduct Archaeological Investigations (filed 11/03/97) was renumbered, reformatted and replaced by 4.10.14 NMAC, Cultural Properties on Private Land and Mechanical Excavation, effective 1/01/06.