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May 23, 2005

**BY HAND DELIVERY**

Mark E. Fesmire, P. E.  
Director  
Oil Conservation Division  
New Mexico Department of Energy,  
Minerals and Natural Resources  
1220 South Saint Francis Drive  
Santa Fe, New Mexico 87505

Case 13482

**Re: Oil Conservation Division/Commission  
Proposed Procedural Rules**

Dear Mr. Fesmire:

At the Division's May 2, 2005 stakeholder's meeting, Burlington Resources Oil & Gas Company presented comments on the Oil Conservation Division's Proposed amendments to its procedural rules. This letter summarizes Burlington's comments.

**REPRESENTATION BY LEGAL COUNSEL:**

Burlington believes that all parties, other than individuals who are appearing *pro se*, should appear through legal counsel. In considering rules that allow groups to appear without counsel and present evidence and cross-examine witnesses, the Division must be reminded that it is a creature of statute and its powers are expressly defined and limited by law. Certain technical oil and gas questions have been delegated to the Oil Conservation Division for decision by the legislature because of the Division's recognized engineering and geological expertise. In this regard, the Division and Commission serve as the trial court and the record made before the agency is the record reviewed by the courts on appeal. The court's review is not *de novo* and, therefore, only the evidence presented to the Division may be considered by the court.

New Mexico's case law is clear that while representing one's self in a legal proceeding is not the practice of law, representing another person or organization does constitute the practice of law. *See Martinez v. Roscoe*, 131 N.M. 137, 33 P.3d 887 (N.M. Ct. App. 2001) (holding corporations must be represented by a New Mexico licensed attorney in a state court); *United States v. Martinez*, 101 N.M. 423, 684 P.2d 509 (N.M. 1984) (holding that representing one's self in a legal proceeding does not constitute practicing law); *Chisholm v. N.M. Medical Review Com'n*, 124 N.M. 255, 948 P.2d 707



(N.M. Ct. App. 1997)("[W]e...hold that a non-attorney parent must be represented by counsel in bringing an action on behalf of a child" before the administrative agency); *State ex rel. Norvell v. Credit Bureau*, 85 NM 521, 526, 514 P. 2d 40, 45 (N.M. 1973) ("representation of parties before judicial or administrative bodies," or "giving legal advice and counsel" would constitute the practice of law).

While New Mexico courts have taken a more functional approach (on a case-by-case basis) to defining what is the practice of law, the Attorney General has spoken directly to the issue of whether advocating before an administrative agency is the practice of law. In 1958, the Attorney General opined that the appearance of a layman or any attorney in a "representative capacity" as an advocate in a hearing before a state agency constituted the practice of law. 1957-1958 Op. Atty Gen. N.M. 808. The opinion likened adversary administrative proceedings as the "substantial equivalent of judicial proceedings." As the Attorney General explained, when the agency is considering legal questions, applying legal principles and weighing facts under legal rules, it is acting as a quasi-judicial body. *Id.* at 8. Similarly, when a person acting in a representative capacity "files pleadings, qualifies, examines and cross-examines witnesses, proves and introduces exhibits into evidence or performs any of the other duties normally associated with an attorney requiring specialized training and skill, such layman or attorney is practicing law within the meaning of the term as it is used in the act." *Id.* at 9.<sup>1</sup>

We encourage the Division to exercise caution in amending its rules to not step across the line and, especially in adjudicatory proceedings, permit the unauthorized practice of law.

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<sup>1</sup> Although the 1998 Attorney General opinion stated that it believed the 1958 opinion was superseded by "intervening legal developments," we believe this should be disregarded as it is not based on sound or accurate reasons. The Attorney General found the 1958 opinion to be superseded because in 1998, the New Mexico appellate courts had yet to decide whether a corporation could represent itself in court. The *Martinez* decision now resolves that ambiguity. Also, the Attorney General noted that the adoption of the Administrative Procedures Act (APA) expressly permits parties in administrative hearings to be represented by persons other than attorneys. However, the APA does not apply unless an administrative body expressly adopts its provisions. In fact, the OCD has not adopted the APA. Finally, citing to other jurisdictions, the Attorney General stated that the judicial trend has been to allow more non-attorney representation in administrative hearings and other contexts. *Id.* at 8. As shown above, New Mexico case law has not been in lockstep with this "trend" instead indicating representation of others constitutes the illegal practice of law.



Burlington believes that there is an important distinction between adjudicatory hearings and rule making proceedings. The more clearly the distinction between these types of proceedings is maintained in the rules, the easier they will be to understand. In rule making proceedings, the public will generally have a greater interest and the Division may want to allow greater public participation. However, in adjudicatory proceedings, the issues are very different and constitutionally protected property interests of the parties are often directly affected. We believe that the efficient presentation of the evidence in adjudicatory proceedings is facilitated when the parties before the Division are represented by counsel. In these cases, where there are persons with monetary and property interests at issue, the parties should appear through their respective attorneys and the Division should attempt to promptly dispose of the technical issues presented to it. This is the purpose of the Oil Conservation Division.

#### INTERVENTION:

We believe that all parties to any proceeding, whether appearing through legal counsel or *pro se*, should be required to comply with the same rules. Any party desiring to intervene in a case should be required to file a pre-hearing statement on the Friday prior to the scheduled hearing and state their interest in the property and the nature of their opposition. If they appear at a later date, they should be allowed to be a party of record but should not be allowed to participate in the hearing. To do otherwise would permit the dilatory party to gain a possible advantage on those who have complied with the rules.

#### PRE-FILING OF EXHIBITS:

Burlington opposes the pre-filing of exhibits. The proposed rule would require that exhibits be filed at the same time as other parties are required to disclose their opposition to the application. Opposition to an application often requires the preparation of more than just rebuttal exhibits. It can dictate significant changes in the evidence to be presented. The parties should be allowed to change their presentation as needed to respond to any opposition or new issue that arises prior to hearing.

If the hearing officer - either an examiner or the Commission - desires to have exhibits pre-filed, it can do so by simply requesting them in advance of the hearing date. If a party needs the exhibits of his opponent, it can subpoena them.

#### REQUESTS FOR A CONTINUANCE:

The requirement that requests for a continuance be made at the time pre-hearing statements are filed should be changed. The first time a party learns that it is going to be opposed may be when pre-hearing statements are filed. This often results in negotiations between parties and it may only be after the pre-hearing statements are



filed and the parties commence negotiations that a continuance is needed. The Division should consider requiring that requests for continuances be filed and served at least 48 hours before the hearing is scheduled to commence. This should avoid the situation where someone travels to the hearing only to discover it has been continued.

Your consideration of these comments is appreciated.

Very truly yours,

William F. Carr

cc: Mr. Alan Alexander  
Burlington Resources Oil and Gas Company



**NEW MEXICO CITIZENS FOR CLEAN AIR & WATER, INC.**

<http://members.aol.com/nmcit>

2708 B. Walnut St.  
Los Alamos, NM 87544-2050  
28 June 2005

Ms. Gail MacQuesten  
Oil Conservation Division  
1220 South St. Francis Dr.  
Santa Fe, NM 87505

Dear Ms. MacQuesten:

**RE: CASE 13482**

Enclosed please find five copies of written comments regarding the proposed amendment of several 1200-series rules. Dr. John Bartlit, state chairman of NMCCA&W, will present our oral testimony at the July 7 hearing. For procedural issues, please contact our counsel:

Alletta Belin  
Belin & Sugarman,  
618 Paseo de Peralta  
Santa Fe, NM 87501  
(505) 983-8936, fax (505) 983-0036, email [belin@bs-law.com](mailto:belin@bs-law.com).

2005 JUL 6 PM 3 36

For NMCCA&W, Inc.

Donald A. Neeper, Ph.D.

## CASE 13482

Proposal by the Oil Conservation Division to amend Rules 1201, 1203 through 1205, 1207, 1208, 1211, 1212, 1214, and 1220

Comments by Donald A. Neeper  
for

New Mexico Citizens for Clean Air & Water, Inc.

RECEIVED

JUL 5 2005

Oil Conservation Division  
1220 S. St. Francis Drive  
Santa Fe, NM 87505

We appreciate the many clarifications and improvements that have been made in the proposed rules, following the OCD workshop on June 2. We understand the concern that adjudicatory hearings not become burdened with frivolous or disruptive arguments. We recognize that most adjudicatory hearings deal with issues of property and marketable rights, and that members of the public would rarely have information to present at such hearings. However, a few adjudicatory hearings deal with issues that impact the public, issues such as pollution, waste management, and remediation of spills. We seek to assure that reasonable persons are not excluded from full participation in these hearings. One possible solution would be to alter or to define the potentially restrictive terms regarding "substantial interest" and "party." A second possibility, which we outline at the end of this document, would be explicitly to include public participation in those hearings that relate to pollution, wastes, waste facilities, and remediation of contamination.

### Synopsis

As presented in subsequent paragraphs, our comments focus on:

- 1) the required submission of exhibits with pre-hearing statements, particularly because of the short interval between the publication of a hearing and the deadline for submitting a pre-hearing statement;
- 2) the benefits to both OCD and participants if the rules would allow electronic submission of pre-hearing documents;
- 3) rules that enable abrupt and repeated continuance of a hearing without notice;
- 4) the undefined terms "substantial interest," and "interested parties," together with an apparent lack of clarity in pre-hearing "appearance" that qualify participation in adjudicatory hearings; and
- 5) our suggestion to gather the qualifications for participation in adjudicatory hearings into a single rule, with specific allowance for public participation in a narrowly defined set of cases.

### Section 1203

We suggest that the rule specifically allow electronic submission of comments by email, text files, word processing files, and/or graphics files of types acceptable to OCD. (The file types would not be designated by rule.) Electronic submissions would assist OCD in posting the comments on the website. Although the proposed rule 1203 does not prohibit electronic submission, a statement allowing electronic submission would

encourage such submissions, and would be consistent with suggested specific wording in **1204 B** and **1211 A** that would allow electronic submission of other pre-hearing documents. Much OCD information is already distributed and exchanged by electronic files, a practice that greatly facilitates both citizens and operators in their interactions with OCD. In the future, it should rarely be necessary for persons to travel to the Santa Fe office to peruse case files, as is now a frequent practice.

### **Section 1204 B**

The proposed rule requires that any person offering technical testimony at a rulemaking hearing must submit all exhibits, along with his pre-hearing statement, 10 days before the hearing date. By **1202**, notice of the hearing is published at least 20 days before the hearing. This leaves the possibility that only 10 days will be allowed for preparation and transmission of exhibits, which tends to restrict participation to persons and legal offices in Santa Fe. A person living far from Santa Fe might need an additional 4 days for assured submission by post, thereby allowing only 6 days for research and preparation. We suggest that at least 15 days should be allowed for preparation and transmission of the pre-hearing statement and exhibits.

Furthermore, we question whether it is necessary to submit exhibits in advance of a hearing, so long as the pre-hearing statement adequately summarizes the testimony. We do not remember that any operators spoke in favor of pre-hearing submission of exhibits at the May 2 workshop.

The proposed **1204 B** requires submission of paper copies. We suggest that allowing electronic submission of required pre-hearing documents would eliminate the time consumed by mailing, would facilitate posting on the website by OCD, and might facilitate distribution to Commissioners.

### **Section 1205 A (2) (h)**

This proposed rule allows continuance of a hearing if the hearing is not completed on the scheduled day. However, it also allows continuance of a hearing that does not commence on the scheduled day. If a hearing is continued without opening and receiving as much testimony as possible on the scheduled day, then notice of the continuation should be provided to all participants at least 20 days prior to the continued date, and the hearing should be again advertised as in **1202**. In the past, notice that a rulemaking hearing has been continued occurred as little as 36 hours before the scheduled date of the hearing, after participants had made plans and travel arrangements. We urge that the current practice of continuing a hearing, shortly before the scheduled date and without required notice, not be allowed in the future. Allowing such practice is unjust, and invites manipulation.

### **Section 1205 E (2)**

If a hearing is reopened, all participants should be notified 20 days in advance of the date scheduled for reopening, in order that they may be present and offer rebuttal.

### **Section 1206**

The proposed rule would require that an applicant for an adjudicatory hearing have a "substantial interest" in the matter. This term is not defined in Rule 7; however,

it is sometimes interpreted to mean only a financial or property interest. Similar terminology exists in **1209**, **1211**, and **1215** in regard to intervenors and other participants. We have no objection to avoiding participation by persons who may be disruptive or who have no useful information. However, in cases that impact the public interest, such as the treatment of wastes or the remediation of spills, useful information and arguments may be presented by persons who have no financial, property, or mineral interest. We therefore suggest that "substantial interest" and "interest" be defined to include such persons. Alternatively, language such as "valid reason" and "property or public interest" may be substituted instead. Finally, in the last section of this document, we suggest yet another alternative by relaxing the qualifications for participation in only those hearings of interest to the public.

### **Sections 1208 A and 1208 B**

The proposed rule states that parties to an adjudicatory hearing include a person to whom notice is required, who has entered an appearance in the case, and any person who properly intervenes. This wording is not clear. It may be interpreted to mean that party status is restricted to a noticed person who has *also* entered an appearance, or it may mean that party status is allowed to noticed persons *and* to anyone else who has entered an appearance. If the present qualifications for participation are retained, we suggest this be clarified to include the "*and*" interpretation.

The term, "party" has not appeared previously in the proposed 1200-series rules, nor is it defined in Rule 7. A person "entitled to notice" may enter an appearance and become a party by filing a written notice. However, **1211 A** says "Interested parties shall be deemed to have made an appearance" when they have either sent a letter regarding the case or "made an in person appearance at any hearing ...". If interpreted literally, this means that any person who has testified or made a statement at any previous hearing, no matter how distant, has in effect made an appearance for the current hearing, but is not necessarily a "party.". Such interpretation would imply that first a person must be an "interested party," then must make an appearance, after which by **1208 B** he is allowed to present evidence. We suggest it would be better to put all distinctions regarding "appearances" in **1208 A**, rather than making an isolated distinction in **1211 A**. Furthermore, we suggest replacing part of **1208 A** with a clear, statement regarding who may participate, without ambiguity introduced by the undefined terms, "interested" and "party." We suggest the following persons should be allowed to present evidence and to cross-examine witnesses:

- 1) the applicant and those who are entitled to notice;
- 2) those who have filed relevant correspondence prior to the date for pre-hearing statements; and
- 2) those who timely file a relevant pre-hearing statement.

Following our section-by-section comments, our paragraphs entitled "Specification of Participants ..." offers a more restrictive resolution of this issue, which presently arises in several sections of the proposed rules.

**Section 1211 A**

We urge the OCD to consider allowing electronic submission of pleadings and correspondence, just as electronic transmission is allowed for service.

**Section 1211 B**

By **1207 B**, adjudicatory hearings are advertised 10 days before the hearing date. Pre-hearing statements and all exhibits are due 4 days in advance of the hearing, thereby leaving 6 days between the advertisement and the delivery of exhibits, including postal time. This is simply too short. One day less is allowed if one must establish "appearance" by filing a letter. We question whether it is necessary to submit exhibits in advance of the hearing. We suggest that 15 days should be allowed for preparation and transmission of pre-hearing documents.

**Section 1211 C**

This section allows any party to file for continuance up to 48 hours before the scheduled hearing date. This is unfair to other participants, who may prepare materials, hire witnesses, and make travel arrangements, only to have the hearing continued. Furthermore, there is no requirement regarding when OCD will rule on the motion for continuance, or a requirement regarding when or whether OCD will notify participants of its ruling. A participant who, even temporarily, does not receive electronic service may learn of the continuance only by arriving at the hearing room at the scheduled time. At less than one week prior to a hearing, continuance should be allowed only for emergency reasons beyond the control of the moving party. If there are participants other than the applicant, an applicant should not be granted a continuance for reasons other than an Act of God because the applicant should have his case prepared, and should commit to a hearing date, before the date is advertised.

**Section 1212 C**

The fourth sentence says, "Participation in adjudicatory hearings shall be limited to parties, as defined in 19.15.14.1212 NMAC, ..." There is no definition of such parties or participation in **1212**. Again, we note that it is unclear just who may participate in an adjudicatory hearing, and that the terms distinguishing participation are scattered through several rules.

**Section 1213**

This Section does not avoid the possibility of a hearing being continued shortly before it is started, thereby generating injustice to participants. If **1213** is intended to apply only to hearings that have exhausted the available time during the scheduled hearing day, and must therefore be continued to a second day, it should clearly say so.

**Section 1215**

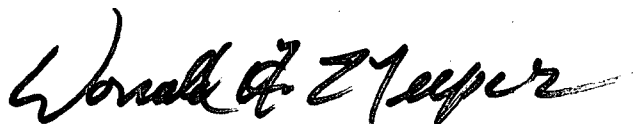
Again, the potentially ambiguous term, "all interested parties" appears. Again, we note that the terms distinguishing participation are scattered through several rules.

**Specification of Participants in Adjudicatory Hearings**

Several of the proposed rules specify separate, indistinct qualifications for initiation of, or participation in, an adjudicatory hearing. This confusing situation may arise because OCD desires to avoid inappropriate appearances in hearings that deal with matters of rights and property, while also avoiding rules so restrictive as to absolutely exclude the public from full participation in cases where the public has a legitimate interest. Rather than attempting to clarify several sections of the rules, we therefore suggest placing all qualifications for participation into **1208**. We suggest the qualification that any person with a financial, property, mineral, or other substantial interest could become a participant (or party) in any adjudicatory hearing by filing a required statement that includes a valid presentation of the person's interest. In a hearing related to pollution, public safety, remediation of contamination, waste management, and waste management facilities, any person could participate by filing the required statement. Most of the specifications for the conduct of hearings could remain as proposed in **1212**, with the exception of the apparently erroneous statement referring to parties as defined in **1212**.

This simple consolidation of participatory qualification would exclude trivial or disruptive arguments from the adjudication of rights, while enabling the public to bring information to those decisions that most affect the common welfare.

For NMCCA&W, Inc.,  
respectfully submitted

A handwritten signature in black ink, appearing to read "Donald A. Neeper", with a stylized flourish at the end.

Donald A. Neeper, Ph.D.



# NEW MEXICO ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT

2005 JUL 12 PM 3 36

**BILL RICHARDSON**

Governor

**Joanna Prukop**

Cabinet Secretary

**Mark E. Fesmire, P.E.**

Director

**Oil Conservation Division**

July 12, 2005

Oil Conservation Commission  
Energy, Minerals and Natural Resources Department  
1220 South St. Francis Drive  
Santa Fe, New Mexico 87505

RE: Comments on proposed amendments to Oil Conservation Division Rules 1201 through 1226

Dear Members of the Commission:

The Oil Conservation Division has reviewed the proposed amendments to the Oil Conservation Division Rules 1201 through 1226 and provides its comments and suggestions below. The comments are provided by section and in some instances by paragraph.

## **19.15.14.1202.A**

Since the Oil Conservation Commission (Commission) conducts the rulemaking hearing the Commission not the Oil Conservation Division should publish the notice and the commission chairman should sign it. See recommended changes in the edited proposed rule, which is attached.

## **19.15.14.1204.A(2)**

Given that it is often impossible to distinguish between an original and copies of an exhibit and that the Commission does not currently distinguish between them, it would be more appropriate to require "six sets" of an exhibit rather than an original and five copies.

## **19.15.14.1204.B(1)**

The proposed rules only require hearing notice for rulemaking to be published 20 days before the hearing. Therefore, the requirement that the pre-hearing statement be filed at least 10 days before the hearing does not leave much time to prepare the statement particularly if the person must mail the statement. Therefore, it would be more appropriate to require persons to file the pre-hearing statement 5 days before the hearing instead of 10. This essentially mirrors the requirement for adjudicatory hearings.

## **19.15.14.1205.C(1)**

See comments on 19.15.1204.A(2) NMAC above.

**19.15.14.1206.A**

Given that substantial interest is not defined and the courts have not interpreted its meaning, it would be better to require standing, which the courts have interpreted and established standards. See recommended changes in edited proposed rule, which is attached.

**19.15.14.1207.A**

A new paragraph 6 should be inserted that requires a reasonable identification of the adjudication's subject matter so that persons who may be affected if the division grants the application will have notice. This is a provision that exists in the current rules that appears to have been inadvertently left out of the proposed rules. See recommended language in edited proposed rule, which is attached.

**19.15.14.1208.A**

The three groups that can be a party to an adjudicatory hearing should be indicated by subparagraphs for clarity. See recommended formatting in edited proposed rule, which is attached.

**19.15.14.1209.A and C**

See comments on 19.15.14.1206.A above.

**19.15.14.1211**

The rule should be clarified to clearly indicate that if a party is represented by counsel that service shall be made on counsel and not the party by inserting "if the party is represented" before references to the party's attorney of record in the fourth sentence of paragraph A and in paragraph B(1). "Interested" before parties in the sixth sentence of paragraph A should be deleted as it may cause ambiguity regarding the meaning of party. Friday in paragraph B(1) should be changed to Thursday so that the commission clerk will have adequate time to distribute pre-hearing statements to the Commission before the weekend and the commissioners will have time to review them.

**19.15.14.1212.C**

The incorrect reference to 19.15.14.1212 NMAC should be changed to 19.15.14.1208 NMAC.

**19.15.14.1215.A**

"Interested" before parties in the first sentence should be removed. See comments on 19.15.14.1211. It should be clearly stated that the Commission or division examiner has the ability to admit relevant evidence, but may exclude evidence that is immaterial, repetitious or otherwise unreliable. See recommended language in edited proposed rule, which is attached.

**19.15.14.1216**

It should be clarified, by placing it before the requirements for hydrogeologists, etc., that it was not intended that licensed lawyers have at least two years of experience in hydrogeology, etc. See recommended language in edited proposed rule, which is attached.

Page 3

Comments on Oil Conservation Division Rules 1201 through 1226

The Oil Conservation Division appreciates the opportunity to provide comments on the proposed rules.

Sincerely,

A handwritten signature in black ink, appearing to read "Gail MacQuesten". The signature is fluid and cursive, with the first name "Gail" being the most prominent.

Gail MacQuesten  
Assistant General Counsel

**TITLE 19       NATURAL RESOURCES AND WILDLIFE**  
**CHAPTER 15   OIL AND GAS**  
**PART 14       PROCEDURE**

**19.15.14.1       ISSUING AGENCY:** Energy, Minerals and Natural Resources Department, Oil Conservation Division, 1220 S. St. Francis Drive, Santa Fe, New Mexico 87505, (505) 476-3440.

[19.15.14.1 NMAC – Rp, 19 NMAC 15.N.1, - -05]

**19.15.14.2       SCOPE:** All rulemaking hearings before the oil conservation commission or adjudicatory hearings before the oil conservation commission (commission) or oil conservation division (division).

[19.15.14.2 NMAC – Rp, 19 NMAC 15.N.2, - -05]

**19.15.14.3       STATUTORY AUTHORITY:** NMSA 1978, Sections 70-2-1 through 70-2-38 set forth the Oil and Gas Act, which grants the division jurisdiction and authority over all matters relating to the conservation of oil and gas, the prevention of waste of oil and gas and of potash as a result of oil and gas operations, the protection of correlative rights and the disposition of wastes resulting from oil and gas operations, and grants the commission concurrent jurisdiction and authority with the division to the extent necessary for the commission to perform its duties.

[19.15.14.3 NMAC – Rp, 19 NMAC 15.N.3, - -05]

**19.15.14.4       DURATION:** Permanent.

[19.15.14.4 NMAC – Rp, 19 NMAC 15.N.4, - -05]

**19.15.14.5       EFFECTIVE DATE:** \_\_\_\_\_, 2005 unless a later date is cited at the end of a section.

[19.15.14.5 NMAC – Rp, 19 NMAC 15.N.5, - -05]

**19.15.14.6       OBJECTIVE:** This Part's objective is to set forth general provisions and definitions pertaining to the division's and the commission's authority pursuant to the Oil and Gas Act, NMSA 1978, Sections 70-2-1 through 70-2-38, by encouraging participation in the division's and commission's hearings, making possible effective presentation of the evidence and the parties' and the general public's points of view, allowing all participants a reasonable opportunity to submit data, views and arguments and to assure that division and commission hearings are conducted in a fair and equitable manner.

[19.15.14.6 NMAC - Rp, 19 NMAC 15.N.6, - -05]

**19.15.14.7       DEFINITIONS:**

A.        "Commission clerk" means the oil conservation division employee the division director designates to provide staff support to the commission, and accept filings in rulemaking or adjudicatory cases before the commission.

B.        "Division clerk" means the oil conservation division employee the division director designates to accept filings in adjudicatory cases before the division.

[19.15.14.7 NMAC – N, - -05]

**19.15.14.1201    RULEMAKING INITIATION:**

A.        The commission may commence a rulemaking proceeding by issuing an order initiating rulemaking. The division, any operator or producer or any other person may initiate a rulemaking proceeding by filing an application to adopt, amend or repeal a rule with the commission clerk. The application shall be in writing and applicants shall specifically identify the rule the applicant seeks for the commission to adopt, amend or repeal. The application or order initiating rulemaking shall include the following:

- (1) a brief summary of the proposed rule change's intended effect;
- (2) a proposed draft of the new rule or amendment;
- (3) the applicant's name;
- (4) the applicant's address, or the address of its attorney, including an email address and fax number if available;
- (5) a proposed legal notice for publication; and
- (6) any other matter a commission order requires.

B. An applicant shall file one original and five copies of the application for rulemaking with the commission clerk. The applicant shall file the application by delivering the application to the commission clerk in person, by mail or by facsimile, as long as the applicant mails or delivers the signed original and five copies to the commission clerk on the next business day.

C. Upon receiving an application for rule change the commission clerk shall file the application, and shall deliver a copy to all commissioners within 10 days of the application's receipt. Unless the commission chairman or another commissioner indicates, within 10 days following the commission clerk's delivery of the rule change application, that a hearing is not necessary or appropriate, the chairman shall schedule a hearing on the rule change application. If a commissioner indicates to the chairman, or if the chairman concludes, that a hearing is not necessary or appropriate because the application is repetitive or frivolous or for any other lawful reason, the commission shall determine within 60 days of the application's filing whether to hear the application, and if the commission decides to hear the application, the chairman shall schedule a hearing on the rule change application.

D. 19.15.14.1201 NMAC shall not apply to special pool rules, which the commission or the division may adopt, amend or rescind in adjudicatory proceedings subject to 19.15.14.1207 and 1210 NMAC's notice provisions.

[19.15.14.1201 NMAC - Rp, 19 NMAC 15.N.1201, - -05]

#### **19.15.14.1202 RULEMAKING NOTICE:**

A. The ~~commission~~~~division~~ shall publish notice, of any proposed rulemaking, in the name of the "State of New Mexico", signed by the ~~division director~~commission chairman and bearing the commission's seal. The notice shall state the hearing's date, time and place and the date by which those commenting shall submit their written comments to the commission clerk. The notice shall be published as follows:

(1) one time in a newspaper of general circulation in the counties that the proposed rule change affects, or if the proposed rule change will have statewide effect, in a newspaper of general circulation in the state, no less than 20 days prior to the scheduled hearing date;

(2) on the applicable docket for the commission hearing at which the commission will hear the matter, which the commission clerk shall send by regular or electronic mail not less than 20 days prior to the hearing to all who have requested such notice;

(3) one time in the New Mexico register, with the publication date not less than 10 days prior to the scheduled hearing date; and

(4) by posting on the division's website not less than 20 days prior to the scheduled hearing date.

B. In cases of emergency, the division director may shorten these time limits by written order.

[19.15.14.1202 NMAC - Rp, 19 NMAC 15.N.1202, - -05]

**19.15.14.1203 WRITTEN COMMENTS ON RULEMAKING:** Any person may submit written comments on a proposed rule change, and those comments shall be made part of the hearing record. Individuals or entities shall provide written comments on the proposed rule change to the commission clerk not later than five days before the scheduled hearing date, unless the division director or the commission extends the time for filing comments. The division director or the commission may extend the time for filing written comments by making an announcement at the hearing, or by posting notice on the division's website. Any person may review written comments on a proposed rule change at the division's Santa Fe office. The division shall post copies of written comments that individuals or entities have filed with the commission clerk on the division's website as soon as practicable after they are filed.

[19.15.14.1203 NMAC - Rp, 19 NMAC 15.N.1203, - -05]

#### **19.15.14.1204 RULEMAKING HEARING PARTICIPATION:**

A. Participation by General Public.

(1) Any person may testify or make an un-sworn statement at the rulemaking hearing. A person does not need to file prior notification with the commission clerk to present non-technical testimony at the hearing.

(2) Any person may also offer exhibits in connection with his testimony, so long as the exhibits are relevant to the proposed rule change and do not unduly repeat the testimony. A person offering exhibits shall file any exhibits prior to the scheduled hearing date or submit them at the hearing. A person offering exhibits shall provide ~~one original plus five copies~~six sets of each exhibit for the commission, copies for each of those individuals or entities that have filed an intent to present technical testimony or cross-examine witnesses at the hearing and five additional copies for others who may attend the hearing.

(3) Members of the general public who wish to present non-technical testimony should indicate their

intent on a sign-in sheet at the hearing.

B. Technical testimony.

(1) Any person, including the division, who intends to present technical testimony or cross-examine witnesses at the hearing shall, no later than ~~10~~<sup>15</sup> days before the scheduled hearing date, file an original pre-hearing statement plus five copies with the commission clerk. Corporations, partnerships, governmental agencies, political subdivisions, unincorporated associations and other collective entities may appear only through counsel or through a duly authorized officer or member.

(2) The pre-hearing statement shall include the person or entity's name and its attorney's name; the names of all witnesses the person or entity will call to testify at the hearing; a concise statement of each witnesses' testimony; all technical witnesses' qualifications including a description of the witness' education and experience; and the approximate time the person or entity will need to present its testimony. The person or entity shall attach to the pre-hearing statement any exhibits it plans to offer as evidence at the hearing. A corporation or other entity not represented by counsel shall identify in its pre-hearing statement the person who will conduct its presentation and shall attach a sworn and notarized statement from the corporation's or entity's governing body or chief executive officer attesting that it authorizes that person to represent the corporation or entity.

(3) The commission may exclude any expert witnesses or technical exhibits not identified in or attached to the pre-hearing statement unless the testimony or exhibit is offered solely for rebuttal or the person or entity offering the testimony or exhibits demonstrates good cause for omitting the witness or exhibit from its pre-hearing statement.

(4) The division shall post copies of pre-hearing statements filed with the commission clerk on the division's website as soon as practicable after they are filed. Any person may review pre-hearing statements filed with the commission clerk at the division's Santa Fe office.

(5) No later than four days before the scheduled hearing date, the commission clerk shall deliver a copy of all pre-hearing statements including exhibits to all commissioners.

C. Modifications to proposed rule changes.

(1) Any person, other than the applicant or a commissioner, recommending modifications to a proposed rule change shall, no later than 10 days prior to the scheduled hearing date file a notice of recommended modifications with the commission clerk.

(2) The notice shall include:

- (a) the text of the recommended modifications to the proposed rule change;
- (b) an explanation of the recommended modification's impact; and
- (c) reasons for adopting the modification.

(3) No later than nine days prior to the scheduled hearing date, the commission clerk shall deliver a copy of any recommended modifications to all commissioners.

[19.15.14.1204 NMAC - Rp, 19 NMAC 15.N.1204, - -05]

**19.15.14.1205 RULEMAKING HEARINGS:**

A. Conduct of hearings.

(1) The rules of civil procedure and the rules of evidence shall not apply.

(2) The commission shall conduct the hearing so as to provide a reasonable opportunity for all persons to be heard without making the hearing unreasonably lengthy or cumbersome and without unnecessary repetition. The hearing shall proceed as follows:

- (a) the hearing shall begin with a statement from the commission chairman identifying the hearing's nature and subject matter and explaining the procedures to be followed;
- (b) the commission may allow any person to make a brief opening statement;
- (c) unless otherwise ordered, the applicant, or in the case of commission initiated rulemaking, commission or division staff, shall present its case first;
- (d) the commission chairman shall establish an order for other participants' testimony based upon notices of intent to present technical testimony, sign-in sheets and the availability of witnesses who cannot be present for the entire hearing;
- (e) the commission may allow any person to make a brief closing statement;
- (f) if the hearing continues for more than one day, the commission shall provide an opportunity each day for public comment;
- (g) at the close of the hearing, the commission shall determine whether to keep the record open for written submittals including arguments and proposed statements of reasons supporting the proposed commission

decision. In considering whether the record will remain open, the commission shall consider the reasons why the material was not presented during the hearing, the significance of material to be submitted and the necessity for a prompt decision. If the commission keeps the record open, the commission chairman shall announce at the hearing's conclusion the subjects on which the commission will allow submittals and the deadline for filing the submittals; and

(h) if the hearing is not completed on the day that it commences, the commission may, by announcement, continue the hearing as necessary.

B. Testimony and cross-examination.

(1) The commission will take all testimony under oath or affirmation, which may be accomplished en masse or individually. However, any person may make an un-sworn position statement.

(2) The commission shall admit any relevant evidence, unless the commission determines that the evidence is incompetent or unduly repetitious.

(3) Any person who testifies at the hearing is subject to cross-examination on the subject matter of his direct testimony. Any person who presents technical testimony may also be cross-examined on matters related to his background and qualifications. The commission may limit cross-examination to avoid harassment, intimidation, needless expenditure of time or undue repetition.

C. Exhibits.

(1) Any person offering an exhibit shall provide ~~one original plus five copies~~ six sets of the exhibit for the commission, copies for each of those individuals or entities that have filed an intent to present technical testimony or cross-examine witnesses at the hearing and five additional copies for others who may attend the hearing.

(2) All exhibits offered at the hearing shall be marked with a designation identifying the person offering the exhibit and shall be numbered sequentially.

D. Transcript of Proceeding.

(1) A verbatim record shall be made of the hearing.

(2) Any person may obtain a copy of the hearing transcript. The person requesting the copy shall pay for the cost of the copy of the hearing transcript.

E. Deliberation and decision.

(1) If a quorum of the commission attended the hearing, and if the hearing agenda indicates that a decision might be made at the hearing's conclusion, the commission may immediately deliberate and make a decision in open session on the proposed rule change based on a motion that includes reasons for the decision.

(2) If, during the course of deliberations, the commission determines that additional testimony or documentary evidence is necessary for a proper decision on the proposed rule change, the commission may consistent with due process requirements, reopen the hearing for additional evidence.

(3) The commission shall issue a written order adopting or refusing to adopt the proposed rule change, or adopting the proposed rule change in part, and shall include in the order the reasons for the action taken.

(4) Upon the commission's issuance of the order, the commission clerk shall post the order on the division's website and mail or e-mail a copy of the order to each person who presented non-technical testimony at the hearing or who filed a pre-hearing statement, or the person's attorney.

F. Filing. The division shall file with the State Records Center and Archives and publish any rule the commission adopts, amends or repeals consistent with the State Rules Act.

[19.15.14.1205 NMAC - Rp, 19 NMAC 15.N.1205, - -05]

#### **19.15.14.1206 INITIATING AN ADJUDICATORY HEARING:**

A. The division, attorney general, any operator or producer or any other person with standing may file an application with the division for an adjudicatory hearing. The division director, upon receiving a division examiner's recommendation, may dismiss an application for an adjudicatory proceeding upon a showing that the applicant does not have ~~a substantial interest in the subject matter~~ standing. The person applying for the hearing or an attorney representing that person shall sign the application requesting an adjudicatory hearing. The application shall include:

- (1) the applicant's name;
- (2) the applicant's address, or the address of the applicant's attorney, including an email address and fax number if available;
- (3) the name or general description of the common source or sources of supply or the area the order sought affects;
- (4) briefly, the general nature of the order sought;
- (5) a proposed legal notice for publication; and

(6) any other matter these rules or a division order require.

B. Applicants for adjudicatory hearings shall file written applications with the division secretary at least 23 days before the application's scheduled hearing date.  
[19.15.14.1206 NMAC – N, - -05]

**19.15.14.1207 ADJUDICATORY HEARING NOTICE:**

A. The division shall publish notice, of any adjudicatory hearing, in the name of the "State of New Mexico", signed by the division director and bearing the commission's seal, stating:

- (1) the adjudicatory hearing's time and place;
- (2) whether the case is set for hearing before the commission or a division examiner;
- (3) the applicant's name and address, or address of the applicant's attorney, including an email address and fax number if available;
- (4) the case name and number;
- (5) a brief description of the hearing's purpose;
- (6) a reasonable identification of the adjudication's subject matter that alerts persons who may be affected if the division grants the application;
- (7) if the application seeks to adopt, revoke or amend special pool rules; establish or alter a non-standard unit; permit an unorthodox location or establish or affect any well's or proration unit's allowable, the notice shall specify each pool or common source of supply that the division or commission's granting the application may affect; and
- (8) if the application seeks compulsory pooling or statutory unitization, the notice shall contain a legal description of the spacing unit or geographical area the applicant seeks to pool or unitize.

B. The division shall publish notice of each adjudicatory hearing before the commission or a division examiner at least 10 days before the hearing by:

- (1) posting notice on the division's website;
- (2) delivering notice by ordinary first class United States mail or electronic mail to each person who has requested in writing to be notified of such hearings; and
- (3) if before the commission, publishing notice in a newspaper of general circulation in the counties the application affects, or if the application's effect will be statewide, in a newspaper of general circulation in the state.

[19.15.14.1207 NMAC – Rp, 19 NMAC 15.N.1207, - -05]

**19.15.14.1208 PARTIES TO ADJUDICATORY PROCEEDINGS:**

A. The parties to an adjudicatory proceeding shall include:

- (1) the applicant;
- (2) any person to whom statute, rule or order requires notice (not including those persons to whom 19.15.14.1207 requires distribution of hearing notices, who are not otherwise entitled to notice of the particular application), who has entered an appearance in the case; and
- (3) any person who properly intervenes in the case.

B. A person entitled to notice may enter an appearance at any time by filing a written notice of appearance with the division or the commission clerk, as applicable, or, subject to the provisions in Subsection (B)(C) below, by oral appearance on the record at the hearing.

(B)(C). A party who has not entered an appearance at least one day prior to the pre-hearing statement filing date provided in Subparagraph 1 of Subsection B of 19.15.14.1211 NMAC shall not be allowed to present technical evidence at the hearing unless the commission chairman or the division examiner, for good cause, otherwise directs.

(C)(D). A party shall be entitled to a continuance of any hearing if it did not receive notice of the hearing at least three days prior to the date for filing a timely appearance as these rules provide.

[19.15.14.1208 NMAC - Rp, 19 NMAC 15.N.1208, - -05]

**19.15.14.1209 ADJUDICATORY PROCEEDING INTERVENTION:**

A. Any person with a substantial interest in a ~~standing with respect to the~~ case's subject matter may intervene by filing a written notice of intervention with the division or commission clerk, as applicable, at least one day before the date for filing a pre-hearing statement. Notice of intervention shall include:

- (1) the intervenor's name;
- (2) the intervenor's address, or the address of the intervenor's attorney, including an email address and

fax number if available;

- (3) the nature of intervenor's interest in the application; and
- (4) the extent to which the intervenor opposes issuance of the order applicant seeks.

B. The division examiner or commission chairman may, at their discretion, allow late intervenors to participate if the intervenor files a written notice on or after the date provided in Subsection A of 19.15.14.1206 NMAC, or by oral appearance on the record at the hearing.

C. The division examiner or the commission chairman may strike a notice of intervention on a party's motion if the notice fails to show that the intervenor has ~~["a substantial interest"]~~ standing to intervene in the hearing. [19.15.14.1209 NMAC - Rp, 19 NMAC 15.N.1209, - -05]

#### **19.15.14.1210 NOTICE REQUIREMENTS FOR SPECIFIC ADJUDICATIONS:**

A. Applicants for the following adjudicatory hearings before the division or commission shall give notice, in addition to that 19.15.14.1207 NMAC requires, as set forth below:

(1) Compulsory pooling and statutory unitization.

(a) The applicant shall give notice to any owner of an interest in the mineral estate of any portion of the lands the applicant proposes to be pooled or unitized whose interest is evidenced by a written conveyance document either of record or known to the applicant at the time the applicant filed the application and whose interest has not been voluntarily committed to the area proposed to be pooled or unitized (other than a royalty interest subject to a pooling or unitization clause).

(b) When the applicant has given notice as required in Subparagraph (a) of Paragraph (1) of Subsection A of 19.15.14.1207 NMAC, of a compulsory pooling application, the proposed unit is not larger in size than provided in 19.15.3.104 NMAC or applicable special pool orders, and those owners the applicant has located do not oppose the application, the applicant may file under the following alternative procedure. The application shall include the following:

- (i) a statement that the applicant expects no opposition including the reasons why;
- (ii) a map outlining the spacing unit to be pooled, showing the ownership of each separate tract in the proposed unit and the proposed well's location;
- (iii) the names and last known addresses of the interest owners to be pooled and the nature and percent of their interests and an attestation that the applicant has conducted a diligent search of all public records in the county where the well is located and of phone directories, including computer searches;
- (iv) the names of the formations and pools to be pooled;
- (v) a statement as to whether the pooled unit is for gas or oil production or both;
- (vi) written evidence of attempts the applicant made to gain voluntary agreement including but not limited to copies of relevant correspondence;
- (vii) proposed overhead charges (combined fixed rates) to be applied during drilling and production operations along with the basis for such charges;
- (viii) the location and proposed depth of the well to be drilled on the pooled units; and
- (ix) a copy of the authorization for expenditure (AFE) the applicant, if appointed operator, will submit to the well's interest owners.

(c) Applicants shall provide with all submittals sworn and notarized statements by those persons who prepared submittals, attesting that the information is correct and complete to the best of their knowledge and belief.

(d) The division shall set all unopposed pooling applications for hearing. If the division finds the application complete, the information submitted with the application will constitute the record in the case, and the division shall issue an order based on the record.

(e) At any interested person's request or upon the division's own initiative, the division shall set any pooling application for full hearing with oral testimony by the applicant.

(2) Unorthodox well locations.

(a) "Affected persons" are the following persons owning interests in the adjoining spacing units:

- (i) the division-designated operator;
- (ii) in the absence of an operator, any lessee whose interest is evidenced by a written conveyance document either of record or known to the applicant as of the date he files the application; and
- (iii) in the absence of an operator or lessee, any mineral interest owner whose interest is evidenced by a written conveyance document either of record or known to the applicant as of the date he filed the

application.

(b) In the event the proposed unorthodox well's operator is also the operator of an existing, adjoining spacing unit, and ownership is not common between the adjoining spacing unit and the spacing unit containing the proposed unorthodox well, then "affected persons" include all working interest owners in that spacing unit.

(c) If the proposed location is unorthodox by being located closer to the spacing unit's outer boundary than 19.15.3.104 NMAC or applicable special pool orders permit, the applicant shall notify the affected persons in the adjoining spacing units towards which the unorthodox location encroaches.

(d) If the proposed location is unorthodox by being located in a different quarter-quarter section or quarter section than special pool orders provide, the applicant shall notify all affected persons.

(3) Non-standard proration unit. The applicant shall notify all owners of interests in the mineral estate to be excluded from the proration unit in the quarter-quarter section (for 40-acre pools or formations), the one-half quarter section (for 80-acre pools or formations), the quarter section (for 160-acre pools or formations), the half section (for 320-acre pools or formations) or section (for 640-acre pools or formations) in which the non-standard unit is located and to such other persons as the division requires.

(4) Special pool orders regulating or affecting a specific pool.

(a) Except for non-standard proration unit applications, if the application involves changing the amount of acreage to be dedicated to a well, the applicant shall notify:

(i) all division-designated operators in the pool; and

(ii) all owners of interests in the mineral estate in existing spacing units with producing wells.

(b) If the application involves other matters, the applicant shall notify:

(i) all division-designated operators in the pool; and

(ii) all division-designated operators of wells within the same formation as the pool and within one mile of the pool's outer boundary that have not been assigned to another pool.

(5) Special orders regarding any division-designated potash area. The applicant shall notify all potash lessees, oil and gas operators, oil and gas lessees and unleased mineral interest owners within the designated potash area.

(6) Downhole commingling. The applicant shall notify all owners of interests in the mineral estate in the spacing unit if ownership is not common for all commingled zones within the spacing unit.

(7) Surface disposal of produced water or other fluids. The applicant shall notify any surface owner within one-half mile of the site.

(8) Surface commingling. The applicant shall give notice as 19.15.5.303 NMAC prescribes.

(9) Adjudications not listed above. The applicant shall give notice as the division requires.

B. Type and content of notice. The applicant shall send any notice 19.15.14.1207 NMAC requires by certified mail, return receipt requested, to the last known address of the person to whom notice is to be given at least 20 days prior to the application's scheduled hearing date and shall include a copy of the application; the hearing's date, time and place and the means by which protests may be made. When an applicant has been unable to locate all persons entitled to notice after exercising reasonable diligence, the applicant shall provide notice by publication, and submit proof of publication at the hearing. Such proof shall consist of a copy of a legal advertisement that was published at least 10 days before the hearing in a newspaper of general circulation in the county or counties in which the property is located, or if the application's effect is statewide, in a newspaper of general circulation in this state, together with the newspaper's affidavit of publication.

C. At the hearing, the applicant shall make a record, either by testimony or affidavit that the applicant or its authorized representative has signed, that:

(1) the applicant has complied with notice provisions of 19.15.14.1207 NMAC;

(2) the applicant has conducted a good-faith diligent effort to find the correct addresses of all persons entitled to notice; and

(3) the applicant has given notice at that correct address as 19.15.14.1207 NMAC requires. In addition, the record shall contain the name and address of each person to whom notice was sent and, where proof of receipt is available, a copy of the proof.

D. Evidence of failure to provide notice as 19.15.14.1207 NMAC requires may, upon proper showing, be considered cause for reopening the case.

E. In the case of an administrative application where the required notice was sent and a timely filed protest was made, the division shall notify the applicant and the protesting party in writing that the case has been set

for hearing and the hearing's date, time and place. No further notice is required.  
[19.15.14.1210 NMAC - Rp, 19 NMAC 15.N.1210, - -05]

**19.15.14.1211 PLEADINGS, COPIES, PRE-HEARING STATEMENTS, EXHIBITS AND MOTIONS FOR CONTINUANCE:**

A. Pleadings. Applicants shall file the original and one copy of pleadings and correspondence in cases pending before a division examiner with the division clerk and one original and five copies of pleadings and correspondence in cases pending before the commission with the commission clerk. For cases pending before the commission, the commission clerk shall disseminate copies of pleadings and correspondence to the commission members. The party filing the pleading or correspondence shall at the same time serve a copy of the pleading or correspondence upon each party who has entered an appearance in the case on or prior to the working day immediately preceding the day when the party files the pleading or correspondence with the division or the commission clerk, as applicable. Parties shall accomplish service by hand delivery or transmission by facsimile or electronic mail to any party who has entered an appearance or if the party is represented, the party's attorney of record. Service upon a party who has not filed a pleading containing a facsimile number or email address may be made by ordinary first class mail. Interested parties Parties shall be deemed to have made an appearance when they have either sent a letter regarding the case to the division or commission clerk or made an in person appearance at any hearing before the commission or before a division examiner. A written appearance, however, shall not be complete until the appearing party has provided notice to other parties of record. Any initial pleading or written entry of appearance a party other than the applicant files shall include the party's address or the address of the party's attorney and an email and facsimile number if available.

B. Pre-hearing Statements.

(1) Any party to an adjudicatory proceeding who intends to present evidence at the hearing shall file a pre-hearing statement, and serve copies on other parties or for parties that are represented, their counsel of record in the manner Subsection A of 19.15.14.1211 NMAC provides, at least four days in advance of a scheduled hearing before the division or the commission, but in no event later than 5:00 p.m. Mountain Time, on the Friday Thursday preceding the scheduled hearing date. The statement shall include:

- (a) the names of the party and the party's attorney;
- (b) a concise statement of the case;
- (c) the names of all witnesses the party will call to testify at the hearing, and in the case of expert witnesses, their fields of expertise;
- (d) the approximate time the party will need to present its case; and
- (e) identification of any procedural matters that are to be resolved prior to the hearing.

(2) Any party other than the applicant shall include in its pre-hearing statement a statement of the extent, if any, to which the party opposes the issuance of the order the applicant seeks and the reasons for such opposition. In cases to be heard by the commission, each party shall include copies of all exhibits that it proposes to offer in evidence at the hearing with the pre-hearing statement. The commission may exclude witnesses the party did not identify in the pre-hearing statement, or exhibits the party did not file and serve with the pre-hearing statement, unless the party offers such evidence solely for rebuttal or makes a satisfactory showing of good cause for failure to disclose the witness or exhibit.

(3) A pre-hearing statement filed by a corporation or other entity not represented by counsel shall identify the person who will conduct the party's presentation at the hearing and include a sworn and notarized statement attesting that the corporation's or entity's governing body or chief executive officer authorizes the person to represent the corporation or entity in the matter.

(4) For cases pending before the commission, the commission clerk shall disseminate copies of pre-hearing statements and exhibits to the commission members.

C. Motions for continuance. Parties shall file and serve motions for continuance no later than 48 hours prior to the time the hearing is set to begin, unless the reasons for requesting a continuance arise after the deadline, in which case the party shall file the motion as expeditiously as possible after becoming aware of the need for a continuance.

[19.15.14.1211 NMAC - Rp, 19 NMAC 15.N.1211, - -05]

**19.15.14.1212 CONDUCT OF ADJUDICATORY HEARINGS:**

A. Testimony. Hearings before the commission or a division examiner shall be conducted without rigid formality. The division or commission shall take or have someone take a transcript of testimony and preserve

the transcript as a part of the division's permanent records. Any person testifying shall do so under oath. The division examiner or commission shall designate whether or not an interested party's un-sworn comments and observations are relevant and, if relevant, include the comments and observations in the record.

B. Pre-filed testimony. The division director may order the parties to file prepared written testimony in advance of the hearing for cases pending before the commission. The witness shall be present at the hearing and shall adopt, under oath, the prepared written testimony, subject to cross-examination and motions to strike unless the witness' presence at hearing is waived upon notice to other parties and without their objection. The parties shall number pages of the prepared written testimony, which shall contain line numbers on the left-hand side.

C. Appearances pro se or through counsel. Parties may appear and participate in hearings either pro se (on their own behalf) or through counsel. Corporations, partnerships, governmental entities, political subdivisions, unincorporated associations and other collective entities may appear only through counsel or through a duly authorized officer or member. Participation in adjudicatory hearings shall be limited to parties, as defined in 19.15.14.12[42]08 NMAC, except that a representative of a federal, state, or tribal governmental agency or political subdivision may make a statement on the agency's or political subdivision's behalf. The commission or division examiner shall have the discretion to allow any other person present at the hearing to make a relevant statement, but not to present evidence or cross-examine witnesses. Any person making a statement at an adjudicatory hearing shall be subject to cross-examination by the parties or their attorneys.

[19.15.14.1212 NMAC - Rp, 19 NMAC 15.N.1213, - -05]

**19.15.14.1213 CONTINUANCE OF AN ADJUDICATORY HEARING:** Any adjudicatory hearing before the commission or a division examiner held after due notice may be continued by the person presiding at such hearing to a specified time and place without the necessity of notice of the same being again served or published.

[19.15.14.1213 NMAC - Rp, 19 NMAC 15.N.1212, - -05]

**19.15.14.1214 POWER TO REQUIRE ATTENDANCE OF WITNESSES AND PRODUCTION OF EVIDENCE; PRE-HEARING PROCEDURE FOR ADJUDICATORY HEARINGS:**

A. Subpoenas. The commission or its members and the division director or the division director's authorized representative have statutory power to subpoena witnesses and to require the production of books, papers, and records in any proceeding before the commission or division. The division director or the division director's authorized representative will issue a subpoena for attendance at a hearing upon a party's written request. The division director or the division director's authorized representative shall, upon a party's request, issue a subpoena for production of books, papers or other tangible things in advance of the hearing. The director or the division examiner assigned to hear the case have discretion to consider pre-hearing motions, such as motions for protection or quashing of subpoenas, prior to the hearing pursuant to Subsection C of 19.15.14.1214 NMAC or to reserve such matters for consideration at a hearing on the merits. The commission and division director or the director's authorized representative shall issue subpoenas for witness depositions in advance of the hearing only in extraordinary circumstances for good cause shown.

B. Pre-hearing conferences. The division examiner or the division director may hold a pre-hearing conference prior to the hearing on the merits in cases pending before the division or the commission, respectively, either upon a party's request or upon the division director or a division examiner giving notice. The pre-hearing conference's purpose shall be to narrow issues, eliminate or resolve other preliminary matters and encourage settlement. The division director or examiner may issue a pre-hearing order following the pre-hearing conference. The division director or division examiner shall either provide or ensure that written or oral notice of a pre-hearing conference is given to the applicant and to all other parties who, at the time such conference is scheduled, have filed appearances in the case.

C. Hearings on motions. The director or any division examiner may rule on motions that are necessary or appropriate for disposition prior to a hearing on the merits. If the case is pending before the commission, the division director shall rule on any such motion; provided that the division director may refer any such motion for hearing by a division examiner specifically designated for the purpose, who, if the case is a de novo application, shall not have participated in the case prior to the filing of the application for de novo hearing. Prior to ruling on any motion, the division director or division examiner shall give written or oral notice to each party who has filed an appearance in the case and who may have an interest in the motion's disposition (except a party who has indicated that it does not oppose the motion), and shall allow interested parties an opportunity, reasonable under the circumstances, to respond to the motion. The division director or division examiner may conduct a hearing on any motion, following written or oral notice to all interested parties, either at a pre-hearing conference or otherwise. If

the commission or division examiner receives oral testimony at any motion hearing, the commission or division examiner shall ensure that a record is made of the testimony as at other hearings.

[19.15.14.1214 NMAC - Rp, 19 NMAC 15.N.1214, - -05]

**19.15.14.1215 RULES OF EVIDENCE AND EXHIBITS FOR ADJUDICATORY HEARINGS:**

A. Presentation of evidence. Subject to other provisions of 19.15.1214 NMAC, the commission or division examiner shall afford full opportunity to all ~~interested~~ parties at an adjudicatory hearing before the commission or division examiner to present evidence and to cross-examine witnesses. The rules of evidence applicable in a trial before a court without a jury shall not control, but division examiners and the commission may use such rules as guidance in conducting adjudicatory hearings. The commission or division examiner may admit any relevant evidence, unless it is immaterial, repetitious or otherwise unreliable. The commission or division examiner may take administrative notice of the authenticity of documents copied from the division's files.

B. Parties introducing exhibits at hearings before the commission or a division examiner shall provide a complete set of exhibits for the court reporter, each commissioner or division examiner and other parties of record.

C. A party requesting incorporation of records from previous division examiner hearings at a commission hearing shall include copies of the record for all commissioners.

[19.15.14.1215 NMAC - Rp, 19 NMAC 15.N.1215, - -05]

**19.15.14.1216 DIVISION EXAMINERS' QUALIFICATIONS, APPOINTMENT AND REFERRAL OF CASES:**

The division director shall appoint as division examiners division staff who are licensed lawyers, or who have at least two years of experience in hydrogeology, hydrology, geology, petroleum engineering, environmental engineering or a related field and a college degree in geology, engineering, hydrology or related field ~~or is a licensed lawyer~~. Nothing in this section shall prevent any commission member from serving as a division examiner.

The division director may refer any matter or proceeding to a division examiner for hearing in accordance with these rules.

[19.15.14.1216 NMAC - Rp, 19 NMAC 15.N.1216, - -05]

**19.15.14.1217 DIVISION EXAMINER'S POWER AND AUTHORITY:** The division examiner to whom the division director refers any matter under these rules shall have full authority to hold hearings on such matter in accordance with these rules, subject only to such limitations as the division director may order in a particular case. The division examiner shall have the power to perform all acts and take all measures necessary or proper for the efficient and orderly conduct of such hearing, including administering oaths to witnesses, receiving testimony and exhibits offered in evidence and ruling upon such objections as may be interposed. The division examiner shall cause a complete record of the proceedings to be made and transcribed and shall certify same to the director as hereinafter provided.

[19.15.14.1217 NMAC - Rp, 19 NMAC 15.N.1217, - -05]

**19.15.14.1218 ADJUDICATORY HEARINGS THAT SHALL BE HELD BEFORE THE COMMISSION:**

Notwithstanding any other provisions of these rules, the hearing on any matter shall be held before the commission if:

A. it is a hearing pursuant to NMSA 1978, Section 70-2-13; or

B. the division director directs the commission to hear the matter.

[19.15.14.1218 NMAC - Rp, 19 NMAC 15.N.1218, - -05]

**19.15.14.1219 REPORT AND RECOMMENDATIONS FROM DIVISION EXAMINER'S HEARING**

Upon the conclusion of any hearing before a division examiner, the division examiner shall promptly consider the proceedings in such hearing, and based upon the hearing's record prepare a written report with recommendations for the division's disposition of the matter or proceeding. The division examiner shall draft a proposed order and submit it to the division director with the certified record of the hearing.

[19.15.14.1219 NMAC - Rp, 19 NMAC 15.N.1219, - -05]

**19.15.14.1220 DISPOSITION OF CASES HEARD BY DIVISION EXAMINER:** After receipt of the division examiner's report, the division director shall enter the division's order, which the director may have modified from the division examiner's proposed order, disposing of the matter.

[19.15.14.1220 NMAC - Rp, 19 NMAC 15.N.1220, - -05]

**19.15.14.1221 HEARING BEFORE COMMISSION AND STAYS OF DIVISION ORDERS:**

A. De novo applications. When the division enters an order pursuant to a hearing that a division examiner held, a party of record whom the order adversely affects has the right to have the matter heard de novo before the commission, provided that within 30 days from the date the division issues the order the party files a written application for de novo hearing with the commission clerk. If any party files an application for a de novo hearing, the commission chairman shall set the matter or proceeding for hearing before the commission.

B. Stays of division or commission orders. Any party requesting a stay of a division or commission order shall file a motion with the commission clerk and serve copies of the motion upon all other parties who appeared in the case, as Subsection A of 19.15.14.1208 NMAC provides. The party shall attach a proposed stay order to the motion. The division director may grant a stay pursuant to a motion for stay or upon his own initiative, after according all parties who have appeared in the case notice and an opportunity to respond, if the stay is necessary to prevent waste, protect correlative rights, protect public health or the environment or prevent gross negative consequences to any affected party. Any division director's order staying a commission order shall be effective only until the commission acts on the motion for stay.

[19.15.14.1221 NMAC - Rp, 19 NMAC 15.N.1221, - -05]

**19.15.14.1222 COPIES OF COMMISSION AND DIVISION ORDERS** Within 10 days after the division or commission issues an order in an adjudicatory case, including any order granting or refusing rehearing or order following rehearing, the division or commission clerk shall mail a copy of such order to each party or its attorney of record. For purposes of 19.15.14.1222 NMAC only, the parties to a case are the applicant and each person who has entered an appearance in the case, in person or by attorney, either by filing a protest, pleading or notice of appearance with the commission clerk or by entering an appearance on the record at a hearing.

[19.15.14.1222 NMAC - Rp, 19 NMAC 15.N.1222, - -05]

**19.15.14.1223 REHEARINGS:** Within 20 days after entry of any commission order any party of record whom the order adversely affects may file with the commission clerk an application for rehearing on any matter the order determined, setting forth the respect in which the party believes the order is erroneous. The commission shall grant or refuse any such application in whole or in part within 10 days after the party files it, and the commission's failure to act on the application within such period shall be deemed a refusal and a final disposition of such application. In the event the commission grants the rehearing, the commission may enter a new order after rehearing as the circumstances may require.

[19.15.14.1223 NMAC - Rp, 19 NMAC 15.N.1223, - -05]

**19.15.14.1224 EX PARTE COMMUNICATIONS:**

A. In an adjudicatory proceeding, except for filed pleadings, at no time after a party files an application for hearing shall any party, interested participant or his representative advocate the issues the application involves to any commissioner or the division examiner appointed to hear the case unless all other parties of record to the proceedings have an opportunity to be present.

B. The prohibition in Subsection A of 19.15.14.1224 NMAC, above, does not apply to those applications that the applicant believes are unopposed. However, in the event that a party files an objection in a case previously believed to be unopposed, the prohibition in A, above, is immediately applicable.

C. This provision does not prohibit communications between the division's attorney or other division staff and the director that are essential to management of a case.

[19.15.14.1224 NMAC - N, - -05]

**19.15.14.1225 EMERGENCY ORDERS AND RULES:**

A. Notwithstanding any other provision of 19.15.14 NMAC, in the event the division or commission finds an emergency exists that requires adoption of a rule or issuance of an order without a hearing, such emergency rule or order shall have the same validity as if the division or commission has held a hearing before the division or commission after due notice. Such emergency rule or order shall remain in force no longer than 15 days from its effective date.

B. Notwithstanding any other provision of 19.15.14 NMAC, if the division or commission finds an emergency exists, the division or commission may conduct a hearing on any application within less than 23 days after party files the application, and the division director may set the notice period at his discretion.

[19.15.14.1225 NMAC – N, - -05]

**19.15.14.1226 COMPUTATION OF TIME:** In computing a period of time this part prescribes, the day from which the period of time begins to run shall not be included. The last calendar day of the time period shall be included in the computation unless it is a Saturday, Sunday or a day on which state agencies observe a legal holiday. In such case, the period of time runs to the close of business on the next regular workday. If the period is less than 11 days, a Saturday, Sunday or legal holiday is excluded from the computation.  
[19.15.14.1226 NMAC – N, - -05]

**HISTORY OF 19.15.14 NMAC:**

Pre-NMAC History: The material in this Part was derived from that previously filed with the State Records Center and Archives:

Rule 1201, Necessity for Hearing, 1-11-82;  
Rule 1201, Necessity for Hearing, 2-5-91;  
Rule 1202, Emergency Orders, 1-11-82;  
Rule 1202, Emergency Orders, 2-5-91;  
Rule 1203, Method of Initiating a Hearing, 1-11-82;  
Rule 1203, Method of Initiating a Hearing, 2-5-91;  
Rule 1204, Method of Giving Legal Notice for Hearing, 1-11-82;  
Rule 1204, Method of Giving Legal Notice for Hearing, 11-5-85;  
Rule 1204, Method of Giving Legal Notice for Hearing, 2-5-91;  
Rule 1204, Publication of Notice for Hearing, 4-12-91;  
Rule 1205, Contents of Notice of Hearing, 1-11-82;  
Rule 1205, Contents of Notice of Hearing, 11-5-85;  
Rule 1205, Contents of Notice of Hearing, 2-5-91;  
Rule 1206, Personal Service of Notice, 1-11-82;  
Rule 1206, Preparation of Notices, 11-5-85;  
Rule 1206, Personal Service of Notice, 2-5-91;  
Rule 1207, Preparation of Notices, 1-11-82;  
Rule 1207, Additional Notice Requirements, 11-5-85;  
Rule 1207, Additional Notice Requirements, 3-27-87;  
Rule 1207, Additional Notice Requirements, 1-6-88;  
Rule 1207, Additional Notice Requirements, 2-5-91;  
Rule 1208, Filing Pleadings, 1-11-82;  
Rule 1208, Filing Pleadings, 2-5-91;  
Rule 1209, Continuance of Hearing Without New Service, 1-11-82;  
Rule 1209, Continuance of Hearing Without New Service, 2-5-91;  
Rule 1210, Conduct of Hearings, 1-11-82;  
Rule 1210, Conduct of Hearings, 2-5-91;  
Rule 1211, Power to Require Attendance of Witnesses and Production of Evidence, 1-11-82;  
Rule 1211, Power to Require Attendance of Witnesses and Production of Evidence, 2-5-91;  
Rule 1212, Rules of Evidence, 1-11-82;  
Rule 1212, Rules of Evidence, 2-5-91;  
Rule 1213, Examiners' Qualifications and Appointment, 1-11-82;  
Rule 1213, Examiners' Qualifications and Appointment, 2-5-91;  
Rule 1214, Referral of Cases to Examiners, 1-11-82;  
Rule 1214, Referral of Cases to Examiners, 2-5-91;  
Rule 1215, Examiner's Power of Authority, 1-11-82;  
Rule 1215, Examiner's Power of Authority, 2-5-91;  
Rule 1216, Hearings Which Must be Held Before the Commission, 1-11-82;  
Rule 1216, Hearings Which Must be Held Before the Commission, 2-5-91;  
Rule 1217, Examiner's Manner of Conducting Hearing, 1-11-82;  
Rule 1217, Examiner's Manner of Conducting Hearing, 2-5-91;  
Rule 1218, Report and Recommendations, Examiner's Hearings, 1-11-82;  
Rule 1218, Report and Recommendations, Examiner's Hearings, 2-5-91;

Rule 1219, Disposition of Cases Heard by Examiners, 1-11-82;  
Rule 1219, Disposition of Cases Heard by Examiners, 2-5-91;  
Rule 1220, De Novo Hearing Before Commission, 1-11-82;  
Rule 1220, De Novo Hearing Before Commission, 12-30-86;  
Rule 1220, De Novo Hearing Before Commission, 2-5-91;  
Rule 1221, Notice of Commission and Division Orders, 1-11-82;  
Rule 1221, Notice of Commission and Division Orders, 2-5-91;  
Rule 1222, Rehearings, 1-11-82;  
Rule 1222, Rehearings, 2-5-91.

**History of Repealed Material:**

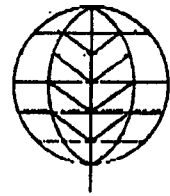
Rule 1206, Personal Service of Notice, Repealed 4-12-91.  
19 NMAC 15.N, Procedure (filed 1-18-96) repealed - -05.

Other History: Rule 1201, Necessity for Hearing, filed 2-5-91; Rule 1202, Emergency Orders, filed 2-5-91; Rule 1203, Method of Initiating a Hearing, filed 2-5-91; Rule 1204, Publication of Notice for Hearing, filed 4-12-91; Rule 1205, Contents of Notice of Hearing, filed 2-5-91; Rule 1207, Additional Notice Requirements, filed 2-5-91; Rule 1208, Filing Pleadings, filed 2-5-91; Rule 1209, Continuance of Hearing Without New Service, filed 2-5-91; Rule 1210, Conduct of Hearings, filed 2-5-91; Rule 1211, Power to Require Attendance of Witnesses and Production of Evidence, filed 2-5-91; Rule 1212, Rules of Evidence, filed 2-5-91; Rule 1213, Examiners' Qualifications and Appointment, filed 2-5-91; Rule 1214, Referral of Cases to Examiners, filed 2-5-91; Rule 1215, Examiner's Power of Authority, filed 2-5-91; Rule 1216, Hearings Which Must be Held Before the Commission, filed 2-5-91; Rule 1217, Examiner's Manner of Conducting Hearing, filed 2-5-91; Rule 1218, Report and Recommendations, Examiner's Hearings, filed 2-5-91; Rule 1219, Disposition of Cases Heard by Examiners, filed 2-5-91; Rule 1220, De Novo Hearing Before Commission, filed 2-5-91; Rule 1221, Notice of Commission and Division Orders, filed 2-5-91; Rule 1222, Rehearings, filed 2-5-91 were all renumbered, reformatted and replaced by 19 NMAC 15.N, Procedure, effective 2-1-96.  
19 NMAC 15.N, Procedure, filed 1-18-96 was renumbered, reformatted and replaced by 19.15.14 NMAC, Procedure, effective 8-29-03.



## Oil & Gas Accountability Project

a program of EARTHWORKS



August 17, 2005

VIA FACSIMILE

Oil Conservation Commission  
Energy, Minerals, and Natural Resources Department  
1220 S. Saint Francis Drive  
Santa Fe, NM 87505

Re: Additional Comments on proposed amendments to Rules 1201, 1203 through 1205, 1207, 1208, 1211, 1212, 1214 and 1220, Revision 6

Dear Members of the Commission:

The Oil & Gas Accountability Project ('OGAP') would like to submit the following brief additional comment, related to the issue of 'standing'.

Both the OCD comments on the proposed changes and those of Yates Petroleum Corporation urge this commission to return to the use of the legal concept of standing, in determining who may file an application for an adjudicatory hearing (Rule 19.15.14.1206) and who may intervene in such a proceeding (Rule 19.15.14.1209). OGAP believes that such a change would, as a practical matter, result in the exclusion of most surface owners from such proceedings. Standing is a legal term of art that 99.5% of the residents of New Mexico do not understand. "Substantial interest in the subject matter" (the proposed language), on the other hand, fairly clearly communicates to most people what is required to be able to initiate an adjudicatory proceeding or to intervene in such a proceeding.

As a point of information, the Colorado Oil and Gas Conservation Commission procedural rules do not use the concept of standing, but rather use the phrase "directly and adversely affected or aggrieved" as the required threshold for participation as a party in such a proceeding.

Therefore, OGAP believes that this commission should err on the side of more inclusion at the cost of slightly less legal precision.

Respectfully submitted,

Bruce Baizel  
Staff Attorney