

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

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IN THE MATTER OF PROPOSED AMENDMENTS TO THE
COMMISSION'S RULE ON RULEMAKING, 19.15.3 NMAC.

CASE NO. 15738

OIL CONSERVATION COMMISSION'S
NOTICE OF PROPOSED MODIFICATIONS OF PROPOSED RULE CHANGES

Pursuant to 19.15.3.11(C) NMAC, the Oil Conservation Commission through its counsel submits its proposal to modify the changes to 19.15.3 NMAC proposed in Oil Conservation Commission Order No. R-14362 issued on May 18, 2017.

The Oil Conservation Commission's proposed modifications are set forth in Exhibit A, which is attached. Changes from the originally proposed amendments to 19.15.3 NMAC are highlighted in yellow with proposed deletions struck through and in brackets and proposed additions underlined.

The modifications are proposed to (1) re-insert existing Paragraph D of 19.15.3.8 NMAC, which was left out of the rule changes included with Order No. R-14362, (2) require that proposed modifications to proposed rule changes and the reasons for the proposed modifications be included with pre-hearing statements, (3) comply with the State Records Center and Archives rule formatting requirements, and (4) remove extraneous or unnecessary words. The addition in Subparagraph (2) of Paragraph B of 19.15.3.11 NMAC requiring that the text and reasons for proposed modifications be included replaces language that is proposed to be deleted from Paragraph C.

WHEREFORE, the Oil Conservation Commission through its counsel requests that its proposed modifications be adopted instead of the amendments previously proposed.

Respectfully submitted,



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Certificate of Service

I hereby certify that the Oil Conservation Commission's Notice of Proposed Modifications of Proposed Rule Changes was served by e-mail and first-class mail to the following parties on September 9, 2017.

Ryan Flynn, Executive Director
New Mexico Oil and Gas Association
P.O. Box 1864
Santa Fe, NM 87504-1864

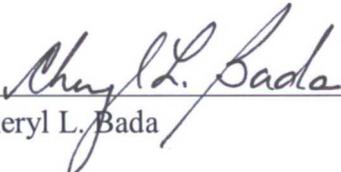

Cheryl L. Bada

EXHIBIT A

PROPOSED MODIFICATIONS TO PROPOSED RULE CHANGES

19.15.3.1 ISSUING AGENCY: Energy, Minerals and Natural Resources Department, Oil Conservation Division and Oil Conservation Commission.
[19.15.3.1 NMAC - Rp, 19.15.14.1 NMAC, 12/1/2008; A, //2017]

19.15.3.3 STATUTORY AUTHORITY: 19.15.3 NMAC is adopted pursuant to the Oil and Gas Act, [NMSA 1978,] Section 70-2-6 NMSA 1978, which grants the oil conservation division and the oil conservation commission 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 [NMSA 1978,] Section 70-2-7 NMSA 1978, which provides that the division shall prescribe by rule its hearing procedures. The 2017 amendments are authorized by [NMSA 1978,] Section 70-2-12.2 NMSA 1978 (2016), which provides for the appeal of [C]commission rules and Laws 2017, Chapter 137, which provides for uniform rulemaking procedures.
[19.15.3.3 NMAC - Rp, 19.15.14.3 NMAC, 12/1/2008; A, //2017]

19.15.3.7 DEFINITIONS: ~~[[RESERVED] [See 19.15.2.7 NMAC for definitions.]]~~ See [also NMSA 1978,] Section 14-4-2 NMSA 1978 (2017) for the definitions of “proceeding,” “proposed rule” and “rule”. As used in 19.15.3 NMAC:

A. “Party” means the applicant or any person filing a pre-hearing statement or an entry of appearance.
B. “Technical testimony” means scientific, engineering, economic or other specialized testimony, but does not include legal argument, general comments, or statements of policy or position concerning matters at issue in the hearing.

[19.15.3.7 NMAC - N, 12/1/2008; A, //2017]

19.15.3.8 RULEMAKING INITIATION:

A. ~~[The commission may commence a rulemaking proceeding by issuing an order initiating rulemaking. The division, an operator or producer or other person may initiate a rulemaking proceeding by filing an application to adopt, amend or repeal a rule with the commission clerk.] Any person may file an application with the commission to adopt, amend or repeal any rule within the commission’s jurisdiction [of the commission].~~ The application shall be in writing and ~~[applicants shall specifically identify the rule the applicant seeks for the commission]~~ specifically identify the rule the applicant proposes 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]~~ rule’s intended effect;
- (2) ~~[a proposed draft of the new rule or amendment]~~ a draft of the proposed rule;
- (3) the applicant’s name;
- (4) the applicant’s address, or the address of its attorney, including an e-mail address ~~[and fax number]~~ if available; and
- (5) a proposed legal notice for publication, which meets the requirements of Subsection B of 19.15.3.9 NMAC ~~[; and~~
- ~~(6) any other matter a commission order requires].~~

B. An applicant shall file ~~[six sets 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 six sets of the application to the commission clerk on the next business day]~~ or by mail and shall also send an electronic copy of the application to the commission clerk.

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 business days of the application’s receipt. ~~[Unless the commission chairman or another commissioner indicates, within 10 business 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.] The commission shall determine, at a public meeting at least 15 days and no later than within 60 days of the application's filing, whether to hold a public hearing on the proposed rule. If the commission decides to hold a public hearing on the proposed rule, the commission may set the date for the hearing and may issue orders specifying procedures for the conduct of the hearing in addition to the procedures [of this Part] in 19.15.3 NMAC, including naming a hearing officer, providing additional public notice and providing for a pre-hearing conference. Prior to the hearing, the chair or other hearing officer appointed by the commission shall have the authority to schedule or continue a hearing, hold a pre-hearing conference and rule on any non-dispositive motions.

D. 19.15.3.8 NMAC shall not apply to special pool orders, which the commission or the division may adopt, amend or rescind in adjudicatory proceedings subject to 19.15.4.9 NMAC and 19.15.4.12 NMAC's notice provisions.

[19.15.3.8 NMAC - Rp, 19.15.14.1201 NMAC, 12/1/2008; A, / /2017]

19.15.3.9 RULEMAKING NOTICE:

A. [The division shall publish notice of a proposed rulemaking set for the hearing in the name of the "State of New Mexico", signed by the 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 business 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.] The commission shall distribute a notice of a proposed rulemaking no later than [thirty] 30 days before the hearing on the rule change by:

_____ (1) posting the notice on the division website;

_____ (2) posting the notice on the sunshine portal;

_____ (3) making the notice available in the division's district offices;

_____ (4) sending the notice by mail or electronic mail to persons who have made a written request for notice from the commission of announcements addressing the subject of the rulemaking proceeding and who have provided a mail or an electronic mail address to the commission;

_____ (5) providing the notice to the New Mexico legislative council for distribution to appropriate interim and standing legislative committees; and

_____ (6) publishing the notice in the New Mexico register and in a newspaper of general circulation in the state.

B. [In cases of emergency, the commission chairman may shorten these time limits by written order.]

Content. The notice shall include:

_____ (1) a summary of the full text of the proposed rule;

_____ (2) a short explanation of the purpose of the proposed rule;

_____ (3) a citation to the specific legal authority authorizing the proposed rule and the adoption of the rule;

_____ (4) information on how a copy of the full text of the proposed rule may be obtained, including an internet link to the full text;

_____ (5) information on how a person may comment on the proposed rule, where comments will be received and when comments are due;

_____ (6) information on where and when a public rule hearing will be held and how a person may participate in the hearing; and

_____ (7) a citation to technical information, if any, that served as a basis for the proposed rule, and information on how the full text of the technical information may be obtained.

[19.15.3.9 NMAC - Rp, 19.15.14.1202, 12/1/2008; A, / /2017]

19.15.3.10 COMMENTS ON RULEMAKING: A person may submit written[-] or electronic [or facsimile]

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 business days before]~~ the date of the scheduled hearing [date], unless the commission chairman or the commission extends the time for filing comments. The commission chairman or the commission may extend the time for filing written~~[-]~~ or electronic ~~[or facsimile]~~ comments by making an announcement at the hearing, or by posting notice on the division's website. A person may review written~~[-]~~ or electronic ~~[or facsimile]~~ comments on a proposed rule change at the division's Santa Fe office. The division shall post copies of written~~[-]~~ or electronic ~~[or facsimile]~~ comments that persons have filed with the commission clerk on the division's website as soon as practicable after they are filed.

[19.15.3.10 NMAC - Rp, 19.15.14.1203 NMAC, 12/1/2008; A, / /2017]

19.15.3.11 RULEMAKING HEARING PARTICIPATION:

A. Non-technical testimony.

(1) A 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) A person may also offer exhibits ~~[in connection]~~ with the 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 exhibits prior to the scheduled hearing date or submit them at 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) A person, including the division, who intends to present technical testimony or ~~[cross-examine witnesses at the hearing]~~ to submit modifications to a proposed rule shall, no later than ~~[five]~~ 10 business days before the scheduled hearing date, file six sets of a pre-hearing statement with the commission clerk. Corporations, partnerships, governmental agencies, political subdivisions, unincorporated associations and other collective entities shall appear only through an attorney 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 witnesses' education and experience; and the approximate time the person or entity will need to present its testimony; and any proposed modifications to the proposed rule change with reasons for adopting the modifications. 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 an attorney 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. A person may review pre-hearing statements filed with the commission clerk at the division's Santa Fe office.

C. ~~[Modifications to proposed rule changes.]~~ **Entry of appearance.** A person, who is or may be affected by the proposed rule, may file an entry of appearance as a party no later than 10 business days prior to the scheduled hearing date.

~~_____ (1) _____ A person, other than the applicant or a commissioner, recommending modifications to a proposed rule change shall, no later than 10 business 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.]~~

[19.15.3.11 NMAC - Rp, 19.15.14.1204 NMAC, 12/1/2008; / /2017]

19.15.3.12 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 [persons] parties 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] pre-hearing statements, sign-in sheets, the availability of witnesses who cannot be present for the entire hearing and any other appropriate factor;
 - (e) the commission may allow [persons] parties 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 without further notice.

B. Testimony and cross-examination.

- (1) The commission shall take all testimony under oath or affirmation, which may be accomplished en masse or individually. However, a person may make an un-sworn position statement.
- (2) The commission shall admit relevant evidence, unless the commission determines that the evidence is incompetent or unduly repetitious.
- (3) A person who testifies at the hearing is subject to cross-examination by [a person who has filed a pre-hearing statement] the commissioners, commission counsel or a party on the subject matter of the person's direct testimony. A person who presents technical testimony may also be cross-examined on matters related to the person's background and qualifications. The commission may limit cross-examination to avoid harassment, intimidation, needless expenditure of time or undue repetition.

C. Exhibits.

- (1) A person offering an exhibit shall provide 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] party and five additional copies for others who may attend the hearing.
- (2) 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) The commission shall make a verbatim record of the hearing.~~
- ~~(2) A 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 reopen the hearing for additional evidence after notice pursuant to 19.15.3.9 NMAC.~~
- ~~(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.]

[19.15.3.12 NMAC - Rp, 19.15.14.1205 NMAC, 12/1/2008, A, / /2017]

19.15.3.13 COMMISSION DELIBERATION AND ACTION:

A. Deliberation. 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] decide in open session on the proposed rule change. The commission may otherwise deliberate and [take action] act in open session at any commission meeting where such deliberation and possible action is listed on the meeting agenda.

B. 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 reopen the hearing for additional evidence after notice pursuant to 19.15.3.9 NMAC.

C. Order. 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. The commission's order shall serve as the "concise explanatory statement" required by [NMSA 1978,] Section 14-4- NMSA 1978 (2017).

D. Termination. The commission may terminate a rulemaking at any time by a motion approved at a commission meeting. The commission shall publish a notice of termination in the New Mexico register and provide notice of the termination in the manner provided in 19.15.3.9 NMAC. If the commission [has not taken action] does not act within two years after publication of a proposed rule change in the New Mexico register, the rulemaking is automatically terminated unless the commission approves a motion to extend the rulemaking and files a statement of good cause in the record. The commission shall also provide for additional public notice, comment and public hearing.

[19.15.3.13 NMAC - N, / /2017]

19.15.3.14 RECORD:

A. The commission shall maintain a record for each rulemaking proceeding. The record shall be available for public inspection at the division's Santa Fe office and a copy shall be provided to the sunshine portal.

B. The record shall contain:

- (1) a copy of all publications in the New Mexico register relating to the proposed rule;
- (2) a copy of any technical information that was relied upon in formulating the final rule;
- (3) any official transcript of the public hearing or, if not transcribed, any audio recording or verbatim transcript of the hearing;
- (4) a copy of all comments and other material received by the commission during the public comment period and at the public hearing;
- (5) a copy of the full text of the initial proposed rule and the full text of the final adopted rule and the order adopted by the commission; and
- (6) any corrections made by the state records administrator pursuant to [NMSA 1978,]

Section 14-4-3 NMSA 1978.

[19.15.3.14 NMAC - N, / /2017]

19.15.3.15 FILING AND APPEAL:

A. Filing. Any rule adopted under [this Part] 19.15.3 NMAC, along with the commission order, shall be filed in accordance with the State Rules Act. No rule shall be filed until the latter of [twenty] 20 days after the commission has entered an order or has refused a rehearing application pursuant to [NMSA 1978,] Section 70-2-25 NMSA 1978. The end of the [twenty] 20-day rehearing period, if no rehearing is requested, or the action of the commission on a rehearing application shall constitute the "adoption of the rule" for the purposes of [NMSA 1978,] Section 14-4-5.D NMSA 1978 (2017). The rule shall be filed with the state records administrator within 15 days after the adoption of the rule.

B. Notice. Upon filing of the rule, the commission shall provide notice of the adoption of the rule to the public. The notice, which shall include the final rule and order or information on how to obtain a copy of the final rule and order, shall be:

(1) posted on the division's website;

- (2) posted on the sunshine portal;
- (3) made available in the division's district offices;
- (4) sent by mail or electronic mail to persons who have made a written request for notice from the commission of announcements addressing the subject of the rulemaking proceeding and who have provided a mail or electronic mail address to the commission;
- (5) sent by mail or electronic mail to persons who have participated in the rulemaking and who have provided a mail or electronic mail address to the commission; and
- (6) delivered to the New Mexico legislative council for distribution to appropriate interim and standing legislative committees;

 C. Corrections. If the state records administrator provides the commission with a record of corrections to the filed rule, as provided in [~~NMSA 1978,~~] Section 14-4-3 **NMSA 1978** (2017), the commission shall within 30 days provide notice of the correction in the same manner as the notice in Subsection A of 19.15.3.9 NMAC.

 D. Appeal. Pursuant to [~~NMSA 1978,~~] Section 70-2-12.2 **NMSA 1978**, any party of record to the proceeding before the commission or any person adversely affected by a rule adopted under the Oil and Gas Act may appeal to the court of appeals within [~~thirty~~] **30** days after filing of the rule under the State Rules Act. [19.15.3.15 NMAC - N, / /2017]