

**Statement of Basis, Specific Statutory Authority, and Purpose
New Rules and Amendments to Current Rules of the Colorado Oil and Gas
Conservation Commission, 2 CCR 404-1**

**Cause No. 1R Docket No. 150700346
Complainant Rulemaking
Amendments to Rules 100., 503.a. and 503.b., 521, 522.b. and 522.e., and 528.**

This statement sets forth the basis, specific statutory authority, and purpose for new rules and amendments (“Complainant Rules”) to the Colorado Oil and Gas Conservation Commission (“Commission”) Rules of Practice and Procedure, 2 CCR 404-1 (“Rules”). The Commission promulgated the Complainant Rules on July 20, 2015.

Parties to recent Commission proceedings have raised legal concerns regarding a complainant’s right to compel an Order Finding Violation (“OFV”) hearing to override the director’s resolution of a complaint. This Complainant Rulemaking modifies specific Commission Rules in response to the issues raised, while preserving complainants’ ability to bring their concerns regarding the director’s action to the Commission.

In adopting the Complainant Rules, the Commission relied upon the entire administrative record for the rulemaking proceeding, which began on April 24, 2015, when Commission Staff announced it would undertake the Complainant Rulemaking.

Stakeholder and Public Participation.

The Commission solicited input from the public as well as interested people and organizations during stakeholder meetings held on May 28 and June 30, 2015. The Commission invited and accepted written and verbal comments regarding the proposed amendments during the stakeholder meetings and the July 20, 2015 rulemaking hearing.

The Commission encouraged public participation in the Rulemaking by allowing the public to comment on the proposed rules in advance of or during the hearing. Persons or organizations desiring to do so could also participate in the Rulemaking as a party. Parties could submit prehearing statements, including alternative rule language, and respond to prehearing statements submitted by other parties.

Statutory Authority.

The Commission’s authority to promulgate the Complainant Rules derives from the following sections of the Colorado Oil and Gas Conservation Act (“Act”), §§ 34-60-101 – 130, C.R.S.:

- Section 34-60-104.5(2)(b), C.R.S. (The director of the Commission shall enforce rules and regulations adopted by the Commission);
- Section 34-60-105(1), C.R.S. (Commission has the power to make and enforce rules);
- Section 34-60-106(15), C.R.S. (Commission may not assign its enforcement authority through intergovernmental agreement or by private contract);
- Section 34-60-108, C.R.S. (Commission’s authority and procedure to adopt rules); and
- Section 34-60-121(4), C.R.S. (Commission or director have authority to notice alleged violations based on reasonable cause).

Identification of New and Amended Rules.

The Commission adopted amendments to Rules: 100., 503.a. and 503.b., 521, 522.b. and 522.e., and 528.

Overview of Purpose and Intent.

The Commission’s primary purpose in promulgating the Complainant Rules was to address a potential legal infirmity in existing Commission Rules that grants a complainant the right to compel an OFV hearing if the complainant disagrees with either the director’s decision not to issue a Notice of Alleged Violation (“NOAV”) in response to a complaint, or with the terms of a proposed settlement of an alleged violation. An OFV hearing is a de novo adjudicatory proceeding in front of the Commission in which the complainant has the burden of proof and assumes the role of prosecutor. It is exactly the same procedure available to the director for prosecuting an alleged violation. Thus, the existing Rules empower complainants to act as “private attorneys general” with authority to prosecute an alleged violation even though the director has determined reasonable cause does not exist, or to compel a de novo adjudicatory hearing even when the director elects to settle an alleged violation based on the totality of circumstances, including input from the complainant.

Empowering a complainant to compel a de novo adjudicatory hearing is at odds with several provisions of the Act. Section 34-60-106(15), C.R.S. states the Commission may not assign its enforcement authority through intergovernmental agreement or by private contract. Section 34-60-104.5(2)(b), C.R.S. states “the director of the commission shall . . . Enforce the rules and regulations adopted by the commission.” Additionally, Section 34-60-121(4), C.R.S. requires the Commission or director—not a citizen—to find reasonable cause for a violation to exist in order to issue a notice of alleged violation. Under these three sections of the Act, only the Commission or director has authority to find reasonable cause for a violation exists, to issue an

NOAV for an alleged violation, and to require corrective actions or impose penalties for violations. Moreover, the Act expressly forbids the Commission from assigning its enforcement authority. No provision of the Act grants citizens authority to allege or enforce violations of the Act or Commission Rules, permits or orders. Empowering a complainant who disagrees with the director's resolution of a complaint to compel an OFV hearing and prosecute an alleged violation is contrary to the Act when read as a whole.

Although complainants should not be authorized to compel an OFV hearing, Commissioners have expressed, during previous hearings, that complainants should have the right to come before the Commission as a "relief valve" to review the director's resolution of a complaint. Accordingly, the Commission adopted a new process for review, initiated by a complainant filing a Petition for Review. Absent compelling circumstances, the Commission's review will proceed on the record that was before the director (i.e., no new evidence to be introduced, no testimony presented). Brief argument by the complainant, the director, the affected operator, and any intervenors will be allowed. The Commission will review the director's decision pursuant to a "clearly erroneous" standard. Black's Law Dictionary describes a finding as "clearly erroneous" when, "although there is evidence to support it, the reviewing court on [the] entire evidence is left with [the] definite and firm conviction that a mistake has been committed." (6th Ed. 1990). It is the complainant's burden to show the director's decision was clearly erroneous.

Should the Commission find the director's decision was clearly erroneous, it may remand the matter to the director for further proceedings, set the matter for an OFV hearing in which the director would prosecute an alleged violation, issue an NOAV, or order other relief it deems just and reasonable. If the Commission finds the director's decision was not clearly erroneous, it will deny the Petition for Review. For a proceeding involving review of a proposed AOC, the Commission may approve the AOC pursuant to Rule 522.e.(1)C or remand the AOC to the director with instructions pursuant to Rule 522.e.(1)D.

The amendments to the Rules implement the new procedures described above or clarify existing regulatory language.

Amendments and Additions to Rules.

The changes undertaken in the Complainant Rulemaking were limited to adding a definition in the 100-Series and amending provisions in the 500-Series Rules that relate to complainants.

100-Series Rules.

The Complainant Rulemaking created a new defined term—Petition for Review—to differentiate what a complainant seeking review must file from applications filed by parties requesting a Commission hearing pursuant to Rule 503. A complainant may

only file a Petition for Review that asks the Commission to consider the complainant's objections to: (1) the director's decision to not issue a NOAV after investigating the written complaint; or (2) the terms of a proposed final AOC that resolve an alleged violation that the complainant directly identified in the written complaint.

500-Series Rules.

1. Rule 503.

The Commission substantively amended Rule 503 to make clear that a complainant does not file an application, but instead files a Petition for Review to initiate the Commission's review of the director's action. To do so, the Complainant Rulemaking amended Rule 503.a. to exclude a complainant's Petition from Review from proceedings that are initiated by filing an application pursuant to Rule 503. Also, the Commission deleted language from Rule 503.b.(4) referencing a complainant applying for an order finding violation.

2. Rule 521.

Rule 521 was amended to apply existing service requirements to the new Petition for Review process.

3. Rule 522.b.

The Commission made three substantive changes to Rule 522.b. as well as a few conforming or clarifying changes that are not discussed here. First, the Commission added clarifying language to subpart (1)E. The prior language was somewhat incomplete because it only included one of two existing requirements necessary for a person to be a complainant under subpart (1)E. The additional language clarifies that a complainant under (1)E. must be adversely affected or aggrieved *and* have an interest entitled to legal protection under the Act, but does not create a new standing requirement for complainants. The "interest entitled to legal protection under the Act" language is consistent with existing Rules. *See* 100-Series definition of "Protestant," *and* Rule 503.b.(10). This language is an acknowledgement that the Commission has limited jurisdiction and some alleged harms raised by a complainant may fall outside of that jurisdiction, in which case the Commission lacks authority to provide a remedy. For example, the Commission lacks jurisdiction to enforce speed limits even though a party may be adversely affected by oil and gas traffic that is disobeying such limits.

Second, the Commission added subparts (5) A. – E. to describe the procedural requirements related to a Petition for Review. Subpart (5)A. was added to describe the information that the Petition for Review must include and articulate the standard of review applied by the Commission when considering the Petition. After

input from stakeholders, the Commission selected “clearly erroneous” as the standard of review. This standard acknowledges that the Act grants the director primary responsibility to investigate complaints and initiate appropriate enforcement action for violations of the Act, Commission Rules, orders, and permits. Moreover, investigation and enforcement decisions contain elements of discretion that, absent a clearly erroneous outcome, should not be disturbed.

Subpart (5)B. was added to address situations in which a complainant may request that the director further investigate a complaint to supplement the record that the Commission will consider. If a continuance is granted the director may reconsider the prior resolution of the complaint in light of any new evidence or information developed. The Petition for Review hearing is intended to be a review of information provided to the director prior to resolution of a complaint. Complainants are strongly encouraged to provide all available, relevant information to the director early in the complaint investigation. Only in compelling situations will a continuance of a Petition for Review hearing be granted.

Subpart (5)C., regarding the deadline to serve the operator with the Petition for Review, previously existed in Rule 522.b. The Complainant Rulemaking created subpart (5)D. to provide the operator and the director, who are parties to the proceeding, the option to separately respond to the Petition for Review within 21 days. Subpart (5)E. was added to explain the process for filing documents with the Commission in a Petition for Review proceeding.

Third, the Complainant Rulemaking created subpart (6) to establish the procedures by which the Commission will consider a Petition for Review because Rules 503, 527, and 528 do not apply. Consistent with this, the Commission secretary or hearing officer will be responsible for scheduling the matter for the next Commission hearing more than 35 days after the Petition for Review is filed and for compiling the administrative record to be presented to the Commission. Subpart (6)A. limits the information the Commission may consider to that which was presented to the director prior to her or his decision, including any evidence or information developed through additional investigation allowed during a continuance under Rule 522.b.(5)B. Thus, if a continuance is granted to allow additional investigation, any new evidence or information developed will be part of the record and may be considered by the Commission at the Petition for Review Hearing. This requirement ensures the director has the best information available to him or her while investigating the complaint or negotiating the AOC and that the Commission’s review will be based on the record before the director. It also prevents a party from unfairly surprising the other parties with previously undisclosed information during the Commission’s review. Although the Commission may not hear evidence or information during a Petition for Review hearing that was not previously provided to the director, the Commission has discretion to continue the hearing if it determines the director should conduct additional investigation or

receive and consider additional information before the Commission hears the Petition for Review.

The Commission added subpart (6)B. to clarify that discovery is not allowed because the purpose of a Petition for Review proceeding is for a complainant to come before the Commission for review of the director's decision. The proceeding is not a fact-finding evidentiary trial, but is more akin to an appeal.

Subpart (6)C. confirms that a complainant bears the burden of proof (as he or she would under the existing Rules) and identifies potential outcomes that the Commission may order. For example, if the Commission finds the director's proposed settlement was not clearly erroneous but nonetheless finds the terms of the settlement unsatisfactory, the Commission may remand the matter to the director with instructions pursuant to Rule 522.e.(1)D. The Commission retains discretion to order any relief within its jurisdiction that it deems just and reasonable under the circumstances. Lastly, Subpart (6)D. sets forth the order of presentation before the Commission and includes reference to participation by intervenors should other parties be entitled or allowed to intervene. For clarification, the Commission added language explaining that parties may make statements directly to the Commission to ensure that even represented complainants or operators may directly address the Commission. Again, the proceeding is not a fact-finding hearing and, therefore, sworn testimony, direct, and cross examination are unnecessary.

4. Rule 522.e.

The Complainant Rulemaking conformed Rule 522.e. to the complainant-initiated process established in revised Rule 522.b., and made some clarifications.

5. Rule 528.c.

The Commission made conforming and clarifying changes to Rule 528.c.

Effective Date.

The Commission adopted the Complainant Rules at its hearing on July 20, 2015, in Cause No. 1R, Docket No. 150700346. These amendments will become effective per Section 24-4-103, C.R.S., twenty days after publication.