

**Regulatory Analysis Pursuant to §24-4-103(4.5), C.R.S.
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., 503.b., 521, 522.b., 522.e., and 528**

On July 20 and 21, 2015, the Colorado Oil and Gas Conservation Commission (“Commission”) will consider new rules and amendments (“Proposed Rules”) to the Commission Rules of Practice and Procedure, 2 CCR 404-1 (“Rules”). The Commission will consider additions and amendments to the 100-Series Rules (Definition for “Petition for Review”) and Rules 503.a., 503.b., 521, 522.b., 522.e., and 528 (“Complainant Rulemaking”). The initial draft rules are attached to the May 29, 2015 Notice of Public Rulemaking Hearing. Second and third drafts of the proposed rules were made publically available and circulated to parties and stakeholders on June 23 and July 10, 2015, respectively.

On June 3, 2015, Boulder County filed a timely request for a regulatory analysis of the Proposed Rules pursuant to the State Administrative Procedures Act. § 24-4-103(4.5), C.R.S.

Introduction

The primary purpose of the Proposed Rules is to address a legal infirmity in the current Rules while preserving the right of complainants to participate in the complaint resolution process and, ultimately, seek Commission review of the Director’s proposed resolution.

Complainants presently have the right to submit complaints to the Commission and request the Director issue a Notice of Alleged Violation (“NOAV”) to an operator. A NOAV commences an enforcement action and may be issued where there is reasonable cause to believe that an operator violated the Colorado Oil and Gas Conservation Act, the Rules, or a Commission order or permit. The Director cannot issue a NOAV unless there is reasonable cause to believe a violation occurred. Once a NOAV is issued, it is generally resolved through an Administrative Order by Consent (“AOC”) or an Order Finding Violation (“OFV”) hearing. An AOC is a settlement agreement between the Commission and the operator under which the operator agrees to pay a penalty and take whatever corrective actions are necessary. The vast majority of NOAVs are resolved through AOCs. The director negotiates penalty amounts and corrective action in an AOC, but the full Commission must approve it.

An OFV hearing is an evidentiary hearing during which an alleged violation is prosecuted before the full Commission. The parties may call witnesses and submit

documents for Commission consideration. The prosecuting party has the burden to prove an alleged violation. The standard of review in an OFV hearing is *de novo*, meaning that the Commission will review all evidence presented without assumptions or deference. Discovery may be requested during an OFV proceeding.

The Rules presently provide that a complainant may compel an OFV hearing if the complainant objects to the Director's decision not to issue an NOAV, or if the complainant objects to the settlement terms in a final proposed AOC. The right of complainants to compel an OFV hearing under these circumstances effectively enables complainants to prosecute alleged violations and is the legal infirmity in the present Rules which necessitated this rulemaking.

Complainants have rarely applied for OFV hearings. Since January 1, 2012, 825 complaints have been submitted to the Commission. Of those 825 complaints, complainants have only applied for an OFV hearing in four matters. All four matters were resolved prior to the OFV hearing, but consumed significant Staff resources while at issue. There has been only one instance in February of 2011 where an OFV hearing took place following a complainant's application.

The Proposed Rules prevent complainants from unilaterally compelling OFV hearings. Complainants will, however, be able to petition the Commission for a review of the Director's resolution of a complaint (the "Petition for Review" or "Petition for Review hearing"). To prevail at the Petition for Review hearing, a complainant must persuade the Commission that the Director's decision not to issue a NOAV was "clearly erroneous," or that the terms of a proposed final AOC are "clearly erroneous." If a complainant prevails at the Petition for Review hearing, the Commission may remand the matter to the Director for further proceedings, order that an OFV hearing take place, or order any other relief it deems appropriate.

The Proposed Rules provide that generally only information presented to the Director prior to the complainant receiving notice of the Director's decision not to issue an NOAV or notice of the terms of a final proposed AOC may be presented to the Commission at the Petition for Review hearing. As such, only parties and their counsel may present argument to the Commission during the Petition for Review hearing. The Petition for Review hearing is a review of the record before the Director when he or she reached a decision on how to best resolve a complaint and no prehearing discovery will be allowed. A Petition for Review hearing will be a less costly proceeding than an OFV hearing, which is a formal evidentiary hearing on the merits of the parties' claims and defenses. As described more fully below, the Petition for Review process allows complainants to bring their objections to the full Commission more quickly and efficiently than under the current Rules.

ANALYSIS

I. Classes of persons who will be affected by the Proposed Rules, including classes that will bear the costs of the Proposed Rules and classes that will benefit from the Proposed Rules.

The Proposed Rules will affect operators, Commission Staff, complainants (including local governments who may be complainants) and citizens of Colorado.

Operators, Commission Staff, complainants and, indirectly, citizens will incur additional costs under the Proposed Rules only in those instances where the Commission grants a complainant's Petition for Review and orders an OFV hearing. Under the current Rules, complainants can compel an OFV hearing by simply filing an application. Under the Proposed Rules, the Commission, after hearing a Petition for Review, can schedule an OFV hearing if it finds the Director's proposed resolution was clearly erroneous. Only in those circumstances do the Proposed Rules add a procedural step to the Commission's complaint-resolution process.

No person will incur any additional costs under the Proposed Rules in those instances where the Commission grants a complainant's Petition for Review and orders further negotiation of a proposed AOC because the Commission can reject a proposed AOC under the current Rules and require further negotiation.

Operators, Commission Staff, complainants and, indirectly, citizens will benefit from the Proposed Rules in numerous ways. Complainants will benefit in that they will be able to present their objections to the Commission in a more streamlined and less costly process than under the current Rules. The complainant will not have the burden of proving an alleged violation during an OFV hearing, which is a rigorous, resource-consuming responsibility. In addition, the Petition for Review will be heard at the next regularly scheduled Commission hearing consistent with statutory notice requirements and the prehearing processes otherwise applicable to formal OFV hearings will not apply.

Operators and Commission Staff will benefit in that they can participate in a process that more efficiently brings the parties before the Commission to hear and address, with greater flexibility, the complainant's remaining concerns. Further, in comparison to the current procedure, the Petition for Review process brings the complainant's objections to a final proposed AOC to the forefront without automatically jeopardizing the AOC and negating all the work that went into negotiating the AOC. In some instances, operators and Staff may be able to avoid the costs of preparing for and participating in a formal OFV hearing.

The streamlined process for reviewing Director decisions likely will reduce Commission Staff time spent on complainant matters. Citizens of Colorado would benefit from a reduction in Commission Staff time and resources spent on

complainant matters because Commission Staff would have additional time to perform other duties, including inspection and permitting duties.

II. Probable quantitative and qualitative impacts of the Proposed Rules on operators, Commission Staff, complainants and Colorado citizens.

The Proposed Rules will likely have qualitative impacts on operators, Commission Staff, complainants, and the citizens of Colorado. Quantitative impacts are less likely because quantitative impacts depend on the number of complainants who object to the Director's resolution of a complaint, and very few have been filed historically.

Should the low rate of objections to the decisions of the Director continue, and there is no reason to expect that it will change, there should be no significant quantitative impact on any class of persons.

It is possible that the reduced cost of a Petition for Review hearing will encourage complainants to object to the Director's resolution of a complaint and result in a greater number of Petitions for Review than past complainant-filed OFV hearing applications. An increased number of objections will increase the quantitative and qualitative impact on operators and Commission Staff as they are required to prepare for Petition for Review hearings. However, as the costs of an OFV hearing are higher than the anticipated costs of a Petition for Review proceeding, there will need to be a significantly higher number of Petitions for Review than past OFV applications filed by complainants for the quantitative and qualitative impacts on any affected class of persons to be significantly increased.

The qualitative impact is expected to be positive on all classes because the Proposed Rules streamline the current process and contemplate a process that brings the complainant's objections to the Commission sooner than under the current Rules. This increase in efficiency will benefit all affected classes of persons as it generally will reduce the cost of resolving a complainant's objections.

Further, the Proposed Rules should have a positive qualitative impact on complainants. The Proposed Rules maintain a complainant's right to appeal the Director's resolution of a complaint to the Commission, right to make a complaint, and ability to communicate with Commission Staff regarding the complaint and receive notification of the Director's decisions. While complainants may experience a negative qualitative impact in the sense that they are no longer able to compel an OFV hearing, any negative impact is tempered by the rights that are preserved in the Proposed Rules. Moreover, shifting the burden of proof from complainants to Staff benefits complainants as they no longer must incur the costs associated with developing a case to prosecute an OFV. Finally, an OFV hearing, prosecuted by Staff, still may result if the complainant prevails at the Petition for Review hearing.

Colorado citizens will experience positive qualitative impacts in that Commission Staff may be able spend less time on enforcement matters and more time on inspections and permitting.

III. Probable costs to the Commission and other agencies of the Proposed Rules and any anticipated effect on state revenues.

a. Costs to the Commission

The costs to the Commission are costs associated with conducting this rulemaking. Overall, the Proposed Rules will reduce the costs to the Commission Staff due to the reduced cost of a Petition for Review proceeding compared to an OFV hearing.

b. Costs to Other Agencies

The Proposed Rules are not expected to impose costs on any other agency.

c. Anticipated Effect on State Revenue

There is no anticipated effect on state revenue as a result of the Proposed Rules.

IV. Comparison of the probable costs and benefits of the Proposed Rules to the probable costs and benefits of inaction.

The Proposed Rules are necessary to correct a legal infirmity in the current Rules. Compared to inaction, the Proposed Rules will likely increase the efficiency of the Commission's complaint resolution process, which will reduce the costs to all affected classes of persons. The citizens of Colorado would also benefit from an increase in Commission Staff time spent on inspections and permitting.

Inaction would likely benefit complainants in the short-term because the current Rules allow complainants to compel an OFV hearing. In the long-term, however, inaction could lead to a legal challenge. If the complainant's right to compel an OFV hearing is found to be contrary to the statutory authority of the Commission, the current Rules would be invalidated and complainants could lose any ability to bring their objections to the Commission absent further rulemaking. The Proposed Rules preserve a complainant's right to have their objections heard by the Commission and remove the litigation risk arising out of the current Rules.

Commission Staff would also benefit, when compared to inaction, because the Proposed Rules remove the risk that portions of the Rules at issue would be invalidated by a legal challenge.

V. Whether there are less costly or intrusive methods, and consideration of any alternative methods, for achieving the purpose of the Proposed Rules.

There are no less costly or intrusive methods for achieving the purpose of the Proposed Rules. Commission Staff initiated this rulemaking to address a specific legal issue in the current Rules. The only option for the Commission Staff was to amend the Rules to remove a complainant's right to compel an OFV hearing. However, the Commission Staff also recognized the importance of continued involvement of complainants. As the Petition for Review process achieves both goals, no alternative methods of achieving the purpose of the Proposed Rules were available.