



## MEMORANDUM

TO: David Neslin  
FROM: Michael Freeman  
DATE: August 5, 2008  
RE: OGCC Rule 503 – right of adversely affected or aggrieved persons to a hearing

---

This memorandum addresses the industry’s post-hearing change of position regarding Rule 503.b.(8). At the June 2008 rulemaking hearing, industry representatives testified that Rule 503 permits “adversely affected or aggrieved” persons to request a hearing from the Commission. We took industry at its word in preparing our own post-hearing brief, and did not provide a detailed discussion of the applicable law on this issue.

But the industry’s post-hearing filing – in a 180-degree reversal from its statements at the hearing -- asserted that neither aggrieved persons, nor adjacent landowners or surface owners, should be permitted to request a hearing before the Commission on the approval of Form 2As and applications for permits to drill (collectively, “permit approvals”). The industry now asserts that providing a procedural remedy to aggrieved persons would turn “every permit decision [into] a vehicle for obstruction and delay.” This new argument requires a response.

Industry’s position is both bad policy, and legally wrong. **The Oil and Gas Conservation Act, C.R.S. § 34-60-101, et seq. (the “Act”), and the Colorado Administrative Procedure Act, C.R.S. § 24-4-101, et seq. (the “APA”), not only allow, but affirmatively require that any adversely affected or aggrieved persons be allowed to request a hearing before this Commission when a permit is approved.**

The scheme in the proposed Rule 503 -- requiring adversely affected persons to rely on local government designees (“LGDs”) to protect their interests, *see* Rule 503.b.(8) -- has no basis in the statute. The attempt in Rule 503 to minimize public involvement in the permitting process contradicts the plain language of the Act.

The Commission should amend Rule 503 to bring it into compliance with the statute.

### **I. The Oil and Gas Conservation Act entitles adversely affected or aggrieved persons to a hearing on permit approvals.**

“The right to participate in agency proceedings is governed by the agency’s enabling legislation.” *Williams Natural Gas Co. v. Mesa Limited Operating Partnership*, 778 P.2d 309,

311 (Colo. App. 1989). An agency rule, even one of long standing, cannot modify or contravene an existing statute. *McCool v. Sears*, 186 P.3d 147, 151 (Colo.App. 2008); *Western Colorado Congress v. Colorado Dept. of Health*, 844 P.2d 1264, 1266-67 (Colo.App. 1992).

Several provisions of the Act demonstrate that adversely affected or aggrieved persons have a right to request a hearing on permit approvals. A leading Colorado practice treatise concluded from these statutes that “any person . . . may apply for a hearing” before the Commission. 1B Krendl and Krendl, *Colo. Methods of Practice* (5<sup>th</sup> ed.) § 14.8 at 77.

**A. C.R.S. § 34-60-105(1)**

First, as noted in CEC’s post-hearing submission, the Act expressly provides that “[a]ny person . . . may apply for any hearing before the commission.” C.R.S. § 34-60-105(1). When the language of a statute is plain and its meaning is clear, it must be applied as written. *Steedle v. Sereff*, 167 P.3d 135, 140 (Colo. 2007); *Huddleston v. Grand County Board of Equalization*, 913 P.2d 15, 18 (Colo. 1996). The Commission cannot engraft a requirement restricting the exercise of such a statutory right to LGDs or other entities.

**B. C.R.S. § 34-60-108(7)**

Second, the Act also allows “any interested person” to petition the Commission on “any matter,” and requires the commission to hold a hearing on the petition: “On the filing of a petition concerning any matter within the jurisdiction of the commission, it shall promptly fix a date for a hearing thereon.” C.R.S. § 34-60-108(7).

The proposed Rule 503 would limit this petition right to certain enumerated persons, such as mineral owners, operators, or LGDs, based on the subject matter of the petition. *See* Rule 503.a (requiring that “[a]ll proceedings other than those initiated by the Commission or variance requests . . . shall be commenced by filing . . . [a] petition which shall be titled ‘application’ . . . .”); Rule 503.b (listing the entities who may file applications to the Commission on different topics).

These restrictions violate the Act. While the Act itself does not define “interested person”, *INB Land & Cattle, LLC v. Kerr-McGee Rocky Mountain Corp.*, \_\_ P.3d \_\_, 2008 WL 2372126, \*6 (Colo. App. June 12, 2008), the APA supplies the definition of this term. The APA defines “interested person” to include “any person who may be aggrieved by agency action.”

C.R.S. § 24-4-102(6.2).<sup>1</sup>

Consistent with this broad definition, the Colorado Court of Appeals has expressly rejected the argument that the term “interested party” requires any particular “interest, motive, or economic connection as a prerequisite to being heard by the commission.” *Williams*, 778 P.2d at 312. In *Williams*, a company sought to participate in an oil and gas conservation commission hearing to protect an interest (the company’s market profits) that the commission was specifically prohibited from considering under the Act. *Williams*, 778 P.2d at 311. The Court nevertheless required that the company be admitted as a party. It reviewed the statutory language discussed above, and concluded that:

[The Act] mandates that ‘any interested person’ shall be entitled to be heard. . . . If we were to engraft a requirement of a beneficent motive as a prerequisite to participation, we would . . . violate the carefully and consistently drafted statutory scheme enacted by the General Assembly.

778 P.2d at 311-312.

Moreover, in contrast to the operator in *Williams*, aggrieved persons seeking to protect their environment, their health, and their safety, assert interests that *are* legally protected under the Act. *See, e.g.*, C.R.S. § 34-60-106(2)(d) (Commission regulates oil and gas operations for the protection of “air, water, soil, or biological resource[s] . . . to the extent necessary to protect public health, safety and welfare, including protection of the environment and wildlife resources.”).

Rule 503 itself recognizes that environmental and public health concerns qualify as interests protected under the Act. The rule allows an LGD to request a hearing on a permit approval to assert these interests. *See* Rules 503.b.(6), 508.j (allowing LGD to seek hearing on permit approvals, where preliminary showing is made of adverse environmental or public health, safety and welfare impacts that were not adequately addressed in the permit).<sup>2</sup>

---

<sup>1</sup> Other provisions of the APA reinforce the conclusion that adversely affected or aggrieved persons have standing to request a hearing on permit approvals. The APA, in fact, also gives aggrieved persons a right to participate as parties during the Director’s consideration of APDs and Form 2As. While the Commission has delegated initial permit approvals to the Director, *see* C.R.S. § 34-60-104.5(e), the consideration of APDs and Form 2As nevertheless represents an agency adjudicatory proceeding. The APA defines “proceeding” to include any agency process for a license or order, which includes a permit to drill. C.R.S. § 24-4-102(13). An “adjudication” refers to the procedure for issuing any license or order. C.R.S. § 24-4-102(2).

The APA’s provision for adjudicatory proceedings requires that “[a] person who may be affected or aggrieved by agency action shall be admitted as a party to the proceeding upon his filing with the agency a written request.” C.R.S. § 24-4-105(2)(c). Once an affected or aggrieved person becomes a party, she “is entitled to a hearing” in conformity with the APA in any proceeding “in which an opportunity for agency adjudicatory hearing is required” by statute. C.R.S. § 24-4-105(2)(a). Thus, an aggrieved person must be permitted (a) to participate as a party in permit proceedings before the Director, and (b) as authorized by the Act, to request a Commission hearing on the Director’s permit approvals.

<sup>2</sup> Similarly, Rule 503.b.(10) authorizes any adversely affected person whose “interest is entitled to legal protection under the act” to request a hearing on issues not specifically listed elsewhere in Rule 503.b. While this rule recognizes the broad range of persons who may have interests that are adversely affected by oil and gas operations, it attempts to restrict the issues on which they can obtain a hearing. Again, nothing in the Act authorizes such restrictions.

LGDs, however, are not the only persons who hold such interests. Nothing in the Act limits the definition of interested persons to governmental parties where environmental and public health interests are involved. Nor does the Act requires persons asserting such an environmental or public health interest to rely on LGDs to act as their proxy.

Finally, the Act also states that “[a]ny person affected by any order of the commission shall have the right at any time to apply to the commission to repeal, amend, modify, or supplement the same.” C.R.S. § 34-60-108(7). This language further demonstrates that affected persons can challenge permit approvals before the Commission. The Colorado Court of Appeals in *Williams* noted that “This provision would have no meaning if requirements for participation in the initial hearing were” strictly limited. “It would be an absurd result if one were denied participation initially in a hearing but retained the right to apply for a modification of an order issued thereafter. *Williams*, 778 P.2d at 312.

## **II. Industry’s unsupported predictions of delay and abuse do not excuse the Commission from complying with the Act.**

The industry’s predictions of abuse and obstructionism represent a transparent effort to avoid addressing environmental and public health concerns by excluding the public from the permitting process. Industry offers no evidence that a deluge of citizens will overwhelm this Commission with meritless petitions for hearing. As noted in our post-hearing submission, other jurisdictions such as New Mexico and the federal government already allow aggrieved persons to file administrative appeals of permit approvals.

The Court of Appeals in *Williams* also rejected the argument that “broad participation may foster delay and protraction of commission hearings.” The Court of Appeals viewed that assertion as “misplaced.” While recognizing a broad right to a hearing, *Williams* noted that “it does not follow that any person enjoys an unrestricted right to deluge the commission with irrelevant and repetitive material.” *Williams*, 778 P.2d at 312. The APA grants the commission “substantial discretion” to control the scope and presentation of hearings. C.R.S. § 24-4-105(4); Rule 501.b (Commission’s authority to take a variety of actions to prevent abuse of procedures).

Allowing adversely affected and aggrieved persons to request an administrative hearing on the issuance of a permit is not a new or radical concept. As noted in CEC’s prehearing statement, recognizing this right has proven workable in numerous other contexts, including land use approvals, C.R.S. § 30-28-118, Colorado water rights applications, C.R.S. §§ 37-92-103(8), 37-92-302(1)(b); *FWS Land and Cattle Co. v. State Division of Wildlife*, 795 P.2d 837, 839 (Colo. 1990), and permits issued by the Colorado Air Pollution Control Division and Water Quality Control Division. 5 C.C.R. 1002-61.7; C.R.S. § 25-7-114.5(6).

Oil and gas operators do not warrant specially tailored procedures that exclude the public from the permitting process. The Commission should amend Rule 503 to allow adversely affected or aggrieved persons to seek a hearing on permit approvals.