



## OPERATOR GUIDANCE

### RULE 502 - Variances

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#### Document Change Log

Change Date	Description of Changes
9/14/2021	Created

#### Background

On November 23, 2020, the Commission adopted the Mission Change Rules. The Mission Change Rules include revisions to Rule 502, Variances. Prior to the Mission Change Rules, variances to COGCC Rules could be approved by the Director and were reported to the Commission. The Mission Change Rules amended this process, requiring that variance requests be submitted to the hearings unit through a hearings application, and heard by the full Commission for approval.

This guidance provides information on how to apply for a variance and how staff are addressing variance requests submitted prior to January 15, 2021, the effective date of the Mission Change Rules.

#### Rule 502

Rule 502.a specifies that all requests for a variance must be filed as an application with the hearings unit and heard by the Commission. However, Rule 502.b provides that if an operator requests a variance pursuant to Rule 502.b for a ministerial matter or practice, the Director may recommend it for approval. Ministerial matters are generally procedural or paperwork requirements. Staff also recognizes that surface owner reclamation-related requests that result in no detrimental impacts to air, water, soil, and biological resources may be ministerial.

For ministerial matters, if the Director agrees that the matter is ministerial and determines the basis for the variance is reasonable, and that it satisfies the requirements of Rule 502.c, the Director can recommend that the variance be approved or denied by the Commission. The Director's recommendation would result in a Hearing Officer preparing a draft order approving the variance which, pursuant to Rule 519.b, would be placed on the Commission's consent agenda for review and approval. Only uncontested ministerial variance requests for which the Director recommends approval may be placed on the Commissioners' consent agenda.

If a variance request is for something other than a ministerial matter or practice, Rule 502.b.(1) requires the applicant to present the request to the Commission at a hearing. Commission approval is required for any variance that substantively implicates protection of public health, safety, welfare, the environment, or wildlife resources. As with a Director recommended variance, a Rule 502.b.(1) variance must satisfy the elements of Rule 502.c. Only the operator or an applicant authorized by the Commission's Rules may file an application

seeking the Commission's approval of a variance. Because variances can only be requested for the Commission's Rules or orders, and nearly all of the Commission's Rules and orders apply to operators, for the most part, only operators may file variance applications. Exceptions include surface owners requesting variances from reclamation rules for orphaned sites for which there is no operator of record, mineral owners requesting variances from rules regarding payment of proceeds matters, and the Commission's Staff requesting variances from enforcement matters. Where the Commission's Rules afford procedural rights to other third parties rather than regulating their conduct, such as local governments and building unit owners and tenants, the Commission structured the applicable rules to allow those third parties to waive their procedural rights, rather than having to file a formal variance request.

## **Filing a Variance Hearing Application**

A hearing application is a formal document that contains specific information necessary for hearing staff to evaluate the relief requested by the applicant. Rule 503.c explains what information must be included in applications. Specifically, Rule 503.c provides that applications must include:

- (1) The Applicant's name and email address;
- (2) If the Applicant is an Operator registered with the Commission, the Operator's Commission identification number (i.e., Operator ID number);
- (3) Identification of the type of application submitted;
- (4) All geologic formations, if necessary for adjudication of the application;
- (5) The location of applicable lands (including county, Field name, Township / Range / Section, and nearby public crossroads) and map of the same;
- (6) The name and contact information (including email) for an Operator or Applicant representative designated to receive questions and petitions;
- (7) A description of the relief requested, set forth in reasonable detail;
- (8) The legal and factual grounds for the requested relief;
- (9) A prayer for relief;
- (10) If applicable, the name, mailing address, phone number, and email address of the Applicant's legal counsel;
- (11) The name of each person entitled to receive notice of the application under the Commission's Rules; and
- (12) Any information required by the Commission's Rules that is specific to the application.

In addition to the information required by Rule 503.c, variance applications must address the five criteria set forth in Rule 502.c. Rule 502.c requires applicants to demonstrate:

- 1) It has made a good faith effort to comply, or is unable to comply, with the specific requirements contained in the Commission's Rule or order from which it seeks a variance, including, without limitation, securing a waiver or an exception, if any;
- 2) That the requested variance will not violate the basic intent of the Act;
- 3) The requested variance is necessary to avoid an undue hardship;
- 4) Granting the variance will result in no net adverse impact to public health, safety, welfare, the environment, or wildlife resources; and
- 5) The requested variance contains reasonable conditions of approval or other mitigation measures to avoid, minimize, or mitigate adverse impacts to public health, safety, welfare, the environment, and wildlife resources.

Upon receipt of a variance application, COGCC hearings staff and technical staff will review the application. Technical staff will advise hearings staff and the applicant in writing whether the variance request should be brought before the Commission for a hearing (Rule 502.b.(1)) or recommended for approval on the Commission's Consent Agenda (Rule 502.b). Technical staff will include in its recommendation a discussion of whether it supports, opposes or takes no position on the variance request.

Once the hearings staff is in receipt of technical staff's recommendation, and if the application satisfies the submission criteria, hearings staff issues a notice of hearing. No application will be heard unless notice of the hearing is provided **at least 60 days** prior to the noticed hearing date. Rule 504.a.(1). Rule 504.b.(7) requires the Director (i.e. COGCC technical staff) and the Relevant Local Government receive notice. The Secretary of the Commission may also designate additional interested persons who should receive notice of a variance application. Filing the application in e-Filing is sufficient for providing notice to Staff. Variance applicants are responsible for providing notice directly to Relevant Local Governments and any other party designated by the Secretary, and demonstrating compliance with the notice requirement pursuant to Rule 504.a.

### **Variations filed prior to January 15, 2021**

Rule 502 became effective January 15, 2021. If a variance request was submitted via a Form 4, Sundry Notice prior to January 15, 2021, Section 19 of SB 19-181 requires the request be considered under and comply with Mission Change Rule 502. Therefore, any variance request submitted to any COGCC Unit prior to January 15, 2021 must be resubmitted in accordance with Rules 502 and 503.a, if the applicant wishes to have its variance request considered.