

BEFORE THE NEW MEXICO MINING COMMISSION

IN THE MATTER OF:

**PETITION FOR THE ADOPTION OF
19.10 PART 15 NMAC – RULEMAKING**

No. 17-01 (R)

FINAL ORDER

THIS MATTER came before the New Mexico Mining Commission (the “Commission”) on the petition filed on September 27, 2017 by the Mining and Minerals Division (“MMD”) of the New Mexico Energy, Minerals and Natural Resources Department, to adopt a new rule, 19.10.15 NMAC, to govern the Commission’s rulemaking proceedings. Notice of the subject, time and place of hearing, the manner in which any interested persons could present their views, and the method by which the public could obtain copies of the proposed rule was published and mailed as required by Section 69-36-8(C) of the Mining Act and Section 14-4-5.2 of the State Rules Act, as amended in 2017. All interested persons and the general public were provided with a reasonable opportunity to present their views and to examine witnesses testifying at the hearing. The hearing was audio-recorded and copies of the audio-recording are in the custody of MMD.

Statement of Proceedings

The Commission heard MMD’s Petition for Hearing for the Adoption of Rule 19.10.15 NMAC (Mining Commission Rulemaking) on February 23, 2018. William R. Brancard, General Counsel for the New Mexico Energy, Minerals and Natural Resources Department, testified in front of the Commission. In addition, Mike Bowen, Executive Director of the New Mexico Mining Association, submitted written public comments prior to the date of the hearing and offered additional public comment at the hearing. No person or entity spoke in opposition to the proposed rule.

At the conclusion of the hearing and upon deliberation, the Commission voted to adopt Rule 19.10.15 NMAC, as amended during the course of the hearing. The Commission directed its counsel to incorporate the amendments proposed to various sections of Rule 19.10.15 NMAC during the hearing and prepare a final order including its statement of reasons for adoption of Rule 19.10.15. It also delegated to Chairman Heaton the authority to approve the rule as amended and sign the final order.

Statement of Reasons

The Commission finds that the adoption of Rule 19.10.15 NMAC ensures that the Commission is in compliance those provisions of the Mining Act and the State Rules Act governing its rulemaking proceedings.

By a vote of 7-0, the Commission voted to approve 19.10.15 NMAC, as proposed by MMD and amended by the Commission during the course of the hearing because it is necessary (a) to establish procedures used in rulemaking proceedings before the commission; (b) to encourage the participation in the hearings conducted by the commission for the promulgation of regulations; (c) to make possible the effective presentation of the evidence and points of view of parties and members of the general public; and (d) to assure that rulemaking hearings are conducted in a fair and equitable manner and in accordance with applicable law.

Rule 19.10.15, adopted as of the date of this Final Order and attached hereto as Exhibit A and incorporated by reference, shall become effective upon its publication in the New Mexico Register.

NEW MEXICO MINING COMMISSION

By: 

John Heaton, Chairman

Dated: March 8, 2018

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TITLE 19 NATURAL RESOURCES AND WILDLIFE
CHAPTER 10 NON-COAL MINING
PART 15 MINING COMMISSION RULEMAKING

19.10.15.1 ISSUING AGENCY: Energy, Minerals and Natural Resources Department, Mining and Minerals Division, and Mining Commission.
[19.10.15.1 NMAC - N, 3/27/2018]

19.10.15.2 SCOPE: 19.10.15 NMAC applies to persons or entities engaged in rulemaking proceedings before the commission.
[19.10.15.2 NMAC - N, 3/27/2018]

19.10.15.3 STATUTORY AUTHORITY: 19.10.15 NMAC is adopted pursuant to the New Mexico Mining Act, Sections 69-36-1 to 69-36-20 NMSA 1978 (1993, as amended), and the State Rules Act, Section 14-4-5.8 NMSA 1978 (2017).
[19.10.15.3 NMAC - N, 3/27/2018]

19.10.15.4 DURATION: Permanent.
[19.10.15.4 NMAC - N, 3/27/2018]

19.10.15.5 EFFECTIVE DATE: March 27, 2018, unless a later date is cited at the end of a section.
[19.10.15.5 NMAC - N, 3/27/2018]

19.10.15.6 OBJECTIVE: The objectives of 19.10.15 NMAC are:
A. to establish procedures used in rulemaking proceedings before the commission;
B. to encourage the participation in the hearings the commission conducts for the promulgation of rules;
C. to make possible the effective presentation of the evidence and points of view of parties and members of the public; and
D. to assure that rulemaking hearings are conducted in a fair and equitable manner.
[19.10.15.6 NMAC - N, 3/27/2018]

19.10.15.7 DEFINITIONS: See Section 69-36-3 NMSA 1978 and 19.10.1.7 NMAC for definitions. See also Section 14-4-2 NMSA 1978 (2017) for the definitions of "proceeding", "proposed rule" and "rule".
[19.10.15.7 NMAC - N, 3/27/2018]

19.10.15.8 LIBERAL CONSTRUCTION: 19.10.15 NMAC shall be liberally construed to carry out its purpose.
[19.10.15.8 NMAC - N, 3/27/2018]

19.10.15.9 SEVERABILITY: If any portion or application of 19.10.15 NMAC is held invalid, the remainder, or its application to other persons or situations, shall not be affected.
[19.10.15.9 NMAC - N, 3/27/2018]

19.10.15.10 POWERS AND DUTIES OF COMMISSION AND HEARING OFFICER:
A. Commission. The commission shall exercise all powers and duties prescribed under 19.10.15 NMAC and not otherwise delegated to the hearing officer or the commission administrator.
B. Hearing officer. The commission shall designate a hearing officer for each hearing who shall exercise all powers and duties prescribed or delegated under 19.10.15 NMAC. The hearing officer may be an appointed member of the commission. The hearing officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited and avoid delay. The hearing officer shall have authority to take all measures necessary for the maintenance of order and for the efficient, fair and impartial consideration of issues arising in proceedings 19.10.15 NMAC governs, including, but not limited to:
(1) conducting hearings under 19.10.15 NMAC;
(2) taking, admitting or excluding evidence, examining witnesses and allowing post-hearing submissions;

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(3) making such orders as may be necessary to preserve decorum and to protect the orderly hearing process;

(4) if requested by the commission, preparing and filing a report of the hearing, with recommendations for commission action;

(5) requesting parties to file original documents with the commission administrator; and

(6) requesting a party to submit a proposed statement of reason in support of the commission's decision.

[19.10.15.10 NMAC - N, 3/27/2018]

19.10.15.11 GENERAL PROVISIONS - COMPUTATION OF TIME:

A. Computation of time. In computing any time prescribed or allowed by these rules, except as otherwise specifically provided, the day of the event from which the designated period begins to run shall not be included. The last day of the computed period shall be included, unless it is a Saturday, Sunday or legal state holiday, in which event the time is extended until the end of the next day, which is not a Saturday, Sunday or legal state holiday. Whenever a party must act within a prescribed period after service upon him or her, and service is by mail, three days is added to the prescribed period. The three-day extension does not apply to any deadline under the act.

B. Extension of time. The commission or hearing officer may grant an extension of time for the filing of any document upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties.

[19.10.15.11 NMAC - N, 3/27/2018]

19.10.15.12 GENERAL PROVISIONS - RECUSAL: No commission member shall participate in an action for which he or she would be disqualified under Section 69-36-6 NMSA 1978 of the Mining Act, the Governmental Conduct Act, or any other applicable law.

[19.10.15.12 NMAC - N, 3/27/2018]

19.10.15.13 GENERAL PROVISIONS - EX PARTE DISCUSSIONS: At no time after the initiation and before the conclusion of a proceeding under 19.10.15 NMAC, shall the division, or any other party, interested participant or their representatives discuss ex parte the merits of the proceeding with any commission member or the hearing officer.

[19.10.15.13 NMAC - N, 3/27/2018]

19.10.15.14 DOCUMENT REQUIREMENTS - FILING AND SERVICE OF DOCUMENTS:

A. The filing of any document that 19.10.15 NMAC requires shall be accomplished by delivering the document to the commission administrator and the commission legal counsel.

B. Any person filing any document shall:

(1) provide the commission administrator with nine original hard copies of the document and one identical bookmarked PDF file via email or personal delivery on CD or jump drive;

(2) if the document is a notice of intent to present technical testimony filed by any person other than the petitioner, serve a copy thereof on the petitioner;

(3) any document filed pursuant to 19.10.15 NMAC shall be filed with the commission administrator at least 20 days before any meeting at which the commission will consider the document. If the document is a motion seeking an order from the hearing officer in a rulemaking hearing, the motion must also be served at the same time with the hearing officer and the commission's legal counsel.

C. Whenever 19.10.15 NMAC requires service of a document, service shall be made by delivering a copy to the person to be served by mailing it, or, if that person has agreed, by sending it by facsimile or by electronic transmission to that person. Agreement to be served by facsimile or electronic transmission may be evidenced by placing the person's facsimile number or email address on a document filed pursuant to 19.10.15 NMAC service shall also be made upon the commission's legal counsel. If a person is represented by an attorney, service of the document shall be made on the attorney. Service by mail is complete upon mailing the document. Service by facsimile or electronic transmission is accomplished when the transmission of the document is completed and acknowledged by designated recipient.

[19.10.15.14 NMAC - N, 3/27/2018]

19.10.15.15 EXAMINATION OF DOCUMENTS FILED:

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A. Examination allowed. Subject to the provisions of law restricting the public disclosure of confidential information, any person may, during normal business hours, inspect and copy any document filed in any rulemaking proceeding before the commission. Such documents shall be made available on the division's website.

B. Cost of duplication. The person seeking copies of documents shall bear the cost of duplicating documents.

[19.10.15.15 NMAC - N, 3/27/2018]

19.10.15.16 PREHEARING PROCEDURES - PETITION FOR RULE CHANGE:

A. Any person, may file a petition with the commission to adopt, amend or repeal any rule within the commission's jurisdiction.

B. The petition shall be in writing and shall include a statement of the reasons for the rule change. The petition shall cite the relevant statutes that authorize the commission to adopt the proposed rules and shall estimate the time that will be needed to conduct the rules hearing, if possible. A copy of the entire rule, including the proposed rule change, indicating any language proposed to be added or deleted, shall be attached to the petition. The entire rule and its proposed changes shall be submitted to the commission in redline fashion, and shall include line numbers. Any document that does not include all the items required to be in a petition shall be returned to the petitioner along with a copy of these rules and a check-off list of required items, and the petitioner will be asked to resubmit his or her petition in the form 19.10.15 NMAC requires.

C. The commission shall determine at a public meeting within 60 days of submission of a petition for rule change whether to hold a hearing on the petition. Any person may respond to the petition for rule change either in writing prior to the public meeting or in person at the public meeting. If the commission determines not to hold a hearing, the commission's determination shall be subject to review as contemplated by Section 69-36-16 NMSA 1978.

D. If the commission determines to hold a public hearing on the petition, it may issue such orders specifying procedures for conduct of the hearing, in addition to those provided by 19.10.15 NMAC, as may be necessary and appropriate to fully inform the commission of the matters at issue in the hearing or control the conduct of the hearing. Such orders may include requirements for giving additional public notice, holding pre-hearing conferences, filing direct written testimony prior to the hearing or limiting testimony or cross-examination.

[19.10.15.16 NMAC - N, 3/27/2018]

19.10.15.17 RULEMAKING NOTICE:

A. The commission shall distribute a notice of proposed rulemaking at least 60 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, if any;
- (4) sending the notice by mail or electronic mail to persons who have made a written request

to the commission for advance notice of hearings 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. 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 rulemaking 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.

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[19.10.15.17 NMAC - N, 3/27/2018]

19.10.15.18 ENTRY OF APPEARANCE: Any person who is or may be affected by the proposed rule change may file an entry of appearance as a party. The entry of appearance shall be filed no later than 10 days before the date of the hearing on the petition. In the event of multiple entries of appearance by those affiliated with one interest group, the hearing officer may consolidate the entries, or divide the service list to avoid waste of resources. The filing of a petition or a notice of intent to present technical testimony shall serve as an entry of appearance.

[19.10.15.18 NMAC - N, 3/27/2018]

19.10.15.19 MOTIONS:

A. General. Any person who has filed an entry of appearance may file a motion. All motions, except those made orally during a hearing, shall be in writing, specify the grounds for the motion and state the relief sought. Each motion shall be accompanied by an affidavit, certificate or other evidence relied upon and shall be served as provided by 19.10.15.14 NMAC.

B. Unopposed motions. An unopposed motion shall state that the concurrence of all other parties was obtained. The moving party shall submit a proposed order approved by all parties for the hearing officer's review.

C. Opposed motions. Any opposed motion shall state either that concurrence was sought and denied, or why concurrence was not sought. A memorandum brief in support of such motion may be filed with the motion.

D. Response to motions. Any party upon whom an opposed motion is served shall have 15 days after service of the motion to file a response. A non-moving party failing to file a timely response shall be deemed to have waived any objection to granting the motion.

E. Reply to response. The moving party may, but is not required to, submit a reply to any response within 10 days after the response is served.

F. Decision. The hearing officer shall decide all motions without a hearing, unless otherwise ordered by the hearing officer sua sponte or upon any party's written request. The hearing officer shall refer any motion that would effectively dispose of the matter, and may refer any other motion to the commission for a decision. A procedural motion may be ruled upon prior to the expiration of the time for response; any response received thereafter shall be treated as a request for reconsideration of the ruling. The hearing officer shall file all original documents with the commission administrator.

[19.10.15.19 NMAC - N, 3/27/2018]

19.10.15.20 TECHNICAL TESTIMONY:

A. Any person, including the petitioner, who intends to present technical testimony at the hearing shall, no later than 10 working days prior to the hearing, file a notice of intent to present technical testimony. The notice shall:

- (1) identify the person for whom the witness(es) will testify;
- (2) identify each technical witness the person intends to present and state each witness's qualifications, including a description of their educational and work background, and the anticipated duration of each witness's testimony;
- (3) if the hearing will be conducted at multiple locations, indicate the location or locations at which the witnesses will be present;
- (4) summarize or include a copy of the direct testimony of each technical witness in narrative form;

- (5) include the text of any recommended modifications to the proposed rule change; and
 - (6) list and attach all exhibits anticipated to be offered by that person at the hearing,
- including any proposed statement of reasons for adoption of rules.

B. The hearing officer may enforce 19.10.15.20 NMAC's provisions through such action as the hearing officer deems appropriate, including exclusion of the technical testimony of any witness for whom a notice of intent was not timely filed. If such testimony is admitted, the hearing officer may keep the record open after the hearing to allow responses to such testimony. The hearing officer may also require that parties submit written rebuttal testimony prior to hearing.

[19.10.15.20 NMAC - N, 3/27/2018]

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19.10.15.21 PARTICIPATION BY PUBLIC:

A. Any member of the public may testify at the hearing. No prior notification is required to present non-technical testimony at the hearing. Any such member may also offer non-technical exhibits with his or her testimony, so long as the exhibit is not unduly repetitious of the testimony.

B. A member of the public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing or submit it at the hearing. Written comment may be submitted electronically, mailed or delivered to the commission administrator. [19.10.15.21 NMAC - N, 3/27/2018]

19.10.15.22 PARTICIPATION BY CONFERENCE TELEPHONE OR SIMILAR DEVICE:

A. A commission member may participate in a meeting or hearing of the commission by means of a conference telephone or other similar communications equipment, when it is otherwise difficult or impossible for the member to attend the meeting or hearing in person, provided that each member participating by conference telephone can be identified when speaking, all participants are able to hear each other at the same time and members of the public attending the meeting or hearing are able to hear any member of the commission who speaks at the meeting or hearing. A commission member's participation by such means shall constitute presence in person at the meeting or hearing. A commission member who wishes to participate in a rulemaking hearing in this manner must receive permission from the hearing officer sufficiently in advance of the rulemaking hearing so as to permit the commission administrator to arrange for adequate telephone hookup.

B. A witness may participate in a rulemaking hearing of the commission by means of a telephone conference or other similar communications equipment when an emergency or circumstances make it impossible for the witness to attend the hearing in person. A witness who wishes to participate in a rulemaking hearing in this manner must receive permission from the hearing officer in advance of the rulemaking hearing. No witness may participate in a rulemaking hearing by telephone conference unless he or she makes a request sufficiently in advance of the rulemaking hearing to permit the commission administrator to arrange for an adequate telephone or electronic hookup. Each witness participating remotely must be identified when speaking, all participants must be able to hear each other at the same time and members of the public attending the hearing must be able to hear any witness who speaks during the hearing.

[19.10.15.22 NMAC - N, 3/27/2018]

19.10.15.23 HEARING PROCEDURES - CONDUCT OF HEARINGS:

A. The rules of civil procedure and the rules of evidence shall not apply.

B. The hearing officer shall conduct the hearing to provide a reasonable opportunity for all persons to be heard without making the hearing unreasonably lengthy or cumbersome, or burdening the record with unnecessary repetition. The hearing shall proceed as follows.

(1) The hearing shall begin with an opening statement from the hearing officer. The statement shall identify the hearing's nature and subject matter, and explain the procedures to be followed.

(2) The hearing officer may allow a brief opening statement by any party who wishes to make one.

(3) Unless otherwise ordered, the petitioner shall present the proposed rule first.

(4) The hearing officer shall establish an order for the testimony of other participants. The order may be based upon notices of intent to present technical testimony, sign-in sheets and the availability of witnesses who cannot be present for the entire hearing.

(5) If the hearing continues for more than one day, the hearing officer shall provide an opportunity each day for testimony from members of the public. Members of the public who wish to present testimony should indicate their intent on a sign-in sheet.

(6) The hearing officer may allow a brief closing argument by any person who wishes to make one.

(7) At the close of the hearing, the hearing officer shall determine whether to keep the record open for written submittals in accordance with 19.10.15.27 NMAC. If the record is kept open, the hearing officer shall determine and announce the subject(s) on which submittals will be allowed and the deadline for filing the submittals.

C. If the hearing is conducted at multiple locations, the hearing officer may require the petitioner's witnesses to summarize their testimony or be available for cross-examination at each location. Other participants are not required to testify at more than one location, and the hearing officer may prohibit a witness from testifying at more than one location.

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[19.10.15.23 NMAC - N, 3/27/2018]

19.10.15.24 TESTIMONY AND CROSS-EXAMINATION:

A. The hearing officer shall allow all interested persons a reasonable opportunity to submit arguments and to examine witnesses testifying at the hearing.

B. All testimony will be taken under oath or affirmation, which may be accomplished in mass or individually.

C. The hearing officer shall admit any relevant evidence, unless the hearing officer determines that the evidence is unduly repetitious. The hearing officer shall require all oral testimony be limited to the position of the witness in favor of or against the proposed rule.

D. Any person who testifies at the hearing may be subject to cross-examination on the subject matter of his or her direct testimony and matters affecting his or her credibility. Any person attending the hearing may conduct such cross-examination if required for a full and true disclosure of matters at issue in the hearing. The hearing officer may limit cross-examination to avoid harassment, intimidation, needless expenditure of time or undue repetition.

[19.10.15.24 NMAC - N, 3/27/2018]

19.10.15.25 EXHIBITS:

A. Any person offering an exhibit at hearing shall provide at least an original and 12 copies for the commission, and a sufficient number of copies for persons attending the hearing.

B. All exhibits offered at the hearing shall be marked with a designation identifying the person offering the exhibit and shall be numbered sequentially. If a person offers multiple exhibits, he or she shall identify each exhibit with an index tab or by other appropriate means.

C. Large charts and diagrams, models and other bulky exhibits are discouraged. If visual aids are used, legible copies shall be submitted for inclusion in the record.

[19.10.15.25 NMAC - N, 3/27/2018]

19.10.15.26 TRANSCRIPT OF PROCEEDINGS: Unless specified by the commission or hearing officer, an audio recording and index shall be made of the hearing. If the hearing officer allows verbatim stenographic transcripts, the petitioner shall bear the cost of the original verbatim transcript of the proceeding and of providing a copy for each commission member and commission counsel.

[19.10.15.26 NMAC - N, 3/27/2018]

19.10.15.27 POST-HEARING SUBMISSIONS: The hearing officer may allow the record to remain open for a reasonable time following the hearing's conclusion for written submission of additional evidence, comments and arguments and proposed statements of reasons. The hearing officer's determination shall be announced at the hearing's conclusion. In considering whether the record will remain open, the hearing officer shall consider the reasons why the material was not presented during the hearing, the significance of the material to be submitted and the necessity for a prompt decision.

[19.10.15.27 NMAC - N, 3/27/2018]

19.10.15.28 HEARING OFFICER'S REPORT: If the commission directs, the hearing officer shall file a report of the hearing. The report shall identify the issues addressed at the hearing, identify the parties' final proposals and the evidence supporting those proposals, including discussion or recommendations as requested by the commission, and shall be filed with the commission administrator within the time specified by the commission. The commission administrator shall promptly notify each party that the hearing officer's report has been filed and shall provide a copy of the report along with a notice of any deadline set for comments on that report.

[19.10.15.28 NMAC - N, 3/27/2018]

19.10.15.29 DELIBERATION AND DECISION:

A. If a quorum of the commission attended at the hearing, and if the hearing notice indicated that a decision might be made at the hearing's conclusion, the commission may immediately deliberate and decide on the proposed rule.

B. If the commission does not reach a decision at the hearing's conclusion, the commission administrator, following receipt of the transcript, will promptly furnish a copy of the transcript to each member that

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did not attend the hearing and, if necessary, to other members, commission counsel and the hearing officer. Exhibits provided to those persons at the time of the hearing need not be supplied again.

C. The commission shall reach its decision on the proposed rule within 60 days following the close of the record or the date the hearing officer's report is filed, whichever is later.

D. If the commission determines during its deliberations that additional testimony or documentary evidence is necessary for a proper decision on the proposed rule change, the commission may, consistent with the requirements of due process, reopen the hearing for such additional evidence only.

E. The commission shall issue its decision on the proposed rule change in a suitable format, which shall include its reasons for the action taken.

F. The commission's written decision is the official version of the commission's action, and the reasons for that action. Other written or oral statements by commission members are not recognized as part of the commission's official decision or reasons.

G. The adoption of the commission's written decision shall constitute the adoption of the rule. Within 15 days after adoption of the written decision, the commission shall file the rule and the written decision in accordance with the State Rules Act.

[19.10.15.29 NMAC - N, 3/27/2018]

19.10.15.30 NOTICE OF COMMISSION ACTION: The commission administrator shall provide notice of the commission's action in accordance with the State Rules Act.

[19.10.15.30 NMAC - N, 3/27/2018]

19.10.15.31 APPEALS AND STAYS - APPEAL OF RULES:

A. Appeal of any rule change by the commission shall be taken in accordance with governing law.

B. The appellant shall serve a copy of the notice of appeal on the commission and on each party.

C. The appellant shall be responsible for preparation of a sufficient number of copies of the hearing record at the appellant's expense.

D. Unless otherwise provided by governing law, the filing of an appeal shall not act as a stay of the rule change being appealed.

[19.10.15.31 NMAC - N, 3/27/2018]

HISTORY: [RESERVED]