

**STATE OF NEW MEXICO  
DEPARTMENT OF ENERGY, MINERALS AND NATURAL RESOURCES  
OIL CONSERVATION DIVISION**

**APPLICATION OF THE NEW MEXICO OIL  
CONSERVATION DIVISION TO AMEND  
19.15.5 NMAC; STATEWIDE**

DEC 17 2019 PM 03:15

**Case No. 20895**

**IPANM's PRE-HEARING STATEMENT**

This Pre-Hearing Statement is submitted on behalf of the Independent Petroleum Association of New Mexico ("IPANM") through its undersigned counsel, as required by NMAC 19.15.3.11 B.

**IPANM'S PROPOSED MODIFICATIONS**

IPANM has reviewed the proposed changes to NMAC 19.15.5 in detail and submits the following modifications with the reasoning for each proposed modification to the proposed changes. IPANM's proposed modifications if adopted with both further the ultimate goals of the Oil and Gas Act by protecting correlative rights and minimizing waste; and, enhance compliance. In addition, the proposed modifications are proposed to correct and mitigate unintended consequences that would result from the proposed changes as written.

A copy of IPANM's proposed changes to regulation are attached as Exhibit 1 with (a) the changes to the text of regulation in redline; and (b) five (5) tables proposed for the regulation.

First, IPANM proposes some changes to make clear that penalties are not mandatory and that prompt, efficacious compliance is the primary goal. Second, IPANM proposes modifications that enhance the even and consistent enforcement of division

regulations and is consistent with legislative intent. The addition of IPANM's proposed Tables 1, 2, 3, 4, and 5 will ensure consistent and predictable penalty assessments. IPANM took the tables adopted as part of the Texas penalty rules and adapted those to issues unique to New Mexico. Third, the proposed rule regarding reviews of NOVs and extensions of Temporary Cessation Orders creates unreasonably long periods between filing and a hearing. For instance, operators could lose leases in the secondary term could be lost if an operator is required to cease production for 30 or more days without any form of review. Fourth, IPANM's proposed modification allow a means for alleged violators to appeal Commission decisions to District Court. This is needed to ensure the proposed changes are in accord with the rest of the Oil and Gas Act. Finally, IPANM proposes changes to make clear that penalties commence from a date no earlier than the operator knew or reasonably should have known about the violation. IPANM states each proposed modification accompanied by a detailed explanation of how these proposed modification correct issues and help to mitigate unintentional consequences for both the Oil Conservation Division and Producers.

#### 19.15.5.10 ENFORCEMENT (Division's filed Exhibit A):

1. In Subpart 10.C(1)(d), deleting "the sanction(s) proposed by the division" and adding "any sanction(s) proposed by the division if the matter is not resolved during the informal review process."
  - a. Clarify that the division may, but is not mandated to, propose sanctions. Section 70-2-31(E) provides that "[t]he commission shall make rules ... providing procedures for ... the assessment of penalties." This language makes clear that that not all violations should be the subject of penalties. This addition gives the OCD alternate routes to ensure compliance by producers. It also enables the OCD flexibility in enforcement with alternate forms of insurance that a producer will not simply slide immediately out of compliance. This also allows producers of all sizes an alternate form of dispute resolution. More importantly this language more accurately reflects the statutory language which gives the OCD the option to assess civil penalties on violations, not the obligation. The OCC's addition of "shall"

in the assessment of penalties infers that all violations must be assessed a civil penalty. However, the addition of alternative avenues to ensure compliance is in line with both the overall goal of compliance and the statutory authority.

2. In Subpart 10.C(2), adding "and, if contact information is available also by facsimile and/or e-mail" after "by certified mail."
  - a. Certified mail provides evidence of receipt but is an increasingly slower form of notice. A quicker form of service for Notice of Violations means a producer can come into compliance much quicker. This serves the main goal of compliance and will ensure that the Notice of Violation is seen quickly by the proper party. This addition also adds no substantial burden on the OCD but will help to ensure that producers can expedite compliance efforts as soon as notice is received, instead of waiting for mail delivery and internal processing of mail.
3. In Subpart 10.C(3), striking "including the civil penalty, if any," and the addition of "No civil penalties shall be proposed by the division if the division and the alleged violator agree to a stipulated final order and the alleged violator fulfills its obligations under that order."
  - a. Section 70-2-31(E) provides that "[t]he commission shall make rules ... providing procedures for ... the assessment of penalties." This language suggests that not all violations should be the subject of penalties. This addition gives the OCD alternate routes to ensure compliance by producers. It also enables the OCD flexibility in enforcement with alternate forms of insurance that a producer will not simply slide immediately out of compliance. This also allows producers of all sizes an alternate form of dispute resolution. More importantly this language more accurately reflects the statutory language which gives the OCD the option to assess civil penalties on violations, not the obligation. The OCC's addition of "shall" in the assessment of penalties infers that all violations must be assessed a civil penalty. However, the addition of alternative avenues to ensure compliance is in line with both the overall goal of compliance and the statutory authority.
4. In Subpart 10.D. adding "Except as provided in 19.15.5.10(C)(3) and 19.15.5.10(E) NMAC," substituting "may" for "shall," and replacing "account for the seriousness of the violation, good faith efforts to comply with the applicable requirement, history of noncompliance under the Oil and Gas Act and other relevant factors" with "be in conformity with the fine amounts, factors for enhancement, and factors in mitigation set forth in Tables 1, 2, 3, 4, and 5 to this Rule."
  - a. Section 70-2-31(E), as recently amended, states "The commission shall make rules, pursuant to section 70-2-12.2 NMSA 1978, providing procedures for the issuance of notices of violation, the assessment of penalties, and the conduct of

informal proceedings and hearing pursuant to this section." This mandates that the OCC make procedures for the assessment of penalties which must be interpreted by its plain meaning. Merriam-Webster dictionary defines "procedures" as "a particular way" or "a series of steps." The plain meaning of the OCC's statutory mandate is it must make rules for the way in which the OCD will assess penalties. By replacing the non-opaque and potentially ad hoc penalty assessment procedure in the initially proposed changes with the reference to attached tables the OCC can be in conformity with its statutory mandate. This addition is essential because without any set procedures for the assessment of penalties, the regulation would violate the OCC's statutory mandate. The OCC does not have the discretion to not act on the statutory mandate and some form of procedure must be required in order to conform to the general principles of administrative law.

- b. The addition of Tables 1, 2, 3, 4, and 5 add a consistent and objective means for the OCD to assess penalties that are fair and predictable. The addition of the Tables will also reduce the amount of litigation and appeals with the OCD and OCC would surely encounter with ad hoc penalty assessment.
  - c. The addition of Tables 1, 2, 3, 4, and 5 also allow for a flexible means in which it can amend penalty amounts and types. Such future rulemaking procedure would only pertain to the specific table that is to be affected. This would shorten the rulemaking process and streamline inevitable changes. The proposed tables were drafted with New Mexico specific issues in mind and have drawn from other states which use the same method for the assessment of civil penalties under its respective Oil and Gas Act.
  - d. The substitution of "may" for "shall" more accurately reflects the statutory language making penalties discretionary instead of mandatory. This substitution gives the OCD more avenues to ensure compliance as the main goal and to work with operators to find the best solution.
5. Add to the end of subpart 10.D "Daily fines recommended by the division shall commence no earlier than the date the operator knew or, in the exercise of ordinary care, should have known about the alleged violation."
- a. The proposed rule is not clear as to the date fines commence. This provision makes clear that fines can commence no earlier than the date that the division determines that the operator knew or reasonably should have known about the violation.
6. Directly after Subpart 10.D., the addition of "E. Exceptions to Civil Penalties. The division shall not impose civil penalties for an alleged violation if the BLM has imposed civil penalties or fines on the alleged violator for the same alleged violation and it shall

revoke any civil penalties imposed if the BLM subsequently imposes civil penalties or fines for the same alleged violation."

- a. This addition ensures that producers are not assessed penalties by the OCD and the BLM for the same conduct. By eliminating the burden of double fines, producers will be able to come into compliance faster. This also helps to balance the disproportionate impact a double fine could have on different types of producers. Most importantly, however, the addition prioritizes compliance instead of the collection of penalties.
7. Directly before Subpart 10.E., the addition of "F. Credits to Civil Penalties. Except as provided in 19.15.5.10(E), if the alleged violator pays civil penalties or fines any state agency or federal agency for an alleged violation, the sums actually paid by the alleged violator shall operate a credit to the civil penalties imposed by the division for the same alleged violation.
- a. This addition ensures that producers are not assessed penalties by multiple agencies for the same conduct. It also ensures that the OCD will be able to collect the upwards difference if the fine imposed by a different agency is less severe than the fine imposed under the Oil and Gas Act. By eliminating the burden of double fines, producers will be able to come into compliance faster. This also helps to balance the disproportionate impact a double fine could have on different types of producers.
8. In Subsection 10.E(2)(e), substituting "7 days" for "15 days"
- a. This substitution allows for the parties to be prepared and informed of all issues prior to the adjudicatory hearing but with an ability to resolve the matter quickly.
9. Directly after Subsection 10.E(2)(g)(vi), the addition of "(h) Shortening Deadlines. On the written request of the alleged violator showing good cause, the hearing officer may shorten any deadlines hereunder to conduct the hearing as expeditiously as possible. If the request for shortening deadlines is opposed by the division the procedures for opposed motions set for in 19.15.5.10(G)(2)(g) shall not apply and the hearing officer shall decide the request, with or without hearing, as quickly as practicable."
- a. This addition allows for the hearing officer and parties to have flexibility in the hearing process to ensure there are not unintended negative consequences that come from the adjudicatory process by virtue of passage of time, especially where an extension to a temporary cessation order is at issue. Such unintended consequences include the loss of leasehold interest (in whole or in part) and the unnecessary disruption of scheduled operations. By allowing the adjudicator to minimize any unintended negative consequences, the OCD will ensure that the goal of compliance is not frustrated by rigidity of the process.

10. Directly after Subsection 10.H., the addition of "I. Rehearing before the Commission. Any party adversely affected by the decision of the Commission may file a petition for rehearing with the Commission which the Commission shall act upon as provided in Section 70-2-25(A) NMSA."
- a. This addition ensure that the proposed changes are in conformity with the Oil and Gas Act. By adding the option for a petition for rehearing the proposed changes will be in conformity with the above-mentioned provision of the Oil and Gas Act. This addition also ensures the proposed changes are consistent with current procedures. This addition is needed for compliance and consistency to ensure that the adjudicatory process is predictable and proper.
11. In Subsection 10.G, substituting "35 days" for "30 days" and adding to the end of the subsection "If the respondent files an appeal to district court pursuant to Section 70-2-25(B) NMSA, any civil penalty paid by the respondent pursuant to the final order is subject to refund, in whole or in part, by the division if and to the extent that respondent is successful in respondent's appeal to the district court."
- a. This addition is essential to ensure a means of appealing the penalty assessment to the District Court. Without this means of review, the penalty assessments would not be reviewable by the court which is not in line with the Oil and Gas Act and current practices. The substitution of thirty-five (35) days allows for the full statutory time for rehearing to pass. This is needed to ensure the appeals process in the district court is not frustrated and to ensure conformity with other procedural laws. The addition ensures that the findings of the district court may include a refund of the assessed and collected penalty. The omission of a process to appeal the penalty assessments to District Court would give the OCC more authority than granted in the statutory language and would result in the proposed changes not being in conformity with the Oil and Gas Act.

#### **IPANM'S PROPOSED EVIDENCE**

##### **WITNESS:**

##### **ESTIMATED TIME:**

Vanessa Fields

45 minutes

Paul Ragsdale

45 minutes

Ms. Vanessa Fields is currently the Regulatory Compliance Manager for EPIC Energy LLC and is a consultant for Thompson Engineering. Ms. Fields oversees Regulatory and Environmental Compliance for numerous Operators in the San Juan

Basin. Ms. Fields has 12 years of experience working in Regulatory and Environmental Compliance. Her past employment experience includes Williams Production, WPX Energy, and The State of New Mexico Energy Mineral and Natural Resources: Oil Conservation Division in District III, all of which she was employed as an Environmental Specialist. Ms. Fields holds numerous Environmental and Regulatory certificates and awarded an Associates Degree in Occupational Safety from San Juan College. Ms. Fields would testify generally about the disproportionate negative impacts the proposed changes would have on smaller producers. Ms. Fields would further testify to the ambiguities regarding violations for past activities in the proposed changes and how IPANM's proposed modifications help mitigate those damages.

Mr. Paul Ragsdale has over 40 years of Oil and Gas Drilling, Completion, Production and Mid-Stream experience in New Mexico. Mr. Ragsdale is currently the Operations Manager for Strata Production Company where he manages drilling, completions and production operations for both oil and gas wells. Mr. Ragsdale received a Bachelor of Science degree from New Mexico State University in 1977. Mr. Ragsdale is well versed in all stages of drilling and production and has a depth of knowledge that can only be gained through his years of experience. Mr. Ragsdale would testify generally about the disproportionate negative impacts that the proposed changes would have on smaller producers. He would further testify to the negative impact the proposed changes could have on the process of drilling and completion. Mr. Ragsdale would further testify to the irreparable harm that will result from the thirty (30) day waiting period for Temporary Cessation Orders. Mr. Ragsdale would testify to how IPANM's proposed amendments

work towards eliminating and mitigating unintended negative impacts while working towards the goal of compliance.

**IPANM'S HEARING EXHIBITS**

1. IPANM's Proposed Modifications to The Division's Proposed Changes to NMAC 19.15.5, Divisions Exhibit A

**PROCEDURAL MATTERS**

None at this time.

Respectfully submitted,

**HINKLE SHANOR LLP**

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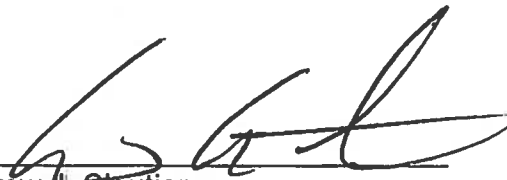
## CERTIFICATE OF SERVICE

I hereby certify that on this 17<sup>th</sup> day of December, 2019 I served a true and correct copy of the foregoing ***IPANM's Pre-Hearing Statement*** via hand-delivery (if so indicated) and via email to:

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Andrew J. Cloutier

This is an amendment to 19.15.5 NMAC, amending Sections 3, 8, 9 and 10 effective x/xx/xxxx.

Explanatory statement: Statute citations were corrected throughout the rule to conform to correct legislative styles.

**19.15.5.3 STATUTORY AUTHORITY:** 19.15.5 NMAC is adopted pursuant to the Oil and Gas Act, Section 70-2-6, Section 70-2-11, ~~[and] Section 70-2-12 and Section 70-2-31~~ NMSA 1978.  
[19.15.5.3 NMAC – N, 12/1/2008, A, X/XX/XXXX]

**19.15.5.8 ENFORCEMENT OF STATUTES AND RULES:** The division is charged with the duty and obligation of enforcing the state's rules and statutes relating to the conservation of oil and gas, including the prevention of waste and the protection of correlative rights, and ~~[including]~~ the protection of public health and the environment. An owner or operator shall obtain information pertaining to the regulation of oil and gas before beginning operations.

[19.15.5.8 NMAC - Rp, 19.15.1.12 NMAC, 12/1/2008, A, X/XX/XXXX]

**19.15.5.9 COMPLIANCE:**

- A.** An operator is in compliance with Subsection A of 19.15.5.9 NMAC if the operator:
- (1) currently meets the financial assurance requirements of 19.15.8 NMAC;
  - (2) is not subject to a division or commission order, issued after notice and hearing, finding the operator to be in violation of an order requiring corrective action;
  - (3) does not have a penalty assessment that is unpaid more than ~~[70]~~ 30 days after issuance of the order assessing the penalty; and
  - (4) has no more than the following number of wells out of compliance with 19.15.25.8 NMAC that are not subject to an agreed compliance or final order setting a schedule for bringing the wells into compliance with 19.15.25.8 NMAC and imposing sanctions if the schedule is not met:
    - (a) two wells or fifty percent of the wells the operator operates, whichever is less, if the operator operates 100 wells or less;
    - (b) five wells if the operator operates between 101 and 500 wells;
    - (c) seven wells if the operator operates between 501 and 1000 wells; and
    - (d) 10 wells if the operator operates more than 1000 wells.

~~[B. The division shall notify an operator on a monthly basis when, according to records on file with the division, a well on the inactive well list described in Subsection F of 19.15.5.9 NMAC shows no production or injection for the past 12 months by making such information available on the division's website. Further, at least 60 days prior to commencing an enforcement action against an operator for a violation of 19.15.5.9 NMAC, the division shall notify the operator by first class mail to the address provided to the division pursuant to Subsection C of 19.15.9.8 NMAC.~~

~~C. The division shall make available on its website and update weekly the status of operators' financial assurance 19.15.8 NMAC requires, according to division records.~~

~~D. Orders requiring corrective action.~~

~~(1) The division shall make available on its website division or commission orders, issued after notice and hearing, finding an operator to be in violation of an order requiring corrective action.~~

~~(2) An operator who contests an order finding it to be in violation of an order requiring corrective action may appeal and may seek a stay of the order. An order that is stayed pending appeal does not affect an operator's compliance with Subsection A of 19.15.5.9 NMAC.~~

~~(3) An operator who completes the corrective action the order requires may file a motion with the order's issuer to declare the order satisfied. The division or commission, as applicable, may grant the motion without hearing, or may set the matter for hearing.~~

~~E. Penalty assessments.~~

~~(1) The division shall make available on its website penalty assessments assessed under the Oil and Gas Act over the last 12 months and the date the operator paid them, according to division records.~~

~~(2) Any order that is stayed pending appeal does not affect an operator's compliance with Subsection A of 19.15.5.9 NMAC.~~

~~F] B. Inactive wells.~~

~~(1) The division shall make available on its website, and update daily, an "inactive well list" listing each well, by operator, that according to division records:~~

~~(a) shows no production or injection for past 15 months;~~

~~[(a)]~~ (b) does not have its well bore plugged in accordance with 19.15.25.9 NMAC through 19.15.25.11 NMAC;

~~[(b)]~~ (c) is not in approved temporary abandonment in accordance with 19.15.25.12 NMAC through 19.15.25.14 NMAC; and

~~[(e)]~~ (d) is not subject to an agreed compliance or final order setting a schedule for bringing the well into compliance with 19.15.25.8 NMAC ~~[and imposing sanctions if the operator does not meet the schedule]~~.

(2) ~~[For purposes of 19.15.5.9 NMAC, the listing of a well on the division's inactive well list as a]~~ A well inactive for more than ~~[one year plus 90 days]~~ 15 months creates a rebuttable presumption that the well is out of compliance with 19.15.25.8 NMAC.

C. **Financial assurance.** The division shall make available on its website and update weekly the status of operators' financial assurance that 19.15.8 NMAC requires, according to division records. ~~[19.15.5.9 NMAC - Rp, 19.15.1.40 NMAC, 12/1/2008; A, 11/30/2016, A, xx/xx/xxxx]~~

#### 19.15.5.10 **[COMPLIANCE PROCEEDINGS:] ENFORCEMENT:**

~~A.~~ The provisions in 19.15.4 NMAC applicable to adjudicatory proceedings shall apply to compliance proceedings unless altered or amended by 19.15.5.10 NMAC.

~~B.~~ A compliance proceeding is an adjudicatory proceeding in which the division seeks an order imposing sanctions for violation of a provision of the Oil and Gas Act, NMSA 1978, Sections 70-2-1 through 70-2-38 or a provision of a rule or order issued pursuant to the act. Such sanctions may include but are not limited to:

~~(1)~~ requiring compliance with a provision of the Oil and Gas Act, NMSA 1978, Sections 70-2-1 through 70-2-38 or a provision of a rule or order issued pursuant to the act;

~~(2)~~ assessment of civil penalties pursuant to NMSA 1978, Section 70-2-31(A); Subsection A of Section 70-2-31 NMSA 1978;

~~(3)~~ corrective action including but not limited to abatement or remediation of contamination and removal of surface equipment;

~~(4)~~ plugging and abandonment of a well and restoration and remediation of the well location, and authority for the division to forfeit the applicable financial assurance if the well is not plugged and abandoned and the location restored and remediated;

~~(5)~~ denial, cancellation or suspension of a permit;

~~(6)~~ denial, cancellation or suspension of authorization to transport; or

~~(7)~~ shutting in a well or wells.

~~C.~~ The division initiates an administrative compliance proceeding by filing a written application with the division clerk:

~~(1)~~ identifying the operator and any other responsible parties against whom the order is sought; including the surety if the division seeks an order allowing forfeiture of a surety bond;

~~(2)~~ identifying the provision of the Oil and Gas Act, NMSA 1978, Sections 70-2-1 through 70-2-38, or the provision of the rule or order issued pursuant to the act, allegedly violated;

~~(3)~~ providing a general description of the facts supporting the allegations;

~~(4)~~ stating the sanction or sanctions sought; and

~~(5)~~ providing proposed legal notice.

~~D.~~ The division shall provide notice of compliance proceedings as follows:

~~(1)~~ the division shall publish notice in accordance with 19.15.4.9 NMAC.

~~(2)~~ the division shall provide notice to the operator and any other responsible parties against whom the compliance order is sought by following the provisions of 19.15.4.12 NMAC.

~~E.~~ The director may enter into an agreed compliance order with an entity against whom compliance is sought to resolve alleged violations of any provision of the Oil and Gas Act, NMSA 1978, Sections 70-2-1 through 70-2-38 or any provision of any rule or order issued pursuant to the act. The director may enter into an agreed compliance order prior to or after the filing of an application for an administrative compliance proceeding. An agreed compliance order shall have the same force and effect as a compliance order issued after an adjudicatory hearing.

~~F.~~ Nothing in 19.15.5.10 NMAC precludes the division from bringing other actions provided for in the Oil and Gas Act, NMSA 1978, Sections 70-2-1 through 70-2-38, including but not limited to the following: suit for indemnification pursuant to NMSA 1978, Section 70-2-14(E) or NMSA 1978, Section 70-2-38(B); an action through the attorney general with respect to the forfeiture of illegal oil or illegal gas pursuant to NMSA 1978,

Section 70-2-32; an injunction under NMSA 1978, Section 70-2-28; or collection of penalties pursuant to NMSA 1978, Section 70-2-31(A).

[19.15.5.10 NMAC - Repealed, 19.15.14.1227 NMAC, 12/1/2008]

**A. General.** Whenever the division determines that a person violated or is violating the Oil and Gas Act or a provision of any rule, order, permit or authorization issued pursuant to the Oil and Gas Act, the division may seek a sanction by:

(1) issuing a temporary cessation order if it determines that the alleged violation is causing or will cause an imminent danger to public health or safety or a significant imminent environmental harm. The temporary cessation order shall remain in place until the earlier of when the division determines that the alleged violation is abated or 30 days, unless a hearing is held before the division and a new order is issued;

(2) issuing a notice of violation; or

(3) commencing a civil action in district court.

**B. Sanctions.** The division may seek one or more of the following sanctions:

(1) a civil penalty;

(2) modification, suspension, cancellation or termination of a permit or authorization;

(3) plugging and abandonment of a well;

(4) remediation and restoration of a well location and associated facilities, including the removal of surface and subsurface equipment and other materials;

(5) remediation and restoration of a location affected by a spill or release;

(6) forfeiture of financial assurance;

(7) shutting in a well or wells; and

(8) any other remedy authorized by law.

**C. Notice of violation.**

(1) A notice of violation issued by the division shall state with reasonable specificity:

(a) the identity of the alleged violator;

(b) the nature of the alleged violation, including the provision of the Oil and Gas Act or rule, order, permit or authorization allegedly violated;

(c) whether compliance is required immediately or within a specified time period;

(d) the sanction(s) available for the alleged violation and ~~the any~~ sanction(s) proposed by the division ~~if the matter is not resolved during the informal review process;~~

(e) the availability of a process for informal review and resolution of the alleged violation;

(f) a statement that if the notice of violation is not informally resolved within 30 days of service, the division will hold a hearing; and

(g) the date of the hearing, which shall be no later than 90 days after the date of the notice of violation.

(2) The division shall serve the notice of violation on the alleged violator by certified mail and, if contact information is reasonably available to the division also by facsimile and/or e-mail.

(3) If during the informal review the division and the alleged violator agree to resolve the alleged violation, they shall incorporate their agreement into a stipulated final order signed by both parties. The stipulated final order shall state that the alleged violator admits the division's jurisdiction to file the notice of violation, consents to the specified relief, including the civil penalty, if any, and waives the alleged violator's right of review by the commission. ~~No civil penalties shall be proposed by the division if the division and the alleged violator agree to a stipulated final order and the alleged violator fulfills its obligations under that order.~~

(4) If the division and the alleged violator fail to enter a stipulated final order within 30 days of service, the division shall hold a hearing at the division's principal office.

**D. Civil penalties.** ~~Except as provided in 19.15.5.10(C)(3) and 19.15.5.10(E) NMAC, the division shall propose civil penalties for each alleged violation on the basis of the facts and circumstances of the violation, in conformity with the fine amounts, factors for enhancement, and factors in mitigation set forth in Tables 1, 2, 3, 4, and 5 to this Rule.~~ The civil penalty assessed by the division shall not exceed \$2,500 per day of noncompliance for each alleged violation, unless the alleged violation presents a risk either to the health or safety of the public or of causing significant environmental harm, or unless the noncompliance continues beyond the time specified in the notice of violation or stipulated final order, whereupon the civil penalty may not exceed \$10,000 per day of noncompliance for each alleged violation, provided that the civil penalty assessed by the division for an alleged violation shall not exceed \$200,000. ~~Daily fines recommended by the division shall commence no earlier than the date the operator knew or, in the exercise of ordinary care, should have known about the alleged violation.~~

**E. Exceptions to Civil Penalties.** The division shall not propose or impose civil penalties for an alleged violation if the BLM has imposed civil penalties or fines on the alleged violator for the same alleged violation and it shall revoke any civil penalties imposed if the BLM subsequently imposes civil penalties or fines for the same alleged violation.

**F. Credits to Civil Penalties.** Except as provide in 19.15.10.5(E), if the alleged violator pays civil penalties or fines any state agency or federal agency for an alleged violation, the sums actually paid by the alleged violator shall operate a credit to the civil penalties imposed by the division for the same alleged violation.

**GE. Adjudicatory procedures.** These adjudicatory procedures shall apply to hearings on temporary cessation orders and notices of violation before the division, and the provisions of 19.15.4 NMAC shall not apply.

**(1) General provisions.**

**(a) Designation of parties.** The parties shall be the division and the person served with a notice of violation or order, referred to herein as "respondent".

**(b) Representation.** Respondent may appear and participate in a hearing either pro se or through counsel, provided that a collective entity, including a corporation, partnership, unincorporated association, political subdivision or governmental agency shall appear only through counsel or a duly authorized officer or member.

**(c) Rule applicability.** In the absence of a specific provision in this section, the hearing examiner may apply the New Mexico Rules of Civil Procedure and Evidence.

**(d) Computation of time.** In computing any period of time under 19.15.5.10 NMAC the day of the event from which the designated period begins to run shall not be included, and the last day of the computed period shall be included, unless it is a Saturday, Sunday or legal state holiday, in which case the time is extended until the next day which is not a Saturday, Sunday or legal state holiday. Whenever a party must act within a prescribed period after service, and service is by first class mail only, three days is added to the prescribed period.

**(e) Extensions of time.** The hearing examiner may grant an extension of time to file a document or continue a hearing upon timely motion upon consent of the parties, or for good cause shown after consideration of prejudice to the other party and undue delay to the hearing.

**(f) Filing of documents.** A party shall file the original of each document and serve a copy on the other party, accompanied by a certificate of service identifying the method and address used to complete service.

**(g) Service of documents.** A party shall serve each document on the other party or its counsel, as applicable, by personal service or first class mail, or by electronical mail if the parties agree.

**(h) Form of documents.** Unless otherwise ordered, all documents, except exhibits, shall be on 8 1/2 x 11-inch white paper, shall contain the caption of the notice of violation or temporary cessation order on the first page and shall be signed by the party or its counsel, as applicable.

**(2) Pre-hearing procedures.**

**(a) Docketing.** At the expiration of the 30 day period for informal resolution of a notice of violation, when a party appeals a final order under Subsection E of 19.15.5.10 NMAC, or when the division gives notice that it intends to extend a temporary cessation order, the division shall docket the notice of violation or order, and serve a notice of docketing on respondent.

**(b) Answer.** No later than 10 days after service of the notice of docketing, respondent shall file an answer stating its objection, if any, and the factual and legal basis for such objection, to each alleged violation and sanction, including each element of the assessed civil penalty, in the notice of violation or order.

**(c) Hearing examiner.** The hearing examiner shall have the authority to take all measures necessary to conduct a fair, impartial and efficient adjudication of issues, and to maintain order and avoid undue delay, including the authority to conduct pre-hearing conferences and hearings, rule on procedural and evidentiary motions, govern the examination of witnesses and the admission of evidence, issue orders and prepare a recommended decision. After the initiation and before the conclusion of a proceeding under this section, the hearing examiner shall not discuss ex parte the merits of the proceeding with the division or the respondent.

**(d) Pre-hearing conference.** The hearing examiner may hold a pre-hearing conference to narrow the issues, eliminate or resolve preliminary matters and encourage settlement, and may issue a pre-hearing order on procedural and evidentiary matters, including a schedule for the filing of motions and testimony, stipulations regarding alleged violations and requested relief, including civil penalties or elements thereof, and any other matter necessary for the efficient conduct of the hearing.

**(e) Pre-hearing statements.** No later than 15 days before the hearing, a party who



intends to present evidence at the hearing shall file and serve a statement that contains the following information:

(i) the name, address, employment and qualifications, including education and work history, of each witness;

(ii) the direct testimony in narrative form of each witness;

(iii) the exhibits and other evidence to be presented by each witness; and

(iv) procedural matters that are to be resolved prior to the hearing.

(f) **Enforcement.** The hearing examiner may enforce the requirements of 19.15.5.10 NMAC by any appropriate means, including the exclusion of testimony, exhibits and other evidence.

(g) **Motions.**

(i) **General.** All motions, except motions made orally during the hearing, shall be in writing, specify the grounds for the motion, state the relief sought, indicate whether the motion is opposed or unopposed and be served on the other party.

(ii) **Unopposed motions.** An unopposed motion shall state that concurrence of the other party was obtained and shall be accompanied by a proposed order approved by the parties.

(iii) **Opposed motions.** An opposed motion shall state either that concurrence was sought and not obtained, or the reason that concurrence was not sought.

(iv) **Response.** No later than 10 days after service of an opposed motion, the opposing party may file a response. Failure to file a response shall be deemed a waiver of any objection to the granting of the motion.

(v) **Reply.** No later than 10 days after service of a response to an opposed motion, the moving party may file a reply.

(vi) **Decision.** The hearing examiner shall decide all motions without a hearing, unless otherwise ordered by the hearing examiner sua sponte or upon written request of a party.

(h) **Shortening Deadlines.** On the written request of the alleged violator showing good cause, the hearing officer may shorten any deadlines hereunder to conduct the hearing as expeditiously as possible. If the request for shortening deadlines is opposed by the division the procedures for opposed motions set forth in 19.15.5.10(G)(2)(g) shall not apply and the hearing officer shall decide the request, with or without hearing, as quickly as practicable.

(3) **Hearing procedures.**

(a) **General.** The hearing examiner shall admit all evidence, unless he or she determines that the evidence is irrelevant, immaterial, unduly repetitious or otherwise unreliable or of little probative value. Evidence relating to settlement that would be excluded by the New Mexico Rules of Evidence is not admissible.

(b) **Witness examination.** Witnesses shall be examined orally and under oath or affirmation, provided that the parties may stipulate to the admission of the testimony of a witness, or part thereof. Parties shall have the right to cross-examine a witness, provided that the hearing examiner may limit cross-examination that is unduly repetitious, harassing or beyond the scope of the direct testimony.

(c) **Exhibits.** A party shall label each exhibit used during the hearing or offered into evidence with a designation identifying the party, the witness using or offering the exhibit and a serial number.

(d) **Burden of persuasion.** The division has the burden of going forward with the evidence and of proving by a preponderance of the evidence the facts relied upon to show the alleged violation occurred and that the proposed civil penalty is appropriate. Following the establishment of a prima facie case, respondent shall have the burden of going forward with any adverse evidence or defense to the allegations.

(4) **Post-hearing procedures.**

(a) **Transcript.** The hearing shall be transcribed verbatim. Respondent may order a copy of the transcript from the reporter at its own expense.

(b) **Recommended decision.** The director may request that the hearing examiner prepare a recommended decision.

(c) **Final order.** The director shall file a final order addressing the material issues of fact and law and may assess a sanction for each alleged violation, which shall be served on the division and the respondent.

**FH. Commission review.** No later than 30 days after the director serves the final order, a party may file a notice of appeal with the commission and shall serve the notice of appeal on the other party. The commission shall schedule a hearing on the appeal and notify the parties of the date and time of the hearing. The commission may appoint a hearing examiner, who may be a member of the commission. The commission shall conduct a de novo review, provided however, that the parties may stipulate to the issues to be heard and to the admission of all or

part of the record before the division. The commission shall conduct the hearing in accordance with the adjudicatory procedures in Paragraph (1), Subparagraphs (c) through (g) of Paragraph (2), Paragraph (3) and Subparagraph (a) of Paragraph (4) of Subsection E of 19.15.5.10 NMAC.

**I. ~~Rehearing before the Commission.~~** Any party adversely affected by the decision of the Commission may file a petition for rehearing with the Commission which the Commission shall act upon as provided in Section 70-2-25(A) NMSA.

**~~GJJ.~~ Payment of civil penalty.** No later than 30 days after the director serves the final order, respondent shall pay the full amount of the civil penalty assessed in the final order, provided however that if respondent files a notice of appeal to the commission, no later than ~~30-35~~ days after the commission files a final order or the appeal is withdrawn, respondent shall pay the full amount of the civil penalty assessed in the final order. ~~If the respondent files an appeal to district court pursuant to Section 70-2-25(B) NMSA, any civil penalty paid by the respondent pursuant to the final order is subject to refund, in whole or in part, by the division if and to the extent that respondent is successful in respondent's appeal to the district court.~~

**~~HKJ.~~ Resolution after commencement of hearing.** If the parties agree to resolve a notice of violation at any time after the commencement of a hearing, they shall file a stipulated final order signed by both parties. The stipulated final order shall state that respondent admits the division's jurisdiction to file the notice of violation, consents to the specified relief, including the civil penalty, if any, and waives respondent's right of review by the commission or the court, as applicable.

**~~HLK.~~ Publication.** On or about October 1 of each year, the division shall publish a list identifying the temporary cessation orders and notices of violation issued during the preceding year, along with the civil penalty paid, if any.

**~~JML.~~ Reservation.** Nothing in 19.15.5.10 NMAC precludes the division from bringing any other action and seeking any relief allowed by the Oil and Gas Act.

[19.15.5.10 NMAC - Rp, 19.15.14.1227 NMAC, 12/1/2008, A, xx/xx/xxxx]

Figure: 19.15.5.10(D)

Table 1. Penalty Guideline

General Description	Base Fine Amount
Commission denied access	\$500.00
failure to comply with well sign requirements	\$250.00
failure to comply with entrance sign requirements	\$250.00
failure to comply with tank battery sign requirements	\$250.00
no drilling permit approved	\$2,500
no drilling permit: no application filed	\$5,000
use of prohibited pits: fresh water pit area	\$2,500
use of prohibited pits: salt water or other fluid area	\$2,500
reserve pits: fresh water pit area	\$2,500
reserve pits: salt water or other fluid pit area	\$2,500
workover and other pits: dry	\$1,200
workover and other pits: wet	\$2,500
no permit to dispose or inject	\$2,500
failure to comply with tubing and packer requirements	\$1,000
open casing/tubing	\$1,000
failure to comply with wellhead control requirements	\$2,500
failure to comply with surface casing requirements	\$1,000
failure to notify of setting plugs	\$750
failure to follow general plugging requirement	\$500.00
failure to remove miscellaneous loose junk and trash	\$500.00
failure to remove tanks, vessels, and related piping	\$1,250.00
failure to empty tanks, vessels, and related piping	\$2,500
failure to test prior to reactivating well	\$500
failure to file completion records/logs	\$1,000
failure to notify of incident	\$1,500
improper fire prevention	\$500
improper storage tank signs in a non-public area	\$250.00
improper storage tank signs in a public area	\$250.00
improper entry signs in a non-public area	\$250.00
improper entry signs in a public area	\$250.00
improper entry signs in a populated public area	\$250.00
failure to update contingency plan	\$1,250.00
failure to notify of H2S contingency plan activation	\$2,500
failure to notify of H2S contingency plan activation	\$5,000
intentional failure to file written report of H2S release	\$1,500
failure to file written report of emergency H2S release	\$2,500
no permit to dispose or inject	\$2,500
failure to comply with tubing and packer requirements	\$1,000
failure to comply with hazardous waste disposal operation requirements	\$1,000



<b>Table 1 (cnt'd)</b>	
<b>General Description</b>	<b>Base Fine Amount</b>
failure to file completion report	\$500
failure to permit seismic/core holes penetrating usable quality water	\$500
failure to properly plug seismic/core holes	\$500

Figure: 19.15.5.10(D) NMAC

**Table 2: Factors in Enhancements**

<b>Evidentiary Factors</b>	<b>Threatened or Actual Pollution</b>	<b>Safety Hazard</b>	<b>Severity of Violation</b>
Agricultural land or sensitive wildlife habitat	\$500 to \$2,500		
Endangered or threatened species	\$1,000 to \$5,000		
Minor freshwater source (minor aquifer, seasonal watercourse)	\$1,250 to \$3,750		
Major freshwater source (major aquifer, creeks, rivers, lakes, and reservoirs)	\$2,500 to \$12,500		
Impacted residential/public areas		\$500 to \$7,500	
Hazardous material release		\$1,000 to \$12,500	
Reportable incident/accident		\$2,500 to \$12,500	
Reckless conduct of operator			Double total penalty
Intentional conduct of operator			Triple total penalty

Figure: 19.15.5.10(D) NMAC

**Table 3. Penalty enhancements based on number of prior violations within four years**

<b>Number of violations in four years prior to action</b>	<b>Enhancement amount</b>
One	\$500
Two	\$1,000
Three	\$1,500
Four	\$2,000

Figure: 19.15.5.10(D) NMAC

**Table 4. Penalty enhancements based on total amount of prior penalties within four years**

<b>Total administrative penalties assessed in the four years prior to action</b>	<b>Enhancement amount</b>
Less than \$5,000	\$500
Between \$5,000 and \$12,500	\$1,250
Between \$12,500 and \$25,000	\$2,500
Between \$25,000 and \$50,000	\$5,000
Between \$50,000 and \$100,000	\$10,000
Over \$100,000	10% of total amount

Table 5: Factors in Mitigation

Factors in Mitigation	Adjustments to Penalty		
Absence of similar prior violations by operator in previous 24 months	50% reduction		
Low productive capacity of well for first violation on well*	20-30 bbls. oil/day or 400-600 mcf/day: 25% reduction	10-19.9 bbls. oil/day or 200-399 mcf./day 50% reduction	Less than 10 bbls./oil day or 200 mcf./day 75% reduction
Lack of Severity to Violation	Tangible efforts made to comply: 25% reduction	Substantial efforts to comply: 50% reduction	
Size of Operator/ Financial ability of operator to pay fine	Operates 501-1,000 wells in NM: 25% reduction	Operates 101-500 wells in NM: 50% reduction	Operates less than 100 wells in NM: 75% reduction

\* Average of 12 months prior to month of violation using reported barrels of oil for oil wells and reported mcf. of gas for gas wells.