

STATE OF NEW MEXICO  
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT  
OIL CONSERVATION DIVISION 4 20

IN THE MATTER OF THE PROPOSAL OF THE OIL CONSERVATION DIVISION, ON ITS OWN MOTION, TO AMEND RULE 7 OF 19.15.1 NMAC; RULES 101 AND 102 OF 19.15.3 NMAC; RULES 201 AND 203 OF 19.15.4 NMAC; RULE 701 OF 19.15.9 NMAC; RULES 1101, 1103, 1104 AND 1115 OF 19.15.13 NMAC; THE ADOPTION OF RULES 37 AND 38 OF 19.15.1 NMAC; RULES 100 OF 19.15.3 NMAC; RULE 1227 OF 19.15.14 NMAC.

CASE NO. 13564

PRE-HEARING STATEMENT

This Pre-Hearing Statement is submitted by Holland & Hart LLP as required by the Oil Conservation Division.

APPEARANCES OF PARTIES

APPLICANT

New Mexico Oil Conservation Division

ATTORNEY

David K. Brooks, Esq.  
Oil Conservation Commission  
1220 South St. Francis Drive  
Santa Fe, NM 87505

OPPOSITION

New Mexico Oil & Gas Association ("NMOGA")

ATTORNEY

William F. Carr, Esq.  
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STATEMENT OF CASE

APPLICANT

The hearing concerns the following: adoption of a new rule setting out procedures for compliance proceedings (to be codified as 19.15.14.1227 NMAC); amendment of 19.15.17 NMAC to define "knowingly and

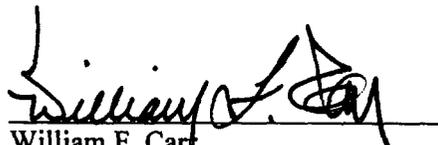
willfully”; adoption of a new rule clarifying the enforceability of permits and administrative orders (to be codified as 19.15.1.38 NMAC); amendment of 19.15.13.1115 NMAC to clarify monthly reporting requirements and their enforcement; adoption of a new rule creating a “good standing” requirement for well operators (to be codified as 19.15.1.37 NMAC); adoption of a new rule regarding operator registration, change of operator and change of name, and including a “good standing” requirement (to be codified as 19.15.3.100 NMAC); amendment of 19.15.3.102 NMAC and 19.15.3.1101 NMAC to clarify the issuance of permits to drill, deepen or plug back, and include a “good standing” requirement; amendment of 19.15.9.701 NMAC to clarify injection permit requirements, and include a “good standing” requirement; amendment of 19.15.13.1104 NMAC to clarify the assignment of allowables and authorization to transport, and include a “good standing” requirement; amendment of 19.15.3.101 NMAC to clarify and expand financial assurance requirements and increase the amounts of one-well financial assurances; amending 19.15.4.203 NMAC, 19.15.1.7 NMAC, 19.15.4.201 NMAC, and 19.15.13.1103 NMAC to distinguish between “temporary abandonment” and “approved temporary abandonment” and clarify the requirements for approved temporary abandonment.

NMOGA will appear and present testimony on the issues raised in its Comments and Proposals of Alternative Rule Amendments. A copy of these Comments and Proposals for Alternative Rule Amendments is attached hereto and incorporated herein by reference.

**PROPOSED EVIDENCE**

Attached hereto is our Exhibit No. 1 that will be presented at the hearing. NMOGA will call the following witnesses to review the proposed rules and to present testimony on the impact of these rules on operators in New Mexico:

<b><u>WITNESSES:</u></b>	<b><u>ESTIMATED TIME</u></b>	<b><u>NUMBER OF EXHIBITS</u></b>
Bruce Gantner (Petroleum Engineer)	30 Minutes	Approx. 1
Elizabeth Bush (Petroleum Engineer)	30 Minutes	None

  
William F. Carr  
Attorney for the New Mexico Oil and Gas Association

**CERTIFICATE OF SERVICE**

I hereby certify that on this 5<sup>th</sup> day of October 2005, I have caused to be hand-delivered a copy of our  
Entry of Appearance in the above-captioned case to the following:

David K. Brooks, Esq.  
Oil Conservation Commission  
1220 South St. Francis Drive  
Santa Fe, New Mexico 87505

  
\_\_\_\_\_  
William F. Carr  
Attorney for the New Mexico Oil and Gas  
Association

**Comments and Proposals for Alternative Rule Amendments of the  
New Mexico Oil Gas Association and the  
Independent Petroleum Association of New Mexico  
on the Oil Conservation Division's Proposed Enforcement Rules  
October 4, 2005**

**GENERAL COMMENTS:**

In recent years the members of the New Mexico Oil and Gas Association and IPA New Mexico have devoted substantial time and effort, working with the Oil Conservation Division, to assure that its rules and regulations lawfully and effectively regulate the oil and gas industry. NMOGA has aggressively pursued practices and policies that are designed to ensure that in its dealing with other stakeholders, the oil and gas industry is a good neighbor and that its activities are conducted with utmost concern for the environment and public health and safety. NMOGA and IPANM do not disagree with the stated objective of the proposed enforcement rules - compliance with the Division's statutes, rules and regulations. However, while the Division has stated that it wants to make it easy for good companies to do business in New Mexico, we are concerned that these rules, as drafted, are directed at the good operators not at bad actors.

We believe that the Oil Conservation Division erred in departing from its traditional rule-making path by not involving all parties, including the oil and gas industry, in development of these rules. If the Division had involved the oil and gas industry, perhaps our threshold questions would have been answered: What is the problem that these rules are designed to fix? What problems are not addressed by current rules?

The difficulty we have faced in responding to the proposed enforcement rules has been further compounded by the limited time allowed for comment and the resulting absence of meaningful dialogue between the agency and those who are most directly affected by these rules. We are concerned that the rules that will result from this process will unnecessarily contain provisions that will force operators to challenge them in the courts instead of resolving our concerns through the reasonable dialogue that has been the hallmark of prior Division rulemaking efforts.

There are several problems with the proposed rules that must be corrected to protect operators from the serious economic consequences that can result from subjective decisions by the agency based on arbitrary standards, misinformation and incorrect data.

The NMOGA and IPANM comments will focus on these major issues. Individual member companies will also provide comments on these and other concerns about the rules as drafted.

## **SPECIFIC COMMENTS:**

### **GOOD STANDING: (New Rule 19.15.1.37)**

Our primary concern relates to the Division's proposed "good standing" rules and the criteria set out therein. As these rules are drafted, if the Division unilaterally determines that an operator is not in good standing, that operator's right to do business in this state can be significantly impaired.

### **NUMBER OF ALLOWED INACTIVE WELLS**

One of the criteria in New Rule 19.15.1.37.A ties an operator's standing to the number of wells it operates that are not in compliance with the Division rules governing the abandonment of wells. It provides that for an operator of fewer than 100 wells to be in good standing, it may have no more than two wells out of compliance. Operators of more than 100 wells may have no more than five wells out of compliance (19.15.4.201 NMAC). This rule sets standards that discriminate against larger operators. The larger the operator, the smaller the percentage of its total wells may be out of compliance. For example, under the rule as proposed, if an operator operates 2000 wells in this state, it may have only 0.25% of its wells out of compliance where an operator with only 4 wells may have 50% of its wells out of compliance and still be in good standing. This rule should be amended to provide that the number of wells an operator is allowed to have on the Division's inactive well list and remain in good standing should be a percentage of the total wells operated in New Mexico by the operator and its related entities. To protect small operators, this rule should also set a floor under the number of wells an operator may have out of compliance.

## **RECOMMENDATION**

NMOGA and IPANM recommend that New Rule 19.15.4.201.A be amended as follows:

- A. A well operator is in good standing with the division if the operator
- ....
- (4) has no more than five wells or 5% of the wells it operates in New Mexico, whichever is larger, out of compliance with 19.15.4. 201 NMAC that are not subject to an agreed compliance order setting a schedule for bringing the wells into compliance with 19.15.4. 201 NMAC and imposing sanctions if the schedule is not met.

## **ACCURACY OF THE DATA USED**

The proposed rules provide serious sanctions against any operator that the Division determines is not in good standing. Direct sanctions include the Division refusal to approve a permit to drill or work-over a well (19.15.3.102 NMAC) and denial of authorization to transport oil or natural gas (19.15.13.1104 NMAC). Furthermore, the

proposed amendments to Rule 19.15.9.701 NMAC provide broad authority to the Division to revoke existing injection permits if an operator is determined to not be in good standing (19.15.9.701 NMAC).

Indirect, and perhaps more serious, consequences can result if the Division posts the name of the operators it determines are not in good standing on its website (19.15.1.37 NMAC). Identifying an operator as not being in good standing will impair an operator's ability to enter agreements with third parties that will directly impact its ability to work in the state. Before the Division determines that an operator is not in good standing, it must assure that its determinations are based on accurate information.

As discussed at the Division's stakeholders meeting held on September 21st, a preliminary review of the Division's Inactive Well List reveals a number of errors in the wells listed. If this list is used to determine whether or not an operator is in good standing, it must be accurate. However, the operators are concerned that the list will always contain inaccuracies that will result from reporting errors and/or delays in finalizing Oil Conservation Division approval of information filed by operators.

Operators fear that they will lose their good standing, not because of a failure to comply with the rules of the Division, but because of an error in the Division's data. To avoid this situation and to assure that the data is correct prior to the determination by the Division that an operator is not in good standing, NMOGA and IPANM recommend that any operator who has more than the allowed wells on the Division's Inactive Well List be advised by the Division, by Certified Mail, that it has 30 days within which to contact the Division and to bring these wells into compliance or it may be found to not be in good standing and subject to the other provisions of these enforcement rules.

When an operator files an Application for Permit to Drill, the Division will be able to determine if that operator is in good standing and, if not, require that it take such action as is required to come back into compliance with Division rules. If it can advise an operator that it is not in good standing in this circumstance, it should be able to notify non-compliant operators that their standing before the Division may be at risk and give them 30 days to bring wells into compliance with Division rules.

No other amendment to the proposed rules will provide this protection to operators or protect the Division from impairing property interests without due process of law. A delay in the effective date of the rules would enable operators to bring wells into compliance, but more is needed. Providing information on the Division's web page that will enable operators to track the status of any inactive well will also help.

Thirty days notice would put the burden on the operator to check the list and the data therein and will afford that operator an opportunity to avoid its being determined to not be in good standing based on inaccurate data. It would also assure that if an operator acquires wells from another operator that are not in compliance, it will not be subject to an immediate determination that it is not in good standing because of the status of wells

it has just acquired. It would have an opportunity to either bring the wells into compliance or enter into an Agreed Compliance Order with the Division.

Providing operators 30 days written notice will also help address the fundamental due process issue raised by the current proposal. Since an operator's "good standing" will determine whether or not it is able to conduct business in New Mexico, if an operator's "good standing" is revoked by the Division, its constitutionally protected property rights will be affected. Unless it is given notice of the pending Division action and is afforded an opportunity to take the matter to hearing, its rights will be impaired without due process of law. Therefore, at a minimum, before the Division revokes an operator's good standing, it must provide the operator with notice and an opportunity to be heard.

The proposed rule provides that if a well is placed on the non-compliant list, a "rebuttable presumption" is created that the well is out of compliance (19.15.1.37.E.(2) NMAC. NMOGA and IPANM ask that an operator be provided 30 days to correct errors, rebut this presumption, and defend itself.

#### RECOMMENDATION

NMOGA and IPANM recommends that Rule 19.15.1.37.E NMAC be amended by the addition of the following language:

F. Prior to revoking the good standing of any operator the Division shall give notice to the operator that, according to division records, it fails to meet the good standing standards of Section 19.15.1.37 and that it has 30 days from the date of this notice to bring its wells into compliance, or negotiate an agreement to bring its wells into compliance, with Division Rule 19.15.4.201 NMAC.

If an operator fails to either bring its wells into compliance with rule 19.15.4.202 NMAC or enter an agreed compliance order with the division, its good standing may then be cancelled.

#### DEFINITION OF "INACTIVE WELL"

The Division's inactive well list should include all wells that have not been properly plugged and abandoned or temporarily abandoned pursuant to Rule 19.15.4.201 NMAC. However, it currently includes a number of wells that are not inactive. To clarify this term and facilitate operator review and challenges to the wells on the inactive well list, this term should be defined in the proposed enforcement rules.

#### RECOMMENDATION

NMOGA and IPANM recommend that the proposed rules contain the following definition:

I. Definitions beginning with the letter "I".

- (1) "Inactive well" A well is "inactive" if according to division records it:
  - a) Has not produced or been used for injection for a continuous period of more than one year plus 90 days;
  - b) Does not have its wellbore plugged in accordance with 19.15.4.202 NMAC;
  - c) Is not on temporary abandonment status in accordance with 19.15.4.203 NMAC;
- (2) A well is not "inactive" if it is:
  - a) A dewatering coal gas well;
  - b) An approved injection well; or
  - c) Not producing because of delays in obtaining surface access to the well.

### **UNIFORMITY OF ENFORCEMENT**

Operators have expressed concern about inconsistencies in the implementation and enforcement of Division rules by the different district offices. These operators are concerned that these inconsistencies will result in wells being considered out of compliance and included on the inactive list in one portion of the state but not in others. The result can be that the good standing status of an operator may depend on the portion of the state in which it operates. The Division expects operators to be consistent. The Division should also be consistent in the interpretation and enforcement of its rules.

### **OPERATOR REGISTRATION**

New Rule 19.15.3.100 provides for operator registration. If not registered, an entity cannot do business in New Mexico. Under this rule, registration may be denied if "an officer, director, partner in the applicant or person with an interest in the application exceeding 5%, is or was within the past five years an officer, director, partner or person with an interest exceeding 5% in another entity that is not in good standing pursuant to 19.15.1.36 NMAC." This provision requires information generally not within or available to another operator. For example, how would an operator know if a person owning an interest in a property subject to a pooling application had been an officer, director, partner or person with an interest exceeding 5% in another entity that had not been in good standing before the Division? While the rule appears to be directed at known bad actors, the inclusion of this provision is of concern to other operators who will try to comply with these rules.

## **FINANCIAL ASSURANCES**

The amendments to Rule 19.15.3.101 NMAC now require two bonds covering wells on federal lands. NMOGA and IPANM believe that the state should have access to a bond if the state is required to plug a well. However, NMOGA and IPANM request that the Division contact the BLM and explore a single joint bond for these wells. There is precedent for this approach in the mining industry and a joint bond would avoid the “double-dipping” of the current proposed amendment.

The Division is also proposing to extend the bonding requirements to cover location restoration and remediation. Bond suppliers have dwindled in number and increasing the potential liability as proposed will further exacerbate this situation. NMOGA and IPANM believe that plugging bonds should be just that and only used for plugging wells.

Compliance with the Division’s financial assurance rules is also a condition of “good standing.” Accordingly, the due process concerns previously raised in these comments concerning inactive wells are applicable to the financial assurances provisions in the proposed enforcement rules.

## **“KNOWINGLY AND WILLFULLY”**

The definition of “knowingly and willfully” contained in the proposed rules has been drawn from a BLM definition used for certain matters involving surface issues. NMOGA and IPANM are concerned about this choice of definition. We believe that before it is determined that an operator has knowingly and willfully violated the Division’s statutes, rules and regulations, the Division should be required to show that the violation was intentional. An operator should not be found to have “knowingly and willfully” violated the Oil and Gas Act or the rules and regulations promulgated there under where the operator does not know its actions are in violation of statute or rule. We also are concerned about the use of terms like “reckless disregard” and “evil intent.”

## **RECOMMENDATION**

NMOGA and IPANM recommend that the current definition of “Knowingly and Willfully” in the Division’s proposed enforcement rules be replaced with the following definition adapted from OSHA’s Willful Violation Criteria:

K. Definitions beginning with the letter “K”.

“Knowing and willful” means either that the violation was intentional of an applicable law, rule, order or permit or in plain indifference to their requirements. The following criteria further defines what will be considered a knowing and willful violation:

1) The operator committed an intentional and knowing violation if:

- a. An authorized representative of the operator was aware of the applicable law, rule, order, or permit condition and was also aware of a condition or practice in violation of those requirements and did not abate the situation.
  - b. An authorized representative of the operator was not aware of the applicable law, rule, order, or permit condition but was aware of a comparable legal requirement (e.g., federal) and was also aware of a condition or practice in violation of that requirement and did not abate the situation.
- 2) The operator committed a violation with plain indifference if:
- a. Higher management officials were aware of the applicable law, rule, order, or permit condition to the company's business but made little or no effort to communicate the requirement to lower level employees and supervisors.
  - b. Company officials were aware of a continuing compliance problem but made little or no effort to avoid violations.
  - c. An authorized representative of the company was not aware of any legal requirement, but was aware that a condition or practice was a hazard to public safety or the environment and made little or no effort to determine the extent of the problem or take corrective action.

### **APPROVED TEMPORARY ABANDONMENT**

The Division is proposing amendments to Rule 19.15.4.203 that governs the temporary abandonment of wells. The intent of these amendments appears to be an attempt by the Division to extend its bonding capacity to inactive wells. The amendments are confusing and result in the inconsistent use terms. If operators are going to comply with Division rules, they should be understandable.

NMOGA and IPANM oppose these amendments. We believe the current temporary abandonment rules are sufficient and have been working. The real issue involves inactive wells and this has been adequately addressed elsewhere in the proposed rules.

We also believe that these amendment go beyond the authority of the Division as those powers have been defined and limited by the Oil And Gas Act. If additional authority is needed to extend the Division's bonding capacity, that is a matter to be addressed by the legislature.

### **CONCLUSION**

The New Mexico Oil and Gas Association and IPA New Mexico appreciate this opportunity to comment on the Oil Conservation Division's proposed enforcement rules and propose amendments to the current draft. NMOGA and IPANM will participate in the October 13, 2005 hearing on these proposals.

**19.15.1.7 Definitions:**

A. Definitions beginning with the letter "A"

Delete definition for "approved temporary abandonment"

I. Definitions beginning with the letter "I".

- (1) Inactive shall be the status of a well that according to division records:
  - a) Has not produced or been used for injection for a continuous period of more than one year plus 90 days;
  - b) Does not have its wellbore plugged in accordance with 19.15.4.202 NMAC;
  - c) Is not on temporary abandonment status in accordance with 19.15.4.203 NMAC;
- (2) A well is not "inactive" if it is:
  - a) A dewatering coal gas well;
  - b) An approved injection well; or
  - c) Not producing because of delays in obtaining surface access to the well.

T. Definitions beginning with the letter "T"

(2) Temporary abandonment shall be the status of a well that is in compliance with 19.15.4.203 NMAC

**[NEW] 19.15.1.37 Good Standing:**

E. Compliance with inactive well requirements.

- (1) The division shall post on its website, and update daily, a "~~rule 201~~ non-compliant list" listing each well, by operator, that according to division records:
  - a) Shows the well to be "inactive"
  - b) Is not subject to an agreed compliance order setting a schedule for bringing the well into compliance with 19.15.4.201 NMAC and imposing sanctions if the operator does not meet the schedule.
- (2) For purposes of 19.115.1.37 NMAC, the listing of a well on the division's ~~rule 201~~ "non-compliant list" creates a rebuttable presumption that the well is out of compliance with 19.15.4.201 NMAC and 19.15.4.203 NMAC.

**19.15.4.201 Wells to be Properly Abandoned:**

- B. A well shall be either properly plugged and abandoned or placed on ~~approved~~-temporary abandonment status in accordance with these rules within (90) days after:

**19.15.4.203 ~~Approved~~-Temporary Abandonment:**

Delete “approved” any time it appears in front of “temporary abandonment”.

Please see the attached amended proposed rule 19.15.4.203 for examples where the term “temporarily abandoned” is used that is inconsistent with the definition that the OCD is proposing for temporary abandonment to mean.

**19.15.13.1103 Sundry Notices and Reports on Wells (Form C-103)**

- A.(1)(c) placing a well on ~~approved~~-temporary abandonment status:
- B.(2)(d) work to secure ~~approved~~-temporary abandonment status:
- E. Report of temporary abandonment work. The operator shall file a notice of work to secure ~~approved~~-temporary abandonment status within thirty days following completion of the work. The report.....

**19.15.4.203 APPROVED TEMPORARY ABANDONMENT;**

**A. Wells Which May Be Temporarily Abandoned** Approved temporary abandonment status.

~~(1) The Division~~ division may permit any well which is required to be properly abandoned under these rules but which has potential for future beneficial use for enhanced recovery or injection, and any other well for which an operator requests temporary abandonment, to be temporarily abandoned place any well on approved temporary abandonment status for a period of up to five (5) years. Prior to the expiration of any approved temporary abandonment the operator shall return the well to beneficial use under a plan approved by the Division division approves, permanently plug and abandon said well or apply for a new approval to temporarily abandon the well.

**B. Request For Approval And Permit** for approval and permit.

(1) Any operator seeking approval for temporary abandonment shall submit on Form form C-103, Sundry Notices and Reports on Wells sundry notices and reports on wells, a notice of intent to temporarily abandon seek approved temporary abandonment status for the well describing the proposed temporary abandonment procedure to be used. The operator shall not commence any No work shall be commenced until approved by the Division division. The and the operator shall give 24 hours notice to the appropriate District district office of the Division division before work actually begins.

(2) The division shall not approve temporary abandonment until the operator No temporary abandonment shall be approved unless evidence is furnished furnishes evidence demonstrating to show that such well the casing of such well is mechanically sound and in such condition as to prevent:

- (a) damage to the producing zone;
- (b) migration of hydrocarbons or water;
- (c) the contamination of fresh water or other natural resources; and
- (d) the leakage of any substance at the surface.

~~(3) If the well fails the mechanical integrity test required herein, the well shall be plugged and abandoned in accordance with these rules or the casing problem corrected and the casing retested within ninety (90) days.~~

~~(4) Upon successful completion of the work on the temporarily abandoned well, the operator shall will submit a request for approved Temporary Abandonment~~ temporary abandonment to the appropriate district office on Form form C-103 together with such other information as is required by Rule 1103 E. (1) Subsection E of 19.15.13.1103 NMAC.

~~(5) The Division may require the operator to post with the Division a one well plugging bond for the well in an amount to be determined by the Division to be satisfactory to meet the particular requirements of the well.~~

~~(6)~~ (4) The Division division shall specify the permit's expiration date of the permit, which shall be not more than five (5) years from the date of approval.

**C. Tests Required** Demonstrating mechanical integrity.

(1) The division may approve the following methods of demonstrating casing integrity may be approved for temporarily abandoning a well for wells to be placed on approved temporary abandonment status:

(a) The operator may set a cast iron bridge plug will be set within one hundred (100) feet of uppermost perforations or production casing shoe, and load the casing loaded with inert fluid and pressure tested to 500 pounds per square inch surface pressure with a pressure drop of not more than 10% for thirty (30) minutes; or

(b) The operator may run a retrievable bridge plug or packer will be run to within one hundred (100) feet of uppermost perforations or production casing shoe, and and test the well tested to to 500 pounds per square inch for surface pressure for thirty 30 minutes with a pressure drop of not greater than 10% for thirty (30) minutes; or

~~(c) for a gas well in southeast New Mexico completed above the San Andres formation, if the operator can demonstrate that the fluid level is below the base of the salt and that a Bradenhead test shows no casing leaks, the Division may exempt the well from the requirement for a bridge plug or packer; or~~

~~(d) a casing inspection log confirming the mechanical integrity of the production casing may be submitted~~

~~(c) The operator may demonstrate that the well has been completed for less than five years and has not been connected to a pipeline.~~

(2) The division will not accept mechanical integrity tests or logs conducted more than 12

~~months prior to submittal. Any such test which is submitted must have been conducted within the previous twelve (12) months.~~

(3) The operator shall record mechanical integrity tests on a chart recorder with a maximum two hour clock and maximum 1000 pound spring, which has been calibrated within the six months prior to conducting the test. All witnesses to the test shall sign the chart. The operator shall submit the chart with the form C-103 requesting approved temporary abandonment status.

(4) The Division ~~division~~ may approve other casing tests submitted the operator proposes if the operator demonstrates that the test will satisfy the requirements of Paragraph (2) of Subsection B of 19.15.4.203 NMAC. ~~on Form C-103 on an individual basis.~~

[7-12-90...7-12-90, 2-1-96; 19.15.4.203 NMAC - Rn, 19 NMAC 15.D.203, 12-14-01]