

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

IN THE MATTER OF THE HEARING CALLED
BY THE OIL CONSERVATION COMMISSION FOR
THE PURPOSE OF CONSIDERING:

CASE NOS: 20895

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

REPORTER'S TRANSCRIPT OF PROCEEDINGS
COMMISSIONER HEARING
January 2, 2020
Santa Fe, New Mexico

BEFORE: ADRIENNE SANDOVAL, CHAIRWOMAN
JORDAN KESSLER, COMMISSIONER
DR. THOMAS ENGLER, COMMISSIONER
MIGUEL LOZANO, ESQ.

This matter came on for hearing before the New Mexico Oil Conservation Commission on Thursday, January 2, 2020, at the New Mexico Energy, Minerals, and Natural Resources Department, Wendell Chino Building, 1220 South St. Francis Drive, Porter Hall, Room 102, Santa Fe, New Mexico.

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Pro Se

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1 CHAIRWOMAN SANDOVAL: We will now proceed with
2 the rules hearing in Case Number 20895 to consider the
3 proposed amendment to the Commission Rule 19.9.5 regarding
4 enforcement submitted to the Oil Conservation Division at
5 the November 6, 2019 Commission meeting.

6 This hearing will be conducted in accordance with
7 the Open Meetings Act, State Rules Act and the Commission's
8 Rulemaking Procedures. This hearing is being recorded.
9 Parties interested in obtaining a copy of the transcript may
10 contact the court reporter directly at the conclusion of
11 this hearing.

12 The Commission has received timely prehearing
13 statements from the following: New Mexico Oil Conservation
14 Division, Independent Petroleum Association of New Mexico,
15 New Mexico Oil and Gas Association, and Larry Marker.

16 Will each party enter their appearances.

17 MR. AMES: Good morning, Madam Chair,
18 Commissioner Kessler, Commissioner Engler, counsel, my name
19 is Eric Ames. I'm an attorney in the Office of General
20 Counsel with the Energy, Minerals and Natural Resources
21 Department here on behalf of the OCD.

22 MR. CLOUTIER: Good morning, Commission, staff,
23 Andrew Cloutier of Hinkle Shanor on behalf of the
24 Independent Petroleum Association of New Mexico with Sunny
25 Richardson from our Roswell, New Mexico office.

1 MR. FELDEWERT: Madam Chair, Michael Feldewert
2 with the Santa Fe office of Holland & Hart appearing on
3 behalf of the New Mexico Oil and Gas Association.

4 MR. MARKER: Good morning. I'm Larry Marker,
5 independent oil producer from southeast New Mexico here
6 representing myself and whatever interest may follow.

7 CHAIRWOMAN SANDOVAL: Thank you. Copies of the
8 proposed amendments to the rule have been available on the
9 Commission's website and the Commission's office, as well as
10 to the interested parties upon request. Printed copies of
11 the proposed rule changes are available at today's hearing
12 on the table located near the door.

13 The hearing will be conducted in a fair and
14 impartial manner so as to assure that the relevant facts are
15 fully elicited and to provide a reasonable opportunity for
16 all persons to be heard without making the hearing
17 unreasonably lengthy or cumbersome, or burdening the record
18 with unnecessary repetition.

19 The rules of civil procedure and evidence shall
20 not apply at this hearing. As Hearing Examiner I will make
21 such orders as maybe necessary to preserve decorum and to
22 prevent -- and to protect the orderly hearing process.

23 All those in attendance today, please sign the
24 attendance sheet at the back of the room, which will later
25 be entered into the record as an exhibit.

1 The hearing shall proceed as follows: Commission
2 counsel will present prefiled exhibits, exhibits admitted
3 into evidence are available for review by the public, but
4 cannot be removed from the room.

5 Any testimony will be taken under oath, but
6 members of the public may make unsworn statements before the
7 Commission if they choose. As Hearing Officer, I will admit
8 any relevant evidence unless I determine that the evidence
9 is incompetent or unduly repetitious.

10 Any person offering exhibits shall provide an
11 original to the Commission Administrator and copy to each of
12 the Commissioners and to its legal counsel, and shall
13 provide an additional copy for the public. If visual aids
14 are used, a dual copy must be submitted for including in the
15 record.

16 Please note the Commission will not make copies
17 of any exhibits used at this hearing. Any party who wishes
18 to make a brief opening statement before their presentation
19 of direct testimony may do so.

20 The Division will present direct testimony on the
21 proposed rule amendments. Other persons or parties who have
22 filed a timely notice of intent to present technical
23 testimony or a prehearing statement may present its
24 statement and/or direct testimony in the order I establish.

25 If any other person, including members of the

1 public, wish to present non-technical testimony, those
2 persons, in the order shown on the sign-up sheet, will
3 present direct testimony on their proposed rule amendment.

4 If you wish to testify and have not yet signed
5 in, please do so now. Because this hearing is being
6 transcribed, all persons presenting testimony must come to
7 the front to speak and may not speak from their seats.
8 Prior to providing testimony, please introduce yourself and
9 state your affiliation.

10 Please remember that only one person may speak at
11 one time. For all of the persons testifying, please direct
12 your testimony and answers to the Commission members. Any
13 persons who testify are subject to cross-examination on the
14 subject matter of his or her testimony and matters affecting
15 his or her credibility.

16 Cross-examination by the Commissioners will be
17 conducted at the conclusion of each presentation, followed
18 by cross-examination by any other identified party. Please
19 remember to direct all testimony and answers to questions to
20 the Commission itself, even if someone other than the
21 Commission member has asked the witness a question.

22 Parties that have filed a prehearing statement
23 are entitled to conduct cross-examination of any witness.
24 As Hearing Officer I may limit cross-examination to avoid
25 harassment, intimidation, needless expenditure of time or

1 undue repetition. Parties that have filed a prehearing
2 statement may make a brief closing argument at the
3 conclusion of the hearing in the same order as the direct
4 testimony.

5 We will now proceed.

6 Does the Commission counsel have any prefiled
7 exhibits to introduce as evidence?

8 MR. LOZANO: Thank you, Madam Chair. Yes, I do.
9 Entering as Exhibit 1 Commission certificate of compliance
10 with notice requirements that includes the following
11 exhibits: Legal notice published in the New Mexico Register
12 on November 26, 2019; Exhibit 1B, the legal notice published
13 in the Albuquerque Journal on November 15, 2019; Exhibit 1C,
14 notice of rule hearing posted on board website, on
15 Commission's website on November 22, 2019; and Exhibit 1D,
16 notice of rule hearing posted on the Sunshine Portal.

17 As Exhibit 2, the proposed amendment to the
18 board's Rule 19.9.5 NMAC entitled Enforcement and
19 Compliance.

20 As Exhibit 3, Division notice of finding of no
21 adverse effects under a Small Business Regulatory Relief
22 Act.

23 And in terms of public comment, written public
24 comment as Exhibit 4, written comment received from Dugan
25 Production Company;

1 Exhibit 5, written comment received from Louis
2 Fulton of CFM Oil;

3 Exhibit 6, written comment received from -- one
4 moment -- George Sharpe of Merrion Oil and Gas;

5 And Exhibit 7, written comment from Paul C.
6 Thompson of Epic Energy LLC. Those are all the prefiled
7 exhibits. The Commissioners should have those in front of
8 them in their board packets.

9 CHAIRWOMAN SANDOVAL: Are there any questions
10 from the Commission members?

11 COMMISSIONER ENGLER: No questions.

12 COMMISSIONER KESSLER: No questions

13 CHAIRWOMAN SANDOVAL: Exhibits 1 through 7 are
14 admitted into the record.

15 (Exhibits 1 through 7 admitted.)

16 CHAIRWOMAN SANDOVAL: If there are no preliminary
17 matters, we will move to testimony by the Division. Will
18 all persons who wish to testify at this hearing on behalf
19 the Division, please stand so that the court reporter can
20 administer the oath.

21 (Oath administered.)

22 CHAIRWOMAN SANDOVAL: Thank you. Does the
23 Division wish to make a brief opening statement?

24 MR. AMES: Yes, Madam Chair. Good morning, today
25 the Division is here to propose compliance rules to enforce

1 the Oil and Gas Act as required by recent amendment adopted
2 by the legislature.

3 The Division has one witness today, Mr. Gabriel
4 Wade, deputy director of the OCD. Mr. Wade will testify
5 that the legislature in the last session recognized that the
6 OCD lacked sufficient authority to enforce the Oil and Gas
7 Act.

8 In 2011 the New Mexico Supreme Court adopted a
9 decision in the Marbob case which effectively stripped the
10 Division of it's authority to assess administrative civil
11 penalties. As a result of the decision, OCD could enforce
12 the civil penalties only in court and only by proving that
13 the violation was knowing and willful, which is essentially
14 a criminal standard.

15 As a result OCD has filed only three cases for
16 civil penalties since 2011, three cases in nine years. The
17 consequence of OCD losing its authority to assess civil
18 penalties should not be surprising. Last month OCD -- or
19 actually two months ago OCD sent out more than 100 notices
20 of violation to operators for 1500 inactive wells, and more
21 than \$8 million in deficient financial assurance
22 requirements.

23 Since then the Division has received some
24 responses, but in large part it appears our notices of
25 violation have been ignored. That's why the legislature

1 amended the Oil and Gas Act and gave the Division the
2 authority to issue NOVs and assess civil penalties, directed
3 this Commission to adopt procedures for the OCD to implement
4 this authority.

5 The OCD's proposed rule satisfies the
6 legislature's purpose. It sets forth procedures to issue
7 and adjudicate NOVs and assess civil penalties. The
8 procedures are fair and reasonable, and they provide due
9 process, reasonable notice, and an opportunity for a
10 hearing.

11 Now, the Division, since filing its proposed rule
12 with the Commission received proposed modifications from the
13 New Mexico Oil and Gas Association or NMOGA and Independent
14 Producers Association of New Mexico or IPANM, and some of
15 those changes are acceptable to the Division, as we'll
16 explain in our testimony.

17 As Mr. Wade will testify, we can agree to changes
18 to clarify the information to be included in the notice of
19 violation, to restate the process for rehearings before the
20 OCC, to stay civil penalties pending a final order by the
21 OCC or district court, and there is a few other changes as
22 well that Mr. Wade will describe in his testimony.

23 All of these proposals are logical outgrowths of
24 the proposal that the Division submitted to the OCC. We
25 prepared an exhibit that has been presented to all of you on

1 the table, Exhibit 4.

2 This is a version of the rule as filed showing
3 the changes that we are willing to agree to in yellow
4 highlight, and Mr. Wade will testify regarding each of those
5 proposed changes.

6 Now, while the OCD has agreed with NMOGA and
7 IPANM regarding some of the changes, it has not to all of
8 them. Some of those other changes are not, in our view,
9 acceptable. It appears that NMOGA and IPANM believe or
10 would have you believe there is no problem here to solve
11 with civil penalties, that everyone wants to comply with the
12 law, or they would just as soon as OCD let the operator know
13 that there was a problem.

14 Specifically, NMOGA and IPANM would prohibit the
15 Division from assessing a civil penalty unless it can show
16 that the violator knew or should have known about the
17 violation. They then propose that after the OCD issues an
18 NOC, the violator can avoid the civil penalty if it comes
19 into compliance. And then finally, if there has to be a
20 civil penalty, then there would be a set of tables in the
21 rule, apparently from Texas, that would prevent OCD from
22 exercising its discretion in the matter.

23 In our view, these changes all undermine the
24 legislative purpose in amending the Oil and Gas Act. As Mr.
25 Wade will testify, these changes prevent OCD from holding

1 violators responsible for their actions. The proposals
2 restrict OCD's ability to craft a civil penalty to fit any
3 violation. And finally he will testify that the proposed
4 changes tie OCD's hands so it can't make adjustments as it
5 gains experience with enforcement.

6 Now, in sum, the Division's proposed rule with
7 changes shown in Exhibit 4 comply with the law, are fair and
8 balanced, and provide due process to alleged violators.

9 Mr. Wade will testify that the rule is necessary.
10 We have over 1500 inactive wells, more than \$8 million in
11 deficient financial assurance, unreported spills, produced
12 water being dumped by the side of road.

13 The legislature said, "Enough," and gave the
14 Division the authority to issue NOVs and assess civil
15 penalties when necessary. It's now the Commission's turn to
16 act. We request that after hearing the evidence the
17 Commission adopt the OCD's proposed rule.

18 Now I would like to call Mr. Gabriel Wade on
19 behalf of the OCD.

20 CHAIRWOMAN SANDOVAL: The Division may now
21 present direct testimony on the proposed rule amendment.
22 Please call your first witness.

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GABRIEL WADE

(Sworn, testified as follows:)

DIRECT EXAMINATION

BY MR. AMES:

Q. Good morning.

A. Good morning.

Q. Please state your full name for the record.

A. Gabriel Wade.

Q. Where do you work, Mr. Wade?

A. I'm the deputy director of the Oil Conservation
Division.

Q. How long have you been deputy director?

A. Been deputy director for a little over a year,
but I've been with the agency for over six years.

Q. What are your responsibilities in the Division?

A. I help manage the daily workload of the Oil
Conservation Division, help ensure that the New Mexico Oil
and Gas Act rules are complied with. I help direct policy.
I have also, both as legal counsel and as acting director
and deputy director, proposed amendments to the Oil and Gas
Act and reviewed and prepared for the rulemaking.

**Q. Did you prepare a curriculum vitae for this
hearing?**

A. I did.

Q. Is that Exhibit 1 to the Department's -- excuse

1 me -- to the Division's prehearing statement?

2 A. It is.

3 Q. Okay. Did you prepare a presentation today?

4 A. I did.

5 Q. Would you like to proceed then?

6 A. Yes. I prepared a slide show. It's only 52
7 slides. I think the easiest way for the Commission to
8 follow along would be to track what I'm showing on the slide
9 show with Exhibit 4. All the changes I'm going to go
10 through are basically in order on that exhibit.

11 MR. MARKER: Did you say Exhibit 4?

12 THE WITNESS: Yes, sir.

13 A. So why are we here? During the 2019 legislative
14 session the New Mexico Legislature faced several things, one
15 was the obvious unprecedented oil and gas growth production
16 here in New Mexico, as well as disposal. With all of this
17 unprecedented growth, it's great for the state economy, but
18 it also had side effects. There is an influx of new
19 operators who may not know New Mexico's rules under the Oil
20 and Gas Act.

21 With the record growth in applications for
22 permits to drill and for new facilities and for disposal
23 wells, there is also more potential for spills and
24 remediation to be needed.

25 The legislature also recognized that there has

1 been a lack of OCD enforcement under the Oil and Gas Act.
2 This lack of enforcement is not fair to diligent operators
3 within the state. It creates an unequal playing field where
4 some operators can get away with whatever they want, while
5 some operators are diligently complying.

6 Ultimately New Mexico, the state, pays for -- for
7 actions like plugging wells, remediating spills when
8 non-compliant operators don't do that. These operators
9 often just declare bankruptcy and leave the state. New
10 Mexico pays both in monetary damages and also in terms of
11 its environment and fresh water.

12 And an example that was given in opening
13 statement is that in just recently, November of 2019, the
14 OCD issued over 100 NOV's. Those are notices of violation
15 for over 1000 inactive wells, and for over 8 million in
16 missing financial assurance or shortfalls in financial
17 assurance.

18 So prior to the amendment to 70-2-31, the OCD did
19 have limited power to effectively and efficiently ensure
20 compliance in the oil patch. The previous version of
21 70-2-31 had a knowingly and willfully standard which was a
22 difficult standard to prove, and I will talk about that a
23 little bit later.

24 There was a 2009 Supreme Court, New Mexico
25 Supreme Court case, the Marbob case in which a decision

1 stated that only the New Mexico Attorney General's Office
2 could levy civil penalties. Well, since 2009 to '19, the
3 attorney general's office didn't file any enforcement action
4 seeking civil penalties, and the OCD only filed three of
5 those types of actions. And that was after being
6 commissioned by the AG, and that was when the OCD could
7 prove knowingly and willfully.

8 The only way that OCD was able to prove knowingly
9 and willfully was because violators were -- entered into
10 stipulated agreed compliance orders, and then violated that
11 agreed compliance order, proving the knowing and willful.

12 So what amended 70-2-31 does is remove the
13 barriers and provide the OCD tools to efficiently and
14 effectively deter non-compliance through enforcement.

15 There is a few terms that I may use throughout
16 the presentation that I just wanted to clarify. Knowingly
17 and willfully is the standard that was in the previous
18 version of 70-2-31. And the Black's Legal Dictionary
19 defines knowingly as having or showing awareness, being
20 deliberate or conscious. And willfully is voluntarily and
21 intentional. Again, it's a high standard and usually linked
22 with a criminal standard which actually remains in
23 amended 70-2-31.

24 I'm going to refer to NOV. That stands for
25 notice of violation. It's a written notice to operators of

1 alleged violation or violations and possible sanctions. And
2 I'm going to refer to TCOs, which are temporary cessation
3 orders. They are similar to an injunction or an order to
4 cease activity.

5 Okay. OCD provided an Exhibit 2, which is the
6 language of amended 70-2-31, which is the source for the
7 rulemaking that we are proposing today. And what amended
8 70-2-31 does is remove the knowingly and willfully language
9 as a civil standard to prove violations under the Oil and
10 Gas Act. Again, that standard remains under the criminal
11 penalties because those penalties can include jail time.

12 Amended 70-2-31 allows the OCD to levy civil
13 penalties. It also limits the amounts of the civil
14 penalties. It provides basic NOV and TCO processes. Those
15 are also clarified by the proposed rule.

16 It provides due process, promotes settlement and
17 provides criminal penalties, which are unchanged from the
18 previous statute. And amended 70-2-31 requires this
19 Commission to adopt procedures for the OCD to issue NOVs and
20 TCOs, assess penalties and conduct hearings.

21 Okay. So OCD's Exhibit 3 and Exhibit 4 are the
22 proposed amendments. Again Exhibit 4, I will speak to a
23 little bit more, but it is the document that I feel would be
24 best for the Commission to track this presentation.

25 So the proposed amendment to 19.15.5 NMAC

1 replaces existing rules that aren't complying with amended
2 70-2-31 and implements 70-2-31. The rule tracks amended 31
3 by removing knowingly and willfully as a civil standard. It
4 gives civil penalties and limits those penalties and
5 promotes due process and settlement. It also provides
6 adjudicatory procedures for NOV's and TCO's.

7 So the OCD did conduct consultation with various
8 stakeholders. The OCD met with NMOGA, IPANM, and different
9 environmental NGOs to discuss their concerns and some
10 recommended changes. Using what OCD has proposed as
11 Exhibit 3, we worked off of that document with those
12 proposed concerns or recommended changes. And it
13 specifically, after further discussion with NMOGA and IPANM,
14 we incorporated some of that language and provided that
15 within Exhibit 4 before you.

16 And I just want to point out that the OCD is
17 committed to further consultations with stakeholders
18 regarding future penalty calculations.

19 Quick road map. I'm going to discuss the
20 proposed changes to 19.5.5 in order. I will talk about
21 Section 3, which is the statutory authority, Section 9,
22 which is compliance, Section 10, which is really the heart
23 of the rule. That's the enforcement portion. I'm going to
24 discuss the proposed Exhibit 4 language at each relevant
25 section.

1 And we also discuss some of NMOGA or IPANM's
2 proposals and why the OCD could not accept those and objects
3 to those at the relevant section. I will later talk about
4 how the proposed rule becomes effective and give a
5 conclusion.

6 So starting with 19.15.5.3, the proposed
7 amendment is to add a citation to 70-2-31, which is the
8 amended statute. I would also like to point out that this
9 rule also needs to refer to 70-2-31.1 which is the
10 requirement that the OCD publish some information regarding
11 compliance from the previous years.

12 And so I highlighted the proposed change in, in
13 my slide on the bottom right-hand corner. It's not
14 reflected on Exhibit 4 at this point, so that would be an
15 additional change.

16 The next proposed amendment to 19.15.5.8, the
17 enforcement of statute to rules, and all it does is add the
18 language directly from the Oil and Gas Act regarding
19 statutory duties, so it includes the prevention of waste and
20 protection of correlative rights to the protection of public
21 health and environment.

22 The next proposed amendment is to
23 19.15.5.9(A)(3), which is titled compliance. What it does
24 is removes the 70-day period that's within the old rule and
25 changes it to a 30-day compliance period. 30 days is a

1 standard compliance period in administrative practice, and
2 that prior 70-day language didn't have a clear origin and
3 it's arbitrary.

4 The next proposed amendment is to
5 19.15.5.9.(A)(4) titled compliance. And what it does is add
6 "or final" to the word "order." That's because the new rule
7 refers to stipulated final orders. That's when parties
8 agree to a resolution, and it also refers to final orders,
9 which is when the OCD or OCC holds a hearing and issues an
10 order.

11 I have highlighted on the left-hand part of the
12 slide, agreed compliance, and the only thing that I'm
13 pointing out here is that we kept that hold-over language to
14 deal with a situation where an ACO has been issued prior to
15 this rulemaking and should be completed under this
16 rulemaking. Going forward there won't be an ACO, agreed
17 compliance order.

18 The next proposed amendments are to 19.15.5.9(B)
19 through (E), and all of those sections are deleted entirely.
20 The current Section 9(B), the first sentence would be
21 replaced by Section 9(B)(1) of the proposed rule, and the
22 second sentence would be superseded by proposed Section 10.

23 The current Section 9(C) would be deleted because
24 that language has been moved to the end of proposed
25 Section 9.

1 The current Section 9(D) would be deleted because
2 it's been superseded by proposed Section 10. And the
3 current Section (E)(1) would be replaced by proposed Section
4 10(I), and (E)(2) would be deleted because it is superseded
5 by proposed Section 10.

6 The next proposed amendment is 19.15.5.9(B)
7 entitled inactive wells. And under (B)(1) little (a), it
8 defines an inactive well, the same definition as the current
9 rule, and that's when a well shows no production or
10 injection for the past 15 months. The amendment to (B)(1)
11 little (b) and little (c) is just relettering to be
12 consistent.

13 And the amendment to (B)(1) little (d) again uses
14 the word "final" before the word "order," and that's to be
15 consistent with the section that I already discussed,
16 5.9.(A)(4).

17 The amendment to (B)(2) is just reworded to be
18 consistent with section (B)(1) little (a), again using 15
19 months as a definition for inactive well.

20 The next proposed amendment is to 19.15.9(C),
21 titled financial assurance. The language is the same from
22 the existing rule, it's just moved locations under the
23 proposed rule.

24 The next proposed amendment is to 19.15.5.10,
25 enforcement. This proposed amendment actually repeals and

1 replaces the entire section of existing 10 because that rule
2 is not consistent with amended 70-2-31. The new rule
3 closely tracks in a lot of places verbatim amended 70-2-31.

4 And just real quickly, a road map of Section 10,
5 Section 10(A) is how the OCD seeks TCOs, NOVs and civil
6 action.

7 10(B) are the sanctions that the OCD may seek,
8 including civil penalties.

9 10(C) are the NOV procedures for service and
10 hearings.

11 10(D) are how civil penalties can be calculated,
12 including criteria to apply, and limits to penalties.

13 10(E) are the hearing procedures.

14 10(F) are the appeals procedures.

15 10(G) are when civil penalties are to be paid.

16 10(H) is the informal resolution process after a
17 hearing has already commenced.

18 10(I) is the publication of enforcement
19 information by the OCD.

20 And 10(J) is a standard savings clause.

21 So the first proposed amendment is under
22 9.15.5.10(A)(1), titled temporary cessation orders. What
23 this section does is allows the OCD to issue a TCO if the
24 OCD determines that a violation poses imminent danger to
25 public health or safety, or the violation poses significant

1 imminent environmental harm.

2 It also provides -- the section also provides
3 procedures, and that's that the OCD issues a TCO, that that
4 TCO remains in effect until either the earlier of the
5 abatement of a violation or 30 days have passed. After 30
6 days have passed, the TCO ceases to exist unless the OCD
7 holds a hearing to request a new TCO be issued.

8 The next proposed amendment is 19.15.5.10(B),
9 sanctions, and this section tracks amended 70-2-31 verbatim.
10 And what it does is allow the OCD to modify, suspend, cancel
11 or terminate a permit or authorization as a sanction. It
12 allows the OCD to shut in and/or plug and abandon wells as a
13 sanction. It requires remediation -- or the OCD may require
14 remediation or restoration of wells in other locations
15 affected by spills.

16 It allows OCD to forfeit financial assurance and
17 the new sanction that's provided by amended 70-2-31 is that
18 the OCD may assess civil penalties.

19 This next slide is the language for proposed
20 19.15.5.10(C), which is the notice of violation provision.
21 What this provision does is provide written notice to an
22 operator of alleged non-compliance. It provides specific
23 information that is required by amended 70-2-31, and that's
24 below -- an NOV under this provision must state the alleged
25 violation, the specific provision of the statute, rule or

1 order allegedly violated, a statement that the alleged
2 violator must comply immediately or by a certain time, that
3 sanction or sanctions sought for each -- it will provide
4 information regarding a sanction or the sanctions sought for
5 each alleged violation if there are any.

6 It will provide a statement of availability of an
7 informal process to resolve alleged violations. It will
8 provide a statement the OCD will hold a hearing if the NOV
9 is not resolved within 30 days and will also provide a
10 hearing date. So there are some NMOGA and IPANM edits to
11 this section, and I will discuss those after this slide.

12 This slide is the OCD's, what I'm calling Exhibit
13 4 amendments. So this, this is language that you would not
14 have seen on Exhibit 3, but is in your Exhibit 4. This is
15 based on discussions with NMOGA. The OCD agrees with this
16 proposed language. All it does is add clarity to the
17 description of the basis of the alleged violation.

18 Okay. So both NMOGA and IPANM proposed
19 amendments to 19.15.5.10(C)(1) little (d), I placed NMOGA's
20 proposed language on the top left hand and IPANM's on the
21 bottom left hand.

22 Both proposals remove sanctions if the violator
23 resolved a violation within the settlement period. It's my
24 opinion that this is inconsistent with amended 70-2-31, and
25 that language is right below on the right-hand side, and it

1 states that whenever the Division determines that a person
2 violated, so a past violation, or is violating, the OCD can
3 impose a sanction.

4 So it's inconsistent because past violations may
5 be cured or resolved. If a violation is, quote, cured, then
6 that could be a factor in the penalty calculation, but
7 shouldn't be a standard as to whether the OCD can assess a
8 penalty.

9 What this does is, this type of proposed language
10 does is create a catch-me-if-you-can effect, and that's, you
11 know, the potential that non-compliant operators will just
12 wait until the OCD catches them, and then go ahead and fix
13 whatever the violation is and not worry about sanctions.

14 And what that does is in general allowing an NOV
15 to cure violations without the possibility of sanctions, it
16 undermines the whole purpose of sanctions creating a
17 deterring effect to non-compliance behavior.

18 This next slide is the Exhibit 4 amendment to
19 19.15.5.10(C)(2). And this was language proposed based on
20 discussions with IPANM and OCD agrees to this language.
21 What it states is the OCD shall serve notice of violation by
22 certified mail and may provide the notice of violation by
23 e-mail if that's possible.

24 This works for the OCD because it allows the
25 process to be expedited, that's if an operator provides an

1 e-mail. It still follows the traditional service procedure
2 by certified mail. I just wanted to note that only an
3 operator's mailing address is required to be given to the
4 OCD, not an e-mail. This is a may situation if an e-mail is
5 provided.

6 IPANM proposed amendments to 19.15.5.10(C)(3),
7 and that's no civil penalty shall be proposed by the
8 Division if the Division and the alleged violator agreed to
9 a stipulated final order and the alleged violator fulfilled
10 its obligations under that order.

11 Similar to the language proposed earlier that I
12 discussed, this again creates something of a catch-me-if-
13 you-can scenario, a non-compliant operator may wait until
14 OCD catches them, fix whatever the violation is under a
15 stipulated order, and not worry about sanctions. That
16 undermines the thresh -- that undermines the deterrent
17 effects. It also undermines 70-2-31 statutory criteria to
18 calculate a penalty.

19 So 70-2-31 requires that the OCD consider three
20 factors in, in calculating a penalty. That's the
21 seriousness of the violation, that's the good-faith effort
22 to comply with the relevant law and history of
23 non-compliance by an operator. If we cannot levy a civil
24 penalty or another sanction, then there is no way we can use
25 that statutory criteria.

1 It also hurts the ability for the OCD to enter
2 into settlements with good or more diligent operators
3 because the fact that they are more diligent would have no
4 effect because we could not use the statutory criteria and
5 we could not scale back the possible sanctions based on, you
6 know, compliant behavior.

7 This next slide is proposed language to
8 19.15.5.10(D), civil penalties. This is the language that
9 was in the original Exhibit 3. What Section 10(D) does is
10 establish procedures to assess civil penalties. It tracks
11 almost verbatim 70-2-31.

12 It allows the OCD or states that the OCD will
13 calculate a penalty for each alleged violation in the NOV.
14 It states that the OCD must apply criteria to assess penalty
15 amounts, the three criteria that I just discussed, the
16 seriousness of the violation, the good-faith effort to
17 comply with the applicable requirements, and operator's
18 history of non-compliance with Oil and Gas Act rules.

19 It also reflects the statutory limits that civil
20 penalties that may be assessed. And those are that the OCD
21 cannot assess more than \$2500 per day for each violation
22 unless the OCD finds that a violation presents risk to
23 public health, safety, or significant harm to the
24 environment, or a violation continues longer than the time
25 period in the NOV or final order for that violation to be

1 abated. If either of those situations presents themselves,
2 the OCD can assess up to \$10,000 per day for each violation,
3 and regardless, there is total cap of 200,000 per violation.

4 The next slide is OCD's Exhibit 4 proposed
5 amendment to 19.15.5.10(D). This change is based on
6 discussions with NMOGA. What it does is delete sentence one
7 of 10(D) as is presented, and adds some language to be
8 consistent with amended 70-2-31.

9 This next slide is NMOGA's proposed amendment to
10 19.15.5.10(D). It states that civil penalty assessed by the
11 Division shall commence no earlier than the date that the
12 Division demonstrates that the respondent was aware or
13 should have been aware of the violation.

14 Aware is synonymous with knowingly, same
15 standard. Legislature clearly removed knowingly from
16 amended 70-2-31. We can -- the OCD could potentially use
17 aware or should have been aware or knowing or knowingly as
18 criteria in calculating penalty amounts, but not whether the
19 OCD can assess a penalty.

20 Next slide is IPANM's proposed amendment to
21 19.15.5.10(D). The OCD objects to this proposed language.
22 What the first part of the proposal does is delete the
23 language that comes verbatim from 70-2-31, and that's the
24 criteria that are to be applied. It also adds back in a
25 knowing standard for civil penalties, and again that is in

1 direct conflict with the amended 70-2-31.

2 IPANM's proposal also replaces those three
3 statutory criteria for assessing penalties with what appears
4 to be Texas rule or guidelines. I see on the slide it's not
5 in Rule -- it is in Texas rules, but no Texas rule
6 explicitly states that the table, the criteria that they
7 apply are guidelines only.

8 And we see multiple problems with the proposed
9 guidelines, with IPANM's proposed guidelines. They are
10 based on Texas rules, and they are different than the New
11 Mexico Oil and Gas Act rules. And some of the fines that
12 you will see on the proposed tables don't, one, don't exist
13 under the New Mexico rule, and, two, make exceed the
14 statutory limits that are found under 70 -- amended
15 70-2-31.

16 There is also an enhancement mitigation table
17 provided by IPANM, and this table is not clear where it
18 comes from, and it doesn't seem to have any precedence in
19 any rule or law.

20 So why should the OCD's proposed 19.15.5.10(D) be
21 adopted? Because it's consistent with and tracks almost
22 verbatim amended 70-2-31. It's consistent with other state
23 and oil and gas commissions and their rules in allowing
24 guidelines to be developed such as Texas. It allows for
25 flexibility to adjust penalties on a case-by-case basis to

1 scale it using the statutory criteria provided in 70-2-31
2 amended. It allows the OCD to calculate penalties below the
3 statutory limits, and it allows the OCD to work with
4 stakeholders to develop a calculation method.

5 IPANM proposed two new entirely new sections, (E)
6 and (F). The OCD objects to both of the proposed sections.
7 Both of these sections rely on some determination to be made
8 that a violation is the same under different statutory
9 schemes or different laws.

10 This slide is IPANM's proposed new Section
11 19.15.5.10(E), but what it proposes is OCD cannot ask for
12 penalties on, quote, same violations that BLM has imposed
13 sanctions on, and if the OCD has imposed sanctions, that the
14 OCD shall refund any penalties imposed.

15 Again, there are no such thing as same violations
16 under these statutory schemes under these different laws.
17 Additionally, the OCD has no mechanism to refund fees that
18 might have been collected and put into the general fund.
19 And the proposal does not seem to have any precedent in any
20 other law.

21 The next slide is IPANM's proposed Section
22 19.15.5.10(F). Again, the OCD objects to this. This
23 proposes that the OCD can't ask for any penalties on, quote,
24 same violations for any other state or penalties imposed, so
25 beyond just BLM laws.

1 Again, there is no such thing as a same violation
2 under these different laws. The OCD does not have a
3 mechanism to refund fees, and this proposal has no precedent
4 in any law.

5 This slide is OCD's procedures for hearing if
6 informal resolution does not succeed found under
7 19.15.5.10(E) which is titled adjudicatory procedures. And
8 just real quickly, 10 has four sections. (E)(1) are the
9 general provisions. (E)(2) are the prehearing procedures.
10 (E)(3) are the hearing procedures, and (E)(4) are the post
11 hearing procedures.

12 So here is the proposed language for
13 19.15.5.10(E)(1), the general provisions. And just to
14 highlight what each proposed provision does is identifies
15 the OCD and alleged violator as the parties. It prohibits
16 participation by third parties. It allows parties to appear
17 pro se or by counsel, except for certain collective entities
18 which might be corporations, for example.

19 It clarifies that the rules of evidence in civil
20 procedure are guidance only. it establishes a standard
21 computation of time. It allows for extensions of time and
22 continuances. It requires parties to serve pleadings, and
23 describes the format and criteria for documents that are
24 submitted.

25 All of these provisions are similar to what other

1 state agencies use for their administrative proceedings.

2 Q. Before you proceed, Gabe, I just draw your
3 attention to Subsection (B), representation. You said that
4 this provision allows parties to appear pro se or by counsel
5 except for collective entities, and you reference
6 corporations. At the end of that sentence -- the end of the
7 sentence refers to counsel or duly authorized officer or
8 member. Does that sentence indicate that a corporation can
9 appear on its own behalf through an officer or a member, not
10 necessarily an attorney?

11 A. That's correct.

12 Q. Okay. Thank you.

13 A. This slide shows the language for proposed
14 Section 19.15.5.10.(E)(2), which are the prehearing
15 procedures. What this section states is that the OCD would
16 docket any unresolved NOV's, TCO's and OCC appeals before a
17 30-day deadline passes, and it provides the steps of the
18 prehearing process. And those are, after docketing, the
19 alleged violator would file an answer. A hearing examiner
20 would be assigned to run a hearing. The hearing examiner is
21 barred from talking about the substance of the case with the
22 parties, so that's no ex parte discussion. The hearing
23 examiner may hold a prehearing conference to resolve any
24 procedural or evidentiary issues, and provides that parties
25 must file prehearing statements and exchange testimony

1 evidence at least 15 days before hearing. And this is to
2 ensure that the parties have an opportunity to prepare and
3 promote settlement.

4 MR. MARKER: Excuse me. On my Exhibit 4, you
5 have 15 crossed out seven. Are IPANM's proposals not
6 included in this part?

7 MR. LOZANO: Mr. Marker, you can address
8 cross-examination after they have completed their direct
9 testimony.

10 MR. MARKER: Okay. Thank you, sir.

11 MR. LOZANO: Thank you, sir.

12 A. The next slide is OCD's Exhibit 4 Amendment to
13 19.15.5.10(E) to little (a) through little (b). These
14 proposed amendments are based on discussions with NMOGA. It
15 just adds language that the Division shall docket the notice
16 of violation or order for hearing, identify the factual
17 basis for the alleged violation and proposed sanctions. It
18 also cleans up some along in part (b).

19 So basically what it does is provide a factual
20 basis for the alleged violation, and it highlights that any
21 disputed sanction after the informal agreement period are
22 not, quote, sanctions at that point, they are just proposed
23 sanctions.

24 **Q. Gabe, are sanctions always proposed until**
25 **assessed after a hearing?**

1 A. Or if they are stipulated to.

2 Q. Okay. Thank you.

3 A. Yeah. This next slide is OCD's proposed
4 amendment to 19.15.5.10.(E)(2) little (c) through little
5 (e). These are also also based on discussions with NMOGA,
6 and what those proposals do is clarify when ex parte
7 applies.

8 It highlights that penalties are proposed at this
9 stage as well. It also shortens the time line from 15 days
10 to seven calendar days. We are fine with that because it
11 still allows time for parties to prepare and give sufficient
12 notice.

13 And the proposed amendment allows exchange of
14 information without requiring a full narrative description.
15 This next slide is IPANM's proposed new Section
16 19.15.5.10.(E)(2)(h). It, it requests that deadlines can be
17 shortened. This is contrary to the explicit language that
18 you find in amended 70-2-31. There is already built-in 30
19 days maximum time lines for TCOs to be in effect. That's 30
20 days, or if a violation is abated. It's either 30 days or
21 if -- when a violation might be abated. So there is a
22 built-in 30-day maximum time line there.

23 The statute also builds in a 30-day minimum time
24 line for notices of violation, and that gives 30 days for
25 informal resolution. If that does not take place, then you

1 use the second NOV for hearing. So the statute already
2 establishes the time line. There is no need to propose a
3 rule to shorten those time lines.

4 This next slide is OCD's proposed amendment to
5 19.15.5.10(E)(3) which is titled Hearing Procedures. These
6 are commonly used administrative procedures. You know,
7 under this section parties can present and cross-examine
8 witnesses. It states that OCD has the burden of proof on
9 each element of an alleged violation, and it provides a
10 standard which is preponderance of the evidence, which is a
11 common civil standard for evidence.

12 This next slide is OCD's proposed amendment to
13 19.15.5.10(E)(4) titled post hearing procedure. It provides
14 that hearings must be transcribed. OCD may request a
15 hearing examiner to prepare a recommended decision, and that
16 the OCD director is solely responsible for issuing a final
17 order.

18 Nmoga did propose an amendment to
19 19.15.5.10(E)(4)(b), and that's that the director, instead
20 of may, the director shall request that the hearing examiner
21 prepare a recommended decision.

22 This shall is not required by statute. It does
23 add additional burden to the OCD to efficiently and
24 effectively enforce violations. It doesn't take into
25 account that many cases might be routine and just don't need

1 a recommended decision, so the OCD objects to that proposal.

2 The next slide is OCD's proposed amendment to
3 19.15.5.10(F) which is Commission review. What this section
4 states is that a party may appeal a decision from the OCD to
5 the OCC -- it's the same as the existing rule -- that the
6 OCC's review is de novo, which is required under the Oil and
7 Gas Act, that parties can stipulate to certain issues and
8 certain portions of the record or all the record from the
9 OCD hearing, and this helps expedite the OCC hearing, that
10 this Commission would use relevant portions of the
11 adjudicatory procedures that are provided in the proposed
12 rule Section 5.10(E).

13 And I just wanted to point out, there are two
14 small typographical errors I highlighted on the bottom
15 left-hand side that you would not see in Exhibit 4.

16 The first that's highlighted is a period after
17 (2); it should be a comma. And the second highlighted is a
18 comma after NMAC, and it should be a period.

19 There was one proposed amendment to 19.15.5.10(F)
20 that you will see in Exhibit 4. It's based on discussions
21 with NMOGA. The proposal that the second sentence of that
22 paragraph would be deleted, and OCD agrees that that
23 sentence can be deleted because under different statutory
24 provisions of 70-2-13, the Commission already has the power
25 to appoint a hearing examiner which may be a member of the

1 Commission. That's the only proposed change in that
2 section.

3 This next slide is OCD's Exhibit 4 proposed new
4 section amendment, it will be 19.15.5.10(G), and it's titled
5 rehearing. It states that a party may file an application
6 for rehearing with the Commission pursuant to 70-2-25. This
7 proposal is based on discussions with both NMOGA and IPANM.
8 They both presented two different versions.

9 The version that the OCD included in the proposed
10 Exhibit 4 was IPANM's, and we just felt it provided the most
11 clear language and clearest path for appeal to the court.

12 The next slide is the OCD's Exhibit 4 amendment
13 to 19.15.5.10, what would be relettered now from (G) to (H),
14 it's payment of civil penalty. We have made this proposal
15 based on discussions with NMOGA. The original 10(G) that
16 the OCD proposed would have required a civil penalty be paid
17 within 30 days of the final order. That would not have
18 taken into account the possibility of appeals. So by adding
19 this language it essentially creates a stay provision where
20 a penalty isn't paid until a final order is issued after an
21 appeal.

22 IPANM proposed an amendment to the original OCD
23 proposal 19.15.5.10(G), which would be relettered to (H).
24 The OCD objects to this proposal. What it states is that if
25 an appeal is successful, that any penalties collected by the

1 OCD prior to that appeal would have to be refunded. Again,
2 the OCD doesn't have a mechanism to collect and then refund
3 penalties out of the general fund.

4 MR. CLOUTIER: Mr. Wade, we are not sponsoring
5 that proposed amendment anymore given the change that you
6 indicated earlier in discussions with IPANM and NMOGA, so if
7 you don't want to talk about it, I don't think the
8 Commission needs to be burdened by it.

9 THE WITNESS: Okay.

10 MR. AMES: So this is otherwise withdrawn?

11 MR. CLOUTIER: I'm just trying to formally
12 withdraw it so we can save a few minutes.

13 BY MR. AMES:

14 **Q. So Mr. Wade, IPANM has indicated they will**
15 **withdraw this proposal based on our proposals previously, so**
16 **if you want to proceed.**

17 CHAIRWOMAN SANDOVAL: Is the 35 day change
18 withdrawn, too, or just the last?

19 MR. CLOUTIER: The entire thing is withdrawn. We
20 agree that the stay provision, that the discussions with us
21 and NMOGA is sufficient to address those concerns, so --

22 MR. AMES: Thank you.

23 A. Okay. So the next proposed amendment is to
24 19.15.5.10, what would have been (H) and now is relettered
25 to (I) titled resolution. And what this section does is

1 allow for settlement after hearing has commenced. That's
2 because even though a hearing may have started, OCD would
3 encourage and support resolution whenever possible. That
4 resolution would be memorialized in a written order, and
5 that order would contain key elements of a legally binding
6 document which includes admission of jurisdiction and to
7 relief and waiver of appeal.

8 The next proposed amendment by the OCD is to
9 19.15.5.10, originally what was proposed under Exhibit 3 as
10 5.10(I), now proposed as 5.10(J), titled publication. And
11 this is verbatim the 70-2-31.1 requirement that the OCD
12 publish information regarding enforcement actions from the
13 previous year.

14 The next OCD proposed amendment would be to
15 19.15.5.10, what was previously (J), now would be relettered
16 to (K), titled reservation. It's a standard savings clause
17 that protects the OCD and the OCC to enforce other parts of
18 the Oil and Gas Act rules.

19 Okay. What would the effective date of this
20 proposed rule be? I would just like to point out that
21 amended 70-2-31 went into effect yesterday, January 1, 2020.
22 The rule can go into effect on the date of publication in
23 the New Mexico Register, and the OCD can publish the rule in
24 the New Mexico Register no earlier than 20 days after this
25 Commission enters a final order on the proposed rulemaking

1 or denies a rehearing application.

2 So in conclusion, this proposed rule complies
3 with and implements amended 70-2-31 and 70-2-31.1,
4 establishes sufficient procedures to file and adjudicate
5 NOVs and TCOs and assess sanctions, including civil
6 penalties.

7 It's consistent with procedures used by other
8 state agencies under New Mexico laws, encourages settlement
9 wherever possible, provides due process, which includes
10 notice and opportunity to contest alleged violations and
11 proposed sanctions, as well as preserving the right to
12 appealing an OCD case to the OCC or to district court.

13 It holds all operators to the same standard of
14 compliance. It protects correlative rights, prevents waste
15 and protects public health and environment. And the OCD
16 respectfully requests that this Commission adopts the rule
17 as proposed today by the OCD.

18 **Q. Thank you, Mr. Wade.**

19 MR. AMES: That concludes our direct testimony.

20 MR. LOZANO: Mr. Ames, would you like to admit
21 these documents into the hearing record? I believe it's
22 Exhibits 1 through 4.

23 MR. AMES: I intended to do that. I can do that
24 now. OCD moves the admission of Exhibits 1 through 4.

25 MR. LOZANO: If there is no objection, I think we

1 can admit them all as Exhibit 8, and we will do sub exhibits
2 OCD 1 through 4.

3 CHAIRWOMAN SANDOVAL: Any objection from the
4 Commissioners?

5 COMMISSIONER ENGLER: No objection.

6 COMMISSIONER KESSLER: No.

7 MR. AMES: The OCD will also move the admission
8 of what we call Exhibit 5, which will be the visual aid
9 presented by Mr. Wade, a copy of the PowerPoint presentation
10 for the record. I do have a copy, I believe Mr. Feldewert
11 borrowed it for the moment, but I will turn it in before we
12 are done.

13 MR. FELDEWERT: I haven't marked on it.

14 CHAIRWOMAN SANDOVAL: Any objections by the
15 parties?

16 (No response.)

17 CHAIRWOMAN SANDOVAL: Any objection by the
18 Commissioners?

19 COMMISSIONER ENGLER: No.

20 COMMISSIONER KESSLER: No.

21 CHAIRWOMAN SANDOVAL: Those will be admitted into
22 the record as Exhibit 8.

23 (Exhibit 8 admitted.)

24 CHAIRWOMAN SANDOVAL: Does the Commission wish to
25 cross-examine the witness.

1 COMMISSIONER KESSLER: I have some questions.
2 Will the Commission be asking questions before the counsel?

3 MR. LOZANO: Up to the chair.

4 CHAIRWOMAN SANDOVAL: Do any of the other
5 identified parties wish to cross-examine the witness?

6 MR. CLOUTIER: Mr. Feldewert, and I will be
7 behind him, Madam Chair, and if he has further questions.

8 MR. MARKER: I will have some after they finish.

9 CROSS-EXAMINATION

10 BY MR. FELDEWERT:

11 Q. Mr. Wade, I know you responded to a question from
12 your counsel where you said that sanctions are always
13 proposed until you actually have a hearing assuming that
14 they are not resolved; correct?

15 A. Correct.

16 Q. And that includes civil penalties?

17 A. Yes.

18 Q. So would you agree with me that the NOV, the
19 notice of violation here is not the vehicle under which
20 penalties or sanctions are imposed?

21 A. They are not imposed, they are proposed.

22 Q. Proposed, okay. So really that notice of
23 violation is the vehicle by which you, the agency now has to
24 provide notice of a compliance issue or concerns to an
25 operator?

1 A. Yes.

2 Q. Okay. And then we have proceedings that occur
3 after that?

4 A. Yes.

5 Q. I want to ask you, if I may, about the, one of
6 those sanctions, and that's the temporary cessation order,
7 okay? Do you have a copy of the statute 70-2-31?

8 A. I do.

9 MR. FELDEWERT: Members of the Commission, do you
10 have a copy of the statute? If not, I have some extra
11 copies.

12 CHAIRWOMAN SANDOVAL: Yes, we do.

13 MR. FELDEWERT: I am going to -- Mr. Ames, do you
14 have one.

15 MR. AMES: Yes, I most likely do.

16 BY MR. FELDEWERT:

17 Q. So I guess if we have the statute out in front of
18 us, and then we take a look at your Exhibit Number 4,
19 which is the proposed OCD revisions, and in looking -- I
20 guess that would be on Page 4 --

21 A. Exhibit 4.

22 Q. -- of Exhibit 4, which also, Mr. Wade, Page 4 of
23 Exhibit 4 which is sub -- I will call it Subsection (A)(1)
24 deals with the temporary cessation order as well; correct?

25 A. Yes.

1 Q. Okay, all right. So I want everybody to look at
2 the last sentence of 70-2-31 (A)(3), and I don't need to
3 read it out loud because we can certainly help the court
4 reporter. Having looked at the cessation order will remain
5 in effect until the earlier of when the violation is abated.
6 Do you see that?

7 A. Yes.

8 Q. Okay. Then when I look at your proposed language
9 here, you have added the language under Subsection, Subpart
10 (A)(1), when the Division determines that the alleged
11 violation is abated. Do you see that?

12 A. Yes. Under the rule I can see that.

13 Q. Why did you do that?

14 MR. AMES: Mr. Feldewert, can you clarify? I
15 cannot see --

16 MR. FELDEWERT: Last sentence of 70-2-31 A 3.

17 MR. AMES: Okay.

18 MR. FELDEWERT: Cessation order will remain in
19 effect until the earlier of when the violation is abated or
20 30 days. Okay?

21 MR. AMES: Are you referring to omission of the
22 word Division determines?

23 MR. FELDEWERT: When the Division determines,
24 yes.

25 MR. AMES: Okay.

1 BY MR. FELDEWERT:

2 Q. So my question is, why was that language added.

3 A. It stands to reason that the Division would
4 determine whether a violation is abated because it issued
5 the temporary cessation orders in the first place.

6 Q. So who -- how would that determination be made?

7 A. Whether it's abated?

8 Q. Whether it's been abated.

9 A. Well, the Division must first determine that the
10 violation is causing or will cause imminent danger to public
11 health or safety or significant imminent environmental harm,
12 it would also stand to reason that the abatement means that
13 under a TCO, the violation no longer causes or will cause
14 imminent danger to public health or safety or significant
15 imminent harm to the environment or imminent environmental
16 harm.

17 Q. So my question is, who will make that
18 determination? And here is my concern, okay? I know you
19 are a very busy Division, and this is the way the statute
20 reads, it's set up to say, okay?

21 TCO, as you want to call it, remains in effect
22 until the earlier of when the violation is abated or 30
23 days. Okay? Now, you have added a requirement that it's
24 the earlier when the Division gets around to determine it.

25 MR. AMES: I'm going to object. This is not a

1 question, this is testimony from counsel. If counsel would
2 like to reframe his questions, that's acceptable to the OCD.

3 CHAIRWOMAN SANDOVAL: Can you reframe the
4 question, please?

5 MR. FELDEWERT: Sure.

6 BY MR. FELDEWERT:

7 Q. Why did the Division change the language to say
8 it's the earlier of when the Division determines it is
9 abated or 30 days?

10 A. All right. I feel like I have already answered
11 that. It's because the Division issued the TCO in the first
12 place, it's the Division that has to apply criteria to
13 whether they can issue the TCO in the first place.

14 Q. Okay. Who will make that determination as to
15 when the violation has been abated? Who is going to do that
16 within the Division?

17 A. Whoever has -- whoever's group has issued the
18 TCO, so it might be conceivably coming from the
19 Environmental Bureau because it's a spill, or it could be
20 coming from the Administrative Compliance Group, if it
21 relates to management of specific portions of the Oil and
22 Gas Act.

23 Q. So we don't know at this point?

24 MR. AMES: Mischaracterizes the witness'
25 testimony.

1 A. You are asking me to speculate on violations that
2 don't, you know, they're not -- I don't know what the
3 violation is, so I couldn't point you to the correct person
4 within the OCD.

5 Q. Okay. How will that determination, which is now
6 the requirement, there is to be a determination by the
7 Division, before its abated, how is that communicated? How
8 will it be communicated?

9 A. It would likely be by Division order stating that
10 the TCO is no longer in effect.

11 Q. We would have to have a hearing?

12 A. I don't believe that that's what the statute or
13 order rule.

14 Q. How can you have a Division order without a
15 hearing?

16 A. I don't know the answer to that.

17 Q. And then the concern here is who in the Division
18 is going to be effectively able to make this determination
19 within 30 days, because otherwise we are going to default to
20 the 30-day period all the time?

21 MR. AMES: Objection.

22 CHAIRWOMAN SANDOVAL: It's an adequate question.

23 Q. Isn't that a concern?

24 A. Can you rephrase the question?

25 Q. Is there any concern, okay, that if we have to

1 sit around and wait for the Division to make a determination
2 as to whether the issue has been abated, make some kind of
3 formal determination, is there any concern you are going to
4 be able to do that effectively within a 30-day period?
5 Because otherwise you just default to 30 days.

6 A. No. I honestly don't know what you are asking.
7 Is there a concern that the OCD might issue a TCO and then
8 not follow through on it?

9 Q. Well, are you asking me a question?

10 A. I don't know what you are asking me.

11 Q. Here is my question. Is there any concern,
12 that's my question, that the Division is going to be able
13 make this determination in some effective manner within 30
14 days?

15 A. I don't think so. I think that if the Division
16 issues a TCO, it's applied some very specific criteria which
17 specifically speaks to imminent dangers. That gives a lot
18 of weight to why the OCD would issue a TCO. And I think the
19 OCD would pursue, pursue that order to make sure that that
20 violation has been abated.

21 The sidewall that's been put in by the
22 legislature is that, after 30 days that TCO no longer
23 exists, and that the OCD would have to then go to hearing to
24 ask for another TCO, a new TCO regarding that violation.

25 Q. The way the legislature did it they said that it

1 **will remain to the earlier of when the violation is abated.**

2 MR. AMES: Objection, not a question.

3 CHAIRWOMAN SANDOVAL: Please reframe the
4 question. Sustain the objection. Please reframe.

5 BY MR. FELDEWERT:

6 Q. Mr. Wade, when I look at the statute, doesn't it
7 say the cessation order will remain in effect until the
8 earlier of when a violation is abated? That's all the
9 statute says; correct?

10 A. The statute says the cessation order will remain
11 in effect --

12 Q. Mr. Wade --

13 MR. FELDEWERT: I'm asking Mr. Wade. He can read
14 the statute.

15 A. I'm allowed.

16 Q. Isn't that what that says is if the -- if it's
17 abated. It doesn't say anything about the Division
18 determines that.

19 A. The statute says the cessation order will remain
20 in effect until the earlier of when the violation is abated
21 of 30 days unless a hearing is held before the Division and
22 a new order issued.

23 Q. You all have added a caveat when the Division
24 determines that?

25 A. That's in the proposed rule.

1 Q. You can't really tell me today who is going to do
2 that or how it's going to be done within a 30-day period?

3 A. I have already told you that the Division would
4 make that determination and likely to do the order.

5 Q. If I then state the statute and I go to
6 70-2-31E --

7 CHAIRWOMAN SANDOVAL: Counsel, can we move on? I
8 think we repeated this multiple times, and Mr. Wade has
9 answered. Can you move on to your next question, please.

10 MR. FELDEWERT: It's what I'm doing. I'm sorry,
11 I'm on the next question.

12 CHAIRWOMAN SANDOVAL: All right.

13 BY MR. FELDEWERT:

14 Q. 70-2-31E, okay, requires the Commission to make
15 rules pursuant to statute providing procedures for various
16 actions. Do you see that?

17 A. Yes.

18 Q. Okay. One of the actions is procedures for the
19 issuance of notices of violation. Okay? Do you see that?

20 A. Yes.

21 Q. Now, when I look at the proposed rule, Exhibit 4,
22 Page 4, what I see in Subpart (A), it says the Division --
23 I'm at the third line -- the Division may seek a sanction
24 by, and go down to (A)(3) -- I'm sorry, (A)(2), issuing a
25 notice of violation. Okay? Do you see that?

1 A. Can you repeat where you are at?

2 Q. On Page 4, Exhibit 4.

3 A. Okay.

4 Q. So Subpart (A)(2).

5 A. Okay.

6 Q. What I get from that is the Division issues a
7 notice of violation. Correct?

8 A. You are asking me what the rule states. It says
9 the Division may issue a sanction by issuing a notice of
10 violation.

11 Q. And then I go down to Subpart (C), which is
12 titled Notice of Violation, and it says, "A notice of
13 violation issued by the Division shall state with reasonable
14 specificity," and it lists some criteria. Okay?

15 My question to you is where does it, does it
16 identify the procedure for the issuance of a notice of
17 violation within your -- and just as a premise, Mr. Wade,
18 while you are thinking about this, this says the Commission
19 shall make rules, I'm on the statute, shall make rules
20 providing the procedure, a procedure.

21 My question to you is, where within this rule is
22 there a procedure for the issuance of a notice of violation?

23 A. I'm not 100 percent sure. I'm not sure what you
24 are asking me. The entire rule addresses the procedure on
25 how to issue a violation.

1 Q. Who is going to issue a notice of violation?

2 A. The Division.

3 Q. Who within the Division?

4 A. Depends on the violation. You are asking me to
5 speculate.

6 Q. Is it going to be issued by the field office? Is
7 it going to be issued by Santa Fe? Who is going to issue
8 the notice of violation? What's the procedure.

9 A. Again, it depends on the violation. You are
10 asking me to speculate.

11 Q. Where does it tell me within the rule who is
12 going to issue the notice of violation?

13 A. A notice of violation issued by the Division.
14 It's in (C)(1).

15 Q. Is that the district office?

16 A. The OCD is the OCD.

17 Q. Can a field person issue a notice of violation,
18 Mr. Wade?

19 A. I don't know the answer to that.

20 Q. Who is going to sign the notice of violation?

21 A. It would be the person issuing the notice of
22 violation within the OCD.

23 Q. And that could be a field person?

24 A. I don't see that as a possibility at this time.

25 Q. Who do you see as issuing this notice of

1 **violation?**

2 A. It would depend on the violation.

3 **Q. Give me an example.**

4 A. For example --

5 MR. AMES: Objection.

6 MR. LOZANO: On what grounds, Counsel?

7 MR. AMES: It's not a question. He is asking the
8 witness to speculate and provide a hypothetical. It's
9 counsel's obligation to ask questions, not to solicit
10 narrative statements from witnesses.

11 MR. LOZANO: Do you have a response, Counsel?

12 MR. FELDEWERT: I'm just trying to figure out how
13 this is going to work.

14 CHAIRWOMAN SANDOVAL: Sustained.

15 BY MR. FELDEWERT:

16 **Q. Can a field person issue a notice of violation?**

17 A. It would depend on the violation.

18 **Q. Can a field -- can a field person issue a notice
19 of violation.**

20 A. It would depend on the nature of the violation.

21 **Q. So you can't -- there's no procedure within the
22 rule identifying who will issue the notice of violation?**

23 A. I don't think that the rule contemplates how the
24 OCD administers the rule. It needs to be spelled out by the
25 rule. It gives a very clear description of how an NOV will

1 be issued. That NOV will be issued by the Division.

2 Q. If I look at the statute 70-2-31E, it says, "The
3 Commission shall make rules defining procedures for the
4 issuance of notice of violation," and what I don't see is
5 any indication of who is going to issue the notice of
6 violation.

7 MR. AMES: Objection, not a question, statement
8 by counsel, asked and answered.

9 CHAIRWOMAN SANDOVAL: Sustained. Let's move on.

10 MR. LOZANO: Yeah.

11 BY MR. FELDEWERT:

12 Q. When I look at (C)(1), (C)(1)(c), it says, notice
13 of violation is going to say, "Whether compliance is
14 required immediately or within a specified time period." Do
15 you see that?

16 A. Yes.

17 Q. Who is going to make that determination?

18 A. The Division issues the NOV. That is a statement
19 that's required to be put into the NOV, so the Division will
20 make that determination.

21 Q. Can a field person make that determination?

22 A. I have already answered that form of question.
23 You are asking me to speculate.

24 CHAIRWOMAN SANDOVAL: Can we move on to something
25 that's not speculative?

1 MR. LOZANO: Mr. Feldewert, you made your point
2 to the Commission regarding the Division deficiency. I
3 would say let's move on.

4 MR. FELDEWERT: Okay, all right.

5 BY MR. FELDEWERT:

6 Q. I had a similar question for a different topic.
7 If I look at 70-2-31E, it says the Commission shall make
8 rules providing procedures for -- we just talked about the
9 issuance of a notice of violation. Next topic is the
10 assessment of penalties, and the next topic is the conduct
11 of the informal proceedings.

12 Okay, Mr. Wade, that's where I'm at. My question
13 to you is, where are the rules -- where are the provisions
14 within this rule that identify the -- and I quote from the
15 statute -- "the conduct of the informal procedures," where
16 do I find that?

17 A. The portion of the rule that addresses the
18 informal review is under 19.15.10.(B)(1)(d).

19 Q. (D)?

20 A. (E) and (f).

21 Q. (E) says the availability of the process for
22 informal review and resolution of the alleged violation. Is
23 that what you are referring to?

24 A. Correct.

25 Q. The NOV is going to notify the party of the

1 availability of a process?

2 A. Correct.

3 Q. And then (f) is going to be, the NOV is going to
4 have a statement that, if the notice of violation is not
5 resolved within 30 days, you are going to hold a hearing?

6 A. Correct.

7 Q. That's the sum and substance of the procedures?

8 A. That is the procedure regarding informal review.

9 Q. When an NOV goes out by some unknown person, what
10 happens? How do you initiate the informal process?

11 MR. AMES: Objection, unknown person. Not clear
12 what that means.

13 CHAIRWOMAN SANDOVAL: Can you clarify?

14 BY MR. FELDEWERT:

15 Q. Mr. Wade, you said you couldn't identify who the
16 person is that's going to issue the NOV because it depends
17 on the circumstance, is what you said. My question is, when
18 that NOV goes out, what is the informal process? Who, what,
19 where, when and why, and how is it initiated?

20 A. I see this process as being exactly similar to
21 the process that already exists. An alleged violator would
22 receive an NOV. They would very clearly understand what the
23 alleged violations were. They would have a basis for them.
24 They could then choose to approach the OCD for informal
25 resolution and enter into what's currently known as an

1 agreed compliance order and what would be known under the
2 rules as a stipulated order.

3 **Q. Okay. How does that initiate?**

4 A. By the NOV.

5 **Q. So the person gets the NOV. Is the NOV going to
6 tell them how to initiate the informal process?**

7 A. There could potentially be language that
8 addresses how you initiate the informal process.

9 **Q. If it's not in the rule, don't you think it
10 should be in the NOV if it's not going to be in the rule?**

11 A. Do I think that language -- can you repeat your
12 question?

13 **Q. So since it doesn't tell me in the rule how to
14 initiate an informal process, is that something that will be
15 in the NOV, the notice of violation?**

16 A. That language could potentially be in the NOV.
17 Again, without being in a rule, the OCD regularly enters
18 into agreed compliance orders with operators regarding
19 violations.

20 **Q. But Mr. Wade, there are operators that have not
21 been through that process and have a need for that process.
22 So my question to you is, who, what, how are they going to
23 be informed of the procedures that govern informal
24 proceedings? How are they going to know how to initiate
25 them?**

1 A. I think that the NOV is the vehicle. The
2 notice -- the operators have the choice to enter into in
3 formal resolution or to go to hearing.

4 Q. Do you think, in your opinion, will the NOV -- or
5 do you foresee the NOV foreseeing, here is how you initiate
6 the the informal process, and here, give them information
7 how to do that?

8 A. I think the NOV could potentially have that
9 language.

10 Q. Once that's initiated, what's the process? Is it
11 going to be a phone conference? Is it going to be a meeting
12 in Santa Fe? Is it going to be a meeting at the district
13 office? What does the Division envision as the procedure
14 for this informal proceeding?

15 CHAIRWOMAN SANDOVAL: Counsel, I believe Mr. Wade
16 has already answered that. You're being repetitious. Can
17 we move on?

18 MR. FELDEWERT: I don't think I have asked him is
19 there going to be a meeting.

20 CHAIRWOMAN SANDOVAL: You have asked what the
21 process is multiple times over and over, which he answered
22 the process could be a meeting, a phone call. Let's move on
23 to the next question.

24 BY MR. FELDEWERT:

25 Q. Who is going to be involved in this informal

1 **process?**

2 A. The Division.

3 **Q. Who within the Division?**

4 A. It would depend. You are asking me to speculate.

5 **Q. It depend on what?**

6 A. On each of the violations.

7 **Q. Is the individual who issued the NOV, would that**
8 **person be involved in the process?**

9 A. I don't think that's a requirement. I think that
10 the Division is the Division, and a representative of the
11 Division can handle the discussion regarding NOV.

12 **Q. So there is no set process at this point, there**
13 **is no proceeds procedure?**

14 MR. AMES: Asked and answered.

15 CHAIRWOMAN SANDOVAL: Mr. Wade, is there a
16 process currently within the OCD to process group compliance
17 orders?

18 THE WITNESS: There is two ways to answer that
19 question. One, the rule talks about informal process,
20 informal based on its own meaning means there is not a set
21 process. It can be informal discussions over the phone,
22 discussions with attorneys, discussions in meetings. That
23 is exactly how the current informal discussions for ACOs
24 takes place.

25 CHAIRWOMAN SANDOVAL: Is it conceivable that the

1 Division could add some more information regarding an
2 informal process into the NOV?

3 THE WITNESS: Yes.

4 CHAIRWOMAN SANDOVAL: Can we move on to the next
5 item, please?

6 BY MR. FELDEWERT:

7 Q. Now, any other -- the other point on this, Mr.
8 Wade, is I know once the Division issues the NOV there is a
9 30-day period for this informal process to occur; correct?

10 A. Correct.

11 Q. Are there any processes in place to make sure
12 that this informal process moves along? For example, I get
13 an NOV. I call you will up, the person on the NOV, say, "I
14 got this NOV. I want to talk about the informal process and
15 everybody is busy and they don't call me back," what do I
16 do?

17 A. Are you asking advice?

18 Q. I'm asking you what you would envision under the
19 rule, what would occur?

20 A. It's an informal process, so I would imagine the
21 operator who had the violation identified in the NOV would
22 pursue the informal process if they wanted some resolution.

23 Q. So I call up the person that issued the NOV to
24 pursue it, leave a message, and no one calls me back. What
25 do I do next?

1 A. I would encourage somebody in that situation to
2 do what anybody should do now, and that's go to the next
3 level of management. If you have no response with the
4 management of OCD, go to the next level of management.

5 Q. So call up the person that you will call person
6 that issued NOV in the field office. Who should I call
7 next?

8 A. We are going through a reorganization at this
9 point. There is an organizational chart on the OCD website.
10 I would refer to that.

11 Q. And go through that process?

12 A. Correct.

13 Q. Okay. Now, you mentioned that the discussions
14 that led to some of your modifications on here on Exhibit
15 Number 4, and I think the first one that you had an issue
16 with dealt with the proposed language that is reflected on
17 your Slide 28. Could you put that up on the screen for me,
18 please?

19 A. Is this the one?

20 Q. Yes. Okay. So now, this is the commencement of
21 the time frame for the -- let me step back.

22 Section (D) is the portion of the rule dealing
23 with civil penalties, and it talks about the amount per day,
24 but what it doesn't say within the rule is it doesn't
25 provide any kind of time frame or sideboard or any parameter

1 for the length of the daily penalties, in other words, how
2 far back whoever issues the NOV go with a daily penalty.

3 MR. AMES: Objection, not a question.

4 CHAIRWOMAN SANDOVAL: Can you reframe it as a
5 question.

6 MR. FELDEWERT: Sure.

7 BY MR. FELDEWERT:

8 Q. Who determines how far back a daily penalty can
9 be imposed for a particular violation?

10 A. I would like to refer you to the language of
11 amended 70-2-31A where it states, "Whenever the Division
12 determines that a person violated or is violating the Oil
13 and Gas Act, then the Division may seek compliance." So the
14 Division makes that determination.

15 Q. And how far, what's the trigger? Is it the date
16 of the the notice of violation? Is that when the day when
17 the penalties start?

18 A. I think the trigger is based on facts. It's
19 determined on a case-by-case basis. And penalties or
20 sanctions can only be imposed on the violations that the OCD
21 can prove.

22 Q. Prove how far back? What's the standard?

23 A. Well --

24 Q. In other words --

25 A. -- assess one a can determine a person has

1 violated that's a past violation. So I think that as long
2 as the OCD can factually prove that a violation took place,
3 that's the standard.

4 **Q. Is it strict liability?**

5 A. The OCD is required to prove violation by
6 preponderance of the evidence. That's the standard in the
7 new rule.

8 **Q. So can the Division impose a daily penalty in a**
9 **circumstance where there was no knowledge by the operator of**
10 **the -- of a, of a compliance issue?**

11 A. The amended 70-2-31 expressly removes the
12 language knowingly and willfully. So the rule tracks
13 amended 70-2-31 and does not have a knowingly and willfully
14 requirement for civil penalties.

15 **Q. Because that was a criminal standard that you**
16 **talked about?**

17 A. That remains in the criminal standard.

18 **Q. Okay. So since we have removed the criminal**
19 **standard, what is the standard for determining how far back**
20 **the Division can go for the daily issuance of penalty?**

21 A. The standard is that the Division would have to
22 prove by preponderance of the evidence that a violation
23 occurred.

24 **Q. Which would mean it could be a circumstance**
25 **dealing that a operator was not even aware of a violation.**

1 A. The knowingly and willfully standard was
2 explicitly removed from amended 70-2-31. The OCD does not
3 have to prove that an operator knowingly or willfully
4 violated.

5 Q. Right. But what we had suggested was that you
6 demonstrate that the respondent was aware, which is
7 different, right, that's different than knowingly and
8 willful?

9 A. Aware is a much lesser standard.

10 A. I don't agree with that.

11 Q. Okay. What about -- sorry. Let's stay on slide
12 28 for me, please.

13 MR. AMES: The witness is answering the question.

14 A. So I will refer you just to the simple Black's
15 Legal Dictionary which defines knowingly as having or
16 showing awareness. They are directly synonymous.

17 Q. Let's go to our proposed language. So we have
18 aware or should have been aware. Do you see that?

19 A. I do see that.

20 Q. Okay. That's a much lesser standard; correct?

21 A. I don't understand.

22 MR. AMES: Objection, argumentative.

23 A. And I don't agree with it.

24 CHAIRWOMAN SANDOVAL:

25 Q. And it's not strict, like in other words you

1 wouldn't be imposed a daily penalty where an operator, as
2 good as they are, had a violation that they could not have
3 been aware of?

4 A. There is no standard of aware or should have been
5 aware within 70-2-31 amended.

6 Q. So is it your position that the Division ought to
7 be able to impose a daily penalty in a circumstance where
8 the operator could not have been aware that a violation had
9 occurred or was occurring?

10 A. It is my position that the OCD may adjust a
11 penalty without knowingly, willfully, or aware or should
12 have been aware standard. However, if somebody was aware or
13 should have been aware may be a factor in the amount of a
14 penalty or sanctions assessed.

15 Q. That's what I'm talking about, the amount. So if
16 you agree with me it can be considered, why wouldn't you put
17 it in the rule?

18 A. It is in the rule.

19 Q. Aware, I am talking about the aware of or should
20 have been aware.

21 A. So there are three statutory criteria that the
22 OCD must apply to assessing penalties. That is the nature
23 of the violation, that is history of compliance or
24 non-compliance or whether good-faith effort to comply with
25 applicable laws, those are the criteria that aware or should

1 have been aware fit under. So in other words, if there is a
2 violation of an operator couldn't have been aware, that may
3 be taken into account by the OCD in assessing the level of
4 sanction.

5 MR. FELDEWERT: Okay. And my final point here,
6 it's not a question, if it can be taken into account, why
7 can't we have it in the rule so we at least have some idea
8 on how far back an NOV can go so we don't have some strict
9 liability and they are issuing a daily penalty in a
10 circumstance where the operator could not have known there
11 was a violation.

12 CHAIRWOMAN SANDOVAL: Your point has been made.

13 A. I will treat that like a question, and my answer
14 to that is it's addressed thoroughly in the rules.

15 MR. FELDEWERT: That's all the questions I have.
16 Thank you.

17 CHAIRWOMAN SANDOVAL: Counsel for IPANM?

18 CROSS-EXAMINATION

19 BY MR. CLOUTIER:

20 Q. Mr. Wade, Andrew Cloutier. We have met before,
21 and I will do my best to talk through Mr. Ames given the
22 seating arrangement.

23 I would like to start on Page 4 of the Division's
24 Exhibit 4 of this. Looking at Sub (B), the sanctions
25 section, my appreciation of the way the rule is drafted is

1 that the Division has, if you will, a toolbox or a set of
2 potential sanctions that it can recommend in the notice of
3 violation, 1 through 7, plus Number 8, which I think is the
4 catch-all for any other sanction allowed by law.

5 So my question to you is, is it true that, for
6 instance, a notice of violation could go out and just
7 propose one of the enumerated sanctions?

8 A. That that potentially, yes, that's a potential.

9 Q. The rule, put another way, the rule gives the
10 Division the discretion to seek one or more of the sanctions
11 listed, but not all of them; correct?

12 A. Correct.

13 Q. This talks about the IPANM proposal on tables,
14 and also proposing that we are -- our proposal that any
15 informal review process, if there is a resolution and
16 compliance with the final order, there not be a penalty.

17 You indicated that the Statute 70-2-31A, says
18 violated or is violating, and that mandated the penalty.
19 Did I understand your testimony correctly?

20 A. No.

21 Q. Okay. Would you explain where you think I'm
22 wrong?

23 A. You will have to rephrase your question for me.

24 Q. Sure. Let me put it this way, Sub (A) of the
25 Statute A says when the Division determines that there has

1 been a violation, that the person violated or is violating,
2 they have three options; correct? They can issue a notice
3 of violation, they can propose a TCO or issue a TCO, or they
4 can go to court; correct?

5 A. Correct.

6 Q. All right. Does anything in the IPANM proposal
7 prohibit the Division from, as you understand it, from
8 issuing a notice of violation?

9 A. Can you make sure we are on the same page as far
10 as which proposal you are discussing?

11 Q. Yeah.

12 A. It is on --

13 Q. I'm happy to do so. And so the proposal is
14 the -- I don't think it's on the slide. It's the
15 proposal -- let me -- I've got the slides here.

16 MR. AMES: 29.

17 BY MR. CLOUTIER:

18 Q. So, yes, it is there -- no, I'm sorry, it's 24.

19 MR. AMES: 24.

20 Q. 24 is the proposal, and I thought I understood in
21 your testimony on this and the statutory criteria you
22 indicated that if the, if there was an informal resolution,
23 that it would be contrary to -- there was no penalty if it
24 would be contrary to the violated or violating language in
25 the statute.

1 A. No.

2 Q. Okay. You would agree with me that the IPANM
3 proposal, this proposal does not prohibit the Division from
4 issuing a notice of violation?

5 A. It would not prohibit the issuance of a
6 violation -- an NOV -- I'm sorry.

7 Q. It would not prohibit the issuance of a TCO?

8 A. It would not.

9 Q. And it would not prohibit the commencing of a
10 civil action in district court?

11 A. It would not.

12 Q. Move over to Page 5, and in Subsection (D), the
13 civil penalties. Did I understand your testimony to be that
14 this is the provision that sets forth the procedures for the
15 assessment of penalties?

16 A. Subsection 10 or -- just to make sure we are on
17 the Subsection (D) of --

18 Q. Titled civil penalties.

19 A. Correct.

20 Q. All right. And did I also understand your
21 testimony correctly that this provision did it best with --
22 was intended to trace the language in Subsection (D) of the
23 Statute 70-2-31?

24 A. Correct.

25 Q. So is the procedure that the Division is

1 recommending to the Commission to make the rules is simply
2 the procedure that was set forth in the statute?

3 A. That's correct. It's using the statutory
4 language to apply specific criteria and then the limits to
5 the civil penalties.

6 Q. Okay. And you don't understand the statutes
7 directive to the Commission to make rules concerning the
8 assessment of penalties to suggest that the Commission
9 should enact further rules beyond what's set forth on the
10 statute on the procedure for doing so?

11 A. If you are asking whether the Commission could
12 create rules beyond what the OCD had proposed in (D), I
13 guess the Commission has that discretion.

14 Q. Okay. Thank you. Mr. Wade, you participated in
15 a meeting with me where we discussed some issues, and one
16 issue that you testified concerns the IPANM proposal to
17 extend the period of time or to shorten the periods of time
18 in the hearing process. I think it's 39. You're there.
19 Okay.

20 Let me try and be clear about the hearing process
21 generally. Is it correct that the rule provides for a
22 hearing in two circumstances; one, in the circumstance that
23 the informal review procedure passes without a stipulated
24 final order in the case of a notice of violation; or, two,
25 in the case where the Division is seeking to extend a TCO or

1 **temporary cessation order.**

2 A. Almost. I believe that as you stated regarding
3 the NOV, that's correct. The way I see the rule is that OCD
4 actually has to ask for a hearing not to extend the TCO, but
5 to actually ask for a new TCO.

6 Q. So to be clear, the statute provides for a TCO
7 that expires on the earlier of the date of abatement of the
8 violation or 30 days; correct?

9 A. Correct.

10 Q. And as I appreciate it, one of your concerns with
11 this proposal was that it would shorten the period to less
12 than 30 days; correct?

13 A. Correct.

14 Q. All right. As I appreciate the operation, the
15 statute and the rule, there would be a TCO in place that
16 would expire if there is no effort to abate, it would expire
17 in 30 days; correct?

18 A. Correct.

19 Q. And then a second TCO could only be issued by a
20 hearing officer on such terms and conditions that the
21 hearing officer saw fit; correct?

22 A. If you will qualify on such terms and conditions.
23 I don't think I can agree with you because I don't know what
24 that means.

25 Q. Let me put it in this way: The second TCO to be

1 issued would have to be done after a hearing; correct?

2 A. It would.

3 Q. And the provisions of the order, that would cease
4 if anything, the length of time it would cease. What the
5 operator could and couldn't do, would be those imposed by
6 the hearing examiner in, in the new issued TCO; is that
7 correct?

8 A. The terms of the TCO would be determined by a
9 hearing examiner after hearing, yes.

10 Q. Yes. That's what I'm trying to say.

11 A. Yes.

12 Q. Okay. And do you understand the IPANM proposal
13 to be simply that the Hearing Officer in any hearing
14 situation can shorten the deadlines set forth in the rule?

15 A. Are you asking? I don't know how far the
16 proposal is asking to reach.

17 Q. Okay. Let me ask you this, my proposal is part
18 of the adjudicatory procedures portion of the rule; correct?
19 It's under Subsection Capital (E).

20 A. It is -- yes.

21 Q. And so therefore only arises in the situation
22 where there is a notice of violation for which there hasn't
23 been informal review or where the Division is seeking a
24 second or additional TCO after having already issued a prior
25 TCO under the statute; correct?

1 A. The proposal would be bound, and the Commission
2 is not going to see it on their report because we did not
3 propose that. It would be found under the prehearing
4 procedures. That's where IPANM proposed to place it.

5 Q. And just to be clear, under the rule, prehearing
6 procedures occur during the course and scope of a hearing
7 after either, one, an NOV continues on past the informal
8 review process without a final stipulated order, or, b,
9 where the Division is seeking a TCO beyond what the statute
10 authorizes the Division to issue on its own, which is a TCO
11 that expired upon the earlier of the abatement or the 30
12 days?

13 A. To state it slightly differently, the prehearing
14 procedures would take place after either an NOV was docketed
15 or a TCO was filed by the Division.

16 Q. And that TCO would be one that would be filed --
17 filed after the Division had already issued a prior TCO for
18 the same operator and same conduct, or well pursuant to the
19 statute that expired on abatement or 30 days; correct?

20 A. I think that's potentially, yes.

21 Q. There is no other -- let me put it this way:
22 The rule permits and the statute permits the Division to
23 enter a TCO that expires on abatement or in 30 days;
24 correct?

25 A. The rule permits the OCD to issue a TCO, correct.

1 **Q.** Correct. And then the rule, the statute permits
2 the Division to go to a hearing, and the rule provides for
3 it to go to a hearing to get a TCO which would extend beyond
4 the 30 days, whether we viewed it as a renewal or a new TCO
5 or whatever it is; correct?

6 A. No, I don't completely agree with that. I think
7 the rule provides the ability for the OCD to file a TCO and
8 that that could be regardless of, it's not an extension of a
9 current TCO, it would actually be filing for a new TCO under
10 this rule.

11 **Q.** All right. All right. Is it the Division's
12 intention -- well, let me ask this question, first. The
13 prehearing procedures in the answer deadline and all that
14 easily could take longer than 30 days; correct?

15 A. Prehearing procedures may take longer than 30
16 days?

17 **Q.** Yes.

18 A. Correct.

19 **Q.** Is it the Division's intention that a TCO should
20 adversely affect property rights?

21 A. Actually, regarding that last question, I would
22 actually have to do the math, which is not my strong point,
23 but there are very specific deadlines within the prehearing
24 procedures, so I would have to add them up to see if that
25 would have been past 30 days. I don't think, just on the

1 first blush -- let's see.

2 So the OCD would docket, an answer would have to
3 come within ten days. Then you would have motions practice,
4 so that's ten days, and then ten days again, so there you
5 are at 30 days.

6 Q. That's okay, but I'm pleased that you satisfied
7 yourself.

8 Is it the Division's intention to adversely
9 affect property rights of oil and gas operators who own
10 leasehold interests?

11 A. No.

12 Q. Do you understand that there are circumstances
13 where an operator may have to conduct some form of
14 operations or produce within certain time frames or risk
15 losing their leasehold interest on a typical --

16 A. I'm certainly no expert in that area. The answer
17 is no.

18 Q. Are you aware, for instance, that the state form
19 statutory lease requires production within a certain period
20 of time after the primary term or advising the Commissioner
21 of intention and actually commencing reworking, refilling or
22 recompletion efforts within certain time frames?

23 A. I am not.

24 Q. Does a TCO issued by a hearing examiner have to
25 have an expiration of the date the violation is abated or 30

1 days, whichever is less?

2 A. I do not believe that is the case.

3 Q. Other than applying the provisions of Subsection
4 (D), the civil penalties, which is both in the statute and
5 the regulation, does the rule contain any other procedure
6 for the assessment of civil penalties?

7 A. Other than applying the statutory criteria?

8 Q. That's correct.

9 A. No.

10 Q. Okay. You indicated that the Division felt that
11 some of the proposed things that IPANM proposed concerning
12 the imposition of civil penalties included things that were
13 not subject or properly the subject of New Mexico law.
14 Which are those?

15 A. I'm going to have to look again.

16 Q. Do you have that in front of you?

17 A. I think my attorney has the documents.

18 Q. I can hand you a copy if you would like.

19 MR. AMES: Sure.

20 Q. And this is Exhibit 1 to 8, prehearing statement
21 for the Commission, and the last six pages are tables first
22 is Table 1.

23 A. Okay. So can you repeat the question?

24 Q. Yes. You had indicated that some of the
25 penalties that IPANM proposed were not issues that the

1 **Division would impose penalties upon, and I was asking which**
2 **ones.**

3 A. Okay. So for example --

4 THE WITNESS: I don't know if the Commission has
5 it.

6 MR. LOZANO: We are looking at it, yes, sir.

7 A. Commission denied access, I don't know what that
8 is. It doesn't refer to any New Mexico rule.

9 Workover and other pits dry, workover and other
10 pits wet, I don't know what that refers to. It doesn't seem
11 to refer to anything.

12 You have improper fire prevention, I'm not sure
13 that that is addressed in any rule within New Mexico.

14 Improper entry signs in non-public area, improper
15 entry signs in a public area, improper entry signs in
16 populated public areas, none of those seem to refer to any
17 rule in New Mexico.

18 Those are examples.

19 **Q. There are signage requirements in New Mexico;**
20 **correct?**

21 A. There are some signage requirements.

22 **Q. Okay.**

23 MR. CLOUTIER: Madam Chair, if I can flip through
24 real quickly.

25 BY MR. CLOUTIER:

1 **Q.** Do you believe that multiple agency fines for the
2 same alleged conduct is going to increase compliance?

3 A. I don't have an opinion on that.

4 **Q.** Okay.

5 MR. CLOUTIER: Madam Chair, that's all my
6 questions.

7 CHAIRWOMAN SANDOVAL: Thank you. Before moving
8 to Mr. Marker's questions and the Commission, we are going
9 to take a ten-minute break and be back here at 11:15.

10 (Recess taken.)

11 CHAIRWOMAN SANDOVAL: We are going to get started
12 again. It's 11:18, and we just completed with IPANM's
13 cross-examination. Mr. Marker, do you wish to cross-examine
14 right now?

15 MR. MARKER: Yes, ma'am. Larry Marker,
16 independent Oil Producer from southeast New Mexico. I do
17 have a couple of questions.

18 CROSS-EXAMINATION

19 BY MR. MARKER

20 **Q.** First off -- just mine are more general, they're
21 not specific -- well, they are specific, but not as
22 specific as these guys.

23 Let's go to Page 4 of Exhibit 4 that's worded
24 very similar to what we have in 70-2-31, the statute that
25 was just amended. We do have, I think, one and two or

1 flip-flopped or whatever. From what I'm seeing from my
2 point of view from a guy in the field that lives under these
3 regulations, and maybe you can correct me, these
4 regulations, is any of this as optional.

5 CHAIRWOMAN SANDOVAL: Mr. Marker, can you ask a
6 question, please?

7 MR. MARKER: That's my question.

8 Q. Is there any mandatory thing that we have to do
9 to tell me that I violated a rule, or can you just get a
10 bill in the mail? Are all of these are optional?

11 MR. LOZANO: Mr. Marker, sounds like you put
12 together a question. Let's let Mr. Wade respond.

13 MR. MARKER: Okay.

14 A. Can you rephrase the question?

15 Q. Okay. On Exhibit 4, Page 4, whenever the
16 Division determines that a person violated or is violating
17 Oil and Gas Act, are any of these three ones -- I'm
18 sorry -- are any of these mandatory. Are any of these
19 optional?

20 MR. LOZANO: Referring to (A)(1) through (3)?

21 MR. MARKER: Yes.

22 A. So I would refer you to the language under (A)
23 which states, "Whenever the Division determines that a
24 person violated or is violating the Oil and Gas Act or
25 provision of any rule, order, permit or authorization issued

1 pursuant to the Oil and Gas Act, the division may seek a
2 sanction by 1, 2, 3."

3 Q. So may is actually optional? That's my problem
4 is we have may, may seek a sanction by which establishes is
5 optional and then we go at the end of Number (2) in
6 parenthesis, issuing a notice of violation or --

7 CHAIRWOMAN SANDOVAL: Can you phrase that into a
8 question?

9 Q. Are any of these (A)(1), (2), or (3), are any of
10 those three, a combination or any of them particularly
11 mandatory?

12 A. I think the word may makes it discretionary.

13 Q. So in reality, I could get a bill in the mail for
14 a violation that I did not receive a notice on or possibly
15 didn't even know that I violated a rule? And that is a
16 question. Can you see receive a --

17 A. No, you cannot. Nowhere in the rule is there a
18 proposal that an operator would just receive a bill in the
19 mail. The rule is very clear on the processes and due
20 process that are involved in receiving sanctions.

21 Q. Where does that -- where does it say that in
22 these regulations is my problem.

23 A. The due process is incorporated into all the
24 sections under 5.10, and it goes to the heart of the
25 process. Division shall issue an NOV, and NOV shall have

1 very specific information so the operator may respond to
2 both the alleged violation and the proposed sanction. Then
3 you have the ability to go to hearing at the OCD level, and
4 then you have ability to appeal to the OCC, then you have
5 the ability to appeal yet again to district court.

6 Q. So it's your position, and this is a question,
7 it's your position that you have to do one of these three?
8 One of these three is mandatory; is that correct?

9 A. That is not correct.

10 Q. Okay. We can say we have due process, I don't
11 see the due process in the regulation. That makes me
12 nervous.

13 MR. AMES: Objection.

14 MR. MARKER: Sir?

15 CHAIRWOMAN SANDOVAL: Can you ask a question,
16 please?

17 Q. What is the mandatory -- what's the mandatory
18 procedure? What do you have to do? You don't have to issue
19 me a temporary cessation order, you don't have to issue me a
20 notice of violation, and you don't have to commence a civil
21 action in district court.

22 MR. LOZANO: Mr. Marker, let me just try to
23 rephrase here. Does the Division have to do one of those
24 three things in order to pursue a violation under the rules?

25 THE WITNESS: Yes. Under the rules, if the

1 Division were to pursue a violation and seek a sanction,
2 these are the three vehicles that they would have to use to
3 pursue that violation.

4 MR. MARKER: Okay. Then the word may needs to be
5 changed to shall.

6 MR. LOZANO: We can move on, Mr. Marker.

7 MR. MARKER: Okay.

8 BY MR. MARKER:

9 Q. We have optional. And then we go to the other
10 questions, and you spoke earlier in your presentation about
11 the civil penalties. My question is, and there again, from
12 my point of view, from a guy in the field that's subject to
13 these regulations, to the statutes, and now the regulations,
14 has anybody taken into account the fact that a lot of these
15 civil penalties actually are criminal, they are punitive in
16 nature? What, what guarantees or what assurance do we have
17 that we are dealing strictly with remedial or civil
18 sanctions?

19 A. 70-2-31 as amended has basically two halves to
20 it. Its first half is the violation that the OCD may pursue
21 civilly, and then there is a criminal portion of the
22 statute.

23 Q. Yes. Yes, I agree. I agree. What I'm saying --
24 and we can go back to the statute, and this may not be the
25 venue I should be arguing this, but even the statute is

1 **allowing for sanctions that are criminal to be applied under**
2 **civil rules.**

3 MR. LOZANO: All right. Mr. Marker, so you are
4 going to have an opportunity to testify regarding what your
5 view of these rules are and potentially the statute. The
6 time that you have right now is to ask him specific
7 questions about his testimony that he has provided.

8 I tell you that it needs to be questions, it
9 cannot be you making statements about what you think about
10 these rules.

11 MR. MARKER: Okay. Okay.

12 BY MR. MARKER:

13 Q. Okay. My question would be -- let me rephrase
14 it. Go to Page 4. Page 4, Part (B), sanctions. The
15 Division may seek one or more of the following sanctions.
16 Has anybody --

17 MR. MARKER: I really don't know how to word that
18 without testifying. I'm just going to have to save this for
19 my testimony.

20 CHAIRWOMAN SANDOVAL: Okay.

21 MR. LOZANO: Okay.

22 MR. MARKER: I will make a statement.

23 MR. LOZANO: You will absolutely have the
24 opportunity to speak Mr. Marker.

25 BY MR. MARKER:

1 Q. Then the other question I have, and it probably
2 is as much -- we are talking in the end of, I don't know
3 what page it is because I already closed my paper, I'm sick
4 of thumbing through it, anyway, we're addressing 70-2-25,
5 after we go for a hearing, you guys are saying I can appeal
6 this to the district court after a hearing with the
7 Commission; is that correct?

8 A. There is an appeals process from the Commission
9 to district court, correct.

10 Q. The issue I have with that is statute 70-2-12.2
11 and it overrides 70-2-25 Part -- 70-2-12.2 Part C, it says,
12 "Any party of record to the proceeding before the Commission
13 or any person adversely affected by rule or adopted Oil and
14 Gas Act may appeal to the court of appeals within 30 days
15 after filing under the state rules act." This rule actually
16 did away with that part of 12 of 25.

17 CHAIRWOMAN SANDOVAL: Mr. Marker, do you have a
18 question?

19 Q. That is my question. Did anybody look at 12.2?

20 A. This language was proposed both by NMOGA, NMOGA's
21 attorney and IPANM's attorney, was reviewed by legal counsel
22 within the OCD, so I imagine that, yes, somebody looked at
23 the statute.

24 Q. And what did they come up with?

25 A. The language that's proposed.

1 Q. You are saying that 25 overrules 12.2?

2 A. I don't have an opinion on that.

3 Q. Sir?

4 A. I'm sorry, I don't have I don't have an opinion.

5 MR. MARKER: No. --

6 MR. LOZANO: Mr. Marker, you address your
7 question to the witness.

8 MR. MARKER: Okay. Never mind. I'm done. Thank
9 you.

10 CHAIRWOMAN SANDOVAL: Thank you. Commissioners,
11 would you like to address questions to the witness.

12 COMMISSIONER KESSLER: Mr. Wade, thank you for
13 your presentation. I had a question about the terminology
14 for the word violator as opposed to the prior term in the
15 rule which was operator slash responsible party.

16 And if you can find that in, its 19.15.5 and
17 (C)(1). So Page 3 of Exhibit 4, (C)(1), identifying
18 operator and any other responsible parties. Can you please
19 discuss the reason that the word violator has been adopted
20 now in the regulation or in the proposed rule?

21 THE WITNESS: Thank you. That's a good question.
22 I don't know the specific answer to that other than it would
23 be to make the language consistent throughout the proposed
24 rule. I don't think that there was any -- I don't think
25 there there is any referral to a definition of violator or

1 anything like that.

2 COMMISSIONER KESSLER: I don't see violator
3 defined.

4 THE WITNESS: It likely is not defined.

5 COMMISSIONER KESSLER: Okay. Is that -- is the
6 term violator perhaps a more narrow term than operator or
7 responsible party?

8 THE WITNESS: Can we look at the language that
9 you are referring to specific to violators? Does it say
10 alleged violator, and I think that might be an important
11 qualifier.

12 COMMISSIONER KESSLER: So I'm just using as an
13 example. Let's see (C) on page back of Page 4 of Exhibit 4
14 notice of violation (C)(1).

15 THE WITNESS: Little (a).

16 COMMISSIONER KESSLER: Little (a), identity of
17 the alleged violator, if I can find some more examples.
18 Paragraph 3, "Shall state that the alleged violator admits
19 the Division," the following Paragraph 4, "the Division and
20 alleged violator."

21 THE WITNESS: So I think that the language was
22 intended to make very clear that anyone that the OCD is
23 looking to establish a violation has occurred and seeking
24 sanctions against is alleged to be a violator as all of
25 these different points within the rule so that their due

1 process isn't harmed. And so I think that you are going to
2 find that throughout the entire rule it's consistently
3 alleged violator.

4 COMMISSIONER KESSLER: Alleged violator.

5 THE WITNESS: That's for due process.

6 COMMISSIONER KESSLER: But the word violator
7 could be an operator, or it could be a responsible party, it
8 doesn't necessarily narrow who the OCD is claiming
9 jurisdiction over; correct?

10 THE WITNESS: By calling somebody an alleged
11 violator?

12 COMMISSIONER KESSLER: Right.

13 THE WITNESS: I would agree with that, that it
14 could encompass an operator or subsidiary of that operator,
15 you know, a larger group, a responsible party. I would also
16 note there are definitions of operator, and I think
17 responsible party but for sure operator.

18 COMMISSIONER KESSLER: For sure operator and --

19 THE WITNESS: In the rule.

20 COMMISSIONER KESSLER: In the relevant statute,
21 yeah. Will the Division following the rulemaking offer
22 policy guidelines related to amounts of the proposed
23 violation?

24 THE WITNESS: Yes. The idea is to continue
25 further discussions with stakeholder groups and get further

1 input. We of course would have to apply the statutory
2 criteria, but the idea being in the future we can put a
3 policy into place that's more or less agreeable that can
4 take care of of some of these maybe more routine type
5 violations and at least establish some kind of baseline.

6 We will have to revisit to the OCD, we will kind
7 of have to reach out to the stakeholder groups to learn what
8 their concerns are to actually conduct some of these
9 enforcement actions and see how they play themselves out.

10 COMMISSIONER KESSLER: For consistency?

11 THE WITNESS: For consistency. That is the goal
12 is to be consistent, we're not trying to play, you know,
13 gotcha or surprise people.

14 COMMISSIONER KESSLER: My last question related
15 to Mr. Cloutier's question shortening the deadline. As I
16 understood that proposal, it was related to a briefing
17 schedule; is that correct?

18 THE WITNESS: Honestly, I'm having trouble with
19 that proposal. I don't understand what it is, and I don't
20 understand what the deadlines are to be shortened. My
21 response in my presentation was that there are at least two
22 deadlines that seem to be set by statute that you can't
23 shorten.

24 One is already short, the 30 day maximum for the
25 TCO, and one is 30-day minimum for NOV. In general, I think

1 that if an operator or any applicant who had hearings has a
2 need for a hearing to take place sooner, I think they can
3 always ask for that because it's always been in place. And
4 then a hearing examiner can determine whether that's
5 appropriate after allowing a response by the other parties.

6 COMMISSIONER KESSLER: So do you envision
7 potentially an alleged violator requesting an expedited
8 briefing schedule, and that would simply be part of the
9 process as opposed to it being included in the rule.

10 THE WITNESS: Correct. I think that's part of
11 the adjudicatory process rather than being set by rule in
12 this particular rule.

13 COMMISSIONER KESSLER: And then I have the same
14 question with respect to Mr. Feldewert's discussion of the
15 temporary cessation order related to the Division's
16 determination of whether a violation has been abated. Would
17 the OCD object to some sort of time frame for making that
18 decision?

19 THE WITNESS: It's my opinion that that time
20 frame is already in the statute. You have 30 days -- the
21 Division has 30 days to operate under a temporary, temporary
22 cessation order. It's just 30 days. After that 30 days
23 that cessation order ceases to exist unless the Division
24 goes to hearing to establish a new cessation order.

25 So I'm not sure that that shorter time can be

1 negotiated because it's in statute. There will be obviously
2 an administrative process as to how TCOs and NOV's will be
3 issued and how they are taken care of administratively
4 within the OCD, but I don't think that needs to be clarified
5 within the rule at this point.

6 COMMISSIONER KESSLER: Okay. That's all my
7 questions. Thank you.

8 COMMISSIONER ENGLER: Mr. Wade, if you go to
9 Slide 30, please, and I think this is kind of covered by one
10 of the previous questions, I think it was 30. I'm looking
11 for the penalty where there was discussion from IPANM about
12 a different clause -- yeah, well, I think it's the next
13 one. I can't read the numbers, so I can't see what the
14 slide numbers are.

15 THE WITNESS: This is Slide 28, this is 29 which
16 is IPANM's proposal to amend 10(D) which is the civil
17 penalties portion.

18 COMMISSIONER ENGLER: I think the next slide you
19 mentioned about reasons why you -- and I think you
20 addressed some of this about the consistency -- about
21 setting certain penalties now, you were not prepared to do
22 that today, and we are waiting to see maybe if you can get
23 with stakeholders, correct, to come up with some type of
24 penalty consistent rules, or not rules but --

25 THE WITNESS: I think this is the slide that

1 touched on those. I think the way I expressed it was
2 exactly correct from the OCD perspective. I think we are
3 going to have to understand what the universe of potential
4 violations that the OCD would have to enforce on is
5 basically from an OCD perspective, administrative
6 perspective, triage that universe to see what we want to
7 spend time on, again using those criteria that you find in
8 the statute. Maybe the worst violators or the worst
9 violation, and then kind of scale from that direction on,
10 you know, somebody with a sign that's on the ground is not
11 going to require a large sanction or a lot of time from the
12 OCD's perspective.

13 COMMISSIONER ENGLER: Do you have a time line
14 where you think those -- because this is effective January
15 1, and then of course you have to go through this process.
16 Do you have a time line where you will have these guidelines
17 or, or penalties prepared for everyone?

18 THE WITNESS: Honestly, I have not thought of a
19 specific time line. I think the sooner the better for not
20 just the OCD but obviously for operators. I mean basically
21 what, the ability to create a policy especially specific to
22 penalty calculations does allow the OCD to scale back from
23 the statutory maximums. Like you said, 70-2-31 amendment is
24 already enacted. At this point in time the OCD can now levy
25 civil penalties.

1 The only guidance we have at this time is what
2 it's in the statute. We want to be able to work with
3 stakeholders, at least the rough time line, I would say,
4 would be six months, in that rough area to be able to come
5 up with something other than what's in the statutory
6 criteria.

7 COMMISSIONER ENGLER: I think flexibility,
8 consistency, and time is what you are after. You stated --
9 let me go back. In one of the proposals there was about the
10 idea about duplication of penalties by the federal BLM or
11 other state agencies. I believe you made some statement in
12 your slides about -- how you did -- you were talking about
13 the -- that they were not similar, or it was some wording
14 in that you had.

15 THE WITNESS: So I think you were talking about
16 IPANM's proposed new sections (E) and (F) and what they both
17 talk about doing is limiting or prohibiting the OCD from
18 levying civil penalties if the BLM has imposed a violation,
19 a penalty on a, quote, same violation. In my -- if you had
20 a further question.

21 COMMISSIONER ENGLER: No, please go ahead.

22 THE WITNESS: Okay. My opinion is that you're
23 working under different laws, one is a federal law, one is a
24 state law. One is a land management agency, one is a
25 regulatory agency. So there is no same violation.

1 COMMISSIONER ENGLER: Well, that helped me
2 because you said there is no such thing as same violation,
3 and for someone like me who is not a lawyer, I kind of
4 wanted to hear more about what federal versus state
5 regulatory.

6 THE WITNESS: That's one example. The other
7 proposal was that if maybe the Environment Department came
8 in and levied some kind of sanction for a type of violation,
9 that maybe we couldn't do that, but the Environment
10 Department regulates under different laws altogether. We
11 are under New Mexico Oil and Gas Act, they are under Water
12 Quality Act, you know, Clean Air Act, that kind of thing.

13 COMMISSIONER ENGLER: So again, I needed some
14 clarification on that statement about different laws, again
15 being nonlegal. I say that as a good thing, by the way. No
16 further questions.

17 THE WITNESS: I will try to move relatively
18 quickly.

19 CHAIRWOMAN SANDOVAL: All right. In your
20 opinion, has OCD's lack of administrative penalties hindered
21 the burden to prove knowing and willful threatened in any
22 way the protection of correlative rights, protection of
23 public health and environment, prevention of waste?

24 THE WITNESS: In my opinion, yes. I think it
25 does in every way. You know, regarding correlative rights

1 and waste, when you don't enforce, that means that diligent
2 operators and non-diligent operators aren't on the same
3 playing field. Diligent operators, you know, put more time
4 and money into being diligent, but they don't get any kind
5 of benefit other than they are diligent operators; whereas,
6 non-diligent operators, you know, they can do what they want
7 without enforcement and compliance.

8 CHAIRWOMAN SANDOVAL: So conversely, will this
9 rulemaking that came out from the, the statute really help
10 the OCD enhance its ability to prevent waste, protect
11 correlative rights, and protect public health and
12 environment.

13 THE WITNESS: I think for sure. And you didn't
14 speak to public health and environment, but in a lot of ways
15 that's obvious that if we enforce against, you know, spills
16 or lack of remediation, then we are going to have a cleaner
17 environment and protect public health.

18 CHAIRWOMAN SANDOVAL: OCD does currently have
19 some mechanisms for compliance. Do you feel like they are
20 effective?

21 THE WITNESS: We do have some mechanisms for
22 compliance. Those are actually restated within the amended
23 statute and the rules. For example, you know, we do have
24 the ability to force an operator to plug a well or to shut
25 in. Those are actually relatively extreme sanctions, not

1 necessarily effective.

2 Certainly the language of knowingly and willfully
3 that was in the previous statute was a large hurdle for the
4 OCD to get over. By removing that language and by allowing
5 a toolbox, if you will, of different sanctions, possible
6 sanctions, including penalties, the OCD will definitely be
7 able to more efficiently and effectively enforce the Oil and
8 Gas Act and hopefully deter future non-diligent behavior.

9 CHAIRWOMAN SANDOVAL: Thank you. Division
10 counsel earlier referred to the couple hundred NOV's that had
11 been sent out over the past couple of months, and of those,
12 a handful of them we have heard back from, but the vast
13 majority there has been no follow-up from operators. Is
14 that the case?

15 THE WITNESS: I believe that's the case in not
16 only this set of NOV's that was sent out, but historically
17 that's been the situation. It also occurs in different
18 forms of letters alerting operators to non-compliance.

19 One example is non-reporting, not reporting their
20 C-115. The OCD has sent letters saying, "You are not in
21 compliance," and it has no mechanism to enforce that
22 non-compliance, enforce compliance with the rules stating
23 that you have to report.

24 CHAIRWOMAN SANDOVAL: So you mentioned that
25 financial assurance, you were 8 million?

1 THE WITNESS: Approximately.

2 CHAIRWOMAN SANDOVAL: Eight million financial
3 assurance, and when companies go bankrupt, the State is left
4 holding the bag. Will that \$8 million in financial
5 assurance assist?

6 THE WITNESS: Absolutely. It more than likely
7 depends on the scenario on a case-by-case basis, you know,
8 the bonding would more than likely not be enough to fully
9 remediate or plug abandoned wells, but it would certainly
10 assist.

11 CHAIRWOMAN SANDOVAL: Kind of referring to
12 Mr. Feldewert's discussion around abatement, is it a common
13 practice for the Division to determine when an item has been
14 abated?

15 THE WITNESS: Yeah, it is. You know, regarding
16 that determination, I would like to make two points. One
17 would be that regardless of whether it's under a TCO or NOV,
18 the OCD would strive to be in open communication with an
19 operator or alleged violator regarding the violation and
20 would strive to come to settlement. That's really one of
21 the main purposes of this rule.

22 I also like to point out that the administration
23 of this rule internally within the OCD would always be under
24 control of OCD management and ultimately the director. So
25 you would not have people issuing NOVs or TCOs without OCD

1 management having knowledge and some control over this
2 process. That's exactly the way compliance orders happen at
3 this time.

4 CHAIRWOMAN SANDOVAL: So without the language the
5 Division determines that the alleged violation is abated,
6 without adding the Division determines, is it conceivable
7 that operators could determine that the alleged violation is
8 abated?

9 THE WITNESS: I don't see how that could occur
10 when the Division is making an initial determination that
11 one of the two criteria apply, and that's why the Division
12 should issue a TCO. So it really just stands to reason that
13 the Division would be the entity that decides, you know,
14 these criteria no longer apply, this order is no longer
15 needed.

16 CHAIRWOMAN SANDOVAL: So that's basically
17 clarifying language clarifies that the Division issued the
18 temporary cessation order and the Division would need to
19 determine whether the alleged the violation is abated?

20 THE WITNESS: Correct.

21 CHAIRWOMAN SANDOVAL: Thank you. Would the
22 Division be amenable to adding some language within the
23 draft NOV letter just notifying operators of what the --
24 how to initiate an informal process?

25 THE WITNESS: Absolutely. I think that gets to

1 the point that I just made. How an NOV is administered
2 would be one, it would come from OCD management, so we would
3 always -- the OCD management would always know what is
4 occurring, what violations have been addressed and how.

5 And two, it would follow kind of a common sense
6 normal process. Agreed compliance orders now tell you who
7 you should contact. It's not as if they are sent out, and
8 you know, you are left hanging and you have no idea who to
9 contact.

10 So I actually anticipate that NOV's in the future
11 will have very specific language as to how you address your
12 violations. And again it's also my hope that operators will
13 take advantage of the informal process and not need to apply
14 strict structure to it so that, yeah, they can make phone
15 calls to Santa Fe when they are down in Carlsbad, or they
16 can come and meet with people in person if they prefer that.

17 CHAIRWOMAN SANDOVAL: Thank you. It was stated
18 that operators may not know that they're not in compliance,
19 there could be an issue out there that they are unaware of.
20 When the operator -- when somebody becomes an operator in
21 this state, is there a formal training where they have to
22 sign off that they understand all of the rules of the State
23 of New Mexico and that they will comply with them?

24 THE WITNESS: There is that training.

25 CHAIRWOMAN SANDOVAL: And all operators have to

1 go through it?

2 THE WITNESS: They do.

3 CHAIRWOMAN SANDOVAL: Okay. Same thing when they
4 transfer wells, so if the Company A acquires wells from
5 Company B, is there a formal process where the liability is
6 transferred and both companies have to sign?

7 THE WITNESS: There is. It's a change of
8 operator form that they both have to sign and it has all the
9 information.

10 CHAIRWOMAN SANDOVAL: Okay. That is all.

11 COMMISSIONER KESSLER: One more question. I just
12 wanted to clarify, Mr. Wade, what language in the statute
13 you are relying on for the day that the penalty begins to
14 accrue. That's in 70-2-31(A); is that correct?

15 THE WITNESS: Yes.

16 COMMISSIONER KESSLER: Revised.

17 THE WITNESS: That's correct. The language in
18 70-2-31(A) contemplated past violations that the OCD may
19 become aware of, perhaps a spill that somehow has been
20 cleaned up, but the fact that that spill was out there, and
21 it would depend on a fact -- a case-by-case basis and
22 factual basis, but there could be circumstances where the
23 OCD pursues past violations.

24 COMMISSIONER KESSLER: Thank you.

25 CHAIRWOMAN SANDOVAL: Does the OCD have the

1 authority to conduct discovery or subpoena information?

2 THE WITNESS: The OCD and OCC does have that
3 ability.

4 CHAIRWOMAN SANDOVAL: Thank you.

5 MR. LOZANO: I have just a couple for you, Mr.
6 Wade. With regard to informal review and settlement
7 process, I know it's informal, not structured. Presumably,
8 when you enter into the stipulated orders, are there going
9 to be fines? Are you anticipating fines being involved with
10 that, maybe lesser fines or some type of financial
11 penalty -- I won't use the word penalty, but something
12 something like that within those orders even if they have
13 abated or cured the violation?

14 THE WITNESS: I think that you would have to take
15 a look at the statute and rule. You have essentially eight
16 sanctions that you can apply, so even within a stipulated
17 order any one of those could apply, and then yes, you would
18 then apply specific penalties, you would apply the statutory
19 criteria at a minimum, and it could be that you have an
20 operator who is a historically bad operator and the
21 violation is egregious, and yes, they would have to agree to
22 some penalty.

23 MR. LOZANO: I know Mr. Feldewert asked you this
24 many times, but do you anticipate, not in the rule, but that
25 the Division have a sort of maybe outline of what the

1 informal process might look like?

2 THE WITNESS: Yeah. I think that it's very
3 possible. I think that we have one that already exists,
4 that we just refine that and potentially have a guideline or
5 a policy on how that were to occur.

6 MR. LOZANO: And sort of follow up on the
7 abatement question. So a TCO is issued, and then the
8 operator called up and says, "We fixed the problem," what's
9 the Division's obligation at that point to either determine
10 whether abatement has occurred or some other action?

11 THE WITNESS: I think you would go into whatever
12 portion of the rules the violation fits within. So if it's
13 an action where there is a spill on the ground, you would go
14 into our our Rule 29 and have to do very specific types of
15 reporting back to the Division, including an abatement plan,
16 for example, and the Division reviews those abatement plans,
17 and they do say, "Yup, we think this is done correctly." So
18 I think it would depend on maybe what the violation was and
19 where it fits within the rules.

20 MR. LOZANO: So there is not really going to be
21 any sort of set response period for that, it just depends on
22 what the Division has to do in order to determine whether
23 that abatement has occurred?

24 THE WITNESS: I think the major sidewall that was
25 placed in by the legislature was that the 30 days maximum

1 for temporary cessation orders, so if he was going to do
2 anything, that's the time to do it.

3 MR. LOZANO: With regard to the civil penalties
4 and NOV, does the Division anticipate calculating out a
5 specific potential sanction, or is it going to simply be,
6 you're subject to \$2500 fine per day for the period of the
7 violation? Or both?

8 THE WITNESS: If I'm understanding your question
9 correctly, we would be capped at the statutory limit. We
10 want to be able to build in the flexibility to go under
11 those statutory limits, so there might be certain violations
12 that I could see just being kind of a rope with a certain
13 amount.

14 But I think you always have to apply those
15 criteria, the statutory criteria. So if you have a sign on
16 the ground that, you know, everyone sees or consider maybe a
17 minor thing, but if you have 100 wells with 100 signs on the
18 ground, that might be more of a problem.

19 MR. LOZANO: Okay. And it was discussed several
20 times, but I guess sort of in general terms, does the
21 Division anticipate any type of statute of limitations on a
22 violation? Can they go ten years back? Is there some level
23 that the Division plans on, on capping how far back a
24 violation can be pursued?

25 THE WITNESS: I think that the cap there is what

1 the OCD can prove. I think as time goes on, the OCD would
2 have more and more trouble proving violations, but I think
3 that depends. It's a case-by-case basis. It's based on the
4 fact. I think there is potential that if the OCD can prove
5 something happened years ago and it wishes to pursue it,
6 that it could under the Act and rules.

7 MR. LOZANO: With regard to docketing, and this
8 is maybe just a technical question, but it seems to me that
9 the NOV must require a date of hearing; is that correct?

10 THE WITNESS: That's correct.

11 MR. LOZANO: So what is the purpose -- so in the
12 docketing process where docketing is required after the
13 informal, I assume that date is already set. So what's the
14 purpose of that, I guess, that provision?

15 THE WITNESS: That's a really good question. It
16 might be a matter of wordsmithing, or without rereading it
17 right now, it could be because that particular section
18 refers to both NOV's and TCO's and maybe didn't distinguish,
19 but I think you have a point as far as you might have a
20 hearing date already established.

21 MR. LOZANO: Okay. That's all I have.

22 CHAIRWOMAN SANDOVAL: A quick follow-up on the
23 TCO's. You said that we currently -- the OCD currently has
24 the ability to shut a well in and revoke a permit. How
25 often has the OCD used that?

1 THE WITNESS: Honestly, I can't give you a hard
2 number. Just in general terms, not often.

3 CHAIRWOMAN SANDOVAL: Can you -- with this new
4 proposed rule change, I mean, do you imagine there would be
5 very many of those, or would those really be the exception?

6 THE WITNESS: I think you would apply the
7 statutory criteria at a minimum, and I would just venture to
8 guess, more speculation, that we would not use the more
9 extreme versions of sanctions, and that's really where the
10 penalties give us a great deal of flexibility.

11 CHAIRWOMAN SANDOVAL: So it's likely safe to say
12 that there would, wouldn't be a large volume of those and
13 they would be -- the Division would be able to manage our
14 workload?

15 THE WITNESS: The Division should be able to
16 manage the enforcement and compliance of the Oil and Gas Act
17 rules much more effectively under these rules that are
18 proposed than currently. I'm not sure if that answers your
19 question.

20 CHAIRWOMAN SANDOVAL: It does. Thank you. Any
21 other follow-up?

22 COMMISSIONER ENGLER: No.

23 CHAIRWOMAN SANDOVAL: Does the Division wish to
24 redirect?

25 MR. AMES: Yes. Thank you. I actually only have

1 one or two questions on Mr. Wade's response to the
2 Commission's questions.

3 REDIRECT EXAMINATION

4 BY MR. AMES:

5 Q. Mr. Lozano asked how far back OCD can go to
6 assess civil penalties. Can the OCD go back before the
7 effective date of the rule to assess penalties for dates of
8 violation occurring before the effective date?

9 A. No.

10 MR. AMES: Thank you, nothing further.

11 CHAIRWOMAN SANDOVAL: Does the Division have any
12 additional witnesses?

13 THE WITNESS: Can I qualify that answer actually?

14 CHAIRWOMAN SANDOVAL: Yes.

15 A. I would say, I think you said civil penalties
16 specifically.

17 Q. I did.

18 A. The answer to that is no. Where other sanctions
19 are available under of the Oil and Gas Act and rules, yes.

20 MR. AMES: Thank you. Nothing further. OCD
21 rests.

22 CHAIRWOMAN SANDOVAL: Thank you. So we're --
23 it's 12:02. We are going to break for lunch for an hour.
24 Let's come back at 1:10.

25 The witness is released.

1 (Lunch recess was taken at 12:02 and the
2 proceeding resumed at 1:15 as follows:)

3

4 CHAIRWOMAN SANDOVAL: Now that we have all of our
5 counsel, we will get started again.

6 It is 1:13 On Thursday, January 2. We will now
7 hear from -- oh, just as a reminder, if you wish to make
8 public comment, please sign up on the sheet on the back. If
9 you don't sign up, then you don't sign up.

10 We will now hear from each party that has
11 submitted their intent to present technical testimony
12 beginning with IPANM.

13 MR. CLOUTIER: Thank you, Madam Chair, a brief
14 statement. At the beginning, as I indicated to the
15 Commission, I will save most of my comments for my closing
16 statement.

17 First of all, we appreciate -- I want to express
18 our appreciation to the Division, particularly Mr. Wade, Mr.
19 Ames and Mr. Brancard, they have been willing to sit down
20 and work with us on some of our concerns. We have some
21 areas of disagreement, but we have been able to reduce those
22 for the Commission and appreciate their professionalism and
23 look forward to continuing to work with them on future
24 issues.

25 Secondly, Madam Chair, I believe you have

1 received at this point comments from Armstrong and then
2 perhaps from Tom Biehl, who is a member, I had been alerted
3 earlier this morning from an e-mail recipient that there may
4 have been some inadvertent e-mails sent to Ms. Davidson, one
5 of them from Armstrong another from Vanessa Fields who is
6 listed as testifying. She has the flu and can't travel down
7 here and was going to submit written public comment.

8 If those are received today, we thank the
9 Commission's indulgence to consider those comments as well
10 today, even though they weren't here first thing this
11 morning.

12 Secondly -- or third, two issues came up in
13 questioning from the Commissioners that I thought it might
14 be more efficient to address in my comment.

15 Commissioner Engler, you asked about our proposal
16 about BLM fines and other agency fines. Our proposal there,
17 I guess what I would stress is that violations occur as a
18 result of the interaction of two things, some certain
19 underlying operative actions or inactions or events and a
20 rule.

21 The proposals from IPANM were meant to address
22 the fact, knowing that the Division does not enforce CFR,
23 the BLM does not enforce the Division's NMAC rules, the
24 Division doesn't enforce the Air Quality Bureau's rules, was
25 that it's the same set of operative facts resulting from

1 fines from one agency, we are not going to double up on
2 them. That's the purpose of our proposal. To quote Mr.
3 Wade, there may be some drafting and inartfulness in those
4 proposals, but that is the basis for our proposal.

5 Commissioner Kessler, you asked about our
6 proposal about having hearing officers reduce the amount of
7 time. We are going to present some testimony on that issue,
8 but I don't think, contrary to the Division's comments, that
9 we are asking that we violate any of the statutory
10 prohibitions.

11 The only place an adjudicatory hearing comes up
12 is after the informal review process, which has to be 30
13 days, then somebody has to docket the NOV, and that starts,
14 our 30 days is already up. So we want the hearing officer
15 to have the ability to reduce the deadlines from that.

16 And then secondly, the adjudicatory process can
17 arise if the Division issues a temporary cessation order for
18 whatever reason they become concerned that it's not going to
19 be abated during the 30 days and they seek to -- Mr. Wade
20 and I were -- Mr. Wade was correct, in my nomenclature I
21 said extend, but issue a new TCO through the hearing
22 officer.

23 And I have a hard time seeing how a hearing
24 officer can hear a request for a new TCO, issue a new TCO,
25 and we are still within the 30 -- and then extend the

1 deadline so there is going to be a hearing within the
2 initial statutory 30 days.

3 So I don't think that, I think that it's
4 important for the hearing officer to have that power. It
5 may not be in our proposal. There is a Subsection (C), I
6 believe, of the procedures that some of the hearing
7 officers' powers, perhaps just shortening the deadline in
8 there is appropriate, but I did want to address those two
9 technical issues that came up in the questions, comments.

10 Our witness today is going to be Paul Ragsdale.
11 Mr. Ragsdale is not a sponsor and is not going to testify as
12 Mr. Wade did about particular amendments that OCD -- that
13 the IPANM has proposed. Rather, he is going to be
14 testifying about the operational issues that we see out in
15 the field, and I will tie those up in my conclusionary
16 arguments as to why we think those facts are important to
17 the amendments that we have put forward and with which we
18 have not been able to agree with the Division on how to
19 resolve.

20 So with that, I will call Mr. Ragsdale. And
21 Mr. Ragsdale, you want to stand by court reporter and be
22 sworn in.

23 (Oath administered.)

24 CHAIRWOMAN SANDOVAL: You may now present direct
25 testimony on the proposals.

1 MR. CLOUTIER: Thank you.

2 PAUL RAGSDALE

3 (Sworn, testified as follows:)

4 DIRECT EXAMINATION

5 BY MR. CLOUTIER:

6 Q. Mr. Ragsdale, would you introduce yourself for
7 the Commissioners?

8 A. My name is Paul Ragsdale. I'm the operations
9 manager for Strata Production. I live in Roswell, New
10 Mexico. Our office is in Roswell, New Mexico.

11 Q. Have you ever testified before the Commission
12 before?

13 A. I have not.

14 Q. Okay. Given that, would you please give them
15 your experience in operations in the oil and gas industry in
16 New Mexico in summary fashion?

17 A. I have worked for Strata Production as operations
18 manager for the past six years. Prior to that I was the
19 operations manager for Yates Petroleum. I worked for Yates
20 Petroleum for 21 years. So operations manager there for
21 about five years, and then I was operations manager of their
22 Midstream Operation, Agave Energy, and I'm the president
23 there.

24 Q. Would you give the Commission a brief idea of
25 what your duties as an operation manager are in terms of

1 being out in the field and particularly interacting with
2 regulations of various agencies and agency regulation?

3 A. So, so my job is to monitor the wells and to make
4 sure that they are producing. That's the main thing. And
5 we want to make sure that those wells are produced
6 efficiently and according to law. And safely, too.

7 Q. And do you have experience -- do you have
8 occasion in your job from time to time to become familiar
9 with you and your field personnel's interaction with
10 regulatory agencies?

11 A. Absolutely, yes.

12 MR. CLOUTIER: I would like to tender Mr.
13 Ragsdale as an expert in oil and gas field operations.

14 CHAIRWOMAN SANDOVAL: Do any of the Commissioners
15 have questions regarding his background?

16 COMMISSIONER KESSLER: No.

17 COMMISSIONER ENGLER: No.

18 CHAIRWOMAN SANDOVAL: Any objection to him being
19 certified as an expert witness?

20 MR. AMES: OCD doesn't believe there is any need
21 to certify witnesses as experts in a rulemaking proceeding.

22 CHAIRWOMAN SANDOVAL: You are recognized as a
23 witness.

24 THE WITNESS: Thank you.

25 BY MR. CLOUTIER:

1 Q. Mr. Ragsdale, I would like to begin talking
2 generally about compliance with the Oil and Gas Act and Oil
3 Conservation Division regulations. What's been yours and
4 your employers' attitudes over the years of your time in the
5 business towards problems that occur in the course of
6 downstream and midstream operations, including those that
7 put you out of compliance with OCD regulations?

8 A. We monitor our wells on a day-to-day basis.
9 Often we monitor the wells twice a day, and if we find that
10 we have a situation where it puts us in non-compliance, then
11 we try to repair those problems as quickly as possible.

12 Q. And what about reporting deficiencies?

13 A. If it's necessary, we do that.

14 Q. Why do you want to fix them as quickly as
15 possible?

16 A. Well, there's a variety of reasons. One is, as
17 we've heard today, it's very important for our company to
18 maintain a good history with our -- with the OCD and with
19 BLM. We operate on state and federal lands, so we try to
20 remain in compliance, and we try to make sure that we are
21 operating under those guidelines.

22 The second and a very important one is, is that
23 if we have a problem, some of these wells, the equipment is
24 old, and we might have a situation that there might be a
25 danger to my people or to other people in the field, and so

1 from a safety standpoint we want to make sure these things
2 are repaired as quickly as possible.

3 And thirdly, you know, my main goal, my main
4 objective is to, when we have to shut a well down, we lose
5 production, and so to try to get those wells back into
6 production as quickly as possible.

7 **Q. In your experience, how common is this sort of**
8 **attitude in the industry?**

9 A. Oh, well, now I have worked for, like I said, I
10 have worked for Strata and for Yates, and it's very common.
11 I think the attitude from a prudent operator is to make sure
12 you are in compliance and to resolve and remedy the
13 situation, especially the safety situations.

14 **Q. Are you saying that every operator is a prudent**
15 **operator and --**

16 A. Well, I think there are some that are probably
17 not prudent, to my knowledge, but I think the majority of
18 operators in New Mexico are prudent operators.

19 **Q. How will the prospect of civil penalties being**
20 **imposed by the Division affect your efforts to comply with**
21 **the Oil and Gas Act and its underlying regulations?**

22 A. Well, as I stated, I feel like our job is to
23 maintain compliance with these rules and regulations. And
24 we, we work closely with the local regulators there, the OCD
25 office and the Carlsbad office of the BLM.

1 So as far as I'm concerned, I don't think these
2 fines are going to change my attitude for compliance. I
3 feel like we already do a good job of being in compliance.

4 MR. CLOUTIER: Madam Chair, I was going to ask
5 Mr. Ragsdale some questions about the speed of or lack of
6 speed of certified mail that the Division has agreed where
7 they can serve by e-mail. And part of our concern is just
8 mostly accumulation of fines on a daily basis because
9 certified mail takes a long time, and also just getting
10 responsiveness because some violations may be technical, and
11 the public's health or safety or production is affected, but
12 others could be, and we appreciate the Division's efforts to
13 amend the rule, and I'm not going to ask Mr. Ragsdale those
14 questions, but just wanted to point that out and thank Mr.
15 Wade and Mr. Ames for their cooperation that way.

16 BY MR. CLOUTIER:

17 **Q. All right. Mr. Ragsdale, are you familiar with**
18 **the term "stripper well"?**

19 A. Yes. Very.

20 **Q. Could you explain in brief terms what a stripper**
21 **well is in industry parlance?**

22 A. Stripper well is a well that is a, is a low-
23 producing well. It produces in small amounts of oil or
24 small amounts of gas. Generally these are older wells,
25 and -- and they are very -- they operate on a very close

1 economic basis. If you experience problems with them, you
2 can put these wells into an uneconomic situation quickly.

3 A lot of times a stripper well, an annual profit
4 on a stripper well may be 1000 or \$2,000. It's a really --
5 it's a tough job to, to maintain those and to, and to keep
6 them in compliance, and to not spend a bunch of money.

7 Q. Where you have a stripper well producing out of a
8 formation where you plugged and abandoned that well, would
9 it be reasonable and prudent for another operator to come in
10 and drill and complete that same formation and seek to
11 produce it ever again?

12 A. Probably not. But you know, with some the new
13 technology, it might be.

14 Q. You are talking about the possibility of
15 horizontal drilling?

16 A. Yes.

17 Q. Where there's a vertical well?

18 A. That's correct.

19 Q. Could the imposition of civil penalties cause
20 operators to cease producing some of these stripper wells?

21 A. Absolutely. You know, we, we see that is --
22 again, we try to operate on a, on a bare-bones basis in
23 compliance, but if you, if you were to have a situation,
24 especially if you had a situation where there's, you know, a
25 daily fine being levied against this well, and you -- I

1 mean, say \$1500 a day or \$2500 a day, and that goes on for
2 ten days, that could easily put that well in an uneconomic
3 situation.

4 **Q. And as operator, are you the only one to decide**
5 **whether a well should be plugged or do others have any say**
6 **in that?**

7 A. Generally our wells are owned by multiple -- many
8 people called working interest owners, and the working
9 interest owner has an opportunity, they have the right
10 through the JOA to come in and request that we plug a well.

11 And so if a well is operating in an uneconomic
12 situation for a period of time where they are having to
13 write us checks, instead of us writing them checks, then
14 they can certainly ask to plug the well.

15 **Q. Do the imposition of civil penalties on stripper**
16 **wells render them uneconomic so that they would be plugged**
17 **and abandoned under those circumstance?**

18 A. Yes.

19 **Q. Would that result in the waste of previously**
20 **unproduced --**

21 A. Premature abandonment, is what I would call that.

22 **Q. Moving to another issue, are you aware that BLM**
23 **can impose civil penalties on operators for violation of**
24 **their regulations?**

25 A. We operate a large number of wells on federal

1 land, and yes, so I am aware of that. BLM has a program to
2 where they train inspectors, and these inspectors are in the
3 field from time to time, and so they, at times they will
4 write us violations, you know, as they are inspecting these
5 wells.

6 **Q. And are civil penalties imposed by BLM as a**
7 **matter of course immediately upon detection of the**
8 **violation?**

9 A. Generally not. They are -- I think generally
10 they will give you a notice of violation and give you a time
11 period to, you know, to respond, but there are -- I'm aware
12 that BLM has some immediate assessments.

13 **Q. Okay. And in your experience would the fact that**
14 **the Division, Oil Conservation Division could impose**
15 **penalties for the same conduct that the BLM can impose**
16 **penalties cause you, as an operator, to come into compliance**
17 **faster?**

18 A. No. No.

19 **Q. Why not?**

20 A. Well, we operate under -- on federal lands we
21 operate those wells under BLM guidelines, and so, you know,
22 I guess I'm not clear on what OCD guidelines are.

23 **Q. I want to turn to some deadline issues and some**
24 **questions that came up here. Are you familiar with oil and**
25 **gas lease, unit agreements, and similar types of agreements**

1 have a primary term for a certain period of time, and then
2 so long thereafter as oil and gas is produced in paying
3 quantities, and if for any reason production ceases in that
4 secondary term, there is typically a window of time in which
5 an operator can restore production or commence operations to
6 redo that well or drill another well?

7 A. I am. Through my career, we -- we -- our
8 operations people work very closely with our land department
9 and our legal counsel, and they keep us informed of what the
10 lease status is on a well. And so there is a typical 60- to
11 90-day window out there that if you don't have a well
12 producing, it's possible that the lease could be terminated.

13 Q. If there's a temporary cessation order or orders
14 entered that prohibit operations for 60 to 90 days, is it
15 possible that the operator and the operator's investors
16 could lose their interest then in the oil and gas lease?

17 A. Yes.

18 Q. Okay. Last topic. Are you aware in general
19 terms that IPANM proposed amendments to the rule we are
20 talking about here today, which included some tables for
21 fines and factors and aggravation and mitigation?

22 A. I am.

23 Q. Okay. What role did you have in preparing those
24 tables?

25 A. None.

1 **Q. In your opinion, is there any value in**
2 **incorporating those tables or similar tables in a rule like**
3 **this?**

4 A. Absolutely.

5 **Q. Why?**

6 A. Well, I think each operator would like to know
7 what, what the fines are and, and where we stand in that. I
8 think it's important that, you know, when -- if you are
9 going to get a violation, the amount that you are looking
10 at.

11 MR. CLOUTIER: I don't have any further --
12 actually I have one further question.

13 BY MR. CLOUTIER:

14 **Q. Mr. Ragsdale, you and I have haven't talked about**
15 **this. You and have I have been sitting here today. Did you**
16 **hear anything today in this morning's presentation that you**
17 **think that from an operational standpoint, comments that**
18 **would be of value to the Commission?**

19 A. I think so. We work closely with, like I said,
20 the local offices in Artesia and Hobbs, the BLM office in
21 Carlsbad, and it's very active in that area. And you know,
22 when I hear that, that OCD is going to turn around something
23 in 30 days, I don't know that I can believe that because I
24 think the staff is so busy, I think they are short-staffed.

25 And so it worries me that if there is a 30-day

1 window, and I'm waiting on a district manager or a field
2 inspector to get back to me, I'm not sure that they will.

3 Q. Okay. All right.

4 MR. CLOUTIER: No further questions, Madam Chair.
5 Pass the witness.

6 CHAIRWOMAN SANDOVAL: Does the Division have any
7 questions for the -- or wish to cross-examine the witness?

8 MR. AMES: We do, Madam Chair.

9 CHAIRWOMAN SANDOVAL: Please proceed.

10 CROSS-EXAMINATION

11 BY MR. AMES:

12 Q. Good afternoon, Mr. Ragsdale.

13 A. Good afternoon.

14 Q. I think I heard you say that your company, you
15 check your locations once or twice a day?

16 A. Yes.

17 Q. So you pretty much stay on top of compliance?

18 A. Yes. We do.

19 Q. It's within your company's purpose objective, a
20 guiding principal?

21 A. It is.

22 Q. So you wouldn't really expect any NOV's from OCD
23 because you probably keep on top of it?

24 A. That's correct.

25 Q. But that's how you conduct your business; right?

1 A. (Nodding.)

2 Q. You would acknowledge that other operators don't
3 act quite as diligently as your company?

4 A. I don't -- I would acknowledge that most other
5 operators do.

6 Q. Okay. You have examined the records of these
7 other operators so you can say that with certainty?

8 A. No, I can't, it's just my supposition.

9 Q. Okay. Thank you. The last question that
10 Mr. Cloutier asked you concerning the informal resolution
11 process, and you expressed concern that the OCD may not get
12 back to you within the 30-day window, and as a result the
13 informal resolution opportunity would evaporate; is that
14 correct?

15 A. It is.

16 Q. Are you aware that the 30-day informal resolution
17 period is simply the statutory minimum period?

18 A. I'm not.

19 Q. Are you aware that the OCD has indicated
20 throughout the rule that it is open to negotiations
21 regarding an informal resolution at any time during the
22 process?

23 A. Well, I heard that today.

24 Q. Are you aware of that from reading the rule
25 yourself?

1 A. No, I have not read the rule.

2 Q. Are you aware that the hearing that OCD would
3 have to hold if informal resolution is not achieved within
4 the 30-day statutory minimum period would not occur at the,
5 right at the end of the 30 days, it would be set at some
6 point off into the future?

7 A. No.

8 Q. You weren't aware of that?

9 A. No, I'm not.

10 Q. So you weren't aware that during that period as
11 well, as well as after a hearing, OCD is always available
12 and open to the potential for resolving a violation; is that
13 correct?

14 A. Correct.

15 Q. Okay. You said that civil penalties could make
16 stripper wells uneconomical.

17 A. Yes, sir.

18 Q. Are you aware that the OCD would not, under this
19 rule, be issuing notices of violation and assessing civil
20 penalties directly against wells?

21 A. No.

22 Q. Were you aware that the OCD would be issuing NOV's
23 to the operator of a well?

24 A. Yes.

25 Q. Or the operator of a brine well, or the operator

1 of a recycling facility?

2 A. Yes.

3 Q. Or a transporter of produced water?

4 A. Yes.

5 Q. So there is more to enforcement than just
6 stripper wells?

7 A. Sure.

8 Q. And there is more to the economic picture than
9 the well itself?

10 A. Sure.

11 Q. And the operator who operates stripper wells may
12 have 100 stripper wells, for example?

13 A. Possibly.

14 Q. Should stripper wells be allowed to continue to
15 produce despite violations?

16 A. No.

17 Q. I had a couple of questions for you about the
18 tables that are attached to IPANM's prehearing statement.
19 If I understand your testimony correctly, you said you had
20 no role at all in producing those tables?

21 A. That's correct.

22 Q. So there is no one here today to testify about
23 those tables; is that correct?

24 A. Well, I don't know about that.

25 Q. You are the only witness for IPANM; correct?

1 A. Yes, sir.

2 Q. Okay. So other than you, there is no other
3 witness from IPANM to testify regarding the tables?

4 A. As far as I know.

5 Q. Okay. So you said you had no role. You also --
6 have you reviewed the tables at all --

7 A. No.

8 Q. -- in preparation for this hearing?

9 A. No.

10 Q. So if I asked you any questions, you wouldn't be
11 able to answer them?

12 A. No.

13 Q. Okay. Just out of curiosity, have you practiced
14 in the oil and gas field in Texas?

15 A. Yes.

16 Q. Have you ever responded to a notice of violation
17 issued by the Texas Railroad Commission?

18 A. I have not.

19 Q. Okay. So you're not familiar with Texas rules or
20 guidelines regarding civil penalties?

21 A. No.

22 Q. Thank you. I would like to ask you a couple of
23 questions about the IPANM proposed changes in 10.(E) and
24 10(F). Those concern limiting OCD's ability to assess a
25 civil penalty for the, quote, same violation if issued by --

1 or penalized by BLM or by another state agency.

2 A. Uh-huh.

3 Q. Okay. The proposal says that if the BLM issues a
4 penalty for a violation for which OCD has already penalized
5 the operator, the OCD will have to return the penalty to the
6 operator. Are you familiar with that provision?

7 A. I have seen it.

8 Q. Okay. I am not clear how this works. Let's say
9 OCD issues a civil penalty or assesses a civil penalty after
10 a hearing for a violation on day one. And one year later,
11 the BLM, assuming it's the, quote, the same violation,
12 another issue altogether, but the BLM does it for,
13 quote-unquote, the same violation, is that -- in that
14 one-year period, the one-year period has passed, does that
15 mean that OCD then has to return the penalty?

16 A. I'm not sure.

17 Q. What about if it's three years afterwards?

18 A. I think the situation I would be most familiar is
19 is that BLM would issue the violation first, and then OCD
20 might issue the violation second because of the way BLM
21 inspects the wells, and as far as I know, I don't know that
22 OCD has an inspection program right now.

23 So I guess that is my biggest concern is if I'm
24 cited by BLM for a notice of violation, and I am working on
25 repairing that or complying with it, then am I subject to a

1 violation from OCD?

2 Q. So your concern is about the sequence of events
3 where, where BLM has gone first and OCD goes second?

4 A. Correct, which is --

5 Q. But your proposal --

6 A. -- basically my experience.

7 Q. But your proposal addresses the other situation;
8 right?

9 A. Right.

10 Q. And you are not clear on that how that would
11 work?

12 A. No, I'm not. But I do see the discontinuance in
13 there -- or discontinuity between the two agencies.

14 Q. So let's say that the Commission adopts your
15 proposal, and OCD has to return civil penalties that it
16 assessed prior to the BLM assessing a civil penalty, so OCD
17 is still -- stated more chronologically, let's presume
18 OCD --

19 A. Was first.

20 Q. -- was first, thank you, BLM is second, the
21 money, where does the money from the civil penalty collected
22 by OCD go? Do you know?

23 A. I assume back to the operator.

24 Q. No, no. Let me restate that, that was not clear.
25 When OCD collects a civil penalty, where does it go?

1 A. Oh. I would not know.

2 Q. If I told you the general fund, would you be
3 surprised?

4 A. No.

5 Q. So let's say OCD assesses a penalty and BLM comes
6 along, and now if this rule were adopted as proposed, OCD
7 has to return that money, that civil penalty to the
8 operator, how do we get the money out of the general fund?

9 A. That's way beyond me. Above my pay grade.

10 Q. Mine, too. Okay. I'm a little unclear about
11 this concept of, I think Mr. Cloutier said same set of
12 operative facts. Your proposal refers to same violation; is
13 that correct?

14 A. Yes.

15 Q. It doesn't say same set of operative facts.
16 Okay. So can you explain the difference?

17 A. I can't.

18 Q. Okay. Do you -- would you agree that OCD could
19 take into account when assessing a civil penalty whether
20 another federal or state agency has already penalized the
21 same conduct?

22 A. I'm sorry, ask me that again.

23 Q. I will ask it a different way.

24 A. Okay.

25 Q. Assume OCD wishes to assess a civil penalty for

1 **conduct similar to conduct already penalized by another**
2 **state or federal agency. OCD might have reasons for doing**
3 **that; correct?**

4 A. Uh-huh.

5 Q. **It may not be exactly the same set of facts for**
6 **one; right?**

7 A. Okay. But it's the same set of facts?

8 Q. **Well, close.**

9 A. Okay.

10 Q. **But not the same. Who decides close, but not**
11 **same?**

12 A. Yeah, I guess you read the violation and you see
13 what the violation is.

14 Q. **But the federal rules don't look at all like the**
15 **state rules.**

16 A. That's my point exactly, is that you are
17 operating on a federal lease under federal guidelines, and
18 how do we know what OCD guidelines are.

19 Q. **Well, you know what OCD rules are?**

20 A. On federal leases.

21 Q. **So then you are saying that there is no overlap**
22 **between what the OCD does and what BLM would do?**

23 A. They would do, or they can do?

24 Q. **Can do under the rules.**

25 A. I'm sure there is overlap.

1 Q. But at this point you can't point to any specific
2 overlap that's of great concern?

3 A. No.

4 Q. Back to my previous point, though. Let's assume
5 there is a situation where we have a similar set of facts.
6 BLM has now assessed a penalty. OCD believes it has the
7 right and the obligation to. Can OCD take into account the
8 fact that the federal agency has already assessed a penalty
9 in deciding how to proceed with respect to that violation?

10 A. I would hope so.

11 Q. Thank you. Now, Mr. Ragsdale, you didn't testify
12 regarding IPANM's proposed changes to 10(D) That's the
13 provision that would prohibit OCD from assessing a civil
14 penalty for violation before the date on which the violator
15 knew or should have known. Is that correct, you didn't
16 testify?

17 A. I did not.

18 Q. So I will not ask you any questions about that.

19 A. Okay, good.

20 Q. And you did not -- you did not testify regarding
21 the proposed changes to 10(C)(1)(b) and 10(C)(3)(2)
22 provisions which read together would prevent the OCD from,
23 from agreeing to a stipulated final order with civil
24 penalties?

25 A. No.

1 Q. Okay. Thank you. All right. I think that's
2 all. Thank you, sir.

3 A. Uh-huh.

4 CHAIRWOMAN SANDOVAL: Counsel, are you going to
5 be able to answer questions regarding the proposed rule
6 following --

7 MR. CLOUTIER: I intended to address them in my
8 comments at the end, Madam Chair, but if you want me to do
9 it after Mr. Ragsdale, that's fine. Ms. Fields, who
10 prepared the tables, came down with the flu, and has been in
11 bed, and just can't be here to testify about the tables, so
12 that's, that's --

13 CHAIRWOMAN SANDOVAL: So are you going to be able
14 to answer questions regarding the proposed changes to this
15 rule?

16 MR. CLOUTIER: If you have questions for me, I
17 would be happy to answer them, yes.

18 CHAIRWOMAN SANDOVAL: Okay. Because it sounds
19 like the Division has questions. I suspect the Commission
20 is going to have questions, and other parties may have
21 questions as well.

22 MR. CLOUTIER: Yes. I will endeavor to answer
23 them. I have discussed some of these things informally with
24 the Division, but I will --

25 CHAIRWOMAN SANDOVAL: Okay.

1 MR. AMES: Madam Chair, at the risk of putting my
2 neck out there, I have some concern about -- with the
3 proposition that counsel can answer questions about a
4 proposal.

5 This is a hearing in which the parties were
6 entitled to present witnesses to testify about their
7 proposals, and the Commission's decision must be based on
8 evidence in the record. The testimony of counsel is not
9 evidence in the record. And if counsel is allowed to answer
10 questions about the proposal or to provide justification for
11 their proposal, then counsel needs to be sworn and presented
12 for cross.

13 And that's not -- counsel has not volunteered to
14 do that in their prehearing statement, so it would -- I
15 think if there are questions, very detectable questions
16 about where language should go, for instance, maybe that's
17 okay, but if you were asking counsel to testify regarding
18 the substance of their proposal instead of presenting that
19 testimony through witnesses, OCD would respectfully object.

20 MR. LOZANO: So your objection is noted. This
21 Commission is able to ask questions of attorneys through
22 closing argument. I believe that it is probably more
23 beneficial for them to do so at this point, but certainly
24 the chair can wait for closing argument to do that.

25 It does not -- they have submitted their

1 proposal and the Commission certainly can open the
2 attorney up -- open the attorney up to questions on that
3 proposal during closing argument. I think now is a good
4 time if the Chair agrees. If not, we can certainly wait
5 until closing argument and then those questions can be
6 addressed through the attorney.

7 CHAIRWOMAN SANDOVAL: I think now would be
8 appropriate.

9 MR. CLOUTIER: Okay. Now I think we have other
10 people with questions for Mr. Ragsdale before. I don't know
11 if they have questions.

12 CROSS-EXAMINATION

13 BY MR. FELDEWERT:

14 Q. Do you have the rule in front of you, Mr.
15 Ragsdale?

16 A. I do not.

17 MR. CLOUTIER: This is IPANM's proposal, but --

18 MR. FELDEWERT: May I approach the witness?

19 MR. LOZANO: Go ahead, counsel.

20 BY MR. FELDEWERT:

21 Q. Mr. Ragsdale, I want you to turn to Page -- have
22 you turn to Page 4 of the Division's Exhibit Number 4. Are
23 you there?

24 A. (Nodding.)

25 Q. You are not a lawyer, you know what it's going to

1 be potentially, but potentially subject to a notice of
2 violation, okay?

3 A. Uh-huh.

4 Q. So as the rule is currently written under
5 Paragraph (C), you are going to get a notice of violation,
6 it's going to be issued by someone within the Division.

7 A. Right.

8 Q. Okay? Under this rule it's going to tell you
9 under (A), the identity of the violator. (B) is going to
10 tell you the nature and factual and legal basis of the
11 alleged violation. So that's good, we know what's going on,
12 including the provisions of the Oil and Gas Act rule or
13 order that have been violated, so that's nice.

14 You are going to get a determination by someone
15 as to whether compliance is required immediately or within a
16 specified time frame. You are going to get notice of the
17 sanctions available, so somebody is going to determine what
18 the the sanctions available --

19 MR. AMES: Objection. Counsel is testifying. He
20 can ask questions and read from the rule, but he can't
21 annotate the rule or editorialize regarding the rule.

22 MR. FELDEWERT: I'm trying to set up my question.

23 CHAIRWOMAN SANDOVAL: Continue.

24 BY MR. FELDEWERT:

25 Q. You are going to get the information in (D), and

1 then in (E) it's going to say the availability of the
2 process for informal review. Okay?

3 A. (Nodding.)

4 Q. Now, but this rule, would you agree with me, if
5 you got a sanction, if you got an NOV, it doesn't tell you
6 how to initiate the informal process; correct?

7 A. That's correct.

8 Q. It doesn't tell you who is going to be involved?

9 A. No.

10 Q. It doesn't tell you how it's going to work?

11 A. No.

12 Q. Would you -- we heard some of this, I think,
13 today, would you agree that at least the NOV should give the
14 information about who to contact? Do you agree with that?

15 A. (Nodding.)

16 Q. Would that be helpful from your perspective?

17 A. Absolutely.

18 Q. Certainly they have to give some identification
19 about what the informal process is going to be. Would that
20 be helpful?

21 A. Yes, sir.

22 Q. And provide some information about what the
23 procedures are going to be during that informal process.
24 Would that be helpful?

25 A. Yes, sir.

1 Q. Because am I correct, Mr. Ragsdale, as you read
2 this rule, that you only have a 30-day period to engage in
3 that informal process?

4 A. That's what I understand.

5 Q. Would you be concerned that if the Division is
6 very busy and you call somebody up and they don't return
7 your call, do you have some concern about what you do from
8 there?

9 A. I do.

10 Q. Now, we heard from Mr. Ames that they are open
11 and willing to extend apparently this time frame. Did you
12 see that anywhere in this rule?

13 A. I have not heard that before.

14 Q. In fact, if I look at Subparagraph F, what does
15 it tell you?

16 A. It says, "If the notice of violation is not
17 informally resolved within 30 days of service, the Division
18 will hold a hearing."

19 Q. Will hold?

20 A. Yes.

21 Q. Not may hold?

22 A. No, not extend.

23 Q. That's all the questions I have. Thank you.

24 CHAIRWOMAN SANDOVAL: Mr. Marker?

25 MR. MARKER: I just have a couple of questions

1 I'm just going to ask him his opinion.

2 MR. LOZANO: As long as it's a question,
3 Mr. Marker.

4 MR. MARKER: There you go. I will do my best.

5 CROSS-EXAMINATION

6 BY MR. MARKER:

7 Q. In your opinion, you have been around a long
8 time, seen a lot of operators, all sorts of operators in all
9 aspects of whatever level of knowledge they have, in your
10 opinion, does it make you nervous -- would it make you
11 nervous for other operators -- the company you work for
12 probably isn't going to have a whole lot of compliance
13 problems, let's just be honest, the type of wells you
14 guys --

15 A. Knock on the desk.

16 Q. Exactly. The type of wells you guys buy --

17 CHAIRWOMAN SANDOVAL: Just ask the question.

18 Q. The question I have is, does it make you nervous
19 for the well being of the smaller or other independent
20 operators to give the Division or the Commission this much
21 discretion?

22 A. So ask it one more time, Larry. Does it make me
23 nervous?

24 Q. Would it make you nervous to give the Commission
25 or Division this much discretion as far as who, what, when

1 **and where?**

2 A. As it's written, yes, it would make me nervous.

3 **Q. Okay. In your opinion it's too much discretion**
4 **for a regulatory agency?**

5 A. Yes.

6 **Q. Okay. Thank you.**

7 CHAIRWOMAN SANDOVAL: Thank you, Mr. Marker.

8 Does the Commission wish to cross-examine the witness?

9 MR. CLOUTIER: Madam Chair, can I have a couple
10 of questions on redirect? What's the appropriate --

11 CHAIRWOMAN SANDOVAL: Let's get through the
12 Commission questions, and then you may redirect.

13 MR. CLOUTIER: Correct.

14 COMMISSIONER KESSLER: Mr. Ragsdale, you work for
15 Strata; is that correct?

16 THE WITNESS: Yes.

17 COMMISSIONER KESSLER: Has Strata received any
18 recent notices of violation from the OCD?

19 THE WITNESS: I don't believe so.

20 COMMISSIONER KESSLER: So Strata would not
21 necessarily be familiar -- you would not necessarily be
22 familiar with the OCD process for resolving notices of
23 violations through ACOI?

24 THE WITNESS: That's correct.

25 COMMISSIONER KESSLER: Can you tell us any recent

1 areas where Strata has been out of compliance?

2 THE WITNESS: You know, I can. We had a
3 situation that we had a broken valve on a location and had a
4 small spill under the reporting requirements, and we -- but
5 we called OCD and cleaned it up.

6 COMMISSIONER KESSLER: Okay. Were you, Strata,
7 within OCD's time frame for resolving that issue?

8 THE WITNESS: Yes.

9 COMMISSIONER KESSLER: Okay. Thank you. That's
10 all the questions.

11 THE WITNESS: And I think that's, what I said
12 earlier, is we have a pretty good line of communication with
13 the local office. We have been doing this a long time.

14 COMMISSIONER KESSLER: So you have experience
15 with open communication?

16 THE WITNESS: Oh, yes. Yeah.

17 COMMISSIONER KESSLER: That's all. Thank you.

18 COMMISSIONER ENGLER: No questions.

19 CHAIRWOMAN SANDOVAL: So if you have open
20 communication with the OCD, but you stated earlier that
21 you're not familiar with our inspection program or if we
22 have one.

23 THE WITNESS: I am not.

24 CHAIRWOMAN SANDOVAL: Would you be surprised to
25 hear we do have an inspection program and we employ quite a

1 few inspectors across the state?

2 THE WITNESS: I wouldn't be surprised. I know in
3 the past we've experienced that, but recently, you know, I
4 don't -- we have not met the inspectors that are out there.

5 CHAIRWOMAN SANDOVAL: Okay. So you said that
6 Strata, you are not aware of any NOV letters that you
7 received recently. But earlier Mr. Wade testified that
8 there were hundreds of NOV letters that were sent to
9 operators a couple of months ago. Would that -- does that
10 show to you or demonstrate that there are quite a few
11 operators that are not prudent and are out of compliance?

12 THE WITNESS: I think so. And the reason why I
13 say that is, is, you know, I see that hundreds of NOV's, and
14 to me it's like, well, who, who were those hundreds of NOV's?

15 CHAIRWOMAN SANDOVAL: Would you be surprised to
16 hear that they were pretty simple things that people were
17 out of compliance. They were simple C-115 submittals, and
18 financial assurance requirements, not even more complex,
19 sometimes field requirements?

20 THE WITNESS: I would be surprised, because of my
21 background where we work very hard to make sure we are in
22 compliance, especially on reporting.

23 CHAIRWOMAN SANDOVAL: Right.

24 THE WITNESS: And the paperwork.

25 CHAIRWOMAN SANDOVAL: But do you think that that

1 demonstrates possibly the need for something like this?

2 THE WITNESS: Yes.

3 CHAIRWOMAN SANDOVAL: Okay. Do you know of any
4 other regulatory agencies who don't have administrative
5 penalty authority?

6 THE WITNESS: The -- no, I don't. I know that
7 some of them are limited.

8 CHAIRWOMAN SANDOVAL: Do you think it could make
9 the OCD's job harder as demonstrated with the NOV letters?

10 THE WITNESS: I do.

11 CHAIRWOMAN SANDOVAL: And it would make it easier
12 for companies to not be in compliance in situations? Not
13 having penalty, administrative penalty authority, would that
14 make it easier for come companies to operate out of
15 compliance?

16 THE WITNESS: Well, yes.

17 CHAIRWOMAN SANDOVAL: Were you aware that the
18 table in the exhibit is actually a guidance document from
19 Texas and not --

20 THE WITNESS: I have had nothing to do with that.

21 CHAIRWOMAN SANDOVAL: So Mr. Wade testified
22 earlier that OCD does have subpoena authority and the
23 ability to do discovery. Are you aware that some of the
24 language in this proposed rule could open companies up
25 for --

1 THE WITNESS: I am.

2 CHAIRWOMAN SANDOVAL: -- discovery on issues?

3 THE WITNESS: Yes.

4 CHAIRWOMAN SANDOVAL: How would you feel about
5 that?

6 THE WITNESS: I'm okay with it.

7 CHAIRWOMAN SANDOVAL: So all of your company
8 e-mails being opened --

9 THE WITNESS: Maybe not all of it.

10 CHAIRWOMAN SANDOVAL: Okay:

11 MR. CLOUTIER: Not with counsel.

12 THE WITNESS: Are those limited?

13 CHAIRWOMAN SANDOVAL: In some ways.

14 That's all the questions I have.

15 REDIRECT EXAMINATION

16 BY MR. CLOUTIER:

17 Q. Mr. Ragsdale, in your dealing with BLM, do the
18 BLM regulations tell you what they can fine you for or
19 impose civil penalties and what the amounts are?

20 A. Yes.

21 Q. And as to the question that Mr. Ames asked you
22 about the potential overlap between BLM and OCD, do you see
23 anywhere in the proposed rule where there was -- it told
24 you what the OCD could fine you for or impose civil
25 penalties on you?

1 A. No.

2 MR. CLOUTIER: Thank you. No further follow-up.

3 MR. LOZANO: Counsel, before -- I want to be
4 clear, do you want to enter the proposed --

5 MR. CLOUTIER: I would like -- I was going to --
6 I would like to enter our Exhibit 1 to our prehearing
7 statement as IPANM Exhibit 1 or Exhibit 9, however it's best
8 to handle it.

9 CHAIRWOMAN SANDOVAL: Are there any objections?

10 MR. AMES: None.

11 CHAIRWOMAN SANDOVAL: I will enter this into as
12 Exhibit 9.

13 (Exhibit 9 admitted.)

14 MR. FELDEWERT: So counsel, my assumption is that
15 the exhibit attached to the prehearing statement, that is
16 part of the record?

17 MR. LOZANO: I agree, Counsel, I think it's
18 clear, but to make it very clear, I like to have the
19 exhibits in order as I referenced on the transcript, so I
20 would prefer that we enter the proposal into this hearing
21 and not simply just a filing.

22 MR. FELDEWERT: I would propose submission of --

23 MR. LOZANO: You can certainly do it when it's
24 your turn, Counsel.

25 MR. CLOUTIER: Can we excuse Mr. Ragsdale?

1 CHAIRWOMAN SANDOVAL: Yes, Mr. Ragsdale. Thank
2 you. So in lieu of asking questions during the closing
3 statement, does the Division have any questions for counsel?

4 Oh, sorry. So does the Commission have any
5 questions for Counsel?

6 MR. LOZANO: Regarding the exhibits.

7 CHAIRWOMAN SANDOVAL: Regarding Exhibit 9.

8 COMMISSIONER KESSLER: So other counsel have the
9 opportunity to ask questions regarding the portion,
10 significant portions of the rule. Is that what I
11 understand?

12 MR. LOZANO: Well, Mr. Ames is correct. He
13 certainly would have to provide testimony in order to be
14 subject to cross-examination.

15 This Commission can ask questions as part of the
16 argument. If the Commission would like to wait until that
17 time, that's fine, but, yeah, I don't believe he is subject
18 to cross unless he is in fact a witness, and I don't believe
19 he is allowed to make himself a witness.

20 MR. CLOUTIER: I'm not ethically allowed to make
21 myself a witness because this is -- what our intent was was
22 to present factual testimony that underlies all the reasons
23 for the proposals, and my hope was to discuss the policy
24 reasons and why we were proposing them in closing argument.

25 So to the extent there are questions now, I don't

1 mind addressing them. And, frankly, that gives Mr. Ames the
2 opportunity to talk about them in his closing because he
3 will have heard my answers to you and give me the
4 opportunity to respond to any arguments that he has that I
5 think to respond to you that, so if that's the way the
6 Commission wants to proceed, I'm happy to do that.

7 CHAIRWOMAN SANDOVAL: We have questions of him;
8 the other counsel may not.

9 MR. LOZANO: Commissioner Kessler, would you be
10 more comfortable waiting for closing argument?

11 COMMISSIONER KESSLER: I'm not entirely
12 comfortable with considering the suggested rule changes that
13 have not been established by factual testimony.

14 CHAIRWOMAN SANDOVAL: Which will be the case.

15 MR. LOZANO: Well, certainly the record will have
16 the suggested rule changes, so there is -- there is a -- the
17 suggested rule changes are in the record. He will be able
18 to refer to them during closing argument, so I think it
19 should be subject to questions by the Commission.

20 MR. CLOUTIER: I do not intend to make factual
21 testimony, I simply -- why we proposed it and what the
22 policy would be underlying it is what I would be covering in
23 my closing. I'm happy to do that.

24 I think Mr. Wade, who is an attorney, sort of
25 combined some of that in his testimony, but his testimony

1 went -- and I didn't object because it went well beyond
2 factual testimony as to what the policy reason was behind
3 certain suggestions, and I think that's fair game for me as
4 counsel as part of your record before you, and I'm happy to
5 do it in whatever order the Commission wants to do it, so --

6 CHAIRWOMAN SANDOVAL: No.

7 COMMISSIONER KESSLER: And I understand that.
8 It's the absence of the underlying factual support of the
9 policy that I'm struggling with, but I understand your
10 point.

11 COMMISSIONER ENGLER: Because these particular
12 tables are significant into this policy's phase, so it's
13 unfortunate that your person is sick. I understand that
14 because I -- there are many questions one could have asked
15 on technically these tables.

16 So I do feel, as Ms. Kessler said, I'm -- I would
17 like to ask somebody more about these, but not just -- more
18 in substance than just, you know, policy.

19 CHAIRWOMAN SANDOVAL: I have questions on a lot
20 more than just the tables that weren't answered by the
21 witness.

22 COMMISSIONER ENGLER: So I don't know how you
23 would -- you want to proceed with that.

24 CHAIRWOMAN SANDOVAL: If the Commissioners have
25 questions, we can proceed with those for now.

1 COMMISSIONER KESSLER: You first.

2 COMMISSIONER ENGLER: Okay. So with regard to
3 the tables --

4 MR. CLOUTIER: Yes, sir.

5 COMMISSIONER ENGLER: -- so we have someone else
6 had really generated these are tables; right.

7 MR. CLOUTIER: I believe that Tables 1 through 4,
8 the Texas tables were used as a guide post to correct Table
9 5 where it's drafted.

10 CHAIRWOMAN SANDOVAL: Let me interject there.
11 They were directly cut and pasted. There are even
12 references to the Commission within the --

13 MR. CLOUTIER: I think so, and --

14 CHAIRWOMAN SANDOVAL: -- which were not --

15 MR. CLOUTIER: I would tell you that I think that
16 there were some efforts to excise matters from the tables,
17 and there were changes in the numbers, but I would say that
18 there probably was some language that was directly cut and
19 pasted, that would not surprise me, Commissioner Sandoval.

20 CHAIRWOMAN SANDOVAL: Sorry. Go ahead.

21 COMMISSIONER ENGLER: Well, somewhere I read
22 where these were supposedly modified to meet New Mexico's
23 particular --

24 MR. CLOUTIER: We attempted to.

25 COMMISSIONER ENGLER: But what's the

1 modification?

2 MR. CLOUTIER: The modifications that occurred
3 were primarily attempting to take out -- and I can't point
4 to particular modifications, but the modifications were to
5 take out matters that the IPANM felt were applicable in the
6 New Mexico that were not in the Texas table, and to add
7 certain items that we thought that the Division would look
8 to pursue with potential civil penalties and to add a table
9 in Table Number 5.

10 MR. AMES: Commissioner Engler, I apologize, I
11 have to make a standing objection to this entire line of
12 questioning and testimony by counsel.

13 This is not a policy issue. Putting aside the
14 question of whether counsel can argue their proposed
15 amendments on the grounds that it's policy and not technical
16 testimony, put that aside for the moment, but this is, you
17 know, Mr. Cloutier is testifying as to the genesis of these
18 tables, where they came from, what changed, how they are
19 different, those are all facts.

20 There are six pages of tables here, and I have
21 two and a half pages of questions, and I have no witness to
22 ask any questions of. It seems inherently unfair to all
23 counsel to testify as to the origin and genesis and
24 rationale or the reasonableness of these tables if we don't
25 have an opportunity to question him about them.

1 That's a standing objection, so if you want to
2 continue with the questions, please do so, but my objection
3 is on the record, and I won't interrupt you all again.

4 MR. LOZANO: Do you have any response,
5 Mr. Cloutier?

6 MR. CLOUTIER: My response is, I'm trying to
7 answer the questions that are posed to me by the
8 Commissioners in the best way I'm able to do so, and I'm not
9 getting to choose what those questions are. So if a
10 question is objectionable, I think we should hear it when
11 the question comes out and save some time. Because, if I
12 shouldn't be answering it under the Commission's guidelines,
13 let's not waste time and have me answer that. I don't want
14 to be giving answers to questions I shouldn't be answering.

15 MR. LOZANO: So what I would say is Mr. Ames is
16 probably correct, and that probably the Commission should
17 limit its questions to simply possible questions regarding
18 rationale of proposed changes and not much further than
19 that.

20 And certainly the standing objection is noted,
21 but I think this Commission needs to get those questions
22 answered, or the Commission can entirely disregard that
23 which has already been admitted which is problematic.

24 CHAIRWOMAN SANDOVAL: Disregard the exhibit?

25 MR. LOZANO: Right. I think it is admissible

1 under the guidelines that we have, pretty much most things
2 are, so it's certainly part of the record. Certainly this
3 Commission can ask questions of counsel regarding his
4 argument on the record, but Mr. Engler is correct, that they
5 should not be factual questions.

6 COMMISSIONER KESSLER: We have to have factual
7 support for anything that's adopted into a rule in order to
8 have it go up on appeal without factual basis for certain
9 portions of that rule.

10 MR. LOZANO: Well, Commissioner, I think that
11 portions of the rule don't -- I'm not sure they can be
12 supported by actual fact. They are essentially conclusions
13 of what the law does or does not require the Commission to
14 make that determination without a factual basis.

15 And I think because, basically, you know, Mr.
16 Wade testified a great deal to basically what he believes
17 the law requires. That's not factual testimony, but this
18 board, this Commission can utilize that information to make
19 its decision.

20 COMMISSIONER ENGLER: Well, Mr. Ames, thanks for
21 your interruption. My questions are more technical in
22 nature. I do have two pages of questions, but at this point
23 I don't see where I want to go any further with that. Maybe
24 the Commissioners have more questions related to how these
25 came about.

1 COMMISSIONER KESSLER: No. My questions are
2 technical in nature.

3 CHAIRWOMAN SANDOVAL: As are mine.

4 MR. CLOUTIER: Okay.

5 CHAIRWOMAN SANDOVAL: All right. Does the IPANM
6 have any additional witnesses?

7 MR. CLOUTIER: We do not.

8 CHAIRWOMAN SANDOVAL: We will now hear from New
9 Mexico Oil and Gas Association, also referred to as NMOGA.
10 NMOGA does not wish to present any direct testimony. Does
11 NMOGA wish to provide a statement or exhibits to the
12 Commission.

13 MR. FELDEWERT: We move our Exhibit 1 attached to
14 our prehearing statement which contained our modifications.

15 CHAIRWOMAN SANDOVAL: Are there any objections to
16 admitting NMOGA's document?

17 MR. AMES: OCD has no objection.

18 MR. CLOUTIER: None.

19 CHAIRWOMAN SANDOVAL: Is there any objection by
20 the Commission?

21 COMMISSIONER ENGLER: No.

22 CHAIRWOMAN SANDOVAL: It will be entered into the
23 record as Exhibit Number 10?

24 MR. LOZANO: Correct.

25 (Exhibit 10 admitted.)

1 MR. FELDEWERT: Secondly, it's through
2 discussions with Division's counsel, Mr. Wade, you will see
3 most of the NMOGA's proposed changes were actually accepted.

4 The one that was not accepted came as no surprise
5 given our -- secondly, I didn't expect so much opposition to
6 my who, what, when, where and why because I had also
7 informed the Division that I saw some gaps in the rule that
8 appeared to be required by the statute.

9 We certainly do not oppose the rule. We are
10 trying to make a better rule, and that was the purpose
11 behind the discussions we have had so far.

12 So briefly, though, if I look at the slides,
13 which is the easiest way to go, and I first go to Slide 28,
14 we had some discussions about this. I didn't think there
15 was a lot of debate about this principally because I don't
16 think anybody intends this to be a strict liability type of
17 circumstance where you can impose a civil penalty in
18 circumstances where an operator is not aware or could not
19 have been aware there was any violation. That seems to be
20 pretty common.

21 What I note here is, yes, they removed knowing
22 and willful, but that's a criminal standard. The standard
23 we have here is nothing more than a negligence standard.
24 It's nothing more than we are going to be fair, and if you
25 are aware or should have been aware, that's how far back we

1 can go with our civil penalties.

2 I note in Bullet Point 3, they concede this can
3 be the criteria in the consideration. If it can be a
4 criteria in the consideration, why wouldn't you put it in
5 the rule now so it is there for a future Division to be able
6 to utilize it. That's my only point. This is not just for
7 the Division today, this is for the Division in the future.

8 And if you are going to have someone who we don't
9 know yet who is going to be apparently issuing these types
10 of notices of violation and go through the process that they
11 are supposed to go through issuing these notices of violation
12 and make the decision about what the notices of violation
13 should say, it seems to me that having some kind of
14 sideboard as to how far back they can go would make it a
15 better rule. That was the purpose for this proposed
16 amendment, nothing more than that. Okay?

17 The second point would be Slide 42, much less
18 controversy. The difference between may and shall. So this
19 is the post-hearing procedures. Now, when I read through
20 this for NMOGA's counsel, I saw the may, I looked at
21 70-2-13, you all can take a look at it yourself. 70-2-13,
22 notice that this is post-hearing procedures. So this is
23 after we have had a hearing, what is to occur after we had a
24 hearing.

25 70-2-13, in my opinion, when I read it, it pretty

1 clearly states that unless there is some other order, that
2 an examiner is to make a report. In fact, it says shall
3 make a report prior to an order being issued, because the
4 examiner is the one who sat through the hearing, the
5 examiner is the one who reviewed the evidence, the examiner
6 is then, under the statute, it says, shall make a report to
7 the Director.

8 That's how it's done. That's how it's always
9 been done when we have had an examiner hearing. I'm not
10 aware of any circumstance where we have had an examiner
11 hearing where that provision of 70-2-13 wasn't done because
12 it seems to be required by the statute.

13 So to make this a better rule, when I looked at
14 it, I said, that's not really discretionary. They are
15 supposed to have a post hearing report. That was the only
16 purpose behind that.

17 Lastly, or second to last, Slide 46. This is a
18 modification of NMOGA's proposal. The only thing I wanted,
19 everybody seemed to agree this is necessary, I want to again
20 reiterate why, and I think Mr. Ames touched on this. The
21 reason why we have to have this provision in the rule is
22 because if you pay a penalty before an appeal, there is no
23 mechanism to get it back.

24 So I don't think you have a lot of discretion
25 here. I think you have to have this provision in your

1 proposal, and we have no problem with this language.

2 Finally, like I said, I didn't mean to create a
3 fire storm. I didn't mean to get so many objections to the
4 questions about how is this NOV process going to work.

5 I want to point out to you that the statute says
6 the Commission was to make rules providing procedures for
7 this, not guidelines, rules. Okay?

8 I think we all want a good rule. I think there
9 has been acknowledgement here today there is a lot of
10 clarification that needs to be done. And to be the number
11 one -- two things that need to be done, and I think you can
12 do it in this rule, and that is, who is actually going to be
13 issuing notices of violations.

14 As I was reading through that section, the reason
15 I read through that section is there's a lot of decisions
16 that have to be made, and a lot of decisions to be made
17 before the NOV is issued.

18 Now, who is going to make them? Is it just going
19 to be somebody in the field? Is it going to be the legal
20 department? Is it going to be the director? In my opinion
21 it should be the legal department, or at least Dan Sanchez
22 from the Enforcement Bureau who has some experience with
23 this. But there needs some direction in the rule about who
24 is going to make this decision because there is a lot of
25 them to be made.

1 And then, secondly, what's the -- what is this
2 informal process? There is a fairly short time frame, and
3 we know people are busy, and we know the Division is going
4 to be busy. It's not getting any better, in fact, it's
5 probably going to get worse. And I'll just tell you what
6 concerns with human nature, if I'm sitting there and I'm
7 busy and somebody calls me about an NOV that they just
8 received and I have other things to do, I'm not sure they
9 are going to answer my call.

10 They have other things that are on their plate,
11 and they know, well, if they don't do anything, we will just
12 have a hearing in 30 days anyway. So I do have some
13 concerns here about what the procedure is going to be and
14 how operators are going to know how to initiate this
15 informal process, who they call, who was involved, who is
16 involved.

17 I don't want it to be the hearing examiner. I'm
18 not sure we want it to be the Director because the Director
19 is the one that has to sign the orders if there is a hearing
20 and sits on the Commission. So who is going to be involved
21 in this informal process?

22 Who are the people with the knowledge and people
23 with the policy decision who can decide how we decide this
24 informal process? And how it's done? How is it done? Are
25 we going to have a meeting in the district office or is it

1 elevated to Santa Fe perhaps where the legal department is
2 so we at least have some structure to it, so we at least
3 know it's not going to drift, the who, the what, and the
4 how, fairly simple.

5 Now, can you do it with providing it in the NOV,
6 I think you probably can. It would be better if we can put
7 it in the rule, but I think we need some instruction about
8 how this is going to work, and right now we don't have any.
9 And I didn't get any comfort in finding out there really
10 wasn't an answer even though I alerted them to this issue
11 earlier this week. So that's the reason I was here.

12 I appreciate your time. Again, we don't object
13 to this rule, we are just trying to make it better.

14 CHAIRWOMAN SANDOVAL: Does the Commission have
15 any questions for counsel for NMOGA?

16 COMMISSIONER KESSLER: Mr. Feldewert, you
17 identified two what you are calling gaps in the rule. Does
18 NMOGA have proposed language to address the gaps.

19 MR. FELDEWERT: To address the gaps, we, no,
20 because I'm not sure what the process should be because I
21 don't work internally within the Division. I did say, I
22 think we have a problem here, and we were hoping to address
23 it at the hearing, but, no, we didn't propose any language.
24 Because I don't know what the process should be. I don't
25 know internally exactly how you want to work things or who

1 is going to be doing what, but it has to be spelled out
2 simply.

3 COMMISSIONER KESSLER: It's difficult though
4 without proposed language to be able to adopt something.

5 MR. FELDEWERT: I appreciate that.

6 COMMISSIONER KESSLER: My second question is, I
7 think it's Slide 28 of Mr. Wade's slide show where there is
8 a discussion about knowingly and willfully. And you said
9 that you believe that these penalties should only apply in
10 situations where the operator was aware of the type of
11 violation.

12 MR. FELDEWERT: Or should have been aware.

13 COMMISSIONER KESSLER: Or should have been aware.
14 Extrapolate when an operator could not have been aware.
15 Where is a situation where they could not have been aware
16 that there was a violation.

17 MR. FELDEWERT: Well, I suppose, do I have a
18 specific example, I guess off the top of my head, I mean,
19 there is going to be circumstances that you are not supposed
20 to release oil, let's say there is a lightning strike and
21 you release oil and your pump goes out 24, 48 hours later,
22 whatever the schedule is, and determines that there is a
23 release, you could not have been aware of that. It was an
24 act of God.

25 Is that a two-day penalty? Is there a penalty

1 provision here? To me, there has to be some, something
2 other than strict liability, which right now, the way it's
3 written, if somebody really wanted to and had the discretion
4 to do so, now or in the future, they could issue an NOV for
5 something that's purely not the fault of the operator,
6 something that the operator could not have known about with
7 due diligence.

8 So that was the purpose of this, just to put some
9 kind of standard, and there doesn't appear to be any debate
10 over the standard. Their own slide says it can be
11 considered. But if we are going to consider it, why not
12 have it in the rule.

13 COMMISSIONER KESSLER: My understanding was that
14 it was a consideration in assessing the amount of penalties,
15 not whether or not the penalties should be assessed.

16 MR. FELDEWERT: I don't see much of a distinction
17 there.

18 COMMISSIONER KESSLER: Well, certainly --

19 MR. FELDEWERT: Well, if your opinion is they can
20 impose a penalty in a strict liability circumstance, that's
21 your decision, but it seems to me rather harsh or untenable.
22 There should be some kind of a standard as to how far back
23 they can go in terms of the issuance of penalty, because any
24 daily penalty, no matter, it is a penalty that goes into
25 your record.

1 COMMISSIONER KESSLER: That's my questions.

2 Thank you.

3 CHAIRWOMAN SANDOVAL: So along those lines, and
4 with your example, lightning strike, oil spills.

5 MR. FELDEWERT: Not tearing down your sign.

6 CHAIRWOMAN SANDOVAL: I believe what Mr. Wade
7 said was the penalty can be assessed as far back as the
8 Division can prove that it was happening. And if your
9 records show that on X days when you found it, but can't
10 prove when it was happening prior to that, how could the
11 Division even go further retroactively?

12 MR. FELDEWERT: Well, apparently if they had a
13 fact where an event occurred a week earlier before the
14 operator found out about it, they could go back a week.

15 CHAIRWOMAN SANDOVAL: If they were assessed,
16 everything hinges upon data, and if there is no data to
17 prove, in fact to prove that there was an issue, then you
18 can't go back any further. I think you are conflating
19 what's been said and saying it can go basically infinitely
20 further back.

21 MR. FELDEWERT: I think your proposition was, as
22 I understand, it goes back to the date that they can prove
23 that the violation occurred.

24 CHAIRWOMAN SANDOVAL: You are saying that knew,
25 right, and that's when they know.

1 MR. FELDEWERT: Correct. When they know or
2 should have known with due diligence.

3 CHAIRWOMAN SANDOVAL: Should have known,
4 basically being negligence?

5 MR. FELDEWERT: Yes. Yeah. The standard for
6 discovery, when did they know or should have known.

7 CHAIRWOMAN SANDOVAL: Okay. All right. It
8 doesn't matter.

9 MR. FELDEWERT: Perhaps not.

10 CHAIRWOMAN SANDOVAL: I will leave it there. Do
11 you have any questions?

12 MR. LOZANO: No.

13 COMMISSIONER ENGLER: No.

14 CHAIRWOMAN SANDOVAL: We will now hear from
15 Mr. Marker.

16 Mr. Marker, you indicated that you did not plan
17 to call any witnesses. Would you like to make an opening
18 statement or provide testimony to the Commission? If you
19 would like to provide testimony, please rise and be sworn
20 in.

21 (Oath administered.)

22 LARRY MARKER

23 (Sworn, testified as follows:)

24 DIRECT TESTIMONY

25 MR. MARKER: Cut this short, I'm going to cut

1 this as short as I possibly can. As far as what we just
2 discussed because it's fresh on my mind, if when an operator
3 knew or should have known, and all of those sorts of things,
4 there is probably an enormous amount of things that can
5 happen on a lease as soon as you drive off. It depends on
6 the age of the well.

7 I have had two gun barrels hit with lightning
8 this year alone. I pulled up on a lease, and I have eight
9 wells on this lease, and the tweakers have stole every motor
10 off every pump jack except one, and the one off in the
11 corner, and you're all happy because the one in the corner
12 is still running, you're like, the tweakers, out of eight
13 motors they left me one. But when you pull up to that well
14 you found out they left the motor on but stole your brass
15 valves and you have a well pumping out oil on the ground.

16 Who gets the fine for that? Obviously the
17 tweaker is not going to. The operator is going to get fined
18 for that. As far as what can go wrong or what will go wrong
19 on a lease, it's immeasurable. I promise you, whatever can
20 go wrong will go wrong, and it will probably go wrong a
21 whole bunch, but that's the nature of the beast working with
22 older equipment and wells.

23 There's been a lot of talk about prudent
24 operators, and as you can probably tell, I do have an issue
25 with giving the regulatory agencies the amount of discretion

1 we are talking about giving regulatory agencies.

2 I say that from my own experiences in life. I
3 generally do not want to spill one single drop of oil on the
4 ground. If I spill it on the ground, I can't sell it.
5 Unfortunately the type of wells that I have and that I have
6 owned in the past, I probably owned well over 400 wells in
7 the past six or seven years. I built my business buying,
8 selling and trading wells.

9 Most of the wells I picked up were deals that the
10 industry term would be deals that had hair on them. They're
11 wells that nobody really particularly wanted. They were
12 sick of dealing with, so the guy couldn't operate them
13 anymore and went on down the road, and I'm pretty confident
14 in my ability to get it cleaned up, pumping and going again,
15 and sell it or trying to keep it and make a living with it.

16 Unfortunately the economic situation over the
17 last several years, and the regulatory situation mainly with
18 the BLM has left my business with what I would consider in
19 shambles. I'm struggling every day just to survive.

20 I show up to the legislative session last year,
21 and I testified against some of the -- some of the
22 amendments, and you are probably aware of some of my issues,
23 but we go back to the simple fact -- and then actually I did
24 receive a notice of violation today, Daniel gave it to me.
25 It was a classic move. I was actually kind of proud of him,

1 he gave me my notice of violation today. And I'm sharing it
2 with you simply because I want to be honest and open and up
3 front. Okay?

4 I happen to be one of those guys that I'm not
5 real popular with the OCC OCD, for whatever reason. On a
6 personal level I get along with all the guys in the field.
7 I made the mistake of filing IPRA, and it wasn't very
8 pleasant. It was quite disturbing, and I wish I had never
9 filed it, but anyway we go from there.

10 But those same people, from my position, I'm just
11 going to be straight up with you, I feel like these
12 regulations are predatory against a guy like me. I'm not
13 saying there is not prudent operators out there, but, I
14 promise you, I do not know a single operator what wakes in
15 up in the morning and says, "I want to violate a rule of the
16 Oil and Gas Act." I promise you.

17 Every operator I have ever known that started in
18 business, was in business, or wanted to leave business,
19 generally wanted to comply. We want, we want set
20 guidelines. We actually do want you to set guidelines --
21 This is the rule. This is what's going to happen if you
22 don't do it. The problem is, right now it's all over the
23 place.

24 And now we've got to the point -- and maybe I'm a
25 little bit jaded, and some of these other guys may be as

1 jaded as me, I doubt it, but they feel like they are going
2 to be targeted just like I am. I honestly feel like I have
3 been targeted or will be targeted. I'm not sitting here
4 saying I want pity, sympathy, or anything else, I'm telling
5 you the facts the way I see them.

6 As far as your civil penalties go and from the
7 studying that I have done and what I know about the law,
8 what little I know about the law -- and today's hearing has
9 been a really good experience. These guys are good. I wish
10 I had the money to pay them. I spent all my money on
11 lawyers in 2017 and crude never did go up, so here I am
12 rambling on.

13 But anyway, when you are talking, a guy like me
14 says, okay -- anyway, let's just use my experiences. I'm
15 sitting here looking on Page 4, you guys can -- the
16 sanctions that are available, you can modify, suspend, plug
17 and abandon, remediation, removal of surface, forfeiture of
18 financial assurance, shutting in a well, blah, blah, blah,
19 any of these can put me out of business, and some of them
20 could put me in jail. That's not a good thing.

21 When we look at what's studying I have been able
22 to do, what we want to see, is the penalty civil, which is
23 remedial, or is it punitive. There is actually a seven
24 element test -- they call it a I seven factor test. I don't
25 know why. It should be called a seven element test -- that

1 tells you, is this penalty civil or is it, is it punitive?
2 Any time, any time forfeiture comes around, that is almost
3 always punitive.

4 Now, as far as calling a surface a plugging bond
5 for a well that's been abandoned, that will be completely
6 remedial because the plugging bond is going to pay to plug
7 that well. But according to the rules, if I've got a
8 leaking box, and I have been down in Carlsbad and I have a
9 leaking box going to Roswell, depending upon how bad things
10 get, you could actually call my bond for that.

11 We, we need, we need set guidelines. We also
12 need to make sure that the penalties, the sanctions that
13 we -- when I say "we," us as an industry, you're included in
14 the industry -- the penalties that we issue or the sanctions
15 that we issue, if they are civil they need to be civil. If
16 they're criminal then there is a whole nother set of
17 standards and it's a whole nother situation.

18 We can look at my -- and I will share this, I
19 don't have any anything to hide, actually. And you had
20 mentioned earlier -- let me find it here -- you had
21 mentioned earlier about the hundreds, hundreds of orders you
22 guys have sent out; correct? How many have we sent out this
23 past month? Hundreds? I did have it here because I was
24 looking at it. How many of those were for financial
25 assurance? Do you know?

1 MR. LOZANO: Mr. Marker, it's your statement, so
2 you can't ask questions of the Commissioners.

3 MR. MARKER: Okay. Give me a second. Now I'm
4 wishing I hadn't put it back in there. Anyway, my question
5 is, while I look for it, let's say that I was issued that
6 notice today. Let's say that these rules, let's just say
7 that these rules were in effect. Are you fining me \$2500
8 from today until I can convince my, my bonding company that
9 they need to increase my bond? I mean --

10 CHAIRWOMAN SANDOVAL: You are making a statement,
11 Mr. Marker.

12 MR. MARKER: No, that's a question.

13 CHAIRWOMAN SANDOVAL: We don't answer questions.

14 MR. MARKER: Okay. You can't answer questions,
15 that would be a problem. I was issued this that says I have
16 14 inactive wells. I have 165 wells. Well, in reality, out
17 of that 165 wells, I've sold, I think, 58 of them to three
18 different individuals.

19 Those individuals can't get a change of operator.
20 One reason they can't get a change of operator is they are
21 having a hard time getting the financial assurance. So if
22 we had a more streamline, or if they could achieve, get
23 their financial assurance, I would have less wells and the
24 financial assurance that I have in place would probably be
25 sufficient.

1 CHAIRWOMAN SANDOVAL: Mr. Marker, are you telling
2 the Commission that you have illegally sold wells?

3 MR. MARKER: I haven't closed the deal yet
4 because I haven't got a change of operator. What I'm
5 telling the Commission is there is circumstances beyond just
6 the black and white, beyond just what it looks like from
7 Santa Fe, New Mexico.

8 CHAIRWOMAN SANDOVAL: Right. I would just remind
9 you that all of this is written down.

10 MR. MARKER: That's fine. That's fine. I have
11 nothing to hide. From where I'm sitting, and just -- let's
12 just be honest, from where I'm sitting, I'm not going to be
13 in this business -- if you guys can do what you are doing
14 here, if you get these rules put into place, I'm probably in
15 serious trouble, judging by -- from my past experience. And
16 if you don't believe me, go back and read some of those
17 IPRAs.

18 Anyway, all that being said, I do have an issue
19 with the discretionary, giving the agency this amount of
20 discretion. Earlier counsel talked about the state getting
21 hung up with the plugged wells, with having to plug wells.
22 The reclamation fund has actually been pretty significant
23 the last several years. That's been a good thing. I'm
24 hoping that we use that, we use that money to -- the OCD was
25 able to use that money to solve a lot of problems that we

1 have in the past.

2 As far as the way things are right now, I don't
3 know -- I don't know that the OCD actually pursued the
4 procedures that we have in place right now as far as
5 asking the attorney general to go after specific operators.

6 The only other question I've got, were these
7 regulations, are they didn't intended to solve a problem, or
8 are they intended as retribution to punish operators? Can
9 you honestly tell me? Are these solely to fix the problems
10 that we have in the industry? Are they here to -- or are
11 they here as retribution or to punish guys that happen to be
12 in the oil and gas business?

13 That would be my question, and with that, that's
14 all I really have to say. And I'm sure I didn't increase my
15 popularity today. Thank you.

16 CHAIRWOMAN SANDOVAL: Does the Commission have
17 any questions for Mr. Marker?

18 COMMISSIONER ENGLER: Just a couple of quick
19 questions to try and clarify some things. You heard
20 Mr. Ragsdale talking about stripper wells. I assume that
21 quite a bit of yours are stripper wells.

22 MR. MARKER: All of my mine are stripper wells.

23 COMMISSIONER ENGLER: So they are under that very
24 low level of balance of being able to survive?

25 MR. MARKER: Yes, sir.

1 COMMISSIONER ENGLER: So you also heard that, I
2 think, under redirect from Mr. Ames that it's not the well,
3 it's the operator who gets --

4 MR. MARKER: Right. Right

5 COMMISSIONER ENGLER: So even though a single
6 well might have a violation, it's not that well, it's the
7 fact that you, as an operator, have to be able to --

8 MR. MARKER: Yes, sir.

9 COMMISSIONER ENGLER: -- deal with that, and I
10 think that came out earlier; right?

11 MR. MARKER: Yes.

12 COMMISSIONER ENGLER: As a prudent operator, as
13 you expressed yourself watching over your wells, it would
14 seem that you seek -- if you are out there sufficiently
15 always monitoring particularly stripper wells, because when
16 they're down you lose money, that you are constantly
17 monitoring and watching your wells.

18 MR. MARKER: Constantly.

19 COMMISSIONER ENGLER: So again, as the director
20 pointed out, again, you stated for your operational purposes
21 that you are always monitoring these particular issues,
22 particularly for stripper wells. So in this case, you know,
23 where this is a means of trying to -- to address those
24 operators who would not follow those kinds of time lines,
25 would you not agree that you actually would see this -- you

1 operate at a level that you would not have to be penalized.

2 MR. MARKER: Say that last part again.

3 COMMISSIONER ENGLER: I guess what I'm -- let me
4 clarify. I'm trying to get to, the issue is between someone
5 who is, the majority of operators, as you and Mr. Ragsdale
6 have said, are prudently watching over your wells,
7 monitoring, so both your timing hopefully will be short, you
8 know, barring an act of God.

9 MR. MARKER: Right.

10 COMMISSIONER ENGLER: Or you are always watching
11 things so that you can maintain production, and also to be
12 able to for safety, which is the other concern, and
13 environmental reasons. So what we are trying to address is
14 those operators who may not be those few who well may be
15 violating the rules or who are not prudent.

16 So getting back to a lot of what you are stating,
17 I would like -- you're a stripper well operator who is a
18 prudent operator who watches over your wells, do you see
19 that these particular penalties would actually take effect.

20 MR. MARKER: Okay. I am an operator, and I give
21 110 percent every day to be a prudent operator.

22 Unfortunately, with what's gone on with my business and
23 what's gone on in my industry, two years ago I had two
24 pumpers and myself, I was a pumper. One of my pumpers
25 worked on a pulling unit with me, we would pull wells, we

1 would go pump wells.

2 Well, things got bad. I had to let him go, so
3 I'm pulling wells myself. And I burned the transmission up
4 on my pulling unit, and now it's probably being stripped
5 right now because of the thievery in the oil fields.

6 So I'm up here in Santa Fe. I had to let my
7 other pumper go, which was my son, he went to work for
8 Barnett. I do my level best to operate my wells at the very
9 best I can. I don't want to go out there and ruin my
10 clothes. I don't want to be embarrassed about -- I take a
11 lot of pride in the fact I was able to build a business from
12 nothing.

13 It's basically destroyed now, and a lot of the
14 reason I'm up here is I want to rebuild my business. I want
15 to be in this business, but I can't rebuild it under these
16 regulatory conditions.

17 I will be better off if we can have rules in
18 place that I know exactly, this is the rule, and this is
19 what's going to happen, no matter who gives you the penalty,
20 or whoever, you know, take all the personality stuff out of
21 it, because apparently I don't have a personality that gets
22 along with people well, for whatever, I thought I did.

23 But bottom line is, to answer your question, I
24 believe to answer your question, I honestly do not know an
25 operator -- I will look you right in the eye -- I'm a lot of

1 things, but I'm not a liar. I do not know an operator that
2 is not giving his every, everything he has under the
3 conditions he is under to operate his wells to the best of
4 his ability. If we don't sell oil, we don't make a living,
5 bottom line.

6 Our equipment is wore out. Our wells are shot.
7 Things are ugly. We have gone through four of the worst
8 years you could possibly go through for stripper welling.
9 We hear all the stuff in the news, the big boom and all
10 that. The big boom has not helped the stripper wellers.

11 The financial assurance, I was up here last year,
12 the financial assurance is going to put people out of
13 business. It's going to put people out of business.
14 Reality is, to answer what I believe possibly could happen,
15 I received that order today for \$2500 a day fine, okay? I
16 received that. I'm not going to argue with it.

17 I'm in fact trying to get my paperwork together
18 to get to the bonding company to increase my bond to the 125
19 that he wants instead of the 50 that I got, and it's all
20 gotten messed up. It's going to take me a little while
21 longer to do because the BLM levied a \$920,000 well for
22 shutting in two wells that the state told me to shut in.

23 And I'm going through that hearing process, and
24 I've got it up in Washington. I won the first appeal. They
25 said, "Yeah, you're right. It should have only been

1 \$256,000."

2 That's the kind of things that happen in a
3 stripper weller's life. That's the way it is. I'm not
4 complaining it's a tough life, but it's a life I chose. But
5 what I'm saying, we need to have set rules, very little
6 discretion. We don't have a problem with compliance,
7 obedience we will struggle with. Compliance, we don't have
8 a problem.

9 If I go buy a well from let's say Buddy, if I go
10 buy a well from Buddy, and all of these rules are in place
11 and been in place for three or four years, and he's been in
12 compliance because the state is doing a better job now or
13 able to do a better job now -- you could use a lot more
14 staff and have a bigger budget, but that's a whole nother
15 story -- I'm going to be more comfortable buying that well
16 because I know things have been a lot better as far as the
17 compliance goes.

18 As far as I know, every operator that's out there
19 right now is doing his level best under the circumstances.

20 COMMISSIONER ENGLER: Thank you. We appreciate
21 your pride in your response. And we are also all trying to
22 make the rule better for everybody as we defined earlier
23 today. So thank you.

24 MR. MARKER: Yes, sir.

25 COMMISSIONER ENGLER: No questions.

1 COMMISSIONER KESSLER: No questions.

2 CHAIRWOMAN SANDOVAL: I don't have any questions.

3 Mr. Marker, since you did provide testimony, the other
4 parties are able to cross you. Division, do you have any
5 wish to cross the witness?

6 MR. AMES: I have a couple of questions for
7 Mr. Marker.

8 CROSS-EXAMINATION

9 BY MR. AMES:

10 Q. Good afternoon, Mr. Marker. You referenced a
11 situation where there might be a release of oil from a
12 lightning strike.

13 A. I said a gun barrel got hit by lightning, two of
14 them.

15 Q. This caused a release of oil?

16 A. No, sir.

17 Q. It did not?

18 A. No, it did not.

19 Q. Let's assume for purposes of argument it did.

20 A. Yes, sir, let's do.

21 Q. That release itself is not a violation of the OCD
22 rules; right?

23 A. I don't know.

24 Q. You don't know?

25 A. I do not know.

1 **Q. Do you know that the rules require you to report**
2 **a spill?**

3 A. Yes, sir, if it's more than three -- actually,
4 well, what I have been doing is reporting any spill because
5 I don't know the minimum amount anymore.

6 **Q. Are you aware that the reporting requirement is**
7 **triggered by the date of discovery of the release?**

8 A. Yes.

9 MR. AMES: Nothing further. Thank you.

10 MR. CLOUTIER: No questions.

11 MR. FELDEWERT: I don't have any questions.

12 MR. MARKER: Can I clarify about the gun barrel
13 strike. Local Hills A and B, the gun barrel was on a
14 federal lease. It was full of iron sulfide. By the time my
15 wells pressured -- because somebody had already fracked and
16 it bled into my wells and pressured up all my wells, pushed
17 all the iron sulfide out the back side of those wells,
18 plugged all up my flow lines, my gun barrel and everything
19 else. Fortunately I was not in production.

20 I had iron sulfide burn to burn. It was ugly.
21 And as a matter of fact, I got the approval this morning
22 from the e-mail from Ms. Waye with the BLM, she approved my
23 plan for cleaning it up.

24 The other one was on a lease that I picked up
25 about a year and a half ago, and I have now found out that

1 the lease has been canceled and I'm trying to get the lease
2 cleaned up. The gun barrel was empty when it got hit by
3 lightning.

4 The only reason the gun barrel was empty is
5 because I'm trying to get the lease cleaned up because the
6 ole boy I got the well from got a letter that said, "We
7 canceled these leases in 2015."

8 He's gone. He's sick. He is out of the picture,
9 so I'm trying to get the mess cleaned up as fast as I can.

10 When I say the mess, get the equipment off, get
11 the tank off. I'm trying to cover for the guy. He's a good
12 ole boy, and he would do the same for me.

13 CHAIRWOMAN SANDOVAL: Thank you, Mr. Marker. Do
14 any of the other identified parties have questions?

15 (No response.)

16 CHAIRWOMAN SANDOVAL: Let's take a ten-minute --
17 ten-ish-minute break and come back at 5 after 3, and then we
18 will commence with the public comment section.

19 (Recess taken.)

20 CHAIRWOMAN SANDOVAL: It's 3:07. We are going to
21 get back to it. There are a couple of exhibits to enter
22 into the record.

23 MR. LOZANO: Thank you, Madam Chair. So during
24 the hearing, sometime today we received additional public
25 comment in writing. The Chair has determined that we will

1 accept those, so we will enter them of record.

2 First is a letter from Armstrong Energy
3 Corporation drafted by Ronald B. Hillman. That will be
4 Exhibit 11.

5 The next is a letter from Thomas M. Beall, and I
6 don't know if it has any affiliation, that will be entered
7 in as Exhibit 12, and then a letter from Carolyn R. Beall as
8 Exhibit 13. If there are no questions or objections from
9 the Commissioners.

10 COMMISSIONER ENGLER: None.

11 COMMISSIONER KESSLER: None.

12 CHAIRWOMAN SANDOVAL: Please enter those into the
13 record.

14 (Exhibits 11, 12, 13 admitted.)

15 MR. CLOUTIER: Madam Chair, Armstrong is one of
16 the two that I mentioned that I appreciate the courtesy that
17 had been submitted previously. The other one I thought
18 might be coming in has been stated previously, so I'm not
19 anticipating another one from our membership of which I'm
20 aware, but I do appreciate the courtesy.

21 CHAIRWOMAN SANDOVAL: Thank you. All right. We
22 will now proceed with public comment. We have three
23 individuals who signed up for public comment.

24 Will Bruce Baizel please come to the witness
25 table and stand so the court reporter may administer the

1 oath.

2 (Oath administered.)

3 CHAIRWOMAN SANDOVAL: You may now make a brief
4 statement on proposal amendment. Please be sure to identify
5 any exhibits that you wish to enter into the record.

6 BRUCE BAIZEL

7 (Sworn, testified as follows:)

8 DIRECT TESTIMONY

9 MR. BAIZEL: My name is Bruce Baizel. I'm the
10 energy program director for Earth Works. We are a national
11 environmental organization that deals with the impacts of
12 mining, oil and gas. I have been doing full time oil and
13 gas work since 2003, and previously was a member of the
14 Governor Richardson's Wolf Task Force here in New Mexico. I
15 see Bill Carr back there. We were just commiserating on the
16 number of days we spent.

17 In addition I served on the Multi Stakeholder
18 Stronger Board, which is industry, state regulators, and
19 public interest groups, and we review state oil and gas
20 regulations. So as part of that I have reviewed both New
21 Mexico's air regulations just most recently, but also
22 Pennsylvania's oil and gas rules, Virginia's, Louisiana's and
23 Colorado's. So that's a little of my background.

24 Specific to this particular issue, we were one of
25 the instigators for the legislation that you are now driving

1 this rulemaking. We submitted bills through legislators at
2 least once prior in 2017 and then again in 2019 with Senator
3 Martinez being the prime sponsor. So I'm intimately
4 familiar with both the legislation and I have read the rule
5 very, very carefully and participated in the stakeholder
6 meeting that the Division held.

7 I think what I would like -- I have three
8 distinct sets of comments I would like to make. One is a
9 basic kudos to the Division. They tracked in the rule the
10 language that came out of legislation very, very closely,
11 and we disagreed with where the legislature ended up on a
12 few issues. We find that this proposed rule with the
13 amendments as of this Exhibit 4 this morning, we actually
14 support everything that's in there.

15 I have not seen some of the other subsequent
16 amendments, so I don't have an opinion on those in
17 particular, but we think that the Commission should adopt
18 that, that rule with those amendments.

19 And part the reason -- there are a couple of
20 issues I would like to point out, and they have come out
21 very clearly in the earlier testimony that we listened to.
22 Over the years we have issued a number of reports reviewing
23 state oil and gas regulations, and particularly compliance
24 and enforcement.

25 We have done New Mexico in 2012. We did

1 Colorado, Texas, Ohio, Pennsylvania, New York. And in the
2 course of doing that, this question of penalty factors came
3 up in all the states and how they treat severity of how much
4 a penalty should or not not be, what factors you take into
5 account.

6 And as a general rule they do not put those
7 penalty factors into regulations. They do them as
8 guidelines or a matrix. Colorado just did a matrix a couple
9 of years ago where you can look at a sliding scale of
10 positive-negative factors, and part of the reason is,
11 because if you put it in a rule, then you have to come to a
12 hearing to change it if you think those factors aren't
13 correct or need to be adjusted in some way or the industry
14 has changed over time.

15 It's not that -- guidelines and guidance are
16 there for the operators and for the agency and for the
17 public to see how those play out to come up with a penalty
18 amount if there is a penalty amount. So it would be unusual
19 to put all of those factors in a regulation as opposed to as
20 agency guidance that is publicly available and communicated.

21 And I would point you, I believe it's the same
22 language in the statute as you have in the regulation that
23 there's -- it says, "They shall consider and other relevant
24 factors." And I know from my own knowledge of negotiating
25 with NMOGA and others that it was partly because we couldn't

1 agree on what those other factors might be, and we thought
2 the agency is the expert, they deal with those factors, they
3 should figure those out in a less formal setting, and that's
4 what that language was put in there for.

5 I have looked at several other states -- I have
6 the Texas example. I haven't seen their exhibit, but they
7 go very detailed. You're fined \$250 if you don't have an
8 operator identification sign on the site. Part of the
9 reason they do that is because it gets the attention of the
10 bookkeepers, not the folks in the field, but the
11 bookkeepers.

12 If they have to pay that money, then feedback
13 goes to the folks in the field that says, "Look, you
14 gotta -- those are easy things. Get in compliance. I don't
15 want to be cutting a check for 250 bucks on a missing sign."

16 That's that set of factors. It's a matrix, not
17 in the regs, but they have a whole range of things. Other
18 states have different things, different levels. So I wanted
19 to make that point.

20 In the course of doing our work on evaluating
21 enforcement and compliance, we have gone through the OCD
22 database on spills in particular, and since I'm under oath,
23 I guess you will have to assume I'm telling the truth
24 because I supervise the -- we got some of it by going
25 through file by file. We got some in requests to the

1 Division. From 2000 to 2018 we looked at spills.

2 And part of the reason that we were so supportive
3 of taking out the knowingly and willful language was because
4 somewhere upwards of 50 percent of spills are through
5 corrosion or through mechanical failure. It's not human
6 factors per se. And so for us it's important then that
7 there be that incentive of penalty and inspection to get
8 operators to be very diligent about trying to discover those
9 as soon as they can so the damage is decreased as much as
10 possible.

11 But that's the reason for us, this question of
12 the standard, was very hard fought, I have to say, in the
13 negotiations. And I appreciated the definition from Black's
14 Law Dictionary about aware. it didn't seem to be much
15 different. That was critically important in the statute, in
16 the bill that was passed.

17 The last point I would make is when we looked at
18 the spill data from OCD, there is a lot of variability
19 between operators and that has come out in the testimony,
20 like a thousand-fold difference. One operator, I'm not
21 naming any names, but in the course of those years, had 16,
22 1700 spills. Another one had 250. And there were some that
23 had less than that. So operator behavior does vary, and I
24 think in that case regulations are for those that aren't
25 paying as much attention, and that's what penalties do is

1 help them pay attention. And if there's some clean up that
2 has -- that have public costs, it helps to cover that, so.

3 So I would just again say, OCD is -- this is a
4 tough -- tough nut to go from what it was to what it will
5 be. Change is hard, and I would encourage you to take a
6 bite at it. Encourage them to come up with a matrix or set
7 of guidelines that stakeholders can have input into, and not
8 try to do it all at once. I think you would be inconsistent
9 with other states when you do that.

10 So that's all I have. Those are my statements.

11 CHAIRWOMAN SANDOVAL: Thank you. Do any of the
12 identified parties have questions for the witness. Does the
13 Division?

14 MR. AMES: I have questions.

15 MR. CLOUTIER: No, thank you, Mr. Baizel.

16 MR. FELDEWERT: No questions.

17 MR. MARKER: You said that 50 percent of the
18 spills that have been reported were mechanical failures.

19 MR. BAIZEL: Or corrosion.

20 MR. MARKER: Or corrosion. The other thing is
21 you mentioned that you felt like -- and you looked over here
22 in this direction -- you felt like we should have some
23 input, and I don't know the exact words on the guidelines or
24 some type of -- like I said earlier, we are not opposed to
25 rules. We are not opposed to compliance, but you mentioned

1 earlier about we could have some input. And we would
2 welcome some input.

3 CHAIRWOMAN SANDOVAL: Will you ask a question,
4 please, Mr. Marker?

5 MR. MARKER: Ma'am?

6 CHAIRWOMAN SANDOVAL: When you are addressing the
7 witness, you need to ask a question.

8 MR. MARKER: Do you feel it's important that
9 industry would also participate in making those regulations?

10 MR. BAIZEL: Well, so I was speaking about either
11 guidelines or a matrix of factors that go into the penalty
12 in practice for all the states I have looked at.

13 MR. MARKER: When you say matrix or factors,
14 I'm --

15 MR. BAIZEL: So the statute gives three, and then
16 says and other relevant factors. So good-faith effort to
17 clean it up, was there environmental harm or not, those
18 would be the kinds of factors that could be --

19 MR. MARKER: Water tables, crossing into rivers
20 or anything like that.

21 MR. BAIZEL: Was it an act of God? Was it simply
22 you didn't go out and check for two weeks, and so it got
23 worse? All of those kinds of things would be the kinds of
24 factors you would take into account. Were people --
25 was worker safety involved.

1 That's what other states would include as their
2 factors in calculating, if there is a fine, what it would
3 be. And that's all I'm saying is, of course, you can do
4 that with your stakeholders, public, industry, local
5 officials, I mean, sure, that would make sense.

6 MR. MARKER: Okay. That's all.

7 CHAIRWOMAN SANDOVAL: Thank you. Did the
8 Commissioners have any questions?

9 COMMISSIONER KESSLER: No.

10 COMMISSIONER ENGLER: No questions.

11 CHAIRWOMAN SANDOVAL: In your, in your past work
12 have you seen any other state that has not had
13 administrative penalty authority?

14 MR. BAIZEL: No, that's that's one of our
15 complaints. That's why we went to the legislature.

16 CHAIRWOMAN SANDOVAL: Thank you.

17 MR. BAIZEL: Thank you. Thank you, good luck.

18 MR. LOZANO: Do we have somebody representing
19 Modrall Sperling here? I can't exactly read the name?

20 CHAIRWOMAN SANDOVAL: Earl DeBrine?

21 UNIDENTIFIED SPEAKER: He's not here.

22 CHAIRWOMAN SANDOVAL: Okay. Earl DeBrine signed
23 up on this sheet, but is no longer here, so we will move on
24 to the next.

25 MR. LOZANO: Buddy Delay.

1 (Oath administered.)

2 CHAIRWOMAN SANDOVAL: You may now make a brief
3 statement on the proposed amendment. Please be sure to
4 identify any exhibits you wish to enter into the record.

5 MR. DELAY: I have no exhibits.

6 BUDDY DELAY

7 (Sworn, testified as follows:)

8 DIRECT TESTIMONY

9 Mr. DELAY: I have three points. Mr. Wade cited,
10 and I believe the Chair has also cited that there were
11 hundreds of NOV's that have been issued over the past couple
12 of months, and I think we established that the biggest part
13 of them were financial assurance and reporting, those
14 issues.

15 I guess some of the reasoning behind this is
16 these, these extra -- this, what we are here for today
17 is -- sorry, I had it all worked out in my head, but -- you
18 have to appear in front of everybody and it gets a little
19 tense.

20 But anyway, my thoughts were, reading all of
21 this, it was to prevent damage to, you know, imminent
22 threats to the environment, public safety. And I feel like
23 if the bulk of those things are not really necessarily
24 imminently damaging to what the guidelines are supposed to
25 be for, then we are using hundreds -- we are using the fact

1 that there's been hundreds of NOV's issued to lend
2 credibility to that it's imminent. So I just had a
3 disagreement with that.

4 And Mr. Wade also admitted that the OCD has
5 available other remedies for compliance, but he has also
6 admitted he has not -- that he rarely used them. So I
7 just -- I can see why that -- because OCD regulates water
8 haulers, oil haulers, waste haulers, treating plants, SWDs,
9 but their financial assurance requirements are different
10 than ours.

11 They are have insurance that they can cancel. If
12 the OCD fines them, well, all they've got -- all they do is
13 pay the fine, go out of business, cancel their insurance.
14 Our bonds are non-revocable, so it's not as easy for us to
15 just go and get a bond as it is for a water hauling company
16 to go get a general liability policy.

17 So I can see where you would need to be able to
18 fine someone immediately in cases such as that because the
19 OCD does not have the -- the -- they don't have same means
20 that they have available to oil operators to cruder haulers
21 in that they can't suspend their C-104s. They can't suspend
22 their runs or whatever. So you would have to be able to
23 have something like that in order to gain compliance from
24 those participants.

25 And the last thing was, Mr. Wade stated that New

1 Mexico is gaining many new operators that may not know the
2 rules. I would say that New Mexico has probably lost more
3 operators than what it's gained. I have been planning on
4 exiting the state since 2018. Just as soon as I can divest
5 of everything I have, then I plan on it. I have holdings in
6 Texas. But it's -- there are no potential buyers. Nobody
7 wants anything here. Everyone's -- anyone that potentially
8 will look at this wants -- they say, "We just want to see
9 what the OCD is going to do."

10 As operators we have been plagued by, I would say
11 since 1990, just a turbulent regulatory environment where we
12 would have sometimes maybe favorable regulatory from the
13 feds, and at the same time we would have adversarial
14 regulatory from the state.

15 And then by the next election it switches again
16 and then the tables are turned. So there is never any -- I
17 would say since I started in 1991, and I don't think that
18 there's been -- you cannot set up a business plan for ten
19 years based on the model -- based on how I guess the
20 regulatory environment in New Mexico has been conducted.

21 So that's all I had.

22 CHAIRWOMAN SANDOVAL: Thank you. Do any of the
23 identified parties have questions for the witness?

24 MR. AMES: No, I don't. Thank you, sir.

25 MR. CLOUTIER: No questions.

1 MR. FELDEWERT: No questions.

2 MR. MARKER: No, I'm --

3 CHAIRWOMAN SANDOVAL: No questions.

4 MR. DELAY: Everybody heard him say that he's
5 going to buy a well from me.

6 CHAIRWOMAN SANDOVAL: Just a second. Do the
7 Commissioners have any?

8 MR. MARKER: I could talk to him for hours, so
9 no, I have no questions.

10 MR. DELAY: Any others?

11 CHAIRWOMAN SANDOVAL: No questions. Thank you.

12 MR. DELAY: All right. Thank you.

13 CHAIRWOMAN SANDOVAL: Do any of the identified
14 parties wish to make a closing argument. Division?

15 MR. AMES: Yes, we do. Thank you.

16 CHAIRWOMAN SANDOVAL: Proceed.

17 MR. AMES: Thank you. Compliance, that's the
18 purpose in changing the Oil and Gas Act, and that's the
19 purpose in our proposing this rule today.

20 This is not an abstract debate. Compliance is a
21 real issue. It's a real problem. As Mr. Wade testified,
22 since the Supreme Court decided the Marbob case in 2011, OCD
23 has not been able to assess an administrative penalty for
24 violation of the Oil and Gas Act, which puts New Mexico in
25 singular company, as Mr. Baizel testified, among the states

1 with oil and gas industries.

2 Since 2011 New Mexico's only filed three cases
3 for civil penalties, all in court, and all because the
4 alleged violator had signed an agreed compliance order,
5 which it then proceeded to violate, and that was the only
6 situation in which the OCD was able to prove the knowing and
7 willful standard.

8 Three cases in nine years, not a very good track
9 record. Everybody knows about the rapid growth of oil and
10 gas in the Permian. And the work being done in the
11 northwest corner of our state, more drilling, more
12 production, more operators, more jobs, more economic
13 opportunity.

14 And that's all good, but it also means nor
15 inactive wells, larger shortfalls in financial assurance,
16 more releases, more failures to report, more trucks dumping
17 produced water and oil field waste on the side of the roads,
18 in fields and yards. Now, the OCD does not have much
19 leverage to deal with it as Mr. Wade explained.

20 It's true we can deny permits and authorization,
21 but if the operator doesn't want anything from OCD, OCD
22 can't do too much about it. If there is no consequences for
23 violating the rules, there is no deterrents and there will
24 be more violations.

25 Last session the legislature recognized the lack

1 of enforcement was resulting in waste, harming correlative
2 rights, the public health and environment, and it amended
3 the statute to authorize the Division to issue NOVs and
4 assess civil penalties.

5 The Division's proposed rules today do that.
6 They are fair and balanced, they provide due process with
7 notice and an opportunity for hearing. They provide
8 reasonable procedures so operators are heard, the facts are
9 established and the law is applied impartially and equally
10 to everyone.

11 There has been many arguments made today, but we
12 are proud to say that we've heard virtually no argument that
13 our rules deny anyone due process.

14 Now, some good changes have been proposed by the
15 other parties, and we appreciate those. And we, as Mr. Wade
16 has testified, support many of them and included them in
17 Exhibit 4 filed here today.

18 But those good changes don't justify the bad
19 ones, the ones that are intended, in our view, to prevent
20 OCD from assessing civil penalties at all. The legislature
21 removed the requirement that violations be knowing and
22 willful before they can be penalized. This change is
23 intended to allow the OCD to assess a penalty regardless of
24 when the violator knew about it.

25 Operators are always responsible for compliance,

1 and that includes violations that occurred even before the
2 NOV was issued. Violators should not be able to ignore the
3 law until they are caught.

4 Now, NMOGA has proposed a change to section
5 10(D), which is on Page 28 of Mr. Wade's presentation, and
6 essentially, from our perspective, this a proposal to add
7 knowing and willful back into the rule, despite the
8 legislature's removal of that language from the statute.

9 Now, NMOGA has subjected this is really no big
10 deal. Since the OCD has agreed that knowledge is a relevant
11 factor to consider in calculating a civil penalty, then it
12 should be not a big deal to put this language in.

13 But that's a bit of a misleading argument. This
14 language isn't about how a penalty is calculated, this
15 language would preclude OCD from assessing a civil penalty
16 in the first instance. So we don't get out of the gate if
17 this language comes in, and we can't show when the
18 violator -- alleged violator, the operator or responsible
19 party knew or should have known about it. That's a pretty
20 stiff burden as shown by the fact we only filed three cases
21 in the last nine years.

22 The legislature also did not grant amnesty from
23 civil penalties if the violator comes into compliance. The
24 statute does require an informal resolution period, and that
25 is an important provision as I will explain further in a

1 moment.

2 But it does not prohibit and should not prohibit
3 the Division from settling for a civil penalty if the facts
4 support one. We can call it a civil penalty, we can call it
5 a fine, we can call it a stipulated penalty, whatever we
6 want to call it, in some cases the Division will want a
7 civil penalty for a violation, and the violator may be
8 prepared to settle for one. There should be no provision
9 that precludes us from doing that. In fact, we believe such
10 a provision would be counter-productive.

11 If the department -- excuse me -- if the Division
12 believes a penalty is warranted, but can't -- but it can't
13 get a penalty during the settlement process through a
14 stipulated final order, then we are going to have to go to
15 hearing. That seems contrary to the legislative purpose in
16 encouraging resolution.

17 Now, I would like to address briefly two issues
18 raised during, during the testimony or during the comments
19 of NMOGA's counsel. The first has to do with hearing
20 officer reports and whether there should be a requirement
21 that hearing examiners prepare a report. If you recall the
22 decision was whether the hearing examiner may prepare the
23 report at the request of the director or shall do one.

24 In our view may is the right choice. We do not
25 see a conflict with the statute as Mr. Feldewert suggested.

1 The statute in 70-2-13 states, "In the absence of any
2 limiting order."

3 And then it goes on to say that the hearing
4 examiner shall cause a complete record of the proceeding to
5 be made transcribed until certified to the Division for
6 consideration together with the report of the examiner.

7 So we only get to where Mr. Feldewert is by
8 ignoring the opening phrase, "In the absence of a limiting
9 order."

10 In our view, this Commission, by adopting this
11 rule will be entering an order. That order itself will
12 limit the scope of its obligations under 70-2-13. So by the
13 order issued here today, or whenever it's issued if you
14 adopt this rule, you can adopt rules that make the filing of
15 the report by the hearing examiner discretionary as opposed
16 to mandatory.

17 The second issue has to do with the question of
18 who issues NOV's. There's a little bit of confusion about
19 this. Mr. Feldewert pressed Mr. Wade to explain who would
20 actually issue the NOV's, could it just be anybody, I guess
21 anyone from the director of one of the offices to an
22 inspector in the field, to hearing clerk, for that matter.

23 That obviously is a stretch of common sense. The
24 way things work, the Division is run by the director. She
25 works through the deputy director. All power flows down

1 from there.

2 As Mr. Wade testified, OCD management is in
3 charge of this process and will be reviewing compliance
4 orders as it has historically before they go out. At this
5 point, Mr. Wade, I should say, was a bit circumspect about
6 who would issue because the rule doesn't strictly define it,
7 and the Division needs the ability to decide where the power
8 should be delegated to for particular kinds of violations.
9 At this point, that's a matter of administration, not
10 procedure. And that's a matter that's delegated to this
11 Division director to decide within the scope of her powers
12 as it properly belongs or where it properly belongs.

13 Now, I want to make four points crystal clear for
14 the Commission. First, NMOGA and IPANM have virtually no
15 evidence for their proposals, virtually none. And NMOGA had
16 no witness, and the statements of counsel are not evidence.

17 As for IPANM, Mr. Ragsdale testified, but his
18 testimony was, by his own statement, very limited. He did
19 not address most of the proposals in IPANM's exhibit
20 attached to their prehearing statement.

21 This Commission can only adopt changes to the
22 proposed rule based on evidence in the record. Well, for
23 that matter it can't adopt the proposed rule without
24 evidence in the record, but Mr. Wade testified at great
25 length as to the basis for the proposed rule, but if this

1 Commission wants to adopt changes to that proposed rule,
2 there needs to be some evidence in the record, and at this
3 point there simply is not.

4 Second, nothing in the OCD rule requires OCD to
5 issue or assess a civil penalty. There seems to be a
6 misperception that we will always be issuing a civil penalty
7 for every violation, and that simply is not true. As Mr.
8 Wade testified, the OCD has many tools in the toolbox.
9 Civil penalties are one of them.

10 We always have the discretion to reduce or not
11 assess a penalty if warranted by the facts. We don't -- do
12 not need additional language in the rule to make that point.

13 Third, OCD will take knowledge, the operator's
14 knowledge of the alleged violation into account during the
15 enforcement process. It is a, quote, relevant factor,
16 unquote, under the statute.

17 As Mr. Baizel pointed out, the question of what
18 factors should be considered in assessing a civil penalty
19 were a matter of debate during the legislative session, and
20 because the parties could not reach an agreement, they
21 substituted the phrase "relevant factors" to cover issues
22 that might come up during the process. Knowledge is
23 definitely one of those.

24 A violator who knows about a violation, but
25 doesn't fix it, should have to pay more. A violator who did

1 not know or who could not have known about a violation might
2 pay less or nothing. It all depends on the facts. OCD
3 needs to be able to adjust the penalty based on the facts.

4 And fourth, OCD fully intends to use the informal
5 resolution process to resolve conflicts. The proposed rule
6 is the procedure for doing this. It specifically said that
7 NOVs must say that informal resolution is available. A
8 long-standing practice of the OCD, as well as every other
9 agency that I have worked for, is to put in a letter who you
10 should call to talk about it. That's pretty standard. If
11 the Commission wants to add the language, including contact
12 information to the relevant subpart of the NOV, that's fine
13 with us, because that simply reflects what we all do, we
14 always do anyway.

15 Our objective is to invite the violator to come
16 talk to us if it wants to. We can't make violators come
17 talk to us. It's up to them. And we will meet with them or
18 talk to them on the phone and discuss these issues in any
19 way that they want to, but how that happens depends on the
20 parties involved.

21 And it would be misguided to state more formally
22 in the rule what is essentially in a settlement process and
23 should be left to mutual agreement between parties seeking
24 resolution of a dispute.

25 Now, I would also like to make clear that the 30-

1 day statutory language regarding informal resolution is not
2 a limit on how much time we have to discuss settlement, it's
3 a statutory minimum. The statute says we have to have
4 informal resolution for 30 days before we can have a
5 hearing.

6 The way this OCD envisions the process working is
7 we would initiate the 30-day period by the NOV, set the date
8 for the hearing sometime out in advance, and then there is a
9 period of time, 30 days at minimum, probably more, when
10 informal resolution can occur. We aren't bound to get it
11 all done in 30 days. And OCD's experience is that rarely
12 happens, anyway. Everything takes more time than you think
13 it will. 30 days is a very short period of time.

14 That said, the rule expressly provides for an
15 even longer period of time to discuss informal resolution.
16 In subsection 10(I), we specifically provide that settlement
17 can continue all the way through to the time of the hearing.

18 There is no limitation on when informal
19 resolution can occur, so there should be no concern about
20 whether or not someone returns a phone call. That said,
21 resolution can occur all the way up through the appeal.
22 There is nothing in the statute, nothing in the rules that
23 bars OCD from talking to an alleged violator about informal
24 resolution at any time in the process.

25 Finally, IPANM proposes a series of tables to

1 calculate this civil penalty. Nobody, as you heard, nobody
2 really knows where the tables came from. They appeared to
3 come initially from Texas, but they were tinkered with. The
4 people who did that aren't here to testify about them.

5 Mr. Ragsdale, to his credit, acknowledged he
6 couldn't answer any questions about the table. He never
7 worked, never worked with these tables. He hasn't handled
8 any enforcement actions in Texas. He wasn't familiar with
9 the Texas rule itself.

10 As Mr. Wade testified, the tables are flawed.
11 Three contain undefined and unknown terms, at least terms
12 unknown to the OCD, as Mr. Wade testified. In addition,
13 Table 1 lists many violations, but doesn't have a catch-all.

14 So what happens if we have a violation that
15 doesn't appear on that page? And it's entirely possible
16 that there are a lot more violations out there. We
17 certainly have more rules out there than are identified on
18 one page of the table. Without that -- without that
19 catch-all, this table essentially functions to preclude
20 civil penalties for any violations that doesn't appear on
21 that list. And, as Mr. Wade testified, he doesn't even
22 recognize half of those violations.

23 Finally the tables, putting tables in a rule are
24 a bad idea. Both Mr. Wade and Mr. Baizel testified that
25 when you set tables like this in a rule, they are in the

1 rule forever, or at least until the rule changes, which
2 isn't easy.

3 Essentially OCD will be locked in. We will have
4 no flexibility. We won't be able to adjust or consider
5 other factors. And these are -- well, and finally IPANM
6 proposes that OCD abate or return penalties if the BLM seeks
7 a penalty itself. As Mr. Wade testified, we do not see how
8 this could possibly work.

9 The critical term here is "same violation."
10 There is no definition. A definition was offered by
11 counsel, but not by a witness. We are not aware of clear
12 overlap between the federal and state rules, or even between
13 OCD's rules and the rules of other state agencies. We
14 perceive this as a road map for litigation.

15 And I would point out that Mr. Ragsdale couldn't
16 say what would happen in the -- in the situation where the
17 BLM came in after OCD had assessed a civil penalty and
18 proposed to assess its own. Mr. Ragsdale was asked what
19 would happen if the BLM came in a year after, or three years
20 after, or five years after, and Mr. Ragsdale wasn't able to
21 say how those time frames would affect OCD's obligation to
22 return the penalty under IPANM's proposal.

23 And then finally, Mr. Ragsdale acknowledged that
24 he was not aware, and there is nothing in the rule or in
25 IPANM's proposal that says how we are supposed to rebate

1 penalties from the general fund once they are paid in there.

2 So this rule is about achieving compliance. The
3 rules are and reasonable. They provide due process, notice,
4 an opportunity for a hearing, appeal to the OCC and district
5 court. The rules comply with the statute. They are good
6 for business. They provide a level playing field. They
7 ensure that no one benefits from violating the law. The
8 rule gets the job done the way the legislature intended, and
9 we would ask that you adopt the rule today. Thank you.

10 CHAIRWOMAN SANDOVAL: Thank you. IPANM?

11 MR. CLOUTIER: Thank you, Madam Chair. So I
12 would like to start off with one of Mr. Ames' comments and
13 expressing my gratitude for it. He indicated that the aim
14 of the rule is compliance.

15 One of the few areas where the Division when they
16 proposed the rule when they were tracing legislative
17 language, they failed to trace legislative language was in
18 Subpart 10(A) the general section. And it says the Division
19 may seek a sanction by. The legislators said, may seek
20 compliance by. These should be compliance tools, not
21 sanction tools.

22 And we here as an association. It's no secret
23 that we oppose the legislation -- the legislature, but we
24 are not here seeking to relegislate or relitigate the
25 legislation. The Commission has an obligation to promulgate

1 a rule. We are here to make a better rule than what we
2 think the Division proposed. We are not here to relitigate
3 or reinstate standards that aren't there.

4 It's interesting in the evidentiary comments
5 because Mr. Ames makes statements that I consider
6 evidentiary in his closing which there is no factual
7 support, such as, there is increased business in the
8 northwest quarter of the state. While, in my experience,
9 nothing could be further from the truth, there is no
10 evidence one way or the other about that. There is not a
11 factual statement.

12 They did have a witness here making legal policy
13 arguments. The rules of evidence do not apply here. I
14 don't object to it. They are free to do so and put that
15 evidence on. But a lawyer talking about the meaning of
16 words in a regulation is not evidence, Commissioners, it's
17 discussion of what the obligations are, what they should be,
18 what the policy should be.

19 And I think that the fact that there is a sworn
20 person making a policy statement in the record does not
21 create evidence before this Commission, it creates an
22 argument for this Commission to consider when it's
23 discharging its duties under the statutes to create
24 regulations pursuant to the statute.

25 IPANM agrees with the Division that it has

1 numerous tools at its disposal. As one of our members, at
2 least one of our members commented in the written comments
3 you received, one of the most powerful to any operator in
4 the field is revoking permits. You revoke a permit to
5 transport, you can't sell. It's a huge lever with which to
6 achieve compliance.

7 The legislature has decided to add civil
8 penalties, a much lower standard, clearly, and eliminating
9 the criminal standard of knowing and willful, and the
10 Division will have that tool. But the legislature also
11 punted, perhaps, to this Commission, delegated to this
12 Commission, the power to enact rules, and in fact, it's not
13 the power, it's an obligation to enact rules on various
14 portions, including the assessment of penalties.

15 And the Division's proposed rule in Subpart
16 10(D), as Mr. Wade testified under cross-examination from me
17 merely tracks Subpart (D) of the statute verbatim he said.
18 There is no additional procedure in this proposed rule on
19 the assessment of penalties other than what the legislature
20 already put forth. And the legislature charged you with
21 adopting procedures for the assessment of penalties.

22 And IPANM, however inartfully I may have
23 discharged that duty, IPANM sought to put some procedures in
24 the rule which we believe the legislature obligates you to
25 put in there, and we think it makes a better rule.

1 If IPANM's particular suggestions don't work,
2 this Commission's response should be either remake them
3 themselves or tell the parties to go back to the drawing
4 board and get these things appropriate so there is actual
5 procedures enacted by the Commission that the Division has
6 to follow and the industry knows about.

7 Civil penalties are not necessary for a whole
8 bunch of operators, we think. We think the example here of
9 financial assurance is an interesting one for inactive
10 wells. Without knowing any of the facts or any of the
11 particulars, it's not going to to be surprising to me that
12 certain operators have ghosted New Mexico. They have gone
13 back to wherever they came from and don't have financial
14 assurance.

15 And in that instance when you don't get the
16 response in the 30 days and no informal resolution, we fully
17 agree that civil penalty is an appropriate form of sanction
18 to consider imposing. Something has to get their attention.
19 If they are not transporting oil and gas in the state of New
20 Mexico, there is no permit to revoke, no problem. The
21 legislature has given the Division the power, and we think
22 that that ought to happen.

23 I would like to walk through IPANM's changes, and
24 I'll use, for everyone's reference, I will use Mr. Ames'
25 slides as a reference, and I think the first one is on Page

1 24.

2 IPANM proposes that no civil penalties shall be
3 imposed if there is a stipulated final order and the alleged
4 violator complies with it. We actually think this is in
5 keeping with the terms of the legislation, which is in fact
6 the intent of the legislature because it provides that the
7 notice in -- notice to the operator in Subpart (B) provides
8 shall provide notice of the potential sanctions, not the
9 sanctions, but the potential sanctions.

10 It talks about the informal resolution, and then
11 it talks about imposing the sanctions as part of the hearing
12 process in the informal procedure is not in effect. So we
13 believe this proposed change better captures the intent of
14 the legislature and the express words of the authorizing
15 legislation.

16 Turning to Page 29, first at the bottom of the
17 page, NMOGA and IPANM make a similar proposed change. This,
18 this body has the obligation as pointed out to promulgate
19 rules concerning the procedure for imposition or assessment
20 of civil penalties.

21 Both parties have used different words to suggest
22 that a negligence standard is appropriate for civil
23 penalties. The exercise of ordinary care is taken directly
24 out of a uniform jury instruction for what constitutes
25 negligence, a failure to exercise ordinary care. And so

1 they either knew or failed to exercise ordinary care.

2 We have used examples of signs here today. Mr.
3 Ragsdale sends his pumper out five days a week to check a
4 well. On Saturday a hunter backs over the sign. Monday
5 morning before the pumper shows up, there is a citation for
6 improper signage by an inspector.

7 What should we do? Well, I think in that
8 situation, getting a sign restored is all that's really
9 needed. Is a civil penalty appropriate in that
10 circumstance? No. If is sign is shot up and rusted and
11 bent up and all rusty and off on the back of the location,
12 well, yeah, they should have known about that at some point.
13 It didn't happen yesterday. We don't think it imposes much
14 of a burden on the Division, and we think it is a sensible
15 policy decision for civil penalties.

16 A lot of questions and unanswered questions
17 apparently about the tables. One of IPANM's persistent
18 issues when it was dealing with the Division both during the
19 legislative process, especially when it appeared that the
20 legislation was going to go through, and during the period
21 where the Division was regulating was that IPANM felt that
22 tables and factors should be incorporated into the rule both
23 as a result of the direction to this Commission to adopt
24 procedures for the assessment of penalties and also as a
25 result of good policy.

1 We think that tables and penalties and factors in
2 litigation and factors of enhancement let everybody know,
3 creates transparency. It reduces the risk of uneven
4 application of the same laws. It allows operators the
5 confidence that they are being treated the same as their
6 peers.

7 And we talked about a Mr. Ames talked about a,
8 you know, an invitation for litigation, with operators not
9 knowing what other people are being fined or penalized for
10 the same conduct and having penalties, this is going to
11 invite district court litigation as to whether the
12 Division's penalties that were imposed were done in an
13 arbitrary and capricious manner, and we are going to have a
14 whole series of lawsuits over whether or not these, the
15 particular penalties for a particular operator were done
16 consistent with policies and guidelines which we're six
17 months away from seeing.

18 If guidelines is the way the Commission is going
19 to direct the Division to go on this, we appreciate the
20 Division's invitation to participate and welcome the
21 participation, but we think it's better in the rule.

22 The BLM has it in their rules. They have every
23 single penalty that they are allowed to assess and every
24 single violation in their operational rules, 31.63.2, and
25 all those. It lists in the regulations what the violation

1 is and they say the amount for what it is.

2 And they, for most of them, they say there is a
3 20-day grace period for compliance once you are notified of
4 it, and for a couple of them that are very severe they say
5 there is no grace period for them. We think this Commission
6 should adopt the same types of rules.

7 If these tables are not the ones that are exactly
8 in conformity with what the Commission thinks ought to
9 happen or the Division, then send those back to the Division
10 and send those back to the parties and let's get a rule that
11 has those in it.

12 We also proposed exemptions where civil penalties
13 were imposed. As I indicated in my comment, a violation
14 doesn't occur because of a rule or statute, a violation
15 occurs because of facts that are contrary to those rules and
16 regulations.

17 And I think it's -- I think the Division is
18 taking -- putting a fine-toothed comb on the issue of
19 violations being somehow a legal matter, and you can't
20 violate the same legal issue. If there is a fine for Action
21 X by the BLM and Action X is the same basis as the civil
22 penalty for the OCD, operators should not be fined twice.

23 Mr. Wade testified he is not aware of any ability
24 to get more compliance with penalties by more than one
25 regulatory agency. Mr. Ragsdale testified that it would not

1 occur any faster if there was one or two people seeking to
2 impose civil penalties on you. We think these are sensible
3 proposals.

4 We accept that perhaps our proposal to reimburse
5 once the money gets into the general fund may not be viable,
6 and if the Commission wants to delete that portion of the
7 proposal on Pages 32 and 33, they are welcome to do so.

8 I spoke very briefly about -- to Commissioner
9 Kessler and those comments stand that the -- or addressed
10 Commission Kessler's question, and those comments stand. We
11 think that if the hearing officer has the power to shorten
12 deadlines, it ought to be enumerated in the list of powers,
13 at a minimum in 2(c) of the subsection -- or Subsection
14 (E)(2)(c) where they enumerate various powers and what the
15 hearing officer can do in a prehearing conference.

16 Even if you don't adopt our additional language,
17 the undisputed evidence here today is that oil and gas
18 leases and other instruments in their secondary term have
19 particular deadlines in which to get actions done.
20 Temporary cessation orders could prohibit that. One of the
21 tools that a hearing officer would then have at their
22 disposal would be, not so much preventing the cessation, but
23 making the Division go to hearing quickly so that the
24 property rights of the operator are not affected.

25 We also talked a little bit about stripper wells,

1 and I agree with Mr. Ames in his question to Mr. Ragsdale.
2 Wells are not people. Wells don't get bills. Wells don't
3 get bills for electricity for pumping costs. Wells don't
4 get bills for pumpers going out there. Wells don't get
5 bills for replacement equipment. Those go to the operator,
6 they all go to the operator.

7 And the question of economics saying that the
8 well doesn't get the bill does not -- does not address the
9 substantive issue that the civil penalties here in New
10 Mexico can burden our smaller operators who have been around
11 for decades and are still here with their lesser production
12 wells and render that well economic. The undisputed
13 evidence is, the facts are that that can cause waste.

14 One of the reasons why we propose these tables
15 and factors in mitigation was to address exactly that,
16 stripper wells ought to be treated differently. A \$500 fine
17 on a 10,000 barrel a month oil well in the Delaware Basin of
18 southeast New Mexico is a lot less money than a \$50 fine on
19 a two-barrel-a-day well in southeastern New Mexico. We
20 think that the Commission needs to recognize that in the
21 procedures that it adopts and requires the Division to
22 comply with so that we don't create waste through stripper
23 wells.

24 We appreciate the Commissioners' attention and
25 the ability to participate in this process. Making sure my

1 client doesn't have anything else that he wanted to me to
2 say. Thank you very much.

3 CHAIRWOMAN SANDOVAL: Thank you. Mr. Feldewert.

4 MR. FELDEWERT: Madam Chair, Commissioners, I
5 appreciate the opportunity. NMOGA had very limited concerns
6 with this rule, and earlier you heard my comments and
7 statements on those very limited concerns, so I have nothing
8 more to add. Thank you.

9 CHAIRWOMAN SANDOVAL: Mr. Marker?

10 MR. MARKER: I said all I need to say. I'm
11 tired. I want to go home.

12 CHAIRWOMAN SANDOVAL: Division, do you have any
13 other?

14 MR. AMES: I appreciate the invitation, but I
15 think I would be abusing fellow counsel by taking it, so
16 nothing further.

17 CHAIRWOMAN SANDOVAL: Thank you. Has everybody
18 present signed the attendance sheet? If not, please do that
19 now.

20 MR. MARKER: The one guy that should have known
21 to sign it. Oh, okay.

22 CHAIRWOMAN SANDOVAL: If there are no questions
23 from the Commission, I admit the exhibit sheet as Exhibit 14
24 and 15 -- I'm sorry. I admit the attendance sheet as
25 Exhibit 14 and the public comment sign-up sheet as Exhibit

1 15.

2 (Exhibits 14 and 15 admitted.)

3 CHAIRWOMAN SANDOVAL: And I would like to thank
4 the Commission and everybody present for their
5 participation. The hearing notice indicated a decision
6 might be made at the conclusion of the hearing. The
7 Commission may immediately deliberate and decide on the
8 proposed regulatory changes at the conclusion of the
9 hearing. The record of the public hearing is now closed.
10 Let the record show that the hearing is adjourned at 4:04
11 p.m.

12 The Commission will immediately deliberate so as
13 to make a decision on the proposal amendments. If the
14 Commission determines that additional testimony or
15 documentary evidence is necessary for a proper decision on
16 the proposed rule amendment, the Commission may, consistent
17 with due process requirements, reopen the hearing for such
18 additional evidence only. If the Commission decides to
19 finalize a proposed rule, a final order will be drafted and
20 considered at the next Commission meeting for final
21 acceptance of the proposed rule.

22 Let's take a break and come back at 4:15 and then
23 the Commission will begin deliberation.

24 MR. MARKER: We can go?

25 MR. LOZANO: You are free to go, Mr. Marker. You

1 don't have to be here anymore if you don't want.

2 MR. MARKER: No.

3 (Recess taken.)

4 CHAIRWOMAN SANDOVAL: Okay. It's 4:17 the
5 Commission will begin deliberating on the proposed rule. Do
6 we want to use Exhibit 4 as a base?

7 COMMISSIONER ENGLER: Exhibit 4?

8 COMMISSIONER KESSLER: I took a note that Mr.
9 Wade had an additional proposal that wasn't in Exhibit 4 to
10 add --

11 CHAIRWOMAN SANDOVAL: Yes.

12 MR. LOZANO: 31.1 --

13 COMMISSIONER KESSLER: I can't read my writing,
14 so I would suggest that we either consider proposals or --

15 CHAIRWOMAN SANDOVAL: We move --

16 REPORTER: This is all on the record; right?

17 CHAIRWOMAN SANDOVAL: Yes.

18 REPORTER: Can you guys speak up a little bit?

19 CHAIRWOMAN SANDOVAL: Yes, sorry. I think to
20 making 19.15.5.3 left out a reference to 70-2-31.1.

21 COMMISSIONER KESSLER: Are you keeping --

22 MR. LOZANO: Yeah, I'm --

23 CHAIRWOMAN SANDOVAL: I'm not seeing anything,
24 basically until -- any changes.

25 COMMISSIONER KESSLER: 19.15.5 -- oh, no, in the

1 statute it looks like there it's red lined. That's --

2 CHAIRWOMAN SANDOVAL: I'm fine with that.

3 COMMISSIONER ENGLER: Protection of correlative
4 rights.

5 CHAIRWOMAN SANDOVAL: Yeah, the language. I
6 guess I will look at.

7 COMMISSIONER KESSLER: The agreement.

8 CHAIRWOMAN SANDOVAL: See if I can -- too many
9 documents.

10 MR. LOZANO: Where is that, Commissioner Kessler?
11 I apologize.

12 COMMISSIONER KESSLER: 19.15.5.8 in Exhibit 4.

13 MR. LOZANO: Right. I have 5, okay.

14 CHAIRWOMAN SANDOVAL: It's okay with the addition
15 of the language, prevention of waste and protection of
16 correlative rights.

17 COMMISSIONER KESSLER: There a strike out of
18 including the section --

19 CHAIRWOMAN SANDOVAL: Going down to 19.15.5.9,
20 really only -- so there was a change from 70 to 30 days,
21 which I'm fine with.

22 COMMISSIONER KESSLER: I'm fine with.

23 CHAIRWOMAN SANDOVAL: Especially because it has a
24 better tie. In 2 at the end?

25 COMMISSIONER KESSLER: Three.

1 CHAIRWOMAN SANDOVAL: Sorry. 70 days doesn't
2 have any origin, 30 does. Next in 4, the addition of word
3 final. I'm fine with that.

4 COMMISSIONER KESSLER: I'm fine.

5 CHAIRWOMAN SANDOVAL: So then we have a strike
6 out of the next section, and the renumbering of (B) for
7 inactive wells which was moved from an existing section,
8 that language, and the main changes here were to create
9 consistency with the definition of inactive wells to 15
10 months, from one year plus nine days.

11 COMMISSIONER KESSLER: I'm fine with it.

12 CHAIRWOMAN SANDOVAL: Okay. Fine, the addition
13 of (C), financial assurance reference, which I believe this
14 was actually moved. This is the section that was moved from
15 a different portion.

16 COMMISSIONER KESSLER: I'm fine with that. I'm
17 trying to find where IPANM's proposed modification
18 highlights the changes from --

19 CHAIRWOMAN SANDOVAL: It's red. Do you have that
20 one? This is IPANM.

21 MR. CLOUTIER: I have it in red if you want an
22 additional copy.

23 COMMISSIONER KESSLER: Would you mind?

24 MR. CLOUTIER: Not at all, and just needs to --

25 COMMISSIONER KESSLER: Thank you.

1 CHAIRWOMAN SANDOVAL: Go to Page 3 now. So we
2 are good with all of the changes that were made so far in
3 Exhibit 4, and that brings us to 19.15.5.10 in this section
4 which is deleted up until a new (A) on Page 4.

5 COMMISSIONER KESSLER: This is the one that
6 brought up as a change, although it was suggested by counsel
7 in the general section the Division may seek a sanction
8 by -- there was discussion brought up on the subject of
9 compliance by -- I just want to raise that. I don't have a
10 real strong sense of that, and it hasn't been proposed.

11 CHAIRWOMAN SANDOVAL: If we change that, we have
12 to change it all throughout.

13 COMMISSIONER KESSLER: Okay, never mind.

14 CHAIRWOMAN SANDOVAL: I'm okay with the verbiage
15 sanction. It's throughout the rest of the document and
16 nobody commented on it and they were --

17 COMMISSIONER ENGLER: That's okay.

18 CHAIRWOMAN SANDOVAL: There was a discussion on
19 Section (A)(1) about Division determining, and that
20 language, how it deviates from 70-2-31. I feel like it's
21 just an additional clarification that the Division is the
22 one who is determining whether or not it's abated, which is
23 standard in how we operate.

24 COMMISSIONER KESSLER: I agree. I think that
25 somebody has to make a determination whether or not it's

1 abated. I think -- I understand the point the concept that
2 without enumerated time frames, there may be just reliance
3 on that 30-day period. But in the absence of proposed
4 language, this is what we have.

5 CHAIRWOMAN SANDOVAL: Yeah, no language about the
6 30 day fall back.

7 COMMISSIONER ENGLER: Are you concerned about the
8 fact that the Division determines or --

9 CHAIRWOMAN SANDOVAL: Yeah, that was raised --
10 that was raised as a discussion point, and I'm saying I
11 think it's valid and --

12 COMMISSIONER ENGLER: This is valid.

13 CHAIRWOMAN SANDOVAL: I think it's a good
14 addition, because it just adds an extra point of clarity
15 that the Division is the one who is determining whether
16 something is abated or not.

17 COMMISSIONER KESSLER: It has to be the Division
18 because there is --

19 CHAIRWOMAN SANDOVAL: Yeah, the operator can't
20 determine that, and that just adds an additional level of
21 clarification that I think is necessary.

22 COMMISSIONER KESSLER: I am sensitive to the
23 point that you don't necessarily just want to -- if there
24 has been something -- you know, I don't think that this
25 would fall under the -- but if there is a relatively more

1 minor issue violation that was abated, that you wouldn't
2 want to just rely on the 30 days in the absence of other
3 time frames. But this is specific to temporary cessation
4 orders, which was stated earlier would more likely be the
5 exception than the rule.

6 CHAIRWOMAN SANDOVAL: Not the norm.

7 The next point of discussion, correct me if I'm
8 wrong, so then (C), (D), both NMOGA and IPANM propose
9 slightly different versions of the language that basically
10 says if the violation is fixed, then there is no penalty.
11 And it's also kind of -- it's also brought up again in
12 IPANM's, in (C)(3), in general I think that this is -- I
13 think that this is taken into consideration on the next page
14 in Section (D) under the civil penalties, and that was laid
15 out in the statute, the Division is supposed to take into
16 account good-faith efforts to comply with the applicable
17 requirements. Which, if have you been notified of the
18 violation and take steps to fix it, that would be taken into
19 account in the -- the assessment of the penalty.

20 And it's, as the Division counsel said, there
21 isn't a requirement to assess a monetary fine. So if in
22 considering the good-faith efforts to comply with the
23 applicable requirements the Division decides that everything
24 has been remediated and everything is okay, there could be
25 the decision to not assess a civil penalty.

1 COMMISSIONER ENGLER: Do you want that -- is that
2 in the procedures, or do you want that written in there to
3 say that?

4 CHAIRWOMAN SANDOVAL: Which part?

5 COMMISSIONER ENGLER: The last part you said,
6 which was last thing you said is, there may not be
7 penalties.

8 CHAIRWOMAN SANDOVAL: It says the Division may
9 seek a sanction.

10 COMMISSIONER ENGLER: That's under the --

11 CHAIRWOMAN SANDOVAL: Yeah. So I don't know if
12 it needs to be expressly stated. It's already expressly
13 stated that we're supposed to take good-faith efforts to
14 comply into consideration. I feel like that's just
15 duplicative.

16 COMMISSIONER ENGLER: What you are saying is you
17 think its covered under (D)?

18 CHAIRWOMAN SANDOVAL: Yes.

19 COMMISSIONER ENGLER: Such that we don't need
20 another notice of violation because (D) is penalty and (C)
21 is notice.

22 CHAIRWOMAN SANDOVAL: Right. I mean, I think it
23 leaves a little bit more open-ended with, we are supposed to
24 take their good-faith efforts into consideration. Putting
25 it into (C) how it is written basically makes it more of a

1 hard -- if it's fixed within some time frame, then there is
2 no problem. No harm, no foul.

3 COMMISSIONER KESSLER: Which I don't think is
4 necessarily as a rule, but we do want to incentivize
5 operators to comply. So perhaps there could be a statement
6 that, in the notice of violation, that that's a factor that
7 we consider, that would be considered, so that operators are
8 aware that IF they work to resolve the violation, that the
9 penalty would essentially be less or none.

10 COMMISSIONER ENGLER: It would reinforce that. I
11 guess that's kind of where I'm thinking. It would -- it is
12 duplication. It would reinforce that this is what we are
13 trying to achieve.

14 CHAIRWOMAN SANDOVAL: Where do you think that
15 would -- I wonder if we could put it into -- I mean, could
16 we just add it on to the sanctions available for the alleged
17 available for the alleged violation and the sanctions
18 proposed by the Division, the Division will take good-faith
19 efforts to comply with the applicable requirements into
20 consideration.

21 COMMISSIONER ENGLER: It's duplication, but I
22 think that might -- it just kind of reinforces that.

23 CHAIRWOMAN SANDOVAL: But it would be okay
24 striking the language in (D) and (3) that NMOGA and IPANM
25 propose, and to, instead of that, insert the kind of the

1 reinforcement of the good-faith effort to comply with the
2 applicable requirements will be taken into consideration.

3 COMMISSIONER ENGLER: Yes.

4 CHAIRWOMAN SANDOVAL: Yes. Did you get that?

5 MR. LOZANO: I don't know where you want to put
6 it.

7 CHAIRWOMAN SANDOVAL: We are thinking (D). So
8 that's kind of where they would -- the sanctions available
9 for the alleged violation and the sanctions proposed by the
10 Division, and then just say the Division will take into
11 consideration good-faith efforts to comply with the
12 applicable requirements.

13 COMMISSIONER ENGLER: Can I ask a question --

14 CHAIRWOMAN SANDOVAL: Yes.

15 COMMISSIONER ENGLER: -- relative to this notice
16 of violation?

17 CHAIRWOMAN SANDOVAL: Any time.

18 COMMISSIONER: It's getting late.

19 COMMISSIONER ENGLER: I only got about another 12
20 hours before I leave. Under notice of violation there was a
21 long, lengthy discussion with regards to, you know, who
22 is -- who is issuing the violation, what's the process,
23 procedures.

24 And then there was a response and it was that,
25 you know, you want to stay away from the administrative

1 side, and this would be more administrative than it would be
2 in terms of rulemaking. So I throw that out there, not that
3 I -- what are your -- what do you think about that in terms
4 of, should we put that definition in here or --

5 CHAIRWOMAN SANDOVAL: The process?

6 COMMISSIONER ENGLER: The process, like an NOV,
7 there would be language about contact persons and I guess
8 other things that I don't know about.

9 CHAIRWOMAN SANDOVAL: So I -- I think we should
10 put something at the end of (E) so the availability of a
11 process for informal review and resolution of the alleged
12 violation and how to enter -- you know, what the mechanism
13 is to enter into this process or something like that,
14 memorialize that in the notice of violation?

15 COMMISSIONER KESSLER: So potentially say
16 something like -- including a description of the processes
17 for informal review and resolution and relevant contact
18 information.

19 CHAIRWOMAN SANDOVAL: I don't know if -- I'm
20 hesitant to put in strict policy every step of the informal
21 resolution, because I think it's going to vary.

22 COMMISSIONER KESSLER: I mean just say, like in a
23 notice of violation letter, you don't think there should be
24 a description of the informal resolution process?

25 CHAIRWOMAN SANDOVAL: I think it should, but have

1 some sort of flexibility because I think every informal
2 process is going to be slightly different, and if we put in
3 super hard steps, I don't want that to inhibit the process.

4 COMMISSIONER ENGLER: You will lose your
5 flexibility.

6 CHAIRWOMAN SANDOVAL: Right. So I want to put in
7 some way to like --

8 COMMISSIONER KESSLER: An initiation of the
9 process or how to get the process going.

10 CHAIRWOMAN SANDOVAL: How to enter the process
11 and who to contact.

12 MR. LOZANO: Procedure for initiating the
13 informal process.

14 CHAIRWOMAN SANDOVAL: Initiation can be okay,
15 because I think that's going to be consistent throughout
16 most of them. It's kind of, once you get into the informal
17 process that it could have variability.

18 COMMISSIONER KESSLER: Yeah, I think that's my
19 understanding of the process now, is all the compliance
20 bureaus start talking about it, so I think that's fine, I
21 don't see any problem with that, but I want it to be
22 transparent how to get into the process.

23 CHAIRWOMAN SANDOVAL: I agree.

24 COMMISSIONER KESSLER: I do think there is value
25 in that.

1 CHAIRWOMAN SANDOVAL: I agree, because we want to
2 settle things informally as much as possible as opposed to
3 require a hearing. I think it's always going to be a better
4 outcome, so --

5 COMMISSIONER KESSLER: Miguel, what did you
6 suggest?

7 MR. LOZANO: I said, it would be the availability
8 of the process for informal review and resolution of the
9 alleged violation and procedures to initiate such informal
10 review or the informal review.

11 COMMISSIONER KESSLER: I think that's great, and
12 we are including contact information. I think that's
13 important, too. That allows OCD to decide if it's going to
14 be out of Santa Fe or field staff or who is the contact
15 person, but it should be -- it should be there.

16 CHAIRWOMAN SANDOVAL: I think we have been
17 developing group e-mails because what I don't want to do is
18 have one person written into that process and then with
19 turnover that person leaves and --

20 MR. LOZANO: We want it to include contact
21 information?

22 CHAIRWOMAN SANDOVAL: Yes, but I don't want to
23 put in here.

24 MR. LOZANO: So don't put that in --

25 CHAIRWOMAN SANDOVAL: You can say to include

1 contact information, but just not specify. Yeah.

2 CHAIRWOMAN SANDOVAL: Does that answer your
3 question, Dr. Engler?

4 COMMISSIONER ENGLER: Yes. I went through that,
5 and there was discussion all over on that and which
6 direction would be better. You guys know more about the
7 process of what should be there. I have not never done an
8 e-mail in my life.

9 COMMISSIONER KESSLER: The other one I did want
10 to talk about is --

11 MR. LOZANO: I apologize, Commissioner. Just so,
12 since we are looking at a draft, I want to make sure that
13 any changes that were submitted as amendments, that you let
14 me know if you want to do them. The only one we have
15 skipped so far is adding factual --

16 CHAIRWOMAN SANDOVAL: I'm fine with that.

17 COMMISSIONER KESSLER: I'm fine with that.

18 CHAIRWOMAN SANDOVAL: I'm fine with that addition
19 throughout. It appears a couple of other times, so to be
20 consistent, I'm okay with that.

21 MR. LOZANO: Okay, good. Just making sure.

22 COMMISSIONER KESSLER: I also want to return to
23 an idea that I think it's legitimate is who issues the
24 violation, and it depends on the type of violation, if it's
25 a reporting violation for, you know, C-115 that will

1 probably come out of -- at least will originate, and there
2 will be contact information for one person, and I don't
3 think that that's a good idea that it should be written into
4 the rule who is going to be issuing the notice of violation.
5 I think the Division is the correct party for that or
6 correct entity, and then your policy can get more specific.
7 I do think it should be, you know, the Division comes up in
8 the policy, I think it should be in there.

9 CHAIRWOMAN SANDOVAL: I agree.

10 Number 2, the addition of e-mails, are you good
11 with that?

12 COMMISSIONER ENGLER: I am.

13 COMMISSIONER KESSLER: And, yeah, and I think a
14 statement that if the notice of violation is not informally
15 resolved within 30 days of service, the Division will hold a
16 hearing.

17 CHAIRWOMAN SANDOVAL: Where are you?

18 COMMISSIONER KESSLER: At (F), and there was a
19 question of whether or not that would inhibit the informal
20 process by saying that. I don't necessarily think so.

21 CHAIRWOMAN SANDOVAL: I don't think so. Isn't it
22 mentioned somewhere else in this document, that you can
23 basically use the informal process?

24 COMMISSIONER KESSLER: Informal process.

25 CHAIRWOMAN SANDOVAL: I feel like it was

1 referenced somewhere else.

2 COMMISSIONER KESSLER: I think the section that
3 was referenced was resolution after commencement of hearing.
4 And OCD counsel referred to that as indicating, I believe,
5 that resolution can happen at any point. We want to make
6 sure that our rule shows that, you know, it doesn't -- in
7 one place it says you can resolve disputes through the
8 informal process at any point and indicate otherwise in a
9 separate section, but I'm not sure that this does that.

10 Miguel, what do you think?

11 CHAIRWOMAN SANDOVAL: It was at the very end, I
12 think the last page. Yeah, right there, under the
13 highlighted section. Resolution.

14 MR. LOZANO: I think that that, accompanied with,
15 I believe there is a provision that says that the hearing
16 officer can continue.

17 CHAIRWOMAN SANDOVAL: Are you looking for it to
18 be more explicit than that?

19 COMMISSIONER KESSLER: Yeah.

20 CHAIRWOMAN SANDOVAL: A statement?

21 COMMISSIONER KESSLER: That if a notice of
22 violation is more than 30 days of service, the Division will
23 hold a hearing, but shall not prevent or will not prevent --
24 I was thinking this may not prevent the Division from
25 engaging in an informal process.

1 CHAIRWOMAN SANDOVAL: Process or resolution up
2 until --

3 COMMISSIONER KESSLER: If this is just a
4 communication going out to the operator, you want it to
5 contain all the information that will impact their decision
6 making, and we do want to say that an informal process, we
7 think, will result or will get you the best results. So we
8 want to communicate to people that they can keep doing that.
9 That's getting a little bit administrative, I
10 guess.

11 MR. LOZANO: Yeah. I think probably more
12 explicitly, leave the authority to a hearing examiner the
13 ability to continue with the informal process is ongoing.
14 I'm not sure where that would go, but what I don't -- what
15 I'm weary of is leaving it open-ended because then when, you
16 know --

17 COMMISSIONER KESSLER: Yeah. So maybe a
18 statement -- yeah, maybe what you were just saying earlier,
19 a statement if the notice of violation is not informally
20 resolved, the Division will hold a hearing that shall not or
21 that does not prevent ongoing informal -- like the setting
22 of the hearing date will not prevent informal --

23 CHAIRWOMAN SANDOVAL: Until basically that final
24 stipulated order -- until a final stipulated order is
25 signed. We are making IT difficult for you?

1 MR. LOZANO: It does not prohibit ongoing
2 negotiations through the informal review process?

3 COMMISSIONER KESSLER: Yeah.

4 CHAIRWOMAN SANDOVAL: Yes.

5 MR. LOZANO: Okay.

6 CHAIRWOMAN SANDOVAL: Okay. I feel like I got my
7 papers all messed up now.

8 COMMISSIONER KESSLER: We are on e-mails.

9 CHAIRWOMAN SANDOVAL: Oh, we were good with the
10 e-mail. Three we agreed to keep as is, and not include the
11 IPANM -- oh, they also reference the tables. No, and
12 then -- sorry, I'm on the wrong page. Now I'm --

13 MR. LOZANO: That's coming up.

14 CHAIRWOMAN SANDOVAL: So 3, I think what we added
15 the reference to the good-faith effort which resolved the
16 comments from IPANM in Number 3, which was the, if you fix
17 it all, it's all good to go.

18 And then we have the civil penalty Section (D),
19 the Division was okay with a civil penalty assessed by the
20 Division, a change in the initial language, which I'm fine
21 with that.

22 I think the larger conversation here is both the
23 terminology aware or should have been aware. IPANM says
24 knew, or in the exercise of ordinary care, should have
25 known, which I think puts a very high burden on the OCD to

1 ever prove, and we move back to square one of where we were
2 before this legislation.

3 COMMISSIONER ENGLER: There was significant
4 discussion about knowing and knowingly and that was removed
5 from the, from the law, the statute. The orders were
6 written in that frame of mind, so --

7 CHAIRWOMAN SANDOVAL: I'm afraid this language
8 puts it back in.

9 COMMISSIONER ENGLER: It goes back in in a
10 fashion that makes it difficult to move forward.

11 CHAIRWOMAN SANDOVAL: We have done three cases in
12 nine years.

13 COMMISSIONER ENGLER: I got that.

14 CHAIRWOMAN SANDOVAL: I understand the concern to
15 want to put sideboards, but unless there is evidence or
16 proof that it's happening, we can't go backwards.

17 COMMISSIONER ENGLER: Everyone agrees you want
18 facts and evidence to support whatever direction you go.
19 But the issue is, there is so many different scenarios for
20 penalties, some are fairly straightforward.

21 So you know, an example, you should be able to
22 correct -- there are examples where things happened, you
23 know, then you won't know for -- you may not know for
24 several days down the road. So I think the question really
25 is, you know -- it's difficult one for me because how you

1 assess when you start those penalties, those are so
2 different in terms of the cases, you know.

3 CHAIRWOMAN SANDOVAL: It's easy on the situation
4 to say like your production reporting, that's documentable,
5 you didn't submit it until October, November, December.

6 COMMISSIONER ENGLER: I don't know if -- how you
7 want to handle that, but I can -- I think, again, because of
8 the way the statute is written, they took out the knowing
9 and willing, I think that's how you say it, I agree. I
10 don't know, I'm just throwing out there, when you come down
11 to how you really assess time, it's going to be -- again,
12 hopefully there is enough flexibility in here to allow
13 certain determination whether that, you know, you have to
14 get a basis in fact.

15 CHAIRWOMAN SANDOVAL: Right, which I think is the
16 basis already.

17 COMMISSIONER ENGLER: Yeah.

18 CHAIRWOMAN SANDOVAL: I don't know -- I don't
19 know what language --

20 COMMISSIONER ENGLER: I don't either.

21 CHAIRWOMAN SANDOVAL: -- solves that.

22 COMMISSIONER ENGLER: Like I said, I don't know
23 how to handle that.

24 CHAIRWOMAN SANDOVAL: The language in there is a
25 no-go, in my opinion.

1 COMMISSIONER KESSLER: I was looking back to the
2 statute to see if there's a --

3 MR. LOZANO: Yeah, I reviewed, and it does not
4 address sort of a statute of limitation of any kind, it just
5 says a violation or continuing violation.

6 CHAIRWOMAN SANDOVAL: I mean, it is something you
7 have to be able to prove which gets harder with time.

8 MR. LOZANO: I will admit, in my discussions with
9 the director, I definitely have similar concerns in terms of
10 how far back does the Division go, but I don't necessarily
11 think that a provision that IPANM and NMOGA is proposing is
12 required in this instance.

13 COMMISSIONER KESSLER: Do you know how other
14 states do it?

15 MR. LOZANO: I do not know.

16 COMMISSIONER KESSLER: Or whether or not there is
17 a --

18 COMMISSIONER ENGLER: When the clock starts?

19 CHAIRWOMAN SANDOVAL: Well, I mean there is a
20 hard kind of stop of yesterday in terms of how far back you
21 can go, so there is that, which in five years is not going
22 to mean as much as it does today.

23 COMMISSIONER KESSLER: Yeah.

24 MR. LOZANO: With that in mind, the Commission
25 can certainly revisit that matter sort of setting a time

1 line at a later date as not part of this specific rule
2 change. I'm weary of adding that today just because it's
3 sort of a bit far afield of what we have in our proposed
4 rule. But five years from now or three years from now maybe
5 there's a clear window that the Division might want say, we
6 don't pursue cases after three years have passed or five
7 years.

8 CHAIRWOMAN SANDOVAL: I'm comfortable with that.

9 COMMISSIONER KESSLER: We don't have any
10 language, I guess, that gets us any closer to knowing and
11 willful, but the circumstances were something that an
12 operator wouldn't reasonably know about, you know, I guess
13 the idea that that's reflected in issuing the amount of
14 penalty, that you take that --

15 CHAIRWOMAN SANDOVAL: I mean, that could also
16 sort of be wrapped up in the other relevant factors, if you
17 don't know about it, if it's something, when you were made
18 aware, that you went out there and saw it, you managed it
19 accordingly and you reported it to the Division, as opposed
20 to just letting it hang.

21 COMMISSIONER KESSLER: Yeah.

22 CHAIRWOMAN SANDOVAL: And continue.

23 COMMISSIONER KESSLER: Can we star that one and
24 come back to it, maybe?

25 CHAIRWOMAN SANDOVAL: Yeah.

1 COMMISSIONER KESSLER: Let me think a little bit
2 more.

3 CHAIRWOMAN SANDOVAL: I'm going through the rest
4 of the page. Let's see. This is where IPANM added their
5 exception to civil penalties and the credit. They added
6 basically an (E) and an (F).

7 COMMISSIONER ENGLER: Before we get to that, also
8 up there in (D), IPANM had proposed the tables.

9 CHAIRWOMAN SANDOVAL: Oh, thank you.

10 COMMISSIONER ENGLER: I think through the
11 discussion today, you know, from what I have heard, it
12 appears like we need more guidelines -- actually, we didn't
13 even have -- again, there is tables where we really couldn't
14 address a lot of questions. That's one.

15 Two, more guidelines as to what's happening in
16 other states, so I think where -- I do think the industry
17 would like to see and would help them to have those
18 guidelines, and there should be stakeholders in building
19 those guidelines, I don't -- at this point after all of
20 this, I don't see the need to build it into the rule. I
21 think that's going to be something that's going to be a
22 guideline that's going to be built within whatever. That's
23 my take on that.

24 CHAIRWOMAN SANDOVAL: Yes, and the Division, I
25 believe, has committed to doing that, having guidelines.

1 COMMISSIONER ENGLER: I think the industry would
2 like to see what that is. That would help them in their --
3 all their work planning. I think it's fair to them. But I
4 kind of agree that really as of today I don't see putting it
5 in the rule. Does that sound good?

6 CHAIRWOMAN SANDOVAL: I agree, there wasn't
7 enough really factual basis to include the tables.

8 COMMISSIONER ENGLER: So now you can go back to
9 your next ones.

10 CHAIRWOMAN SANDOVAL: So we are all on the same
11 page on that.

12 COMMISSIONER KESSLER: Yes. I think there should
13 be tables, but I agree with what's been stated. I think
14 those can be accomplished through policy. That would be
15 like on the -- that would be a negotiated process.

16 CHAIRWOMAN SANDOVAL: I agree. Okay. Now back
17 to the BLM. The BLM exceptions and credits to civil
18 penalties. Again, I feel like this is going to put a pretty
19 large burden on the Division to check with BLM and see
20 what's going on. And I mean, they are going to have to
21 check with us. I think it's such an arduous process, plus,
22 as was pointed out, they are issuing violations for their
23 rules which are completely separate from ours. We are
24 issuing violations for our rules. Same, I think, from the
25 the Environment Department, they are looking at maybe air

1 quality or something completely different.

2 So I think it's totally plausible that a site
3 could get a violation from possibly all three, but on three
4 different items, and that doesn't preclude us from issuing a
5 violation on something that is truly a violation of our
6 rules. BLM could issue something that is a violation of
7 their rules, and the air -- you know, Air Quality Bureau
8 can issue an air quality violation.

9 There is a world that you have to comply with all
10 of those, and that is a burden placed on the operator as
11 part of operating your business is knowing and understanding
12 the rules and you have to comply with them in this
13 jurisdiction.

14 That's a long way of saying I don't think that
15 the sections should be added.

16 COMMISSIONER ENGLER: When I first -- when I
17 first read all of this multiple times, this was interesting,
18 you know, I have to say after -- from what I gathered from
19 today, like you just pointed out, you can have an event, and
20 the event, like you said, may be under -- one part of the
21 event would be a violation of OCD. That would be one
22 penalty, but that same event, it could be air quality and
23 another penalty from someone else. So really a single event
24 could actually have multiple penalties just because of the
25 fact of where the jurisdiction lies; right?

1 I think that what you want -- I understand it. I
2 think that's good. When I first read it, what I was worried
3 was if it was the same instance, the same thing, both
4 entities are penalizing the same thing, that would be
5 duplication, I don't think that would be fair.

6 But from what I'm gathering from all of you, that
7 that's not the case.

8 CHAIRWOMAN SANDOVAL: And in the very small world
9 that that maybe could happen, again we have in here we are
10 supposed to take into account other relevant factors, and in
11 my mind that would be another relevant factor for us to
12 consider, okay, they are already paying something to BLM, we
13 take that into consideration in the calculation.

14 COMMISSIONER ENGLER: The case was made about who
15 was first and who is second. So if we do something and BLM
16 comes back and they are second, that's not --

17 CHAIRWOMAN SANDOVAL: Right.

18 COMMISSIONER ENGLER: To me there is a lot of
19 moving parts that are -- after today I'm kind of leery about
20 that. That's a long way of saying yes.

21 CHAIRWOMAN SANDOVAL: Okay, so remove (E) and
22 (F), those proposals. I don't think they are in your
23 document, we are just stating it for the record.

24 MR. LOZANO: Got it.

25 CHAIRWOMAN SANDOVAL: Okay, (E), it does not look

1 like, just in comparison to NMOGA and IPANM comments, that
2 basically until you get to the prehearing procedure that
3 everybody was -- there was no added to what was proposed in
4 Exhibit 4.

5 So are you -- is everybody good with the
6 proposals from Exhibit 4 all the way up until we can start
7 at 2, prehearing procedures? Okay. There was the addition
8 of, for hearing identify the factual basis of the alleged
9 violation and imposed sanctions, which was basically a
10 continuation of the verbiage from the beginning in (C),
11 which we agreed upon.

12 COMMISSIONER KESSLER: Wait. What?

13 CHAIRWOMAN SANDOVAL: Sorry. We added --

14 COMMISSIONER KESSLER: Yeah, yeah.

15 CHAIRWOMAN SANDOVAL: -- factual basis, I think
16 this is really just a continuation of ensuring there is
17 consistency. And the last one, or the next one, I'm sorry.
18 Just proposed and then --

19 COMMISSIONER KESSLER: These are generally agreed
20 on for the shortening the deadlines proposal.

21 CHAIRWOMAN SANDOVAL: Where is that one? That
22 was in IPANM.

23 COMMISSIONER ENGLER: That's in the prehearing
24 statement.

25 CHAIRWOMAN SANDOVAL: Yeah, I think this was all

1 basically agreed upon, which I was fine with.

2 COMMISSIONER KESSLER: Yes.

3 MR. LOZANO: The prehearing statement changed the
4 seven days. Is that agreeable to the Commission?

5 CHAIRWOMAN SANDOVAL: Yes.

6 COMMISSIONER KESSLER: Yes. Okay. I understand
7 that, at least from the land office perspective, there is a
8 concern about lease termination for failing to comply with
9 production and quantities if an operator isn't producing for
10 a -- I think it was like they come up for 30 days, but if
11 there are multiple operation cessations that were stacked,
12 even if there were two, I think that, for the land office,
13 you could approach the land office and ask for an extension,
14 but I don't know about them privately.

15 So I do think that there's -- so it's a long way
16 of saying I'm sensitive to the fact that timing is important
17 to these briefing schedules given the leases could expire.
18 So to the extent that the hearing officer has the ability
19 certainly to grant extensions, which I think is said in a
20 different place, I think they should also, upon request from
21 one of the parties, be able to expedite the briefing
22 schedule.

23 COMMISSIONER ENGLER: Shorten the deadlines.

24 CHAIRWOMAN SANDOVAL: I don't see any issues
25 conflicting with the statute to establish --

1 COMMISSIONER KESSLER: Like, I don't think -- it
2 would be under 30 days. I don't think it's 30 days, is the
3 question. I mean, agree to a briefing schedule that would
4 be -- I think Gabe started to add them up, and he had over
5 30 days.

6 CHAIRWOMAN SANDOVAL: Yeah, I think it was 30.

7 COMMISSIONER ENGLER: 30 or more.

8 COMMISSIONER KESSLER: So maybe we could say that
9 they could agree to a briefing schedule that was within 30
10 days, or something like that, that would be at 30 days.

11 CHAIRWOMAN SANDOVAL: Does the land office
12 requirement usually at 30?

13 COMMISSIONER KESSLER: So I'm less concerned -- I
14 think that there is potentially an issue with production if
15 it exceeds 30 days, but it's really a situation where there
16 is like two of those put together, two of the temporary
17 cessation orders stacked for a state exploratory lease form,
18 but I don't know -- I'm not familiar enough with private
19 leases and to know whether or not other people could get
20 extensions, or if it's a, you know, if your lease
21 automatically terminates at 30 days, I don't know if
22 that -- I don't want to cause an unintended consequence of
23 terminating a lease while we are waiting on the adjudicatory
24 process. I just don't want it to be unintended, and that's
25 a pretty serious consequence.

1 MR. LOZANO: Would the suggestion be to simply
2 allow the hearing examiner to expedite a hearing upon
3 request or --

4 COMMISSIONER KESSLER: Yeah, to have -- and it's
5 not even a hearing. So the hearing should be after 30 days,
6 but it's adding up the answer -- the docketing, the
7 answering, the motions practice, keeping that practice
8 within 30 days, is what I think is important.

9 MR. LOZANO: Okay.

10 CHAIRWOMAN SANDOVAL: Upon request and good
11 cause?

12 COMMISSIONER KESSLER: Yeah, something like that.

13 CHAIRWOMAN SANDOVAL: I would add some sort of
14 good cause because I don't think we want this every time.
15 It has to be for a legitimate reason, and if a private
16 landowner is going to cancel your lease, I think that would
17 be good cause.

18 MR. LOZANO: Okay.

19 COMMISSIONER ENGLER: Yes. I'm trying to think
20 why -- without the good cause, you know, if I were in this
21 situation, I would be asking for short deadlines every time.

22 CHAIRWOMAN SANDOVAL: Yeah, like let's move it
23 up, let's go.

24 COMMISSIONER ENGLER: But I guess good cause --

25 CHAIRWOMAN SANDOVAL: As determined by the

1 Division?

2 COMMISSIONER ENGLER: Yeah, again for at least
3 expiration.

4 CHAIRWOMAN SANDOVAL: Yeah, as determined by -- I
5 don't know if we want to write it in.

6 COMMISSIONER ENGLER: I was just thinking to
7 myself how I would handle that.

8 COMMISSIONER KESSLER: You are right, we don't
9 want to this be every time.

10 COMMISSIONER ENGLER: Because I would ask for
11 every shortening that I could.

12 CHAIRWOMAN SANDOVAL: Right. Is this -- okay,
13 wait, sorry. Is this only -- can we explicitly say this is
14 only for the temporary cessation orders?

15 COMMISSIONER KESSLER: That's the only thing I
16 have concern about.

17 CHAIRWOMAN SANDOVAL: Because I don't want this
18 to be for -- I think if we have it all the time for every
19 hearing, but I can see where it's --

20 COMMISSIONER KESSLER: For the temporary
21 cessation orders.

22 MR. LOZANO: You want to --

23 CHAIRWOMAN SANDOVAL: For temporary cessation
24 orders, you want to narrow it.

25 MR. LOZANO: The shortened deadline provision,

1 narrow it to just temporary cessation orders?

2 CHAIRWOMAN SANDOVAL: And they have to show good
3 cause as determined by --

4 MR. LOZANO: It already states that.

5 COMMISSIONER KESSLER: Showing good cause.

6 CHAIRWOMAN SANDOVAL: I think I want it to be
7 specific, for good cause. I think those are going to be
8 more the exception than the norm.

9 MR. LOZANO: Okay. I don't have -- I made a
10 note for myself to add that in because I don't have that in
11 Word format.

12 CHAIRWOMAN SANDOVAL: No problem. Okay. So that
13 gets us to (3). So -- wait, I guess I'm jumping ahead. In
14 (4) we had the may versus shall issue in (B).

15 COMMISSIONER ENGLER: What's the concern?

16 CHAIRWOMAN SANDOVAL: I think the concern is it's
17 just going to add a lot of extra work and time particularly
18 for routine cases if it's something like a production or
19 financial assurance, something that we are going to see over
20 and over, is that really necessary?

21 MR. LOZANO: What's the alternative, Madam Chair?
22 I mean, presumably the Division director is going to have to
23 make some determination on their own. How would that sort
24 of work out after hearing?

25 CHAIRWOMAN SANDOVAL: Good question.

1 MR. LOZANO: I assume that your hearing examiner
2 is going to provide you something that says, "This is the
3 facts, and this is what we believe the decision should be."

4 CHAIRWOMAN SANDOVAL: Right.

5 MR. LOZANO: I'm not certain it needs to be
6 required, but I think it's going to happen more frequently
7 because you don't sit for those hearings.

8 CHAIRWOMAN SANDOVAL: I don't.

9 MR. LOZANO: So you are going to have to
10 review -- presumably you will have recommendation in front
11 of you.

12 COMMISSIONER KESSLER: I think this a lot of
13 the -- the recommended decisions at this point are -- I
14 don't want to say they are routine, but there is like a
15 template.

16 CHAIRWOMAN SANDOVAL: There is.

17 COMMISSIONER ENGLER: Well, yeah. I think you,
18 as director, probably want them to have to do this for your
19 information.

20 CHAIRWOMAN SANDOVAL: I think most cases it's
21 just do we want it set in stone. I'm comfortable with it
22 not being set in stone and being a requirement that's -- by
23 discretion for things that are pretty --

24 COMMISSIONER ENGLER: So for certain cases you
25 would be informing the examiner that, "Yes, I want you to

1 prepare a recommended decision"?

2 That's how you want to go -- this is your
3 operating world, not mine.

4 COMMISSIONER KESSLER: I feel like for future
5 directors.

6 COMMISSIONER ENGLER: Oh, is there more?

7 COMMISSIONER ENGLER: I mean, if you put shall,
8 it says the director shall request, so if you don't request,
9 it ain't happening; right?

10 CHAIRWOMAN SANDOVAL: This is true. If I don't
11 explicitly request it, it does not have to happen.

12 COMMISSIONER ENGLER: It says may, may or shall.
13 I mean, in either case, if you ain't requesting, it ain't
14 going to happen. Either way you want to go, it will be your
15 discretion.

16 CHAIRWOMAN SANDOVAL: I was reading it slightly
17 different. I was reading it is I have to request.

18 COMMISSIONER ENGLER: May and shall, that's two
19 different things.

20 CHAIRWOMAN SANDOVAL: Yeah, I guess -- does
21 request leave it open-ended enough? Because I was reading
22 it as I basically am going to have to make the request, and
23 you are seeing it -- you are seeing it as the director shall
24 request, as like, if I don't request it, then it doesn't
25 have to happen.

1 MR. LOZANO: You can reframe it in terms of
2 hearing examiner -- it could be, hearing examiner may
3 provide the director with a recommended decision or shall at
4 the request of the division director.

5 COMMISSIONER KESSLER: I don't know how you sign
6 off on something where you don't have like a -- I mean, it
7 doesn't have to be a report.

8 CHAIRWOMAN SANDOVAL: Yeah, like a very formal
9 process, but if there is no like --

10 COMMISSIONER KESSLER: I don't know where that
11 would have to -- I think you can create that process. It
12 could be a paragraph, you know, it could be request that the
13 hearing examiner prepare a recommended decision, that
14 decision could be yes. I don't think it has to be as
15 extensive as maybe --

16 CHAIRWOMAN SANDOVAL: As maybe I'm thinking?

17 COMMISSIONER KESSLER: Yeah. But absent that, I
18 don't think you have a whole lot of cover from --

19 CHAIRWOMAN SANDOVAL: Making the decision.

20 COMMISSIONER KESSLER: Yeah. But then it's your
21 signature, so --

22 CHAIRWOMAN SANDOVAL: For now, as Dr. Engler
23 pointed out. How did you phrase it, Miguel?

24 MR. LOZANO: If you want them to provide one, you
25 can simply say, the hearing officer shall provide or prepare

1 a recommended decision.

2 CHAIRWOMAN SANDOVAL: Upon the director's
3 request?

4 MR. LOZANO: If you want it to be the default, we
5 can leave it as, they may provide a recommended decision
6 unless specifically requested by the director. That's an
7 alternative. But if you all always want some kind of
8 recommended decision, I would phrase it in terms of the
9 hearing officer shall provide a recommended decision or
10 prepare a recommended decision.

11 CHAIRWOMAN SANDOVAL: Okay. I'm fine with your
12 verbiage.

13 MR. LOZANO: As a may or shall?

14 CHAIRWOMAN SANDOVAL: I was leaning on the shall
15 side.

16 MR. LOZANO: Okay. The hearing examiner shall
17 prepare a recommended decision for review by the director.

18 CHAIRWOMAN SANDOVAL: Yes. Where are we now?
19 Prehearing --

20 COMMISSIONER KESSLER: I think we had
21 incorporated IPANM's language.

22 CHAIRWOMAN SANDOVAL: I believe so. And then
23 that resolved their comments.

24 COMMISSIONER KESSLER: Same thing with --

25 CHAIRWOMAN SANDOVAL: Yeah. And then the next

1 section, wasn't that resolved, if I'm remembering correctly,
2 (H) was resolved.

3 COMMISSIONER KESSLER: Yes.

4 MR. LOZANO: Yes. This essentially allows them
5 to withhold their payment of fine and until all the appeal
6 rights have passed.

7 CHAIRWOMAN SANDOVAL: Right. And 30 days -- 30
8 instead of 35. 35 seems awkward. And now we are back
9 to aware, knowing back to that, back to Page 5. I just
10 simply don't know how that to follow that without strongly
11 flirting with knowing and willful. Solve our problem.

12 MR. LOZANO: You know, as I said, I don't think
13 that the statute requires that the operator were aware of
14 the violation. But I think, again, as I said, as a policy
15 matter, I do have concerns about not having any sort of
16 front end as to when the Division can impose sanctions.

17 CHAIRWOMAN SANDOVAL: Is it something you think
18 could be kind of rolled into the guidelines that we're
19 thinking of doing or that we are doing for the penalty
20 tables?

21 MR. LOZANO: I think that certainly the Division
22 could make a statement as to how far back they would go, but
23 I don't think it's sort of enforceable -- a statement like
24 that is not enforceable unless it's in a rule.

25 CHAIRWOMAN SANDOVAL: Right. Do you have any

1 idea how other agency or Environment Department or --

2 MR. LOZANO: No. I don't work with any agency
3 that have a compliance rule like this. And the ones that I
4 do all have statute of limitations on. Most of them are two
5 years back. I think Psychologist Board is five years back.

6 CHAIRWOMAN SANDOVAL: I'm fine as is, but I don't
7 know where you guys are at. As is, meaning removing NMOGA
8 and IPANM statements and going with the proposed language of
9 Exhibit 4.

10 COMMISSIONER ENGLER: Yeah, I think -- well, I
11 think it's a little -- we are talking about, one is about
12 knowing and willing, so what do you know from the time of
13 the event from when a penalty starts, and then the other
14 thing is how far back would you mean? How far back, you
15 mean in terms of that event, or how far back in terms of
16 violations for that company.

17 MR. LOZANO: I think as a general matter, the
18 Association were concerned that, you know, something might
19 occur, and two years passed and they never knew about it,
20 and then the Division could potentially take daily
21 violations on those two years.

22 COMMISSIONER ENGLER: Okay.

23 CHAIRWOMAN SANDOVAL: Which is capped at 200.

24 MR. LOZANO: There is a cap. One of the things
25 that is certainly possible, I mean, if the Association come

1 to find that the sky is actually falling, as they sort of
2 present, then they can petition for this board to create
3 that gap of time.

4 So this Commission -- so I'm not sure if that
5 will ever come to fruition. I don't think the Division is
6 going to go ten years back for violations. I'm pretty sure
7 they don't have the resources to do that.

8 COMMISSIONER ENGLER: From what I gather, this is
9 like, whenever this goes into effect is like day one. I
10 mean, you can't go back now. You have you to wait until
11 accumulated time, and then you can go back.

12 CHAIRWOMAN SANDOVAL: Right.

13 COMMISSIONER KESSLER: And I think my problem is
14 just the lack of clarity in the statute.

15 COMMISSIONER ENGLER: Take to that your
16 lawmakers.

17 COMMISSIONER KESSLER: The resolution here is
18 that we do the best we can with the language that was
19 provided in the statute, because the only connection to the
20 statute that was made was Gabe's reference to the first time
21 whenever the Division determines a person violated or is
22 violating Oil and Gas Act, there is no other -- you can't
23 find any other language and no other attorneys pointed to
24 the language in the statute that would command a different
25 rule. So in the absence of other, you know, statutory

1 hooks, I would think we go with the Division's and then the
2 statute needs to be changed with the statute of limitation.

3 CHAIRWOMAN SANDOVAL: Or the rules, the rules can
4 be more --

5 COMMISSIONER KESSLER: But I think the
6 statute does that.

7 CHAIRWOMAN SANDOVAL: I think it does that.
8 Dr. Engler?

9 COMMISSIONER ENGLER: Yeah, I don't have a
10 problem with what you are saying. I do see maybe down the
11 road some potential modifications coming back, which is
12 probably not --

13 COMMISSIONER KESSLER: Like some sort of
14 carve-out for acts of God, and you know, I know that there
15 is a mechanism to consider that at the assessment of the
16 penalty stage, but it's uncomfortable.

17 COMMISSIONER ENGLER: Our expectation is that
18 there is enough flexibility and hopefully enough common
19 sense to recognize that, you know, this is something you
20 didn't -- this is what happened, but you are moving towards
21 fixing. Not everything is about compliance. So if you are
22 notified and move towards compliance, I would say that we
23 are taking the idea that it's okay to go that direction. So
24 that's, to me, the underlying idea.

25 CHAIRWOMAN SANDOVAL: Right. And I think the

1 point they made earlier even, if you spill something, but if
2 you follow the rules, then it's not a violation. It's when
3 you don't.

4 COMMISSIONER KESSLER: And the idea that an OCD
5 inspector is going to be out there day one after something
6 happens --

7 CHAIRWOMAN SANDOVAL: Likely not.

8 COMMISSIONER KESSLER: The idea that an OCD
9 inspector would discover it before an operator would
10 discover it is unlikely to the point of --

11 COMMISSIONER ENGLER: It's unlikely, but it does
12 happen, oddly enough, if just someone just happens to drive
13 by and --

14 CHAIRWOMAN SANDOVAL: One of our four inspectors,
15 it's possible for sure.

16 COMMISSIONER ENGLER: For sure. I've seen it.

17 CHAIRWOMAN SANDOVAL: So we are good as is
18 proposed in Exhibit 4, it does enact the statute, and all of
19 us are comfortable as is.

20 COMMISSIONER ENGLER: I agree.

21 MR. LOZANO: Is that all the changes that the
22 Commission is looking at?

23 COMMISSIONER ENGLER: That you are.

24 COMMISSIONER KESSLER: One final point. Sorry,
25 guys. I'm looking at the -- I'm just going through the

1 statute, and looking at Section E, and I want to make sure
2 we're all comfortable. "The Commission shall make
3 rules pursuant to Section 70-2-12.2 NMSA 1978 providing
4 procedures for the issuance of notices of violations, the
5 assessment of penalties and the conduct of informal
6 proceedings and hearings," do we feel good about having put
7 together enough of the conduct of informal proceedings? I
8 think with the additional language we have, I'm comfortable,
9 but --

10 CHAIRWOMAN SANDOVAL: I like the addition of our
11 language which was -- what did we say? Sorry.

12 MR. LOZANO: The procedure provides that -- the
13 Division will provide procedures for initiation of informal
14 review process including contact information, and then --

15 CHAIRWOMAN SANDOVAL: That was in the NOV
16 section, so that's contained within it. So basically our
17 notice of violation will give them a road map.

18 I'm comfortable with that because I'm afraid if
19 we get too nitty-gritty, it's going to hamstring everybody.

20 COMMISSIONER ENGLER: Yeah, you don't want to
21 micromanage.

22 COMMISSIONER KESSLER: For sure. Just as long as
23 we feel satisfied.

24 COMMISSIONER ENGLER: At least convey enough
25 information so industry operators know how to move through

1 the process and who to get to, so they have something that
2 they can move forward with.

3 MR. LOZANO: So I would say, rather than adopting
4 a final order today, the Commission can certainly direct me
5 to draft a proposed order for hopefully the January 16th
6 meeting for review and approval.

7 CHAIRWOMAN SANDOVAL: So what's the difference?

8 MR. LOZANO: If you adopt an order today orally,
9 it doesn't allow to you to do much deliberation in terms
10 of what else is there?

11 CHAIRWOMAN SANDOVAL: We would still have to
12 formally adopt it at the 16th.

13 MR. LOZANO: Correct.

14 CHAIRWOMAN SANDOVAL: So this way you are going
15 to draft it and we will review it on the 16th and then adopt
16 it.

17 COMMISSIONER KESSLER: I think that makes sense.

18 MR. LOZANO: For whatever reason you don't like
19 the changes that were made, or even if you have additional,
20 then you can still add those.

21 CHAIRWOMAN SANDOVAL: Okay.

22 MR. LOZANO: All right?

23 CHAIRWOMAN SANDOVAL: Do I need to formally
24 direct you?

25 MR. LOZANO: For the record, you can certainly

1 formally direct me.

2 CHAIRWOMAN SANDOVAL: Commission Counsel will
3 make the edits and finalize a draft order for the January
4 16, 2020, hearing where we will review the case.

5 MR. LOZANO: Okay.

6 (Case number 20895 concluded.)

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1 STATE OF NEW MEXICO
2 COUNTY OF BERNALILLO

3

4 REPORTER'S CERTIFICATE

5

6 I, IRENE DELGADO, New Mexico Certified Court
7 Reporter, CCR 253, do hereby certify that I reported the
8 foregoing proceedings in stenographic shorthand and that the
9 foregoing pages are a true and correct transcript of those
10 proceedings that were reduced to printed form by me to the
11 best of my ability.

12 I FURTHER CERTIFY that the Reporter's Record of
13 the proceedings truly and accurately reflects the exhibits,
14 if any, offered by the respective parties.

15 I FURTHER CERTIFY that I am neither employed by
16 nor related to any of the parties of attorneys in this case
17 and that I have no interest in the final disposition of this
18 case.

19 Dated this 2nd day of January 2020.

20

21

Irene Delgado, NMCCR 253
License Expires: 12-31-20

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