

NM OCD's Proposed Amendments to 19.15.5 NMAC

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Why are we here?

In 2019 legislative session, the NM legislature recognized:

- The unprecedented growth in O&G production and disposal in NM
 - With growth came influx of new operators who may not know rules
 - With record growth in APD's/facilities/disposal wells, potential for more spills/remediation
- The lack of OCD enforcement of O&G Act
 - Lack of enforcement not fair to diligent operators, unequal playing field
 - NM pays to plug wells/remediate spills for non-compliant operators (often go bankrupt)
 - NM pay in both \$ and damage to environment/fresh water
- For example: In November 2019 OCD issued over 100 NOV's for over 1,000 inactive wells and around \$8 million in missing FA

OCD Enforcement/Compliance Power Limited

- Prior to Amended 70-2-31, OCD had limited authority to effectively and efficiently ensure compliance in oil patch:
- Old 70-2-31 had “Knowingly and willfully” standard, difficult to prove
- “Marbob” case, 2009 NM Supreme Court (only NMAG could levy civil penalties)
 - NMAG did not file any enforcement actions seeking civil penalties
 - OCD filed only 3 enforcement actions (AG Commissioned, OCD could prove “knowingly and willfully” standard via ACO)
- Amended 70-2-31 removes barriers/provides tools for OCD efficiently and effectively deter non-compliance through enforcement

Terms Used

- “Knowingly and Willfully”- Old standard found for proving civil violations of O&G Act under old 70-2-31. Black’s legal dictionary defines “Knowingly” as having or showing awareness, deliberate or conscious. Blacks defines “Willfully” as voluntary and intentional.
- “NOV”- A Notice of Violation, a written notice to operators of alleged violation(s) and possible sanctions
- “TCO” – A Temporary Cessation Order, like an injunction, cease activity

Amended 70-2-31

OCD Exhibit 2

- Removes “knowingly and willfully” as civil standard to prove violations
 - Allows OCD to levy civil penalties (also limits amounts of civil penalty)
 - Provides basic NOV and TCO processes (also clarified by proposed rule)
 - Provides due process
 - Promotes settlement
 - Provides criminal penalties (unchanged from previous statute)
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- Amended 70-2-31 also requires OCC to adopt procedures for the OCD to issue NOVs and TCO’s, assess penalties, and conduct hearings

What do Proposed Amendments to 19.15.5 do?

OCD Exhibit 3 and Exhibit 4

19.15.5 Amendments:

- Replace existing rules that aren't compliant with Amended 70-2-31
- Implement Amended 70-2-31:
 - No “knowingly and willfully” civil standard
 - Civil penalties and limits
 - Promotes due process and settlement
- Provides adjudicatory procedure for NOV's and TCO's

OCD Consultation with Stakeholders

- OCD met with representatives of NMOGA, IPANM, and environmental NGOs to discuss concerns and recommended changes
- OCD proposed rule amendments to OCC (Exhibit 3)
- After proposal, further discussed with NMOGA and IPANM and incorporated discussed language into Exhibit 4
- OCD is committed to further consultation with stakeholders regarding future penalty calculations

Presentation Roadmap

- Discuss proposed amendments to 19.15.5 in order:
 - Section 3 - Statutory Authority
 - Section 9 - Compliance
 - Section 10 – Enforcement
- Discuss OCD proposed Exhibit 4 language at each relevant section
- Discuss NMOGA/IPANM proposals, OCD objections
- Discuss how rule becomes effective
- Conclusion

19.15.5.3- Statutory Authority

19.15.5.3 STATUTORY

AUTHORITY: 19.15.5 NMAC is adopted pursuant to the Oil and Gas Act, Section 70-2-6, Section 70-2-11, [~~and~~] Section 70-2-12 and Section 70-2-31 NMSA 1978.

- Adds citation to 70-2-31 to reflect OCC's authority to adopt these rules
- Need to include reference 70-2-31.1 to reflect requirement under 5.10(I) (Publication)

19.15.5.3 STATUTORY

AUTHORITY: 19.15.5 NMAC is adopted pursuant to the Oil and Gas Act, Section 70-2-6, Section 70-2-11, [~~and~~] Section 70-2-12 Section 70-2-31, and Section 70-2-31.1 NMSA 1978.

19.15.5.8- Enforcement of Statutes and Rules

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

- Adds OGA statutory duties

19.15.5.9(A)(3)- Compliance

19.15.5.9 COMPLIANCE:

A. An operator is in compliance with Subsection A of 19.15.5.9 NMAC if the operator:

(3) does not have a penalty assessment that is unpaid more than [~~70~~] 30 days after issuance of the order assessing the penalty;

- Changes 70 days to 30 days for compliance period:
 - 30 days standard compliance period in administrative practice
 - 70 days has no clear origin and is arbitrary

19.15.5.9(A)(4)- Compliance

19.15.5.9 COMPLIANCE:

A. An operator is in compliance with Subsection A of 19.15.5.9 NMAC if the operator:

(4) has no more than the following number of wells out of compliance with 19.15.25.8 NMAC that are not subject to an **agreed compliance** or final order setting a schedule for bringing the wells into compliance with 19.15.25.8 NMAC and imposing sanctions if the schedule is not met:

- Adds “final order” for orders issued after effective date
- New rule refers to “stipulated final orders” when the parties agree to resolution and “final orders” when OCD or OCC holds a hearing and issues an order
- Retains hold over language “agreed compliance order” for cases filed before effective date of proposed rules

19.15.5.9(B-E)- Sections Deleted/Why

- Current Section 9(B)
 - First sentence replaced by proposed Section 9(B)(1)
 - Second sentence superseded by proposed Section 10
- Current Section 9(C)
 - Language has been moved to end of proposed Section 9
- Current Section 9(D)
 - Superseded by proposed Section 10
- Current Section 9(E)
 - (E)(1) replaced by proposed Section 10(I)
 - (E)(2) superseded by proposed Section 10

19.15.5.9(B)- Inactive Wells

F] B. Inactive wells.

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

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

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

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

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

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

- (1)(a) defines inactive well (same as current rule)
- (1)(b) & (c) re-lettered
- (1)(d) re-lettered, “final order” consistent with Section 5.9(A)(4) already discussed
- (2) reworded for consistency with (1)(a) (15 months)

19.15.5.9(C)- Financial Assurance

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

- No change from existing rule just moved to new section

19.15.5.10- Enforcement

- Repeals and replaces Section 10 because existing rule not consistent with Amended 70-2-31
- Closely tracks language of Amended 70-2-31

Section 10 Roadmap

- A – How OCD seeks: TCOs, NOVs, and civil actions
- B – Sanctions OCD may seek, including civil penalties
- C – NOV procedures for service and hearings
- D – How civil penalties calculated, including criteria to apply and limits to penalties
- E – Hearing procedures
- F – Appeal procedures
- G – When civil penalties paid
- H – Informal resolution process after hearing commenced
- I – Publication of enforcement information by OCD
- J – Savings clause

19.15.5.10(A)(1)- Temporary Cessation Orders

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

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

- TCOs allowed when OCD determines:
 - Violation poses imminent danger to public health or safety *or*
 - Violation poses significant imminent environmental harm
- Procedure:
 - OCD issues TCO
 - TCO remains in effect until earlier of abatement or 30 days
 - OCD must hold hearing within 30 days to get new TCO

19.15.5.10(B)- Sanctions

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

- (1) a civil penalty;
- (2) modification, suspension, cancellation or termination of a permit or authorization;
- (3) plugging and abandonment of a well;
- (4) remediation and restoration of a well location and associated facilities, including the removal of surface and subsurface equipment and other materials;
- (5) remediation and restoration of a location affected by a spill or release;
- (6) forfeiture of financial assurance;
- (7) shutting in a well or wells; and
- (8) any other remedy authorized by law.

- Tracks Amended 70-2-31 verbatim
- OCD may:
 - Modify, suspend, cancel, or terminate permit or authorization
 - Shut in and/or plug & abandon wells
 - Require remediation or restoration of wells and other locations affected by a spill
 - Forfeit financial assurance
- New Sanction in 70-2-31:
 - OCD may assess civil penalties

19.15.5.10(C)- Notice of Violation

C. Notice of violation.

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

(a) the identity of the alleged violator;

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

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

(d) the sanction(s) available for the alleged violation and the sanction(s) proposed by the division;

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

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

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

(2) The division shall serve the notice of violation on the alleged violator by certified mail.

(3) If during the informal review the division and the alleged violator agree to resolve the alleged violation, they shall incorporate their agreement into a stipulated final order signed by both parties. The stipulated final order shall state that the alleged violator admits the division's jurisdiction to file the notice of violation, consents to the specified relief, including the civil penalty, if any, and waives the alleged violator's right of review by the commission.

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

19.15.5.10(C) NMAC - Notice of Violation

- Provides written notice to an operator of alleged noncompliance
- Provides specific information required by Amended 70-2-31:
- NOV states:
 - alleged violation
 - specific provision of the statute, rule or order allegedly violated
 - statement that alleged violator must comply immediately or by a certain time
 - sanction(s) sought for each alleged violation, if any
 - statement of availability of an informal process to resolve alleged violation(s)
 - statement that OCD will hold hearing if the NOV is not resolved within 30 days
 - hearing date
- See NMOGA/IPANM proposed edits to this section

OCD's Ex. 4 Amendment 5.10(C)(1)(b)

C. Notice of violation.

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

(a) the identity of the alleged violator;

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

- Based on discussions with NMOGA, OCD agrees
- Adds clarity to description of basis of alleged violation

NMOGA/IPANM Proposed 19.15.5.10(C)(1)(d)

NMOGA: C. Notice of violation.

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

(d) the sanction(s) available for the alleged violation and the sanction(s) proposed by the division if the notice of violation is not cured;

IPANM: C. Notice of violation.

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

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

- Both proposals remove sanctions if violator “resolves” violation in settlement period

Inconsistent with Amended 70-2-31(A):
*“Whenever the division determines that a person **violated** or is violating . . .”*
can impose sanction

- Past violations may be “cured” or “resolved” already
- If a violation “cured”, then may be a factor in penalty calculation- not whether the OCD can assess a penalty
- Creates a “catch me if you can” effect, non-compliant operators will wait to get caught then fix
- Allowing NOV to “cure” violations without sanctions undermines the deterrent effect of sanctions

OCD's Ex. 4 Amendment 19.15.5.10(C)(2)

C. Notice of violation.

(2) The division shall serve the notice of violation on the alleged violator by certified mail, and may provide the notice of violation by electronic mail if possible.

- Based on discussions with IPANM
- Allows OCD to expedite process (if operator provides email)
- Still follows traditional service procedure by certified mail
- Only operator's mailing address is required to be provided by OCD rule

IPANM Proposed 19.15.5.10(C)(3)

IPANM: C. Notice of violation.

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

OCD objects:

- Creates a “catch me if you can” effect, non-compliant operators will wait to get caught then fix
- Undermines statutory criteria to calculate a penalty: seriousness, good faith, history
- Undermines settlement because OCD cannot scale sanctions to “bad actors” even through settlement
- Not fair to diligent operators
- Undermines deterrent effect penalties have on noncompliance

19.15.5.10(D)- Civil Penalties (Original Proposed)

D. Civil penalties. The division shall calculate a proposed civil penalty for each alleged violation in the notice of violation. The calculation shall account for the seriousness of the violation, good faith efforts to comply with the applicable requirement, history of noncompliance under the Oil and Gas Act and other relevant factors. The civil penalty assessed by the division shall not exceed \$2,500 per day of noncompliance for each alleged violation, unless the alleged violation presents a risk either to the health or safety of the public or of causing significant environmental harm, or unless the noncompliance continues beyond the time specified in the notice of violation or stipulated final order, whereupon the civil penalty may not exceed \$10,000 per day of noncompliance for each alleged violation, provided that the civil penalty assessed by the division for an alleged violation shall not exceed \$200,000.

19.15.5.10(D)- Civil Penalties

Section 10(D) establishes procedures to assess civil penalties (tracks 70-2-31):

- OCD will calculate penalty for each alleged violation in NOV
- OCD must apply criteria to assess penalty amounts:
 - seriousness of violation
 - good faith efforts to comply with applicable requirement(s)
 - operator's history of noncompliance with OGA or rules

Reflects statutory limits on civil penalties that may be assessed

- OCD cannot assess more than \$2,500 per day for each violation unless:
 - violation presents risk to public health, safety, or significant harm to environment or
 - violation continues longer than time specified in NOV or final order
- Then OCD can assess up to \$10,000 per day for each violation
- Total cap of \$200,000 per violation

OCD's Ex. 4 Amendment 19.15.5.10(D)

Sentence 1 of 10(D)

~~D. Civil penalties. The division shall calculate a proposed civil penalty for each alleged violation in the notice of violation. The calculation~~ A civil penalty assessed by the division shall account for the seriousness of the violation, good faith efforts to comply with the applicable requirement, history of noncompliance under the Oil and Gas Act and other relevant factors.

- Based on discussions with NMOGA
- Sentence one of 10(D) deleted
- Consistent with Amended 70-2-31

NMOGA's Proposed 19.15.5.10(D)

Sentence 2 of 10(D)

The civil penalty assessed by the division shall commence no earlier than the date that the Division demonstrates that the respondent was aware or should have been aware of the violation and shall not exceed \$2,500 per day of noncompliance for each alleged violation, unless the alleged violation presents a risk either to the health or safety of the public or of causing significant environmental harm, or unless the noncompliance continues beyond the time specified in the notice of violation or stipulated final order, whereupon the civil penalty may not exceed \$10,000 per day of noncompliance for each alleged violation, provided that the civil penalty assessed by the division for an alleged violation shall not exceed \$200,000.

OCD objects:

- “Aware” synonymous with “knowingly”
- Legislature expressly removed “knowingly” from Amended 70-2-31
- “Aware or should have been aware” can be a criteria in calculating penalty amounts not if OCD can assess

IPANM's Proposed 19.15.5.10(D)

(D) Civil penalties. Except as provided in 19.15.5.10(C)(3) and 19.15.5.10(E) NMAC, the division shall ~~shall~~ may calculate a proposed civil penalty for each alleged violation in the notice of violation. The calculation shall ~~account for the seriousness of the violation, good faith efforts to comply with the applicable requirement, history of non-compliance under the Oil and Gas Act, and other relevant factors~~ and be in conformity with the fine amounts, factors for enhancement, and factors in mitigation set forth in Tables 1, 2, 3, 4, and 5 to this Rule. The civil penalty assessed by the division shall not exceed \$2.500 per day of noncompliance for each alleged violation, unless the alleged violation presents a risk either to the health or safety of the public or of causing significant environmental harm, or unless the noncompliance continues beyond the time specified in the notice of violation or stipulated final order, whereupon the civil penalty may not exceed \$ 10.000 per day of noncompliance for each alleged violation, provided that the civil penalty assessed by the division for an alleged violation shall not exceed \$200.000. Daily fines recommended by the division shall commence no earlier than the date the operator knew or in the exercise of ordinary care, should have known about the alleged violation.

OCD objects:

- Directly violates 70-2-31 by:
 - Deleting verbatim language from Amended 70-2-31 (criteria that *shall* be applied)
 - Adding “knowing” standard for civil penalties
- Replaces statutory criteria with Texas guidelines for fine amounts
 - Not in rule in Texas, “guidance”
 - Multiple problems with proposed table:
 - Based on Texas rules not NM
 - Some fines exceed statutory limits
- Adds an enhancement/mitigation table no known precedence

OCD Proposed 19.15.5.10(D) Should be Adopted

- Consistent with and tracks almost verbatim Amended 70-2-31
- Consistent with other state oil/gas commissions in allowing guidelines to be developed (Texas)
- Allows flexibility to adjust penalties on a case-by-case basis (scale to statutory criteria)
- Allows OCD to calculate penalties below the statutory limits
- Allows OCD to work with stakeholders to develop calculation method

IPANM's Proposed new Sections (E) & (F)

- OCD objects to the proposed sections
- Both rely on a determination that violations can be the “same” under different laws

IPANM's Proposed New 19.15.5.10(E)

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

OCD objects:

- (E) proposes that OCD can't ask for penalties on "same" violations as BLM has imposed on, OCD shall refund if BLM imposes penalties
- No such thing as a "same" violation (different laws)
- No mechanism to refund fees
- This proposal has no precedent in any law

IPANM's Proposed New 19.15.5.10(F)

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

OCD objects:

- (D) proposes that OCD can't ask for penalties on "same" violations for any other state or federal penalties imposed
- No such thing as a "same" violation (different laws)
- No mechanism to refund fees
- This proposal has no precedent in any law

OCD's 19.15.5.10(E)- Adjudicatory Procedures

- Procedures for hearings if informal resolution does not succeed
- Section 5.10(E) Roadmap:
 - E(1) - General provisions
 - E(2) - Pre-hearing procedures
 - E(3) - Hearing procedures
 - E(4) - Post-hearing procedures

19.15.5.10(E)(1) NMAC - General Provisions

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

(1) General provisions.

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

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

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

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

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

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

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

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

- Identifies OCD and alleged violator as parties
- Prohibits participation by third parties
- Allows parties to appear pro se or by counsel, except certain “collective entities”
- Clarifies that rules of evidence and civil procedure are guidance only
- Establishes standard computation of time
- Allows extensions of time and continuances
- Requires parties to serve pleadings
- Describes format and criteria for documents

Similar general provisions are used by other state agencies for administrative proceedings

19.15.5.10(E)(2)- Pre-Hearing Procedures

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

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

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

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

(e) Pre-hearing statements. No later than 15 days before the hearing, a party who intends to present evidence at the hearing shall file and serve a statement that contains the following information:

- (i) the name, address, employment and qualifications, including education and work history, of each witness;
- (ii) the direct testimony in narrative form of each witness;
- (iii) the exhibits and other evidence to be presented by each witness; and
- (iv) procedural matters that are to be resolved prior to the hearing.

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

(g) Motions.

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

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

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

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

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

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

- OCD docketed unresolved NOV's, TCO's and OCC appeals before 30 day deadline

Steps in pre-hearing process:

- After docketing, alleged violator files answer
- Hearing Examiner (HE) assigned to run hearing
- HE barred from talking about substance of case with parties (no ex parte)
- HE may hold pre-hearing conference to resolve procedural and evidentiary issues
- Parties must file pre-hearing statements and exchange testimony and evidence at least 15 days before hearing
 - ensures that parties have opportunity to prepare effectively
 - facilitates settlement

OCD's Ex. 4 Amendment 19.15.5.10(E)(2)(a)-(b)

(2) Pre-hearing procedures.

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

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

- Based on discussions with NMOGA
- Provides the factual basis for alleged violation and proposed sanction(s)
- Highlights that disputed sanctions after informal agreement period are still “proposed”

OCD's Ex. 4 Amendment 19.15.5.10(E)(2)(c)-(e)(ii)

(2) Pre-hearing procedures.

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

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

(e) Pre-hearing statements. No later than ~~15~~ **7 calendar** days before the hearing, a party who intends to present evidence at the hearing shall file and serve a statement that contains the following information:

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

(ii) ~~the direct testimony in narrative form of each witness a~~ **statement identifying the opinions and factual assertions supporting those opinions of each witness' testimony;**

- Based on discussions with NMOGA
- Clarifies when ex-parte applies
- Highlights that penalties are “proposed” at this stage
- Shortens timeline to allow for preparation but still allows for sufficient notice (15 to 7 calendar days)
- Allows exchange of enough information without requiring a “narrative”

IPANM's Proposed New 19.15.5.10(E)(2)(h)

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

OCD objects:

Contrary to explicit language in Amended 70-2-31

- 30 day maximum for TCO:

*(A) A “cessation order will remain in effect until the earlier of when the violation is abated **or thirty days** unless a hearing is held before the division and a new order is issued.”*

- 30 day minimum for NOV:

*C. If the notice of violation is not resolved informally **within thirty days** after service of the notice, the division shall hold a hearing . .*

OCD's 19.15.5.10(E)(3)- Hearing Procedures

(3) Hearing procedures.

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

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

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

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

- Commonly used administrative procedures
- Parties can present and cross-examine witnesses
- OCD has burden of proof on each element of alleged violation
 - Standard is “preponderance of evidence”
 - Common civil standard of evidence

OCD's 19.15.5.10(E)(4)- Post Hearing Procedures

(4) Post-hearing procedures.

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

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

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

- Hearings must be transcribed
- OCD Director may request HE to prepare a recommended decision
- OCD Director solely responsible to issue final order

NMOGA's Proposed 19.15.5.10(E)(4)(b)

(4) Post-hearing procedures.

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

OCD objects to proposal:

- Not required by statute
- Adds additional burden to efficient and effective enforcement
- Many cases may be “routine” and do not require a recommended decision

OCD's 19.15.5.10(F) – Commission Review

F. Commission review. No later than 30 days after the director serves the final order, a party may file a notice of appeal with the commission and shall serve the notice of appeal on the other party. The commission shall schedule a hearing on the appeal and notify the parties of the date and time of the hearing. The commission may appoint a hearing examiner, who may be a member of the commission. The commission shall conduct a de novo review, provided however, that the parties may stipulate to the issues to be heard and to the admission of all or part of the record before the division. The commission shall conduct the hearing in accordance with the adjudicatory procedures in Paragraph (1), Subparagraphs (c) through (g) of Paragraph (2), Paragraph (3) and Subparagraph (a) of Paragraph (4) of Subsection E of 19.15.5.10 NMAC,

- Party may appeal to OCC (same as existing rule)
- OCC's review is de novo (required by OGA)
- Parties can stipulate to issues and the record from OCD hearing (expedites OCC hearing)
- OCC will use relevant portions of adjudicatory procedures in 5.10(E)
- Need to correct 2 typographical errors
 - period should be comma
 - comma should be period

See Proposed Amendment to (F)

OCD's Ex. 4 Amendment to 19.15.5.10(F)

F. Commission review. No later than 30 days after the director serves the final order, a party may file a notice of appeal with the commission and shall serve the notice of appeal on the other party. The commission shall schedule a hearing on the appeal and notify the parties of the date and time of the hearing. ~~The commission may appoint a hearing examiner, who may be a member of the commission.~~

- NMOGA proposes deleting sentence 2
- OCD agrees because OCC already has power to assign HE under 70-2-13:

“Any member of the commission or the director of the division or his authorized representative may serve as an examiner as provided herein.”

- Only proposed change in (F)

OCD's Ex. 4 NEW Amendment 19.15.5.10(G)

G. Rehearings. A party may file an application for rehearing with the Commission pursuant to Section 70-2-25, NMSA 1978.

- Based on discussions with NMOGA and IPANM
- OCD prefers IPANM's version; contains applicable reference
- Provides clear path for appeals to district court

OCD's Ex. 4 Amendment to 19.15.5.10(G)(H)

GH. **Payment of civil penalty.** No later than 30 days after the director serves the final order, respondent shall pay the full amount of the civil penalty assessed in the final order, provided however that if respondent files a notice of appeal to the commission, or to a district court pursuant to Section 70-2-25, NMSA 1978, no later than 30 days after the commission or the district court files a final order or the appeal is withdrawn, respondent shall pay the full amount of the civil penalty assessed in the final order.

- Based on discussions with NMOGA
- Re-lettered OCD's previously proposed 5.10(G)
- OCD's 10(G) originally required payment of civil penalty within 30 days of final order
- Adds stay provision for appeals, penalty isn't paid until a "final order" is issued after appeal

IPANM's Proposed Amended 19.15.5.10(G)(H)

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

OCD objects:

- Proposal is that if appeal is successful, penalties collected must be refunded
- OCD cannot collect penalties and refund \$ from general fund
- OCD proposed language easier to administer (no fines to refund)
- Adds arbitrary timeline of 35 days for penalty to be paid

19.15.5.10(H)(I)- Resolution

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

- Allows for settlement after hearing has commenced
- OCD encourages and supports resolution whenever possible
- Resolution will be memorialized in written order
- Written order contains key elements of legally binding document, including admission of jurisdiction, consent to relief, and waiver of appeal

19.15.5.10(I)(J) – Publication

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

- This is the 70-2-31.1 requirement that OCD publish information regarding enforcement actions during the preceding year

19.15.5.10(J)(K) - Reservation

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

- Standard savings clause to protect OCD and OCC's authority to enforce other parts of OGA and OCD rules

Effective Date of Proposed Rule

- Amended 70-2-31 went into effect on January 1, 2020
- Rule goes into effect on date of publication in NM Register
- OCD can publish rule in NM Register no earlier than 20 days after OCC enters final order or denies rehearing application

Conclusion

Proposed rule:

- Complies with and implements Amended 70-2-31 and 70-2-31.1
- Establishes efficient procedures to file and adjudicate NOVs and TCOs and assess sanctions, including civil penalties
- Consistent with procedures used by other state agencies and NM laws
- Encourages settlement where possible
- Provides due process:
 - notice and opportunity to contest alleged violation(s) and proposed sanction(s)
 - preserves right to appeal to OCC and district court
- Holds all operators to same standard of compliance
- Protects correlative rights, prevents waste, and protects public health and environment
- OCD requests that this Commission adopts the rule as proposed today by the OCD