

**STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION**

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

CASE NO. 20895

**NEW MEXICO OIL CONSERVATION DIVISION'S
RESPONSE TO PETITION FOR COMMISSION
TO HOLD IN ABEYANCE A FINAL ORDER**

The New Mexico Oil Conservation Division (“OCD”) submits this response in opposition to Larry Marker’s Petition for Commission to Hold in Abeyance a Final Order. The petition lacks merit and should be denied.

On January 2, 2020, the Oil Conservation Commission (“Commission”) held a full public hearing on OCD’s proposed rule. It heard testimony from OCD, IPANM and Marker, and considered the legal arguments of all the parties, including Marker. IPANM informed the Commission that one of its witnesses was ill and could not attend the hearing, but at no time did IPANM request that the Commission continue the hearing to allow the witness to testify.

The petition is Marker’s latest attempt to prevent the Commission from complying with its statutory obligation to adopt a rule under the Oil and Gas Act (“OGA”). On December 16, 2019, Marker filed a Request for Continuance, which argued that the Commission should continue the hearing because the public notice was untimely and the rulemaking should be stayed until the court decides his pending challenge to the OGA amendments requiring the Commission to adopt this rule. The Commission denied that request because the notice was correct and no court had issued a stay, and after a hearing, deliberated and decided to grant the OCD’s application.

Marker now asserts that the Commission should not adopt the final order. First, he argues that the Commission did not hear all of the testimony and evidence proposed by the parties because one of IPANM's witnesses was unable to attend the hearing. To the contrary, the Commission heard all of the testimony and evidence presented by the parties at the hearing, and none of the parties, including IPANM, suggested that it had been denied its opportunity to present evidence to the Commission. The Commission may have the option – not the obligation – to hold the hearing open to take additional testimony, but that decision is committed to its sole discretion. Moreover, it was IPANM's witness, not Marker's, that was unable to attend the hearing, and consequently, it was IPANM's right, not Marker's, to request that the hearing be held open to take her testimony.

Second, Marker renews his argument that the Commission should stay its adoption of the final order until the court decides his pending challenge to the OGA. The Commission has already rejected this argument as noted above.

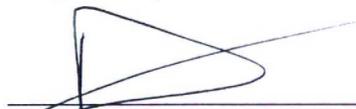
Third, Marker contends that the “proposed penalties will also directly affect” his pending challenge to the financial assurance regulations. Again, no court has issued a stay, and apparently Marker has not even requested one. But even if he had, it would be denied because the New Mexico Supreme Court has held that “a court may not intervene in administrative rule-making proceedings before the adoption of a rule or regulation.” *New Energy Economy, Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 14, 149 N.M. 42, 243 P.3d 746 (per curium); *Earthworks' Oil and Gas Accountability Project v. New Mexico Oil Conservation Commission*, 2016-NMCA-055, ¶ 4 (the court has no authority to hold a new rulemaking in abeyance while the appeal of a previous rule is pending.) Additionally, Marker misunderstands the proposed rule, which does not impose penalties on any alleged violator of the financial assurance regulations, but rather

authorizes a process mandated by the legislature for issuing notices of violation and imposing sanctions which may include civil penalties. Notably, the proposed rule will not be effective until publication in the New Mexico Register on or about February 25, 2020, so there is no likelihood that Marker's hypothetical conflict would occur for months, during which time his appeal may be dismissed.

Finally, Marker argues that OCD failed to "address in its petition potential violations of due process, division of powers and various other legal issues within the proposed regulations." OCD had no obligation to address Marker's vaguely formulated concerns in its petition. Even so, the hearing was conducted in full accordance with the requirements of due process, and the testimony amply demonstrated that the proposed rule provides due process to alleged violators and complies with the OGA amendments. As for the alleged violation of the "division of powers", "It is well-established that the Legislature can properly delegate rulemaking power to administrative agencies through an enabling statute." *New Energy Economy*, 2010-NMSC-049, ¶ 6.

For the foregoing reasons, OCD respectfully requests that the Commission issue an order denying Marker's petition.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was mailed electronically on January 14, 2020 to:

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