

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

**IN THE MATTER OF PROPOSED AMENDMENTS TO THE
COMMISSION'S RULES ON COMPLIANCE AND ENFORCEMENT,
19.15.5 NMAC; STATEWIDE**

**CASE NO. 20895
ORDER NO. R-20985-A**

ORDER OF THE COMMISSION

THIS MATTER came before the New Mexico Oil Conservation Commission ("Commission") on the application of the Oil Conservation Division of the Energy, Minerals and Natural Resources Department ("Division") to amend Rules 19.15.5 NMAC. The Commission, conducted a hearing in this matter on January 2, 2020, and deliberated in open session following the hearing and also during the January 16, 2020 meeting. The Commission, having considered the testimony, the record, and the arguments of the parties, and being otherwise fully advised, enters the following findings, conclusions, and order.

THE COMMISSION FINDS THAT:

1. Statutory Authority. The Commission is authorized to adopt rules, after a hearing, under the Oil and Gas Act, NMSA 1978, Sections 70-2-1 to -38 (1935, as amended through 2019) ("Act"). NMSA 1978, § 70-2-12.2 (2015). The Commission and the Division are given the duty to prevent waste and protect correlative rights and to make and enforce rules to carry out the purpose of the Act, NMSA 1978, § 70-2-11, and are specifically authorized to make rules regarding the issuance of notices of violations, the assessment of penalties and the conduct of informal proceedings and hearings. NMSA 1978, § 70-2-31(E).
2. In 2019, the New Mexico Legislature amended the Act to specify the types of actions and general procedures for those actions that may be taken if the Division determines that a person violated or is violating the Oil and Gas Act or any provision of any rule, order, permit or authorization issued pursuant to the Act. NMSA 1978, § 70-2-31. The Division may seek compliance and civil penalties by (1) issuing a notice of violation; (2) commencing a civil action in district court for appropriate relief, including injunctive relief; or (3) issuing a temporary cessation order if the division determines that the violation is causing or will cause an imminent danger to public health or safety or a significant imminent environmental harm. NMSA 1978, § 70-2-31(A).
3. Prior to the 2019 amendments to this section, the Attorney General's Office was the only entity authorized to pursue enforcement actions seeking civil penalties under the Act. The

Legislature amended this section to provide the Division authority to seek civil penalties for violations of the Act and corresponding rules, orders, permits, and authorizations issued pursuant to the Act. The amendments also included the removal of the requirement that violations be “knowing and willful” in order for the violator to be subject to civil penalties.

4. Application and Notice. The Division filed an Application on October 18, 2020, to amend 19.15.5 NMAC to implement NMSA 1978, Section 70-2-31 by enacting rules related to compliance and enforcement of the Act. The Application included a draft of the proposed rule change and a proposed legal notice. 19.15.3.8(A) NMAC.

5. At a public meeting on November 6, 2020, the Commission determined to hold a hearing on the proposed rule change and scheduled the hearing to begin on January 2, 2020. 19.15.3.8(C) NMAC.

6. Pre-hearing statements were submitted by the Division, the Independent Petroleum Association of New Mexico (“IPANM”), the New Mexico Oil and Gas Association (“NMOGA”), and independent operator, Larry Marker (“Mr. Marker”). The Division and IPANM each provided one witness for testimony during the hearing and Mr. Marker testified on his own behalf. NMOGA did not present any witnesses. In their respective pre-hearing statement, IPANM and NMOGA offered modifications to the proposed rule changes. In his pre-hearing statement, Mr. Marker submitted his objections to the entire rule. The Commission reviewed several written comments received before and during the hearing.

7. Proposed Rule Change. The Division proposed to amend rule 19.15.5 NMAC. The proposed rule changes generally include the following:

- a. 19.15.5.3 NMAC amends the legal authority to include authority provided by NMSA 1978, Section 70-2-31;
- b. 19.15.5.8 NMAC amends the duties and obligations of the Division with regard to enforcement of the Act;
- c. 19.15.5.9 NMAC reorganizes the compliance section of the rule and removes superfluous language; and
- d. 19.15.5.10 NMAC outlines the Division’s enforcement authority and the procedures that the Division and Commission will follow when issuing and adjudicating notices of violation and temporary cessation orders.

8. Public Hearing. The Commission conducted a public hearing on the proposed rule changes on January 2, 2020. The Commission began its deliberations immediately after the adjournment of the hearing and completed its deliberations on January 16, 2020.

9. The Division presented Deputy Director Gabriel Wade as a technical witnesses. IPANM presented Paul Ragsdale as a witness. Mr. Marker provided testimony on his own behalf. These witnesses were subject to cross-examination by the other parties and by the Commissioners and Commission Counsel.

10. Mr. Wade, testifying on behalf of the Division, explained the purpose of the statutory change and the proposed rule change. He stated that the primary purpose of the proposed rule changes was to implement the 2019 amendments to the Act, including the explicit enforcement and adjudicatory authority provided to the Division. The proposed rule changes address significant issues arising from the lack of enforcement including insufficient authority, inconsistent application and compliance, and costs and damage to the environment which must be addressed and remedied at the expense of the public.

11. Mr. Wade testified about each element of the proposed rule changes and presented the Division's suggested amendments to the original proposed rule in response to concerns and alternative language provided by the other parties in their pre-hearing statements. Mr. Wade addressed each proposed change as well as the Division's decision not to agree to certain language. Specifically, Mr. Wade testified as follows:

a. 19.15.5.3 NMAC ("Statutory Authority"): The amendment adds NMSA 1978, Section 70-2-31 to reflect the Commission's authority to adopt these rules and NMSA 1987, Section 70-2-31.1 to reflect the publication requirement found in statute.

b. 19.15.5.8 NMAC (Enforcement of Statutes and Rules"): The amendment adds the statutory duties of the Division to enforce rules relating to the prevention of waste and the protection of correlative rights.

c. 19.15.5.9(A)(3) NMAC: The amendment reduces the period of non-compliance for non-payment of a penalty from 70 days to 30 days because this is a standard compliance period in administrative practice.

d. 19.15.5.9(A)(4) NMAC: The amendment adds "final order" for consistency with the new enforcement and adjudication provisions related to stipulated final orders and retains the reference to the "agreed compliance order" to maintain the enforcement authority over such orders issued prior to adoption of the proposed rule changes.

e. 19.15.5.9(B) through (E) NMAC: Except for subsection (C), these sections are replaced or superseded by other portions of the proposed rule. Subsection (B), which relates inactive wells, was also amended for consistency with other proposed rule changes. Subsection (C) regarding financial assurances was moved to the end of this amended section.

f. 19.15.5.10 NMAC ("Enforcement"): This repeal and replacement of Section 10 is necessary to conform to the statutory changes to NMSA 1978, Section 70-2-31. It includes procedures of the Division for enforcement actions resulting from violations of the Act.

g. 19.15.5.10(A)(1) NMAC: This new provision tracks the Act's language and provides for the issuance of a Temporary Cessation Order ("TCO") by the Division if the alleged violation poses an imminent danger to the public health or safety or significant environmental harm. A TCO will remain in effect until the earlier of abatement of the violation or 30 days. The Division is required to hold a hearing within 30 days to seek the issuance of another TCO.

h. 19.15.5.10(B) NMAC: This new provision outlines the possible sanctions for noncompliance that may be imposed by the Division pursuant to NMSA 1978, Section 70-2-31, including civil penalties; modification, suspension, cancellation, or termination of a permit or authorization; plugging and abandoning wells; requiring remediation or restoration of wells and other locations affected by a spill; and forfeiture of financial assurance.

i. 19.15.5.10(C) NMAC: This new provision requires the Division to serve a written Notice of Violation ("NOV") to an operator which, shall include specific information required under NMSA 1978, Section 70-2-31. Specifically, the NOV shall state (1) the alleged violation; (2) the specific provision(s) of the statute rule or order allegedly violated; (3) a statement that the alleged violator must comply immediately or by a certain time; (4) the sanction(s) sought for each alleged violation, if any; (5) a statement regarding the availability of an informal process to resolve the alleged violation(s); (6) a statement that the Division will hold a hearing if the NOV is not resolved within 30 days; and (7) the date of the scheduled hearing. Based on suggested changes from the other parties, the Division requested that the proposed rule also be amended to (1) require that the factual and legal basis for the alleged violation be stated in the NOV so that the operator would have a clear understanding of the basis for the Division's action and (2) require that the Division serve the NOV via electronic mail if possible so that the operator would have notice of the problem as soon as possible. The Division observed that it would use the traditional service procedure of certified mail for purposes of actual notice, since OCD's rules only require operators to provide a mailing address. The Division rejected proposed language from IPANM and NMOGA prohibiting sanctions and penalties if the alleged violator resolves or cures the violation during the informal review process. The Division asserted that this would create a "catch me if you can" effect by which operators would wait until they were caught to fix a problem, undermining the deterrent effect of civil penalties. The Division also explained that the Act allows the Division to assess civil penalties for past violations, which by definition may have already been "cured." The Division observed that it can take the operator's good faith effort to "cure" a violation into account in calculating the civil penalty, but that barring it assessing any civil penalty would not be fair to diligent operators and would have the perverse effect of discouraging informal resolution if the Division believed that a civil penalty was warranted by the facts of a particular case.

j. 19.15.5.10(D) NMAC: This new provision establishes procedures to assess civil penalties and includes the penalty limitations and factors stated in NMSA 1978, Section 70-2-31. The Division also proposed new language simplifying this provision. The Division rejected language proposed by IPANM and NMOGA which limits the imposition of civil penalties to the date in which the violator became aware or should have been aware of the violation because it effectively reinserted the "knowing and willful" standard into the statute. The Division also observed that it could take the operator's knowledge of the violation into account during the calculation of a civil penalty. Additionally, the Division rejected the use of an attached table proposed by IPANM which specifies the fines to be imposed by the Division. The Division stated that the reasons for their opposition of the proposed table are that (1) it violated the Act by replacing the statutory criteria with Texas guidelines for fine amounts; (2) the Texas guidelines are not mandatory like IPANM's proposal; (3) many of the violations listed in the first table don't exist in the OCD's rules; (4) the list of violations is exclusive but there are many more possible

violations under the OCD's rules for which there is no method of calculating a civil penalty; (5) the civil penalties in the tables exceed the statutory limits; and (6) the enhancement/mitigation tables are based on concepts and language that do not appear in the OCD's rules.

k. The Division rejected new sections proposed by IPANM which limit the Divisions ability to collect and retain penalty amounts if the Bureau of Land Management ("BLM") or another state or federal agency imposed fines for the same alleged violation. Mr. Wade asserted that these provisions were not feasible because the Division has no refund mechanism under the law and because there is no such thing as the "same violation" under different federal and state laws.

l. 19.15.5.10(E) NMAC: The new provisions include procedures for adjudications under this rule in the event that the informal resolution process is not successful.

m. 19.15.5.10(E)(1) NMAC: These general provisions identify the Division and the alleged violator, who may appear pro se or be represented by counsel, as parties to these matters and prohibit participation by additional parties. They also establish standards for continuances, the computation of time, rules regarding the filing of pleadings, and states that the Rules of Evidence and Civil Procedure may be applied.

n. 19.15.5.10(E)(2) NMAC: These provisions outline the procedures prior to a hearing arising from an NOV or TCO. The Division is required to docket unresolved matters after the informal resolution period has expired. The alleged violator is then required to file an answer within 10 days after the notice of docketing is served. The provision requires the assignment of a hearing examiner, who is authorized to hold prehearing conferences to resolve procedural and evidentiary issues. The provision also requires the parties to submit prehearing statements and written motions, and establishes the procedures for subsequent motion practice. Based on discussions with NMOGA, the Division proposed that the notice of docketing include the factual basis for the alleged violation and proposed sanction. The Division also recommended that the term "proposed" be utilized before sanction or civil penalty for clarity. Finally, the Division recommended language clarifying the prohibition of ex parte communications with the hearing examiner as well as the required deadline for prehearing statements and information within the statements related to witnesses.

o. The Division rejected a provision proposed by IPANM that authorizes the hearing examiner to shorten the deadlines under this rule in order to conduct a hearing as expeditiously as possible.

p. 19.15.5.10(E)(3) NMAC: This new provision outlines procedures for hearings under this rule. It contains common administrative procedures for adjudications including those related to testimony and cross-examination as well as the admission of exhibits and the burden of persuasion.

q. 19.15.5.10(E)(4) NMAC: This new provision outlines requirements of the Hearing Examiner and Division Director after conducting a hearing under this rule. The rule requires that a transcript be prepared and permits the Director to request a recommended decision

from the hearing examiner. It also requires the Director to issue a final order included facts, law, and ordered sanctions. The Division rejected proposed language requiring the Director to request a recommended decision in every case because this creates an unnecessary burden on the Division and is not required by the Act.

r. 19.15.5.10(F) NMAC: This new provision recognizes a party's right to a *de novo* appeal from a decision of the Division to the Commission. This provision permits the parties to stipulate to issues and to the admission of all or part of the Division hearing record in order to expedite the Commission hearing process. The Division agreed with NMOGA's proposal to remove the Commission's authority to appoint a hearing examiner because the statute already contained that authority.

s. 19.15.5.10(G) NMAC: Based on discussions with IPANM and NMOGA, the Division recommended that a provision be added which explicitly authorized a party to apply for rehearing pursuant to NMSA 1978, Section 70-2-25, thereby providing a clear path for an appeal to the District Court.

t. 19.15.5.10(H) NMAC: This new provision requires that the payment of a civil penalty imposed under this rule no later than 30 days after the director serves the final order. Based on discussions with NMOGA, the Division recommended that this provision be amended to permit a stay of the payment of a civil penalty if the party files an appeal with Commission or a district court. However, the Division rejected proposed language provided by IPANM which extended the repayment period to 35 days and required that the alleged violator be refunded if they were successful on appeal. The Division asserted that there is no mechanism to refund a penalty paid into the general fund and that the Division's amendments to the proposed language addresses IPANM's concerns and is easier to administer.

u. 19.15.5.10(I) NMAC: This new provision allows the parties to settle a matter after a hearing has commenced. The Division asserts that the provision will encourage resolutions whenever possible, which is consistent with the Act.

v. 19.15.5.10(J) NMAC: This new provision codifies the Division reporting and publication requirements found in NMSA 1978, Section 70-2-31.1.

w. 19.15.5.10(K) NMAC: This new provision retains the right of the Division to pursue actions otherwise authorized by the Act.

12. During cross-examination by NMOGA, Mr. Wade was asked to describe the process for issuing a NOV and conducting the informal review process. Mr. Wade responded that the proposed rule changes describe the process for issuing and resolving a NOV, but that the specific process for conducting a negotiation depends on the parties involved, and should not be specified in the rule. He also observed that the Division always provides the name of a Division employee in correspondence so that the recipient knows who it can contact for more information.

13. IPANM presented Paul Ragsdale as a witness. Mr. Ragsdale is an operations manager for Strata Production in Roswell, New Mexico with over 30 years of oil operation

experience. Mr. Ragsdale testified that he believes that no operator wants to be out of compliance and that, in his experience, safety and compliance is the top priority for most operators. He stated that the company's wells are monitored daily and that they meet all reporting requirements when necessary. He also stated that safety is a priority and for that reason, as well as economic reasons, things must be repaired as quickly as possible. For these reasons, he does not think that the proposed fines are going to change his attitude regarding compliance because his company already does a good job in compliance. He spoke briefly about "stripper wells" and his concern that these proposed rules will make compliance even more difficult when operating these wells. He believes that stripper wells may no longer be economical and will result in waste. He expressed great concern with the Division's ability to timely implement and enforce the proposed rules. Although he stated that he had nothing to do with the proposed amendments filed by IPANM, he did comment on the proposed provisions relating to penalties imposed by other government entities. He stated that BLM has similar provisions in its rules that prohibit redundant penalties for identical violations and that BLM generally does not impose fines immediately after the issuance of an NOV. During cross-examination from Mr. Marker, Mr. Ragsdale asserted that the discretion provided to the Division in the proposed rule makes him nervous as it is too much discretion to provide a regulatory agency.

14. IPANM also provided recommended amendments to the proposed rule as part of its pre-hearing statement and participated by presenting a witness, cross-examining the Division's witness, and presenting oral statements to the Commission regarding the proposed rule and IPANM's proposed amendments to the rule. IPANM's attorney noted that the witness who could testify about the proposed tables was unable to attend due to illness. IPANM's attorney argued that the tables were contemplated by the Legislatures charge to the Commission to adopt procedures for imposition of penalties and that, if its proposed tables were inadequate, the Commission should ask the Division to work with the parties to formulate tables before adoption of a rule. IPANM's attorney asserted that the proposed provision prohibiting penalties if the alleged violator resolved or cured the violation during the informal review process should be adopted because the goal of the rules should be compliance.

15. NMOGA participated in the hearing through counsel by presenting a pre-hearing statement with proposed amendments, cross-examining witnesses, and presenting oral statement to the Commission regarding the proposed rule. NMOGA's counsel expressed general agreement with the adoption of the rule, but outlined some of the concerns that NMOGA has with the rule in the proposed form. He expressed concern that the rule creates a strict liability standard for violations and reiterated NMOGA's proposed change to create a prudent operator "awareness" standard. He also asserted that NMSA 1978, Section 70-2-31(E) requires that the rules provide defined procedures for the issuance of NOVs, and the conduct of informal review and resolution proceedings.

16. Mr. Marker participated in the hearing by presenting a pre-hearing statement, cross-examining witnesses, and providing narrative testimony to the Commission. In his pre-hearing statement Mr. Marker raised objections to the proposed rule. He stated that the proposed rule denies individuals due process prior to imposing penalties. He also requested that the Commission continue the hearing due to alleged insufficient notice and the pendency of a related district court

case in which he is a party. During his hearing testimony, Mr. Marker reiterated his written objections and also expressed significant discontent with the proposed rule and the negative impact they will have on small operators such as himself. Mr. Marker asserted that he was concerned about the proposed rule because it imposes penalties even if the operator is unaware of the violation. Mr. Marker provided anecdotes related to this concern which involved individuals tampering with oil equipment which created a problem with one of his wells. In that instance, Mr. Marker stated that he would not be aware of the problem until he went to the well site. He stated that it would be him and not the individual tampering with the equipment that would be stuck with the fine. He stated that the amount of things that can go wrong on a well is immeasurable and that whatever can go wrong, will go wrong. He reiterated his concerns with giving regulators the amount of discretion that the proposed rule does and that the Division is targeting operators like him. He also stated that the proposed rule does not tell operators what will happen to them if they fail to comply. Mr. Marker also expressed opposition to the proposed rule because it created criminal penalties

17. The Commission heard public comment from Bruce Baizel, an energy program director from Earthworks. Mr. Baizel has been conducting oil and gas production oversight for several years and in several states. Mr. Baizel indicated that Earthworks was one of the “instigators” of the statute authorizing the proposed rules and expressed support for the proposed rule with the suggested amendments from the Division. In response to previous testimony, Mr. Baizel provided some context regarding the use of fine tables in other states stating that most states do not put those tables into rule or regulations. He asserted that the Division is the most qualified to determine which factors should be considered when calculating appropriate fines. He provided statistics regarding the spills between 2008 and 2018 noting that 50 percent of spills are through corrosion and mechanical failure rather than human factors. He also stated that there is a great deal of variability between operator compliance with some having as many as 1700 spills and others with 250 or less. For these reasons, Mr. Baizel asserted that it was important to incentivize inspection to discover damage as soon as possible. He also expressed support of the penalty costs as a deterrent measure as well as the fines in order to help offset the cost of cleanup by the State.

18. The Commission heard public comment from Buddy Delay who expressed his opposition to the proposed rule and concerns with his ability to successfully maintain his oil operations under the regulatory conditions that exist today. He disagreed with the Division’s assertion that the proposed rules were necessary because there were hundreds of NOVs in the past few months as he believes that those violations were related to financial assurances and reporting rather than threats to the environment. He stated that the Division already has enforcement mechanisms but rarely uses them. Finally he asserted that the number of operators in the state is diminishing and that he cannot divest his state assets because he is unable to find a potential buyer.

19. Written Comments. The Commission received written comments from several individuals and entities before and during the hearing. The Commission reviewed these comments as part of the record of this hearing. A synopsis of each written comment is below:

a. Dugan Production Corporation provided comment prior to the hearing which generally states that the proposed rule was unnecessary because the Division currently has significant authority to require compliance by current operators including termination and

cancellation of permits. The comment also states that the penalties should not be mandatory but should seek informal resolutions without penalties. The comment also addressed the damage that the rule will do to small independent operators including the slow elimination of small independent operators in the state.

b. Louis F. Fulton of CFM Oil Company submitted comment prior to the hearing which states that the proposed rule will deny ones right to due process and is designed to target small businesses engaged in the production of oil. He also states that this rule and actions of the Division are geared towards the destruction of independent oil producers.

c. Carolyn R. Beall submitted written comment prior to the hearing which states that the proposed rules will hurt the oil and gas industry, which is integral to the success of the state as a whole. She also states that the Division should choose not to burden the industry because it will have a negative effect on the economy of New Mexico.

d. Betty R. Young submitted written comment during the hearing which praises the oil and gas industry for its contribution to the state's general fund and expresses opposition to the proposed rule because it will diminish the revenue stream from the industry.

e. George Sharp of Merrion Oil and Gas submitted written comment during the hearing which expresses concerns regarding the potential abuse of administrative penalties by overzealous regulators and the possibility of daily penalties even if the operator is unaware of the violation. He further states that the purpose of the penalties should be to discourage operators who try to circumvent the rules and that the rules should not punish operators who make mistakes with no intent to do so. He also suggests that these rules should only permit penalties when the Division finds that an operator purposefully disregards the rules.

f. Thomas M. Beall submitted written comment during the hearing which expresses his objection to proposed rules that will allow the Division to administer monetary penalties for violations indicating that this new authority is an overreach. He also states that the Division currently has sufficient authority to ensure compliance. He concludes by stating that the new rules will have a negative impact on the production and development of oil and gas in the state to the financial detriment of New Mexico.

g. Ronald Hillman of Epic Energy submitted written comment during the hearing which states his opposition to the proposed rule in its current form as the rule exceeds the authority granted to the Division by NMSA 1978, Section 70-2-31. He states that the rule permits the Division to impose penalties prior to holding a hearing to determine if a violation occurred and that any such rule should be revised to conform to the statute.

h. Paul Thompson of Epic Energy, LLC submitted written comment during the hearing which states that the proposed rules are unnecessary because the Division's prior authority would be effective in ensuring compliance and because the Attorney General could force compliance in cases where operators knowingly and willfully violated the Act. Mr. Thompson suggests that the Division create a table specifying the fines for specific violations and that the rule should not mandate those fines when the operator and Division reach an agreement. He also

recommends that no penalty should be imposed unless the operator was aware of the violation and that the rule should permit appeal of any sanction to the District Court.

20. Deliberation and Action. The Commission began deliberations regarding the proposed rule changes immediately after the hearing on January 2, 2020. The Commission reached a tentative decision on the proposed rule changes, and requested that Commission Counsel prepare a proposed order for its review and approval. At the meeting on January 16, 2020, the Commission reviewed the proposed rule changes and the proposed order, and adopted the rule changes as provided in attached Exhibit A for the reasons set forth herein.

21. Reasons for Adopting Rule Changes. The Commission finds that the 2019 amendments to the Act require changes to the Commission's compliance and enforcement rules. The proposed rule changes are a reasonable implementation of the statutory changes and are supported by substantial evidence. The proposed rule changes are necessary to bring 19.15.5 NMAC into compliance with the statutory mandate, which requires that the Division enforce the Act and corresponding rules through specific actions and procedures including the imposition of civil penalties. The Commission finds that the proposed rule changes, as modified, create a necessary and appropriate enforcement scheme that satisfies the compliance and enforcement requirements now present in the Act. The proposed rule changes provide adequate, clear, and detailed due process to potential violators in the event that the Division determines that a violation has occurred and also provide for the informal resolution of violations prior to proceeding with a hearing as required by the Act.

22. The Commission finds that the changes to the proposed rule in 19.15.5.3 and 19.15.5.8 NMAC are necessary to clarify the authority of the Division and Commission as it relates to these rules.

23. The Commission finds that the changes to 19.15.5.9 NMAC are necessary to conform with amendments to NMSA 1978, Section 70-2-31 and provide necessary clarification of the requirements for compliance and the identification of inactive wells.

24. The Commission finds that changes to 19.15.5.10 NMAC are necessary to conform with the amendments to NMSA 1978, Section 70-2-31. These changes appropriately repeal and replace the existing compliance provisions in favor of enforcement procedures consistent with the Act. These procedures are sufficient to meet statutory mandates and provide appropriate due process to potential violators. Additionally, the adjudicatory procedures are generally consistent with general practices of administrative adjudications, as well as prior adjudicatory practices of the Division and Commission. Specifically, the Commission took the following actions related to the proposed section 19.15.5.10 NMAC:

a. The Commission accepts the proposed rule changes related to enforcement that provide the Division authorization to issue TCOs and NOV's and to commence a civil action in district court as required by the Act. These rule changes also provide for sanctions consistent with the Act, including civil penalties.

b. The Commission elects to amend provisions related to the issuance and content of an NOV to require the Division to explicitly indicate that the Division will take into consideration the alleged violators good faith efforts to comply with applicable requirements when calculating a potential penalty, and identify procedures to initiate the informal review process. The Commission also altered the proposed rule to retain the possibility of informal resolution at any point during the proceedings pursuant to the intended purpose of the Act and these rules.

c. The Commission accepts the suggested change to the proposed rule requiring that the NOV or TCO also be served by electronic mail if possible.

d. The Commission accepts the proposed language simplifying the civil penalty provision and the clarifying the prohibition on ex parte communications.

e. The Commission accepts the suggested changes to the proposed rules requiring the Division to identify the factual and legal basis of the alleged violation in the varying notices contemplated by these rules.

f. The Commission accepts the use of “proposed sanction” or “proposed civil penalty to clarify that penalties are not imposed until after a hearing.

g. The Commission accepts the suggested change to shorten the deadline to file the pre-hearing statement from 15 to 7 days prior to the hearing in order to allow appropriate preparation for the hearing, and to clarify the type of information required in the pre-hearing statement.

h. The Commission accepts, in concept, the additional provision proposed by IPANM authorizing the Hearing Examiner, upon a showing of good cause, to expedite the hearing process for hearings arising from a TCO. The Commission altered IPANM’s proposed language for clarity and consistency with the entire rule and to conform to the mandatory language conventions set by the State Records Center.

i. The Commission accepts, in concept, the provision proposed by NMOGA requiring the Hearing Examiner to draft a recommended decision for the Division Director in every case that goes to hearing.

THE COMMISSION CONCLUDES THAT:

1. The Commission has jurisdiction, under the Oil and Gas Act, NMSA 1978, §§ 70-2-1 to -38, over the parties and subject matter of this case.

2. The Commission has legal authority, under the Oil and Gas Act, to enact the proposed rule changes.

3. The Commission provided due public notice and an opportunity for the public to provide comments regarding the proposed rule change. A public hearing was held and reasonable opportunity was provided for all persons present to provide testimony, evidence and exhibits.

4. All Commissioners were present at the public hearing and considered all the evidence presented during the hearing including the proposed amendments submitted by the parties. The Commission deliberated after the hearing and adopted the rule changes as stated above.

5. The Commission concludes that there is substantial evidence in the record to support the proposed rule changes that these rule changes are within the authority of the Commission under the Oil and Gas Act, and that these rule changes are reasonable and further the goals of the Oil and Gas Act.

IT IS THEREFORE ORDERED THAT:

The proposed changes to 19.15.5 NMAC, as shown on attached Exhibit A, are hereby approved by the Commission. The adoption of the rule changes will be final upon the later of (a) the action, or deemed action, of the Commission on a rehearing application filed pursuant to NMSA 1978, § 70-2-25, or (b) 20 days from the date of this order if no rehearing application is filed. The rule change shall not be filed with the state records administrator until the rule change is adopted and then must be filed within 15 days after the adoption. If no rehearing is required by the Commission, this Order shall serve as the “concise explanatory statement” required by NMSA 1978, § 14-4-5.5 (2017).

DONE at Santa Fe, New Mexico, on this 16th day of January 2020.



**STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION**

DR. THOMAS ENGLER, P.E., MEMBER

JORDAN KESSLER, Esq., MEMBER

ADRIENNE SANDOVAL, M.E., CHAIR

SEAL

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

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

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

[19.15.5.3 NMAC – N, 12/1/2008, A, X/XX/XXXX]

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

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

19.15.5.9 COMPLIANCE:

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

- (1) currently meets the financial assurance requirements of 19.15.8 NMAC;
- (2) is not subject to a division or commission order, issued after notice and hearing, finding the operator to be in violation of an order requiring corrective action;
- (3) does not have a penalty assessment that is unpaid more than ~~[70]~~ 30 days after issuance of the order assessing the penalty; and
- (4) has no more than the following number of wells out of compliance with 19.15.25.8 NMAC that are not subject to an agreed compliance or final order setting a schedule for bringing the wells into compliance with 19.15.25.8 NMAC and imposing sanctions if the schedule is not met:

- (a) two wells or fifty percent of the wells the operator operates, whichever is less, if the operator operates 100 wells or less;
- (b) five wells if the operator operates between 101 and 500 wells;
- (c) seven wells if the operator operates between 501 and 1000 wells;

and

- (d) 10 wells if the operator operates more than 1000 wells.

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

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

~~D. Orders requiring corrective action.~~

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

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

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

~~_____ E. Penalty assessments.~~

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

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

~~_____ F] B. Inactive wells.~~

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

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

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

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

~~_____ [(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.~~

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

~~[19.15.5.9 NMAC - Rp, 19.15.1.40 NMAC, 12/1/2008; A, 11/30/2016, A, xx/xx/xxxx]~~

19.15.5.10 [COMPLIANCE PROCEEDINGS:] ENFORCEMENT:

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

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

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

~~_____ (2) assessment of civil penalties pursuant to NMSA 1978, Section 70-2-~~

~~31(A); Subsection A of Section 70-2-31 NMSA 1978;~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~_____ F. _____ Nothing in 19.15.5.10 NMAC precludes the division from bringing other actions provided for in the Oil and Gas Act, NMSA 1978, Sections 70-2-1 through 70-2-38, including but not limited to the following: suit for indemnification pursuant to NMSA 1978, Section 70-2-14(E) or NMSA 1978, Section 70-2-38(B); an action through the attorney general with respect to the forfeiture of illegal oil or illegal gas pursuant to NMSA 1978, Section 70-2-32; an injunction under NMSA 1978, Section 70-2-28; or collection of penalties pursuant to NMSA 1978, Section 70-2-31(A).~~

~~[19.15.5.10 NMAC—Rp, 19.15.14.1227 NMAC, 12/1/2008]]~~

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

(1) issuing a temporary cessation order if it determines that the alleged violation is causing or will cause an imminent danger to public health or safety or a significant imminent environmental harm. The temporary cessation order shall remain in place until the

earlier of when the division determines that the alleged violation is abated or 30 days, unless a hearing is held before the division and a new order is issued;

(2) issuing a notice of violation; or

(3) commencing a civil action in district court.

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

(1) a civil penalty;

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

(3) plugging and abandonment of a well;

(4) remediation and restoration of a well location and associated facilities, including the

removal of surface and subsurface equipment and other materials;

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

(6) forfeiture of financial assurance;

(7) shutting in a well or wells; and

(8) any other remedy authorized by law.

C. Notice of violation.

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

(a) the identity of the alleged violator;

(b) the nature and 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;

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

(d) the sanction(s) available for the alleged violation, the sanction(s) proposed by the division, and a statement that the division will take into consideration the violators good faith efforts to comply with the applicable requirements;

(e) the availability of a process for informal review and resolution of the alleged violation, and the procedure to initiate the informal review process, including the contact information of the appropriate division employee;

(f) a statement that if the notice of violation is not informally resolved within 30 days of service, the division will hold a hearing, but that the hearing shall not prohibit the parties from negotiating and settling the notice of violation at any time; and

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

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

(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.

D. Civil penalties. 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. 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.

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.

(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 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 division issues 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 seven 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) a statement identifying the opinions and factual assertions supporting each witness' testimony;

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

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

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

(g) **Motions.**

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

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

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

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

(v) **Reply.** No later than 10 days after service of a response to

an opposed motion, the moving party may file a reply.

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

(h) **Shortening Deadlines.** On the written request of the alleged violator showing good cause, the hearing examiner may shorten the deadlines specified in Paragraph 2 of Subsection E of 19.15.10 NMAC to conduct the hearing on the division's application for a temporary cessation order as expeditiously as possible. If the division opposes the request to shorten deadlines, the procedures for opposed motions set forth in Subparagraph (g) of Paragraph 2 of Subsection G of 19.15.5.10 NMAC shall not apply and the hearing examiner shall decide the request, with or without hearing, as quickly as practicable.

(3) **Hearing procedures.**

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

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

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

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

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

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

(b) **Recommended decision.** The hearing examiner shall prepare a recommended decision for review by the director.

(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.

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 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.

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

H. Payment of civil penalty. Respondent shall pay the full amount of the civil penalty assessed in the final order (i) no later than 30 days after the director serves the final order, or (ii) if respondent files a notice of appeal to the commission or the 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.

I. 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.

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.

K. Reservation. Nothing in 19.15.5.10 NMAC precludes the division from bringing any other action and seeking any relief allowed by the Oil and Gas Act.
[19.15.5.10 NMAC - Rp, 19.15.14.1227 NMAC, 12/1/2008, A, xx/xx/xxxx]