

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

IN THE MATTER RULEMAKING HEARING
ON THE APPLICATION OF NEW MEXICO OIL
CONSERVATION DIVISION TO
AMEND 19.15.5 NMAC.

CASE NO. 20895

Larry Marker
Applicant

APPLICATION FOR REHEARING

Pursuant to 70-2-25 NMSA 1978 Larry Marker (applicant) submits this Application for a Rehearing of final Order No. R-20895-A issued January 16th 2020.

Applicant files this application setting forth the claim that Regulations 19.15.5 NMAC Amended by Order No. R-20895-A, are;

- (1) Arbitrary, capricious and an abuse of discretion.
- (2) Are not supported by substantial evidence in the record.
- (3) Are not in accordance with law.

Claim No. 1

1-Applicant submitted a Petition requesting the Commission hold in abeyance the issuance of a final order on January 13th 2020 outlining several but not all the reasons he was petitioning the Commission to hold final order in abeyance.

2-Applicant filed Petition in anticipation of the Hearing of the Commission to be held January 16th 2020.

3-The Commission did review and consider Applicants Petition denying the Petition with Order No. R-20985-B

4-The commission was unable to hear and consider the totality of the testimony and evidence proposed.

5-The IPANM had properly proposed as part of the prehearing statement a table of violation specific fines for consideration in the rulemaking hearing held Jan 2nd 2020.

6-The IPANM had properly notified the Commission of two witnesses presenting testimony in support of the IPANM's proposals.

7-The IPANM did prior to the date of the hearing notify the Commission that one of the witnesses was ill and would not be available to testify.

8-The Commission did during the hearing request more information related to the violation specific fines.

9-The Commission was informed that the witness "ill with the flu" was responsible for the research, construction and testimony related to that portion of the IPANM evidence.

10-Each of the Commissioners expressed a desire for more details and information on the violation specific fines.

11-Counsel for the IPANM during the hearing was requested by the Commission to provide at least some information on the violation specific penalties.

12-Counsel for the Oil Conservation Commission objected to IPANM's counsel participation as a witness.

13-The attempt was abandoned.

14-The rules of administrative procedure NMAC 19.15.3.12, A. (2) (g) (h) provides the Commission the opportunity to hold the record open for further submittals and arguments.

15-The Commission by rule had the option to hold the record open and reschedule a hearing until IPANM witness was able to provide her testimony.

16-The Commission chose to disregard the lack of evidence, information and testimony even after clearly and specifically expressing a need for more information on that subject.

17-The witness and her testimony were obviously a critical element of this process unknown is the complete affects this information should or could have had on the proceedings.

18-The Commission by their own admission of needing more information on the violation specific penalties indicate the subject order was not adequately supported.

19-The Commission abused its discretion by moving forward with the promulgation of the amending of the subject regulations regardless of the known and expressed deficiencies in the evidence and testimony relevant.

Claim No. 2

20-The amending of the subject regulations is illegal until the final disposition of District Court Case No. D-504-CV-2019-0038.

21-Petitioner cites *Article IV Section 34 of the Constitution of the State of New Mexico*. “No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.”

22-Section 34 also applies to administrative agencies see, *Pineda v. Grande Drilling Corp.*, 1991-NMCA-004, 111 N.M. 536, 807 P.2d 234.

23-Section 34 limits ability of legislature to enact legislation that affects pending litigation. *State v. Stanford*, 2004-NMCA-071, 136 N.M. 14, 94 P.3d 14.

24-The Oil Conservation Commission is bound by law to postpone the enactment of any regulations until the final disposition of Case No. D-504-CV-2019-00338.

25-Established law clearly states that “No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.” please See *Hillelson v. Republic Ins. Co.*, 96 N.M. 36, 627 P.2d 878 (1981)

Claim No. 3

26-The proposed penalties will also directly affect the subject matter of Case No. A-1-CA-37860 pending in the Court of Appeals.

27-The Commission stated that a large number of Notices of Violations were recently issued.

28- A large portion of those were for violations for non-compliance of financial assurance.

29-Any penalties assessed or sanctions implemented for violations of financial assurance will be issued on regulations that are the subject of a pending appeal.

30-No known procedural mechanism exists to repeal sanctions or refund penalties should the petitioner prevail in the Court of appeals.

31-The enactment of regulations directly affecting the rules of financial assurance are clearly a violation of *Article IV Section 34 of the Constitution of the State of New Mexico*. *"No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case."*

32-Section 34 also applies to administrative agencies see, *Pineda v. Grande Drilling Corp.*, 1991-NMCA-004, 111 N.M. 536, 807 P.2d 234.

33-The Oil Conservation Commission is bound by law to postpone the enactment of any regulations until the final disposition of Case No.A-1-CA-37860.

34-Established law clearly states *that "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case."* please See *Hillelson v. Republic Ins. Co.*, 96 N.M. 36, 627 P.2d 878 (1981)

Claim No. 4 General issues to consider.

35-The pending case in District Court challenges the validity of the statutes authorizing the Commissions amending of the subject regulations.

36-The pending case in District Court also contains claims that the statutes as passed violate several Constitutional provisions.

- 37-The promulgation of regulations that are amended with challenged statutory authority is futile until the completion of the judicial process.
- 38-The maxim of equity applied requires the exhaustion of judicial procedures be provided by the claimant of exhaustion of administrative procedures.
- 39-The Commission does not have jurisdiction of legal matters beyond the Oil and Gas Act that would include decisions on constitutional claims.
- 40-Procedural due process requires a fair and impartial hearing before a trier of fact who is disinterested and free from any form of bias or predisposition regarding the outcome of the case. The question is not if the commission is bias but would the average person be tempted to come to a decision that is bias.
- 41-The volume of potential constitutional violations made possible by the amended regulations is staggering.
- 42-The rulemaking hearing did reveal the intentions of the division to apply sanctions “as far back as can be proven”.
- 43-The Mendoza-Martinez framework as ‘the test’ in determining whether a statute is intended as punitive rather than remedial. Some the sanctions specified in these regulations when subjected to this test are construed as punitive.
- 44-Punitive sanctions require a higher standard of proof and substantially more protections for the accused.
- 45-The amended rules do not require the basic due process provision of mandatory notice and opportunity.
- 46-The regulations as amended are vague and ambiguous.
- 47-The volume of potential suites against the Commission, Division and State is staggering as well. This fact was mentioned by IPANM counsel during the hearing.
- 48-The Commissions refusal to fully flesh out the totality of the evidence and testimony and consider the full ramifications of the either of the pending judicial proceedings is nonsensical and on its face an abuse of discretion.

Conclusion

Applicant is requesting the Commission withdraw its Order No. R-20895-A and provide a rehearing of amending the subject regulations until statutory authority is ripe.

Respectfully submitted
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Served via Electronic Mail January 23rd 2020