



## Attorney General of New Mexico

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### **PROPOSAL TO AMEND OIL AND GAS ACT TO PROVIDE ADEQUATE ENFORCEMENT FRAMEWORK**

The New Mexico Oil and Gas Act was originally enacted in 1935. A number of the Act's enforcement mechanisms, some dating from 1935, are outdated and ineffective.

Further, in 2009, the New Mexico Supreme Court held that the New Mexico Oil Conservation Division (OCD) is not authorized under the Act to administratively assess civil penalties against violators, and that to impose penalties, a lawsuit must be brought. *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 25, 146 N.M. 24, 206 P.3d 135.

Since the *Marbob* decision, the number of compliance orders issued by OCD has decreased dramatically: from 2001 to the *Marbob* decision 431 compliance orders were issued; since *Marbob* 91 compliance orders have been issued. Since *Marbob*, OCD stopped assessing penalties; from 2001 to *Marbob*, OCD assessed \$2,404,500 in penalties. <http://www.ocdimage.emnrd.state.nm.us/imaging/AEOrderCriteria.aspx>.

Oil and gas development and production are important economic activities for New Mexico, which should be conducted in an environmentally responsible manner. This requires an adequate enforcement framework. See State Review of Oil and Natural Gas Act Regulations, Inc. 2013 Guidelines, §§ 1.1, 1.2, 1.3.1(f), 4.1, 4.1.3.

Toward this end, the attached proposes to amend the New Mexico Oil and Gas Act through the following:

1. **Authorizes OCD to bring administrative compliance orders** and retains its authority to bring a lawsuit in court. Such an election of remedies mirrors other state environmental statutes. Many environmental violations are more efficiently addressed, both for the respondent and the enforcement agency, through an administrative compliance order rather than through court.
2. **Eliminates the requirement that a civil violation be "knowing" and "willful."** Proving that a violation is "knowing" and "willful" is a criminal standard that erects an unreasonably high barrier to civil enforcement.
3. **Establishes a \$15,000 per day civil penalty per violation** instead of the \$1,000 per day penalty established in 1935. In today's dollars, \$1,000 from 1935 represents \$17,134.40. <http://www.dollartimes.com/calculators/inflation.htm>. The proposed penalty amount is consistent with those in other state environmental statutes, and establishes an effective specific and general deterrent amount.
4. Allows respondents to challenge a compliance order through a **public hearing before the Oil Conservation Commission (OCC)**, and for **judicial review of an OCC decision in the court of appeals**.
5. Allows for **penalties to be placed in the oil and gas reclamation fund** (instead of general fund).
6. **Deletes the provision in citizen suit section that requires OCD to be substituted for private party if a private party brings a successful suit.** Such a provision is not consistent with citizen suit provisions in other state or federal statutes.



HOUSE BILL \_\_\_

52nd legislature - STATE OF NEW MEXICO - first session, 2014

INTRODUCED BY

\_\_\_\_\_  
AN ACT

RELATING TO OIL AND GAS; AMENDING SECTIONS OF THE OIL AND GAS ACT CONCERNING POWERS OF THE OIL CONSERVATION COMMISSION AND THE OIL CONSERVATION DIVISION, CIVIL AND CRIMINAL PENALTIES, PERMITS FOR THE DISPOSITION OF WASTE, AND APPEALS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 70-2-14 NMSA 1978 (being Laws 1977, Chapter 237, Section 3, as amended) is amended to read:

"70-2-14. REQUIREMENT FOR FINANCIAL ASSURANCE.--

A. Each person, firm, corporation or association [~~who~~] that operates any oil, gas or service well within the state shall, as a condition precedent to drilling or producing the well, furnish financial assurance in the form of an irrevocable letter of credit or a cash or surety bond or a well-specific plugging insurance policy pursuant to the provisions of this section to the [~~oil conservation~~] division [~~of the energy, minerals and natural resources department~~] running to the benefit of the state and conditioned that the well be plugged and abandoned in compliance with the rules of the [~~oil conservation~~] division. The [~~oil conservation~~] division shall establish categories of financial assurance after notice and hearing. Such categories shall include a blanket plugging financial assurance in an amount not to exceed fifty thousand

dollars (\$50,000) and one-well plugging financial assurance in amounts determined sufficient to reasonably pay the cost of plugging the wells covered by the financial assurance. In establishing categories of financial assurance, the [~~oil conservation~~] division shall consider the depth of the well involved, the length of time since the well was produced, the cost of plugging similar wells and such other factors as the [~~oil conservation~~] division deems relevant. In addition to the blanket plugging financial assurance, the [~~oil conservation~~] division may require a one-well financial assurance on any well that has been held in a temporarily abandoned status for more than two years. All financial assurance shall remain in force until released by the [~~oil conservation~~] division. The [~~oil conservation~~] division shall release financial assurance when it is satisfied the conditions of the financial assurance have been fully performed.

B. If any of the requirements of the Oil and Gas Act or the rules [~~promulgated~~] or permits issued pursuant to that act have not been complied with, the [~~oil conservation~~] division, after notice and hearing, may order any well plugged and abandoned by the operator or surety or both in accordance with division rules. If the order is not complied with in the time period set out in the order, the financial assurance shall be forfeited.

C. When any financial assurance is forfeited pursuant to the provisions of the Oil and Gas Act or rules promulgated pursuant to that act, the director of the [~~oil conservation~~] division shall give notice to the attorney general, who shall collect the forfeiture without delay.

D. All forfeitures shall be deposited in the state treasury in the oil and gas reclamation fund.

E. When the financial assurance proves insufficient to cover the cost of plugging oil and

gas wells on land other than federal land and funds must be expended from the oil and gas reclamation fund to meet the additional expenses, the [~~oil conservation~~] division is authorized to bring suit against the operator in [~~the~~] district court [~~of the county in which the well is located~~] for indemnification for all costs incurred by the [~~oil conservation~~] division in plugging the well. All funds collected pursuant to a judgment in a suit for indemnification brought under the provisions of this section shall be deposited in the oil and gas reclamation fund.

F. An operator required to file financial assurance for a well pursuant to this section is considered to have met that requirement if the operator obtains a plugging insurance policy that includes the specific well and that:

- (1) is approved by the insurance division of the public regulation commission;
- (2) names the state of New Mexico as owner of the policy and contingent beneficiary;
- (3) names a primary beneficiary who agrees to plug the specified wellbore;
- (4) is fully prepaid and cannot be canceled or surrendered;
- (5) provides that the policy continues in effect until the specified wellbore has been plugged;
- (6) provides that benefits will be paid when, but not before, the specified wellbore has been plugged in accordance with rules of the [~~oil conservation~~] division in effect at the time of plugging; and
- (7) provides benefits that are not less than an amount equal to the one-well financial assurance required by [~~oil conservation~~] division rules.

G. If, subsequent to an operator obtaining an insurance policy as provided in this section, the one-well financial assurance requirement applicable to the operator's well is

increased, either because the well is deepened or the rules of the [~~oil conservation~~] division are amended, the operator is considered to have met the revised requirement if:

- (1) the existing policy benefit equals or exceeds the revised requirement;
- (2) the operator obtains an amendment increasing the policy benefit by the amount of the increase in the applicable financial assurance requirement; or
- (3) the operator obtains financial assurance equal to the amount, if any, by which the revised requirement exceeds the policy benefit."

Section 2. Section 70-2-28 NMSA 1978 (being Laws 1935, Chapter 72, Section 19, as amended) is amended to read:

"70-2-28. ADMINISTRATIVE AND CIVIL ACTIONS FOR VIOLATIONS, PENALTIES, JUDICIAL REVIEW.—

A. Whenever it [~~shall appear~~] appears that any person is violating or threatening to violate any statute of this state with respect to the conservation of oil and gas or both or any provision of [~~this~~] the Oil and Gas Act or any rule, [~~regulation or~~] order [~~made thereunder~~] or permit issued pursuant to that act, the division may:

(1) issue a compliance order for appropriate relief, including compliance and corrective action immediately or within a specified time period, a civil penalty, and suspension or termination of the permit allegedly violated; or

(2) commence a civil action in district court for appropriate relief, including injunctive relief, a civil penalty, and suspension or termination of the permit allegedly violated.

B. Any civil penalty shall not exceed fifteen thousand dollars (\$15,000) per day for each violation of an act, rule, order or permit.

C. In assessing a civil penalty, the division shall take into account the seriousness of the violation, any good faith efforts to comply with the applicable requirements and other relevant considerations.

D. Any compliance order issued by the division pursuant to this section shall become final unless, no later than thirty days after the compliance order is served, any person named in the compliance order submits a written request to the commission for a public hearing.

E. The commission may appoint an independent hearing officer to preside over the public hearing. The commission shall consider and weigh only the evidence contained in the record before the commission. Based on a review of the evidence, the arguments of the parties, and any recommendations of a hearing officer, the commission shall sustain, modify or reverse the action of the division. The commission shall enter a decision with findings of fact and conclusions of law, and shall keep a record of the review.

F. Penalties collected pursuant to this section shall be deposited in the oil and gas reclamation fund.

G. A person who is adversely affected by a decision of the commission pursuant to this section may appeal to the court of appeals. All such appeals shall be upon the record made before the commission and shall be taken to the court of appeals within thirty days after issuance of the decision by the commission.

H. Upon appeal, the court of appeals shall set aside the commission's action only if it is found to be:

- (1) arbitrary, capricious or an abuse of discretion;
- (2) not supported by substantial evidence in the record; or
- (3) otherwise not in accordance with law.

~~[through the attorney general shall bring suit against such person in the county of the residence of the defendant or in the county of the residence of any defendant, if there be more than one defendant, or in the county where the violation is alleged to have occurred for penalties, if any are applicable, and to restrain such person from continuing the violation or from carrying out the threat of violation. In such suit, the division may obtain injunctions, prohibitory and mandatory, including temporary restraining orders and temporary injunctions, as the facts may warrant, including, when appropriate, an injunction restraining any person from moving or disposing of illegal oil or illegal oil product or illegal gas or illegal gas product, and any or all such commodities or funds derived from the sale thereof may be ordered to be impounded or placed under the control of an agent appointed by the court if, in the judgment of the court, such action is advisable.]"~~

Section 3. Section 70-2-29 NMSA 1978 (being Laws 1977, Chapter 255, Section 63) is amended to read:

**“70-2-29. ACTIONS FOR DAMAGES; INSTIUTION OF ACTIONS FOR INJUNCTIONS BY PRIVATE PARTIES.**

**A.** Nothing in this act contained or authorized, and no suit by or against the commission or the division, and no penalties imposed or claimed against any person for violating any statute of this state with respect to conservation of oil and gas, or any provision of this act or any rule, ~~[regulation or]~~ order or permit issued thereunder, shall impair or abridge or delay any cause of action for damages which any person may have or assert against any person violating any statute of the state with respect to conservation of oil and gas, or any provision of this act, or any rule, ~~[regulation or]~~ order or permit issued thereunder. Any person so damaged by the violation may sue for and recover such damages as ~~[he]~~ that person may be

entitled to receive.

B. In the event the division should fail to bring suit to enjoin any actual or threatened violation of any statute of this state with respect to the conservation of oil and gas, or of any provision of this act, or of any rule, ~~[regulation or]~~ order or permit issued ~~[made]~~ thereunder, then any person or party in interest adversely affected by such violation, and who has notified the division in writing of such violation or threat thereof and has requested the division to issue a compliance order or sue, may to prevent any or further violation, bring suit for that purpose after thirty days of notifying the division in the district court of any county in which the division could have brought suit. ~~[If, in such suit, the court holds that injunctive relief should be granted, then the division shall be made a party and shall be substituted for the person who brought the suit, and the injunction shall be issued as if the division had at all times been the complaining party.]~~

Section 4. Section 70-2-31 NMSA 1978 (being Laws 1981, Chapter 362, Section 1) is amended to read:

"70-2-31. CRIMINAL VIOLATIONS OF THE OIL AND GAS ACT--PENALTIES.--

~~[A. Any person who knowingly and willfully violates any provision of the Oil and Gas Act or any provision of any rule, or order issued pursuant to that act shall be subject to a civil penalty of not more than one thousand dollars (\$1,000) for each violation. For purposes of this subsection, in the case of a continuing violation, each day of violation shall constitute a separate violation. The penalties provided in this subsection shall be recoverable by a civil suit filed by the attorney general in the name and on behalf of the commission or the division in the district court of the county in which the defendant resides or in which any defendant resides if there be more than one defendant or in the district court of any county in which the~~

~~violation occurred. The payment of such penalty shall not operate to legalize any illegal oil, illegal gas or illegal product involved in the violation for which the penalty is imposed or relieve a person on whom the penalty is imposed from liability to any other person for damages arising out of such violation.~~

[B.] A. It is unlawful, subject to a criminal penalty of a fine of not more than five thousand dollars (\$5,000) or imprisonment for a term not exceeding three years or both such fine and imprisonment, for any person to knowingly and willfully:

(1) violate any provision of the Oil and Gas Act or any rule, ~~[regulation or order of the commission or the division]~~ order or permit issued pursuant to that act; ~~or~~

(2) do any of the following for the purpose of evading or violating the Oil and Gas Act or any rule, ~~[regulation or order of the commission or the division]~~ order or permit issued pursuant to that act:

(a) make, or cause to be made, any false entry or statement in a form or report required by the Oil and Gas Act or by any rule, ~~[regulation or order of the commission or division]~~ order or permit issued pursuant to that act;

(b) make or cause to be made any false entry in any record, account or memorandum required by the Oil and Gas Act or by any rule, ~~[regulation or order of the commission or division]~~ order or permit issued pursuant to that act;

(c) omit or cause to be omitted from any such record, account or memorandum full, true and correct entries; or

(d) remove from this state or destroy, mutilate, alter or falsify any such form, report, record, account or memorandum; or

(3) aid or abet the commission of any act described in this subsection.

~~[C.]~~ B. For the purposes of Subsection ~~[B]~~ A of this section, each day of violation shall constitute a separate offense.

~~[D.]~~ C. Any person who knowingly and willfully ~~[aides]~~ aids or abets the commission of any act described in Subsection A ~~[or B]~~ of this section shall be subject to the same penalties as are prescribed therein.

Section 5. Section 70-2-33 NMSA 1978 (being Laws 1935, Chapter 72, Section 24, as amended) is amended to read:

"70-2-33. DEFINITIONS.--As used in the Oil and Gas Act:

A. "person" means:

(1) any individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, joint venture, syndicate or other entity; or

(2) the United States or any agency or instrumentality thereof or the state or any political subdivision thereof;

B. "pool" means an underground reservoir containing a common accumulation of crude petroleum oil or natural gas or both. Each zone of a general structure, which zone is completely separate from any other zone in the structure, is covered by the word pool as used in the Oil and Gas Act. Pool is synonymous with "common source of supply" and with "common reservoir";

C. "field" means the general area that is underlaid or appears to be underlaid by at least one pool and also includes the underground reservoir or reservoirs containing the crude petroleum oil or natural gas or both. The words field and pool mean the same thing when only one underground reservoir is involved; however, field, unlike pool, may relate to two or more pools;

D. "product" means any commodity or thing made or manufactured from crude petroleum oil or natural gas and all derivatives of crude petroleum oil or natural gas, including refined crude oil, crude tops, topped crude, processed crude petroleum, residue from crude petroleum, cracking stock, uncracked fuel oil, treated crude oil, fuel oil, residuum, gas oil, naphtha, distillate, gasoline, kerosene, benzine, wash oil, waste oil, lubricating oil and blends or mixtures of crude petroleum oil or natural gas or any derivative thereof;

E. "owner" means the person who has the right to drill into and to produce from any pool and to appropriate the production either for ~~[himself]~~ the person or for ~~[himself]~~ the person and another;

F. "producer" means the owner of a well capable of producing oil or natural gas or both in paying quantities;

G. "gas transportation facility" means a pipeline in operation serving gas wells for the transportation of natural gas or some other device or equipment in like operation whereby natural gas produced from gas wells connected therewith can be transported or used for consumption;

H. "correlative rights" means the opportunity afforded, so far as it is practicable to do so, to the owner of each property in a pool to produce without waste ~~[his]~~ the owner's just and equitable share of the crude petroleum oil or natural gas or both in the pool, being an amount, so far as can be practicably determined and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable crude petroleum oil or natural gas or both under the property bears to the total recoverable crude petroleum oil or natural gas or both in the pool and, for such purpose, to use ~~[his]~~ the owner's just and equitable share of the reservoir energy;

I. "potash" means the naturally occurring bedded deposits of the salts of the element potassium;

J. "casinghead gas" means any gas or vapor or both indigenous to an oil stratum and produced from such stratum with oil, including any residue gas remaining after the processing of casinghead gas to remove its liquid components; ~~and~~

K. "produced water" means water that is an incidental byproduct from drilling for or the production of crude petroleum oil and natural gas;

L. "commission" means the oil conservation commission; and

M. "division" means the oil conservation division of the energy, minerals and natural resources department."

Section 6. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2014.



## COMPARISON OF NEW MEXICO ENVIRONMENTAL STATUTES' ENFORCEMENT PROVISIONS

Prepared by Tannis L. Fox, Assistant Attorney General, Office of the Attorney General

June 25, 2013

	Water Quality Act	Hazardous Waste Act	Air Quality Control Act	Mining Act	Oil and Gas Act	Proposed Amendments to Oil and Gas Act (6/25/13)
<b>Administrative agency enforcement authority for violations</b>	NMED may issue COs <sup>1</sup> or file suit in district court	NMED may issue COs or file suit in district court	NMED may issue COs or file suit in district court	MMD or Mining Commission may assess penalties	No authority to issue COs or assess civil penalties <sup>2</sup>	OCD may issue CO or file suit in district court
<b>Mense rea standard for proving civil violation</b>	None	None	None	None	Knowingly and willfully	None
<b>Civil penalty for violation of act, permit, rule or order</b>	\$10,000 or \$15,000 per day of non-compliance <sup>3</sup> and suspension/termination of permit	\$10,000 per day of non-compliance and suspension/revocation of permit	\$15,000 per day of non-compliance and suspension/revocation of permit	\$10,000 per day of non-compliance	\$1,000 maximum or \$1,000 for each day of continuing violation; no permit suspension/termination	\$10,000 per day of violation and suspension/termination of permit
<b>Civil penalty for violating CO</b>	\$25,000 per day of non-compliance	\$10,000 per day of non-compliance	\$15,000 per day of non-compliance and suspension/revocation of permit	\$10,000 per day of non-compliance	\$1,000 maximum or \$1,000 for each day of continuing violation	\$10,000 per day of violation and suspension/termination of permit
<b>Criminal penalty</b>	2 <sup>nd</sup> to 4 <sup>th</sup> degree felonies, depending on violation	Misdemeanor to 2 <sup>nd</sup> to 4 <sup>th</sup> degree felonies, depending on violation; \$5,000 to \$250,000 penalties	Misdemeanor, 2 <sup>nd</sup> or 4 <sup>th</sup> degree felonies; \$10,000 to \$250,000 penalties	\$10,000 per day and/or 1 year prison	\$5,000 maximum and/or maximum 3 years prison	\$5,000 maximum and/or maximum 3 years prison
<b>Venue</b>	County where state agency resides	County where state agency resides	County where state agency resides	Appeal in county where state agency has offices, the capital or where appellant resides	County where defendant resides or violation occurred	County where state agency resides

<sup>1</sup> Administrative compliance order.

<sup>2</sup> *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 25, 146 N.M. 24, 206 P.3d 135 ("we hold that Section 70-2-28 [of the Oil and Gas Act] requires the Attorney General to bring suit on behalf of the [Oil Conservation] Division in court to impose civil penalties authorized by Section 70-2-31").

<sup>3</sup> \$15,000 for permitting violations, and \$10,000 for non-permitting and water quality standards violations.



# New Mexico Oil Conservation Division Compliance Order History

Compiled by the New Mexico Office of the Attorney General July 1, 2013

Accessed at <http://ocdimage.emnrd.state.nm.us/imaging/AEOrderCriteria.aspx>

AGREED COMPLIANCE ORDERS (ACO)				AGREED COMPLIANCE ORDERS - INACTIVE WELLS (ACOIW)				COMPLIANCE HEARING ORDERS (CHO)			
Year	ACO Total	ACO Penalty Assessed	Penalty Amount	Year	ACOIW Total	ACOIW Penalty Assessed	Penalty Amount	Year	CHO Total	CHO Penalty Assessed	Penalty Amount
2001				2001				2001	1	0	\$0
2002	2	2	\$6,000	2002				2002	2	0	\$0
2003	3	3	\$5,000	2003				2003	1	0	\$0
2004	19	19	\$56,500	2004	27	2	\$2,000	2004	6	2	\$275,000 *
2005	29	29	\$118,000	2005	15	3	\$7,500	2005	9	0	\$0
2006	55	53	\$123,000 *	2006	75	10	\$46,500	2006	8	2	\$10,000 **
2007	62	59	\$752,750	2007	28	1	\$7,000	2007	8	2	\$78,000 **
2008	36	36	\$661,250 **	2008	21	0	\$0	2008	20	11	\$240,000 ***
2009 (thru 3/11)	2	2	\$16,000 ***	2009 (thru 3/11)	2	0	\$0	2009 (thru 3/11)	0	0	\$0
<b>Pre-Marbob Subtotal:</b>	<b>208</b>	<b>203</b>	<b>\$1,738,500</b>	<b>Pre-Marbob Subtotal:</b>	<b>168</b>	<b>16</b>	<b>\$63,000</b>	<b>Pre-Marbob Subtotal:</b>	<b>55</b>	<b>17</b>	<b>\$603,000</b>
2009 (3/12-12/31)	6	3	\$6,000	2009 (3/12-12/31)	9	0	\$0	2009 (3/12-12/31)	3	0	\$0
2010	6	0	\$0	2010	15	0	\$0	2010	1	0	\$0
2011	4	0	\$0	2011	19	0	\$0	2011	2	0	\$0
2012	3	0	\$0	2012	21	0	\$0	2012	0	0	\$0
2013	1	0	\$0	2013	1	0	\$0	2013	0	0	\$0
<b>Post-Marbob Subtotal:</b>	<b>20</b>	<b>3</b>	<b>\$6,000</b>	<b>Post-Marbob Subtotal:</b>	<b>65</b>	<b>0</b>	<b>\$0</b>	<b>Post-Marbob Subtotal:</b>	<b>6</b>	<b>0</b>	<b>\$0</b>
<b>GRAND TOTAL:</b>	<b>228</b>	<b>206</b>	<b>\$1,744,500</b>	<b>GRAND TOTAL:</b>	<b>233</b>	<b>16</b>	<b>\$63,000</b>	<b>GRAND TOTAL:</b>	<b>61</b>	<b>17</b>	<b>\$603,000</b>

\*\$1,500 of this amount would be waived if conditions were met.  
 \*\*\$28,000 of this amount would be waived if conditions were met.  
 \*\*\*\$10,000 of this amount would be waived if conditions were met.

\*\$270,000 of this total was assessed against Greka Energy and Saba Energy jointly.

\*\*\$72,000 of this total was assessed to Pronghorn Mgmt, however later filings indicated that the case had been dismissed. \$10,000 of this total was assessed to Northstar, but the OCD allowed NS to reduce the penalty to whatever was expended to complete the OCD's orders, if completed by a certain date.

\*\*\*\$48,000 of this total was assessed to Sandlott Energy, however later filings indicate that \$36,000 was waived. \$16,000 of this total was assessed to C&D Management d/b/a Freedom Ventures, however \$5,000 of the penalty was dismissed under Marbob.

<u>Compliance Orders</u>		
Issued:	Compliance Order Penalties Assessed:	Total Penalty Amount:
431	236	\$2,404,500
<b>Pre-Marbob:</b>		
91	3	\$6,000
<b>Post-Marbob:</b>		
<b>Difference:</b>	<b>-78.9%</b>	<b>-98.7%</b>
		<b>-99.8%</b>



# 2013 STRONGER GUIDELINES

## SECTION 1

### INTRODUCTION

#### 1.1. Background

The 1980 amendments to the Resource Conservation and Recovery Act (RCRA) created an exemption to the federal hazardous waste program for oil and gas exploration and production (E&P) wastes pending completion of a study by the U.S. Environmental Protection Agency (EPA). In 1988, EPA completed its study and determined that these wastes should not be regulated as hazardous wastes. EPA's regulatory determination concluded that existing state and federal regulations were generally adequate, but that some regulatory gaps existed and that enforcement of existing regulations was inconsistent. EPA proposed a three-pronged approach to address these concerns that included working with the states to encourage improvement in state regulations and enforcement programs. Further discussion of the regulatory determination follows in section 1.2.

In 1989, the Interstate Oil and Gas Compact Commission ("IOGCC") responded by offering to assist EPA by creating a state regulatory review process. The IOGCC created the Council on Regulatory Needs, bringing together state, environmental, and industry representatives to develop national guidelines for state oil and gas programs. In early 1990, the Council released a document entitled "EPA/IOCC Study of State Regulation of Oil and Gas Exploration and Production Waste". This document established guidelines that represented recommended criteria for regulatory programs. The Council also proposed to implement a process by which state oil and gas programs were reviewed in comparison with those guidelines.

In 1990, EPA provided a grant to the IOGCC to initiate state regulatory program reviews in comparison with the guidelines. Review teams were comprised of state regulatory officials, environmental representatives, and industry representatives. Representatives of other interested parties, such as federal agencies and tribal governments, were invited to observe the process. State reviews were conducted in states that volunteered for review. Recommendations were offered as blueprints for change to be considered by state legislators and regulators.

The Council recommended that the guidelines be reviewed and updated every three years. In 1994, the Council updated the guidelines and added sections regarding naturally occurring radioactive material (NORM) and abandoned wells.

In 1999, a multi-stakeholder organization was formed by the state review

program participants to revitalize and carry the state review program forward. This new organization is called State Review of Oil and Natural Gas Environmental Regulations, Inc. ("STRONGER"). STRONGER is a non-profit corporation that has been specifically formed to educate regulators and the public as to the appropriate elements of a state oil and gas exploration and production waste management regulatory program, and to compare various state programs against the guidelines developed by STRONGER and accepted by the IOGCC for the protection of public health, safety and the environment.

In 1999, STRONGER established five committees to review and update the 1994 version of the guidelines. STRONGER incorporated the consensus recommendations of the committees, including a new section on performance measures, in the 2000 Guidelines update, which were reviewed by the IOGCC in draft, revised, and accepted by the IOGCC member states. STRONGER again initiated revision and updating of the Guidelines in 2004, which resulted in the 2005 Guidelines. The 2005 Guidelines incorporate spill prevention and performance measures into the administrative criteria section and were expanded to include a new section on stormwater management. In 2009 STRONGER formed a hydraulic fracturing workgroup that developed guidelines that were finalized in 2010. These 2010 Guidelines are the basis for subsequent reviews.

Since 1990, 38 initial and follow-up state reviews have been conducted against the guideline standards: 12 under the 1990 guidelines, 5 under the 1994 revised guidelines, 11 under the 2000 guidelines, 2 under the 2005 guidelines, and 6 focused on hydraulic fracturing. These states represent over 94% of all domestic, onshore oil and gas production. The states have implemented many of the recommended improvements, as documented in STRONGER's report entitled "A Report on the STRONGER State Review Process" (March, 2011).

## **1.2. EPA's Regulatory Determination for E&P Waste**

The 1980 amendments to the RCRA required EPA to conduct a study of the environmental and potential human health impacts associated with E&P wastes and their associated waste management practices. EPA completed its two-year study in 1987. Based on the findings in the Report to Congress, and on oral and written comments received during public hearings in the spring of 1988, on June 30, 1988, EPA decided not to recommend federal regulation of E&P wastes as hazardous wastes under Subtitle C of RCRA (EPA 1988). The Agency gave the following reasons for its determination:

- a. "Subtitle C does not provide sufficient flexibility to consider costs and avoid the serious economic impacts that regulation would create for the

industry's exploration and production operations;

- b. "Existing state and federal regulatory programs are generally adequate for controlling oil, gas, and geothermal wastes. Regulatory gaps in the Clean Water Act and UIC (Underground Injection Control) program are already being addressed, and the remaining gaps in state and federal regulatory programs can be effectively addressed by formulating requirements under Subtitle D of RCRA and by working with the States;
- c. "Permitting delays would hinder new facilities, disrupting the search for new oil and gas deposits;
- d. "Subtitle C regulation of these wastes could severely strain existing Subtitle C facility capacity;
- e. "It is impractical and inefficient to implement Subtitle C for all or some of these wastes because of the disruption and, in some cases, duplication of state authorities that administer programs through organizational structures tailored to the oil and gas industry; and
- f. "It is impractical and inefficient to implement Subtitle C for all or some of these wastes because of the permitting burden that the regulatory agencies would incur if even a small percentage of these sites were considered Treatment, Storage, and Disposal Facilities (TSDFs)." (53 FR 25456, July 6, 1988).

In the determination, EPA found that "existing state and federal regulations are generally adequate...Certain regulatory gaps do exist and enforcement of existing regulation in some states is inadequate." To address those concerns, EPA announced a three-pronged approach that consists of:

- "Improving federal programs under existing statutory authorities in RCRA Subtitle D, the Clean Water Act, and the Safe Drinking Water Act;
- "Working with states to encourage improvements in the states' regulations and enforcement of existing programs; and
- "Working with Congress to develop any additional statutory authority that may be required."

### **1.3. State and Federal Relations**

Periodic evaluations of state and federal E&P waste management programs have proven useful in improving the effectiveness of those programs and increasing cooperation between federal and state regulatory agencies.

Stakeholder review mechanisms have demonstrated the need for establishment of a performance baseline against which E&P waste management programs can be evaluated. Those mechanisms have led to the identification of strategies that will improve communication and program understanding between the states and the federal government.

### **1.3.1 Strategies for Maintaining a Successful Relationship Between State and Federal Agencies**

As stated in EPA's regulatory determination for E&P waste, "...existing state and federal regulations are generally adequate to control the management of oil and gas wastes. Certain regulatory gaps do exist, however, and enforcement of existing regulations in some states is inadequate." The key is that overall state programs are adequate, and have improved since 1990 through adoption of recommendations from reviews, information sharing among the states and self-initiated program improvements. To address remaining gaps and build upon the success of the state review program, the focus of future efforts should be to utilize information developed from the reviews already conducted, augmented by new information developed by the stakeholders, to improve the performance of state regulatory programs.

The stakeholders — oil and gas producing states, public interest representatives, and industry representatives — have identified ten related strategies that enhance state and federal relations and promote effective management of oil and gas wastes.

- a. **Commitment to Work Cooperatively.** The states and federal agencies should maintain a commitment to work cooperatively to improve the design, implementation, and enforcement of state and federal programs for managing E&P wastes. State and federal agencies should take steps to encourage open communications among state and federal agencies, the regulated industry, and other interested parties pertaining to the management and regulation of E&P wastes.
- b. **Recognition of Different Priorities.** States should recognize the interest of federal agencies in achieving national goals and objectives and assuring adherence to federal statutory and regulatory requirements. At the same time, federal agencies should recognize the authorities, responsibilities, and capabilities of states to regulate certain activities within their borders.
- c. **Recognition of Different Statutory Objectives.** Several of the federal statutes governing protection of the environment (*e.g.*, RCRA, Clean Water Act (CWA), Safe Drinking Water Act (SDWA)) provide for state

implementation of certain elements with federal oversight. The objectives of and authorities granted by each statute differ. As such, it should be recognized that federal and state authorities and implementation approaches may differ.

- d. **Recognition of Regional Diversity.** As discussed in the Report to Congress and the legislative history of the SDWA, variable approaches to the management of E&P wastes are necessary. These variable approaches are partly a result of the different geologic, hydrologic, or historic conditions in states and areas within a state, the diverse characteristics of oil and gas activities, and differences in state government structures among the producing states. Guidelines or criteria, whether issued by a federal agency such as EPA or as advocated by the IOGCC and STRONGER, should be sufficiently flexible to permit states to take into account these varying conditions.
- e. **Baseline of Performance.** The criteria adopted by IOGCC and STRONGER should be used by federal or state agencies that are responsible for any portion of an E&P waste management program. These criteria should serve as a baseline of performance by which the effectiveness of programs can be judged. The criteria provide states flexibility to address unique conditions while accomplishing the goals set forth in Section 3.
- f. **State Responsibility for Enforcement.** Enforcement is a critical component of a state E&P waste management program. Federal government involvement should occur only if the state agency fails to enforce the requirements or requests federal assistance.
- g. **State Program Review Process.** The state program review process should continue to provide states with an independent evaluation of their E&P waste management programs using criteria adopted by the IOGCC and STRONGER.
- h. **Resolving Conflicts/Building Consensus.** Where there are unresolved national issues or concerns regarding E&P waste management, a task force should be created which is similar in makeup and form to that established for the EPA's Office of Drinking Water Mid-Course Evaluation of Class II UIC programs. The creation of this task force would bring knowledgeable federal and state regulators together to discuss issues, to ascertain whether problems associated with these issues are real or perceived, and to decide how best to address the issues. This process should be based on the best available information and could be initiated by either the federal government or the states.
- i. **Effective Multi-Agency Coordination.** Coordination among the state

## SECTION 4

### ADMINISTRATIVE CRITERIA

#### 4.1. Basic Requirements

Various federal regulations applicable to the delegation to states of federal environmental programs provide a useful framework for the development of criteria for an effective state program. Environmental regulatory programs for E&P activities should, at a minimum, include provisions for permitting, compliance evaluation, and enforcement.

##### 4.1.1. Permitting

A state should have a regulatory mechanism to assure that E&P activities are conducted in an environmentally responsible manner. A program to achieve that objective may rely on one or more mechanisms, including issuance of individual permits, issuance of permits by rule, establishment of regulatory requirements by rule, issuance of general permits, registration of facilities, and/or notification of certain activities undertaken pursuant to general regulations. State agencies should have authority to refuse to issue or reissue permits or authorizations if the applicant has outstanding, finally determined violations or unpaid penalties, or if a history of past violations demonstrates the applicant's unwillingness or inability to comply with permit requirements. Where the operator responsible for E&P activities changes, state requirements should address the new operator's financial responsibility and compliance history. An effective state program should provide that a state permit does not relieve the operator of the obligation to comply with federal, local, or other state permits or regulatory requirements.

Individual permits for specific facilities or operations should be issued for fixed terms. In the case of commercial or centralized facilities, permits generally should be reviewed and revised, if necessary, no less frequently than every five years. Where similar requirements are mandated by two or more regulatory programs, those requirements should be combined where feasible. The process for obtaining permits and other authorizations should also involve prompt consideration and response to applications while preserving the integrity of the permit review process, including appropriate public participation. For the purposes of these guidelines, the terms "license" or "licensing" as used in Section 7 of these guidelines, criteria for the management of oil-field NORM, will be synonymous with the terms "permit" or "permitting" as they are used throughout these guidelines.

##### 4.1.2. Compliance Evaluation

#### **4.1.2.1.**

State programs should contain the following compliance evaluation capabilities:

- a.** Procedures for the receipt, evaluation, retention, and investigation for possible enforcement action of all notices and reports required of permittees and other regulated persons. Investigation for possible enforcement action should include determination of failure to submit these notices and reports. Effective data management systems as prescribed in Section 4.2.7. can be used to track compliance.
- b.** Inspection and surveillance procedures that are independent of information supplied by regulated persons and which allow the state to determine compliance with program requirements, including:
  - i.** The capability to conduct comprehensive investigations of facilities and activities subject to regulation in order to identify a failure to comply with program requirements by responsible persons;
  - ii.** The capability to conduct regular inspections of regulated facilities and activities at a frequency that is commensurate with the risk to the environment that is presented by each facility or activity; and
  - iii.** The authority to investigate information obtained regarding violations of applicable program and permit requirements.
- c.** Procedures to receive and evaluate information submitted by the public about alleged violations and to encourage the public to report perceived violations. Such procedures should not only involve communications with the public to apprise it of the process to be followed in filing reports or complaints, but should also communicate how the state agency will assure an appropriate and timely response.
- d.** Authority to conduct unannounced inspections of any regulated site or premises where E&P activities are being conducted, including the authority to inspect, sample, monitor, or otherwise investigate compliance with permit conditions and other program requirements.
- e.** Authority to enter locations where records are kept during reasonable hours for purposes of copying and inspecting such records.
- f.** Investigatory procedures that will produce a paper trail to support evidence which may be admitted in any enforcement proceeding brought against an alleged violator, including clear inspection and inspection reporting procedures.

### **4.1.3. Enforcement**

#### **4.1.3.1.**

With respect to violations of the state program, the state agency should have effective enforcement tools, which may include the following actions<sup>1</sup>:

- a. Issue a notice of violation with a compliance schedule;
- b. Restrain, immediately and effectively, any person by order or by suit in state court from engaging in any impending or continuing unauthorized activity which is causing or may cause damage to public health or the environment;
- c. Establish the identity of emergency conditions which pose an imminent and substantial human health or environmental hazard that would warrant entry and immediate corrective action by the state agency after reasonable efforts to notify the operator have failed;
- d. Sue or cause suit to be brought in courts of competent jurisdiction to enjoin any impending or continuing violation of any program requirement, including any permit condition, without the necessity of a prior revocation of the permit;
- e. Require, by administrative order or suit in state court, that appropriate action be undertaken to correct any harm to public health and the environment that may have resulted from a violation of any program requirement, including, but not limited to, establishment of compliance schedules;
- f. Revoke, modify, or suspend any permit upon a determination by the state agency that the permittee has violated the terms and conditions of the permit, failed to pay an assessed penalty, or used false or misleading information or fraud to obtain the permit; or
- g. Assess administrative penalties or seek, in court, civil penalties or criminal sanctions including fines and/or imprisonment.
- h. Forfeiture of financial assurance instruments.

#### **4.1.3.2.**

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<sup>1</sup> In some states, enforcement remedies include authorities to cause cessation of production or transportation of product, and/or seizure of illegal product.

States should develop guidance for calculations of penalties that include factors such as the economic benefit resulting from the violation, willfulness, harm to the environment and the public, harm to wildlife, fish or aquatic life or their habitat, expenses incurred by the state in removing, correcting or terminating the effects of the unauthorized activity, conservation of the resource, timeliness of corrective action, notification of appropriate authority, and history of violations. Benefits of guidance for calculation of penalties include consistency in the assessment of penalties and development of readily defensible assessments. Penalties should be such that an operator does not benefit financially from unlawful conduct, and should provide compliance incentive to other operators. States should evaluate their enforcement options and policies to assure that the full range of actions available are effectively used.

#### **4.1.3.3.**

The right to appeal or seek administrative and/or judicial review of agency action should be available to any person having an interest which is or may be adversely affected, or who is aggrieved by any such action.

## **4.2. Additional Program Requirements**

Beyond basic requirements, an effective state program should also include a variety of other administrative requirements as discussed below.

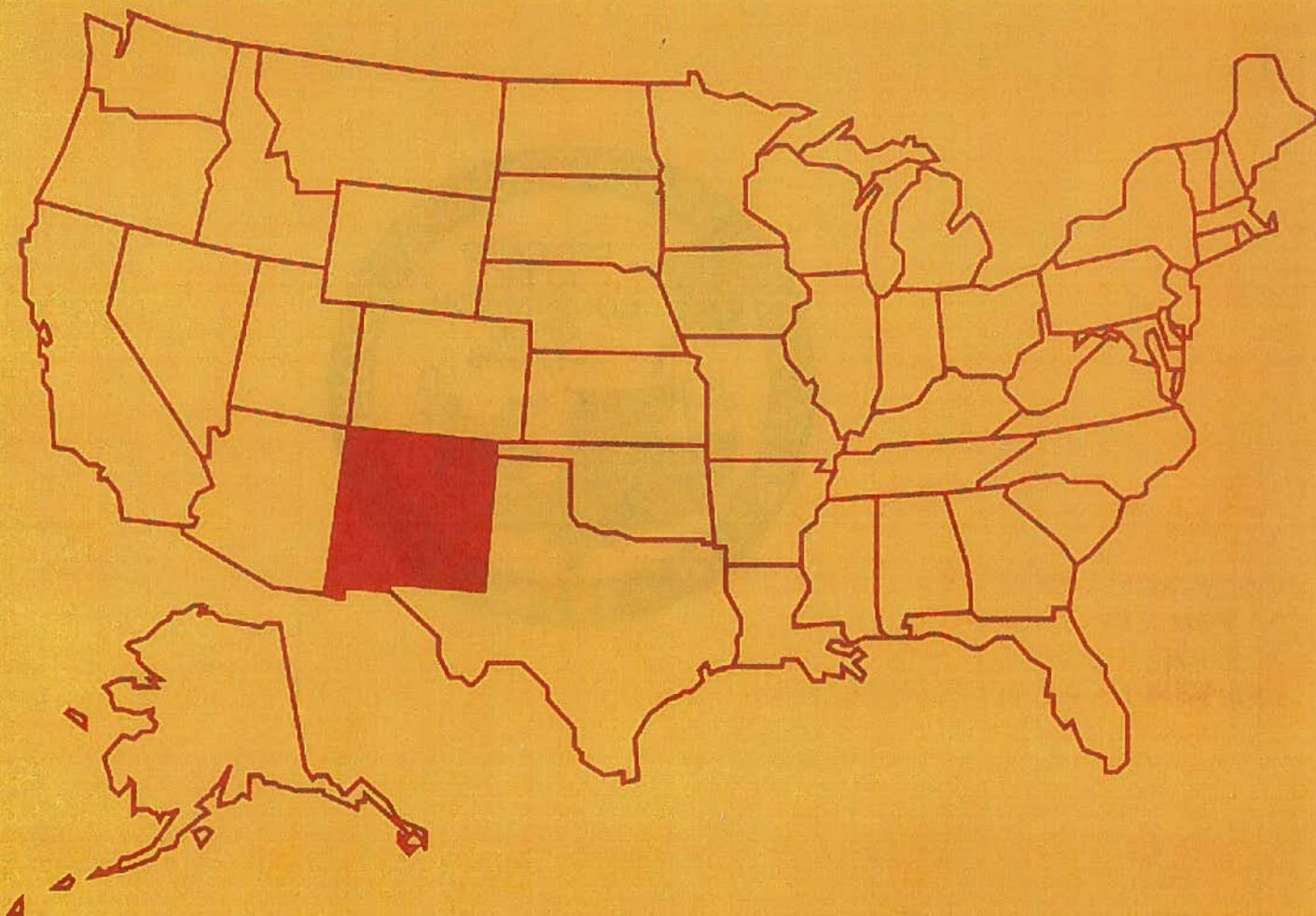
### **4.2.1. Contingency Planning and Spill Risk Management**

#### **4.2.1.1. State Contingency Program**

- a. The state should develop and adopt a state contingency program for preventing and responding to spills and unauthorized releases to land or water from E&P facilities. The state program need not duplicate applicable federal regulations for contingency planning and spill risk management. The state's contingency program may include a state contingency plan, or may consist of a set of regulations or operator contingency plan requirements. The program should define the volume of a spill or release of a petroleum product or waste and the level of risk to various receiving environments that triggers implementation of the spill contingency plan and response requirements.
- b. The state contingency program should also contain funding provisions which enable the state agency to undertake immediate response actions for significant spills or releases which constitute a threat to human health or the environment in the event that a responsible operator cannot be located or is unwilling or unable to respond to the spill or release in a timely manner.

**IOGCC/EPA STATE REVIEW OF  
OIL & GAS EXPLORATION & PRODUCTION  
WASTE MANAGEMENT REGULATORY PROGRAMS**

# **New Mexico State Review**



**A PROJECT OF THE  
Interstate Oil & Gas Compact Commission**

**June 1994**

## **NEW MEXICO STATE REVIEW**

# **IOGCC/EPA STATE REVIEW OF OIL & GAS EXPLORATION AND PRODUCTION WASTE MANAGEMENT REGULATORY PROGRAMS**



**A Project of the  
Interstate Oil and Gas Compact Commission**

**June 1994**

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## X. ENFORCEMENT

OCD has the authority to take enforcement actions under the OGA, WQA, and their implementing rules and regulations. Although the agency has a variety of enforcement methods available, OCD relies primarily on voluntary compliance under the threat of shutting down an operation, and according to the agency, its voluntary compliance policy is effective. However, no independent evaluation of the effectiveness of OCD's voluntary compliance policy has been conducted.

### FINDING X.1.

OCD prefers and encourages an operator's "voluntary compliance" with the state's laws, rules, regulations, and guidelines.

### RECOMMENDATION X.1.

OCD should authorize an independent evaluation of the effectiveness of its "voluntary compliance" policy in encouraging operators to accomplish corrective actions. (IOGCC Guidelines, section 4.1.3.2.)

Generally, operators are provided verbal notice that a problem exists at a facility. If the problem is not corrected in a timely manner, OCD staff can refer the case to the district supervisor or OCD Director for subsequent enforcement action. These enforcement actions may include written notice of violation, orders, cease-production orders, and civil and criminal penalties. The district supervisor or OCD Director coordinates these subsequent enforcement actions with the OCD Counsel.

#### A. Notices of Violation

Notices of violation can be given verbally or in writing, and in either case, compliance schedules can be specified. Verbal notices from districts are recorded in the FR's field trip reports. Presently, field trip reports may not always document how problems are handled, communicated and tracked. Followup field inspections are conducted to verify an operator's correction of the violation and compliance with requirements.

### FINDING X.2.

Administrative procedures for tracking problems and violations have not been established.

### RECOMMENDATION X.2.

OCD should develop, and provide to its field representatives, written guidelines for initial enforcement procedures. Field

trip reports should be modified to allow documentation and tracking of problems and verbal notices of violation, including compliance status. (IOGCC Guidelines, section 4.1.3.2.)

#### **B. Orders**

OCD has the authority to issue orders to operators following a public hearing. Orders may also be issued by the OCD Director based upon a recommendation by a Division examiner. Under certain circumstances, the operator or a party in interest may request a hearing or rehearing before OCC, after which they may request a public hearing before the Secretary of EMNRD. Appeals from OCC orders are under the jurisdiction of a district court.

#### **C. Civil Penalties**

OCD may seek a civil penalty of up to \$1,000 per day for each violation of the OGA, its implementing rules or regulations, or an order pursuant to the Act. Penalties of up to \$15,000 per day apply for each violation of the WQA. There is no cumulative maximum monetary penalty.

#### **FINDING X.3.**

There are no specific, written criteria by which civil penalties can be calculated or imposed. Because there are no written criteria, OCD's use of civil penalties may be ineffective.

#### **RECOMMENDATION X.3.**

OCD should consider developing specific criteria for the imposition and amount of civil penalties. (IOGCC Guidelines, section 4.1.3.2.)

#### **D. Court Actions**

OCD, through the Attorney General, may bring suit against an operator to impose or recover penalties and/or restrain an operator from continuing any violations. OCD may also obtain injunctions. Such action does not require prior revocation of a permit.

#### **E. Enforcement Actions**

OCD may take other enforcement actions, including the issuance of orders without a hearing in emergency situations and the performance of corrective action upon the failure of an operator to act. OCD has, in fact, taken such emergency actions. OCD may also revoke, modify, or suspend permits and cause the forfeiture of financial assurance instruments. OCD reported that its Counsel did not have a backlog of enforcement cases.

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In practice, OCD in the last two years has taken the following actions to remedy violations and bring operators into compliance:

1. Shut down several facilities for various violations, including unauthorized acceptance of waste;
2. Proposed the assessment of two \$1,000 fines, but collected neither when compliance was achieved;
3. Ordered remedial actions and cleanup at several facilities; and
4. Issued approximately 50 written notices of violation.

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**FINDING X.5.**

OCD has an escalating enforcement policy, progressing from voluntary compliance and verbal notices of violation to penalties, orders, and court actions. OCD has relied on some, but not all, of its available enforcement options.

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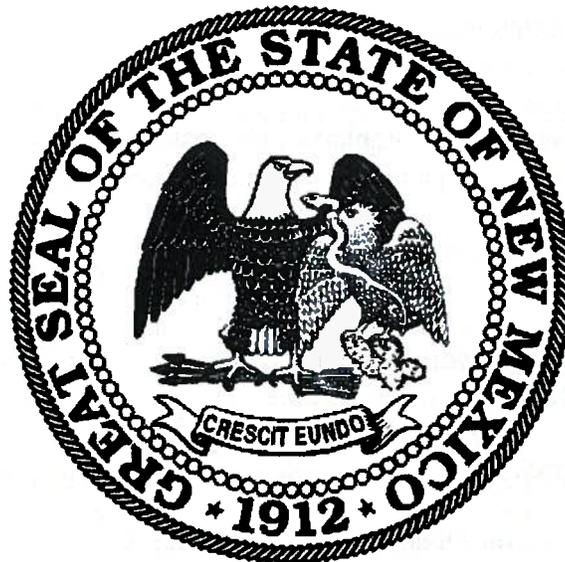
**RECOMMENDATION X.5.**

OCD should periodically reevaluate its enforcement policies, practices and procedures to ensure that appropriate options are used to achieve compliance. (IOGCC Guidelines, section 4.1.3.1.)



**NEW MEXICO**

**FOLLOW-UP AND SUPPLEMENTAL  
REVIEW**



**State Review of Oil and Natural Gas  
Environmental Regulations, Inc.**

August, 2001

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**Follow-up Review Comments:**

This recommendation has been met.

**Finding and recommendation X.3**

**Finding X.3:**

There are no specific, written criteria by which civil penalties can be calculated or imposed. Because there are no written criteria, OCD's use of civil penalties may be ineffective.

**Recommendation X.3:**

OCD should consider developing specific criteria for the imposition and amount of civil penalties. (IOGCC Guidelines, section 4.1.3.2.)

**OCD Response:**

On-going. As the OCD experiences more violations warranting civil penalties, the OCD can determine what are fair and reasonable penalties for each type of violation. See X.2

**Follow-up Review Comments:**

This recommendation has not been met. The Review Team recommends that OCD meet the requirements of section 4.1.3 of the Guidelines.

**Finding and recommendation X.5**

**Finding X.5:**

OCD has an escalating enforcement policy, progressing from voluntary compliance and verbal notices of violation to penalties, orders, and court actions. OCD has relied on some, but not all, of its available enforcement options.

**Recommendation X.5:**

OCD should periodically reevaluate its enforcement policies, practices and procedures to ensure that appropriate options are used to achieve compliance. (IOGCC Guidelines, section 4.1.3.1.)

**OCD Response:**

See X.3.

**Follow-up Review Comments:**

This recommendation has been partially met. In 2000, OCD re-evaluated its enforcement policies, practices and procedures and developed "OCD Enforcement Guidelines", which discuss the various enforcement actions contained in IOGCC Guideline 4.1.3.1. It is still not clear that the Enforcement Guidelines are being appropriately used to achieve compliance. **The Team recommends that OCD's tracking system be used to ensure that voluntary compliance is working.**

## ENFORCEMENT

### **Finding and recommendation X.1**

#### **Finding X.1:**

OCD prefers and encourages an operator's "voluntary compliance" with the state's laws, rules, regulations, and guidelines.

#### **Recommendation X.1:**

OCD should authorize an independent evaluation of the effectiveness of its "voluntary compliance" policy in encouraging operators to accomplish corrective actions. (IOGCC Guidelines, section 4.1.3.2.)

#### **OCD Response:**

It is not clear why the OCD should have "an independent evaluation of the effectiveness of its voluntary compliance policy." This is not OCD policy but is a state policy mandated by legislative act (74-6-9.D.). It is also one of five primary Department goals. Since the OCD has no discretion for not working toward voluntary compliance, and finds voluntary compliance far superior in obtaining satisfactory results, this recommendation should not be implemented

#### **Follow-up Review Comments:**

The Review Team finds the recommendation for an independent evaluation of the effectiveness of the voluntary compliance policy to be beyond the scope of the Guidelines. From a review of OCD's statutes and rules, the team finds that OCD is not limited to voluntary compliance, and does have authority to take appropriate enforcement actions. Performance measurement of the program is addressed in Part 2, Section 8 of this report. No further recommendation is made.

### **Finding and recommendation X.2**

#### **Finding X.2:**

Administrative procedures for tracking problems and violations have not been established.

#### **Recommendation X.2:**

OCD should develop, and provide to its field representatives, written guidelines for initial enforcement procedures. Field trip reports should be modified to allow documentation and tracking of problems and verbal notices of violation, including compliance status. (IOGCC Guidelines, section 4.1.3.2.)

#### **OCD Response:**

Guidelines for enforcement procedures and tracking of violations have been developed. A tracking module is active in RBDMS.