

OCD ENFORCEMENT GUIDELINES

**State of New Mexico
Oil Conservation Division
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OCD

ENFORCEMENT GUIDELINES

This document is intended to collect in one document enforcement tools employed by the New Mexico Oil Conservation Division (hereinafter referred to as "OCD"). It is hoped this document will assist OCD Districts and Bureaus to improve enforcement of the statutes, rules and orders which govern oil and gas operations in New Mexico. It is also hoped that this document will assist the regulated industries to understand OCD's enforcement procedures and rationale and thereby increase voluntary compliance with the statutory and regulatory scheme.

I. THE NEW MEXICO REGULATORY SCHEME.

A. The Regulatory Basis for Enforcement Activities.

Many aspects of oil and gas operations in New Mexico are regulated. The Oil and Gas Act, NMSA 1978, § 70-2-1 *et seq.* and the Water Quality Act, NMSA 1978, § 74-6-1 *et seq.* (hereinafter referred to collectively as "the Acts") require certain drilling, production, processing, transporting and production practices and delegate authority to OCD and the Oil Conservation Commission (hereinafter referred to as "the Commission") to regulate these activities. The Commission has promulgated Rules (19 NMAC) and numerous orders which regulate in the aforementioned areas.

B. Examples of Violations.

Failure to adhere to the statutes, rules or orders referred to in the previous paragraph may result in enforcement action. It is not within the scope of this document to enumerate all possible violations of the Acts, Rules and orders. However, by way of introduction to the enforcement processes, examples of common violations that may result in enforcement may be useful. Common violations include failure to file production or other required reports, failure to properly plug or temporarily abandon a well, failure to report or remediate spills or leaks, improper disposal of oil field waste, failure to follow an approved discharge plan, failure to submit or follow an abatement plan, failure to properly place signage or failure to test when required.

II. VOLUNTARY COMPLIANCE.

An important goal of the Energy, Minerals and Natural Resources Department and its OCD is to assist the regulated industries to voluntarily comply with the statutes, rules and orders. Therefore, this document must be interpreted flexibly; field personnel should work with the regulated industry when appropriate to resolve compliance issues that arise.

III. INTRODUCTION TO THE ENFORCEMENT GUIDELINES.

The enforcement guidelines are in two main sections - a section on enforcement techniques that can be employed to achieve compliance, and a section on violations in need of immediate response. The enforcement tools are set out in a step-by-step manner; however, District and Bureau personnel should exercise judgment in the selection of a process that is appropriate to the situation. Not all violations should be enforced in a step-by-step manner; for example, when a violation is repeated or is intentional, nothing in the statutes, rules or orders require handling the violation in a step-by-step manner. Personnel should consult with the District Supervisor, Bureau Chief, the Director of the Oil Conservation Division (hereinafter referred to as "the Director") and OCD Legal as appropriate to select the most appropriate process for the situation.

IV. PROGRESSIVE ENFORCEMENT.

A. Discovery of a Violation.

A violation may be discovered during a field inspection, during a review of documents (such as a well file), during computerized tracking (ONGARD)(RBDMS) or when reported by a third party. Once a violation is discovered, enforcement action may be taken.

B. *Step 1* - Evaluate Circumstances.

Upon discovery, the circumstances of the violation should be investigated and evaluated. The applicable statute or rule of OCD or the Water Quality Control Commission (hereinafter referred to as "WQCC") should be identified to aid in thorough and accurate investigation. If the circumstances dictate that immediate action should be taken (such as a spill, pipeline rupture or blowout), immediate enforcement action may be needed, and some options in this regard are discussed in section V below. If the circumstances dictate that a step-by-step approach is appropriate, the violation may instead be addressed pursuant to the enforcement procedures described in the following paragraphs. In general, field personnel of a District or Bureau shall make the initial evaluation of the threat the violation poses, in consultation with the District Supervisor or Bureau Chief as necessary.

C. *Step 2* - Verbal or Written Directive.

Once the threat is evaluated pursuant to the previous paragraph and found not to be immediate, enforcement may commence. Step 2 involves delivery of a verbal or written directive to the violator(s). The directive should identify the statute, rule or order violated. The directive may also order correction or cessation of the activity at issue and provide a

reasonable time to correct the problem. The directive may refer to the Oil and Gas Act or Water Quality Act or rules of the OCD or WQCC and possible consequences of the violation, such as civil or criminal penalties. Field personnel of a District or Bureau should, in most cases, issue the directive.

D. *Step 3 - Document the Directive.*

The fact that a directive was issued, even if issued orally, should be documented. For example, the violation and the verbal/written directive may be documented as appropriate in RBDMS, field/phone notes and well files. E-mail may be used to document the violation so long as a copy of the E-mail is placed in the relevant file. All evidence pertinent to the violation should be gathered, documented and stored (e.g. photographs, documents, samples and written statements).

E. *Step 4 - Repeat Directive.*

If no response is received to the directive, a second directive may be issued, if appropriate. If the first directive was oral, the second should be in writing. If the first directive was in writing, the second should clearly state it is a second notice. Certified mail may be used to focus attention on the seriousness of the situation.

F. *Step 5 - Evaluate Response/Select Remedy.*

F.1. Inadequate or No Response

The District Supervisor or Bureau Chief should, in most cases, determine whether a response received to the directive is adequate. If no response is received, or if a response is received which is inadequate, a Notice of Violation should immediately be issued and further enforcement action considered.

F.2. Adequate Response

If the response is adequate, a corrective action plan may be agreed upon. A corrective action plan may be oral, but even if oral should be documented. If written, the assistance of OCD Legal may be sought to prepare an appropriate document to memorialize the plan. If a corrective action plan is agreed upon, the matter shall remain at the District or Bureau unless the corrective action plan is not performed fully.

G. Step 6 - Issuance of Notice of Violation ("NOV").

If no response is received to the directive, or if the response received is inadequate, or if the person fails to follow an agreed-upon corrective action plan, a letter setting forth a Notice of Violation ("NOV") may be sent, certified mail, and a copy of the NOV posted at the well or site, if practicable. The NOV shall identify the statute, rule or order violated, order correction or cessation of the activity at issue, and order immediate compliance. The NOV may include a notice of intent to issue an order to shut-in production, cancel an allowable, temporarily cancel oil and gas transport authority, order temporary abandonment or permanent abandonment, or other appropriate action. A copy of the NOV should be forwarded to OCD Legal.

H. Step 7 - Follow-up of NOV.

If no response is received to the NOV or if an inadequate response is received, the District or Bureau may make additional follow-up efforts to obtain voluntary compliance. These efforts may be in writing or oral, but all such efforts should be documented in the appropriate file. These efforts may be supported by OCD Legal as necessary. If appropriate to the situation, the violator may be informed of subsequent enforcement steps that may be considered, as well as possible penalties of continued non-compliance. In addition, an order may be issued shutting-in production of a particular well, unit or project, temporarily canceling oil and gas transport authority, ordering temporary abandonment, ordering permanent abandonment or suspending action on pending applications. The Director and OCD Legal should be consulted in appropriate circumstances.

I. Step 8 - Decision on Further Enforcement.

If the measures described previously fail to result in compliance, the District Supervisor or Bureau Chief, in consultation with the Director and OCD Legal, should make a decision on further enforcement action from among the alternatives described below.

J. Orders to Show Cause.

J.1. When Issued.

An Order to Show Cause may be issued in instances where a violation is committed by a person under the regulatory authority of OCD (*e.g.* current operator or a holder of a discharge plan approved by OCD). An Order to Show Cause requires the regulated person to show OCD, in the context of a formal hearing

before a hearing examiner, or, as appropriate, before the Oil Conservation Commission, why the authority granted by OCD should not be revoked, why subsequent orders should not be issued which require correction of the problem, why penalties should not be imposed or why other appropriate action should not be taken.

J.2. *Step 9 - Application for Show Cause Order.*

District or Bureau field personnel may apply to the Director for an Order to Show Cause concerning the violation. The application must be in writing, must be in the form described in Rule 1203, and must be prepared with the assistance of OCD Legal. The Director will, in most cases, direct the application to an examiner for hearing. In other cases, the Director may direct the application to the Oil Conservation Commission for hearing.

J.3. *Step 10 - Preparation for Hearing.*

Once the application is made and a hearing has been scheduled, a copy of the District or Bureau file should be sent to OCD Legal. The file should include copies of any advisory or NOV that was issued. Notice pursuant to Rule 1207 should be served on the person and on other persons affected by the order (*e.g.*, surety companies/banks for bonds or letters of credit, transporters, etc.). If the violating party desires to negotiate concerning the NOV and pending hearing, a continuance may be granted by the hearing examiner or the Oil Conservation Commission, as appropriate, until the issues are resolved. OCD Legal may initiate settlement negotiations with the violating party at any time in an attempt to resolve the matter prior to the hearing. OCD Legal shall inform the District or Bureau of evidence (witness statements, photos, documents, trip reports, analyses) and witnesses needed for the hearing. In most cases, the District or Bureau should have a pre-hearing meeting with OCD Legal to review testimony and discuss the evidentiary needs.

J.4. *Step 11 - Hearing/Issuance of Order to Show Cause.*

A hearing on the Order to Show Cause shall be held before an examiner (or the Oil Conservation Commission, as appropriate). During the hearing, the person to whom the Order to Show Cause was issued shall appear and show cause why the authority granted by OCD should not be revoked, why subsequent orders should not issue, why penalties should not be imposed or other appropriate action taken. The District or Bureau witnesses shall testify to the

violation and subsequent course of events and, within a reasonable time following the hearing, an appropriate order shall be issued.

J.5. *Step 12 - Compliance Monitoring.*

After an order has been issued and served, District or Bureau field personnel should monitor compliance with the terms of the order. If monitoring indicates that further action is needed, the District Supervisor or Bureau Chief will consult with the Director and OCD Legal on an appropriate course of action.

J.6. *Step 13 - Appeal de novo.*

If the matter was heard before a hearing examiner, the person to whom the order pertains may file a request for a hearing *de novo* before the Oil Conservation Commission.

J.7. *Step 14 - Appeal, District Court.*

After an order resulting from the hearing before the Oil Conservation Commission has been issued and rehearing has been conducted or denied, the order may be appealed to the District Court. The District Court may, upon application, stay further enforcement action pending its decision on the record. An appeal to appellate court(s) may follow.

J.8. *Step 15 - Appeal - Department Secretary.*

After an Order has been issued by the Oil Conservation Commission and rehearing has been conducted or denied, the Order may be appealed to the Secretary of the Department of Energy, Minerals and Natural Resources. The Secretary may conduct a hearing concerning whether the order or decision of the Oil Conservation Commission contravenes the public interest.

K. Compliance Orders.

K.1. When Issued.

The Director may issue a Compliance Order (hereinafter referred to as "CO") to address violations of the Water Quality Act, the Oil and Gas Act or rules or orders of the Commission. A CO may address issues that arise, for example, from violations of Rules 18, 19, 116, 310 and 711 or other rules of the OCD or WQCC, as appropriate.

K.2. *Step 9B* - Application for Compliance Order.

Field personnel of the District or Bureau may apply to the Director for issuance of a CO. The application should be in writing and must be prepared with the assistance of OCD Legal. Depending on the circumstances, a hearing may be required before issuance. *See* Step 11B. The application should include a draft form of Order including the relief requested (such as compliance, remedial measures to be required and recommended penalties). Penalties include: (a) for violations arising of the Water Quality Act, the CO may require compliance immediately or within a specified time period, may assess a civil penalty of up to Fifteen Thousand Dollars (\$15,000) per day of noncompliance, and/or suspend or terminate the relevant permit or, if a time period to comply is provided in an earlier CO, a subsequent CO may assess a civil penalty of twenty-five thousand dollars (\$25,000) for each day of continued noncompliance and suspend or terminate the relevant permit; or (b) for violations arising out of the Oil and Gas Act, a CO may require compliance immediately or within a specified time period, may assess a civil penalty of up to One Thousand Dollars (\$1,000) per violation, or One Thousand Dollars (\$1,000) per day of continuing noncompliance, and/or suspend or terminate the relevant permit.

K.3. *Step 10B* - Issuance of Compliance Order.

The Director may issue the CO as appropriate.

K.4. *Step 11B* - Determine Whether a Hearing Should be Scheduled.

Any CO which is issued pursuant to the Water Quality Act becomes final unless, no later than thirty (30) days after being served, the person to whom the CO applies submits a written request to the Water Quality Control Commission for a public hearing. Once a CO is issued, District or Bureau staff should calendar the due date for such a request. If a request for hearing is served, District or Bureau staff should forward the request and all pertinent documentation to the WQCC for docketing. If no request is forthcoming, no hearing should be scheduled. Any CO which is applied for pursuant to the Oil and Gas Act shall be scheduled for a hearing before a hearing examiner or the Commission, as appropriate, before the CO is issued.

K.5. *Step 12B - Preparation for Hearing.*

If a hearing is scheduled, a copy of the District or Bureau file must be sent to OCD Legal. The file should include copies of any advisory or NOV that was issued, the CO and all supporting documentation. Notice appropriate to the situation should be served. If the violating party desires to negotiate concerning the CO and pending hearing, a continuance may be granted by the Hearing Examiner or the Commission, as appropriate, until the issues are resolved. OCD Legal shall inform the District or Bureau of evidence needed to present and witnesses needed for the hearing.

K.6. *Step 13B - Public Hearing.*

K.6.a. Under the Water Quality Act.

District or Bureau staff, supported by OCD Legal, shall present the matter to the WQCC. District or Bureau witnesses shall testify to the violation and subsequent course of events and, after the hearing, an appropriate order shall be issued and served.

K.6.b. Under the Oil and Gas Act.

A CO under the Oil and Gas Act shall be issued only after hearing. The person committing the violation(s) shall be given notice appropriate to the situation. During the hearing, District or Bureau witnesses, supported by OCD Legal, shall testify to the violation and subsequent course of events. Within a reasonable time following the hearing, an appropriate order shall be issued.

K.7. *Step 14B - Appeal de novo.*

If the matter was heard before a hearing examiner of OCD, the person to whom the Order pertains may file a request for a hearing *de novo* before the Oil Conservation Commission.

K.8. *Step 15B - Compliance Monitoring.*

After a CO has been issued and served, District or Bureau field personnel should monitor compliance with the terms of the order. If monitoring indicates that further action is needed, the District Supervisor or Bureau Chief will consult with the Director and OCD Legal on an appropriate course of action.

K.9. *Step 16 - Appeal.*

K.9.a. Court of Appeals.

After issuance of an affirmance of a CO by the WQCC, the person aggrieved may appeal to the Court of Appeals.

K.9.b. District Court.

After a CO has been issued under the Oil and Gas Act and rehearing has been conducted or denied, an appeal to the District Court may be filed. The District Court may, upon application, stay further enforcement action pending its decision on the record. An appeal to appellate court(s) may follow.

K.9.c. Appeal - Department Secretary.

After a CO has been issued by the Oil Conservation Commission under the Oil and Gas Act and rehearing has been conducted or denied, the person to whom the Order pertains may appeal to the Secretary of the Department of Energy, Minerals and Natural Resources. The Secretary may conduct a hearing concerning whether the order or decision of the Oil Conservation Commission contravenes the public interest.

V. IMMEDIATE ACTION.

A. Emergencies and Response Action.

It is beyond the scope of this document to address emergency response, which is handled pursuant to OCD's emergency response procedures. However, should the need for immediate enforcement arise, emergency enforcement measures may be required which are described briefly below. In all cases requiring immediate enforcement measures, the District or Bureau should immediately notify the Director and OCD Legal of the situation and take appropriate emergency response measures to abate or mitigate the threat pursuant to established procedures.

B. Emergency Administrative Orders.

B.1. Rule 1202 Administrative Order.

If an emergency is found to exist that requires issuance of an order without a hearing, the OCD or OCC may promulgate an

emergency order pursuant to Rule 1202. An order issued pursuant to Rule 1202 shall remain in force no longer than fifteen (15) days from its effective date.

B.2. 72-Hour Orders Pursuant to the Water Quality Act.

If a pollution source or combination of sources poses an immediate and substantial danger to public health, a 72-hour emergency order may be issued by the Director or the OCC, as appropriate. If time permits, the District or Bureau may apply to the Director for such an Order, and OCD Legal may assist the District or Bureau with the application and a draft Order. An emergency order issued hereunder may be supplemented by an application to the district court for further orders.

C. Subsequent Actions.

After issuance and service of an emergency order, steps should be immediately taken by the District or Bureau to make the order permanent, if appropriate. Thus, the District or Bureau should immediately prepare a CO or an application for a hearing to show cause, or should coordinate with OCD Legal in an application to the District Court for further relief.

VI. SETTLEMENT.

Settlement may be undertaken at any time during the foregoing proceedings. The District Supervisor or Bureau Chief, in consultation with the Director, may agree to a settlement upon terms that are mutually agreeable and which safeguard the rights of relevant persons. If a formal settlement agreement is to be prepared, the District or Bureau may draft the document, with the assistance of OCD Legal. Field personnel of the District or Bureau shall monitor performance of the settlement agreement and report any subsequent violations to the Director and OCD Legal, who will take appropriate follow-up actions.

VII. PENALTIES.

A. Introduction.

It is beyond the scope of this document to detail all penalties that can be imposed upon violation of the Acts, rules or orders. Examples are listed below to assist Districts and Bureaus to prepare applications and orders. Choice of the penalty appropriate to the situation should be carefully considered and, when questions arise, consultation should be undertaken with the District Supervisor, Bureau Chief, the Director and OCD Legal.

B. Examples of Penalties.

B.1. Shut-in well.

For a producing oil or gas well, an effective remedy for a violation is to terminate production from the well, commonly referred to in the industry as "shutting-in" the well. An order to shut-in a well, unit or project may be issued in a NOV, a CO or following hearing on an Order to Show Cause, as appropriate. A shut-in order may order production halted, and may also withdraw transport authority. An order to shut-in a well, unit or project may also order transporters (e.g. gathering companies, pipeline companies, and surface transporters) not to take product from a well, unit or project.

B.2. Cancel Allowable - Terminate Production.

For an oil or gas well which is producing from a prorated oil or gas pool, an effective remedy for a violation is termination of the allowable and production pursuant to Rules 601-604. The oil or gas well allowable may be cancelled in a NOV, a CO or following a hearing on an Order to Show Cause, as appropriate. Subsequent orders may order production halted. Subsequent orders may also order transport authority revoked, and transporters (e.g. gathering companies, pipeline companies, and surface transporters) not to transport or take product from a well.

B.3 Plugging and Abandonment of Wells.

For an oil and gas well which is not producing, a remedy for a violation is an order directing the relevant person or persons to either temporarily abandon the well pursuant to the rules or permanently plug and abandon the well. An order to plug and abandon a non-producing well may be issued after hearing or in a CO. The Oil and Gas Reclamation Fund may be expended to permanently plug and abandon wells; however, such an order may be issued only after notice and hearing; therefore an Order to Show Cause is necessary to impose this penalty.

B.4. Permit Revocation/Water Quality Act.

For an oil and gas operator who holds a discharge permit pursuant to the Water Quality Act, a remedy for a violation is an order revoking the relevant permit (and other permits). An order revoking a discharge permit may be issued after hearing or in a CO.

B.5. Civil Penalty Assessment.

A civil penalty assessment in the amount of up to \$1,000 *for each day* of violation may be assessed by OCD for violations of the Oil and Gas Act.). A civil penalty of up to \$25,000 *per day of noncompliance* may be issued for violations of the Water Quality Act. An order imposing a civil penalty may be issued after hearing or in a CO. OCD Legal shall recover the amount of the assessment in District Court, if necessary.

B.6. Forfeiture of Financial Assurance.

For an oil and gas operator with financial assurance required by Rule 101, a remedy for violation is forfeiting the plugging and/or reclamation bond or making a draft on a letter of credit, generally upon failure of the operator to comply with an order to plug and abandon a well or properly reclaim a site. OCD Legal will collect the forfeited financial assurance.

B.7. Indemnity.

Where the costs of properly plugging exceed the amount recovered from the financial assurance under the preceding section, OCD Legal may institute proceedings to recover the unrecovered plugging costs from the relevant person.

B.8. Seizure and Sale.

Under rare circumstances, seizure and sale of illegal oil or gas that is produced or transported may be ordered. OCD Legal will initiate such a proceeding in District Court *in rem*.

B.9. Criminal penalties.

Under appropriate circumstances, criminal penalties for noncompliance with the acts and rules may be imposed. Where appropriate, OCD Legal and/or the Director may apply to the proper authorities for imposition of criminal penalties.

VIII. CAVEAT CONCERNING LEGAL EFFECT OF THESE GUIDELINES.

This document is intended to collect enforcement tools that presently exist in statutes, rules and orders, and to collect in written form processes which have been employed by the agency historically when faced with the need to enforce a statute, rule or order. This document is *not* intended to create new enforcement tools or to require a particular procedure to be used in any particular case; nor is it intended to create rights or responsibilities which are not otherwise set out in statutes, rules or orders.

ISSUED this ___ day of September, 2000.

THE OIL CONSERVATION DIVISION

By _____
Lori Wrotenbery, Director