

THE COGCC'S NEW PENALTY RULES

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ROCKY MOUNTAIN EHS PEER GROUP MEETING
DENVER, COLORADO
JANUARY 15, 2015



- The Oil and Gas Conservation Act authorized:
 - \$1,000 daily penalty per violation
 - \$10,000 total penalty absent significant impacts
- COGCC Rule 522: Penalty Procedures
 - Gave the COGCC substantial discretion over the process, e.g., warnings/NOAVs and AOCs/OFVs
- COGCC Rule 523: Fines
 - Violations x Penalties x Days
 - Ad hoc calculations that were typically negotiated

- Perception that COGCC was too lenient, though its recent enforcement results compare well to:
 - Other Colorado agencies, e.g., CDPHE-HM&WMD
 - Other state oil and gas commissions, e.g., TX & PA
- Executive Order D 2013-004 ordered the COGCC to revise its penalty rules
- HB 14-1356 amended the Act to:
 - Increase the daily penalty per violation from \$1,000 to \$15,000;
 - Require a penalty for each day of violation;
 - Eliminate the \$10,000 cap; and
 - Mandate quarterly reporting on penalties

- Stakeholder meetings August – December 2014
- Rulemaking hearing December 2014 – January 2015
- Rules adopted January 5, 2015
- Rules expected to be published January 25, 2015
- Rules effective beginning February 14, 2015

- Enforcement and penalties: Rules 522 and 523
- Miscellaneous: More than 20 other Rules amended without opposition, including:
 - 317.e (casing and cementing)
 - 317.r (anti-collision evaluation)
 - 317.s (fracture stimulation setbacks)
 - 319.a (plugging)
 - 603.e (well control equipment)

- Initiation of enforcement still requires “reasonable cause,” and reasonable cause still requires “physical evidence”
- A complainant may still comment on an AOC and apply for an OFV, but:
 - A written complaint is required; and
 - Deadlines are imposed
- Violations may be resolved by either:
 - A warning letter or corrective action required inspection report (without a penalty); or
 - An NOAV (with a penalty)

- An NOAV must be issued and a penalty must be assessed for all alleged violations that:
 - Are characterized as “major,” i.e., have “actual significant adverse impacts”;
 - Involve a “Class 3 Rule,” i.e., one “directly related to protecting” the public or environment and whose violation “presents a significant probability of actual or threatened adverse impacts”;
 - Involve violations for which the operator previously received a letter or report;
 - Cannot be corrected without undue delay; or
 - Are not timely corrected

- OFV hearings are required for all cases involving:
 - Gross negligence or knowing and willful misconduct that resulted in an egregious violation;
 - A pattern of violation; or
 - A hearing request by a complainant
- Other procedural changes:
 - An NOAV must be retracted in writing if the Director determines it lacks reasonable cause;
 - NOAVs must be answered within 28 days;
 - Any statement that an AOC does not constitute an admission must be negotiated on a case-by-case basis; and
 - The protest of cease-and-desist order will not stay the order

- Special presumptions apply when determining the days of violation:
 - Most violations begin when they are discovered or should have been discovered; and
 - Most violations end when “appropriate corrective action is commenced.” This requires both:
 - Assessing the impacts; and
 - Stopping and controlling the impacts
 - Examples of corrective action include:

■ Containing a spill	■ Providing alternative water
■ Establishing well control	■ Mobilizing resources

- A new Penalty Matrix is used to determine the base penalty:

	<u>Class 1</u>	<u>Class 2</u>	<u>Class 3</u>
<u>Major</u>	\$5,000	\$10,000	\$15,000
<u>Moderate</u>	\$1,500	\$5,000	\$10,000
<u>Minor</u>	\$200	\$2,500	\$5,000

- Draft Classification of Rules:
 - Class 1: Paperwork
 - Class 2: Permitting, Safety, Financial Assurance, and Aesthetics and Noise
 - Class 3: Waste Management, Reclamation, and Wildlife
- Degree of Impact:
 - Major: Actually significant
 - Moderate: Threatened significant or actually moderate
 - Minor: Little threat and no actual

- Other Changes:
 - A prerequisite for mitigation of the base penalty is that the operator cooperates with the COGCC;
 - Aggravating factors are modified to add gross negligence/knowing and willful misconduct and pattern of violation and to omit property damage and wildlife loss;
 - Daily penalty amounts may be decreased for violations of long duration; and
 - A pattern of violation requires the violations to be confirmed by an AOC or OFV

- Voluntary Disclosure
 - Requires a regulatory compliance program, whose indicia include:
 - Written procedures;
 - Organizational supervisor;
 - Designated personnel; and
 - Documentation of results
 - Applies to all violations, but the presumed penalty reduction is reduced from 100% to at least 35%

- Forthcoming
- Will include:
 - Classification of Rules; and
 - Violation Duration Matrix
- May include other guidance, e.g.,
 - Consolidation of violations; and
 - Adjustments for settlement, ability to pay, and remediation costs
- Nonbinding and creates no legal rights

EXAMPLES OF POTENTIAL PENALTIES UNDER THE AMENDED RULES*

<u>Type of Violation</u>	<u>Days</u>	<u>Class</u>	<u>Degree of Harm</u>	<u>Penalty Increase</u>
Reclamation (Rules 324A, & 1004)	1,321	3	Moderate	59x
Waste Management (Rules 902, 906.a, 902, 903, & 907)	10	3	Moderate	10x
MIT (Rule 316)	669	2	Moderate	23x

*From L. McDonald, PhD

- COGCC leadership emphasizes discretion and promises to exercise new authority judiciously
- Some Commissioners express concern, particularly regarding:
 - Effect on smaller companies; and
 - Relationship between penalty and culpability

1. Is the penalty matrix a starting point, an end point, or something in between?
2. How will the COGCC exercise its discretion?
3. Will the COGCC continue to assess multiple violations for single events?
4. Is private enforcement lawful under the Act?
5. Is the operator for purposes of authorization always the operator for purposes of enforcement?

1. More NOAVs and penalties, especially regarding waste and reclamation rules
2. Much larger penalties
3. Greater reputational harm
4. Tougher AOC negotiations
5. More contested cases



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