



COLORADO

**Oil & Gas Conservation
Commission**

Department of Natural Resources

COLORADO OIL AND GAS CONSERVATION COMMISSION

ENFORCEMENT GUIDANCE AND PENALTY POLICY

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INTRODUCTION

The mission of the Colorado Oil and Gas Conservation Commission (“Commission”) is to foster the responsible development of Colorado’s oil and gas natural resources. In Colorado, this means that the development of these natural resources must be consistent with protection of public health, safety, and welfare, including the environment and wildlife resources, at all times.

A strong enforcement program plays an important part in assuring the responsible development of oil and gas natural resources across Colorado. This guidance document describes the Commission’s enforcement policies. These policies are presented in this written form to provide all those interested in and affected by the development of oil and gas natural resources with a clear roadmap as to how and when the Commission will enforce the statute and the rules that guide oil and gas development.

Substantial and appropriate penalties, levied in appropriate circumstances, are a part of any strong enforcement program. This document describes the rules that govern Colorado’s oil and gas penalty program. It explains how the Commission will propose and assess penalties. It lays out a penalty program that deters violations, as well as encourages compliance and good conduct.

Part A of this *Enforcement Guidance and Penalty Policy* describes the Commission’s policies, practices and procedures for issuing and resolving Warning Letters, “corrective action required” inspection reports, and NOAVs. Part B describes the Commission’s policies, practices, and procedures for determining penalty amounts.

A. COGCC ENFORCEMENT GUIDANCE

I. Introduction

The Colorado Oil and Gas Conservation Act, §§ 34-60-101 to 130, C.R.S. (2014) (the “Act”) (available at http://cogcc.state.co.us/RR_Docs_new/rules/AppendixV.pdf), authorizes the Commission to enforce the Act, or Commission Rules of Practice and Procedure, 2 CCR 404-1 (“Rule”), orders, or permits. § 34-60-121, C.R.S. The enforcement guidance in this section explains how the Commission will exercise these enforcement powers.

When the Commission initiates enforcement action in which it seeks penalties, it issues a Notice of Alleged Violation (“NOAV”). The NOAV identifies the statutory and regulatory provisions allegedly violated as well as the facts alleged to constitute the violation. Penalties may be imposed only by Commission order after a hearing, or by Commission approval of an Administrative Order by Consent agreed to by the operator and Director.

In the event a violation is significantly less serious, the Director may elect to issue a Warning Letter or a Corrective Action Required Inspection Report. Less serious violations are limited to violations that do not pose significant actual or threatened injury to public health or the environment, including wildlife resources, do not cause waste, do not damage correlative rights, and are not part of a pattern of violations by the operator.

A Warning Letter or Corrective Action Required Inspection Report requires an operator to correct a less serious violation within a specified time. If the operator complies within the prescribed time, the Director may close the matter without issuing an NOAV and without seeking a penalty. If the operator does not timely correct the violation, the Director will issue an NOAV and seek a penalty.

II. Commission Options for Resolving Alleged Violations

When the Director has reasonable cause to believe that a violation of the Act, or a Commission rule, order or permit has occurred, the Director will require the operator to remedy the violation and may issue an NOAV to the operator. Rule 522.a.(1). “Reasonable cause” must be supported by circumstances sufficiently strong to justify a belief that a violation may have occurred, or is occurring. This may include physical evidence, analytical data, reports or forms, or the absence of required forms or reports available to the Director. As a threshold matter, the Director will always consider whether the concept of force majeure applies to a given set of facts prior to issuing an NOAV.

Reasonable cause to believe that a violation has occurred may arise upon the Director’s own investigation and initiative, upon a third-party complaint, or as a

result of any other reliable information available to the Director. The Director will respond to an alleged violation by issuing a Warning Letter or Corrective Action Required Inspection Report, or by issuing an NOAV and seeking a penalty. The principal difference between these approaches is that if a Warning Letter or a Corrective Action Required Inspection Report is issued, a penalty usually will not be sought by the Commission or the Director. In the event an NOAV issues, a penalty usually will be sought.

The circumstances underlying the issuance of these documents are described below.

A. Warning Letter or Corrective Action Required Inspection Report

When a potential violation is identified by any means, staff must determine as a threshold question whether a warning coupled with prompt action to correct the violation is appropriate, or whether an NOAV seeking a penalty is warranted. The Commission's Rule Classification (Appendix A) , classifies each Commission Rule as a Class 1, 2, or 3, in ascending order of potential adverse consequences of a violation. The Director will separately determine the degree (i.e. Major, Moderate or Minor) to which a violation results in an actual or threatened adverse impact to public health, safety, and welfare, including the environment and wildlife resources (this concept is discussed in more detail below). Warning Letters or Corrective Action Required Inspection Reports may only be issued where the rule allegedly violated is not a Class 3 Rule and the degree of actual or threatened impact is Minor or Moderate.

In general, a Warning Letter or Corrective Action Required Inspection Report is appropriate for an alleged violation of a Class 1 or Class 2 Rule that has a Moderate or Minor impact if the Director determines all of the following factors exist:

- The violation did not and will not result in actual or a threat of significant adverse impacts to public health, safety, or welfare, including the environment and wildlife resources, significant waste of resources, or significant harm to correlative rights;
- Corrective action can bring the operator into compliance quickly;
- The operator has a good compliance history;
- The violation is not part of a pattern of violation by the operator; and
- The operator has not received a recent Warning Letter or Corrective Action Required Inspection Report for a similar violation under similar circumstances.

A Warning Letter or Corrective Action Required Inspection Report will describe the corrective action required and the deadline by which the operator must complete the corrective action *and* provide the Director with notice, including evidence of completion.

Absent unusual circumstances, the Director will not pursue penalties or further enforcement when an operator timely completes the required corrective action and provides notice of completion. Determining the existence of unusual circumstances lies wholly within the discretion of the Commission and the Director.

If an operator fails to complete corrective action and provide notice of completion by the deadline, the Director will issue an NOAV seeking penalties and, where applicable, requiring corrective actions.

Staff typically is available to discuss the details of a Warning Letter or Corrective Action Required Inspection Report with an operator. If warranted by facts or circumstances previously unknown to staff, a Warning Letter or Corrective Action Required Inspection Report may be modified or withdrawn in whole or in part.

Repeat Violations. Warning Letters or Corrective Action Required Inspection Reports will not be issued when the Director concludes that an operator has been warned previously about the same or materially similar violations.

Repeat violations will be evaluated on a per-well, per-location, or operator basis, depending on the Rule. For example, a repeat violation of a Rule evaluated on a per-well basis will result in an NOAV if the operator received a warning for the same violation at the same well within the prior two years. But, if the prior warning was for a different well or Rule the operator would still be eligible for a warning.

Appendix A identifies, for each Rule: 1) classification; 2) the lead COGCC unit responsible for enforcing the Rule; 3) whether violation of a given rule will generally lead to the issuance of an NOAV or whether staff retains the discretion to issue a warning; 4) how repeat violations are evaluated; and 5) the presumptive time allowed for corrective actions.

Under specific circumstances described in the following section, Warning Letters or Corrective Action Required Inspection Reports will not be issued and an NOAV seeking penalties will be issued for alleged violations.

B. Notice of Alleged Violation

The Director will issue an NOAV and seek penalties for any violation that the Director determines meets one or more of the following circumstances:

- A Class 3 Rule was violated;
- The violation results in a significant threatened or actual adverse public health or environmental impact;
- The violation results in significant waste or significant harm to correlative rights;
- The violation is committed by an operator which previously has been warned by the Director about a similar violation;

- A violation that occurs when an operator receives a Warning Letter or Corrective Action Required Inspection Report but does not complete required corrective action and provide evidence of completion within the prescribed time;
- The operator exhibits a pattern of violations (*See* Penalty Policy, Part VI.);
- The operator's conduct is one of gross negligence or knowing and willful misconduct that results in an egregious violation (*See* Penalty Policy, Part VI.); or
- The Director otherwise determines that a Warning Letter or Corrective Action Required Inspection Report is inappropriate.

The circumstances described above are illustrative. They are not an exclusive list of the circumstances in which an NOAV and penalty assessment, rather than a Warning Letter or Corrective Action Required Inspection Report, will issue for a violation. The Director retains full discretion to issue an NOAV and assess a penalty for any violation.

C. Initiation of NOAV Process

1. NOAVs

The Commission or Director initiates enforcement actions by issuing an NOAV to an operator. The NOAV is a written document that alleges that an operator or other person or entity is in violation of the Act, or Commission rules, orders, or permits. Service of an NOAV constitutes commencement of an enforcement action for purposes of §34-60-115, C.R.S. Rule 522.d.(3).

An NOAV will, in virtually all circumstances, seek the assessment of a penalty. The penalty will be calculated based on the Act and Commission Rule 523, and with reference to the Penalty Policy in Part B of this Guidance.

Staff may issue an NOAV based upon its own inspection or investigation, in response to a citizen complaint (Form 18) pursuant to Rule 336, or upon other reliable information provided to the Commission.

To facilitate early identification of disputed factual issues, operators are required to file an answer to the NOAV under Rule 522.d.(2). An answer should at a minimum admit or deny the allegations contained in the NOAV, explain the basis for any denials, identify corrective actions taken in response to the NOAV, if any, and identify facts known to the operator at the time that are relevant to the operator's response to the alleged violations. Answers are filed with the Secretary of the Commission and should be emailed to dnr_cogccenforcement@state.co.us. Rule 521.b (citing 503.h). A courtesy email to the NOAV author would be appreciated, but is not required.

2. Contents and Service of an NOAV

An NOAV must identify each provision of the Act, Commission rule, order, or permit allegedly violated as well as plain and short statement of the facts alleged to constitute each violation. § 34-60-121(4), C.R.S. The NOAV may propose a specific penalty amount or refer generally to Rule 523. Rule 522.d.(1). The NOAV may include required corrective actions but not necessarily a corrective action completion date different from the date of issue. § 34-60-121(4), C.R.S.; Rule 522.d.(1). Completing specified NOAV corrective actions by the corrective action date is not a defense to the underlying violation, but a prompt, effective and prudent response to the violation is a mitigating factor. Rule 523.c.(3).B.2. Operators are encouraged to commence corrective actions without delay in all cases.

When preparing an NOAV, Commission staff ordinarily cites all potential violations supported by facts and circumstances presented to the staff member. The Hearings Unit independently evaluates each alleged violation and may consolidate or eliminate violations based on the available evidence.

An NOAV must be served in person or by certified mail. § 34-60-121(4), C.R.S.; Rule 521.

III. Resolution of an NOAV

An NOAV may be resolved provisionally through an agreement negotiated between the operator and the Director, called an Administrative Order by Consent (“AOC”). AOCs are subject to final approval by the Commission. § 34-60-121(1), C.R.S.; Rule 522.e.(1).

When the Director and an operator do not reach agreement about the resolution of a violation, appropriate corrective action, penalty, or any other matter, the enforcement action will be scheduled for an Order Finding Violation (“OFV”) hearing before the Commission. Rule 522.e.(2) The Director initiates an OFV hearing by serving a Notice and Application for Hearing, and places the matter on the Commission docket. The Notice and Application for Hearing must give the operator 35 days notice prior to the hearing. Rule 507.a.

A more detailed discussion of policies and procedures for AOCs and OFVs follows.

A. Administrative Orders by Consent

As noted, the Director and the operator may provisionally resolve an NOAV through a negotiated settlement. The settlement is memorialized in an AOC, and the AOC is subject to the Commission’s final approval. § 34-60-121(1), C.R.S.; Rule 522.e. The majority of NOAVs are resolved through negotiated AOCs.

The key elements for the negotiation of most AOCs are the penalty and the corrective actions the operator will be required to take to return to compliance and remedy any adverse impacts arising from the violations.

1. Corrective Action

Corrective actions are case and location specific. In all cases, the Commission will require corrective measures that remedy violations as expeditiously as practical under the circumstances. Any adverse impacts to public health, safety, welfare, the environment, or wildlife arising from the violations must be corrected and remediated as soon as possible.

In most cases, the required corrective action and an abatement schedule will be set forth in the NOAV. In many cases, the corrective action needed for an operator to return to compliance is obvious. For example, an operator will be required to submit a required report, or to remove non-oil and gas equipment from the well pad. In such a case, negotiations between the operator and the Director are relatively straightforward.

In other cases, returning to compliance or remediating adverse impacts is more complicated; for example, a site investigation and a remediation workplan may be required pursuant to Rule 909. This may be an iterative process requiring investigation and more detailed corrective actions than those initially included in the NOAV.

In cases in which an NOAV issues as a result of the third-party complaint, the Director will confer with the Complainant regarding proposed corrective actions and completion dates. The Director retains final authority as to the appropriate corrective action and any penalty amount assessed in all circumstances.

2. Penalty Assessment

The penalty amount sought in an enforcement order is determined based on the Act and Commission Rule 523, and with reference to the Penalty Policy in Part B of this Guidance.

In general, a “daily penalty” is determined for every violation in an NOAV. Duration – the number of days of violation – is also determined for each violation. Each daily penalty is multiplied by the duration for each violation, and all such penalties are summed. The resulting amount will typically be the penalty amount that will be sought if the matter goes to contested hearing. This total amount can then be adjusted up or down if aggravating and mitigating factors apply or where other factors discussed in Part B, Section V. apply.

Presumptive daily penalty amounts are set forth in a Penalty Schedule in Rule 523.c.(1) and Part B, Section III, below. The Penalty Schedule considers (1) the class of the Rule violated (see Appendix A) and (2) the degree of threatened or actual adverse impact to public health, safety, or welfare, including the environment and wildlife resources, resulting from the violation.

In less complex cases, such as failure to conduct a required test or to submit a required report, the Director may propose an AOC with corrective action and a proposed penalty at the same time the NOAV and/or the Notice and Application for Hearing is issued. In these less complex cases, the operator will have a brief period of time – typically 21 days – in which to: (1) accept the proposed corrective action, penalty amount, and other settlement terms; (2) suggest modifications; or (3) elect to proceed with an OFV hearing.

In matters involving more complex violations or violations resulting in adverse environmental impacts, the Director may take more time to assess all relevant facts before making a penalty proposal. For example, a Site Investigation and Remediation Workplan (Form 27) may be required. If so, requirements of Rule 909 are expected to be followed in a timely manner. Failure to satisfy Rule 909 requirements in a timely manner may result in a longer duration calculated for NOAV violations resulting in larger total penalties.

Operators are encouraged to actively engage with enforcement and technical staff to resolve the violations alleged in the NOAV (see Rule 523.c.(3)). Commission staff will respond to operator questions promptly and encourage good faith negotiations and compliance efforts in any way that they can.

3. Public Projects

Rule 523.f. describes how an operator may perform a public project that benefits public health, safety and welfare, including the environment or wildlife, to satisfy some or all of a penalty amount. Further discussion on this is found in Part B, VII., below.

4. Final Approval of an AOC

If the parties reach agreement in principle to resolve an NOAV, the parties will draft an AOC to memorialize the agreement. The draft AOC will describe relevant facts and circumstances, violations asserted, corrective and remedial actions, the agreed penalty amount, and other relevant terms and provisions.

If the NOAV was issued as a result of a third-party complaint, the Director will confer with a Complainant who has filed a written complaint on a Form 18 during the course of negotiations regarding the proposed settlement terms. The Director will also provide a copy of a draft AOC to a Complainant prior to final agreement

between the Director and the operator. The Complainant will have 14 days to comment on the terms of a draft AOC. Rule 522.e.(1). A Complainant's comments will be considered in reaching a final agreement, but may either be accepted or rejected by the Director and operator. In either event, the Complainant will be presented with a final proposed AOC. A Complainant who is dissatisfied with the final proposed AOC may apply for a limited OFV hearing within 28 days of receipt of the final AOC, pursuant to Rule 522.b. Additional information with respect to Complainant's rights is available below in Section IV.E.

Once the AOC is executed by the parties and the Complainant, if any, has expressed approval of the AOC or failed to object within the 28 days required by Rule 522.b.(5), the matter will be placed on the Commission's hearing docket for final approval. AOCs are typically docketed on the Commission's Consent Agenda, which means they may be approved without a formal hearing. An approved AOC is a final, enforceable order of the Commission, subject to judicial review. If the Commission denies the AOC, the matter is remanded to the Director for further proceedings. Typically the Director and operator will seek to renegotiate proposed settlement terms to satisfy the Commission's concerns. If the Director and operator fail to reach agreement on a revised AOC consistent with the Commission's comments, the matter will be referred to a Hearing Officer who typically will convene a pre-hearing conference, set a pre-hearing schedule, and docket the matter for an OFV hearing.

B. Order Finding Violation

When the Director and the violator cannot reach a proposed settlement, or if the Director asserts the operator has engaged in a pattern of violations or gross negligence or knowing and willful misconduct, an NOAV will be scheduled for an OFV hearing before the Commission.

An OFV hearing is an adjudicative administrative hearing. It is governed by the Colorado Administrative Procedure Act ("APA"), the Colorado Rules of Civil Procedure ("CRCP"), the Colorado Rules of Evidence, and Rule 528. The Commission has discretion to relax procedural requirements of the CRCP, and to admit evidence that would not be admissible under the Colorado Rules of Evidence.

An OFV hearing is a *de novo* proceeding. This means the Commission hears the whole case, beginning to end, and makes its decision based only on the evidence presented at the hearing. Absent a stipulation or other arrangement, neither the operator nor the Commission is bound by terms, conditions, or penalty amounts offered or discussed prior to the hearing. Commission staff often seeks the highest penalty amount allowed under the Act and Commission rules when an NOAV proceeds to OFV hearing.

Preparation required for contested OFV hearings can be extensive. Parties may conduct discovery, including depositions, interrogatories, and requests for admissions.

OFV hearings typically include opening statements, presentation of cases-in-chief, including lay and expert witness testimony, questioning by Commissioners, cross-examination, Rule 510 statements by non-parties, rebuttal testimony, and closing arguments. Colorado's APA permits parties to submit all or part of their evidence in writing without the need for oral testimony, but most parties proceed with oral and documentary evidence and argument.

After due consideration of written and oral statements, the testimony and arguments presented at hearing, and all other evidence and argument, the Commission determines its findings and issues its decision. The Commission's decision is recorded in the hearing minutes and in a final Order.

IV. Hearing Procedures

A. Notice and Application for Hearing

While issuance of the NOAV initiates the formal enforcement process, the Commission's hearing process is initiated when the Secretary of the Commission docket the matter and issues a Notice and Application for Hearing pursuant to Rule 507, or alternatively a Notice and Application for Mandatory OFV Hearing, pursuant to Rule 522.e.(2)B, setting the hearing date. The Notice and Application for Hearing or Notice and Application for Mandatory OFV Hearing serves as an application for purposes of Rule 503.

This notice is served upon the operator, as required by the Act, the Colorado Rules of Civil Procedure, and Rule 521. This notice is also published once in a Denver newspaper and in a newspaper in general circulation in the county in which the property involved is located. The content of the Commission's Notice and Application for Hearing is governed by the Administrative Procedure Act, the Colorado Rules of Civil Procedure, and the Colorado Oil and Gas Conservation Act.

B. Prehearing Procedures

A prehearing conference pursuant to Rule 527 may be convened by the Director, or at the request of an applicant or any party to a contested hearing. A prehearing conference may be used to facilitate settlement, narrow issues, identify stipulated facts, or resolve other pertinent issues. By participating in one or more prehearing conferences, parties frequently are able to reduce the scope and length of the adjudicatory hearing before the Commission.

A Notice and Application for Hearing is generally sent with a cover letter requesting that the noticed operator contact the Enforcement Officer or Assistant

Attorney General handling the matter. If the matter is not subject to Rule 522.e.(2)A, the Director and operator ordinarily will explore settlement opportunities. The operator always will be required to correct violations and return to compliance as a condition of settlement.

Settlement conferences may be conducted off the record for purposes of negotiation. Technical staff is frequently involved, as many of the discussion topics deal with performance of corrective actions, remediation requirements, and other technical issues. The parties will incorporate any agreements reached in an AOC.

If a settlement cannot be reached or if the matter is subject to Rule 522.e.(2)A, a formal prehearing conference will be scheduled and the parties will proceed to hearing. A case may have a parallel track of prehearing proceedings supervised by a Hearing Officer, while settlement negotiations are on-going.

Prehearing conferences are governed by Rule 527, the APA, and the Colorado Rules of Civil Procedure. The Director, a Hearing Officer, or a Commissioner appointed by the Commission as a Hearing Officer, will preside over the prehearing conference and rule on preliminary matters.

At a prehearing conference, the parties and the Hearing Officer will identify legal and factual issues in dispute, schedule discovery procedures (where necessary), schedule prehearing statements and exchange of exhibits, and allocate amounts of hearing time before the Commission. A Hearing Officer may continue the hearing date pursuant to motion and Rule 506.

If the parties identify potentially dispositive legal issues in dispute, the Hearing Officer may establish a schedule for briefing and arguing those issues before the Commission. Cases may be bifurcated such that the Commission will only hear oral arguments on the briefs at the first hearing, and will not hear the factual aspects of the matter until the legal issues have been resolved. At a prehearing conference, the Hearing Officer may require the exchange and acceptance of service of proposed exhibits, the establishment of a list of exhibits and witnesses, and a timetable for the completion of discovery.

If an operator does not respond to an NOAV or Notice and Application for Hearing the case will be docketed for hearing and staff will request the Commission to enter a default judgment. Similarly, if the violator fails to appear at the hearing, a default judgment will be requested. Occasionally, an operator will appear at the noticed hearing without having contacted the Enforcement Officer in advance. The Commission has discretion in that instance to continue the matter, to proceed with the hearing, or to fashion some other remedy appropriate in the circumstances.

C. Enforcement Hearing Procedures

Commission enforcement hearings are conducted pursuant to §24-4-105, C.R.S. and Rule 528.c. The Director, a Complainant, if any, and the operator may present evidence and argument, and may conduct direct and cross examination of witnesses. Witness testimony is given under oath and witnesses are subject to cross-examination.

Enforcement matters are heard *de novo* by the Commission. This means the Commission hears the whole case, beginning to end, and makes its decision based only on the evidence presented at the hearing.

An operator against whom the Commission enters an Order imposing a penalty ordinarily must pay the penalty amount due within 30 days of the effective date of the order unless otherwise provided in the order.

D. Service

Rule 521 specifies how service associated with enforcement actions occurs. Generally, service will be perfected by the Director by certified mail at the address an operator has on file with the Commission. Where the Director has an email address on file, or has established email communication with an operator's legal counsel or regulatory compliance personnel responsible for the matter, email communication will be used for service of documents other than those requiring service by more formal means.

The Director may serve notices and documents on a Complainant via email but will confirm the Complainant has regular access to an email account before doing so. A Complainant filing a Rule 522.b.(5) application must serve the application pursuant to Rule 521.d. given the importance of timely service.

Last, Cease and Desist Orders will be served as quickly and effectively as possible, via confirmed electronic or facsimile copy, followed by a copy sent via other means. The goal is to get the order to the operator as quickly as possible so the problem can be addressed.

E. Complainant's Rights and Responsibilities

Pursuant to Rule 522.b. a Complainant has the right to initiate a limited OFV hearing. An OFV hearing is typically a full adjudicatory proceeding, requiring the presentation of testimony and evidence. However, a Complainant-initiated OFV hearing is limited to either the Director's decision not to issue an NOAV for an alleged violation specifically identified in the written complaint or to the settlement terms in a final proposed AOC settling an alleged violation arising directly from the written complaint. An application for a Complainant-initiated OFV hearing must be filed within 28 days of notification of the Director's decision not to issue an

NOAV or receipt of the final proposed AOC. A Complainant who initiates an OFV hearing has the burden of persuading the Commission that the Director has erred and convincing the Commission to order the Director to issue an NOAV and initiate an enforcement action, renegotiate the AOC, or take some other related action.

V. Cease and Desist Orders.

Rule 522.g. and §34-60-121(5), C.R.S., describe the Commission's procedures with respect to cease and desist orders. Cease and desist orders can only be issued during an emergency situation. Before issuing a cease and desist order, the Commission or the Director typically communicate with the operator regarding the need for the order. However, the Commission and the Director reserve the right to issue the order and then attempt communication, if the facts require prompt action.

Should the Director issue the order, the Director will likely notify the full Commission to discuss the matter as soon as possible, but Rule 522.g. requires that the Commission be notified no later than the next regularly scheduled Commission hearing. Director communication with the Commission may involve calling an emergency meeting of the Commission, a conference call or some other means of timely communication. The Commission and the Director reserve the authority to stay or modify a Cease and Desist Order, or a discrete portion thereof, where it is appropriate. Moreover, the Commission and the Director, in consultation with the operator, will consider force majeure or impossibility of compliance before issuing a Cease and Desist Order or deciding to stay or modify an order that has been issued.

B. COGCC PENALTY POLICY

I. Introduction

This section sets forth the Commission's policies, procedures, interpretations, and guidelines for determining appropriate penalties for violations of the Act, Commission Rules, Orders, or permits. This Penalty Policy is intended to deter noncompliance and to encourage any out-of-compliance operators to come into compliance as soon as possible. It is also intended to encourage prompt, cooperative, and complete responses to environmental or public health and safety impacts and concerns when violations do occur.

Further, this Penalty Policy is intended to ensure penalties:

- Are assessed equitably and consistently while allowing reasonable flexibility and discretion to the Commission;
- Are appropriate in view of the gravity or seriousness of the violation;
- Eliminate any economic benefit of noncompliance; and
- Are administered to encourage a rapid return to compliance.

A. Preliminary Matters

The policies and procedures set out in this Penalty Policy are for guidance only. This document does not contain rules or binding procedures. Similarly, nothing in this Penalty Policy creates any substantive or procedural right in any person or entity. Finally, the Commission may change this Penalty Policy as it sees fit.

It will be unusual for the Commission or the Director to substantially vary from this Penalty Policy. Nevertheless, the Commission retains the discretion to vary penalty assessments from the guidance contained in this Penalty Policy when appropriate.

The Commission acknowledges that an assessment of no penalty, or an assessment of a penalty less than that called for under this Penalty Policy, may be the just and appropriate enforcement response in the circumstances of a particular violation. Similarly, the Commission acknowledges that other circumstances may dictate a penalty greater than the penalty calculated under this Penalty Policy.

B. Documentation of Penalty Assessment

Enforcement staff will explain how a proposed penalty is determined and calculated in the enforcement order. Documentation will include information sufficient to demonstrate that a penalty is consistent with the Act, Commission rules, and this Penalty Policy. If a proposed penalty varies substantially from this Penalty Policy,

a written explanation will provide the rationale for the variance if not explained in the enforcement order.

The administrative record for the determination of a final administrative penalty is generally a public record. This record is available for public review pursuant to the Colorado Open Records Act.

II. A Brief Overview of the Calculation of a Penalty

This section describes the calculation of a penalty amount for a hypothetical NOAV. Each of the steps set forth in this section is described in more detail in the text below.

1. The first step in the penalty assessment process is to list each violation described in the NOAV and the Class of each rule violation.
2. Next, a daily penalty amount is determined for each violation using the Penalty Schedule. The daily penalties in the Penalty Schedule are based upon the Rule class violated and the degree of threatened or actual harm to public health, safety, welfare, the environment, or wildlife caused by the violation.
3. The third step in the penalty assessment process considers the duration of each violation. Each daily penalty amount is multiplied by the number of days the violation continues.
4. Additional procedures that reduce penalty amounts based upon duration may be applied for violations of long duration.
5. A total penalty amount for each violation, including duration considerations, is then listed. These amounts are added together to reach a cumulative amount for all violations in the NOAV.
6. The penalty assessment then considers and applies aggravating and mitigating factors to this cumulative amount.
7. Other considerations may also be applied to adjust a penalty on a case-by-case basis, as discussed in Part B, Section V. This adjusted cumulative amount is the penalty the Director will seek in the enforcement order.

III. Calculation of the Daily Penalty

To ensure that a penalty is appropriate to the nature of a violation and that penalties are applied uniformly over time, the Commission has established a Penalty Schedule, codified in Rule 523.c.(1) and reprinted below. The penalty amounts shown in the schedule are guidelines to inform the Director and Commission, as well as the regulated community, the public, and other

stakeholders, in considering the appropriate range of an administrative penalty for a violation of a particular Rule. The final amount of a penalty proposed by the Director or approved by the Commission will be determined on an individual case-by-case basis for each violation and may vary from the amounts shown in the schedule.

The Commission's Penalty Schedule is based upon: (1) the Commission's Rule Classification (Appendix A), which establishes rule classes for Commission Rules based on the nature of the violation; and (2) the degree of threatened or actual adverse impact to public health, safety, welfare, the environment, or wildlife caused by the violation. These factors form the vertical and horizontal axes of the Penalty Schedule.

The penalty amounts in the cells in the Penalty Schedule are based on a statutory maximum penalty of \$15,000 per violation per day. The Commission will begin its determination of a daily penalty amount by selecting which cell in its Penalty Schedule best fits the violation at issue. However, the Commission has the authority to levy a penalty for each day a violation continues from \$0 to \$15,000 under the Act.

Penalty Schedule – Rule 523.c.(1)

		Rule Classification		
		Class 1: Paperwork or other ministerial rules, a violation of which presents no direct risk or threat of harm to public health, safety, and welfare, including the environment and wildlife resources.	Class 2: Rules related at least indirectly to protecting public health, safety, and welfare, including the environment and wildlife resources, a violation of which presents a possibility of distinct, identifiable actual or threatened adverse impacts to those interests.	Class 3: Rules directly related to protecting public health, safety, and welfare, including the environment and wildlife resources, a violation of which presents a significant probability of actual or threatened adverse impacts to those interests.
Degree of threatened or actual impact to public health, safety, welfare, the environment, or wildlife	Major: Actual significant adverse impacts	\$5,000	\$10,000	\$15,000
	Moderate: Threat of significant adverse impacts, or moderate actual adverse impacts	\$1,500	\$5,000	\$10,000
	Minor: No actual adverse impact and little or no threat of adverse impacts	\$200	\$2,500	\$5,000

A. The Rule Classification

The first part of the Penalty Schedule is based upon the Commission’s Rule Classification (Appendix A) for each Commission Rule. Appendix A classifies each substantive Commission Rule using a three-tiered approach. The Rule classification consideration is shown in the vertical columns of the Penalty Schedule.

As a first example, Rule 705 requires submittal of a Notice of Intent to Conduct Seismic Operations, and is a Class 2 Rule. The minimum penalty for violating a

Class 2 Rule, as shown in the Penalty Schedule, is \$2,500 per day. A second example is Rule 324.A., which requires operators to take precautions to prevent significant adverse environmental impacts to air, water, soil, or biological resources. It is a Class 3 Rule. The minimum penalty for violating a Class 3 Rule, as shown in the Penalty Schedule, is \$5,000 per day.

The rule classifications listed in the Commission's Rule Classification (Appendix A) will be followed in most instances. Rule classifications are, by necessity, broad characterizations. Separately classifying each operative sub-part within each individual rule is impractical. Therefore, the Director retains the discretion to reclassify discrete sub-parts of a Rule (e.g. from a Class 2 to a Class 1), on a case by case basis, where a violation of that sub-part does not have the same consequences as a violation of the remainder of the Rule. For example, Rule 1003, a Class 2 rule, specifies the interim reclamation requirements an operator must satisfy. Rule 1003.e.(3) requires the filing of a Form 4 which documents compliance with the interim reclamation requirements. Clearly, failing to file the form does not have the same consequence as failing to comply with the reclamation requirements altogether. Therefore, the Director may exercise discretion and reclassify a violation of Rule 1003.e.(3) to a lower class where the facts of an individual case support it.

B. The Degree of the Actual or Threatened Impact to Public Health, Safety, Welfare, the Environment, or Wildlife

The degree to which a violation results in an actual or threatened adverse impact to public health, safety, and welfare, including the environment and wildlife resources, is the second factor that determines the daily penalty for a given Rule violation. This factor is shown along the left side of the Penalty Schedule.

The degree of threatened or actual adverse impact to the environment will be determined through consideration of all circumstances of a violation. Generally, "threatened adverse impacts" are those particular and foreseeable adverse consequences that could result immediately from the violation. The Penalty Schedule contains three gradations for this consideration: minor, moderate, and major, as described below. The gradation applied to a particular circumstance lies wholly within the discretion of the Commission and the Director.

Rule 523.c.(2) includes a non-exclusive list of criteria the Director and Commission will consider when assessing the extent of adverse impacts, if any, resulting from a violation. The Commission retains discretion to consider and weigh other facts or circumstances relevant to determining the significance of an impact.

Based upon the circumstances of a particular violation, the Commission will evaluate and rate the magnitude of the impact or threat as follows:

- a) A "major" violation occurs when there is an *actual significant adverse impact* to the environment or public health.
- b) A "moderate" violation occurs when there is a *threat of a significant adverse impact or a moderate actual adverse impact* to the environment or public health.
- c) A "minor" violation occurs when there is a *little or no threat of adverse impact, and no actual adverse impact* to the environment or public health.

C. The Duration of the Violation

The total penalty per violation is calculated by multiplying the daily penalty in the Penalty Schedule by the days of violation. Under Section 121 of the Act and Rule 523, each day a violation persists ordinarily constitutes a separate act of violation. Each day of violation is subject to a daily penalty. § 34-60-121(1), C.R.S.

Rule 523.b. describes how the Director will calculate the duration of a violation in most cases. Generally, for minor violations the Director will count days of violation commencing when an action should have been taken and ending when the required action is completed or commenced to the Director's satisfaction.

For example, Rule 309 requires the filing of Operator's Monthly Report of Operations, Form 7, within 45 days after the end of each month. A violation of Rule 309 will commence on the 46th day and end when the report is filed (there being no other acceptable way to commence the required action to the Director's satisfaction besides actually filing the report). Another example might be a situation where a well has been temporarily abandoned by the removal of necessary surface equipment. Rule 326.c.(1) requires the performance of mechanical integrity testing on all temporarily abandoned wells within 30 days of abandonment. A violation of Rule 326.c.(1) would commence on the 31st day and end when the operator takes the steps necessary to perform the mechanical integrity test which, depending on the facts, may include contracting for performance of the test when a rig is next available or actually commencing the test.

In other situations, the day a violation began or ended (or both) may not be as obvious and may require consideration of indirect evidence or require certain inferences. Rule 523.b.(2) states that "all other violations" (i.e. violations of a more serious nature) presumptively begin on the date the violation was discovered or should have been discovered through the exercise of reasonable care and continues until the appropriate corrective action is commenced to the Director's satisfaction.

As an example, assume a flowline leak exists with noticeable surface impacts and the operator has failed to pressure-test the leaking flowline for two years. Rule 1101.e(1) requires annual pressure testing. In this case, the beginning date of the might be: (1) when the surface impacts were first identified; (2) when the surface

impacts should have been discovered through the exercise of reasonable care; or (3) on the date the delinquent flowline test should have been performed. The Director will consider all available facts and evidence in determining the most appropriate start date of the violation in cases like this.

Similar challenges may apply to determining when a violation should end, particularly in cases involving significant environmental impacts. Ordinarily, a violation will end when immediate actions necessary to assess and evaluate the actual or threatened adverse impacts and all other near term actions necessary to stop, contain, or control actual or threatened impacts have been taken. Depending on the circumstances, this could take hours to several days or more. No penalty will be imposed for days on which an operator is awaiting Commission or Director approval of a work plan, though such approval is rarely required to perform the kinds of near-term actions necessary to stop an ongoing violation. Operators are required to undertake all other responsive activities that can be performed while awaiting approval.

With respect to remedying a threatened adverse impact in order to stop the accrual of daily penalties, the analysis may be more complicated. At the very least, an operator must take the steps necessary to eliminate particular and foreseeable adverse consequences to public health, safety, and welfare, including the environment and wildlife resources that could result immediately from the violation. The Director will not engage in elaborate hypotheticals in order to identify an actionable threat, but where a set of facts clearly represents a threat to the environment or public health an operator will be liable for daily penalties until the threat is removed. For example, imagine a poorly constructed tank battery where subsidence of the tank causes a valve to break and significant quantities of hydrocarbons to spill. First, the operator would be required to remedy the actual cause of the impact, the broken valve, and then eliminate the threat of additional impacts, perhaps by shutting-in the wells and emptying the affected tank. Once those actions are commenced, daily penalties will stop accruing and the operator can begin the long-term work of remedying the spill.

Rules 522 and 523 cannot be read in isolation from the operative rules underlying an alleged violation. In most cases, commencing actions to correct the violation itself will eliminate the threat of harm. For example, Rule 907.a.1 states that “[o]perators shall ensure that E&P waste is properly stored, handled, transported, treated, recycled, or disposed to prevent *threatened* or actual significant adverse environmental impacts to air, water, soil or biological resources or to the extent necessary to ensure compliance with the concentration levels in Table 910-1, with consideration to WQCC ground water standards and classifications” (emphasis added). Under this rule, if an operator were to improperly store E&P waste near a municipal water source the operator might be liable under 907.a.1 for creating a threat of a significant adverse environmental impact. As such, the operator might be subject to a penalty pursuant to Rule 523.b. beginning when the threat was

created (i.e. when the E&P waste was improperly stored near a municipal water source) until the threat is eliminated (i.e. when the E&P waste was properly stored in a way that would no longer represent a threat of significant adverse environmental impacts to the municipal water source). Absent aggravating circumstances, the time required for long-term actions necessary to fully and completely remediate adverse environmental or wildlife impacts resulting from a violation ordinarily will not be counted as part of the violation. Such long-term remedial actions may include, without limitation, construction and on-going operation and maintenance of a groundwater treatment system; long-term monitoring of environmental impacts; in-situ soil treatment; provision of a permanent alternative water supply; or land treatment of oily waste. Completing these kinds of remedial actions often can take many months or years.

The Commission recognizes that in circumstances in which a violation persists for a long time, a straight per-day-of-violation calculation can result in an extremely large penalty amount. In some cases, such a large penalty can be disproportionate and unjust under the circumstances of the violation. In such cases, the Commission *may* adjust the duration aspect of the total penalty in order to fit the particular violation in a way that is more just.

As a guide to determining appropriate penalties for long-duration violations, the Commission may use the following Violation Duration Matrix. The Violation Duration Matrix reduces the percentage of the daily penalty to be applied during different time intervals of a continuing violation. The calculations for each time interval are then added together to determine the total daily penalty. The decision to apply the Violation Duration Matrix lies wholly within the discretion of the Commission and the Director.

Violation Duration Matrix

		Days of Continuing Violation (Columns represent parts of the complete duration of the violation)					
		1-10	11-30	31-60	61-120	121-365	366+
Type of Violation (refer to the axes of Penalty Matrix)	Class 3/Major	100.00%	50.00%	25.00%	10.00%	5.00%	2.00%
	Class 3/Moderate	100.00%	45.00%	22.50%	9.00%	4.50%	1.80%
	Class 3/Minor	100.00%	40.00%	20.00%	8.00%	4.00%	1.60%
	Class 2/Major	100.00%	35.00%	17.50%	7.00%	3.50%	1.40%
	Class 2/Moderate	100.00%	30.00%	15.00%	6.00%	3.00%	1.20%
	Class 2/Minor	100.00%	20.00%	10.00%	4.00%	2.00%	0.80%
	Class 1/Major	100.00%	18.30%	9.20%	3.70 %	1.80%	0.70%
	Class 1/Moderate	100.00%	16.70%	8.30%	3.30%	1.70%	0.70%
	Class 1/Minor	100.00%	15.00%	7.50%	3.00%	1.50%	0.60%

Example Calculation

For illustration, consider a violation of a Class 3 Rule (the right column of the Penalty Schedule) that resulted in a moderate degree of threatened or actual impact to public health, safety, welfare, the environment, or wildlife (the middle row of the Penalty Schedule). The daily penalty for the violation, using the correct cell in the Penalty Schedule, is \$10,000 per day of violation.

Assume the violation persists for 82 days. A straight per-day-of-violation calculation would result in a penalty of \$820,000.

Applying the Violation Duration Matrix, the penalty would be calculated using the “Class 3/Moderate” row of the matrix. The calculation would be:

Days 1-10	(\$10,000)X(10 days)X(100%)	\$100,000
Days 11-30	(\$10,000)X(20 days)X(45%)	\$90,000
Days 31-60	(\$10,000)X(30 days)X(22.50%)	\$67,500
Days 61-82	(\$10,000)X(22 days)X(9.00%)	<u>\$19,800</u>
Total Penalty		\$277,300

Using the Violation Duration Matrix reduces the total daily penalty for this long duration violation by \$542,700, or approximately 66%.

The Violation Duration Matrix is a guide only. The Commission retains the discretion to propose penalties greater or smaller than those calculated using the Violation Duration Matrix.

IV. Adjustments to the Penalty for Aggravating and Mitigating Factors

The Commission or Director *may* adjust the total penalty in an enforcement order based upon consideration of the aggravating and mitigating factors in Rule 523.c.(3). The Commission or Director is under no obligation to adjust a penalty based upon these factors. Typically, adjustments based upon aggravating or mitigating factors will be applied to the cumulative penalty amount, not individual violations.

Adjustments for aggravating and mitigating factors often offset each other.

Aggravating and mitigating factors are listed and explained in the next subsections.

A. Aggravating Factors

1. The violator acted with gross negligence or knowing and willful misconduct.

Gross negligence is reckless or conscious disregard. Gross negligence is also conduct beyond simple negligence showing an extreme departure from the ordinary standard of care.

Knowing and willful conduct is conscious and intentional.

While assessing whether a violation is the result of gross negligence or of knowing and willful misconduct, the Commission will ordinarily consider the following factors. It may consider other factors as appropriate in a specific case:

- Whether the violator had control over the events constituting the violation, and to what degree;
- Whether the events constituting the violation were foreseeable;
- Whether the violator took or could have taken reasonable precautions against the events constituting the violation;
- Whether the violator knew or should have known of the hazards associated with the events constituting the violation; and
- Whether the violator proceeded with actions constituting the violation with specific knowledge, or whether the violator knew or should have known of the legal requirement that was violated.

Lack of knowledge of a legal requirement is not a basis upon which to reduce a penalty.

If a violation resulting from gross negligence or knowing and willful misconduct is an egregious violation, the violation cannot be resolved administratively by the Director, but must be docketed for an OFV hearing before the Commission.

2. The violation results in significant waste of oil and gas resources.

[No commentary]

3. The violation had a significant negative impact on correlative rights of other parties.

[No commentary]

4. The violator was recalcitrant or uncooperative with the Commission and other agencies in correcting or responding to the violation.

[No commentary]

5. The violator falsified reports or records.

[No commentary]

6. The violator benefited economically from the violation, in which case the amount of such benefit will be taken into consideration.

The Commission will seek penalties that eliminate economic incentives for noncompliance. Regulatory requirements for which violations are likely to present significant economic benefits include, but are not limited to, failure to perform mechanical integrity tests (Rule 326), failure to remediate spills or releases of E & P Waste (Rule 906), and failure to legally dispose of E & P Waste (Rule 907).

7. The violator has engaged in a pattern of violations.

The Commission will evaluate a violator's compliance history to determine whether the violator is engaged in a pattern of violations. Factors relevant to a determination of whether an operator has engaged in a pattern of violations are listed in Rule 523.d.(3). If the Director finds a violation is part of a pattern of violations, the Director must apply to the Commission for an OFV hearing and may not resolve the matter through the AOC process.

In addition to applicable penalties, the Director or Commission may seek to suspend an operator's Certificate of Clearance or withhold new Applications for Permits to Drill ("APD"), or take other appropriate action, if the Director or Commission find an operator has been engaged in a pattern of violations.

B. Mitigating Factors

An operator's cooperation with the Director, Commission, and other regulatory agencies actively involved in responding to an alleged violation is a prerequisite to a reduction in penalties based on the following mitigating factors.

1. The violator self-reported the violation.

Self-reporting means the operator discloses the existence of a violation to the Director as soon as practicable after discovery. This mitigating factor may apply where the violation was discovered through means other than as a direct result of an audit conducted pursuant to a regulatory compliance program, and disclosed voluntarily as contemplated by Rule 523.e. This mitigating factor may also apply if either the regulatory compliance program or the disclosure fail to meet the requirements of Rule 523.e. An operator who discovers a violation during a regulatory compliance program audit, self-reports, and receives a penalty reduction under Rule 523.e.(1) will not be eligible for any additional penalty reduction under this mitigating factor.

2. The violator demonstrated prompt, effective and prudent response to the violation, including assistance to any impacted parties.

[No commentary]

3. The cause of the violation was outside the violator's control and responsibility, or is customarily considered to be force majeure.

The Director will consider whether force majeure caused, in whole or substantial part, an alleged violation prior to the issuing an NOAV. The Director typically will not issue an NOAV if force majeure appears to be the sole cause of an alleged violation. Where the Director determines force majeure does not constitute a complete defense but was a substantial contributing factor to the violation or adverse impacts arising from the violation, the concept may be applied as a mitigating factor.

4. The violator made a good faith effort to comply with applicable requirements prior to the Commission learning of the violation.

[No commentary]

5. The cost of correcting the violation reduced or eliminated any economic benefit to the violator, excluding circumstances in which increased costs stemmed from non-compliance.

The Commission does not consider costs incurred to return to compliance a mitigating factor, even if those costs have increased as a result of being out of compliance. For example, where an operator has improperly disposed of E & P Waste the cost of disposal will usually be higher than if the waste had been properly disposed of from the start. This increased cost will not be considered a mitigating factor.

6. The violator has demonstrated a history of compliance with the Act, and Commission rules, orders, and permits.

An operator's exceptional compliance history over an extended period of time may warrant consideration as a mitigating factor. The existence of an established regulatory compliance program may also be considered as part of an operator's overall compliance efforts.

V. Other Penalty Adjustment Considerations

A. Consolidation of Violations

Often, a single activity or event will result in violations of multiple Commission Rules. The Commission typically will seek a separate penalty for each individual Rule violation that is substantially distinguishable from other violations caused by the same act of violation.

In general, violations are substantially distinguishable when: 1) the Rules violated have at least one distinct legal or factual element; or 2) the purpose of each Rule violated is separate and distinct.

Circumstances exist in which asserting a full penalty for all possible violations arising from a single activity or event would result in a penalty disproportionately large. In these circumstances, flexibility and discretion in the Commission's enforcement program will be used to provide just and effective enforcement and penalties.

When separate violations are not substantially distinguishable, the Director or Commission may exercise discretion to consolidate or drop duplicative violations.

Conversely, where separate acts constitute distinct violations of the same Rule, each act of violation will be separately prosecuted.

B. Adjustments in Settlement Negotiations

Many NOAVs are resolved through a negotiated settlement agreement by the Director and the violator, and then memorialized in a proposed AOC.

Preparing for an adjudicatory hearing is usually very time-consuming and expensive. The outcome of any hearing is uncertain. Conducting a hearing also can delay the resolution of an NOAV by many months.

In light of the avoided costs and burdens reached through settlement, and the inherent uncertainty associated with going to hearing, the Director may reduce a penalty as an inducement to settle. It is not possible to define an appropriate formulaic reduction for settlement. However, as a general guide, the Director will not reduce a proposed penalty by more than 30 percent as an inducement to settle an NOAV.

C. Violator's Ability to Pay

The Commission may consider the violator's "ability to pay" when setting a penalty. "Ability to pay" means the effect a penalty might have on the violator's ongoing operations in Colorado. Of particular concern is whether a high penalty would cause the operator to "orphan" its assets, leaving the state with unfunded liability for remediation.

If a large penalty would jeopardize a violator's ability to conduct necessary environmental remediation, or delay the operator's ability to perform necessary corrective actions or remediation, the Commission may consider structuring a settlement that suspends a portion of its total penalty contingent on timely completion of remediation under a compliance schedule. If the remediation is performed properly, the suspended portion of the penalty is typically vacated. The suspended portion of the penalty provides the operator incentive to complete the required work on time, as failure to do so will result in certain and rapid imposition of the remainder of the suspended portion of the penalty.

An operator unable to pay a penalty may also request a payment plan. Payment plans are at the sole discretion of the Director or Commission.

A violator which wishes to have its ability to pay considered in penalty assessment generally will need to document its financial condition to the satisfaction of the Director or Commission. The Director or Commission may request financial records from an operator who claims a proposed penalty would jeopardize its ability to continue operating. Absent sufficient evidence, a penalty typically will not be adjusted based on claimed hardship.

D. Remediation Costs

The Commission understands that environmental remediation can be very expensive and resource-intensive. In order to encourage violators to fully remediate adverse impacts, the Commission may choose to consider remediation costs as a penalty adjustment factor.

The Commission will consider remediation costs only when the cost of environmental remediation exceeds: 1) any economic benefit to the operator of non-compliance; and 2) the total proposed penalty for the violation (which should take into account economic benefit). Further, the violator must have responded to the environmental impacts arising from the violation promptly and effectively. The Commission will not consider inflated remediation costs incurred because of intentional or negligent operator actions (*e.g.*, where an operator fails to timely remediate an oil spill and, with the delay, the oil is given additional time to migrate into groundwater, increasing final remediation costs).

E. Suspended Penalties

The Director or Commission may suspend a portion of a proposed penalty contingent upon an operator's prompt return to, and on-going compliance with, the Rule or Rules at issue. This approach may be particularly appropriate for violations of Class 1 Rules where a penalty calculated under Rule 523 and this policy is inappropriately high, considering the nature of the violation. The full penalty will become due if the contingencies in the enforcement order are not fully satisfied. The Director or Commission may consider this approach independent of an operator's ability to pay.

VI. Pattern of Violations or Gross Negligence or Knowing and Willful Misconduct

A "pattern of violations" is a history of non-compliance with the Act, Commission rules, orders, or permits. It demonstrates the operator's persistent, and potentially intentional, disregard for these legal requirements or the Commission's authority.

Gross negligence is reckless or conscious disregard. Gross negligence is also conduct beyond simple negligence showing an extreme departure from the ordinary standard of care. Knowing and willful conduct is conscious and intentional.

When the Director alleges an operator has engaged in a pattern of violation, or gross negligence or knowing and willful misconduct that results in an egregious violation, the Director will explain the basis for the allegation in the notice of OFV hearing and proceed directly to hearing without consideration of a possible AOC.

Moreover, and in addition to a large penalty, the Director or Commission may suspend a violator's Certificate of Clearance, withhold new drilling or oil and gas

location permits for the violator, or take other appropriate action. § 34-60-121(7), C.R.S.

Such a violator's Certificate of Clearance will be restored, and it may obtain new drilling or oil and gas location permits, once the violator demonstrates – to the satisfaction of the Director and the Commission – that it has brought each of its violations into compliance and that any penalty assessed (not subject to judicial review) has been paid. *Id.*

Criteria that will be used by the Commission and the Director to evaluate a pattern of violation are listed in Rule 523.d.(3). The Director will only consider OFVs or AOCs, and not un-adjudicated warning letters and/or inspection reports, as a basis to assert a pattern of violations. The Director considers OFVs and AOCs violations, as opposed to alleged violations, regardless of the inclusion of non-admission of liability language contained in an AOC.

VII. Public Projects

Pursuant to Rule 523.f., the Commission may consider a Public Project in lieu or in partial satisfaction of a penalty. Public Projects most commonly are projects that benefit public health, safety, and welfare, including the environment and wildlife resources. Projects with a geographic nexus to affected communities or areas are preferred.

A violator must not otherwise be legally required to perform a proposed Public Project (outside of the agreement and order memorializing a Public Project). Public Projects must be carefully designed and the Director likely will require documentation of the project scope, timeline, cost estimates, extent of public participation, and other relevant information prior to approving a project. A post-completion report also will be required in most cases, to document successful completion of the project, to report on actual costs and other relevant parameters.

Past examples of approved public projects include first-responder training, donations of specialized emergency response equipment related to oil and gas operations; and providing an outside consultant to analyze an oil and gas related issue with potential adverse impacts to public health, safety and welfare. The violator is ultimately responsible and legally liable for ensuring the satisfactory performance of a Public Project. If a Public Project is not adequately performed pursuant to an AOC, the Director reserves the right to impose the full penalty amount.

The operator will submit a Public Project proposal in writing to the Director including the following information:

- Docket No. of the Enforcement Action;

- Project manager and contact person (whether the violator or a third party);
- Geographic area of the project;
- Type and description of project;
- Expected benefit to public health, safety, and welfare, or the environment;
- Project budget; and
- Project schedule, including timing for reporting to the Commission.

VIII. Voluntary disclosure

Pursuant to Rule 523.e., an operator which has implemented a Regulatory Compliance Program (defined in Rule 100) and promptly self-reports violations discovered as a direct result of an audit conducted pursuant to the program will be entitled to a rebuttable presumption of a penalty reduction of at least 35%. This is considered a floor for the amount of penalty reduction; the Director or Commission has discretion to reduce the penalty up to 100% depending on the circumstances.

Rule 523.e. is intended to encourage and reward implementation of a robust, systematic regulatory compliance program. To qualify for the presumptive penalty reduction, an operator will be required to provide documentation of its regulatory compliance program, including information concerning frequency and schedule of audits; personnel responsible for implementing the program, compliance audit forms and checklists, and reports generated as a result of the audit in question. For example, a qualifying program may include checklists distributed to contract employees who regularly analyze on-site conditions. Assuming those checklists are maintained and regularly reviewed by the operator, compliance issues identified by the contract employee may qualify for a penalty reduction under Rule 523.e. While the Director will not “pre-certify” that a regulatory compliance program satisfies Rule 523.e., Commission staff are available to discuss program design and implementation.

Should an operator wish to disclose a violation pursuant to Rule 523.e., the operator should file a request, substantially similar to the following, with an Enforcement Officer. If multiple violations are discovered that are tied to the same factual circumstances (e.g. same date of discovery, same location, etc.), please include them in the same request. If multiple violations are discovered that are the result of different factual circumstances, please submit separate requests for each. By submitting a request, an operator acknowledges that:

- The Commission reserves the right to deny a penalty reduction based on the facts and information presented in the request, and additional information gathered during its own investigation and application of the factors in Rule 523.e.
- The Commission reserves the right to verify the accuracy of the information submitted by an operator or the adequacy of sampling, monitoring, and other methods to obtain information through the regulatory compliance program.

- The Commission’s reserves the right to enter any site, copy records, inspect, monitor, or otherwise investigate compliance, including the Commission’s authority to investigate complaints.
 - The Commission reserves the right to allocate a penalty reduction of greater than 35% depending on the circumstances of each case, including the operator’s response to the violation.
 - If the operator does not correct the violation within a reasonable time, typically set forth in a compliance plan, the Commission reserves the right to pursue the full penalty amount at a later date and require timely completion of corrective actions.
-

Request for Voluntary Disclosure Consideration Pursuant to Rule 523.e.

Operator Name:

Date of Submission:

Facility or Well Name:

Location:

Describe the Operator’s Regulatory Compliance Program:

- How often are audits or reviews performed?
- How are they conducted?
- What is the scope of the program?
- Who are the personnel assigned to fulfill these duties?
- What have been the results of evaluations conducted?
- Any other facts you think would be helpful to the Commission’s determination of the strength of this regulatory compliance program.

Attach documentation supporting the existence of a regulatory compliance program: written procedures, recognized authority within the organization, designated personnel, and documentation of results of evaluations conducted (past and current).

Is this regulatory compliance program required by any other regulation or statute?

Yes/No

If yes, what regulation or statute?

Date violation or violations were discovered through regulatory compliance program:

Provisions of the Act, Commission rule, permit, or order violated:

The penalty reduction in Rule 523.e. will ONLY apply to those provisions listed here.

Summary of the factual circumstances regarding the violation(s), including a discussion of the discovery:

What corrective actions have been taken to remedy the violation(s)?

What corrective actions will be taken to remedy the violation(s)?

When will these corrective actions be completed?

The voluntary disclosure penalty reduction presumption may also apply when an operator which acquires oil and gas assets self-reports adverse environmental conditions associated with those assets discovered as a result of a systematic regulatory compliance program undertaken within 120 days of acquisition. To be eligible for a penalty reduction:

- 1) the operator must remediate the adverse environmental impacts within a reasonable time period agreed upon with the Director; and
- 2) the adverse impacts discovered during the audit existed at the time of acquisition and were not aggravated by the acquiring operator's conduct.

X. Guidance Disclaimer

The policies and procedures set out in this document are intended solely as guidance. This document does not contain rules or otherwise binding requirements. Nothing in this document creates any substantive or procedural right enforceable by or in favor of any person or entity. The Commission reserves the right to vary its activities from this *Enforcement Guidance and Penalty Policy* at any time and in its discretion. The Commission may change this *Enforcement Guidance and Penalty Policy* from time to time.

**Commission Rule Classification
Appendix A**

Rule Number	Rule Title	Rule Class	Lead NOAV Unit [Permitting (Perm); Field Inspection (FIU); Environmental (Env); Engineering (Eng)]	Mandatory (M)/ Discretionary (D) Penalty	Recidivism Measured by Well (W) /Location (L) /Operator (O)	Presumptive Time for Corrective Actions (Months unless otherwise stated)
DEFINITIONS (100 Series)						
The 100 Series includes general definitions that are not separately enforced. They are not listed below as a result.						
GENERAL RULES (200 Series)						
201	Effective Scope of Rules and Regulations	X				
202	Office and Duties of Director	X				
203	Office and Duties of Secretary	X				
204	General Functions of Director	X				
205	Access to Records	1	Any	D	O	1
205A	Hydraulic Fracturing Chemical Disclosure	1	Eng/Env	D	O	1
206	Reports	1	Any	D	O	1
207	Tests and Surveys	2	Any	D	O	1
208	Corrective Action	X				
209	Protection of Coal Seams and Water-Bearing Formations	2	Eng	D	W/L	6
210	Signs and Markers	2	FIU	D	W	1

210.d.	Signs and Markers Tanks and Containers	2	FIU	D	W	1
211	Naming of Fields	X				
212	Safety	X				
213	Forms Upon Request	X				
214	Local Governmental Designee	X				
215	Global Positioning Systems	1	Any	D	W	1
216	Comprehensive Drilling Plans	X				
DRILLING, DEVELOPMENT, PRODUCTION AND ABANDONMENT (300 Series)						
301	Records, Reports, Notices - General	1	Eng/Perm	D	O	1
302	OGCC Form 1. Registration for Oil and Gas Operations	2	Eng/Perm	D	O	1
303	OGCC Form 2. Requirements for Form 2, Application for Permit-to-Drill, Deepen, Re-enter, or Recomplete and Operate; Form 2A, Oil and Gas Location Assessment	2	Eng/Perm	D	W/L	1
304	Financial Assurance Requirements	X				
305	Form 2 and 2A Application Procedures	2	Perm/Env	D	W/L	1
305.f.	Statutory Notice to Surface Owners	2	Eng/Perm/FIU	D	W/L	1
306	Consultation and Meeting Procedures	2	Any	D	W/L	1
306.a	Consultation with Surface Owner	2	Any	D	W/L	1
307	OGCC Form 4. Sundry Notices and Reports on Wells	1	Any	D	W/L	1
308A	OGCC Form 5. Drilling Completion Report	2	Eng/Perm	D	W	1
308B	OGCC Form 5A. Completed Interval Report	2	Eng/Perm	D	W	1
308C	Confidentiality	X				
309	OGCC Form 7. Operator's Monthly Production Report	1	Perm (Prod)	D	O	1
310	OGCC Form 8. Mill Levy	1	Perm (Prod)	D	O	1

311	OGCC Form 6. Well Abandonment Report	1	Eng/Perm	D	O	6
312	OGCC Form 10. Certificate of Clearance and/or Change of Operator	1	Perm	D	O	6
313	OGCC Form 11. Monthly Report of Gasoline or Other Extraction Plants	1	Perm (Prod)	D	L	6
314	OGCC Form 17. Bradenhead Test Report	1	Eng/Perm	D	W	6
315	Report of Reservoir Pressure Test	1	Eng/Perm	D	W	6
316A	OGCC Form 14. Monthly Report of Fluids Injected	1	Eng/Perm	D	W	6
316B	OGCC Form 21. Mechanical Integrity Test	1	FIU/Perm/Env	D	O	6
316C	OGCC Form 42 Field Operations Notice	2	Eng	D	O	1
317	General Drilling Rules	2	Any	D	W	6
317A	Special Drilling Rules - D-J Basin Fox Hills Protection Area	2	Perm	D	W	1
317B	Public Water System Protection	3	Env	M		
318	Location of Wells	1	Perm	D	W	1
318A	Greater Wattenberg Area Special Well Location, Spacing and Unit Designation Rule	1	Perm	D	W	1
318A.f	Goundwater Baseline Sampling and Monitoring	2	Env	D	W/L	1
318B	Yuma/Phillips County Special Well Location Rule	1	Perm	D	W	1
319.a	Plugging	2	Eng/FIU	D	O	6
319.b	Temporary Abandonment	1	Eng/FIU	D	O	6
320	Liability	2	Perm/Eng/FIU	D	O	6
321	Directional Drilling	1	Perm	D	O	6
322	Commingling	1	Perm	D	W	1
323	Open Pit Storage of Oil or Hydrocarbon Substances	3	Env/FIU	M		

324A.a	General Environmental Protection	3	Env	M		
324A.b	Water Quality	3	Env	M		
324A.c	Air Quality	3	Env	M		
324A.d	Injection	3	Eng (UIC)/FIU	M		
324A.e	Waste Disposal	3	Eng (UIC)/FIU	M		
324B	Exempt Aquifers	X				
324C	Quality Assurance for Chemical Analysis	1	Env	D	O	1
324D	Criteria to Establish Points of Compliance	X				
325	Underground Disposal of Water	3	Eng (UIC)/FIU	M		
326	Mechanical Integrity Testing	2	Eng	D	W	6
326.a	Injection Wells	2	Eng (UIC)	M		
326.b	Shut-in Wells	2	Eng	D	W	6
327	Loss of Well Control	3	Eng	M		
328	Measurement of Oil	1	Hearings	D	O	6
329	Measurement of Gas	1	Hearings	D	O	6
330	Measurement of Produced and Injected Water	2	Perm/FIU	D	W	6
331	Vacuum Pumps on Wells	2	FIU/Eng	D	W	1
332	Use of Gas for Artificial Gas Lifting	2	FIU/Eng	D	W	1
333	Seismic Operations	2	FIU/Perm	D	O	6
334	Public Highways and Roads	X				
335	OGCC Form 15. Earthen Pit Report/Permit	X				
336	OCCC Form 18. Complaint Form	X				
337	OGCC Form 19. Spill/Release Report	X				
338	OGCC Form 27 Site Investigation and Remediation Workplan	X				
339	Bradenhead Monitoring During Well Stimulation Operations	2	Eng/Perm	D	W	1
UNIT OPERATIONS, ENHANCED RECOVERY PROJECTS, AND STORAGE OF LIQUID HYDROCARBONS 400 Series						
401	Authorization	2	Hearings	D	O	6
402	Notice and Date of Hearing	X				

403	Additional Notice	1	Hearings	D	O	1
404	Casing and Cementing of Injection Wells	3	Eng	M		
405	Notice of Commencement and Discontinuance of Injection Operations	2	Eng	D	W	1
RULES OF PRACTICE AND PROCEDURE (500 Series)						
The 500 Series includes procedural rules that are not separately enforced, except Rule 522.f (Failure to Comply with Commission Orders) which is described at the bottom of the table. The remaining 500 Series rules are not listed below.						
SAFETY REGULATIONS (600 Series)						
601	Introduction	X				
602	General	2	Any	D	W/L	1
603	Statewide Location Requirements For Oil & Gas Operations	2	Perm	D	W/L	1
603.a	Statewide Location Requirements	2	Perm	D	W/L	1
603.f	Statewide Equipment, Weeds, Waste, and Trash Requirements	2	FIU/Env	D	W/L	1
603.g	Statewide Equipment Anchoring Requirements	2	FIU	D	W/L	1
604	Setback and Mitigation Measures	2	FIU/Perm	D	W/L	1
604.c.(2)(G)	Berms/Secondary Containment	2	FIU/Env	D	W/L	1
605	Oil & Gas Facilities	2	Any	D	W/L	1
606A	Fire Prevention and Protection	2	FIU	D	W/L	1
606B	Air and Gas Drilling	2	FIU	D	W/L	1
607	Hydrogen Sulfide Gas	2	Eng	M		
608	Coalbed Methane Wells	2	Any	D	W/L	1
608.b	CBM _ Water Well Sampling	2	Any	D	W	1
609	Statewide Groundwater Baseline Sampling and Monitoring	2	Env	D	O	1
FINANCIAL ASSURANCE AND OIL AND GAS CONSERVATION AND ENVIRONMENTAL RESPONSE FUND (700 Series)						
701	Scope	X				
702	General	X				
703	Surface Owner Protection	2	Perm (Bond)	D	W/L	1
704	Centralized E&P Waste Management Facilities	2	Perm (Bond)	D	L	1

705	Seismic Operations	2	Perm (Bond)	D	O	1
706	Soil Protection & Plugging and Abandonment	2	Perm (Bond)	D	W/L	1
707	Inactive Wells	2	Perm (Bond)	D	O	1
708	General Liability Insurance	2	Perm (Bond)	D	O	1
709	Financial Assurance	2	Perm (Bond)	D	O	1
710	Reserved	X				
711	Natural Gas Gathering, Natural Gas Processing and Underground Natural Gas Storage Facilities	2	Perm (Bond)	D	O	1
712	Surface facilities and structures appurtenant to Class II Commercial Underground Injection Co	2	Perm (Bond)	D	W/L	1
AESTHETIC AND NOISE CONTROL REGULATIONS (800 Series)						
801	Introduction	X				
802	Noise Abatement	2	FIU	D	W/L	1
803	Lighting	2	FIU	D	W/L	7 days
804	Visual Impact Mitigation	2	FIU	D	W/L	6
805	Odors and Dust	2	FIU	D	W/L	1
E&P WASTE MANAGEMENT (900 Series)						
901	Introduction	2	Perm/Env	D	W/L	1
902	Pits - General and Special Rules	2	FIU/Env	D	W/L	1
903	Pit Permitting/Reporting Requirements	2	FIU/Env (OGLA)	D	W/L	1
904	Pit Lining Requirements and Specifications	2	FIU/Env (OGLA)	D	W/L	1
905	Closure of Pits, and Buried or Partially Buried Produced Water Vessels	2	Env/FIU	D	W/L	3
906.a.	Spills and Releases - General	2	Env/FIU	D	W/L	1
906.b	Spill Reporting	2	Env	D	W/L	24 HRS
906.c	Remediation of Spills/Releases	2	Env	D	W/L	1
906.d	Spill Remediation	2	Env	D	W/L	1
906.e	Spill Prevention	2	Env	D	W/L	1

907	Management of E&P Waste	2	Env/FIU	D	W/L	1
907.b	E&P Waste Transportation	2	Env	D	W/L	1
907.c	Produced Water	2	Env	D	W/L	1
907.d	Drilling Fluids	2	Env	D	W/L	1
907.e	Oily Waste	2	Env	D	W/L	1
907.f	Other E&P Waste	2	Env	D	W/L	1
907A	Management of Non-E&P Waste	2	Env/FIU	D	W/L	1
908	Centralized E&P Waste Management Facilities	2	Env	D	W/L	1
909	Site Investigation, Remediation and Closure	2	Env	D	W/L	1
910	Concentrations and Sampling for Soil and Ground Water	2	Env	D	W/L	1
911	Pit, Buried or Partially Buried Produced Water Vessel, Blowdown Pit, and Basic Sediment/Tank Bottom Pit Management Requirements Prior to December 30, 1997	2	Env/FIU	D	W/L	1
912	Venting or Flaring Natural Gas	3	Eng/FIU	M		
RECLAMATION REGULATIONS (1000 Series)						
1001	Introduction	X				
1002	Site Preparation and Stabilization	2	FIU (Recl)	D	W/L	1
1002.b	Soil Removal & Segregation	2	FIU (Recl)	D	W/L	1
1002.e	Surface Disturbance Minimization	2	FIU (Recl)	D	W/L	1
1002.f	Stormwater Management	2	FIU (Recl)	D	W/L	1
1003	Interim Reclamation	2	FIU (Recl)	D	W/L	3
1003.d	Drilling Pit Closure	2	FIU (Recl)	D	W/L	3
1004	Final Reclamation of Well Sites and Associated Production Facilities	2	FIU (Recl)	D	W/L	3
PIPELINE REGULATIONS (1100 Series)						
1101	Installation and Reclamation	2	FIU/Eng	D	O	1
1102	Operations, Maintenance, and Repair	2	FIU/Eng	D	O	1
1103	Abandonment	2	FIU/Eng	D	O	1
PROTECTION OF WILDLIFE RESOURCES (1200 Series)						

1201	Identification of Wildlife Species and Habitats	X				
1202	Consultation	2	Env (OGLA)	D	W/L	6
1203	General Operating Requirements in Sensitive Wildlife Habitat and Restricted Surface Occupancy Areas	2	FIU (Recl)	D	W/L	6
1204	Other General Operating Requirements	2	FIU (Recl)	D	W/L	6
1205	Requirements in Restricted Surface Occupancy Areas	2	FIU (Recl)	D	W/L	6
Violation of an Enforcement Order (Rule 522.f)		3	Any	M		
Violation of a General or Field Order (Rule 522.f)		2	Any	D	O	3
Violation of a Permit		2	Any	D	W/L	3

Comments

1. Rules with blank data fields across the row are generally procedural rules that are not separately enforced.
2. Mandatory rules have no recidivism classification, as they go straight to formal enforcement (NOAV).
3. Whole rule number classifications generally apply to all subsections of the rule unless otherwise designated. However, the Director retains the discretion to reclassify discrete subparts of a Rule, on a case by case basis, where a violation of that subpart does not have the same potential consequences as a violation of the remainder of the Rule.
4. Where multiple units are designated lead, discovering unit takes lead and confers with other unit(s).
5. The policies and procedures set out in this document are intended solely as guidance.
6. This document does not contain rules or otherwise binding requirements.
7. Nothing in this document creates any substantive or procedural right enforceable by or in favor of any person or entity.
8. The Director reserves the right to vary its activities from this document at any time and in its discretion.
9. The Director may change this document from time to time.