



COGCC Approves Large Fines for Ongoing Environmental Harm

Introduction

At its October 30, 2017 hearing, the Colorado Oil and Gas Conservation Commission (COGCC) considered three enforcement matters that involved ongoing threatened environmental harm. After considerable debate, the COGCC approved orders finding violations and imposed fines *three to ten times larger* than staff had recommended. At the center of the COGCC's debate was the "duration matrix," which is a tool that the COGCC uses to reduce fines such that the penalty is "appropriate to the nature of the violation" under C.R.S. § 34-60-121(1)(c)(I). In these enforcement matters, the COGCC did not apply the reduction provisions of the duration matrix and imposed the full daily penalty for the violation. These matters all involved defunct operators, which could limit the precedential effect. However, they may indicate a trend of significantly larger fines for situations where there was *ongoing* harm or threat of harm.

Duration Matrix

The duration matrix is incorporated into the COGCC's enforcement and penalty guidance document, and reduces fines based on their duration. For example, a violation that involved moderate actual environmental harm (Class 3 Moderate) and went on for one year will have the penalty imposed at 100% for the first 10 days of violation, 50% for the next 20 days, 25% for the next 30 days, 10% for the next 60 days, and 5% for the remainder of the year. Thus, a Class 3 Moderate violation would have a fine of \$10,000 per day for the first 10 days, \$4,500 for the next 20 days, and so on. Under the duration matrix, the fine would be **\$421,750**, but without it that fine increases to **\$3,650,000**.

Enforcement Matter Summaries

In the first case, the owner of the company that violated rules was deceased and the company was no longer a going concern. In this matter, the COGCC staff recommended an order finding violation (OFV) for a number of violations, including failure to perform a Mechanical Integrity Test (MIT) for 74 days, which was listed as a Class 2 Moderate Violation (\$5,000 per day). The staff recommended a **\$106,700** fine for just the failure to perform the MIT, which was a reduced amount based on the duration matrix. In a split vote, the COGCC approved a fine of **\$370,000** (\$5,000 per day for 74 days), with Chairman Benton voting against increasing the fine above the staff recommendation.

In the second case, the company was a U.S. affiliate of a Canadian company that went out of business. Like the first matter, the COGCC staff recommended an OFV for a number of violations. One of the violations was failure for 132 days to remediate spills at three locations, which the COGCC had observed in the form of “stained soil” around wells. This was classified as a Class 2 Minor violation (\$2,500 per day). The staff recommended a penalty of \$49,100 for each spill violation, or a total of **\$147,300**, which again was a reduced amount based on the duration matrix. In a split vote, the COGCC approved a fine of **\$990,000** (\$2,500 per day for 132 days for three violations), with Chairman Benton voting against increasing the fine above the staff recommendation.

In the third case, the company failed to respond to all communications from the COGCC. In this matter, the COGCC staff recommended an OFV for five violations, including a 276-day failure to manage E&P Waste, resulting in significant impacts to waters of the state. This came from a well venting gas and liquid from uncapped valves. COGCC staff determined this to be a Class 2 Moderate Violation (\$5,000 per day). The staff recommended a **\$143,900** fine for just the failure to manage E&P Waste, applying the duration matrix. In a split vote, the COGCC approved a fine of **\$1,380,000** (\$5,000 per day for 276 days), with Chairman Benton voting against increasing the fine above the staff recommendation. This was nearly a ten-fold increase in the fine.

Future Effects of Decisions

As noted above, all three matters involved defunct operators. During the COGCC’s debate, Director Lepore and Chairman Benton questioned the advisability of significantly increasing fines that the COGCC would never collect. They also mentioned that the COGCC has a directive from the State Legislature and the Governor’s office to increase the percentage of fines collected, and this would decrease the percentage without appreciable benefit. Commissioner Overturf argued that the benefit would be the message it would send to other operators, along with the attendant deterrent effect. Ultimately, all the Commissioners except Chairman Benton voted with Commissioner Overturf, so it seems that her argument had persuasive value.

Operators should be aware that where a violation results in *ongoing* threatened or actual harm, the operator now is at a significant risk of a higher fine. Depending on the duration of the violation, the fines could be anywhere from slightly higher to nearly 10 times as much as what has previously been assessed by the COGCC staff. It is especially important to note that the COGCC imposed a higher fine for an MIT violation. MIT violations are among the most common violations that the COGCC prosecutes. We moderate this warning with the caveat about the operators being defunct and unrepresented in the cases at issue. Operators may be able to mitigate the severity of penalties by appearing at COGCC and advocating for lower fines. Nevertheless, given the possibility of these decisions’ precedential effect, Operators should consider taking extra measures to ensure that they are not the target of any enforcement actions for ongoing violations that threaten environmental harm.

For additional information or assistance regarding these matters, please contact [James Parrot](#), [Jim Martin](#) or [Jill Fulcher](#).