



New Mexico's MOVING AHEAD

Restoring the Oil Conservation
Division's Strength and Authority

January 2019



EARTHWORKS



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Report available at earthworks.org/NM-Enforcement

CONTRIBUTORS AND ACKNOWLEDGMENTS:

Author – Nathalie Eddy, Earthworks

Contributor – Warren King, The Wilderness Society

Acknowledgments – Matthew Garrington, Environmental Defense Fund

COVER PHOTOS AND DESIGN:

Worker and pumpjack by zhengzaishanchu/adobe.com

Aerial photo by Ecoflight

Graphic Design by CreativeGeckos.com



EARTHWORKS

Offices in Colorado, California, Maryland, Montana, New York, Pennsylvania, Texas, and West Virginia

EARTHWORKS • 1612 K St., NW, Suite 904 Washington, D.C., USA 20006 • earthworks.org
202.887.1872 • Report available at earthworks.org/NM-Enforcement

Earthworks is dedicated to protecting communities and the environment from the adverse impacts of mineral and energy development while promoting sustainable solutions.

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Summary

In 2012 Earthworks published an assessment of New Mexico's oversight of oil and gas operations based on public information requests of the state's Oil Conservation Division (OCD) enforcement records. It found:

- Inspection capacity is severely limited
- Violations are arbitrarily assessed and inadequately reported and tracked
- Civil fines cannot be administratively assessed by the OCD
- Fines are rarely issued to companies violating the rules
- Fines are inadequate to punish or prevent irresponsible behavior by oil and gas operators – or even to cover the state's costs of fining a violator.

In 2019, New Mexico is experiencing an unprecedented boom in energy production. Shale oil development in the Permian Basin of southeastern New Mexico has catapulted the state to the third largest onshore oil producer in the nation.¹ Alongside that rapid increase in development comes more pollution and a dramatic rise in spills of chemicals and waste. In fact, the total number of oil and gas-related spills increased nearly 100% since 2008 and more than 500% since 2000.²

Elected officials have so far ignored these challenges, even while welcoming more oil and gas development. Currently OCD, which issues permits and oversees the industry, lacks the clear authority to issue fines and hold polluters accountable, and the agency's enforcement resources are woefully inadequate.

This report, an update of the 2012 investigation, outlines the essential improvements needed to allow OCD to more effectively fulfill its mandate to prevent the unnecessary waste of oil and gas resources³ and protect human health and environment.⁴

Key Recommendations

The following actions are needed to protect public health and environment, enforce state regulations, and deter oil and gas violations in the future:

1. Restore OCD's authority to assess civil penalties for violations of the New Mexico Oil and Gas Act
2. Strengthen OCD enforcement capacity with more budgetary resources and well-paid, well-trained inspectors
3. Establish consistency and transparency in the assessment of violations and penalties, and communication of oil and gas spills



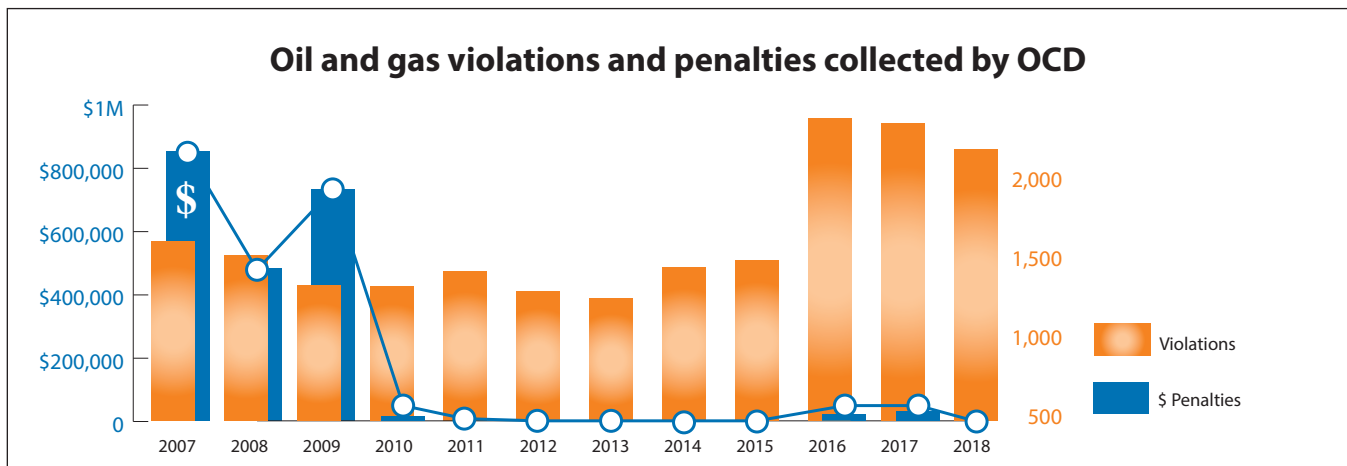
1 Restore OCD's Authority to Assess Civil Penalties

In 2009, the New Mexico Supreme Court ruled that the OCD could no longer administratively assess meaningful civil penalties.⁵ During the last eight years, OCD found between 776-1,877 violations each year (for a total of 10,117 violations for 2011-2018), but could only assess seven civil penalties totaling \$50,000.⁶ Annual penalties collected in 2007-2009 averaged more than \$500,000. Since the Marbob Supreme Court decision, the annual penalties fell dramatically and ranged from zero to \$30,000.

In addition to restoring OCD's authority, inconsistencies in maximum daily penalty amounts and liability standards should be corrected in the New Mexico Oil and Gas Act.

This single legal decision burdened the New Mexico Attorney General's office with bringing each individual violation of the state Oil and Gas Act to district court on behalf of the OCD. This has led to longer processing time, increased staffing costs at the New Mexico Attorney General's Office, lost penalty revenue, and more incidents of air and water pollution for which there is no accountability. The lack of penalties collected by OCD is also a missed opportunity to increase budgetary resources for OCD and support strengthened enforcement capacity in the face of growing oil and gas operations.

The charts below illustrate the significant impact of the 2009 New Mexico Supreme Court ruling on oil and gas penalties collected by OCD over the course of the last decade.



Data for graph above: Oil and gas violations and penalties collected by OCD 2007-2018⁷

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Penalties assessed	\$850,000	\$479,000	\$727,000	\$14,000	\$0	\$0	\$0	\$0	\$0	\$20,500	\$30,000	\$0
Violations⁸	1134	1042	856	849	942	816	776	967	1016	1909	1877	1712

In sum, New Mexico is losing needed revenue and gaining long-lasting environmental problems, while oil and gas operators are breaking state rules with impunity. Without reinstating OCD's authority to directly assess civil liability, oil and gas enforcement cannot be effective, because OCD cannot effectively deter operators from violating the state Oil and Gas Act.

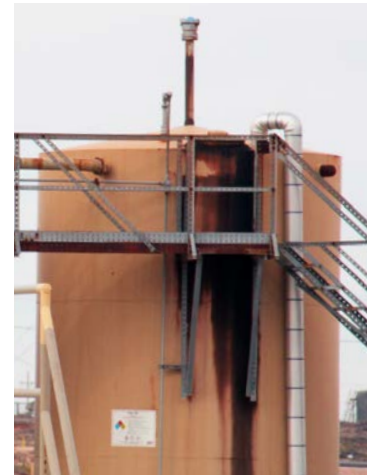


2 Strengthen Capacity of OCD Enforcement

OCD's budget provides for 14 full-time inspectors to be located in OCD's field offices. OCD strives to keep the 14 inspectors positions filled, but typically has several vacancies at any given time. Frequent turnover is likely yet another outcome of OCD budget constraints, as government agencies struggle to compete with the oil and gas salaries offered by the industry, a trend which has only increased with the current boom in the New Mexico Permian Basin.

Even assuming the maximum 14 positions supported by the OCD budget, this number is insufficient to inspect 57,154 active wells in New Mexico.⁹ In 2018, if there were 14 inspectors¹⁰ to conduct the 36,363 inspections, each inspector would cover 2,597 inspections per year, or 216 inspections per month. This would require each inspector to conduct nearly 11 inspections each day (estimating 20 days per month, not accounting for vacation, sick or holiday time).

This rough calculation of inspectors' workload does not account for the reporting and processing time for inspectors to complete post-inspection paperwork for each of the field inspections conducted. OCD's inspector capacity simply cannot match the growing numbers of wells and spills in New Mexico's booming oil and gas industry, implying that the public cannot currently rely on OCD to protect their health from these operations' pollution.



ESTIMATED INSPECTION LOAD FOR EACH OF THE 14 OCD INSPECTORS*	
Year	2,597 inspections
Month	216 inspections
Day	10.8 inspections

*Assumes 36,363 inspections and 14 inspectors; does not account for vacation/sick-time.

OCD's inspector capacity simply cannot match the growing numbers of wells and spills in New Mexico's booming oil and gas industry.

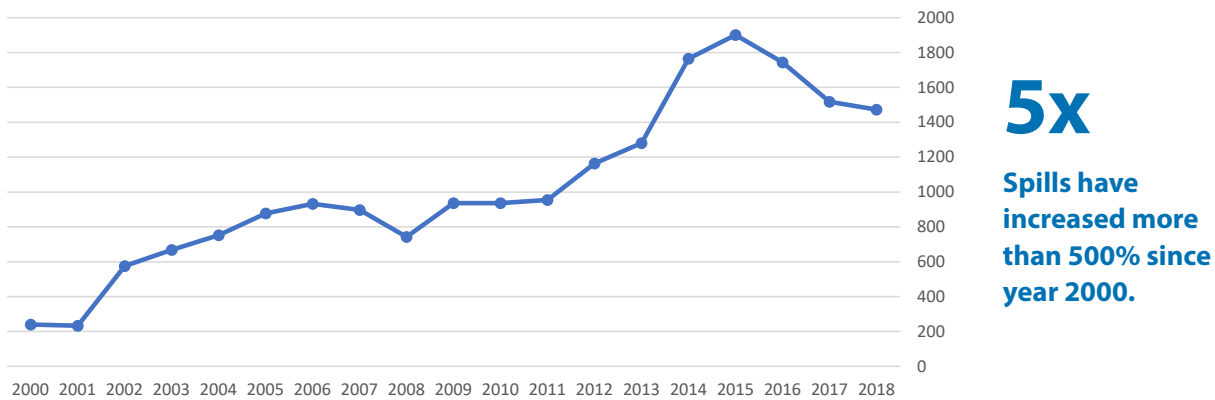
TOTAL NUMBER OF WELLS AND ANNUAL OCD INSPECTIONS (including desk and field inspections)								
	2011	2012	2013	2014	2015	2016	2017	2018
# of wells ¹¹	53,319	53,907	54,377	54,676	54,885	54,643	56,899	57,101
# of inspections	29,000 ¹²	34,276 ¹³	36,902 ¹⁴	35,729 ¹⁵	47,593 ¹⁶	49,624 ¹⁷	37,928 ¹⁸	36,363 ¹⁹



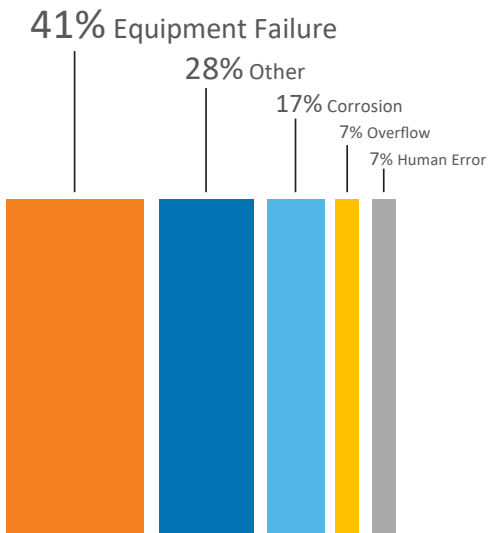
Spills on the rise

The pressure on OCD will only increase given that drilling activity is up nearly 50% from annual averages over the last decade²⁰ and oil production hit a historic record in 2018.²¹

That increased drilling and production along with reduced enforcement capacity and an inability to issue fines has naturally led to a sharp and dramatic increase in reported spills of oil and gas as well as waste products and possibly chemicals and substances used in operations. Oil and gas companies reported 14,415 spills since 2008 and 19,590 spills since 2000. That means **the number of reported spills has increased nearly 100% since 2008 and more than 500% since 2000.**²² It is unknown how many spills go unreported by operators, but the number is unlikely to be zero.

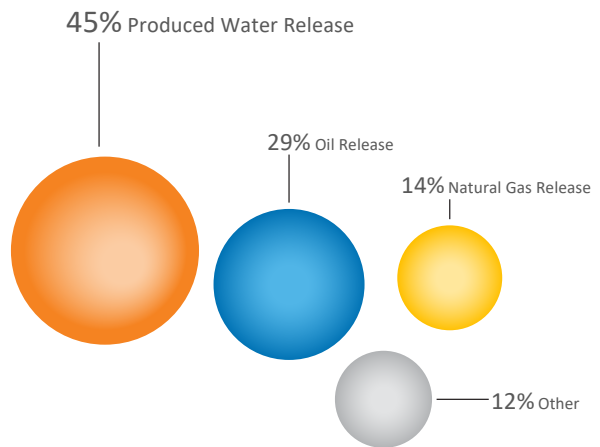


Spills by Cause Since 2000



The leading cause of spills over the last 20 years was equipment failure followed by corrosion. Spills can occur along the supply chain from a variety of issues such as split hoses, broken pumps, line ruptures, fires, frozen valves, and human error.²³

Spills by Incident Type Since 2000



Produced water releases make up nearly half of all spills since 2000. This is followed by crude oil releases at 29% and natural gas releases at 14%.²⁴



3 Establish consistency and transparency in the assessment of violations and resulting penalties

OCD has made strides in increasing transparency and access to enforcement and violation data. Its “Data and Statistics” web page includes information on unauthorized releases, spills and incidents, penalty assessments, inspections, and pending hearing orders. Similarly, its “Administrative Order Search” allows the public to access information on public complaints and actions the Division has taken to resolve outstanding compliance issues including notices of violation issued to operators and compliance orders.

INCONSISTENT PENALTY ASSESSMENT IN NEW MEXICO STATUTES ²⁵			
	Maximum Penalty	Knowledge Required	Authority to assess civil penalties
Oil and Gas Act ²⁶	\$1,000	No. OCD must prove operator acted willfully and knowingly violating the NM Oil and Gas Act.	NO
Air Quality Control Act ²⁷	\$15,000	Yes. Knowing and willful violations can increase a penalty, but lack of knowledge cannot reduce or negate a penalty.	YES
Water Quality Act ²⁸	\$10,000 to \$15,000	Yes. Whenever a constituent agency determines there has been a violation the agency may issue a compliance order to assess a civil penalty.	YES
New Mexico Mining Act ²⁹	\$10,000	Yes. Knowing and willful violations increase the amount of penalty, but are not required to actually assess penalty.	YES

Unfortunately, the information provided by the Division is still severely limited and the data interfaces are difficult to navigate. For instance:

- Inspection Statistic Reports are published quarterly and list the type and number of inspections conducted as well as the total violations identified. However, only the most recent report is accessible online and there is no information on the type of violation, when it occurred, where it occurred or if it was resolved.
- Unauthorized Release Summaries are published annually but no historic records are available on the Division’s web page, so it is difficult to identify patterns, trends, and changes.
- Penalty assessment data only goes back to 2016 and only identifies the operator, penalty amount, and date it was assessed.
- The Order Search interface does not provide any context for the “order types” available in the search and the results are returned in an online format that does not allow for any sorting or manipulation of the data.





OCD has recognized the need for strengthened capacity and transparency for years. For the last 6 years, OCD listed the following goals in their annual reports³⁰

- Increase public access to information
- Strengthen consistency and transparency of information and policies, and
- Increase field staff and enforcement capacity

More generally, there is no easy way to identify when penalties are assessed, or if other enforcement actions are taken to resolve non-compliance issues. It is nearly impossible to track violations to their ultimate conclusion – meaning there is little ability to conduct accountability or oversight of the Division’s inspection and enforcement processes.

The Division should take steps to improve transparency and data availability when it comes to inspection and enforcement information. It should provide historic records of inspection, release penalty assessment reports, and expand the information made available in those documents. The Division should also assess the feasibility of updating its online data repositories to make them more user friendly and intuitive. Impacted communities have incentive and desire to ensure OCD does its job well. Making OCD data easily available helps the public help OCD do its job.

Conclusion

The 2009 New Mexico Supreme Court ruling removing OCD’s enforcement authority and requiring the Attorney General’s Office to pursue civil penalties via court proceedings significantly curtails application of state rules, industry compliance, and deterrence of infractions. This situation is made even worse by the lack of OCD inspectors and oversight resources. These two trends have converged at a time when oil and gas development is rapidly accelerating in New Mexico and has reached a much higher level than prior to the 2009 Supreme Court ruling.

Key Recommendations

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Endnotes

- 1 Energy Information Administration, Crude Oil Production. https://www.eia.gov/dnav/pet/pet_crd_crpdn_adc_mbbbl_m.htm. Accessed Jan. 3, 2019.
- 2 New Mexico Oil Conservation Division. (2018). Spills and Incidents Search [Data File]. Available from New Mexico Oil Conservation Division website: <https://wwwapps.emnrd.state.nm.us/ocd/ocdpermitting/Data/Spills/Spills.aspx>. Accessed Dec. 31, 2018.
- 3 The New Mexico Oil and Gas Act grants OCD the “jurisdiction, authority and control [...] to enforce effectively the provisions of this act or any other law of this state relating to the conservation of oil or gas and the prevention of waste.” NM Stat § 70-2-6 (2017).
- 4 The OCD “is charged with the duty and obligation of enforcing the state’s rules and statutes relating to the conservation of oil and gas including the protection of public health and the environment.” 19.15.5.8 NMAC.
- 5 Marbob Energy v. N.M. Oil Conservation. Comm’n, NMSC-13, 206 P.3d 135 (2009). See <http://caselaw.findlaw.com/nm-supreme-court/1296572.html>. Accessed Jan 10, 2019.
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- 7 Ibid.
- 8 Personal communication between Nathalie Eddy, Earthworks and New Mexico Oil Conservation Division Enforcement and Compliance Manager, Daniel Sanchez, Oct. 4, 2018 and Jan. 8, 2019.
- 9 New Mexico Oil Conservation Division. OCD Data and Statistics: Production - “Production by well - Go-Tech site.” OCD’s Active well count (excluding Plugged Wells) available using Go-Tech site - <https://wwwapps.emnrd.state.nm.us/ocd/ocdpermitting//Data/Wells.aspx>. Accessed Jan. 14, 2019.
- 10 OCD had five open inspector positions at the time of this publication, leaving the enforcement office with nine inspectors. Personal communication between Nathalie Eddy, Earthworks and New Mexico Oil Conservation Division Enforcement and Compliance Manager, Daniel Sanchez, Jan. 8, 2019.
- 11 Petroleum Recovery Research Center database, GO-TECH. Summary production well search for 2010-2018. http://octane.nmt.edu/gotech/Petroleum_Data/General.aspx. Accessed Dec. 27, 2018.
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- 19 Personal communication between Nathalie Eddy, Earthworks and New Mexico Oil Conservation Division Enforcement and Compliance Manager, Daniel Sanchez, Jan. 8, 2019.
- 20 Baker Hughes, North America Rig Count. <http://phx.corporate-ir.net/phoenix.zhtml?c=79687&p=irol-reports>. Accessed Jan. 3, 2019.
- 21 *Albuquerque Journal*, “New Mexico oil production gushes to all-time record.” <https://www.abqjournal.com/1145074/17-nm-oil-production-hits-another-record.html>. Accessed Jan. 3, 2019.
- 22 New Mexico Oil Conservation Division. (2018). Spills and Incidents Search [Data File]. Available from New Mexico Oil Conservation Division website: <https://wwwapps.emnrd.state.nm.us/ocd/ocdpermitting/Data/Spills/Spills.aspx>. Accessed Dec. 31, 2018.
- 23 Ibid.
- 24 Ibid.
- 25 Comparative statutory reference table re-printed from Earthworks’ 2012 Enforcement Report NM OCD: New Mexico Oil & Gas Conservation Division – Inadequate enforcement guarantees irresponsible oil and gas development, Earthworks Oil & Gas Accountability Project, May 2012.
- 26 NM Stat § 70-2-31 (2017).
- 27 NM Stat § 74-2-12.1 (2017).
- 28 NM Stat § 74-6-10 (2017).
- 29 9.10.11.1105-1108 NMAC.
- 30 New Mexico Environment, Mining and Natural Resources Department – Annual Reports 2011-2017. <http://www.emnrd.state.nm.us/ADMIN/publications.html>. Accessed Jan. 14, 2019.

