Headquarters
120 Shelton McMurphey Blvd.
Suite 340
Eugene, Oregon 97401
(541) 485-2471
info@westernlaw.org

Offices
Portland, Oregon
Seattle, Washington
Taos, New Mexico
Santa Fe, New Mexico
Helena, Montana

Defending the West westernlaw.org

Western Environmental Law Center

April 17th, 2020

Submitted via Email

Re: Comments on the New Mexico State Land Office Emergency Rule Amendment, Rule 19.2.100.71 NMAC, "Temporary Shut-In of Oil Wells Due to a Severe Reduction in the Price of Oil"

Dear State Land Office,

The Western Environmental Law Center (WELC), along with Climate Advocates Voces Unidas (CAVU), Conservation Voters New Mexico, Diné Citizens Against Ruining Our Environment (Diné C.A.R.E.), Earthworks, New Mexico Environmental Law Center, New Mexico Interfaith Power and Light, New Mexico Horse Council, New Mexico Sportsmen, Oil Change International, ProgressNow New Mexico, Sierra Club Rio Grande Chapter, and WildEarth Guardians appreciate the opportunity to submit comments regarding the emergency amendment to New Mexico State Land Office Rule 19.2.100.71 NMAC, "Temporary Shut-In of Oil Wells Due to a Severe Reduction in the Price of Oil" ("emergency Rule" "emergency Rule amendment" or "Rule").

We recognize the emergency nature of this action and see merit in the temporary (or even long-term) cessation of production in the public interest–in the current situation, by deferring revenues in a low-price environment and mitigating or avoiding public health risks. However, the emergency amendment is structured to allow lessees the *option* to shut in wells temporarily without losing their lease. Accordingly, a lessees' expectations for well profitability will drive their decisions to shut in wells because of the low-price environment, or to continue producing despite that environment. It is entirely unclear how such decisions will satisfy the SLO's independent and overarching imperative to ensure that oil and gas production on state trust lands serves the best interests of state trust beneficiaries or the New Mexico public as a whole.

Accordingly, we strongly recommend that the SLO condition the circumstances under which lessees may benefit from this emergency amendment and thereby preserve their lease rights–namely, by requiring that lessees meet high standards of accountability and provide assurances that wells will be properly plugged and abandoned and leaseholds fully restored in the event that shut-ins become permanent or lessees end up in bankruptcy. Anticipating certain industry-driven arguments, we also categorically reject any notion that the collapse in oil prices or other events should operate as an excuse to

impose or exacerbate financial risks to the state, or to weaken or avoid actions that protect public health, state trust lands, or New Mexico's unparalleled natural heritage.

While the stated mission of the State Land Office (SLO) is to "use state trust land to raise revenue for New Mexico public schools, hospitals, colleges, and other public institutions," the SLO's trust mandate can and should extend beyond current or short-term revenue maximization to include broader notions of longer-term economic–and environmental–sustainability in trust land management.[1] Indeed, through the SLO's trust responsibilities (and New Mexico's Enabling Act, state Constitution, and relevant statutes and regulations) the Commissioner has broad, but not unlimited, authority and discretion to take certain actions whenever she deems them to be in the best interest of the trust, with no apparent express or implied limitations on the time frame for determining that "best interest." Such actions include, but are not limited to, promulgating this emergency Rule amendment, withholding state trust lands from oil and gas lease sales, and imposing additional rental requirements and other restrictions on state oil and gas leases.[2] Even more broadly, Section 19-10-1 NMSA 1978 requires that oil and gas leases on state trust lands are "to be issued upon such terms and conditions *as the commissioner may deem to be for the best interests of the* ***state***" (emphasis added).[3] Together, the State Land Office's mission, responsibilities, and authorities provide ample room to condition the sale of a lease, decide not to sell a lease, and to regulate and condition a lessee's decision to avail

---

[1] *See* Jon A. Souder et. al., Sustainable Resources Management and State School Lands: The Quest for Guiding Principles, 34 Nat. Resources J. 271, 297–98 (1994) ("Trust principles guide the trustee. Trust managers rely on the duty to protect the corpus and maintain its productivity in dealing with recalcitrant lessees. . .In three additional disputes, the timber programs in Oregon and Washington, and New Mexico's grazing program, trustees have extended the trust mandate beyond simple current revenue maximization;" and "ambiguity about future conditions transcends the requirement for current income"); *See also* Havasu Heights Ranch and Dev. Corp. v. State Land Dep't, 764 P.2d 37 (Ariz. App. 1988)(finding that the state of Arizona could withhold land from leasing if it believed future use value would be greater if left undeveloped/unleased, rooted in same Enabling Act as New Mexico's and similar provisions re: Commissioner discretion in leasing state trust lands).

[2] *See, e.g.*, Section 19-10-6 NMSA 1978 ("if, after notice and public hearing, the Commissioner finds that because of a severe reduction in the price of oil the beneficiaries of state trust lands are ultimately better served if oil wells are allowed to be temporarily shut in rather than produced at a low price, the Commissioner may promulgate a regulation which allows such wells to be shut in without expiring the lease where the well is located."); *See also*
19.2.100.31 NMAC ("The commissioner reserves the right to reject any and all bids not in conformity with law and the posted notice of sale, and to require higher rentals, impose additional restrictions and requirements and to withhold lands from leasing whenever, in the commissioner's discretion, the commissioner shall deem it to be for the best interests of the trust to do so.").

[3] The possibilities for such "terms and conditions" appear wide and varied, albeit subject to any limitations set forth in 19-10-1 NMSA 1978 by the requirement that they are "not inconsistent with the provisions of Chapter 125, of the Session Laws of 1929 [19-10-1, 19-10-12 to 19-10-25 NMSA 1978], and amendments thereto." These terms and conditions could presumably include, for example, the "higher rentals" or "additional restrictions and requirements" authorized in 19.2.100.31 NMAC, or, potentially, additional surface damage bonding requirements as the Commissioner deems necessary on a case-by-case basis, *see* 19.2.100.23 (A) and (B) NMAC, (noting commissioner's discretion to determine case-by-case surface damage bond adequacy and set minimum single-lease damage bond amounts and stating, for example, that a $20,000.00 multi-lease (blanket) bond amount 'will be acceptable' "*unless and until the commissioner determines*, or one or more surface lessees or purchasers show the commissioner, *that the amount is not adequate in a given case."*)*(*emphasis added).

themselves of any temporary shut-in rule to protect the state's long-term interest in effective and responsible management of state trust lands and their resources.

The SLO and Commissioner's exercise of such authority and discretion in fulfillment of these trust mandates, to protect and promote both immediate/near-term *and* long-term value and benefits of state public trust lands for New Mexicans, is especially important in light of the extreme oversupply conditions in world oil markets and the COVID-19 pandemic. We appreciate that the State Land Office is acting swiftly during this health emergency to help avoid or mitigate imminent threats to public health, safety, and welfare, specifically the health of oil and gas workers whose jobs involve fracking, drilling, and other operations often conducted in close proximity to other people and the communities where they live and work.[4] In addition, these shut-ins, properly performed (including proper decommissioning if the shut-in becomes permanent), would help to alleviate ongoing respiratory health impacts to people and communities in New Mexico, particularly in the Greater Chaco and Greater Carlsbad areas, who are living in close proximity to oil and gas extraction and disproportionately breathing polluted air.[5] We also recognize that the Commissioner has a duty to act in the best interest of trust beneficiaries and has broad discretion to determine that "best interest," and that in response to a sudden drop in oil prices, she has determined that allowing temporary shut-ins without expiration of state trust land leases best fulfills that duty, at least in the near term.[6]

Nonetheless, we are concerned that potential consequences of this Rule amendment may endure long after this particular emergency has subsided, especially if it proceeds without additional assurances that oil and gas companies, operators, or lessees will satisfy their environmental and financial obligations, and be held accountable if they don't (particularly given heightened risks that they will be unable or unwilling to meet these obligations)[7]. Therefore, we submit these comments and suggested amendments to the proposed rule to ensure that the private interest of lessees in temporary well shut-ins is understood in the context of the paramount interest in proper management, protection, and restoration of state trust lands for sustained, long-term beneficial use in service of the trust land's beneficiaries.

I. Overview of Proposed Conditions and Other Rule Amendments

[4] *See* New Mexico State Land Office, Announcement Re: Emergency Amendment of New Mexico State Land Office Rule 19.2.100.71 NMAC, "Temporary Shut-In of Oil Wells Due to Severe Reduction in the Price of Oil" (April 3rd, 2020) [Hereinafter SLO Emergency Announcement] *available at* https://www.nmstatelands.org/announcements/

[5] *See, e.g.,* Kendra Chamberlain, "For Greater Chaco Communities, Air Pollution Compounds COVID-19 Threat." The NM Political Report (April 15, 2020) *Available at* https://nmpoliticalreport.com/2020/04/15/for-greater-chaco-communities-air-pollution-compounds-covid-19-threat/

[6] SLO Emergency Announcement, *supra* Note 4.

[7] "Trump's Oil Deal May Not be Enough to Save Some U.S. Oil Companies", The Washington Post, April 14, 2020. *Available at* https://www.google.com/search?q=Trump%27s+oil+deal+may+not+be+enough+to+save+some+U.S.+oil+companies&oq=Trump%27s+oil+deal+may+not+be+enough+to+save+some+U.S.+oil+companies&aqs=chrome..69i57.1484j0j8&sourceid=chrome&ie=UTF-8

Fundamentally, we want to ensure that the emergency Rule amendment, in offering the opportunity for rapid short-term relief to lessees during a major and possibly prolonged "bust," does not undermine the SLO's trust mandate and its laudable ongoing efforts to manage public trust lands for the benefit of *all* New Mexicans, now and for generations to come.

To that end, we acknowledge and appreciate the requirement in the proposed emergency Rule amendment that leases be "maintained in good standing according to the terms and conditions thereof and all applicable statutes and regulations" in order for lessees to take advantage of temporary shut-in provisions under the Rule.[8] And perhaps the SLO already has mechanisms in place for verifying lessees' compliance and good standing that are not outlined in this proposed Rule. But, particularly for certain issues of great importance to protecting public health and the environment, and minimizing financial risks to the state and its people and trust beneficiaries, we think it's important to augment the general "good standing" requirement in the proposed Rule with additional express, specific conditions. Such conditions will promote increased transparency and lessee accountability, enable the SLO to take a more proactive role in serving both the immediate and long-term best interests of the trust, and further emphasize the importance of compliance as a pre-condition to lessees' availment of the emergency Rule.

We thus propose the following three conditions that lessees/operators must satisfy before they can avail themselves of the proposed emergency Rule provisions (i.e., that the lease not expire due to non-production):

1) The Lessee demonstrates compliance with State Land Office and Oil Conservation Division financial assurance requirements, at, currently, 19.2.100.3 NMAC and 19.15.8 NMAC, respectively, and the Commissioner verifies this compliance and certifies it in writing.

2) Notwithstanding any waiver of SLO financial assurance requirements previously filed with the Commissioner, the lessee has now filed sufficient financial assurances in accordance with the requirements of 19.2.100.23 NMAC.

3) The Lessee submits, and the Commissioner approves,[9] an adequate and up-to-date Closeout and Operation Plan for surface operations and surface reclamation in accordance with Subsection C of 19.2.100.66 NMAC and Subsection E of 19.2.100.67 NMAC.

In addition to the conditions above, which would augment Subpart C of this emergency Rule amendment, we propose three more stand-alone requirements in this Rule. Two of the three are, like the above conditions, additional requirements of lessees. As with the

[8] *See* Proposed Rule Amendment 19.2.100.71 NMAC, Subsection C

[9] Importantly, the Commissioner may, consistent with retained authorities, disapprove a Closeout and Operation plan, request additional information or content, or condition approval on additional requirements.

conditions, these requirements will promote increased transparency and lessee accountability, and enable the SLO to take a more proactive role in serving the best interests of the trust.

These proposed requirements are:

1) If, under this emergency Rule, any lessee has caused expenditures to be made from the State Trust Land Restoration and Remediation Fund, that lessee shall enter into an Agreement with the State Land Office to pay back such expenditures by a date certain, to be determined by the Commissioner in the terms of the Agreement.

2) The lessee shall not sell, assign, or otherwise transfer a lease maintained under this emergency Rule unless the entity acquiring the lease demonstrates compliance with State Land Office and Oil Conservation Division financial assurance requirements, and the Commissioner verifies this compliance and certifies it in writing.

3) In accordance with the discretion afforded by 19.2.100.31 NMAC, the Commissioner shall not issue any new oil and gas leases on state trust lands during the effective period of this Rule to protect the value of oil and gas leases, including sale price and royalty value, and to minimize the risk that additional oil and gas wells not in existence as of the effective date of this emergency rule and pending termination of this emergency rule will be drilled and subsequently shut in.

We recommend that the State Land Office add these conditions and requirements to the text of the proposed emergency Rule amendment, 19.2.100.71 NMAC, consistent with the SLO's statutory and rulemaking authority. See Appendix A, attached, for redline edits to the emergency rule draft, reflecting the proposed conditions and additional requirements, recommended changes to notice requirements in Paragraph C (2), and some minor additional suggestions. In our redline version of the proposed Rule, the new conditions are added to Subsection "C" of the proposed Rule, augmenting the list of requirements that lessees must meet so that their leases "shall not expire." The three additional requirements are inserted as new Subsections "D," "E," and "F."

To help ensure up-front accountability from oil and gas lessees and to facilitate SLO's verification of lessees' compliance with the above conditions, we also propose amending the 30-day period for notifying the SLO of an already-commenced temporary shut-in from Paragraph C (2) of the proposed Rule.[10] Specifically, we ask that the SLO amend Paragraph C (2) to require that lessees seeking to benefit from the emergency rule[11] notify the SLO of each temporary well shut-in within one week (7 days) of the date the

[10] *See* Proposed Rule Amendment 19.2.100.71 NMAC, Paragraph C (2), allowing lessees to wait up to 30 days from the first shut-in date to notify the Commissioner of a shut-in.

[11] Other than lessees who, due to the severe drop in oil prices, already commenced shut-in of the well(s) in question on or after March 1st but before the effective date of this Rule

well was first shut in. For lessees who already commenced one or more well shut-ins on or after March 1st, 2020 due to the severe drop in oil prices, we suggest that the SLO further amend Paragraph C (2) of the proposed Rule to require, within one week (7 days) of the effective date of the Rule, notification to SLO of any and all well shut-ins commenced between March 1st and the effective date of this Rule. In all cases, lessees will provide this notification via a form supplied by the SLO, as described in Paragraph C (2) of the proposed Rule, accompanied by the requisite OCD form C-103 or other written OCD approval of the temporary shut-in.

All of the conditions and requirements we have proposed are discussed in further detail in Section III of this document, beginning on page 7.

II. Background and Context on Long-Term Environmental and Financial Risks of the Proposed Emergency Rule Amendment

While the well shut-ins allowed under this emergency Rule are intended to be temporary,[12] the current confluence of health, economic, environmental and climate crises exacerbates the risk that these wells will not resume production in the near future, or perhaps ever. For one, social distancing, stay-at-home orders, and other such measures to attempt to control the spread of the SARS-CoV-2 virus may be in place for quite some time, and could be necessary in waves as cases re-surge seasonally or after periods of temporary (or premature) relaxation of infection control measures.[13] And the broader economic and social ramifications of COVID-19 will likely endure long after the pandemic subsides. All of this dampens demand for oil and suppresses prices for the foreseeable future.

In addition, oil and gas companies were already facing plummeting prices and credit ratings and increased bankruptcy rates *before* the onset of the pandemic or oil supply glut.[14] The current public health emergency and oil price drop have only accelerated and intensified the volatile fossil fuel industry's latest bust, particularly against the backdrop of a global climate crisis. This bust increases the chances that: (1) temporary shut-ins will become permanent, as it becomes less economically viable for wells to return to production; and (2) we will witness a significant increase in the number of oil and gas bankruptcies. And with increased bankruptcies and longer periods of well shut-ins come increased risks that oil and gas operators/lessees will abandon wells and equipment without engaging in proper plugging and cleanup, leaving legacies of pollution and

---

[12] We do have one request for clarification regarding Paragraph B (1) of the proposed Rule (Effective Period). The timelines articulated in the redline text in the first five lines of that paragraph seem inconsistent with the remaining, non-redlined text in the last three lines. Which components of this paragraph best characterize the effective period for this proposed emergency Rule amendment?

[13] Kissler et al., Projecting the Transmission Dynamics of SARS-CoV-2 Through the Postpandemic Period. *Science.* (April 14, 2020). *Available at* *https://science.sciencemag.org/content/sci/early/2020/04/14/science.abb5793.full.pdf*

[14] *See, e.g.,* "American Oil Drillers Were Hanging On by a Thread. Then Came the Virus", The New York Times, March 20, 2020 (updated March 23, 2020), available at https://www.nytimes.com/2020/03/20/business/energy-environment/coronavirus-oil-companies-debt.html. [Hereinafter American Oil Drillers 2020]

staggering cleanup costs in their wake that are problematically shouldered by the state and its people.[15] Indeed, we increasingly wonder whether the challenges faced by the oil industry—e.g., mounting concerns regarding the climate crisis and industry's high debt loads[16]—reflects persistent and systemic structural problems with the logic of oil and gas production that create serious short- and long-term risks to the state's interest in state trust lands– far beyond the usual, if still very problematic, boom-bust cycles we've historically witnessed.

Prior to commencing development or surface disturbance on a lease, operators are required to post bonds or other financial assurances to cover the costs associated with well plugging and abandonment and site clean-up and restoration.[17] However, as the SLO has rightly acknowledged in calling for a state-wide bonding adequacy review, these bonds are usually woefully inadequate to cover the actual costs of well plugging and abandonment, reclamation, or surface damage.[18] If bonds are inadequate or companies shirk their responsibilities and aren't held accountable, the state and taxpayers will be left to foot the bill and to bear substantial environmental, health, and economic consequences. Both the financial and environmental risks posed to state trust lands also threaten the long-term interests of trust beneficiaries and the corpus of the trust. Particularly amidst a confluence of health, economic, environmental, and climate crises with no near-term or guaranteed end in sight, such risks may constitute precisely the kind of "ambiguity about future conditions" that "transcends the requirement for current income" and merits–or even necessitates– consideration of longer-term environmental and economic sustainability in managing state trust lands.[19]

III. Detailed Discussion of Suggested Conditions for Allowing Lessees to Avail Themselves of the Provisions of This Emergency Rule Amendment

Conditioning lessees' availment of the emergency rule on up-front accountability and compliance with all applicable requirements, rules, and laws, is an especially important safeguard for public health–and the public trust–amidst the chaos of the COVID-19 pandemic, where everyone is stretched thin and non-compliance might be more readily overlooked. We are already seeing this dynamic play out with Federal agencies like BLM and EPA, who seem to be exploiting the COVID-19 pandemic to push forward policies and regulatory rollbacks that elevate the Trump Administration's "energy dominance" agenda over climate, health, environmental justice, and long-term environmental and

---

[15] *See, e.g.,* ARO Working Group (2019) ARO Watch: "Risky Retirement." *Available at* https://www.arowatch.org/

[16] "American Oil Drillers 2020, *supra* Note 14.

[17] *See, e.g.,* 19.2.100.23 NMAC (SLO financial assurance regulatory requirements); *see also* 19.15.8 NMAC (OCD financial assurance regulatory requirements).

[18] *See, e.g.,* New Mexico State Land Office, "Notice of Intent to Initiate Rulemaking–Bonding Adequacy Review and Update" (Feb. 21, 2020), *available at https://www.nmstatelands.org/2020/02/20/notice-of-intent-to-initiate-rulemaking-bonding-adequacy-review-and-update/*; *See also* United States Government Accountability Office (GAO), Oil and Gas: Bureau of Land Management Should Address Risks from Insufficient Bonds to Reclaim Wells (September 2019), *available at* https://www.gao.gov/assets/710/701450.pdf (discussing inadequacies of BLM bonds to cover well plugging and abandonment and cleanup on federal public lands)

[19] *See* Souder et al., *Supra* Note 1.

economic sustainability.[20] The apparent exploitation of the pandemic by agencies ostensibly charged with protecting public health and public lands is particularly appalling and unjust in light of mounting evidence linking air pollution exposure to increased risk and severity of COVID-19.[21] A dual public health and economic crisis should not provide an excuse for the fossil fuel industry—or the agencies and regulators who enable it—to avoid accountability. Rather, it's all the more imperative that the state and taxpayers aren't saddled with additional, unnecessary financial (and health) burdens and risks. While BLM and EPA's actions are beyond the SLO's control, they provide important context and underscore the role that the SLO can play to uphold the public interest.

We thus propose three conditions that must be met *before* any lessee can take advantage of the emergency Rule amendment. To further clarify that these are mandatory conditions, all of which lessees must meet up front, we also propose adding "and only if" to the end of Subsection C of the proposed emergency Rule amendment, so that it reads, "Any oil and gas lease issued by the commissioner of public lands and maintained in good standing according to the terms and conditions thereof and all applicable statutes and regulations shall not expire if, ***and only if***:.." (emphasis added). Please see Appendix A for redline. In addition, we propose two additional requirements for inclusion in the emergency Rule amendment. The proposed conditions and requirements are as follows:

1) **The Lessee demonstrates compliance with State Land office and Oil Conservation Division financial assurance requirements at, currently, 19.2.100.3 NMAC and 19.15.8 NMAC, respectively, and the Commissioner verifies this compliance and certifies it in writing**

We appreciate the steps the State Land Office is already taking, such as the proposed bonding adequacy review, to understand and address gaps and deficiencies in existing bonding requirements, and we hope to engage early and often with the SLO and other agencies and stakeholders as these efforts develop. We also recognize that a statewide bonding adequacy review and update is a longer-term endeavor involving multiple state agencies, while the proposed Rule amendment is an emergency SLO measure. Thus, while we are not asking at this time for an all-encompassing update of bonding requirements in the context of this emergency, we still want to ensure, at minimum, that oil and gas lessees comply with *existing* bonding requirements, which provide at least *some* financial backstop should wells ultimately need to be permanently plugged and abandoned and land need to be restored. This backstop is particularly important given the increased risk, under the current circumstances, that lessees/operators may permanently

[20] One recent example is the U.S. EPA's blanket policy suspending enforcement and civil penalties for regulated entities that can show COVID-19 was the cause of a failure to comply with the law, unveiled in late March following a call for help from the American Petroleum Institute the week prior.
[21] *See, e.g.,* Jamie Smith Hopkins, "A Likely but Hidden Coronavirus Risk Factor: Pollution." The Center for Public Integrity (March 27, 2020). *Available at* https://publicintegrity.org/health/coronavirus-and-inequality/a-likely-but-hidden-coronavirus-risk-factor-pollution/ (The article discusses not only the link between coronavirus and air pollution exposure, but also the profound environmental justice implications of this issue).

abandon these shut-in wells without properly decommissioning them or reclaiming well sites, in particular if they go bankrupt.

In addition, a recent review of OCD well data indicates that there may already be over 2500 oil and gas wells in New Mexico evading current bonding requirements.[22] These wells are currently labeled as "active" in OCD's database, but should, as far as we can tell, be deemed "inactive" given that their "last production date" is over 15 months in the past.[23] Some of these wells haven't produced in over a decade, and over 600 of these are state wells.[24] And the 2020 Q1 New Mexico Legislative Finance Committee (LFC) report indicates that state regulators lack necessary capacity to monitor and address non-compliance with bonding requirements (and other regulatory and permit requirements).[25] While the SLO may not address this specific issue in this proceeding, it is illustrative of our concerns regarding industry compliance with state bonding requirements that substantiates the need for our recommended actions in this proceeding.

We thus ask that the State Land Office require that lessees verify and certify their compliance with all currently applicable SLO and OCD bonding/financial assurance requirements prior to allowing lessees to take advantage of this emergency Rule amendment. Both SLO and OCD financial assurance requirements apply to oil and gas lessees on state trust lands. The SLO financial assurance regulatory requirements are found in 19.2.100.23 NMAC. The OCD financial assurance regulatory requirements for plugging and abandonment and reclamation are found in 19.15.8 NMAC.

To facilitate this verification, we propose that lessees[26] be required to submit up-front documentation to the SLO demonstrating that they have posted the legally-required bonds or other financial assurances for all applicable wells/leases, and that those bonds are up-to-date. Lessees should submit this documentation to SLO upon initial notification of well shut-in, according to the procedures in Paragraph C (2) of the proposed Rule (as we suggest amending them–see Appendix A, redline version of proposed Rule). Lessees could provide this documentation as an accompaniment to the SLO form required under Paragraph C (2) of the Proposed Rule Amendment, and the required form C-103 or equivalent that they must furnish to indicate OCD's shut-in approval. For lessees who already commenced one or more well shut-ins on or after March 1st but prior to this Rule's effective date, due to the sudden and unexpected drop in oil prices, as described in Paragraph C (2) of this Rule, we propose that, as soon as possible, and within a time

---

[22] New Mexico Energy, Minerals and Natural Resources Department (EMNRD), Oil and Gas Conservation Division (OCD) (2020), *Well Search, Available at* https://wwwapps.emnrd.state.nm.us/ocd/ocdpermitting/Data/Wells.aspx

[23] *Id;* The 15-month mark is important because, pursuant to 19.15.25.8 NMAC, wells which have been continuously inactive for a period of one year or more must be "properly plugged and abandoned" or placed in "approved temporary abandonment" (*see* 19.15.25.12 and 19.15.25.13 NMAC) within 90 days.

[24] *Id*.

[25] New Mexico Legislative Finance Committee (2020), Performance Report Card: Energy, Minerals and Natural Resources Department, First Quarter, Fiscal Year 2020. *Available at* https://www.nmlegis.gov/Entity/LFC/Documents/Agency_Report_Cards/521%20-%20EMNRD%20FY20%20Q1.pdf

[26] Other than lessees who, due to the severe drop in oil prices, already commenced shut-in of the well(s) in question on or after March 1st but before the effective date of this Rule

frame not to exceed one week (7 days) after the effective date of this Rule, such lessees be required to submit documentation to SLO demonstrating that they have posted the legally-required bonds or other financial assurances for all applicable wells/leases.

Where lessees fail to affirmatively demonstrate compliance with existing bonding requirements, and/or the Commissioner finds that lessees are not in compliance with existing bonding requirements, we suggest adding express language that the State Land Office shall *not* allow lessees to take advantage of the Rule unless and until lessees post adequate bonds in accordance with the applicable SLO and OCD bonding requirements. To that end, please see Appendix A for suggested redline adjustments to the proposed Rule.

2) **Notwithstanding any waiver of SLO financial assurance requirements previously filed with the Commissioner, the lessee has now filed sufficient financial assurances in accordance with the requirements of 19.2.100.23 NMAC.**

The current confluence of economic, environmental, health, and climate crises increases the risk that the wells temporarily shut in under this emergency Rule could become permanently abandoned without proper plugging and decommissioning. In abandoning a well, operators are also likely to leave behind other equipment, all posing a heightened risk of damage to state trust lands and the interests therein. In recognition of these risks, we request that *all* lessees seeking to benefit from this emergency Rule be required to file sufficient financial assurances according to the requirements in 19.2.100.23 NMAC, even where lessees have previously filed waivers of such requirements.

Typically, 19.2.100.23 NMAC requires lessees on state trust lands to post adequate bonds before commencing development or operations on the lease. However, Subsection B of 19.2.100.23 contains a waiver provision. It states, "if any purchaser, patentees or surface lessees shall file with the commissioner a waiver duly executed and acknowledged by the purchaser, patentee or surface lessee of the purchaser's, patentee's or surface lessee's right to require such bond or other surety pursuant to Section 19-10-26 NMSA 1978 the development, occupation and use of the lands by the oil and gas lessee *may in the discretion of the commissioner* be permitted without said surety." (emphasis added).

Both the language of 19.2.100.23 (B) and, importantly, the statutory provision in Section 19-10-26 NMSA 1978[27] afford the Commissioner discretion to allow (with duly executed waiver) *or* to *prohibit* the lessee's development, occupation, and use of state lands in the absence of financial assurance requirements. Accordingly, the Commissioner can, and in this case should, exercise that authority to prohibit the lessee's availment of the proposed Rule unless and until the lessee has posted adequate financial assurances in accordance

[27] *See* Section 19-10-26 NMSA 1978, stating, "if any such purchaser shall file with the commissioner of public lands a waiver duly executed and acknowledged by him of his right to require such bond, such development, occupation and use of the lands by a mineral lessee may be permitted without the bond herein required."

with the other provisions of 19.2.100.23 NMAC, no exceptions–even where a waiver was previously allowed.

Please see Appendix A for the incorporation of this condition into our redline version of the proposed Rule.

3) **The Lessee submits, and the Commissioner approves, an adequate and up-to-date Closeout and Operation Plan for surface operations and surface reclamation in accordance with Subsection C of 19.2.100.66 NMAC and Subsection E of 19.2.100.67 NMAC.**

The provisions in 19.2.100.66 NMAC and 19.2.100.67 NMAC outline surface operation requirements and reclamation requirements, respectively, for oil and gas lessees on state trust lands. The stated purpose of 19.2.100.66 NMAC is "to establish minimum procedures for protecting the surface affected by operation and development activities on state oil and gas leases." Its provisions apply "to all operations conducted after its effective date on state oil and gas leases, the surface of which is held in trust by the commissioner of public lands." The stated purpose of 19.2.100.67 NMAC is "to establish minimum procedures to follow in reclaiming surface disturbances resulting from development and production on state oil and gas leases, the surface of which is held in trust by the commissioner of public lands." Its provisions apply "to areas disturbed by operations conducted under all existing and future leases."

Both 19.2.100.66 NMAC and 19.2.100.67 NMAC contain several detailed provisions and requirements to accomplish the aforementioned purposes. We recognize that, in the context of an emergency Rule amendment, developing a mechanism to verify compliance with each of these requirements, paragraph-by-paragraph, may prove unrealistic. However, there's an additional means by which oil and gas lessees can comply with these sections. Subsection "C" of 19.2.100.66 NMAC, and Subsection "E" of 19.2.100.67 NMAC, each provide for a "Closeout and Operation Plan" that can substitute for the surface operation and reclamation requirements enumerated in the regulations. They both state that "A reclamation or operation plan may be submitted to the state land office for review. If approved, the plan shall substitute for the reclamation and operation requirements of 19.2.100.66 NMAC and 19.2.100.67 NMAC." These "Closeout and Operation Plans," while not overly prescriptive, also contain requirements that would help lessees plan for—and help the State Land Office easily monitor—how they will fulfill important cleanup responsibilities during *and* after the emergency. Specifically, both 19.2.100.66 NMAC and 19.2.100.67 NMAC provide that "The plan shall consist of reclamation and operation specifics for compliance with the regulations concerning reclamation and operations, *with an additional section that sets out the schedule of implementation on a continuing basis during the life of the lease relative to operation, maintenance, spills, leaks, cleanup and revegetation.*" (Emphasis added).

Thus, for the benefit of lessees, the State Land Office, and the trust, we request including in Subsection C of the proposed emergency Rule amendment an express condition that, in order to avail themselves of the benefits of this emergency Rule, lessees must submit to

the SLO, for discretionary approval by the Commissioner, an adequate, up-to-date Closeout and Operation Plan for surface operations and surface reclamation in accordance with Subsection C of 19.2.100.66 NMAC and Subsection E of 19.2.100.67 NMAC.

We feel that these provisions are very important to encapsulate via an express condition in the emergency Rule amendment. They provide minimum—but crucial—safeguards against surface damage from oil and gas operations–damage that can not only lead to acute environmental and health risks and near-term cleanup costs, but also pose long-term threats to public health and the environment (e.g., from harmful substances leaching from abandoned equipment into groundwater), and in so doing, may degrade the value of state trust lands, to the detriment of trust beneficiaries.

The surface reclamation requirements in 19.2.100.67 NMAC also state that "current lessees will not be held responsible for reclaiming areas disturbed under a lease which has previously expired or been terminated and for which the current lessee is not a successor-in-interest." This latter provision underscores the importance of ensuring that accountability mechanisms are in place throughout the life of a lease–not only as applied to one lessee or operator, but also in the context of expiration, termination, transfer, or sale of the lease.

4) **If, under this emergency Rule, any lessee has caused expenditures to be made from the State Trust Land Restoration and Remediation Fund, that lessee shall enter into an Agreement with the State Land Office to pay back such expenditures by a date certain, to be determined by the Commissioner in the terms of the Agreement.**

Expenditures from the State Trust Land Restoration and Remediation Fund may be made "to administer contractual surface damage and watershed restoration and remediation projects on state trust lands." *See* NMSA 1978, 19-1-11, Part B. Of note and in the context of the current emergency, 19.2.23.10 NMAC states that, in considering which projects to support from this Fund, the Commissioner "will give priority" to "emergency treatments requiring a timely response to any situation that presents an imminent and substantial danger to life, public health, property, or the environment." While use of the funds in response to an acute emergency, or for any specific project, is not mandatory, it's quite possible that demands on the Restoration and Remediation Fund will increase over the effective period of this emergency Rule amendment. In addition, an overall economic downturn means that investments, which have in more prosperous times provided a good source of additional revenue to the fund, are not likely to be as high-return.

An express provision in this emergency Rule amendment, requiring lessees to pay back their fair share if their actions further deplete this fund, can help safeguard against increased demands—and decreased fund balances—on the fund. In addition, this affirmative, time-bound requirement to pay back funds expended for restoration and remediation costs could incentivize lessees to act in ways that better protect the leased

lands—and the people and communities surrounding them—from the outset. And in being better stewards of state trust lands, lessees are also better serving the interests of the trust than the might otherwise.

This suggested Rule amendment provision can also help the Commissioner fulfill her statutory mandate to attempt to recover remediation project costs expended from the fund. Pursuant to NMSA 1978, 19-1-11, Part C**,** the Commissioner "shall" attempt to recover remediation project costs "from any person who may otherwise bear liability for that remediation project…" And 19.2.23.11 NMAC reiterates the statutory requirements in 19-1-11 NMSA, stating that for any expenditure made from the restoration and remediation fund, the Commissioner "shall" attempt to recover project costs "from any person or entity that may bear liability for that project under any lease, easement or other agreement with the state land office, or by statute." Prior to making an expenditure from the fund, the Commissioner must send written notice to the relevant person or entity (if known) of the possibility of initiating an action to recover costs. But lack of written notice does not waive the Commissioner's recovery right. And if incorporated into the Rule, this suggested requirement, while not an individualized form of written notice, would still help put *all* lessees on notice of the Commissioner's intent to recover costs in this context. Finally, like many of our other proposed additions to this Rule, this requirement also serves to remind lessees that an emergency is no excuse to endanger public health, public safety, public lands, and the public trust.

5) **The lessee shall not sell, assign, or otherwise transfer a lease maintained under this emergency Rule unless the entity acquiring the lease demonstrates compliance with State Land Office and Oil Conservation Division financial assurance requirements, and the Commissioner verifies this compliance and certifies it in writing.**

Because of the very market collapse that has led the State Land Office to promulgate this emergency Rule amendment, adequate financial assurances at the point of oil and gas lease/asset transfer are of particular concern. Smaller private operators with limited capital are less likely to survive the moment, and are thus more likely to either 1) sell their assets (and liabilities) to larger firms, thus leading to industry consolidation, or 2) declare bankruptcy. In the instance of small-operator bankruptcy, large banks moving to "foreclose" on outstanding debt may then form holding companies to take over operations, which they have asserted will be "temporary" until the prices bounce back.

Yet it's likely that both the pandemic (and related measures to contain it or prevent its resurgence) and these market conditions will last for quite some time–with the market conditions likely to outlast even a prolonged pandemic. For lessees who have availed themselves of this emergency rule, the leases/assets transferred include shut-in wells. And given the high risk that those wells may need to be plugged and abandoned (and other related assets decommissioned and land properly restored), our proposed requirement for verified bonding compliance before transfer, even to ostensibly "temporary" holding companies, would provide the state some additional assurance that funds are available for such plugging, abandonment, and restoration.

6) **In accordance with the discretion afforded by 19.2.100.31 NMAC, the Commissioner shall not issue any new oil and gas leases on state trust lands during the effective period of this Rule to protect the value of oil and gas leases, including sale price and royalty value, and to minimize the risk that additional oil and gas wells not in existence as of the effective date of this emergency rule and pending termination of this emergency rule will be drilled and subsequently shut in.**

Pursuant to 19.2.100.31 NMAC, the SLO "reserves the right to reject any and all bids not in conformity with law and the posted notice of sale, and to require higher rentals, impose additional restrictions and requirements *and to withhold lands from leasing whenever, in the commissioner's discretion, the commissioner shall deem it to be for the best interests of the trust to do so.*" (Emphasis added). The Commissioner should exercise this express grant of discretion, rooted in trust principles and responsibilities in addition to statutory and regulatory authority, to halt the sale of any new oil and gas leases on state trust lands for the effective period of this emergency Rule.

With oil prices so low as to prompt a finding by the Commissioner that trust beneficiaries' interests can be better served by temporary shut-ins than by production at this time, it would make little sense for the SLO to lease additional state lands for oil and gas development, only to have operators promptly shut in existing wells, or neglect the newly-leased parcels because development isn't viable at the moment (economically and perhaps in terms of workforce capacity as well, in light of the pandemic). Worse yet, absent a *mandate* from the SLO or other state entity to shut in wells, lessees may still attempt to continue production at extremely low prices, to the detriment of the trust.

Indeed, the present emergency counsels in favor of withholding state lands from leasing to serve both the immediate and long-term best interest of the trust.

IV. Conclusion: Need and Opportunity for State Land Office Leadership

The State Land Office is well-positioned to be a leader in protecting New Mexicans against—and ultimately helping the state achieve independence from—a volatile fossil fuel industry that produces revenue for the state but also, by virtue of our state's very dependence on that revenue, creates risks. The SLO's broad trust mandate and the Commissioner's considerable statutory and regulatory authority and discretion, enable such leadership to address these risks. And the SLO's laudable ongoing efforts towards environmentally and economically sustainable land management, including a proposed bonding adequacy review and the recent creation of an Office of Renewable Energy, indicate that such leadership is already underway.[28] The SLO can further demonstrate this leadership now by ensuring that the oil and gas industry is accountable to the public–and that it does not impose unfair financial, public health, and environmental risks on New Mexico's people, communities, lands, and ecosystems–through adequate up-front

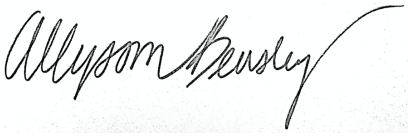
[28] *See* New Mexico State land Office, *FY 2019 Annual Report, available at* https://www.nmstatelands.org/wp-content/uploads/2020/02/2019-AR-PDF-Final.pdf, at 27.

financial assurances and other requirements we recommend for inclusion in this emergency Rule amendment.

The acceleration of an impending oil and gas bust by the COVID-19 pandemic and OPEC-Russia oil supply wars—indeed, the very need for this emergency Rule amendment, as articulated by the SLO—is a stark reminder of the vulnerability of volatile fossil-fuel-dependent economies and entities to crises near and far, even setting aside the risks and realities associated with climate change. We thus appreciate the SLO's diligence and look forward to working with the SLO and other stakeholders to address these realities through future action.

Thank you again for the opportunity to submit comments and for your consideration of the information, concerns, and proposed emergency Rule amendment changes addressed herein.

Sincerely,



Allyson (Ally) Beasley, Legal Fellow
Western Environmental Law Center
208 Paseo del Pueblo Sur, Unit 602
Taos, New Mexico 87571
575-224-6260
beasley@westernlaw.org

and

Jordan Vaughan Smith, Executive Director
Climate Advocates Voces Unidas (CAVU)

Demis Foster, Executive Director
Conservation Voters New Mexico

Carol Davis, Executive Director
Diné C.A.R.E.

Bruce Baizel, Director
Energy Program, Oil & Gas Accountability Project
Earthworks

Eric Jantz, Interim Executive Director
New Mexico Environmental Law Center

Joan Brown, Executive Director
New Mexico Interfaith Power and Light

Oscar Simpson, State Chair,
New Mexico Sportsmen
and
Oscar Simpson, President
New Mexico Horse Council

Lorne Stockman, Senior Research Analyst
Oil Change International

Lucas Herndon, Deputy Director
ProgressNow New Mexico

Camilla Feibelman, Director
Sierra Club: Rio Grande Chapter

Jeremy Nichols, Director
Climate and Energy Program
WildEarth Guardians

Appendix A: WELC Redline Version of Proposed Emergency Rule Amendment

Note: for this document, State Land Office "Redline" is in bold black text and WELC redline is in red.

19.2.100.71 TEMPORARY SHUT-IN OF OIL WELLS DUE TO SEVERE REDUCTION IN THE PRICE OF OIL:

A. Basis for allowing shut in of oil wells: After notice and a public hearing pursuant to Section 19-10-6 NMSA 1978, the commissioner has determined that, because of a severe reduction in the price of oil, the beneficiaries of state trust lands will be better served if oil wells are allowed to be temporarily shut in rather than produced at a low price.

B. Effective ~~**date**~~**period:**

(1) Pursuant to Section 14-4-5.6 NMSA 1978 and 19.2.16.14 NMAC, this emergency rule shall be effective immediately upon filing. Pursuant to 19.2.16.14 NMAC, this rule shall not continue in effect longer than 30 days unless within that time period the commissioner commences proceedings to adopt the rule under the normal rulemaking process, in which case the emergency rule shall remain in effect until a rule is adopted under the normal rulemaking process, but in no event shall remain in effect for more than 120 days. Unless extended by the commissioner after a subsequent notice and public hearing or terminated sooner by a subsequent regulation of the commissioner after finding that the price of oil is no longer severely reduced, 19.2.100.71 NMAC shall remain in effect for a period of two years from its effective date.

(2) Any termination of 19.2.100.71 NMAC before the expiration of two years from its effective date shall not be effective until 30 days after the commissioner has by certified mail sent notice of the prospective termination to each lessee whose lease is being extended by the operation of this section.

C. Any oil and gas lease issued by the commissioner of public lands and maintained in good standing according to the terms and conditions thereof and all applicable statutes and regulations shall not expire if, and only if:

(1) there is a well capable of producing oil located upon some part of the lands included in the lease and such well is**, on or after March 1, 2020,** shut in because of the severe reduction in the price of oil;

(2) the lessee, if applicable well shut-in has not commenced by the effective date of this rule, timely notifies the commissioner in writing within ~~30~~ 7 days of the date the well is first shut in, on a form made available by the commissioner for that purpose, accompanied by a form C-103 filed with the oil conservation division or other written oil conservation division approval of the shut-in; or, if the lessee shut in applicable wells between March 1, 2020 and the effective date of this rule, the lessee timely notifies the commissioner in writing within 7 days of the effective date of the rule of all such shut-ins;

(3) the lessee timely pays an annual shut-in royalty within 90 days from the date the well was first shut in and thereafter before each anniversary of the date the well was first shut in. The amount of the shut-in royalty shall be twice the annual rental due by the lessee under the terms of the lease but not less than three hundred twenty dollars ($320) per well per year**, the fee established by the state legislature in Section 19-10-6 NMSA 1978.** If the other requirements of this subsection are satisfied, the timely payment of the shut-in royalty shall be considered for all purposes the same as if oil were being produced in paying quantities until the next anniversary of the date the well was first shut in; provided, that 19.2.100.71 NMAC continues to be in effect.

(a) In order for a lessee to rely on the payment of shut-in royalty to maintain a lease in effect after all wells on the lease capable of producing oil have been shut in, the lessee must have provided timely notice of the shut-in and payment of the shut-in royalty to the commissioner in accordance with Subsection C of 19.2.100.71 NMAC for each **such** well ~~**shut in**~~ as it was shut in, regardless of whether at the time the well was shut in there continued to be a **different** well producing on the **same** lease ~~**after the well was shut in.**~~ For example, if the lease area has four wells capable of producing oil, and the wells ~~**were**~~ **are** shut in at different times rather than all at once, the lessee must ~~**have**~~ provide~~d~~ timely notice of the shut-in and payment of the shut-in royalty as to each of the four wells as each well ~~**was**~~ **is** shut-in and may not rely on notification and payment of the shut-in royalty only after the last of the four wells is shut in.

(b) A shut-in well located on a state land office lease within the boundaries of an area covered by a unit agreement **or** ~~**,**~~ communitization agreement~~**, or commingling order**~~ or constituting a pooled unit or cooperative area, will be considered to be a shut-in well located upon each state lease within the area.

(c) If the date when a shut-in royalty payment is due falls on a Saturday, Sunday or legal state or federal holiday, the shut-in royalty may be timely paid if received on the next calendar day which is not a Saturday, Sunday or holiday.

(d) Under the standard business practice of the state land office, the date that the state land office stamps or otherwise marks the shut-in royalty payment or check establishes the date of actual receipt by the state land office

(4) the lessee demonstrates compliance with state land office and oil conservation division financial assurance requirements at, currently, 19.2.100.3 NMAC and 19.15.8 NMAC, respectively, and the Commissioner verifies this compliance and certifies it in writing.

(a) To demonstrate compliance with bonding requirements, the lessee timely submits signed, written documentation, concurrent with the lessee's initial shut-in notice submission to the state land office in accordance with paragraph C (2) of this Rule, showing that the lessee has posted all legally-required bonds or other financial assurances for all applicable wells/leases, and that those bonds are up-to-date.

(b) For a lessee who has already commenced one or more well shut-ins on or after March 1st but prior to this Rule's effective date, the lessee submits to the state land office as soon as possible, and within a time frame not to exceed one week (7 days) after the effective date of this Rule, signed, written documentation to SLO demonstrating that they have posted the legally-required bonds or other financial assurances for all applicable wells/leases.

(c) Where a lessee fails to affirmatively demonstrate compliance with existing bonding requirements, and/or the commissioner finds that a lessee is not in compliance with existing bonding requirements, the State Land Office shall *not* allow lessees to avoid lease expiration under this Rule, unless and until lessees post adequate bonds in accordance with the applicable state land office and oil conservation division bonding requirements.

(5) notwithstanding any waiver of SLO financial assurance requirements previously filed with the Commissioner, the lessee has now filed sufficient financial assurances in accordance with the requirements of 19.2.100.23 NMAC.

(6) the Lessee submits, and the commissioner approves, an adequate and up-to-date Closeout and Operation Plan for surface operations and surface reclamation in accordance with Subsection C of 19.2.100.66 NMAC and Subsection E of 19.2.100.67 NMAC.

D. If, under this emergency rule, any lessee has caused expenditures to be made from the State Trust Land Restoration and Remediation Fund, that lessee shall enter into an Agreement with the State Land Office to pay back such expenditures by a date certain, to be determined by the Commissioner in the terms of the Agreement**.**

E. The lessee shall not sell, assign, or otherwise transfer a lease maintained under this emergency rule unless the entity acquiring the lease demonstrates compliance with state land office and oil conservation division financial assurance requirements, and the Commissioner verifies this compliance and certifies it in writing.

F. In accordance with the discretion afforded by 19.2.100.31 NMAC, the Commissioner shall not issue any new oil and gas leases on state trust lands during the effective period of this Rule to protect the value of oil and gas leases, including sale price and royalty value, and to minimize the risk that additional oil and gas wells not in existence as of the effective date of this emergency rule and pending termination of this emergency rule will be drilled and subsequently shut in.

G. If the lessee fails to timely comply with the requirements of Subsection C of 19.2.100.71 NMAC, no action by thee commissioner **or,** the state land office ~~**or any other representative of the commissioner**~~ may ratify, re-grant or revive the expired lease or estop the commissioner from ~~**asserting**~~ **treating** ~~**that**~~ the lease **h**~~as~~ expired, unless such relief is granted expressly in writing signed by the commissioner.

H. Under no circumstances will the commissioner refund any portion of the shut-in royalty paid for a shut-in well up to the amount required by Subsection C of 19.2.100.71 NMAC.

I. Upon the termination of 19.2.100.71 NMAC, automatically or by action of the commissioner, a lease maintained in effect by payment of shut-in royalty shall expire unless there is actual production in paying quantities within 90 days thereafter, unless the time is further extended, in writing, on an individual lease basis, upon request **and,** at the discretion of the commissioner.

[19.2.100.71 NMAC, Rn, SLO Rule 1, Seetion 1.072, 12/13/2002; Repealed, 6/30/2016; 19.2.100.71 NMAC - N, 10/31/2016]