

**STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION**

**APPLICATION OF NEW MEXICO OIL
CONSERVATION DIVISION TO AMEND
19.15.5 NMAC; STATEWIDE**

CASE NO. 20895

**NEW MEXICO OIL CONSERVATION DIVISION'S
PRE-HEARING STATEMENT**

The New Mexico Oil Conservation Division ("OCD") submits this Pre-Hearing Statement in accordance with 19.15.3.11(B) NMAC.

I. STATEMENT OF THE CASE

OCD proposes to amend four sections of 19.15.5 NMAC – *Compliance and Enforcement*:

- (1) Section 3 will be amended to add the legal authority in NMSA 1978, Section 70-2-31.
- (2) Section 8 will be amended to state the duties and obligations of OCD.
- (3) Section 9 will be amended to reorganize the section and remove language that is superfluous or superseded by the proposed amendments to Section 10.
- (4) Section 10 will be amended to describe OCD's enforcement authority as set forth in the 2019 amendments to the Oil and Gas Act, and the procedures that OCD will follow to issue and adjudicate notices of violation and temporary cessation orders.

II. TESTIMONY AND EXHIBITS

OCD will present one witness, Gabriel Wade, OCD Deputy Director. Mr. Wade participates in policy decisions regarding oil and gas issues arising before OCD, including the enforcement of the Oil and Gas Act and the implementing rules. Mr. Wade previously served as

OCD Acting Director. Prior to joining OCD, Mr. Wade served as an attorney for OCD in the Office of General Counsel of the Energy, Minerals and Natural Resources Department. He holds a B.S. from Southern Oregon University and a J.D. from the University of New Mexico.

Mr. Wade will testify that about the existing compliance rule in 19.15.5 NMAC, the recent amendments to the Oil and Gas Act which authorized OCD to issue notices of violation and seek a range of sanctions, including civil penalties, and the procedures proposed by OCD to implement that statutory authority. OCD estimates that Mr. Wade will testify for 45 minutes and offer the following exhibits:

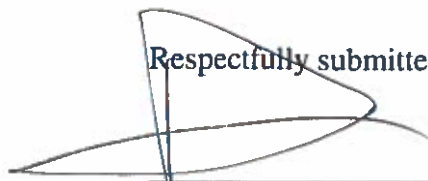
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|-----------|-------------------------------------|
| Exhibit 1 | Curriculum Vitae of Gabriel Wade |
| Exhibit 2 | NMSA 1978, Section 70-2-31 |
| Exhibit 3 | Proposed Amendments to 19.15.5 NMAC |

OCD reserves the right to call rebuttal witnesses as necessary.

III. PROCEDURAL MATTERS

The OCD is not aware of any procedural matters to be resolved prior to the hearing.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was mailed electronically on December 17, 2019 to:

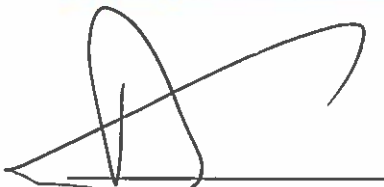
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Eric Ames

Curriculum Vitae of Gabriel Wade

Employment

Deputy Director of the New Mexico Oil Conservation Division (OCD).
New Mexico Energy, Minerals and Natural Resources Department (EMNRD)
November 2018 to Present

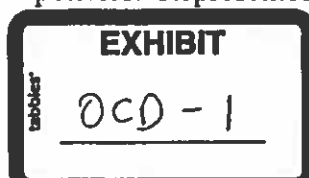
- Make policy decisions on issues affecting the OCD and the oil and gas industry, ranging from routine to complex and controversial.
- Supervise the development and implementation of OCD's compliance and enforcement program, including the hearing process.
- Supervise the development and implementation of OCD policies and procedures, including the consistent application of rules by the district offices.
- Coordinate legal matters with the Office of General Counsel.
- Serve as Vice-Chair of the New Mexico Water Quality Control Commission, the state's water pollution control agency for purposes of the federal Clean Water Act and Safe Drinking Water Act.

Acting Director of the New Mexico Oil Conservation Division, EMNRD
January 2019 to April 2019

- Duties of Deputy Director listed above.
- Made policy decisions on issues affecting the OCD and the oil and gas industry, ranging from routine to complex and controversial.
- Led the OCD through the 2019 60-day legislative session, including drafting and testifying regarding proposed legislation, and assisting the Cabinet Secretary and General Counsel to prepare their testimony.
- Served as Chair of the New Mexico Oil Conservation Commission (OCC). Led the OCC in hearings and decided a range of complex and controversial issues affecting the oil and gas industry.

Assistant General Counsel, Mining and Minerals Division (MMD) and OCD, EMNRD
May 2013 to October 2019

- Legal support for MMD on a wide variety of complex and controversial legal issues including conducting rulemaking hearings before the NM Mining Commission.
- For the OCD, identified and investigated administrative and environmental compliance issues; prepared notices of violation to ensure administrative and environmental compliance.
- Represented the OCD in administrative hearings; provided legal counsel to OCD hearing examiners at OCD administrative hearings; and provided legal counsel to the NM Oil Conservation Commission.
- Reviewed existing and proposed statutes, rules, and policies for improvement. Drafted new or amended statutes, rules, or policies. Represented OCD in rulemaking hearings.



Special Assistant Attorney General
New Mexico Office of the State Engineer
November 2008 to May 2013

- Represented the Water Rights Division in administrative hearings before the State Engineer (SE). Lead counsel for the SE in appeals to state courts and ensured regulatory compliance for the SE against illegal uses of water through compliance orders and injunctions.
- Litigated water rights adjudications on behalf of the state of New Mexico in state and federal courts.

Assistant Public Defender
New Mexico Public Defenders Office, Santa Fe Trial Division
January 2008 to November 2008

- Represented criminal defendants in a variety of different felony cases, including homicide.

Assistant District Attorney
1st Judicial District Attorney's Office, State of New Mexico
August 2005 to January 2008

- Prosecuted misdemeanor and felony criminal offenses, including homicide.

Education

University of New Mexico Law School
Juris Doctorate 2005

Southern Oregon University
Bachelor of Science, History 1999

70-2-31. Violations of the Oil and Gas Act; penalties. (Effective January 1, 2020.)

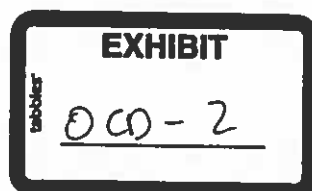
A. Whenever the division determines that a person violated or is violating the Oil and Gas Act or any provision of any rule, order, permit or authorization issued pursuant to that act, the division may seek compliance and civil penalties by:

- (1) issuing a notice of violation;
- (2) commencing a civil action in district court for appropriate relief, including injunctive relief; or
- (3) issuing a temporary cessation order if the division determines that the violation is causing or will cause an imminent danger to public health or safety or a significant imminent environmental harm. The cessation order will remain in effect until the earlier of when the violation is abated or thirty days unless a hearing is held before the division and a new order is issued.

B. A notice of violation issued pursuant to Paragraph (1) of Subsection A of this section shall state with reasonable specificity the nature of the violation, shall require compliance immediately or within a specified time period, shall provide notice of the availability of an informal review and the date of a hearing before the division and shall provide notice of potential sanctions, including assessing a penalty, suspending, canceling or terminating a permit or authorization, shutting in a well and plugging and abandonment of a well and forfeiting financial assurance pursuant to Section 70-2-14 NMSA 1978.

C. If the notice of violation is not resolved informally within thirty days after service of the notice, the division shall hold a hearing and determine whether the violation should be upheld and whether any sanctions, including civil penalties, shall be assessed. In assessing a penalty authorized by this section, the division shall take into account the seriousness of the violation, any good faith efforts to comply with the applicable requirements, any history of noncompliance under the Oil and Gas Act and other relevant factors. When a decision is rendered by the division after a hearing, any party of record adversely affected shall have the right to have the matter heard de novo before the commission pursuant to Section 70-2-13 NMSA 1978.

D. Any civil penalty assessed by a court or by the division or commission pursuant to this section may not exceed two thousand five hundred dollars (\$2,500) per day of noncompliance for each violation unless the violation presents a risk either to the health or safety of the public or of causing significant environmental harm, or unless the noncompliance continues beyond a time specified in the notice of violation or order issued by the division, commission or court, whereupon the civil penalty may not exceed ten thousand dollars (\$10,000) per day of noncompliance for each violation. No penalty assessed by the division or commission after a hearing may exceed two hundred



thousand dollars (\$200,000); provided that such limitation does not apply to penalties assessed by a court.

E. The commission shall make rules, pursuant to Section 70-2-12.2 NMSA 1978, providing procedures for the issuance of notices of violations, the assessment of penalties and the conduct of informal proceedings and hearings pursuant to this section.

F. It is unlawful, subject to a criminal penalty of a fine of not more than five thousand dollars (\$5,000) or imprisonment for a term not exceeding three years or both such fine and imprisonment, for any person to knowingly and willfully:

(1) violate any provision of the Oil and Gas Act or any rule, regulation or order of the commission or the division issued pursuant to that act; or

(2) do any of the following for the purpose of evading or violating the Oil and Gas Act or any rule, regulation or order of the commission or the division issued pursuant to that act:

(a) make any false entry or statement in a report required by the Oil and Gas Act or by any rule, regulation or order of the commission or division issued pursuant to that act;

(b) make or cause to be made any false entry in any record, account or memorandum required by the Oil and Gas Act or by any rule, regulation or order of the commission or division issued pursuant to that act;

(c) omit or cause to be omitted from any such record, account or memorandum full, true and correct entries; or

(d) remove from this state or destroy, mutilate, alter or falsify any such record, account or memorandum.

G. For the purposes of Subsection F of this section, each day of violation shall constitute a separate offense.

H. Any person who knowingly and willfully procures, counsels, aids or abets the commission of any act described in Subsection A or F of this section shall be subject to the same penalties as are prescribed in Subsection D or F of this section.

History: 1978 Comp., § 70-2-31, enacted by Laws 1981, ch. 362, § 1; 2019, ch. 197, § 7.

ANNOTATIONS

The 2019 amendment, effective January 1, 2020, revised certain penalty provisions for violations of the Oil and Gas Act; deleted former Subsection A, added new Subsections A through E and redesignated former Subsections B through D as Subsections F through H, respectively; in Subsection G, after "Subsection", deleted "B" and added "F"; and in Subsection H, after "Subsection A or", deleted "B" and added "F", and after "prescribed", deleted "therein" and added "in Subsection D or F of this section".

Applicability. — Laws 2019, ch. 197, § 12 provided that the provisions of Laws 2019, ch. 197 apply to contracts entered into on and after July 1, 2019.

Source: <https://laws.nmonesource.com>

This is an amendment to 19.15.5 NMAC, amending Sections 3, 8, 9 and 10 effective x/xx/xxxx.

Explanatory statement: Statute citations were corrected throughout the rule to conform to correct legislative styles.

19.15.5.3 STATUTORY AUTHORITY: 19.15.5 NMAC is adopted pursuant to the Oil and Gas Act, Section 70-2-6, Section 70-2-11, [and] Section 70-2-12 and Section 70-2-31 NMSA 1978.
[19.15.5.3 NMAC – N, 12/1/2008, A, X/XX/XXXX]

19.15.5.8 ENFORCEMENT OF STATUTES AND RULES: The division 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 prevention of waste and the protection of correlative rights, and [including] the protection of public health and the environment. An owner or operator shall obtain information pertaining to the regulation of oil and gas before beginning operations.

[19.15.5.8 NMAC - Rp, 19.15.1.12 NMAC, 12/1/2008, A, X/XX/XXXX]

19.15.5.9 COMPLIANCE:

- A. An operator is in compliance with Subsection A of 19.15.5.9 NMAC if the operator:
- (1) currently meets the financial assurance requirements of 19.15.8 NMAC;
 - (2) is not subject to a division or commission order, issued after notice and hearing, finding the operator to be in violation of an order requiring corrective action;
 - (3) does not have a penalty assessment that is unpaid more than [70] 30 days after issuance of the order assessing the penalty; and
 - (4) has no more than the following number of wells out of compliance with 19.15.25.8 NMAC that are not subject to an agreed compliance or final order setting a schedule for bringing the wells into compliance with 19.15.25.8 NMAC and imposing sanctions if the schedule is not met:
 - (a) two wells or fifty percent of the wells the operator operates, whichever is less, if the operator operates 100 wells or less;
 - (b) five wells if the operator operates between 101 and 500 wells;
 - (c) seven wells if the operator operates between 501 and 1000 wells; and
 - (d) 10 wells if the operator operates more than 1000 wells.

~~[B. The division shall notify an operator on a monthly basis when, according to records on file with the division, a well on the inactive well list described in Subsection F of 19.15.5.9 NMAC shows no production or injection for the past 12 months by making such information available on the division's website. Further, at least 60 days prior to commencing an enforcement action against an operator for a violation of 19.15.5.9 NMAC, the division shall notify the operator by first class mail to the address provided to the division pursuant to Subsection C of 19.15.9.8 NMAC.~~

~~C. The division shall make available on its website and update weekly the status of operators' financial assurance 19.15.8 NMAC requires, according to division records.~~

~~D. Orders requiring corrective action:~~

~~(1) The division shall make available on its website division or commission orders, issued after notice and hearing, finding an operator to be in violation of an order requiring corrective action.~~

~~(2) An operator who contests an order finding it to be in violation of an order requiring corrective action may appeal and may seek a stay of the order. An order that is stayed pending appeal does not affect an operator's compliance with Subsection A of 19.15.5.9 NMAC.~~

~~(3) An operator who completes the corrective action the order requires may file a motion with the order's issuer to declare the order satisfied. The division or commission, as applicable, may grant the motion without hearing, or may set the matter for hearing.~~

~~E. Penalty assessments.~~

~~(1) The division shall make available on its website penalty assessments assessed under the Oil and Gas Act over the last 12 months and the date the operator paid them, according to division records.~~

~~(2) Any order that is stayed pending appeal does not affect an operator's compliance with Subsection A of 19.15.5.9 NMAC.~~

~~F] B. Inactive wells.~~

~~(1) The division shall make available on its website, and update daily, an "inactive well list" listing each well, by operator, that according to division records:~~

~~(a) shows no production or injection for past 15 months;~~

EXHIBIT

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~~[(a)]~~ **(b)** does not have its well bore plugged in accordance with 19.15.25.9 NMAC through 19.15.25.11 NMAC;

~~[(b)]~~ **(c)** is not in approved temporary abandonment in accordance with 19.15.25.12 NMAC through 19.15.25.14 NMAC; and

~~[(c)]~~ **(d)** is not subject to an agreed compliance or final order setting a schedule for bringing the well into compliance with 19.15.25.8 NMAC ~~[and imposing sanctions if the operator does not meet the schedule].~~

~~(2) [For purposes of 19.15.5.9 NMAC, the listing of a well on the division's inactive well list as a] A well inactive for more than [one year plus 90 days] 15 months creates a rebuttable presumption that the well is out of compliance with 19.15.25.8 NMAC.~~

C. Financial assurance. The division shall make available on its website and update weekly the status of operators' financial assurance that 19.15.8 NMAC requires, according to division records.
~~[19.15.5.9 NMAC - Rp, 19.15.1.40 NMAC, 12/1/2008; A, 11/30/2016, A, xx/xx/xxxx]~~

19.15.5.10 [COMPLIANCE PROCEEDINGS:] ENFORCEMENT:

~~[A. The provisions in 19.15.4 NMAC applicable to adjudicatory proceedings shall apply to compliance proceedings unless altered or amended by 19.15.5.10 NMAC.~~

~~B. A compliance proceeding is an adjudicatory proceeding in which the division seeks an order imposing sanctions for violation of a provision of the Oil and Gas Act, NMSA 1978, Sections 70-2-1 through 70-2-38 or a provision of a rule or order issued pursuant to the act. Such sanctions may include but are not limited to:~~

~~(1) requiring compliance with a provision of the Oil and Gas Act, NMSA 1978, Sections 70-2-1 through 70-2-38 or a provision of a rule or order issued pursuant to the act;~~

~~(2) assessment of civil penalties pursuant to NMSA 1978, Section 70-2-31(A); Subsection A of Section 70-2-31 NMSA 1978;~~

~~(3) corrective action including but not limited to abatement or remediation of contamination and removal of surface equipment;~~

~~(4) plugging and abandonment of a well and restoration and remediation of the well location, and authority for the division to forfeit the applicable financial assurance if the well is not plugged and abandoned and the location restored and remediated;~~

~~(5) denial, cancellation or suspension of a permit;~~

~~(6) denial, cancellation or suspension of authorization to transport; or~~

~~(7) shutting in a well or wells.~~

~~C. The division initiates an administrative compliance proceeding by filing a written application with the division clerk:~~

~~(1) identifying the operator and any other responsible parties against whom the order is sought; including the surety if the division seeks an order allowing forfeiture of a surety bond;~~

~~(2) identifying the provision of the Oil and Gas Act, NMSA 1978, Sections 70-2-1 through 70-2-38, or the provision of the rule or order issued pursuant to the act, allegedly violated;~~

~~(3) providing a general description of the facts supporting the allegations;~~

~~(4) stating the sanction or sanctions sought; and~~

~~(5) providing proposed legal notice.~~

~~D. The division shall provide notice of compliance proceedings as follows:~~

~~(1) the division shall publish notice in accordance with 19.15.4.9 NMAC.~~

~~(2) the division shall provide notice to the operator and any other responsible parties against whom the compliance order is sought by following the provisions of 19.15.4.12 NMAC.~~

~~E. The director may enter into an agreed compliance order with an entity against whom compliance is sought to resolve alleged violations of any provision of the Oil and Gas Act, NMSA 1978, Sections 70-2-1 through 70-2-38 or any provision of any rule or order issued pursuant to the act. The director may enter into an agreed compliance order prior to or after the filing of an application for an administrative compliance proceeding. An agreed compliance order shall have the same force and effect as a compliance order issued after an adjudicatory hearing.~~

~~F. Nothing in 19.15.5.10 NMAC precludes the division from bringing other actions provided for in the Oil and Gas Act, NMSA 1978, Sections 70-2-1 through 70-2-38, including but not limited to the following: suit for indemnification pursuant to NMSA 1978, Section 70-2-14(E) or NMSA 1978, Section 70-2-38(B); an action through the attorney general with respect to the forfeiture of illegal oil or illegal gas pursuant to NMSA 1978,~~

Section 70-2-32; an injunction under NMSA 1978, Section 70-2-28; or collection of penalties pursuant to NMSA 1978, Section 70-2-31(A).

[19.15.5.10 NMAC - Rp. 19.15.14.1227 NMAC, 12/1/2008]

A. General. Whenever the division determines that a person violated or is violating the Oil and Gas Act or a provision of any rule, order, permit or authorization issued pursuant to the Oil and Gas Act, the division may seek a sanction by:

(1) issuing a temporary cessation order if it determines that the alleged violation is causing or will cause an imminent danger to public health or safety or a significant imminent environmental harm. The temporary cessation order shall remain in place until the earlier of when the division determines that the alleged violation is abated or 30 days, unless a hearing is held before the division and a new order is issued;

(2) issuing a notice of violation; or

(3) commencing a civil action in district court.

B. Sanctions. The division may seek one or more of the following sanctions:

(1) a civil penalty;

(2) modification, suspension, cancellation or termination of a permit or authorization;

(3) plugging and abandonment of a well;

(4) remediation and restoration of a well location and associated facilities, including the removal of surface and subsurface equipment and other materials;

(5) remediation and restoration of a location affected by a spill or release;

(6) forfeiture of financial assurance;

(7) shutting in a well or wells; and

(8) any other remedy authorized by law.

C. Notice of violation.

(1) A notice of violation issued by the division shall state with reasonable specificity:

(a) the identity of the alleged violator;

(b) the nature of the alleged violation, including the provision of the Oil and Gas Act or rule, order, permit or authorization allegedly violated;

(c) whether compliance is required immediately or within a specified time period;

(d) the sanction(s) available for the alleged violation and the sanction(s) proposed by the division;

(e) the availability of a process for informal review and resolution of the alleged violation;

(f) a statement that if the notice of violation is not informally resolved within 30 days of service, the division will hold a hearing; and

(g) the date of the hearing, which shall be no later than 90 days after the date of the notice of violation.

(2) The division shall serve the notice of violation on the alleged violator by certified mail.

(3) If during the informal review the division and the alleged violator agree to resolve the alleged violation, they shall incorporate their agreement into a stipulated final order signed by both parties. The stipulated final order shall state that the alleged violator admits the division's jurisdiction to file the notice of violation, consents to the specified relief, including the civil penalty, if any, and waives the alleged violator's right of review by the commission.

(4) If the division and the alleged violator fail to enter a stipulated final order within 30 days of service, the division shall hold a hearing at the division's principal office.

D. Civil penalties. The division shall calculate a proposed civil penalty for each alleged violation in the notice of violation. The calculation shall account for the seriousness of the violation, good faith efforts to comply with the applicable requirement, history of noncompliance under the Oil and Gas Act and other relevant factors. The civil penalty assessed by the division shall not exceed \$2,500 per day of noncompliance for each alleged violation, unless the alleged violation presents a risk either to the health or safety of the public or of causing significant environmental harm, or unless the noncompliance continues beyond the time specified in the notice of violation or stipulated final order, whereupon the civil penalty may not exceed \$10,000 per day of noncompliance for each alleged violation, provided that the civil penalty assessed by the division for an alleged violation shall not exceed \$200,000.

E. Adjudicatory procedures. These adjudicatory procedures shall apply to hearings on temporary cessation orders and notices of violation before the division, and the provisions of 19.15.4 NMAC shall not apply.

(1) **General provisions.**

(a) Designation of parties. The parties shall be the division and the person served with a notice of violation or order, referred to herein as "respondent".

(b) Representation. Respondent may appear and participate in a hearing either pro se or through counsel, provided that a collective entity, including a corporation, partnership, unincorporated association, political subdivision or governmental agency shall appear only through counsel or a duly authorized officer or member.

(c) Rule applicability. In the absence of a specific provision in this section, the hearing examiner may apply the New Mexico Rules of Civil Procedure and Evidence.

(d) Computation of time. In computing any period of time under 19.15.5.10 NMAC the day of the event from which the designated period begins to run shall not be included, and the last day of the computed period shall be included, unless it is a Saturday, Sunday or legal state holiday, in which case the time is extended until the next day which is not a Saturday, Sunday or legal state holiday. Whenever a party must act within a prescribed period after service, and service is by first class mail only, three days is added to the prescribed period.

(e) Extensions of time. The hearing examiner may grant an extension of time to file a document or continue a hearing upon timely motion upon consent of the parties, or for good cause shown after consideration of prejudice to the other party and undue delay to the hearing.

(f) Filing of documents. A party shall file the original of each document and serve a copy on the other party, accompanied by a certificate of service identifying the method and address used to complete service.

(g) Service of documents. A party shall serve each document on the other party or its counsel, as applicable, by personal service or first class mail, or by electronic mail if the parties agree.

(h) Form of documents. Unless otherwise ordered, all documents, except exhibits, shall be on 8 1/2 x 11-inch white paper, shall contain the caption of the notice of violation or temporary cessation order on the first page and shall be signed by the party or its counsel, as applicable.

(2) Pre-hearing procedures.

(a) Docketing. At the expiration of the 30 day period for informal resolution of a notice of violation, when a party appeals a final order under Subsection E of 19.15.5.10 NMAC, or when the division gives notice that it intends to extend a temporary cessation order, the division shall docket the notice of violation or order, and serve a notice of docketing on respondent.

(b) Answer. No later than 10 days after service of the notice of docketing, respondent shall file an answer stating its objection, if any, and the factual and legal basis for such objection, to each alleged violation and sanction, including each element of the assessed civil penalty, in the notice of violation or order.

(c) Hearing examiner. The hearing examiner shall have the authority to take all measures necessary to conduct a fair, impartial and efficient adjudication of issues, and to maintain order and avoid undue delay, including the authority to conduct pre-hearing conferences and hearings, rule on procedural and evidentiary motions, govern the examination of witnesses and the admission of evidence, issue orders and prepare a recommended decision. After the initiation and before the conclusion of a proceeding under this section, the hearing examiner shall not discuss ex parte the merits of the proceeding with the division or the respondent.

(d) Pre-hearing conference. The hearing examiner may hold a pre-hearing conference to narrow the issues, eliminate or resolve preliminary matters and encourage settlement, and may issue a pre-hearing order on procedural and evidentiary matters, including a schedule for the filing of motions and testimony, stipulations regarding alleged violations and requested relief, including civil penalties or elements thereof, and any other matter necessary for the efficient conduct of the hearing.

(e) Pre-hearing statements. No later than 15 days before the hearing, a party who intends to present evidence at the hearing shall file and serve a statement that contains the following information:

(i) the name, address, employment and qualifications, including education and work history, of each witness;

(ii) the direct testimony in narrative form of each witness;

(iii) the exhibits and other evidence to be presented by each witness; and

(iv) procedural matters that are to be resolved prior to the hearing.

(f) Enforcement. The hearing examiner may enforce the requirements of 19.15.5.10 NMAC by any appropriate means, including the exclusion of testimony, exhibits and other evidence.

(g) Motions.

(i) General. All motions, except motions made orally during the hearing,

shall be in writing, specify the grounds for the motion, state the relief sought, indicate whether the motion is opposed or unopposed and be served on the other party.

(ii) Unopposed motions. An unopposed motion shall state that concurrence of the other party was obtained and shall be accompanied by a proposed order approved by the parties.

(iii) Opposed motions. An opposed motion shall state either that concurrence was sought and not obtained, or the reason that concurrence was not sought.

(iv) Response. No later than 10 days after service of an opposed motion, the opposing party may file a response. Failure to file a response shall be deemed a waiver of any objection to the granting of the motion.

(v) Reply. No later than 10 days after service of a response to an opposed motion, the moving party may file a reply.

(vi) Decision. The hearing examiner shall decide all motions without a hearing, unless otherwise ordered by the hearing examiner sua sponte or upon written request of a party.

(3) Hearing procedures.

(a) General. The hearing examiner shall admit all evidence, unless he or she determines that the evidence is irrelevant, immaterial, unduly repetitious or otherwise unreliable or of little probative value. Evidence relating to settlement that would be excluded by the New Mexico Rules of Evidence is not admissible.

(b) Witness examination. Witnesses shall be examined orally and under oath or affirmation, provided that the parties may stipulate to the admission of the testimony of a witness, or part thereof. Parties shall have the right to cross-examine a witness, provided that the hearing examiner may limit cross-examination that is unduly repetitious, harassing or beyond the scope of the direct testimony.

(c) Exhibits. A party shall label each exhibit used during the hearing or offered into evidence with a designation identifying the party, the witness using or offering the exhibit and a serial number.

(d) Burden of persuasion. The division has the burden of going forward with the evidence and of proving by a preponderance of the evidence the facts relied upon to show the alleged violation occurred and that the proposed civil penalty is appropriate. Following the establishment of a prima facie case, respondent shall have the burden of going forward with any adverse evidence or defense to the allegations.

(4) Post-hearing procedures.

(a) Transcript. The hearing shall be transcribed verbatim. Respondent may order a copy of the transcript from the reporter at its own expense.

(b) Recommended decision. The director may request that the hearing examiner prepare a recommended decision.

(c) Final order. The director shall file a final order addressing the material issues of fact and law and may assess a sanction for each alleged violation, which shall be served on the division and the respondent.

F. Commission review. No later than 30 days after the director serves the final order, a party may file a notice of appeal with the commission and shall serve the notice of appeal on the other party. The commission shall schedule a hearing on the appeal and notify the parties of the date and time of the hearing. The commission may appoint a hearing examiner, who may be a member of the commission. The commission shall conduct a de novo review, provided however, that the parties may stipulate to the issues to be heard and to the admission of all or part of the record before the division. The commission shall conduct the hearing in accordance with the adjudicatory procedures in Paragraph (1), Subparagraphs (c) through (g) of Paragraph (2), Paragraph (3) and Subparagraph (a) of Paragraph (4) of Subsection E of 19.15.5.10 NMAC.

G. Payment of civil penalty. No later than 30 days after the director serves the final order, respondent shall pay the full amount of the civil penalty assessed in the final order, provided however that if respondent files a notice of appeal to the commission, no later than 30 days after the commission files a final order or the appeal is withdrawn, respondent shall pay the full amount of the civil penalty assessed in the final order.

H. Resolution after commencement of hearing. If the parties agree to resolve a notice of violation at any time after the commencement of a hearing, they shall file a stipulated final order signed by both parties. The stipulated final order shall state that respondent admits the division's jurisdiction to file the notice of violation, consents to the specified relief, including the civil penalty, if any, and waives respondent's right of review by the commission or the court, as applicable.

I. Publication. On or about October 1 of each year, the division shall publish a list identifying the temporary cessation orders and notices of violation issued during the preceding year, along with the civil penalty paid, if any.

J. Reservation. Nothing in 19.15.5.10 NMAC precludes the division from bringing any other action and seeking any relief allowed by the Oil and Gas Act.
[19.15.5.10 NMAC - Rp, 19.15.14.1227 NMAC, 12/1/2008, A, xx/xx/xxxx]