

TITLE 19 NATURAL RESOURCES AND WILDLIFE
CHAPTER 11 GEOTHERMAL RESOURCES DEVELOPMENT
PART 3 HEARINGS

19.11.3.1 ISSUING AGENCY: Energy, Minerals and Natural Resources Department, Energy Conservation and Management Division.
[19.11.3.1 NMAC - N, 2/27/2018]

19.11.3.2 SCOPE: All persons who engage in the exploration, development or production of a geothermal resource.
[19.11.3.2 NMAC - N, 2/27/2018]

19.11.3.3 STATUTORY AUTHORITY: Geothermal Resources Development Act, Section 71-9-1 et seq. NMSA 1978 (2016).
[19.11.3.3 NMAC - N, 2/27/2018]

19.11.3.4 DURATION: Permanent.
[19.11.3.4 NMAC - N, 2/27/2018]

19.11.3.5 EFFECTIVE DATE: February 27, 2018, except where a later date is cited at the end of a section.
[19.11.3.5 NMAC - N, 2/27/2018]

19.11.3.6 OBJECTIVE: The objective of 19.11.3 NMAC is to establish procedures for hearings before the energy conservation and management division pursuant to the Geothermal Resources Development Act, Section 71-9-1 et seq. NMSA 1978 (2016).
[19.11.3.6 NMAC - N, 2/27/2018]

19.11.3.7 DEFINITIONS: [RESERVED]
[See 19.11.1.7 NMAC for definitions.]
[19.11.3.7 NMAC – N, 2/27/2018]

19.11.3.8 PERMIT HEARING: The applicant or permittee, affected persons or interested persons may file a request with the division for a permit hearing. The person requesting a permit hearing or an attorney representing that person shall sign the hearing request. The director shall generally grant a permit hearing if the applicant or an affected person requests a hearing. However, the director has discretion to deny a hearing request if the issues are not substantial or have previously been heard and decided before the Oil Conservation Division, the Oil Conservation Commission or the division and the parties to the hearing, other than the division, would be the same as the parties to the original hearing. If the applicant or an affected person does not request a hearing, the director may grant a hearing if there is significant public interest in the application; or if the director determines, in his or her discretion, that a hearing may clarify one or more substantial issues involved in the permit. Permit hearings shall be held in Santa Fe. The hearing request shall be submitted in writing to the division and be postmarked or e-mailed by the close of the public comment period in Paragraph (3) of Subsection A of 19.11.2.13 NMAC. The hearing request shall include:

- A.** the requestor's name;
- B.** the requestor's address, or the address of the requestor's attorney, including an e-mail address and phone number if available;
- C.** the division's action that is disputed or a copy of the public notice referencing the division's action;
- D.** the name or general description of the property interest that the division's action affects, if any;
- E.** briefly, the general nature of the dispute with the division's action or proposed action; and
- F.** any other matter division rules or a division order requires.

[19.11.3.8 NMAC - N, 2/27/2018]

19.11.3.9 PERMIT HEARING NOTICE:

A. The division shall publish notice of a permit hearing in the name of the “State of New Mexico”, signed by the director stating:

- (1) the time and place for the hearing;
- (2) the hearing requestor’s name and address, or address of the requestor’s attorney, including an e-mail address, if available;
- (3) a case name and number;
- (4) brief description of the purpose of the hearing; and
- (5) a reasonable description of the subject matter of the hearing that alerts persons who may be affected if the division approves or enacts the proposed action.

B. The division shall publish notice of each hearing at least 30 days before the hearing by:

- (1) posting notice on the division’s website;
- (2) delivering written notice to the hearing requestor, by certified mail, return receipt requested and the applicant or permittee if not the hearing requestor;
- (3) delivering written notice by ordinary first class United States mail to federal and state agencies with jurisdiction over fish and wildlife resources and state and tribal historic preservation officers;
- (4) delivering written notice by ordinary first class United States mail to the EPA and any other agency which the division knows has issued or is required to issue a Resource Conservation and Recovery Act permit, an air quality permit, a national pollutant discharge elimination system permit, 404 permit or sludge management permit for the same facility or activity;
- (5) delivering written notice by ordinary first class United States mail to any unit of local government having jurisdiction over the area where the well or facility is to be located and to any state agency having authority with respect to the construction or operation of the well or facility;
- (6) delivering written notice by ordinary first class United States mail or e-mail to each person who has requested in writing to be notified of such hearings or of the hearing for a specific application;
- (7) delivering written notice by ordinary first class United States mail or e-mail to persons on a mailing list developed by the division including those who request in writing to be on the list, soliciting persons for “area lists” from participants in past permit proceedings in that area and notifying the public of the opportunity to be put on the mailing list through periodic publications in the public press, etc.; and
- (8) publishing notice in a newspaper of general circulation in the county where the well or facility is located or is proposed to be located or in a newspaper of general circulation in the state.

[19.11.3.9 NMAC - N, 2/27/2018]

19.11.3.10 PARTIES TO PERMIT HEARINGS: The parties to a permit hearing shall include:

- A.** the division;
- B.** the applicant or permittee of the geothermal well or facility; and
- C.** an affected person who has requested a hearing or to intervene in the hearing.

[19.11.3.10 NMAC - N, 2/27/2018]

19.11.3.11 CONDUCT OF HEARINGS:

A. Testimony. Hearings shall be conducted without rigid formality. The division shall take or have someone take a transcript or recording of the testimony and preserve it as part of the division’s records. A person testifying shall do so under oath. The hearing examiner shall designate whether an interested person’s unsworn comments and observations are relevant and, if relevant, include the comments and observations in the record.

B. Pre-filed testimony. The director or hearing examiner may order the parties to file prepared written testimony in advance of the hearing. The witness shall be present at the hearing and shall adopt, under oath, the prepared written testimony, subject to cross-examination and motion to strike the unless the witness’ presence at hearing is waived upon notice to other parties and without their objection. The parties shall number pages of prepared written testimony, which shall contain line numbers on the left-hand side.

C. Appearances pro se or through attorney. Parties may appear and participate in hearings either pro se (on their own behalf) or through an attorney. Corporations, partnerships, governmental entities, political subdivisions, unincorporated associations and other collective entities may appear only through an attorney or duly authorized officer or member. Participation in hearings shall be limited to parties as defined in 19.11.3.10 NMAC, except that a representative of a federal, state or tribal governmental agency or political subdivision may make a statement on the agency’s or political subdivision’s behalf. The hearing examiner shall have the discretion to allow

other persons at the hearing to make a relevant statement, but not to present evidence or cross examine witnesses. A person making a statement shall be subject to cross-examination by the parties or their attorneys.

D. Presentation of evidence. The hearing examiner shall afford full opportunity to the parties at a hearing to present evidence and to cross-examine witnesses. The rules of evidence applicable in a trial before a court without a jury shall not control, but hearing examiners may use such rules as guidance in conducting hearings. The hearing examiner may admit relevant evidence, unless it is immaterial, repetitious or otherwise unreliable. The hearing examiner may take administrative notice of the authenticity of documents copied from the division's files.

E. Parties introducing exhibits at hearings shall provide a complete set for the court reporter, if applicable, the hearing examiner and other parties.

[19.11.3.11 NMAC - N, 2/27/2018]

19.11.3.12 HEARING EXAMINER'S POWER AND AUTHORITY: The hearing examiner to whom the director refers a matter shall have full authority to hold a hearing on the matter, subject only to such limitations as the director may order in a case. The hearing examiner shall have the power to perform all acts and take all measures necessary and proper for the hearing's efficient and orderly conduct, including administering oaths to witnesses, receiving testimony and exhibits offered in evidence and ruling upon such objections as may be interposed. The hearing examiner shall cause a complete record of the proceedings to be made and transcribed or recorded and shall certify the record of the proceedings to the director.

A. The hearing examiner may hold a pre-hearing conference prior to the hearing on the merits on cases pending before the division upon a party's request or upon the hearing examiner giving notice. The pre-hearing conference's purpose shall be to narrow issues, eliminate or resolve other preliminary matters and encourage settlement. The director or hearing examiner shall either provide or ensure that written or oral notice of a pre-hearing conference is given to the parties.

B. The director or hearing examiner may rule on motions that are necessary or appropriate for disposition prior to the hearing on the merits. Prior to ruling on a motion, the director or hearing examiner shall give written or oral notice to each party who has filed an appearance in the case and who may have an interest in the motion's disposition (except a party who has indicated that it does not oppose the motion), and shall allow parties a reasonable opportunity to respond to the motion. The director or hearing examiner may conduct a hearing on the motion, following written or oral notice to the parties.

[19.11.3.12 NMAC - N, 2/27/2018]

19.11.3.13 REPORT AND RECOMMENDATIONS FROM HEARING EXAMINER: Upon conclusion of a hearing, the hearing examiner shall promptly consider the proceedings in such hearing, and based upon the hearing's record prepare a written report with recommendations for the division's disposition of the matter or proceeding. The hearing examiner shall draft a proposed order and submit it to the director with the certified record of the hearing.

[19.11.3.13 NMAC - N, 2/27/2018]

19.11.3.14 DISPOSITION OF CASES HEARD BY A HEARING EXAMINER: After receipt of the hearing examiner's report, the director shall enter the division's order, which the director may have modified from the hearing examiner's proposed order disposing of the matter.

[19.11.3.14 NMAC - N, 2/27/2018]

19.11.3.15 CIVIL PENALTIES AND HEARINGS:

A. If a person violates the provisions of the Act or the rules promulgated pursuant to the Act or an order or permit issued pursuant to the Act, the division may assess the person a civil penalty of \$2,500 for each violation. In the case of a continuing violation, each day of violation shall constitute a separate violation.

B. To begin an action for a civil penalty, the division will issue a notice of violation. The notice of violation shall:

- (1) identify the person against whom the order is sought;
- (2) identify the provision of the Act or the provision of the rule, permit or order issued pursuant to the Act allegedly violated;
- (3) provide a general description of the facts supporting the allegations;
- (4) state the sanction or sanctions sought; and
- (5) provide the date, time and place of the public hearing.

C. The division shall provide notice by posting notice on the division's website and by delivering the

notice of violation to the person against whom the order is sought by certified mail, return receipt requested to the person's last known address, and delivering notice by first class United States mail or e-mail to each person who has requested in writing to be notified of such hearings, and publishing notice in a newspaper of general circulation in the county where the violation occurred or in a newspaper of general circulation in the state.

D. The parties to the public hearing shall include the division and the person against whom the order is sought.

E. In determining the amount of the civil penalty, the division shall consider the person's history of previous violations of the Act or the Geothermal Resources Act, Section 19-13-1 NMSA 1978 (1967, as amended) or the rules, permits or orders issued pursuant to those acts, the seriousness of the violation, any hazard to the health or safety of the public or the environment and the demonstrated good faith of the person.

F. The division may assess a civil penalty only after a public hearing is held or the person has entered an agreed compliance order that waives the person's opportunity for a public hearing.

G. A public hearing to assess a civil penalty shall be held pursuant to 19.11.3.11 through 19.11.3.14 NMAC.

H. The director may enter an agreed compliance order with the permittee against whom a civil penalty is sought to resolve alleged violations of any provision of the Act or any provision of any rule, permit or order issued pursuant to the Act. The director may enter an agreed compliance order prior to or after the filing of a notice of violation. An agreed compliance order shall have the same force and effect as an order issued after a public hearing.

I. After the public hearing is held, or the person has failed to participate in the public hearing, the division shall issue an order requiring that the person pay any civil penalty imposed.

J. If the person fails to pay the civil penalty as ordered by the division, the division may file a civil suit to collect the penalty in the district court of the county in which the defendant resides or in which any defendant resides if there is more than one defendant or in the district court of any county in which the violation occurred. [19.11.3.15 NMAC - N, 2/27/2018]

HISTORY of 19.11.3 NMAC: [RESERVED]