This Statement of Reasons provides the basis upon which the Energy, Minerals and Natural Resources Department (EMNRD), Energy Conservation and Management Division (ECMD) adopts 19.11.1 NMAC, General; 19.11.2 NMAC, Permits; 19.11.3 NMAC, Hearings; and 19.11.4 NMAC, Construction and Operation; and repeals 19.14.110 NMAC, Geothermal Power, Necessity for Hearing, through 19.14.131 NMAC, Geothermal Power, Rehearings. This Statement of Reasons outlines the statutory background, process, issues that resulted in revisions to the proposed rules, summary of the final rules and repeals, and reasons for adopting 19.11.1 NMAC through 19.11.4 NMAC and repealing 19.14.110 through 19.14.131 NMAC.

I. Statutory Authority

In 2016, New Mexico Legislature enacted the Geothermal Resources Development Act (Act), NMSA 1978, Section 71-9-1 et seq. and repealed the prior statute that regulated geothermal energy, the Geothermal Resources Conservation Act. The Act transferred geothermal energy regulation from the Oil Conservation Division (OCD) to ECMD. NMSA 1978, Section 71-9-6 directs ECMD to promulgate rules for the exploration, development, and production of geothermal resources and to accomplish the purposes of the Act and that are “reasonably necessary to carry out the purposes of the act whether or not indicated or specified in any section of that act.” The rules at a minimum must include provisions to: protect the environment; prevent waste of natural resources, including geothermal resources; ensure proper casing to prevent the escape of geothermal resources, water, or other fluids into other strata; prevent the premature cooling of geothermal reservoirs; protect the general public against injury or damage; protect correlative rights; regulate disposal of geothermal resources or the residue of geothermal resources or the disposal of non-domestic waste; regulate the permitting of geothermal projects, facilities, and wells and provide for public notice and comment and an opportunity for hearing; where sufficient information is available, define the limits of geothermal reservoirs; permit and regulate the injection of fluids into geothermal reservoirs; require geothermal projects, facilities, and wells to be drilled, installed, developed, operated, or produced to prevent environmental injury to neighboring leases or properties and to reasonably protect human life, health, and the environment; require permit applicants to show they have the right to produce the geothermal resource; require geothermal projects, facilities, and wells to be operated efficiently; require financial assurance; require permittees to keep and maintain records; require abandoned geothermal projects, facilities, and wells to be reclaimed; and govern the conduct of hearings pursuant to the Act.

ECMD proposes these rules pursuant to the Geothermal Resources Development Act (Act) to aid development of geothermal resources in such a manner as to safeguard life, health, property, natural resources, and the public welfare and to encourage maximum economic recovery. The adoption of 19.11.1 through 19.11.4 NMAC and repeal of 19.14.110 through 19.14.131 NMAC are necessary since the Act transferred regulation of geothermal resource exploration, development, and production from OCD to ECMD and requires ECMD to adopt rules. 19.14.110 through 19.14.131 NMAC governed hearings before the OCD and the Oil Conservation Commission pursuant to the Geothermal Resources Conservation Act. As ECMD now administers the program, 19.14.110 through 19.14.131 NMAC are no longer applicable, and hearings are governed by 19.11.3 NMAC.
II. Process

EMNRD drafted the rules based on the requirements of the Act, review of other western states geothermal rules and regulations, consultation with industry and other interested parties, the implementing rules for the Geothermal Resources Conservation Act, federal requirements for underground injection wells, and review of other natural resources permitting rules such as those for oil and gas drilling pits and surface waste management facilities.

Notice of the rulemaking and a public hearing was published in the Albuquerque Journal and in the New Mexico Register on November 14, 2017. In addition, EMNRD distributed notice of the rulemaking on November 13 and 14 including e-mailing to the Legislative Council Service and the Department of Information Technology, for posting to the Sunshine Portal, posting notice on ECMD’s website, and sending notice to the Small Business Advisory Commission. On January 3, 2018, EMNRD held a public hearing on the proposed rules at 9:15 a.m. in Porter Hall at the Wendell Chino Building, 1220 S. St. Francis Drive, in Santa Fe. At the hearing, Cyrq Energy and Lightning Dock Geothermal HI-02, LLC and Americulture commented on the proposed rules. The Hidalgo Soil and Water Conservation District, Americulture, the New Mexico Economic Development Department on behalf of the Small Business Regulatory Advisory Commission, and Cyrq Energy and Lighting Dock Geothermal HI-02, LLC also submitted written comments. After reviewing the comments, ECMD prepared the final rules for adoption. Cyrq Energy and Lightning Dock Geothermal HI-02, LLC and the Small Business Regulatory Advisory Commission supported adoption of the rules without changes. Americulture supported adoption of the rules with its proposed changes.

The rules as adopted are summarized below and attached.

III. RULES

19.11.1 NMAC, General

19.11.1.2 NMAC (Scope)

The rules apply to all persons who engage in the exploration, development, or production of a geothermal resource.

19.11.1.6 NMAC (Objective)

The objective of 19.11.4 NMAC is to establish rules to ensure the exploration, development, and production of geothermal resources is conducted in a manner that safeguards life, health, property, natural resources, the environment, and the public welfare, and to encourage maximum economic recovery.

19.11.1.7 NMAC (Definitions)

This section provides definitions of terms used in 19.11.1 through 19.11.4 NMAC. Many of the definitions were taken from the New Mexico Environment Department’s Ground and Surface Water rule, 20.6.2 NMAC, and a few were taken from rules of other states and the New Mexico Oil Conservation Division’s Pit Rule.
19.11.1.8 NMAC (Confidential Information Protection)

This section provides a process for officially determining what is “confidential information” when an applicant or permittee makes a claim that a submittal to ECMD contains confidential information.

The rules for the Geothermal Resources Conservation Act did not have a section regarding confidential information. ECMD wants to make it clear to applicants and permittees what the law allows with respect to maintaining confidentiality of documents submitted to it.

19.11.1.9 NMAC (Other Requirements)

This section details ECMD’s authority to enter and inspect permitted facilities. This is required by the Act, NMSA, Section 1978, Section 71-9-7 and is also required by the United States Environmental Protection Agency’s (EPA) rules regarding underground injection control, 40 C.F.R. § 144.51(i).

19.11.1.10 NMAC (Transitional Provisions)

Pursuant to the Act, ECMD shall administer all permits, orders, and determinations issued pursuant to the Geothermal Resources Conservation Act and they shall remain in effect as provided in 19.11.1.10 NMAC.

This allows current permits issued pursuant to the Geothermal Resources Conservation Act to remain in effect until the permittee applies for a new permit or the current permits expire five years after the promulgation of these rules.

19.11.2 NMAC, Permits

19.11.2.6 NMAC (Objective)

The objective of 19.11.2 NMAC is to require persons to obtain a permit prior to commencing exploration, development, and production of geothermal resources and to establish procedures for application for and approval or denial of permits.

19.11.2.8 NMAC (Information to State Engineer)

Based on the Act, this section details the regulatory interaction between ECMD and the Office of the State Engineer.

19.11.2.9 NMAC (Permit Required)

Except as provided in 19.11.1.10 NMAC, no person shall explore, develop, or produce a geothermal resource including drilling or operating an injection well except pursuant to and in accordance with the terms and conditions of permit issued by the division under the Act.

NMSA 1978, Section 71-9-5 allows ECMD to require persons seeking to explore, develop, or produce geothermal resources to obtain a permit from ECMD. ECMD is requiring applicants and operators to obtain a permit so that it can regulate geothermal resources in accordance with the Act and US EPA rules including 40 C.F.R. § 144.31 and 40 C.F.R. § 145.11
for injection wells. NMSA 1978, Section 71-9-6(B)(11) requires ECMD to promulgate rules that regulate the permitting of geothermal projects, facilities, and wells.

19.11.2.10 NMAC (Application to Drill, Modify or Operate Wells or Facilities in a Geothermal Resource)

This section details the permit application requirements for each type of geothermal resource well or facility. This is based on the Act and the US EPA rules for injection wells.

19.11.2.11 NMAC (Changing, Supplementing or Correcting Applications)

This section details the process for making changes to permit applications. This section uses procedures from the New Mexico Environmental Improvement Board rules regarding Air Quality. See 20.2.72.203(D) NMAC.

19.11.2.12 NMAC (Permit Decisions and Appeals)

This section details the process the division uses to review an application and develop a permit for a geothermal resource well or facility, and the process for which the applicant may appeal a permit decision. NMSA 1978, Section 71-9-6 requires ECMD to promulgate rules that “regulate the permitting of geothermal projects, facilities and wells, and provide for public notice and comment, and an opportunity for hearing.” US EPA rules 40 C.F.R. § 124.6 requires a draft permit for an injection well. 40 C.F.R. § 124.8 requires a fact sheet for a draft permit.

19.11.2.13 NMAC (Public Notice for Permit Actions Involving a Geothermal Well or Facility)

This section details the public notification requirements for both the applicant and the Division. NMSA 1978, Section 71-9-6 requires ECMD to promulgate rules that “regulate the permitting of geothermal projects, facilities and wells, and provide for public notice and comment, and an opportunity for hearing”. 40 C.F.R. § 124.10 requires public notice and comment regarding injection permits.

19.11.2.14 NMAC (Basis for Denial of Permit)

ECMD shall deny an application for a permit or permit modification or renewal if the construction or operation of the geothermal well or facility will not or does not comply with the Act or the rules promulgated pursuant to the Act. ECMD is required to regulate the development of geothermal resources to safeguard life, health, property, natural resources, and the public welfare. If a permit, permit modification, or renewal does not comply with the Act or the rules, then it may not safeguard life, health, property, natural resources, and the public welfare. In addition, it may not protect correlative rights.

19.11.2.15 NMAC (Permit Conditions)

This section details the contents of a geothermal well or facility permit. NMSA 1978, Section 71-9-6 requires that rules promulgated pursuant to the Act meets certain requirements to protect against environmental damage, prevent waste of natural resources, ensure proper casing to prevent geothermal resources from escaping from the strata in which they are found, prevent premature cooling of any geothermal reservoir, protect the public, and regulate disposal of
geothermal resources or residue of geothermal resources, among other requirements. 40 C.F.R. § 145.11 requires certain conditions for injection permits.

19.11.2.16 NMAC (Permit Cancellations, Terminations and Modifications)

This section details the process for cancelling, terminating, and modifying permits when wells have been plugged and abandoned, a facility has been closed, or based on noncompliance with permit conditions or other factors. 40 C.F.R. § 124.5 and 40 C.F.R. § 144.40 govern modification revocation or termination of permits for injection wells.

19.11.2.17 NMAC (Corrective Action)

This section details corrective actions a permittee of an injection well shall take prior to commencing injection operations. 40 C.F.R. § 144.55 requires corrective action plan in certain circumstances for injection wells.

19.11.2.18 NMAC (Financial Assurance for Geothermal Wells and Facilities)

This section details the requirements for financial assurance for wells and facilities as stipulated under existing and previous rules and required by the Act. NMSA 1978, Section 71-9-6 states that rules promulgated pursuant to the Act shall “require financial assurance in the form of a surety bond, cash bond, or letter of credit for geothermal projects, facilities and wells, as may be applicable, in amounts to be established by the Division”. 40 C.F.R. § 144.52 requires financial responsibility for injection wells. The language is based upon similar requirements in 19.15.36 NMAC for oil and gas surface waste management facilities.

19.11.3 NMAC, Hearings

19.11.3.6 NMAC (Objective)

The objective of 19.11.3 NMAC is to establish procedures for hearings before ECMD.

19.11.3.8 NMAC (Permit Hearing)

This section details who can request a public hearing regarding a pending ECMD permitting action and when a hearing will be held. The section also details the procedures for conducting a hearing. NMSA 1978, Section 71-9-6 requires ECMD to “regulate the permitting of geothermal projects, facilities and wells, and provide for public notice and comment, and an opportunity for hearing”. The part is based on the OCD rule regarding hearings, 19.15.4 NMAC.

19.11.3.9 NMAC (Permit Hearing Notice)

This section details when and how ECMD shall notice a public hearing. The section is based on the Act’s requirement for public notice. 40 C.F.R. § 124.10 requires notice to certain entities of permit applications for injection wells.

19.11.3.10 NMAC (Parties to Permit Hearings)

This section details who shall be party to a permit hearing. This language is from OCD rule 19.15.4 NMAC with the addition of ECMD being a party to the hearing. The addition is
necessary to allow ECMD staff to testify at the hearing regarding the permit and have the testimony received into evidence.

19.11.3.11 NMAC (Conduct of Hearing)

This section details hearing procedures for testimony, pre-filed testimony, appearances pro se or through an attorney, and presentation of evidence. This language is from OCD rule 19.15.4 NMAC.

19.11.3.12 NMAC (Hearing Examiner’s Power and Authority)

This section details some of the duties and the power and authority of the hearing examiner. This language is from OCD rule 19.15.4 NMAC.

19.11.3.13 NMAC (Report and Recommendations from Hearing Examiner)

This section details the duty of the hearing examiner to provide ECMD with a report based on the evidence from the hearing and a recommended decision for the ECMD director. This language is from OCD rule 19.15.4 NMAC.

19.11.3.14 NMAC (Disposition of Cases Heard by a Hearing Examiner)

This section directs the ECMD director to enter ECMD’s order after receipt of the hearing examiner’s report. This language is from OCD rule 19.15.4 NMAC.

19.11.3.15 NMAC (Civil Penalties and Hearings)

This section details ECMD’s authority to assess a civil penalty to a person who violates the Act or rules promulgated pursuant to the Act or an order or permit issued pursuant to the Act. The section also details the process for the Division to issue a notice of violation and for a public hearing regarding the alleged violation. This language is taken from the Act, NMSA 1978, Sections 71-9-1 et seq. (2016).

19.11.4 NMAC, Construction and Operation

19.11.4.6 NMAC (Objective)

The objective of 19.11.4 NMAC is to establish rules to ensure the exploration, development, and production of geothermal resources is conducted in a manner that safeguards life, health, property, natural resources, the environment and the public welfare, and to encourage maximum economic recovery.

19.11.4.8 NMAC (Geothermal Well Location Limitations)

One goal of the new rule was to adopt a rule that is similar to those in surrounding jurisdictions (i.e. neighboring states). The well location limitations language is taken from the State of Utah’s geothermal rules (R655-1.2.4). The new location limitations are less restrictive than the OCD rule, 19.14.23.9 NMAC.
19.11.4.9 NMAC (Permittee’s Notification Requirements and Requests for Approval to Division)

ECMD does not have a working history of Sundry Notices such as is common in the back and forth communication between OCD and its regulated population. Therefore, ECMD is requiring a less formal notification system for a listed variety of activities. The activities and notification requirements are similar to Nevada’s regulation NAC 534A.535.

19.11.4.10 NMAC (Well Construction and Casing Requirements)

NMSA 1978, Section 71-9-6(B)(3) requires ECMD to promulgate rules to “ensure proper casing to prevent geothermal resources, water or other fluids from escaping from the strata in which they are found into other strata”. NMSA 1978, Section 71-9-6(B)(11) requires ECMD to promulgate rules that “require the geothermal projects, facilities and wells to be drilled, installed, developed, operated or produced in a manner so as to prevent environmental injury to neighboring leases or properties and to afford reasonable protection to human life and health and to the environment”. This section advises applicants on the requirements for constructing a geothermal well and the associated casing requirements. To maintain similarity with other geothermal programs in the region, the language in this section is similar to language in Utah rule R655-1.2.7 and Idaho rule IDAPA 37.03.04.06.

19.11.4.11 NMAC (Blowout Prevention)

NMSA 1978, Section 71-9-6(B)(5) requires ECMD to promulgate rules to “protect the general public against injury or damage resulting from the exploration, development or production of geothermal resources”. This section recommends and dictates safety measures. The section is based upon Utah rule R655-1.2.7.

19.11.4.12 NMAC (Operating Limitations)

NMSA 1978, Section 71-9-6(B)(11) requires ECMD to promulgate rules that “require the geothermal projects, facilities and wells to be drilled, installed, developed, operated or produced in a manner so as to prevent environmental injury to neighboring leases or properties and to afford reasonable protection to human life and health and to the environment”. The wording in this section is from the Act.

19.11.4.13 NMAC (Testing and Monitoring)

NMSA 1978, Section 71-9-6(B)(11) requires ECMD to promulgate rules that “require the geothermal projects, facilities and wells to be drilled, installed, developed, operated or produced in a manner so as to prevent environmental injury to neighboring leases or properties and to afford reasonable protection to human life and health and to the environment”. To assure this occurs, this section requires testing and monitoring for both construction and operation of geothermal resource wells and facilities. Some of the language is based upon existing regulations or rules in Idaho, Nevada, and Utah and some of the language is directly from US EPA Underground Injection Control (UIC) regulations.

19.11.4.14 NMAC (Recordkeeping and Reporting)

NMSA 1978, Section 71-9-6(B)(15) requires ECMD to promulgate rules that require permittees to maintain records and submit them to ECMD. This section dictates recordkeeping
and reporting by the permittee to allow ample verification by ECMD that the permittee is following the requirements in 19.11.4 NMAC. ECMD is required by statute to implement and enforce the Act and associated rule.

19.11.4.15 NMAC (Geothermal Surface Facilities)

NMSA 1978, Section 71-9-6(B)(8) requires ECMD to promulgate rules for the permitting of projects, facilities, and wells. The new rule provides for the permitting of entire geothermal facilities including the surface equipment (not just wells). With the permitting of surface equipment, ECMD has added simple general maintenance provisions as found in the Utah rule R655-1-7.

19.11.4.16 NMAC (Plugging and Abandonment)

NMSA 1978, Section 71-9-6(B)(16) requires ECMD to promulgate rules to “require abandoned geothermal projects, facilities and wells to be reclaimed, including requiring wells to be plugged in a manner to confine all fluids in the strata in which they are found and to prevent them from escaping into other strata”. The subject of this section, the proper plugging and abandonment of wells, is applicable to all permitted wells in all jurisdictions, to effectively protect usable water aquifers. The Nevada regulation 534A.490 was used as a template for this section.

19.11.4.17 NMAC (Pit and Closed Loop Design, Construction and Operating Plan and Closure-Remediation Plan Requirements)

NMSA 1978, Section 71-9-6(B)(11) requires ECMD to promulgate rules that “require the geothermal projects, facilities and wells to be drilled, installed, developed, operated or produced in a manner so as to prevent environmental injury to neighboring leases or properties and to afford reasonable protection to human life and health and to the environment”. This section and associated Tables 1 and 2 are from OCD’s pit rule. With the concurrence of the regulated industry, ECMD has created a short version of the broad OCD pit rule, 19.15.17 NMAC, to regulate the geothermal industry. Much of the OCD pit rule applies to oil and gas production and thus is not applicable to the geothermal industry, which rarely drills into hydrocarbon rich subsurface zones and thus rarely produces hydrocarbon waste streams.

19.11.4.18 NMAC (Table 1-Closure Criteria for Soils Beneath Drying Pad Associated with Closed-Loop Systems)

Table 1 is from OCD’s pit rule. With the concurrence of the regulated industry, ECMD has created a short version of the broad OCD pit rule to regulate the geothermal industry. Much of the OCD pit rule applies to oil and gas production and thus is not applicable to the geothermal industry, which rarely drills into hydrocarbon rich subsurface zones and thus rarely produces hydrocarbon waste streams.

19.11.4.19 NMAC (Table 2-Closure Criteria for Geothermal Waste Left in Place in Pits)

Table 2 are from OCD’s pit rule. With the concurrence of the regulated industry, ECMD has created a short version of the broad OCD pit rule to regulate the geothermal industry. Much of the OCD pit rule applies to oil and gas production and thus is not applicable to the geothermal industry, which rarely drills into hydrocarbon rich subsurface zones and thus rarely produces hydrocarbon waste streams.
19.11.4.20 NMAC (Disposal of Geothermal Resources, Residue of Geothermal Resources or Nondomestic Waste from the Exploration, Development or Production of Geothermal Resources)

NMSA 1978, Section 71-9-6(B)(7) requires ECMD to “regulate disposal of geothermal resources or the residue of geothermal resources or the disposal of nondomestic waste from the exploration, development or production of geothermal resources and direct the surface or subsurface disposal of such in a manner that will afford reasonable protection against contamination of all fresh water and water of present or probable future value for domestic, commercial, agricultural or stock purposes and will afford reasonable protection to human life and health to the environment”. This section allows for the periodic but limited disposal of geothermal resources according to 20.6.2.3109(C) NMAC.


IV. Issues

The final versions of 19.11.1 through 19.11.4 NMAC summarized above differ slightly from the versions ECMD initially proposed in that ECMD incorporated some of the proposed changes from Americulture and Hidalgo Soil and Water Conservation District and resolved an inconsistency in the proposed rule regarding approval of minor modifications. The comments and changes that ECMD made based upon the comments are discussed below.

19.11.1 NMAC, General

19.11.1.7 NMAC (Definitions)

Americulture proposed changes to the definitions of “blowout”, “injection well”, “monitoring well”, “waste”, and “well”. ECMD revised the definition of “blowout” by changing “liquids and gases” to “liquids or gases, or both” to clarify that a blowout can result in the escape of liquids, gases, or both. Americulture proposed that the definition of “monitoring well” be revised to read that the well is only used for monitoring. ECMD did not revise the definition of monitoring well because wells that are used for monitoring may also be used for other purposes. Americulture proposed that the definition of “injection well” be revised. ECMD did not make the revision as the definition is the same as those used in Idaho and Utah’s rules. Americulture proposed the definition of “waste” be revised because the Geothermal Resources Act, NMSA 1978, Section 19-13-3, which governs geothermal leases on state trust lands, states that the geothermal resource not be diminished beneath applicable natural seasonal fluctuations. ECMD did not make the suggested change because the Geothermal Resources Development Act does not contain that language. Americulture proposed that the definition of well be revised to not include subsurface distribution systems. ECMD did not make the proposed change as the definition of well is from the water quality regulations, 20.6.2.7 NMAC. The revisions would make the two definitions inconsistent.
19.11.1.8 NMAC (Confidential Information Protection)

The Hidalgo Soil and Water District proposed that 19.11.1.8 NMAC, Confidential Information Protection be modified to clarify what is and is not confidential and to clarify who in ECMD would make a decision regarding whether the information marked confidential is confidential and when that decision will be made. Information can be confidential under differing laws and circumstances. Therefore, it is not possible to list what information will be confidential and what will not. The intent of the rule is for ECMD to determine whether the information is confidential prior to processing the application. Therefore, ECMD made changes to 19.11.1.8 NMAC based upon the comments to state that the division will determine whether the information is confidential prior to reviewing the application or request for approval.

Americulture proposed that interested persons should be able to contest the confidentiality determination. If a person requests information pursuant to the Inspection of Public Records Act and the agency does not provide the information because it is deemed confidential, the person may request the district court review that decision. Therefore, ECMD did not make the proposed change. Americulture proposed that if ECMD determines information is confidential that the applicant or permittee be required to submit redacted copies. The proposed rule provides that ECMD may require an applicant or permittee to submit redacted copies. Redacted copies are appropriate when only certain information on a page is confidential. In those circumstances ECMD would require redacted copies. However, where all the information on a page is confidential redacted copies are unnecessary, as none of the information may be disclosed. Therefore, ECMD did not make the proposed changes regarding redaction. Americulture also proposed that the term “contaminants” as used in 19.11.1.8(D) be defined. ECMD has defined contaminant using the definition in the Safe Drinking Water Act.

19.11.1.9 NMAC (Other Requirements)

Americulture proposed that Subsection D should include geothermal resources and material mediums in the list of items that ECMD employees may sample. ECMD found the comment well taken. Therefore, ECMD made the proposed change to the rule based upon the comment.

19.11.1.10 NMAC (Transitional Provisions)

Americulture proposed that the section should address permits, orders, and determinations that have pending appeals with the courts. Unless a court has stayed a permit, order, or determination, the permit, order, or determination is effective pending the outcome of the court case. Therefore, ECMD did not make changes to the rule based upon the comment.

19.11.2 NMAC, Permits

19.11.2.10 NMAC (Application to Drill, Modify or Operate Wells or Facilities in a Geothermal Resource)

Americulture commented that changing an injection well to a production well should be subject to the notice requirements and that even minor permit modification should be subject to the notice requirements. ECMD did not make the change as proposed, but in reviewing 19.11.2.10 NMAC found inconsistencies in the draft rule regarding approval of minor modifications. Therefore, ECMD made changes to 19.11.2.10 NMAC to clarify that the ability to apply for approval of a minor modification up to 30 days after the activity has occurred only
applies to changing the previously proposed location of a well so long as it is within an area already approved, and does not apply to approval of other minor modifications. To address Americulture’s concern that some minor modifications and operational activities may have unforeseen effects on neighboring wells or activities, ECMD added a new Subsection E to 19.11.2.10 NMAC to require applicants or permittees to provide written notification to adjacent surface owners within one-half mile, water rights owners with a well that is within one mile, and any geothermal resource owners or lessees within five miles of the geothermal well or facility when requesting approval of a minor permit modification or prior to taking an action listed in Paragraph (3) of Subsection A or Paragraphs (3), (6), (8), or (10) of Subsection B of 19.11.4.9 NMAC.

19.11.2.12 NMAC (Permits and Appeals)

Americulture commented that this section does not mention the appeal process and that the appeal process should be specifically defined in the section. NMSA 1978, Section 71-9-9 provides that a person subject to a final decision of ECMD may appeal to the district court pursuant to NMSA 1978, Section 39-3-1.1. NMSA 1978, Section 39-3-1.1 and court rule, 1-074 NMRA provide the specific requirements for appeals to the district court. Therefore, while ECMD made changes to 19.11.2.12 NMAC to reference that appeals shall be pursuant to NMSA 1978, Section 39-3-1.1, it did not include the specific requirement of the statute and court rule.

19.11.2.13 NMAC (Public Notice for Permit Actions Involving a Geothermal Well of Facility)

Americulture proposed that the reference to “such hearings” in 19.11.2.13(A)(8) be changed to “such permit applications”. Americulture is correct that the reference should be to permit applications. Therefore, ECMD changed the reference to “such permit applications, modifications or renewals” to the rule based upon the comment.

19.11.4 NMAC, Construction and Operation

19.11.4.9 NMAC (Permit Required)

Americulture commented that any proposed activity that may affect interested parties or the resource should be subject to the notice requirements of 19.11.2.13 NMAC. Specifically, Americulture commented that changing an injection well to a production well should be subject to the notice requirements of 19.11.2.13 NMAC. To address Americulture’s concern that some minor modifications and operational activities may have unforeseen effects on neighboring wells or activities, ECMD added a new Subsection E to 19.11.2.10 NMAC to require applicants or permittees to provide written notification to adjacent surface owners within one-half mile, water rights owners with a well that is within one mile, and any geothermal resource owners or lessees within five miles of the geothermal well or facility when requesting approval of a minor permit modification or prior to taking an action listed in Paragraph (3) of Subsection A or Paragraphs (3), (6), (8), or (10) of Subsection B of 19.11.4.9 NMAC.

19.11.4.13 NMAC (Testing and Monitoring)

Americulture proposed that the section should describe the enforcement actions ECMD may take in the event the testing and monitoring results show that the activity does not comply with the regulatory or permit requirements. Enforcement is addressed in 19.11.2.16 NMAC and 19.11.3.15 NMAC. 19.11.2.16 NMAC provides for cancellation, termination, or modification of a
permit, if a permittee fails to comply with 19.11.1 through 19.11.4 NMAC. 19.11.3.15 NMAC provides for assessment of civil penalties for violations. Therefore, ECMD did not make changes to the rule based upon the comment.

V. Conclusion

ECMD considered the potential impacts of the rule on small businesses and while it determined that there do not appear to be any negative impacts it provided notice of the rule to the Small Business Regulatory Advisory Commission. The Small Business Regulatory Advisory Commission reviewed the proposed rules and found no adverse implications for small businesses.

After conducting a public meeting in Santa Fe and receiving and reviewing the comments, ECMD adopts the rules as attached and summarized above in Section III. 19.11.1 through 19.11.4 NMAC and the repeal of 19.14.110 through 19.14.131 NMAC shall become effective on February 27, 2018.

Ken McQueen, Cabinet Secretary

Date: Feb. 7, 2018