STATE OF NEW MEXICO
DEPARTMENT OF ENERGY, MINERALS AND NATURAL RESOURCES
OIL CONSERVATION DIVISION

IN THE MATTER OF THE APPLICATION OF NEARBURG EXPLORATION COMPANY, L.L.C., SRO2 LLC AND SRO3 LLC FOR AN ACCOUNTING AND LIMITATION ON RECOVERY OF WELL COSTS, AND FOR CANCELLATION OF APPLICATION FOR PERMIT TO DRILL, EDDY COUNTY, NEW MEXICO

CASE NO. 15441

IN THE MATTER OF THE APPLICATION OF COG OPERATING LLC FOR A NON-STANDARD SPACING AND PRORATION UNIT AND COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO

CASE NO. 15481

IN THE MATTER OF THE APPLICATION OF COG OPERATING LLC FOR A NON-STANDARD SPACING AND PRORATION UNIT AND COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO

CASE NO. 15482

RESPONSE TO COG'S MOTION FOR A PROTECTIVE ORDER

On December 18, 2015, Nearburg Exploration Company, L.L.C., SRO2 LLC and SRO3 LLC, (together, "Nearburg" or "NEX"), caused to be served on COG the Division's December 16, 2015 Subpoena Duces Tecum which among other things, obliged COG to produce the following documents:

1. All internal and external communications and documents relating to the Subject Wells.

COG continues to disobey its obligation to produce documents responsive to this subpoena item. Only fourteen days remain before a consolidated hearing on the merits on NEX's

Application and COG's two compulsory pooling applications. Each day that COG has withheld its documents has resulted in cumulative prejudice to NEX's ability to prepare for hearing. Now, that prejudice is compounded with COG's attempt to interject into the process a new step that suggests that the Examiners must first make the determination that COG's internal emails are pertinent to one limited issue that may be considered at a hearing on the merits. This most recent effort to delay production is without basis and runs afoul of the Examiner's recent instructions to COG to come into compliance with its discovery obligations. As of late in this day, April 20, 2015, COG remains disobedient.

A. The Division Has the Duty, Authority and the Ability to Enforce its Subpoenas.

COG would have the Division disregard its statutory and regulatory authority to issue and enforce its subpoenas and otherwise supervise adjudicatory proceedings. COG argues that discovery in this proceeding be abated and that the Division should defer to the conduct of discovery in a parallel district court proceeding. But COG does not reveal that it is desperately seeking the dismissal of litigation in the 1st Judicial District Court, or that discovery had not even begun in that forum.

COG asks that inarguably applicable provisions of the Oil and Gas Act be ignored, most notably being the Division's subpoena powers as are set forth at NMSA 1978 §70-2-8 (1995). Those subpoena powers are supported by various components of The Oil and Gas Act and give the Division considerable authority to act. *See* NMSA 1978 §70-2-6 (establishing that the Division has broad power to "enforce effectively" the provisions of the act); and NMSA 1978 §70-2-11 (providing that the Division may do "whatever may be reasonably necessary" to carry out the purposes of the act, whether or not specified by another section of the act). The Division's hearing examiners are similarly empowered. *See*

Rule 19.15.4.9 NMAC (providing that examiners have the power "to perform all acts and take all measures necessary and proper for the hearing's efficient and orderly conduct").

Additionally, COG challenges the "competence" and "expertise" of Division staff to sufficiently administer adherence to the Division's discovery responsibilities. *See* MPO at 2. We strongly disagree. No further response to this astonishing assertion is warranted.

B. COG Has No Basis for Withholding Relevant, Non-Privileged Internal Emails Regarding the Subject Wells.

NEX has—since December 2015—diligently sought relevant documents from COG. COG has blatantly refused to abide by its discovery obligations. During the recent April 11, 2016 pre-hearing conference, the Examiner granted NEX's Motion to Compel and overruled COG's relevance objections. The Examiner found that the documents related to the Subject Wells are relevant. Rather than comply with the Examiner's directive, COG continues to maintain its meritless relevance objections based on a newly-conceived assertion that COG's internal emails generated after the Subject Wells were drilled are not "relevant, to the 'good faith belief' issue before the Division." Motion, pgs. 3-4. Once again, COG defies the Examiner's ruling and continues to withhold documents relevant to NEX's claims. The Division should again overrule COG's objection, and order COG to produce ***all*** of its non-privileged internal emails related to the Subject Wells.

COG's internal emails after the completion of the 43H and 44H wells are relevant and can shed light on whether COG had a "good faith belief" before drilling the wells. In the simplest example, if COG discussed the fact that it had no right to drill the well – that is absolutely relevant to the issues before the Division. Instead of not being relevant, internal emails could demonstrate that COG absolutely did ***not*** have a "good faith belief." NEX is entitled to discover exactly what COG knew concerning the Subject Wells, what documents

COG reviewed in connection with filing its OCD forms, and whether COG engaged in a pattern of conduct designed to hide its wrongful conduct after the fact.

In light of the obvious relevance of the internal emails, COG's refusal to produce the documents should indicate to the Examiners that those documents contain evidence of its wrongful conduct.[1] NEX requests the Division order COG to immediately produce ***all*** non-privileged internal emails related to the Subject Wells.

C. COG Fails to Establish that the Work Product Doctrine Applies to the Requested Communications.

COG summarily asserts that its "internal emails that do not involve an attorney . . . were generated in anticipation of litigation [after] late May of 2015" and therefore are protected from disclosure by the work product doctrine. MPO at 4. COG fails to establish that such emails constitute work product. Moreover, it fails to provide an adequate privilege log that would allow NEX to challenge its assertions of work product. *See* Rule 1-026(B)(7)(a) NMRA. Further, even if COG's internal emails could satisfy the elements of the work product doctrine, such emails are discoverable because NEX has substantial need of the information therein and it cannot obtain the substantial equivalent by other means. Rule 1-026(B)(5). For all of these reasons, COG's Motion should be denied.

Documents or other discoverable information "prepared in anticipation of litigation or for trial by or for another party or that party's representative (including the party's attorney, consultant, surety, indemnitor, insurer or agent)" is discoverable when the requesting party "has substantial need of the materials in the preparation of the party's case and . . . the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Rule 1-026(B)(5). Work product includes work prepared by a non-attorney representative of a

[1] If the internal emails supported COG's "good faith belief," it is unlikely that COG would be withholding them.

party, ***when that work is conducted for and on behalf of the party's attorney.*** *Knight v. Presbyterian Hosp. Ctr.*, 1982-NMCA-125, ¶ 5, 98 N.M. 523; *accord Santa Fe Pac. Gold*, 2007-NMCA-133, ¶ 38 (noting work product includes "materials prepared by the attorney's agents and consultants").

Contrary to COG's assertion, internal emails generated after a date on which NEX asserts it learned of NEX' position do not necessarily constitute work product. *See* MPO at 4-5. COG has the burden to establish "that the rule applies for each document." *S.F. Pac. Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 38, 143 N.M. 215 (citing *Hartman,* 1997–NMCA–032, ¶ 20, 123 N.M. 220). "This burden may be met by submitting detailed affidavits *sufficient to show that precise facts exist to support the immunity claim.*" *Hartman v. Texaco Inc.*, 1997-NMCA-032, ¶ 20, 123 N.M. 220. COG does not even attempt to establish that the work product doctrine applies for each email. *See generally* MPO at 4-5. Notably, COG has not established that the internal emails were created outside of the ordinary course of business. *See id.*; *see also Hartman*, 1997-NMCA-032, ¶ 21 ("The party with the burden of persuasion must demonstrate that litigation was 'the driving force' behind the preparation of each challenged document."). Moreover, COG cites no authority for its position. Its request for a protective order should therefore be denied.

Moreover, even if the internal emails do constitute work product, which NEX vigorously disputes, ordinary work product is discoverable upon a showing of substantial need for the information and undue hardship to obtain by other means. Rule 1-026(B)(5). Here, COG admits that the work product is ordinary work product. MPO at 4 (referencing "internal emails that do not involve an attorney" and that "contain the thoughts, opinions, actions, reactions, impressions and conclusions concerning NEX's allegations by COG's personnel"); *see Hartman*, 1997-

NMCA-032, ¶ 19 (distinguishing between "absolute immunity for . . . documents which reflect an attorney's mental impressions, conclusions, opinions or legal theories and a qualified immunity for all other 'non-opinion' work product"). NEX has a substantial need for the internal communications that reveal COG's knowledge regarding its right to drill the 43H and the 44H. Moreover, the internal communications alleged to be work product are simply unavailable to NEX, which has no other means of obtaining COG's internal communications. COG would suffer undue and unfair hardship if denied the opportunity to obtain evidence that may negate COG's summary assertions of good faith belief in its right to drill. Thus, the internal communications should be produced to NEX, regardless of whether such communications constitute work product.

Finally, COG's refusal to provide a privilege log for work product hampers the Hearing Examiners' ability to make a decision regarding the summary work product assertions. The lack of a privilege log also precludes NEX from evaluating whether the internal emails satisfy the requirements of the work product doctrine and whether COG may have waived any purported work product protection. Without an adequate privilege log, NEX is unduly prejudiced in responding to COG's assertions of work product. *See S.F. Pac. Gold Corp.*, 2007-NMCA-133, ¶ 21 ("Appellants' general assertions that every document contained in the Geolex Materials is a communication related to legal advice or a statement of an attorney's mental impressions are overly broad and do not provide a sufficiently detailed explanation of the privilege asserted."); *see also Piña v. Espinoza,* 2001–NMCA–055, ¶¶ 20–22, 24, 130 N.M. 661 (stating that the resisting party "must assert the ... privilege with sufficient detail so that [the requesting party], and ultimately the trial court, may assess the claim of privilege as to *each* withheld *communication* "); *Hartman*, 1997–NMCA–032, ¶ 21 ("The party with the burden of persuasion

must demonstrate that litigation was 'the driving force' behind the preparation of each challenged document."). *See generally id.* ¶¶ 18–25 (discussing the detail necessary for a party to properly claim work-product immunity).

D. COG Fails to Establish that the Requested Communications Are Attorney-Client Communications Protected from Disclosure

In one sentence, COG asserts that attorney client privilege applies to numerous unidentified emails and therefore a protective order should be entered. MPO at 6. This bald assertion is shocking in its brevity. COG makes ***no effort whatsoever*** to establish that "[n]umerous other emails, ALL of which were generated after the wells were drilled, are protected from disclosure by the attorney client privilege." MPO at 6. As explained, COG has provided an inadequate privilege log. Under these circumstances, COG's request for a protective order should be denied.

Attorney-client privilege in New Mexico is governed by Rule 11-503 of the New Mexico Rules of Evidence: "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." Rule 11-503(B) NMRA. Thus, "[t]he elements of attorney-client privilege, as reflected in Rule 11-503(B), are (1) a communication (2) made in confidence (3) between privileged persons (4) for the purpose of facilitating the attorney's rendition of professional services to the client." *Santa Fe Pacific Gold Corp.*, 2007-NMCA-113, ¶ 14. As defined in the Rule, "confidential communications" are those types of communications that are "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Rule 11-503(A)(4).

The party asserting privilege has the burden to establish that a communication or document meets the elements of privilege. If the privileged nature of the communication is established, the burden shifts to the discovering party to establish waiver of the privilege. *Santa Fe Pac. Gold*, 2007-NMCA-133, ¶ 25. New Mexico appellate courts have indicated that the central inquiry in determining whether attorney-client privilege applies is the actual content of the communication at issue. *See, e.g., Santa Fe Pacific Gold*, 2007-NMCA-133, ¶27 (stating that, in a corporate context, "[w]hat is vital to the privilege is that the communication be made *in confidence* for the purpose of obtaining *legal* advice *from the lawyer*" (quoted authority omitted) (emphasis in original)).

E. COG's Belated Privilege Log Requires Disclosure of Numerous Emails Identified Therein.

COG's belated privilege log, revealed only this afternoon, is deficient in a number of ways. First, COG fails to identify in the log any emails that it claims are protected under the work product doctrine. For this reason alone, their claims for work product immunity should be denied. Rule 1-026(B)(7)(a); *see* MPO at 4-5.

Second, COG fails to establish that its in-house attorneys are acting in a legal capacity, as opposed to a business capacity, when engaged in the email communications. It cannot be discerned from the privilege log whether COG was seeking or receiving business advice or legal advice from its in-house attorneys. *See* Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine, Vol. 1 at 337 (5th ed. 2007) (stating that a determination must be made as to "whether the primary purpose for the attorney's presence and advice was the giving of business advice rather than legal advice"). COG also fails to establish that each person on the emails had a "need to know" the purported confidential information that COG refuses to disclose. Moreover, a number of emails fail to identify the sender, making it impossible to

establish whether the information was disclosed in confidence to someone acting within the scope of their duties. *See Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981). Indeed, at least one email has no date and no sender, making it impossible to evaluate the purported confidential nature of the communication. In addition, COG makes no attempt to establish the privileged nature of any attachment to an email, but simply assumes with no apparent basis, that such attachments are privileged. For all of these reasons, COG's attempts to hide its internal communications should be rejected.

Third, the emails between in-house counsel, Gabrielle Gerholt, and Niranjan Khalsa are not privileged because Ms. Khalsa is an employee of the State Land Office. Any emails with Ms. Khalsa should be immediately produced, because Ms. Khalsa is not an agent of COG.

Fourth, COG has already provided to NEX the SRO title opinions, which are the subject of numerous emails for which COG claims privilege. COG has thus waived any privilege that may have existed with respect to any email related to the SRO opinions. *See* Rule 11-511 (stating that privilege is waived if the "holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication"); *see, e.g.*, Epstein, *supra*, at 407 (5th ed. 2007) ("[A] party may not disclose or use one privileged document on a particular subject matter and retain the privilege as to the rest."). All emails in any way related to the SRO title opinions, before or after those opinions were generated or supplemented, must therefore be produced.

WHEREFORE, for all of the foregoing reason, COG's Motion for a Protective Order should be denied. NEX does not believe a hearing on COG's Motion is necessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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