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January 5, 2010

HAND DELIVERED

Mr. Mark Fesmire, P.E., Chairman
Oil Conservation Commission
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

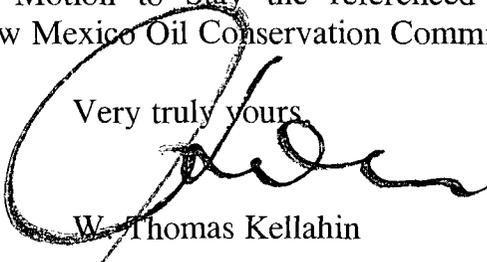
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*Re: Chesapeake Response to COG Operating's Motion to Stay
NMOCD CASES 14323, 14382, 14365 AND 14366
Order Nos. R-13155, R-13154-A*

Dear Mr. Fesmire:

On behalf of Chesapeake Energy Corporation and Chesapeake Operating Company, parties of record, please find enclosed our Response to COG Operating's Motion to Stay the referenced matters currently pending before the New Mexico Oil Conservation Commission.

Very truly yours,


W. Thomas Kellahin

cc: all counsel of record

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

CASE NO. 14323-DeNovo
Order R-13154-A

APPLICATION OF CHESAPEAKE ENERGY CORPORATION
FOR CANCELLATION OF A PERMIT TO DRILL (“APD”) ISSUED
TO COG OPERATING L.L.C., EDDY COUNTY, NEW MEXICO
(Blackhawk “11” Fed Com No. 1-H)

CASE NO. 14382

APPLICATION OF CHESAPEAKE ENERGY CORPORATION
FOR CANCELLATION OF A PERMIT TO DRILL (“APD”) ISSUED
TO COG OPERATING L.L.C., EDDY COUNTY, NEW MEXICO
(Blackhawk “11” Fed Com No. 2-H)

CASE NO. 14365 DeNovo
Order R-13155

APPLICATION OF COG OPERATING LLC FOR DESIGNATION OF A
NON-STANDARD SPACING UNIT AND FOR COMPULSORY POOLING
EDDY COUNTY, NEW MEXICO
(Blackhawk “11” Fed Com No. 1-H)

CASE NO. 14366 DeNovo
Order R-13155

APPLICATION OF COG OPERATING LLC FOR DESIGNATION OF A
NON-STANDARD SPACING UNIT AND FOR COMPULSORY POOLING
EDDY COUNTY, NEW MEXICO
(Blackhawk “11” Fed Com No. 2-H)

**CHESAPEAKE ENERGY CORPORATION’S
RESPONSE TO COG OPERATING LLC’S MOTION TO STAY**

Chesapeake Energy Corporation and Chesapeake Operating, Inc. (collectively “Chesapeake”), in response to COG Operating, LLC’s (“COG”), Motion to Stay, states:

Once again, COG is attempting to avoid the consequence of having filed a falsified certification on Division Form C-102 in order to obtain approval of two permits to drill (“APDs”) at a surface location without having a mineral interest therein. Once again, COG wants to delay the adjudication proceedings so that, after the fact, it can attempt to induce the

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Commission to adopt a rule that might allow an operator to obtain an approved application for permit to drill (“APD”) even though it owns no interest in each of the 40-acre tracts of the approved 160-acre non-standard spacing unit for the horizontal wellbore and to do so without notice to those affected working interest owners.

COG’s strategy is to avoid a determination by the Oil and Gas Conservation Commission (“Commission”) based upon a speculative hope that the Commission will adopt a rule which will not only overrule the prior Division’s orders but also make this rule change retroactively so that COG avoids the consequences of having violated Division rules. There is no provision in the Oil and Gas Act granting the Commission with authority to adopt retroactive rules. As noted by the United States Supreme Court:

Retroactivity is not favored in the law. Thus, congressional enforcement and administrative rules will not be construed to have retroactive effect unless their language requires this result. . . . By the same principal, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.

Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208, 109 S.Ct. 468, 472 (1988).

Currently, in order to comply with the certification within Form C-102, the proposed operator for a horizontal wellbore to be dedicated to a 160-acre non-standard spacing unit must have a working interest in each of the 40-acre tracts to be penetrated by the well before it can be assigned the C-102. The C-102 is a necessary attachment for the application for permit to drill (“APD”). See Order R-13154-A, dated September 21, 2009, Case 14323. These consolidated cases raise specific facts, involve a limited area and will affect the property rights of the parties. Therefore, the Commission not only has a duty to proceed with making a determination on the application in these adjudicatory proceedings, it cannot act through rulemaking. *Cf.*, *Johnson v. New Mexico Oil Conservation Comm’n*, 127 N.M. 120, 978 P.2d 327 (1999)(where proceeding

before the Commission which affect a specific property interest Commission notice rules for adjudicating hearings must be followed). Where, as here, an applicant has requested relief pursuant to the Oil and Gas Act, the Commission must proceed and decide the dispute. The Oil and Gas Act simply does not authorize the Commissioner to stay an adjudicatory proceeding based upon a party's request to have the parties' rights determined through a retroactive rulemaking proceeding.

COG's proposed rulemaking has yet to be initiated and the outcome of which is speculative at best. The Division has already denied COG's previous attempt to substitute a "rulemaking" proceeding for this adjudication proceeding. By Order R-13154, dated August 11, 2009, entered in Case 14323, the Division ruled that:

- (4) It is undisputed that COG owns no interest in the oil, gas and minerals in and under the SE/4 SW/4 or the SW/4 SW/4 of Section 11, and that COG intends to complete the wellbore, in part, within the horizontal boundaries of those tracts. COG's only interest in the W/2 of the proposed non-standard unit is a right to use the proposed surface location. Chesapeake seeks cancellation of the Division's approval of COG's APD by reason of these undisputed facts.
- (5) COG has moved to dismiss Chesapeake's application prior to hearing on four grounds:
 - (a) Chesapeake's application seeks an advisory opinion.
 - (b) The subject matter of the application would be better resolved by a rule.
 - (c) Chesapeake's application is barred by administrative (quasi judicial) estoppel.
 - (d) Chesapeake's application will be rendered moot by Case No. 14365.
- (6) Chesapeake's application involves a live and present controversy. Pursuant to the Division's approval of COG's APD, it could commence drilling operations prior to the Division's decision of Case No. 14365.
- (7) However desirable a rule may be, the resolution of this controversy between these parties about this APD cannot await a hypothetical rulemaking.

While these cases involve horizontal wellbores instead of vertical wellbores, Chesapeake's requests are fully supported by the Division and Commission precedent and will ensure orderly development of oil and gas resources. Chesapeake's applications are clear, direct and precise. They mean what they say—that COG has falsely filed certifications in Division Form C-102 in order to obtain approval of permits to drill at surface locations in which it has no interest. The Commission has already decided against COG's position concerning the surface location portion of the subject case by its order in the *Chesapeake v. Samson, et al*, Cases 13492 and 13493 (DeNovo). To ensure that operators would not obtain APDs until they had reach a voluntary agreement or obtained compulsory pooling orders, the Commission by Order R-12343-E, dated March 16, 2007,¹ directed the Division to change Division form C-102 concluding as a legal matter that:

33. To prevent further misunderstandings in the interpretation of the Commission's orders, particularly in Case No. 13153, *Application of Pride Energy Company, etc.*, Order No. R-12108-C and *Application of TMBR/Sharp, Inc.*, Order R11700-B, the Commission approves of the language on Division Form C-102, field 17, concerning the operator's certification and asks the Division to continue its use and to notify the Commission if it plans to discontinue its use. That certification states "I hereby certify that the information contained herein is true and correct to the best of my knowledge and belief and that the organization either owns a working interest or unleased mineral interest in the land, including the proposed bottomhole location, or has a right to drill this well at this location pursuant to a contract with an owner of such mineral or working interests or in a voluntary pooling agreement or compulsory pooling order hereto entered by the Division". Case Nos. 13492 and 13493 (De Novo) Order No. R-12343-E Page 6.

In addition, the Commission determined that “[a]n operator shall not file an application for a permit to drill or drill a well unless it owns an interest in the proposed well location or has a

¹ A dispute between Samson, Kaiser-Frances and Mewbourne to cancel two APDs obtained by Chesapeake and Chesapeake's attempt to compulsory pool those parties.

right to drill the well as stated in Division Form C-102.” See Finding 19 of Order R-12343-B (Case 13492 and 134939 DeNovo).

The only remaining question that is different from a vertical wellbore, is whether the operator of a horizontal wellbore, at the time it files its APD, must also have an interest in each of the four 40-acre tracts to be included in the 160-acre non-standard unit. COG admitted that it had no such interest. While the certification appears to have been written with vertical wellbores in mind, it seems reasonable to apply the certification to horizontal wellbores by interpretation that the operator must have an interest in any tract penetrated by a horizontal wellbore. If not, then a horizontal wellbore APD violates the activity that the Commission was seeking to prevent when it amended the certification contained on the Division Form C-109 in a case involving a vertical wellbore.

Additionally, the rulemaking proceeding referenced by COG is not as represented. There is no rule change application to be ready to be filed in January or February of 2010. The next NMOGA Regulatory Practices Committee (“RPC”) meeting is to be held March 2, 2010 in Santa Fe at Holland and Hart’s office with the next Horizontal Committee meeting expected to be held the day before. COG has simply suggested a “special rule” to the RPC to be included with the draft of proposed horizontal wellbore rule that are being circulated to members of an industry group—the New Mexico Oil & Gas Association. COG’s suggested Rule 19.15.14.8 does not comply either with Division form C-102 or with recent OCD orders.

The rule proposed by COG would allow an operator to circumvent the operator’s certification in Division Form C-102, allowing an operator to obtain an approved APD even though it owns no interest in each of the 40-acre tracts of the approved 160-acre non-standard spacing unit for the horizontal wellbore and to do so without notice to those affected working

interest owners. Such action will also tie up the affected working interest owner's property for not less than one year. Whether the rule will be proposed to the Division, whether it will receive substantial industry support² and whether it will be promulgated unattended by the Commission are all matters of speculation which cannot support stay of this proceeding.

The "rulemaking" strategy is only the latest part of COG's plan to ambush other operators owning working interests in adjacent acreage and to control the mineral interests of other working interest owners by obtaining an approved then filing an application for a compulsory pooling order without notice to the parties to be pooled. Jan Spradlin at COG has informed Chesapeake that she believes that COG, as a practical matter, does not send out proposal letters to working interest owners on wells they want to drill. She indicated that their procedure is to get a permit and send it, along with their pooling application, to the affected WI owner. The Commission should not promote these tactics by granting COG's request.

CONCLUSION

The subject cases filed by Chesapeake are the only proper method for the Commission to address issues presented in the application and there is no reason to defer to a speculative "rulemaking" proceeding that has yet to be initiated. Despite the clear directions of the

² Chesapeake has proposed that the following be adopted by the RPC as the rule:

B. An operator shall not file an application for permit to drill, including the C-102 and its certification, until the proposed operator of a horizontal wellbore has obtained a joint operating agreement for the proposed horizontal wellbore's spacing unit or the written agreement of at least one working interest owner, not otherwise subject to another joint operating agreement, in each of the 40-acre tract to be traversed/penetrated by any part of the producing interval for the well in NMAC 19.15.16.7 or compulsory pooling order for the proposed horizontal wellbore's spacing unit.

Commission's order and the certification required by Division Form C-102, COG is confused. COG's "rulemaking" argument is nothing more than a red herring to misdirect the Commission away from COG's false representation in the Form C-102. To grant a request for stay without any evidence to support the stay in favor of a speculative rulemaking which could not be applied retroactively to adjudicate the issue presented herein would be contrary to law and a clear abuse of discretion. Accordingly, Chesapeake requests that the Commission deny COG's Motion for a Stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 5, 2010, I served a copy of the foregoing documents by:

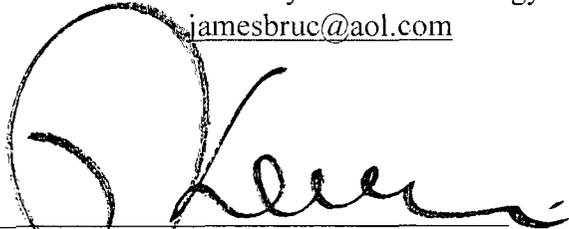
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