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STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION DIVISION
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**APPLICATION OF THE NEW MEXICO OIL CONSERVATION
DIVISION FOR THE AMENDMENTS OF 19.15.14.8 AND 19.15.16 NMAC**

CASE NO.: 14744

MOTION TO STRIKE BY JALAPENO CORPORATION

Jalapeno Corporation ("Jalapeno") submits the following Motion to Strike the Oil Conservation Division's post-hearing Supplemental Application filed November 21, 2011. As grounds therefor, Jalapeno states:

(1) The Division's Supplemental Application requests that the Commission delete proposed section 19.15.16.15.F from the rules recommended for adoption in its original Application:

Compulsory pooling. The provision of 19.15.13 NMAC regarding compulsory pooling and proposal of additional wells in compulsory pooled units shall apply to horizontal wells and compulsory pooled project areas.

The Division also proposes a further change to proposed Rule to 19.15.16.15.G (formerly subsection H) which was not included in the notice of hearing:

Consolidation of project area. If a horizontal well is dedicated to a project area in which there is more than one owner of any interest in the mineral estate, the operator of the horizontal well shall cause the project area to be consolidated by voluntary agreement *or, if applicable*, compulsory pooling before the division may approve a request for form C-104 for the horizontal well.

(2) The reason offered by the Division for these changes is that “the Commission probably does not have the power to provide by rule that any and all project areas for horizontal wells may be the subject of compulsory pooling.” The Division acknowledges the absence of statutory authority and even goes so far as to recommend that “application be made to the Legislature to clarify the applicable statutory directive and limitations.” Nevertheless, the Division requests that the Commission ignore Jalapeno’s proposed modification to the proposed rules that will provide the very clarification that is needed--language which specifically sets forth when compulsory pooling is permissible and the appropriate risk penalty in such proceedings.

(3) The Division’s supplemental Application is not authorized by the Commission’s rules and if accepted will deprive Jalapeno of its right to due process. The Division contends that “as Applicant in this rulemaking proceeding, [it] is authorized to recommend changes at any time,” citing Rule 19.15.3.11(C)(1) NMAC as the basis for this contention. However, the Rule merely provides that parties other than the applicant or Commissioner recommending modifications to a proposed rule must submit their recommendations at least 10 business days prior to the hearing.

(4) Nothing in the Commission’s rules provide for an applicant to reshuffle the deck after the hearing and propose different rule changes which were

not noticed and which the parties did not have an opportunity to respond to and present evidence. The Commission's rules require that a hearing be conducted "so as to provide a reasonably opportunity for all persons to be heard" and this requirement cannot be met if amendments to a proposed rule were never presented in advance of the hearing. A rulemaking application requires notice and hearing under Rules 19.15.3.8 and 19.15.3.11 NMAC.

(5) Rule 19.15.3.12(A)(g) provides that the Commission can keep the record open for written submittals "including arguments and proposed statement of reasons supporting the proposed Commission decision" but the Rule does allow for the submission of new amendments to the rules that were not proposed and considered during the hearing. At the conclusion of the hearing in this case the Commission requested that proposed findings of fact, conclusions of law and briefs be filed concerning the Commission's statutory authority for compulsory pooling for horizontal wells in project areas. Even if the rule allowed it, since the Commission did not keep the record open for submission of additional proposed modifications to the rule, the Division's Supplemental Application is improper and should be stricken.

(6) In asking the Commission to eliminate proposed Rule 19.15.16.15.F from this rulemaking, the Division hopes to avoid the Commission's consideration of Jalapeno's proposals which will seek to include the statutory limits on

compulsory pooling in the Commission's proposed Special Horizontal Rules and eliminate the presumptive 200% risk penalty for compulsory pooling proceedings involving horizontal wells. Since the Commission already denied the motion by the Division to limit the evidence presented at the hearing, the Supplemental Application is nothing more than a back-door attempt to accomplish the same purpose.

(7) The Division's Application in this case not only involved amendments to existing Rules but also proposed a completely new rule entitled "Special Rules for Horizontal Wells," 19.15.16.15 NMAC. Therefore, the Division's contention that Jalapeno's recommended modification to the Special Rules should be rejected because Rule 19.15.13 for compulsory pooling was not included in the notice of proposed rulemaking is nonsense. The Commission ruled that Jalapeno's proposed amendments were germane to the rules being considered in this rulemaking. Jalapeno's proposals must be considered and should be included in the Special Rule for Horizontal Wells to provide legal certainty as to the circumstances in which compulsory pooling of multiple spacing unit project areas is permissible and the proper assessment of a risk penalty in those proceedings.

(8) Because the Division shares Jalapeno's view that the Division lacks the statutory authority to create through compulsory pooling horizontal well project areas that encompass multiple, contiguous spacing units, the Commission

can and should through this rulemaking enact appropriate findings and conclusions on that issue. Doing so will avoid continued legal uncertainty and prevent the Division's crowded docket from being tied up with compulsory pooling cases that the Division recognizes are beyond its pooling authority.

(9) By including in its Special Horizontal Rules provisions that make it clear that: (a) multiple, contiguous spacing units cannot be compulsory pooled; (b) compulsory pooling cannot be ordered for tracts already committed to a joint plan of development that encompasses an existing spacing unit; and (c) compulsory pooling for horizontal wells should not include an automatic 200% risk penalty, the Commission will create legal certainty consistent with its rulings in the *Cimarex* case, Order No. R-13278-F. Operators seeking to drill a horizontal well encompassing multiple spacing units are still free to negotiate an agreement that is fair and equitable without rules that disadvantage a party to the negotiations.

WHEREFORE, Jalapeno respectfully requests that the Commission strike the Division's Supplemental Application and enact the proposed amendments to the Special Rule for Horizontal Wells, 19.15.16.15 NMAC proposed by Jalapeno.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on December 7, 2011, I served a copy of the foregoing documents by U.S. Mail to the following:

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