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April 12, 2012

Ms. Florene Davidson, Secretary
NM Oil Conservation Commission
1220 S. St. Francis Drive
Santa Fe, NM 87505

Hand Delivered

Re: NMOCD Case No. 14752: Application of Cimarex Energy Company of Colorado For Approval of a Water Disposal Well, Eddy County, New Mexico

Dear Ms. Davidson:

On behalf of Nearburg Producing Company LLC, enclosed for filing is an original and six copies of Nearburg's Pre-Hearing Memorandum for Motion for Leave to File Application for Hearing De Novo.

Thank you.

Very truly yours,

J. Scott Hall

JSH:kw

cc: W. Thomas Kellahin, Esq.

367614

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

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APPLICATION OF CIMAREX ENERGY
COMPANY OF COLORADO FOR APPROVAL OF
A WATER DISPOSAL WELL, EDDY COUNTY,
NEW MEXICO

CASE NO. 14752

PRE-HEARING MEMORANDUM
FOR
MOTION FOR LEAVE TO FILE
APPLICATION FOR HEARING DE NOVO

Nearburg Producing Company LLC, ("Nearburg"), by its undersigned attorneys, Montgomery & Andrews, P.A., submits this memorandum for the Commission's consideration in connection with the hearing on the Motion For Leave To File An Application For Hearing De Novo in this matter.

Nearburg seeks further agency review of Order R-13494 authorizing Cimarex Energy Company to inject produced water into the Pennsylvanian Canyon formation through the former Dorchester Exploration, Inc. Secrest et al. Well No. 1 located in Section 7, Township 19 South, Range 26 East, NMPM. *Order No. R-13494* (December 21, 2011). The Secrest et al. Well No. 1 is located on Nearburg's oil and gas lease and Nearburg has plans for further drilling and development on its acreage. Nearburg opposed Cimarex's Application because of concerns that the proposed injection operations will interfere with its operations.

On October 27, 2011, Nearburg participated as a party of record in the examiner hearing on Cimarex's Application. Some two months later, the Division entered Order No. R-13494, but Nearburg did not receive a copy of the order in the mail. *Order No. R-13494* (December 21, 2011). The Division cannot verify that the order was either mailed or posted on the Division's

website Hearing Orders page, www.emnrd.state.nm.us/ocd/2007Hearings.htm . With frequent regularity, we check the Division's usually reliable website Hearing Orders page for the issuance of new Division and Commission orders, but even with the exercise of this normal diligence, it was not ascertainable in this case whether Order No. R-13494 had been entered. With the order's issuance so close to the end of the year, it is possible that the order was posted only for a few days or not posted at all. On subsequent inquiry to the Division's IT staff and counsel, the Division is unable to confirm that Order No. R-13494 was ever posted to the Hearing Orders page as the electronic back-up data for 2011 were not preserved.

The Division's rules, promulgated pursuant to NMSA 1978, § 70-2-7, provide that a party of record adversely affected by an order entered by a Division hearing examiner has a right to have the matter heard de novo before the Commission. 19.15.4.23 NMAC. This right is exercised by filing a written application for de novo hearing within 30 days of the date the order is issued. *Id.* In this case, due to circumstances outside of its control, Nearburg had no notice that the Order had been issued and that the 30-day time period for filing an application for de novo hearing had begun.

New Mexico courts have held that appeals filed after the time provided by statute or rule may be permitted if the delay results from unusual circumstances beyond the control of the parties. *See Schultz v. Pojoaque Tribal Police Dept.*, 2010-NMSC-034, ¶¶18, 21, 148 N.M. 692, 242 P.3d 259; *Chavez v. U-Haul Co. of N.M.*, 1997-NMSC-051, ¶ 22, 124 N.M. 165, 947 P.2d 122; *Trujillo v. Serrano*, 117 N.M. 273, 278, 871 P.2d 369, 374 (1994); *Hyden v. N.M. Human Svcs. Dept.*, 2000-NMCA-002, ¶¶ 14-16, 128 N.M. 423, 993 P.2d 740. This practice is in line the New Mexico Supreme Court's stated policy "to construe both statutes and court rules in favor of deciding an appeal on the merits whenever possible." *Id.* at 276, 871 P.2d at 372; *see*

also *Hyden*, 2000-NMCA-002, ¶ 16 (noting Supreme Court’s “long history of stating that rules will be construed liberally in order that cases on appeal may be heard on their merits”). One unusual circumstance that has been found to warrant late filing of an appeal is error on the part of the court. *See id.* at 278, 871 P.2d at 374.

For instance, in *Trujillo*, the New Mexico Supreme Court held that there was no jurisdictional bar for the district court to hear an appeal of a magistrate court decision filed over a month after the judgment was entered, when the delay in filing the notice of appeal was caused by judicial error. *Id.* In that case, the magistrate took the case under advisement after the hearing, and indicated that he would recall the parties to the court on an unspecified later date to announce his decision. The magistrate then filed a written judgment in favor of the plaintiff without further notice to the parties, and the defendant was not informed of the decision until he received a copy at his post office box over a month after the judgment was filed. *Id.* at 275, 871 P.2d at 371. The New Mexico Supreme Court observed that

[p]rocedural formalities should not outweigh basic rights where the facts present a marginal case which does not lend itself to bright-line interpretation. Where . . . there are two possible interpretations relating to the right to an appeal, that interpretation which permits a review on the merits rather than rigidly restricting appellate review should be favored.

Id. at 276, 871 P.2d at 372.

In the instant case, Nearburg never received a copy of the Order by mail, the Division cannot confirm that the Order was ever sent to Nearburg, or that the Order was ever posted on the Division’s Hearing Orders website page where similar orders are routinely posted. Thus, Nearburg’s inability to comply with the 30-day time period was caused by a failure of notice

occasioned by apparent administrative oversights. These facts present precisely the type of “marginal case” that should be interpreted favor of a review on the merits rather than rigidly restricting Nearburg’s right to a de novo hearing under 19.15.4.23 NMAC. To deny Nearburg its right to a de novo hearing before the Commission because of these circumstances “runs against the most basic precepts of justice and fairness.” *Trujillo*, 117 N.M. at 278, 871 P.2d at 374.

NEARBURG’S OBJECTION SHOULD BE DECIDED ON THE MERITS

Procedural deficiencies should not prevent the agency from further considering the merits of Cimarex’s proposed operation, and Nearburg’s objections to it. Instead, the basis of the Division’s or the Commission’s action should be to determine whether underground injection operations may impair correlative rights, lead to waste or threaten damage to Nearburg’s lease or drilling operations.

The agency has ongoing jurisdiction to base a decision on the merits and Order No. R-13494 expressly provides that “*Jurisdiction is hereby retained for the entry of such further orders as the Division may deem necessary.*” *Order No. R-13494*, Conclusions ¶15 (December 21, 2011). Moreover, Nearburg would be entitled to seek further adjudicatory relief under the Division’s rules in any event: (“The division, attorney general, an operator or producer or other person with standing may file an application with the division for an adjudicatory hearing.” 19.15.4.8 NMAC, in part). This rule has been previously cited by the Commission as authority to permit a party to pursue a hearing before the Commission after the time for filing an application for hearing de novo had expired. *Order No. R-10672-A*, Conclusion ¶D(2), (March 19, 1997); *Case No. 11510 De Novo; Application of Branko, Inc. et al. To Reopen Case No. 10656 (Order No. R-9845), Lea County, New Mexico*. More recently, over similar objections made by Lynx Petroleum Consultants, Inc., the Commission’s Acting Chair entered an order preserving

Cimarex's de novo appeal rights, as there was at the time no Commission available to act on an Application for Rehearing filed by Cimarex within the ten day period prescribed by NMSA 1978 § 70-2-25. *Order No. R-13228-G* (January 21, 2011); Case Nos. 14418 and 14480 *De Novo; Applications of Cimarex Energy Co. for a Non-Standard Oil Spacing and Proration Unit and Compulsory Pooling, Eddy County, New Mexico*. Moreover, the Division and Commission frequently authorize further proceedings, most notably in cases involving underground injection matters, long after the passage of any appeal period from an initial order.¹

NEARBURG HAS STANDING

Cimarex questions Nearburg's standing, but this a non-issue. To acquire standing, a party must demonstrate "(1) an injury in fact,² (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *John Does I Through III v. Roman Catholic Church of The Archdiocese, Inc.*, 1996-NMCA-094, 122 N.M. 307, 924 P.2d 273. In addition, a party must also establish "that the injury alleged is within the zone of interests to be protected by a . . . statute." *Forest Guardians*

¹ *Order No. R-12649* (October 24, 2006); Case No. 13686; *Amended Application of DKD, LLC for an Order Revoking the Injection Authority for the Gandy Corporation State "T" Well No. 2, Lea County, New Mexico*.

Order No. R-11611 (July 3, 2001); Case No. 12588; *Application of Raptor Natural Pipeline, LLC f/k/a LG&E Energy Corporation for Special Rules for the Grama Ridge Morrow Gas Storage Unit, Lea County, New Mexico, and Case No. 12441, Application of LG&E Natural Pipeline, LLC for Special rules for the Grama Ridge Morrow Gas Storage Unit, Lea County, New Mexico*. *Order No. R-11768-B* (November 22, 2002); Case No. 12622, *Application of Nearburg Exploration Company, LLC for Two Non-Standard Gas Spacing and Proration Units, Lea County, New Mexico and Case No. 12908-A, Application of the Oil Conservation Division for an Order Creating, Re-designating and Extending the Vertical and Horizontal Limits of Certain Pools in Lea County, New Mexico*. *Order No. R-12433* (October 6, 2005); Case No. 13532, *Application of J. W. Neal, Patricia Neal and the Claudia Young Trust to Rescind Division Administrative Order No. SWD-984, Lea County, New Mexico*. *Order No. R-13707* (June 21, 2006); *Application of Yates Petroleum Corporation to Rescind or Amend Administrative Order SWD 1021, Lea County, New Mexico*.

² The threat of injury is also sufficient to establish standing. *Am. Civil Liberties Union v. City of Albuquerque*, 1999-NMSC-044, 128 N. M. 315, 992 P. 2d 866.

v. Powell, 2001-NMCA-028, 130 N.M. 368, 375, 24 P.3d 803, citing to *Key v. Chrysler Motors Corp.*, 121 N.M. 764, 774, 918 P.2d 350, 360 (1996).

Here, the proposed disposal well is located on Nearburg's oil and gas lease. Under NMSA 1978 §70-2-23, as an interested party, Nearburg is entitled to be heard. Nearburg's interests fall squarely within the zone of interests that numerous provisions of the Oil and Gas Act are intended to protect and Nearburg may accordingly invoke the agency's administrative processes to protect those interests. It need not wait until further harm is caused.

These surrounding circumstances, together with the actual lack of notice, warrant allowing Nearburg leave to file an application for hearing de novo. Otherwise, a technicality will deprive Nearburg of an opportunity to present its case, and the Oil Conservation Commission will be prevented from determining the matter based on geologic and engineering evidence.

Respectfully submitted,

MONTGOMERY & ANDREWS, P. A.

By: 

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Certificate of Service

I hereby certify that on April 12, 2012, a true and correct copy of the foregoing was sent via electronic mail to the following party:

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