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

2005 DEC 12 PM 2 54

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION COMMISSION FOR THE PURPOSE OF CONSIDERING:

CASE NO. 13564
ORDER NO. R-12452

APPLICATION OF THE OIL CONSERVATION DIVISION TO AMEND RULE 7 OF 19.15.1 NMAC; RULES 101 AND 102 OF 19.15.3 NMAC; RULES 201 AND 203 OF 19.15.4 NMAC; RULE 701 OF 19.15.9 NMAC; RULES 1101, 1103, 1104 AND 1115 OF 19.15.13 NMAC; AND THE ADOPTION OF RULES 40 AND 41 OF 19.15.1 NMAC; RULE 100 OF 19.15.3 NMAC; AND RULE 1227 OF 19.15.14 NMAC.

RESPONSE OF THE OIL CONSERVATION DIVISION TO MARBOB ENERGY CORPORATION'S APPLICATION FOR REHEARING

The Oil Conservation Division (Division) opposes the application for rehearing submitted by Marbob Energy Corporation (Marbob).

I. THE OIL CONSERVATION COMMISSION ACTED WITHIN THE SCOPE OF ITS AUTHORITY IN ADOPTING THE RULES.

Marbob's argument that the Oil Conservation Commission (Commission) exceeded its authority is limited to the issue of penalties. The rules adopted in Order No. R-12452 mention penalties only twice: in defining compliance under Rule 40, and by treating applications in which the Division seeks an order imposing penalties as a "compliance proceeding" subject to the procedural protections set out in Rule 1227. Marbob interprets the Oil and Gas Act to allow the imposition of penalties only by district court order, and equates the references to penalties in Rule 40 and Rule 1227 with an assertion that the Division or the Commission may assess penalties at the administrative level. The Division disagrees with Marbob's interpretation of Rules 40 and 1227, and with Marbob's interpretation of the penalty powers under the Oil and Gas Act.

A. The Oil Conservation Commission Did Not Exceed Its Authority By Including The Failure To Obey An Order Assessing Penalties As A Compliance Issue Under Rule 40.

A well operator is in compliance with Rule 40 if, among other things, it "does not have a penalty assessment that is unpaid more than 70 days after issuance of the order

assessing a penalty." Rule 40.A(3). Marbob errs in reading this provision as an assertion of a right to assess penalties at the administrative level. Rule 40 is silent on who issues orders assessing penalties. Rule 40 will apply to orders issued by the district court assessing penalties under NMSA 1978, §70-2-28. Rule 40 will also apply to penalties assessed under agreed compliance orders, negotiated by the operator and the Division to avoid penalty litigation. And Rule 40 will apply to orders assessing penalties issued by the Division or Commission after notice and hearing, as the Division believes is appropriate under NMSA 1978, §70-2-31(A) and the general enforcement powers granted by the Oil and Gas Act.

Rule 40 does not prevent an operator, such as Marbob, from contesting the authority of the Division and Commission to assess penalties after notice and hearing. Rule 40 specifically provides that "an operator who contests an order assessing penalties may appeal and may seek a stay of the order. An order that is stayed pending appeal does not affect an operator's compliance with [Rule 40]." Rule 40.E(2). And an unpaid penalty assessment does not affect compliance under Rule 40 until it is unpaid for 70 days, giving the operator the opportunity to file an appeal and obtain a stay. See Rule 40.A.(3).

B. The Oil Conservation Commission Did Not Exceed Its Authority By Defining Compliance Proceedings To Include Actions In Which The Division Seeks The Imposition Of A Penalty.

Rule 1227 sets out additional procedural safeguards applicable to compliance proceedings, including provisions regarding the contents of the application and notice. The rule defines a compliance proceeding as an adjudicatory proceeding in which the Division seeks an order imposing sanctions for violating the Oil and Gas Act, or a rule or order issued pursuant to that act. The rule goes on to define "sanctions" to include the assessment of civil penalties pursuant to NMSA 1978, §70-2-31(A).

Recognizing that applications seeking an order imposing sanctions are compliance proceedings triggering the protections of Rule 1227 does not decide the issue of whether the Division or Commission may assess penalties. Regardless of Marbob's interpretation of the Oil and Gas Act, the Division and the Commission have routinely issued compliance orders, after notice and hearing, assessing civil penalties. (The Division asks the Commission to take administrative notice of the orders issued by the Division and Commmission, and available on the Division's website at www.emnrd.state.nm.us/ocd under "OCD Online," "Imaging," "Hearing Orders," particularly under "Inactive Well Project" and "Well Plugging.") Ignoring that reality in a rule designed to create protections for respondents in compliance actions would deprive them of the rule's protections.

C. The Oil Conservation Commission And The Oil Conservation Division May, After Notice And Hearing, Assess Civil Penalties For Violations Of The Oil And Gas Act, And Rules And Orders Issued Pursuant To That Act.

As discussed above, the rules adopted in Order No. R-12452 do not assert a right to assess penalties at the administrative level, so the Commission does not need to decide that issue in this rulemaking proceeding. The Division suggests the issue of clarifying penalty assessment authority is better left to the legislature or to the courts in a case clearly addressing the issue. The Division takes issue with some of Marbob's assertions regarding penalties, however, and wishes to address them here.

Marbob relies on NMSA 1978, §70-2-28 for the proposition that only the district court may assess penalties. That statute provides that for any violation or threatened violation, the Division, through the attorney general, shall bring suit for injunction and/or penalties. The Division agrees that enforcement under Section 70-2-28 is available only through district court suit. But the Division disagrees that district court suit is the only enforcement mechanism recognized under the Oil and Gas Act.

NMSA 1978, §70-2-31 also refers to an action for penalties: "The penalties provided in this subsection shall be recoverable by a civil suit filed by the attorney general in the name and on behalf of the commission or the division...." The use of the word "recoverable" is instructive. There is no need for a separate statutory provision in the Oil and Gas Act setting out how to recover penalties assessed by order of the district court. The civil procedure statutes provide for enforcement of orders and satisfaction of judgments. But this provision regarding suits for the recovery of penalties is necessary if the Division or Commission issues an order assessing penalties. That order, unlike an order of the district court, can not be enforced under the rules of civil procedure. The Division must first translate that order into an enforceable district court order.

This interpretation of the two statutory provisions on penalties in the Oil and Gas Act is consistent with the broad enforcement powers granted under the act. See NMSA 1978, §70-2-6(A); NMSA 1978, §70-2-11(A); NMSA 1978, §70-2-12(B), and the discussion of those provisions in the Division's Brief in Support of Application for Rule Adoption and Amendment.

Allowing the Division and Commission, after notice and hearing, to assess penalties for violations pursuant to either Section 70-2-31 or the general enforcement power provisions is also consistent with the role of an administrative agency. The function of an administrative agency is to administer the statute and the rules promulgated under that statute. Under the doctrine of primary jurisdiction, courts commonly look to the administrative agency for its interpretation of the statute and rules, and defer to the agency's technical expertise. Litigants ordinarily are required to exhaust their administrative remedies before applying to the courts for relief. Marbob's interpretation of the Oil and Gas Act would cripple that administrative function, preventing the Division from administering and enforcing its own rules.

Marbob's interpretation is contrary to the actual practice of the Division and Commission. Both entities have been issuing orders assessing penalties, and in fact that has been the exclusive method of assessing penalties for years. See orders at

www.emnrd.state.nm.us/ocd. And Marbob's interpretation is contrary to the intent of the legislature, which has built those administratively assessed penalties into the Division's budget. See 2005 Regular Session, "General Appropriations Act of 2005," HB 2, Section 9(Q).

II. THE OIL CONSERVATION COMMISSION AND THE OIL CONSERVATION DIVISION FOLLOWED THE APPLICABLE PROCEDURAL RULES.

A. The Oil Conservation Division And The Oil Conservation Commission Provided Sufficient Notice Of The Rulemaking Proceeding.

Marbob makes a general complaint that the notice period was "insufficient" without alleging any violations of notice rules, or alleging any specific prejudice. There is no fundamental right to notice and hearing in rulemaking; it is statutory only. *Livingston v. Ewuing,* 98 N.M. 685, 689, 652 P.2d 235 (1982). The Division and Commission followed the requirements of the applicable rules and statutes.

The Division's procedural rules provide that the Division shall publish notice of rulemaking

- One time in a newspaper of general circulation in the state no less than 20 days prior to the scheduled hearing date;
- On the commission docket, which the clerk shall send by regular or electronic mail not less than 20 days prior to the hearing to all who have requested such notice;
- One time in the New Mexico register, with publication date not less than 10 business days prior to the scheduled hearing date; and
- By posting on the division's website not less than 20 days prior to the scheduled hearing date.

The rule also provides that in cases of emergency, the division director may shorten these time limits by written order. Rule 1202.

The Division filed its application for rulemaking on September 2, 2005, providing more than adequate time to meet the notice requirements for an October 13, 2005 hearing. The Division met all the requirements, with one exception: the commission docket should have been sent out on Friday, September 23, 2005 in order to meet the 20 day requirement. Instead, it went out on Monday, September 26, 2005. That notice issue affected not only the hearing on the enforcement and compliance rules, but one other rulemaking proceeding (final action on Case 13555) and two adjudicatory proceedings (Cases 13274 and 13480). The Division moved for a written order to shorten the time for notice, as provided for in Rule 1202. In support, the Division pointed out the additional actions it had taken to provide notice on the enforcement and compliance rules, to demonstrate that the persons who received late notice of the commission docket were not

prejudiced by the weekend delay. See Motion for Written Order Shortening the Time for Notice, filed October 3, 2005.

Although not required by the rules, the Division filed an 18-page brief in support of the proposed rules on September 15, 2005, explaining the rules and why the Division believes they are necessary. That brief was posted on the Division's website and mailed electronically on September 16, 2005, to the list of persons and entities who have requested notice of dockets. So although those persons and entities received the commission docket on Monday instead of Friday, they had already received notice of the proposed rules a week earlier, when they received the Division's brief. The delay in receiving the docket could not have prejudiced them.

The Division went even further in providing notice of this rulemaking proceeding. The Division conducted a stakeholders' meeting on September 21, 2005. Notice of the meeting was posted on the Division's website, letters were sent to each person who attended meetings on House Memorial 39, and notice was seen by electronic mail to every person or entity on a list kept by the Division's Environmental Bureau of entities interested in environmental regulations.

The division director granted the Division's motion, and issued a written order on October 4, 2005 shortening the time for sending out the Commission docket, and making the issuance on September 26, 2005 timely.

Marbob did not file an objection to that order. The Division recently revised its procedural rules, and left the notice provisions for rulemaking essentially unchanged. See Order R-12327-A, issued September 15, 2005. Marbob had the opportunity, at that time, to make its case that the notice provided for in the rules is insufficient. It did not do so. And it has not made its case that the notice in this proceeding was insufficient.

B. Changes To The Proposed Rules By The Oil Conservation Division And The Oil Conservation Commission Did Not Deny Marbob A Reasonable Opportunity To Participate In The Rulemaking Proceeding.

An agency may promulgate a final rule that differs from the rule it has proposed without first soliciting further comments if the final rule is a logical outgrowth of the proposed rule. *Louisiana Federal Land Bank Association, FLCA v. Farm Credit Administration*, 336 F.3d 1075 (D.C. Cir. 2003). General notice of the issues to be presented at the hearing is sufficient to comport with due process. *Santa Fe Exploration Co. v. Oil Conservation Commission*, 114 N.M. 103, 111, 835 P.2d 819 (1992). The changes made to the proposed rules by the Division in its amended application, and by the Commission in deliberations, are logical outgrowths of the proposed rules, and the Commission's adoption of those changes did not deprive Marbob of due process.

1) Changes by the Oil Conservation Division.

On October 3, 2005, twelve days after the public meeting, the Division filed an amended application making two substantive changes, and correcting formatting and citation errors. The Division

- revised paragraph E of Rule 37 to changed the title of the "rule 201 non-compliant list" to the "inactive well list," and clarified that the list will identify inactive wells, rather than non-compliant wells. By changing the search terms, an operator would be able to identify wells inactive for 15 months (and therefore out of compliance with Rule 201) or search for wells inactive for shorter time periods;
- revised Rule 100 to explain that the address the operator provides will be used for notice, and to add a requirement that the operator provide an emergency contact name and telephone number for each district in which the operator operates wells. The revisions to Rule 100 also corrected the citation to the "good standing rule" from Rule 36 to Rule 37. (It is now numbered Rule 40.); and
- revised Rule 1115 to correct a formatting error.

See Amended Application for Rule Adoption and Amendment, filed October 3, 2005. Marbob objects that the Division made these changes too close to the date of the hearing, and therefore compromised Marbob's ability to participate in the hearing.

The amended application was posted on the Division's website, as were all pleadings filed in this case, so they would be available to anyone who was interested. Division rules also provide that pleadings will be served by hand-delivery, facsimile or electronic mail to all parties who have entered an appearance on or prior to the business day immediately preceding the filing date. See Rule 1211(A). Marbob, however, did not enter an appearance in this case until October 5, 2005.

The Division requested the change to the title and description of the "rule 201 non-compliant list" to address industry concerns about a list posted on the web site "labeling" operators as non-compliant. No one from industry argued for a return to the title "rule 201 non-compliant list." Indeed, industry argued for, and obtained, additional changes to the rule to remove language industry believed was pejorative, ultimately resulting in changing the title of the rule from "Good Standing," which industry found offensive, to the current title: "Compliance." The term "good standing" was removed from the rule entirely.

The Division made the change to Rule 100 requiring emergency contact information in response to a request made by a Division district supervisor. See Tr. P. 180. That request was a logical outgrowth of the original proposed rule, which requested operators to provide an address. Although Marbob's attorney asked a question concerning contact information during his cross examination of the witness, he made no objection to the addition of emergency contact information. Tr. p. 182.

2) Changes by the Oil Conservation Commission.

During the hearing and deliberations, the Commission made a number of substantive changes to the proposed rules. The majority of the changes were in response to concerns raised by industry, and Marbob has raised no objection to the Commission:

- changing the number of non-compliant wells an operator may have before running afoul of Rule 40. Under the proposed rule, and operator could have no more than 3 wells or 5 wells out of compliance, depending on the total number of wells operated. The Commission substituted a range of numbers from 0 (if the operator operated only one well) to 10 wells (if the operator operated more than 1000 wells). See Rule 40.A.4;
- adding a requirement that the Division notify an operator by mail when a well on the inactive list shows no production or injection for the past 12 months. See Rule 40.B. The rule as proposed contained no requirement for notice by mail;
- changing the description of the lists to be posted on the website regarding compliance. The original proposed rule provided that the Division would post lists of operators out of compliance with Rule 40 under the standards set out in that rule. The Commission changed the description of the lists so that the Division will be required to post the information to determine if an operator is out of compliance with Rule 40, without explicitly identifying any operator as out of compliance with Rule 40. See Rule 40.B, 40.C.1, 40.D.1, and 40.E;
- delaying the effective date of Rule 40 by 60 days;
- changing Rule 100.B to require a closer connection between related entities before the non-compliance of one entity will affect the ability of the other to register;
- deleting proposed language in Rule 1227 that would have allowed the Division to provide notice of compliance proceedings by regular mail to the operator's address of record, rather than certified mail. See Rule 1227.D; or
- replacing proposed language in Rule 101 that would have required the posting of financial assurance for all wells in New Mexico with language requiring financial assurances only for wells located on "privately owned or state owned lands." See Rule 101.A.

Marbob's application for rehearing challenges only the following Commission changes:

- The addition of language requiring the restoration and remediation of the location after plugging and abandonment (Rules 203.A and 1103.A.2);
- Changes to the approved temporary abandonment rule (Rule 203); and
- Changes to the notice provisions of the injection rule (Rule 701).

The "restoration and remediation" language clarifies that to properly plug and abandon a well under Rule 201, an operator must not only plug the wellbore, but restore

the site as required in Rule 201.B.3. The language reminds operators of existing requirements; it does not change them.

The Commission changed the temporary abandonment rule to add requirements for testing external mechanical integrity. Industry was clearly on notice that mechanical integrity testing would be on the table during the rulemaking proceeding: the Division's original application set out proposed changes to mechanical integrity requirements, the Division's brief in support of the application discussed those changes, and the Division's pre-hearing statement identified a technical witnesses who would be called specifically to "testify concerning the proposed changes to Rule 203 Temporary Abandonment, including approved methods for demonstrating mechanical integrity" as well as another technical witness who would testify generally about the environmental problems that can result from communication between formations. "Pre-hearing Statement", filed October 5, 2005. On the first day of the two-day hearing, during the cross-examination of one of those witnesses, a commissioner expressed concern about external mechanical integrity. See Tr. p. 130. The chairman followed up with additional questions, Tr. p. 135. Division counsel suggested the Commission consider the external mechanical integrity tests used by the Environmental Protection Agency. Tr. p. 137. Rather than release the technical witness at the close of cross-examination, the Commission reserved the right to re-call him on this issue. Tr. p. 138. During this lengthy discussion of external mechanical integrity, counsel for Marbob made no objection. At no point did counsel present evidence on the issue, or request that the hearing be held open so that he could present testimony on the issue.

The Division's original application sought to amend the notice requirements for injection well applications. As described in the Division's brief in support of the application, paragraph B(2) of Rule 701 requires the applicant "to notify other 'affected persons' within one-half mile of the well, in addition to each leasehold operator. See Brief, page 10. A division hearing examiner who testified at the hearing explained that he suggested rule change specifying notice to mineral owners within a 'half –mile radius' and that it is the current practice of hearing examiners to require such notice. Tr. pp. 140-141. Counsel for Marbob did not cross-examine this witness. Tr. p. 140. During questioning of the witness by commissioners, one commissioner expressed concern that the rule, as written, only required notice to persons in adjoining spacing units, which may be as small as a quarter mile. Tr. p. 141-142. When the witness reiterated his intent to require notice for persons within a half-mile radius, the commission discussed changing the language to match that intent. Tr. pp. 143-148. Counsel for Marbob did not object to the language change, but did suggest that the commission provide that an operator could meet the notice obligation by publication. Tr. p. 148.

Division procedural rules allow the Commission to keep the record open to permit written submittals including arguments and proposed statements of reasons supporting the proposed commission decision. Rule 1205.A(2)(g). If Marbob believed it needed to present additional comment on the issues of restoration and remediation, mechanical integrity, or notice, it had the opportunity to do so. It cannot complain now.

C. The Commission May Adopt Proposed Rules With Changes.

Marbob takes the position that the Commission has only three choices in a rulemaking proceeding: adopt the rules as proposed, eliminate some portions of the proposed rules, or reject the rules as proposed. According to Marbob's argument, the Commission has no authority to alter the proposed rule in any way, except by eliminating provisions. To support this argument, Marbob relies on wording in the Division's procedural rules. The Division disagrees with Marbob's interpretation.

Marbob first points to Rule 1204.C.1, which provides that "any person, other than the applicant or a commissioner, recommending modifications to a proposed rule change shall, no later than 10 business days prior to the scheduled hearing date, file a notice of recommended modification with the commission clerk." Marbob reads this provision to prohibit any changes to the proposed rules after that cutoff date, including changes by the applicant or the Commission. The rule cited by Marbob expressly excludes the applicant and the Commission from its provisions. The reason for that exclusion is obvious: the applicant, and the Commission, should have the opportunity to react to the proposed changes. By agreeing to proposed changes, or revising its proposed rules to meet concerns raised in comments (as the Division did in this case) the Division can streamline issues at hearing. At the hearing, the Commission should have the ability to react to comments and testimony to give effect to public comment and craft the best possible rules. The use of that ability was evident in this case, with the Commission making many changes to the proposed rules in order to address industry concerns.

The second rule Marbob cites is Rule 1205.E.3, which states that "[t]he commission shall issue a written order adopting or refusing to adopt the proposed rule change, or adopting the proposed rule change in part." Again, Marbob interprets this rule to restrict the Commission to adopting, rejecting, or partially deleting the rules as proposed, with no other changes. The Commission has never taken that approach to rulemaking and should not do so now. Interpreting the rule in the manner Marbob suggests would be contrary to statute. The Oil and Gas Act gives the Commission concurrent power with the Division to make rules. NMSA 1978, §70-2-11. The Commission cannot exercise that power if it is restricted to accepting, rejecting or cutting rules proposed by others.

III. THE OIL CONSERVATION COMMISSION DID NOT ACT IN AN ARBITRARY, CAPRICIOUS OR UNREASONABLE MANNER IN ENACTING RULE 40, AND THE RULE IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Marbob attacks Rule 40 by attacking the data in the inactive well list, arguing that the data is so flawed that adoption of the rule was arbitrary, capricious and unreasonable, and that the rule is unsupported by the evidence. The Division disagrees.

Rule 40 creates a special inactive well list, to be used for Rule 40 enforcement. The list includes inactive wells that do not have their wellbore plugged in accordance with Rule 202, are not in approved temporary abandonment status in accordance with

Rule 203, and are not subject to an inactive well agreed compliance order. Rule 40.F(1) The appearance of a well on the list as inactive for a period exceeding 15 months creates a rebuttable presumption that the well is out of compliance with Rule 201, and that well will count towards Rule 40 compliance under 40.A(4).

The first and most important point is that the data used to create the inactive well list comes from the operators themselves. The well's activity, or lack thereof, is determined from C-115 production reports that the operators are required to file. See Rule 1115. Information on wellbore plugging comes from the sundry notice the operator must file under Rule 1103.F to comply with Rule 202. Information on approved temporary abandonment status comes from the sundry the operator must file under Rule 1103.B(2) to comply with Rule 203. An inactive well agreed compliance order is formal document obtained by the operator from the Division Director. See Rule 1227.

The Division has worked for years to assure the accuracy of this data. The Commission heard testimony concerning a project begun in 2000 under which operators were sent lists identifying their inactive wells, and they were asked to correct any inaccurate data. Tr. pp. 151-155. The data was also reviewed during the inactive well agreed compliance project, when operators were asked to sign agreements to bring the wells identified as inactive into compliance. Tr. pp. 158-160.

In creating the inactive well list under Rule 40 the Division took further steps to ensure the accuracy of the data. In the process, it eliminated from the list many wells that are out of compliance with Division rules, in order to ensure that compliant wells would not be listed by mistake. For example,

- the list currently includes only wells that have, at some point, reported production. Tr. p. 265. A well that was drilled, and left unplugged, will not appear on the Rule 40 inactive well list if it never produced (although it is out of compliance with Rule 201). This decision was made because the Division realized that it could determine from available data whether an APD had been issued, but could not necessarily determine whether the well had actually been drilled.
- Rule 40 looks only to whether the wellbore is plugged, and not to whether the site has been cleaned and released within one year of plugging, as required by Rule 202. Again, to ensure that compliant wells were not listed by mistake, the Division excluded from the list many non-compliant wells. Tr. p. 260; Tr. pp. 265-267.
- Where the data indicated an approved temporary abandonment, but no expiration date for that temporary abandonment, the list gives the operator the benefit of the doubt and assumes that the temporary abandonment was approved for the maximum amount of time: 5 years. Tr. pp. 260-261.

The Rule 40 inactive well list was made available to industry before the hearing, so industry could work with the list and identify errors. Because the list identifies all inactive wells that fit its criteria, regardless of how long the well has been inactive, a well

will appear on the list for 15 months before it will affect Rule 40 compliance. An operator may track his inactive wells using the list, and in effect is given 15 months notice before the Division will consider an inactive well on the list to be out of compliance.

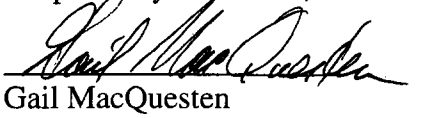
Although industry has criticized the accuracy of the list, witnesses for industry could point to few specific examples at the hearing. One witness, representing an operator with 6044 wells, and only 4 wells on the Rule 40 inactive well list, complained that a well had returned to production but still appeared on the list. Div. Exhibit 27; Tr. p432. Further discussion revealed that the operator had not yet filed a C-115 reporting production, and the operator was given instructions on how to file production reports to remove productive wells from the list more quickly. Tr. pp. 43-434. Another witness complained that she had found many errors in the list, but she was unable to identify them in her testimony. Tr. p. 476. Marbob, operating over 800 wells, had no wells on the inactive well list. Tr. p. 271- and 452.

After considering the evidence on the Rule 40 inactive well list, the Commission made two changes to the rule. First, it added a provision requiring the Division to notify an operator by mail when it has a well on the inactive well list that shows no production or injection for 12 months. Rule 40.B. That will give the operator additional notice that a well appears on the list as inactive, and will affect his Rule 40 compliance if action is not taken to remove the well from the list before it is inactive for 15 months. Second, the Commission gave the rule a delayed effective date of February 13, 2006. This will give operators additional time to review and correct the list before it affects their compliance under the rule. The Commission has not acted in an arbitrary, capricious, or unreasonable manner in adopting Rule 40, and the rule is well supported by the evidence.

CONCLUSION

Marbob has not demonstrated error. The Oil Conservation Division respectfully requests that the Commission deny Marbob's application for rehearing.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on December 12, 2005, I served a copy of the foregoing document by hand-delivery, electronic mail, fax or U.S. mail, as appropriate under Rule 1221.A, to the following parties who entered a formal appearance in this matter or participated in the hearing in this matter:

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

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RESPONSE OF THE OIL CONSERVATION DIVISION TO MARBOB ENERGY CORPORATION'S APPLICATION FOR REHEARING

AMENDED CERTIFICATE OF SERVICE

The Oil Conservation Division was not able to serve the Oil and Gas Accountability Project at the e-mail address indicated in the certificate of service attached to the Response of the Oil Conservation Division to Marbob Energy Corporation's Application for Rehearing.

I certify that on December 12, 2005, I served a copy of the Response of the Oil Conservation Division to Marbob Energy Corporation's Application for Rehearing by fax to the Oil & Gas Accountability Project at fax number 970-259-7514. A copy of this amended certificate of service was served to the other parties by the means indicated on the original pleading.

Respectfully submitted,

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