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

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

APPLICANTS' RESPONSE TO COG'S REQUEST FOR A PREHEARING CONFERENCE

Nearburg Exploration Company, L.L.C., SRO2 LLC, and SRO3 LLC (collectively, "NEX") hereby respond to the request for a prehearing conference filed by COG Operating LLC ("COG") on September 16, 2016.

NEX filed an Application for Hearing De Novo on July 29, 2016, requesting that a hearing de novo be set before the Oil Conservation Commission on December 6, 2016. As a threshold matter, NEX notes that COG did not file a request for de novo hearing before the Commission. COG is therefore not entitled to de novo review of its applications that were considered in connection with the instant matter and denied.[1] 19.15.4.23.A NMAC. It is therefore unclear why COG is now demanding that the hearing on NEX's application be set in November.

[1] Moreover, COG's failure to file a request that the matter be heard de novo before the Commission forecloses a challenge by COG to any findings or rulings made by the Division that are adverse to COG. *See* 19.15.4.23.A NMAC.

It is customary for the applicant, in this instance NEX, to request a hearing date. No statute or regulation restricts the time for which the applicant may request a setting for the de novo date. NEX submitted its application on July 29, 2016. NEX requested that the hearing be set on December 6, 2016. COG did not object to the request for a December hearing date. NEX was subsequently advised by the Commission's secretary that the Commission will be holding a three-day rulemaking hearing December 5 through December 7 and that Commissioner Balch will be unavailable after the morning of December 8. *See* Email from Florene Davidson to Scott Hall (Aug. 17, 2016), attached hereto as Exhibit 1. NEX was further advised that it was possible that the de novo hearing would be moved to a January Commission meeting. Consequently, NEX has been planning for a January hearing date.

A hearing date in November would not be practical for NEX for a number of reasons. November is only one month from now. Once a hearing date has been set, NEX plans to request the issuance of subpoenas to certain COG witnesses for testimony at the hearing. Moreover, NEX did not have the opportunity to complete its discovery at the Division level. Notably, COG resisted discovery. Instead of complying with the Director's subpoena, COG took the position that discovery was limited to narrow time frames and narrow issues. COG's position improperly limits the Commission's ability to determine the issues raised by NEX's application and the evidence related thereto.

COG further took the position that the Division was not capable of resolving the discovery disputes and that the discovery sought by NEX should be pursued in the parallel district court proceedings. *See* COG's Motion for a Protective Order at 1-2, attached hereto as Exhibit 2. Consequently, and in part to avoid duplication, NEX has sought similar discovery in the district court where protocols are established under the New Mexico Rules of Civil Procedure. COG continues to resist production of numerous documents in the district court

proceeding and, despite the parties' efforts to informally resolve the discovery disputes, it appears that NEX will be required to file a motion to compel in the district court in the immediate future. It is unlikely that the motion to compel in the district court would be resolved in time for a November hearing before the Commission. A January hearing date, however, would allow sufficient time to resolve the parties' discovery disputes in the district court, as suggested by COG, and would enable NEX to obtain the documents necessary to fully present its case at the de novo hearing.

COG argues that "[t]he factual record before the Hearing Examiner contains all facts necessary for the Commission to determine the issues presented." COG's Request for a Prehearing Conference at 4, ¶ 6. NEX respectfully disagrees. Documents that COG refused to produce are expected to contain evidence directly related to issues raised by NEX before the Commission. For example, emails post-dating the drilling of the two wells involved could reveal the knowledge and intent of COG at the time of drilling. Moreover, COG's position is contrary to NMSA 1978, § 70-2-13, which provides NEX with a right to have the matter heard de novo. *See, e.g., Santa Fe Pub. Sch. v. Romero*, 2001-NMCA-103, ¶ 19, 131 N.M. 383 ("De novo review means judicial review which at a minimum: (1) contemplates additional evidentiary presentation beyond the record created in front of the administrative agency, and (2) allows the reviewing entity more discretion in its judgment than simply reversal of the agency's decision and remand for further proceedings." (internal quotation marks, brackets and citation omitted)); *accord Contreras v. Miller Bonded, Inc.*, 2014-NMCA-011, ¶ 32, 316 P.3d 202 (quoting *Timmons v. White*, 314 F.3d 1229, 1234 (10th Cir. 2003) for the proposition that "de novo review means 'the court's inquiry is not limited to or constricted by the administrative record'").

Finally, counsel for NEX is unavailable in November due to pre-existing scheduling conflicts. In conclusion, NEX states that a case status conference is unnecessary. NEX asks that a de novo hearing be set in January 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on counsel of record by electronic mail on October 3, 2016:

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J. Scott Hall

J. Scott Hall

From: Davidson, Florene, EMNRD <florene.davidson@state.nm.us>
Sent: Wednesday, August 17, 2016 1:41 PM
To: J. Scott Hall
Subject: De Novo Case 15441

Good afternoon, Scott. You are probably already aware of this, but the Commission has scheduled Case 15487, the special pool rules case for the drilling of new wells underlying the Roswell Artesian Basin, for hearing beginning at 1:00 p.m. on December 5 through December 7. I know you have asked for the De Novo hearing of Case 15441 for Nearburg, SRO2LLC and SRO3LLC to be held on December 6, the regularly scheduled meeting date for the Commission. This case will be heard after Case 15487 is finished if there is time. Commissioner Balch will not be available after the morning of December 8. I just wanted to let you know that there is a possibility your case will be moved to a January Commission meeting. Sorry.

Florene

EXHIBIT 1

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

APPLICATION OF NEARBURG EXPLORATION COMPANY, SRO2 LLC AND SRO3 LLC FOR AN ACCOUNTING AND LIMITATION ON RECOVERY OF WELLS COSTS, AND FOR CANCELLATION OF APPLICATION FOR PERMIT TO DRILL, EDDY COUNTY, NEW MEXICO.

CASE NO. 15441

COG's MOTION FOR A PROTECTIVE ORDER

COG Operating LLC ("COG"), pursuant to the instructions of the Division at the April 11th status conference, moves the Division to limit the production of the internal emails requested by Nearburg Exploration Company ("NEX").

COG has produced to NEX the well files for the SRO State Com 43H (30-015-41141) and the SRO State Com 44H (30-015-41142) located in the W/2 of Sections 17 and 20 of Township 26 South, Range 28 East (the "Subject Wells"). These files contain emails retained in the well files in the normal course of business that have been produced to NEX. COG has also agreed to produce all external emails related to the Subject Wells. Nonetheless, NEX maintains COG is required to conduct a search of employee files and produce ALL internal emails involving the Subject Wells.

A. NEX's Broad Request For ALL Internal Emails Involving The Subject Wells Is The Type Of Discovery That Should Be Pursued In The Parallel District Court Proceedings.

NEX's request for ALL internal emails involving the Subject Wells is highly unusual for Division proceedings and implicates relevancy and privilege issues the Division is not tasked or adequately staffed to address. The Division is tasked and staffed by the legislature for the purpose of applying particular geologic and engineering expertise to the technical issues that

EXHIBIT 2

arise under the duties imposed by the Oil & Gas Act. *See Continental Oil Co. v. Oil Conservation Comm'n*, 70 N.M. 310, 318, 373 P.2d 809, 814 (1962) (Division "is a creature of statute, expressly defined, limited and empowered by the laws creating it."); *Marbob v. N.M. Oil Conservation Division,* 2009-NMSC-013, 206 P.3d 135 (Division tasked by statute to promote conservation of oil and gas, prevent waste and protect correlative rights.) For this purpose, the Division is directed and staffed with individuals that possess the "expertise, technical competence, and specialized knowledge of engineering and geology" necessary to carry out these limited legislative directives. *Santa Fe Exploration v. Oil Conservation Division,* 1992-NMSC-044, ¶ 37, 835 P.2d 819. The Division is not tasked by statute or staffed sufficiently to address the broad document discovery associated with district court proceedings. As *Continental Oil* observed, since the Division serves an administrative capacity in carrying out the limited, legislative directives in the Oil and Gas Act, "grave constitutional problems" arise when the Division undertakes functions better left to the judiciary. *Id. at* 818.

Accordingly, the subpoena power under the Oil & Gas Act must be narrowly tailored for the technical information and other documents necessary for the Division to carry out its statutory duties. *See* NMSA 1978, § 70-2-8 (a subpoena must be "pertinent to some question lawfully before" the Division). The Division's subpoena powers should not be utilized by parties engaged in parallel district court proceedings to bypass the procedural protections and legal expertise available in district court. In other words, the Division's subpoena power is not a means of pursuing the broad discovery pursued allowed in district court, nor is that power to be used to circumvent the procedural requirements and protections that apply in district court.

The extensive document discovery NEX seeks to pursue must be limited to only that which is clearly pertinent and necessary to address to the "good faith belief" issue before the

Division. Broad document discovery, particularly discovery that raises extensive issues of privilege, should be left to the parallel district court case filed by NEX to avoid encroachment on the role of the district court. *See* Exhibit 1 to COG's Motion to Dismiss (Complaint filed in *Nearburg Exploration Company, L.L.C., SRO2 LLC, and SRO3 LLC v. COG Operating LLC*, CV-2015-02541).[1]

B. COG's Internal Emails Generated After The Subject Wells Were Drilled Are Not Pertinent To The "Good Faith" Issue Raised By NEX's Application.

As recognized by the Division Examiners at the February 3, 2016, hearing on COG's Motion to Dismiss, the issue before the Division under NEX's application is whether COG had a "good faith belief" it was entitled to develop NEX's state lease in the W/2 of Section 20 at the time the Subject Wells were drilled.[2] This conclusion rests on the Commission's Order entered in the *Tmbr/Sharp* cases (attached as Exhibit D to NEX's Response to COG's Motion to Dismiss) wherein the Commission states:

> 27. When an application for permit to drill is filed, the Division does not determine whether an applicant can validly claim a real property interest in the property subject to the application, and therefore whether the applicant is "duly authorized" and "is in charge of the development of a lease or the operation of a producing property." The Division has no jurisdiction to determine the validity of any title, or the validity or continuation in force and effect of any oil and gas lease. Exclusive jurisdiction of such matters resides in the courts of the State of New Mexico. The Division so concluded in its Order in this matter. See Order No. R-l 1700 (December 13, 2001).
>
> 28. It is the responsibility of the operator filing an application for a permit to drill to do so under a good faith claim to title and a good faith belief that it is authorized to drill the well applied for. It appears to this body that Arrington had such a good faith belief when it filed its application, but subsequently the District Court found otherwise. It is not within the purview of this body to question that decision and it should not do so in this case.

See Order R-11700-B at pg. 5.

[1] The voluminous exhibits to the district court complaint (over 200 pages) are not included in Exhibit 1.
[2] COG's Motion to Dismiss and NEX's Response were filed in January of 2016, and provides a chronology of the events in this matter with supporting exhibits.

The Subject Wells were drilled in August and October of 2014 pursuant to applications to drill approved by the Division on February 26, 2013. Accordingly, the only internal emails that could potentially be pertinent or relevant in any way to the "good faith belief" issue before the Division are those non-privileged emails generated prior to the drilling of the 43H and 44H wells. Internal emails generated after drilling cannot reflect the company's state of mind at the time the wells were drilled and are therefore not pertinent, or even remotely relevant, to the "good faith belief" issue before the Division. COG therefore requests that the Division issue a protective order limiting production of non-privileged internal emails to those generated prior to the drilling of the 43H and 44H wells.

C. Many Of The Emails Generated After The Subject Wells Were Drilled Are Immune From Disclosure Under The Work Product Doctrine.

At the Examiner's direction, included with this brief is a thumb drive containing internal emails that do not involve an attorney, but which were generated in anticipation of litigation after NEX first informed COG in late May of 2015 that it believed COG was not authorized to drill the Subject Wells. These emails contain the thoughts, opinions, actions, reactions, impressions and conclusions concerning NEX's allegations by COG's personnel. These types of internal communications are protected from disclosure by the work production doctrine.

Before conducting an *in camera* review of this thumb drive, it is important to note that these emails were generated over six months after the Subject Wells were drilled. As a result, an *in camera* review of these emails *is necessary only if* the Division determines internal emails generated after the Subject Wells were drilled are somehow pertinent to the "good faith belief" issue before the Division.

Documents or correspondence generated in anticipation of litigation are protected by the work product doctrine and are therefore immune from discovery. *See Gingrich v. Sandia Corp.*,

2007-NMCA-101, ¶ 9, 142 N.M. 359. Courts have held that "[l]itigation need not necessarily be imminent as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation." *Anaya v. CBS Broad., Inc.*, 251 F.R.D. 645, 651 (D.N.M. 2007). *See also Gargano v. Metro-North*, 222 F.R.D. 38, 40 & n.2 (D. Conn. 2004) ("Statements taken by claims agents in anticipation of litigation are protected by [the work product doctrine].") New Mexico courts have recognized that the work product doctrine applies irrespective of whether an attorney is involved in the generation of the documents. *See S.F. Pacific Gold Corp v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 38, 143 N.M. 215, 175 P.3d 309 (documents prepared by an attorney or representative, in anticipation of litigation, are immune from discovery by virtue of the work product doctrine).

Since the Subject Wells were drilled in 2014, the impetus for the internal emails on the thumb drive was NEX's surprising allegation in late May of 2015 that COG was not authorized to drill them or act as operator in the W/2 of Section 20.[3] Because of the time frame in which these internal emails were generated, they are not pertinent to the "good faith belief" issue before the Division and are otherwise immune from discovery under the work product doctrine.

[3] As reflected in COG's Motion to Dismiss, NEX's allegations in late May of 2015 were surprising. NEX ratified an Operating Agreement in 2009 when it held a working interest in the W/2 of Section 20 and subsequently confirmed that agreement in early May of 2015 by executing two communitization agreements covering the Subject Wells and associated spacing units. *See* Exhibits 2, 4 and 5 to COG's Motion to Dismiss. The executed communitization agreements state, in bolded type, that **"COG Operating LLC shall be the Operator of said communitized area and all matters of operation shall be determined and performed by COG Operating LLC."** See Exhibits 4 and 5 at ¶ 8. Clearly when NEX executed these agreements it recognized COG's status as operator of the W/2 of Section 20. Nonetheless, NEX has asked the district court to declare, for undisclosed reasons, "that Plaintiffs are not subject to the Operating Agreement" NEX ratified in 2009. See Exhibit 1 (Complaint) at p. 14, ¶ 77.

D. Other Internal Emails Are Protected From Disclosure By The Attorney Client Privilege.

Numerous other emails, ALL of which were generated after the wells were drilled, are protected from disclosure by the attorney client privilege. In New Mexico, the attorney-client privilege is codified in Rule 11-503 NMRA. This rule states that a client has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made for the purpose of facilitating or providing professional legal services to that client. Rule 11-503(B) NMRA; *see also Santa Fe Pac. Gold. Corp. v. The Travelers Indem. Co.*, 2007-NMCA-133, ¶ 14, 143 N.M..

Since ALL of the emails protected by the attorney client privilege were generated AFTER the Subject Wells were drilled, the need for a privilege log only arises in the event the Division determines internal emails generated after the Subject Wells were drilled are somehow pertinent to the "good faith belief" issue before the Division. In the event the Division makes such a determination, then a privilege log will be generated and provided.

WHEREFORE COG requests that Division issue an Order protecting from disclosure internal emails generated after the Subject Wells were drilled. Such a ruling avoids the privilege issues discussed above. In the alternative, COG requests that the Division issue an Order protecting from disclosure, on the basis of the work product doctrine, the internal emails on the thumb drive provided with this motion (which have been stamped C-015133-19295, C-019327-23537, C-023545-53557, C-023720-24514) as well as emails protected from disclosure by the attorney client privilege.

Respectfully submitted,

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I hereby certify that on April 18, 2016, I served a copy of the foregoing document to the following counsel of record via electronic mail:

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