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August 6, 2009

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HAND DELIVERED

Florene Davidson
New Mexico Oil Conservation Division
1220 S. St. Francis Drive
Santa Fe, NM 87505

Re: NMOCD Case No. 14323: Application Of Chesapeake Energy Corporation For Cancellation Of The Division's Approval of an Application For Permit To Drill Issued To COG Operating LLC, Eddy County, New Mexico

Dear Ms. Davidson:

Enclosed for filing are the original and two copies of a Motion to Dismiss on behalf of COG Operating LLC.

Also enclosed for file confirmation is an extra copy of the Motion. Thank you.

Very truly yours,

Karen Williams

Karen Williams
Assistant to J. Scott Hall

JSH/kw
Enclosures
cc: W. Thomas Kellahin, Esq.
David Brooks, Esq.

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

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

CASE NO. 14323

APPLICATION OF CHESAPEAKE ENERGY CORPORATION FOR CANCELLATION OF THE DIVISION'S APPROVAL OF AN APPLICATION FOR PERMIT TO DRILL ISSUED TO COG OPERATING LLC, EDDY COUNTY, NEW MEXICO

MOTION TO DISMISS

COG Operating LLC, ("COG"), by and through its undersigned attorneys, Montgomery & Andrews, P.A., hereby requests the Division enter its order dismissing Chesapeake Energy Corporation's Application in this matter. In support, COG states:

Chesapeake has filed a sparsely-worded Application that asks the Division to rescind the APD previously approved by the BLM for COG's Blackhawk "11" Fed Com Well No. 1-H.. Chesapeake's Application should be dismissed for four separate but equally compelling reasons:

(1) Chesapeake seeks only an advisory opinion, not real relief. The Application is not ripe for decision.
(2) The subject matter of Chesapeake's Application is best resolved by an anticipated rulemaking proceeding that will address the adoption of new horizontal drilling rules.
(3) Chesapeake's Application is barred by the doctrine of estoppel.
(4) Chesapeake's Application will be rendered moot by Case No. 14365 (*Application of COG Operating LLC for designation of a non-standard spacing unit and for compulsory pooling, Eddy County, New Mexico*).

BACKGROUND

On April 30, 2008, at considerable expense to it, COG filed an application for a permit to drill ("APD") with the Bureau of Land Management-Roswell for the Blackhawk "11" Fed Com Well No. 1-H, (API # 30-015-36541) The APD was approved on August 4, 2008. COG plans to

horizontally drill the Blackhawk "11" Fed Com Well No. 1-H from a surface location 430' from the South line and 430' from the West line to a bottomhole location 330' from the South line and 330' from the East line to a depth sufficient to test the Abo/Wolfcamp formation.

Four forty-acre tracts comprising the S/2 S/2 of Section 11 are dedicated to the non-standard spacing unit for the well. COG owns or controls 100% of the working interest in the S/2 SE/4 of Section 11. Chesapeake owns a working interest in the S/2 SW/4 of Section 11. COG has the right to occupy both the surface and bottom-hole locations for the well.

Based on the considerable experience of operators in this play, the prospective Abo/Wolfcamp oil reserves in this area are most effectively and efficiently developed by the creation of a special project area configured as a "lay-down" 160-acre non-standard spacing unit comprising the S/2 S/2 of Section 11 and those reserves would be best accessed by a horizontal well at the approximate surface and bottom-hole locations proposed for the Blackhawk well. Development of each of the 40-acre tracts in the S/2 S/2 of the section with four separate vertically drilled wells cannot be justified. Presumably, Chesapeake does not dispute this. Chesapeake has not proposed alternative configurations for units to develop the reserves underlying the section.

Chesapeake has evinced no plans to develop its lease interests. At the same time, Chesapeake objects to COG's development of the unit and seeks the cancellation of COG's APD. Although it has not said one way or another, it must be presumed that Chesapeake does not wish to have its acreage included in the non-standard lay-down unit.

COG has been compelled to file an application to obtain approval of the non-standard unit for the S/2 S/2 of Section 11 and for compulsory pooling of un-joined interests in the unit.

COG's Application in Case No. 14365 is scheduled to be heard by the Division on August 20, 2009.

I. The Division Does Not Issue Advisory Opinions

Chesapeake seeks only an advisory opinion from the Division. Chesapeake must admit to the Division that it has made no plans to drill in any portion of the S/2 S/2 of Section 11. Chesapeake's Application is devoid of any allegation of harm to its interests, actual or potential. Neither has it alleged that granting its Application will prevent waste, protect correlative rights or promote conservation. It has no competing application for a drilling permit. This causes one to wonder: once Chesapeake has a decision in this case, what will it do with it?

Obviously, there is no presently justiciable controversy for the Division to decide. Any opinion issued by the Division on this question would therefore be advisory in nature, and such opinions are frowned upon in the administrative context.

Where no actual controversy exists, or where injury is speculative or based on assumptions, a party is deemed to be seeking in effect an advisory opinion. *See Grand Lodge of Ancient and Accepted Masons of New Mexico v. Taxation*, 106 N.M. 179, 180, 740 P.2d 1163, 1165 (Ct.App. 1987). An advisory opinion resolves a hypothetical situation that may or may not arise. *See Weddington v. Weddington*, 2004-NMCA-034, 135 N.M. 198, 86 P.3d 623. The concern with issuing advisory opinions stems from the waste of resources used to resolve such hypothetical situations. *See Santa Fe Southern Railway, Inc. v. Baucis Ltd. Liability Co.*, 1998-NMCA-002, 124 N.M. 430, 952 P.2d 31. The basic purpose of this policy is to conserve adjudicative machinery for problems which are real and present or imminent, not to squander it on abstract or hypothetical or remote problems. *See New Mexico Indus. Energy Consumers v. New Mexico Pub. Serv. Comm'n*, 111 N.M. 622, 629-30, 808 P.2d 592, 599-600 (1991).

The proscription on advisory opinions extends to the administrative context, and, in fact, has been followed by the Division. In Case No. 13817, *In the Matter of the Application of Harvey E. Yates Company for an Exemption to Commission Rule 19.15.2.50(A)*, (Order No. R-12656), the OCD denied an application for an exemption to allow an applicant to use a reserve pit on the Bennett Ranch Unit in Otero County. In so holding, the Division expressly noted that the application "*was not ripe for decision*" because permit approval for the pit was still pending with the Bureau of Land Management. The Division accordingly denied the application and did not render an advisory opinion on what was at the time a hypothetical situation.

II. Chesapeake's Issue Will Be Addressed In A Rulemaking Proceeding

The position taken by Chesapeake in this case places it exclusively at odds with an industry which seeks the orderly and efficient development of hydrocarbon reserves through horizontal drilling. By way of its hypothetical dispute, Chesapeake seeks resolution of a matter that is best addressed through the rulemaking process. Seeking answers to a hypothetical question via a single adjudicatory proceeding is ill-advised. Chesapeake's application raises issues regarding horizontal drilling and development that have broad policy implications for the New Mexico oil and gas industry.

Before Chesapeake brought its Application before the Division, an industry subcommittee was formed, at the request of the Division, to formulate proposals to modify or replace the Divisions rules on deviated wells, directional wells, project areas with multiple proration units (NMAC 19.15.3.111) and other affected rules (including compulsory pooling). The subcommittee has been working well over a year and has had numerous meetings. It is anticipated that sometime an application for a rulemaking will be filed with the agency.

Therefore, the Division may address this issue either by attempting to adjudicate this specific dispute between two parties, or by allowing the rulemaking process to determine the outcome for the entire industry and the agency. As demonstrated below, rulemaking is the preferred method of deciding this question.

"The decision to make new law through rulemaking or adjudication is one that lies primarily in the informed discretion of the administrative agency." *Hobbs Gas Co. v. New Mexico Public Service Com'n*, 115 N.M. 678, 858 P.2d 54 (1993) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947)). That said, rulemaking is generally believed to be "a far better method for making public policies, especially those polices aimed at large groups," than ordermaking. Kenneth F. Warren, *Administrative Law in the Political System*, Fourth Edition, p. 272 (Westview Press, 2004). "Basically, rulemaking is preferred because it is perceived as a much more open, democratic process than order-making. That is, while agency adjudications are normally closed to interested outside parties that are not specific litigants in the dispute, the rulemaking process is open to all interested parties who want to influence the drafting of rules." *Id.* Accordingly, "a solid consensus of administrative law and public administration scholars believe that rulemaking should generally be preferred over ordermaking for promulgating public policies." *Id.; see also* Warren E. Baker, *Policy by Rule or Ad Hoc Approach--Which Should It Be?,* 22 L & Contemp Probs 658, 671 (1957) (concluding that rulemaking should be preferred over ad hoc decisionmaking).

Chesapeake's Application may result in a decision that is inconsistent with the rulemaking effort. Further, given the pendency of the significant efforts to support the rulemaking process, Chesapeake's adjudicatory application is a waste of administrative resources.

III. Chesapeake's Application Is Barred By The Doctrine Of Estoppel

Chesapeake asks the Division to cancel the APD held by COG for the reason that the wellbore will traverse acreage in which COG presently has no ownership. However, Chesapeake cannot ask this relief from the Division when it is similarly situated. Chesapeake itself has acquired approved APD's with a wellbore planned to traverse one or more tracts that it did not control. (See, for example: Orion Federal Well No. 2; API No. 30-005-27994; N/2 S/2 Sec. 13 T15S R31E; NMOCD Case No. 14208.) Chesapeake cannot have it both ways.

The position Chesapeake seeks to advance inevitably violates the doctrine of judicial estoppel. Judicial estoppel has been described as a companion doctrine to the election of remedies doctrine, *see Gens v. Resolution Trust Corp.*, 112 F.3d 569 (1st Cir. 1997), and is an equitable doctrine that "generally prevents a party from prevailing in one phase of a case on an argument and relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 748, 749 (2001). The doctrine of judicial estoppel "prevents a party who has successfully assumed a certain position in judicial proceedings from then assuming an inconsistent position, especially if doing so prejudices a party who had acquiesced in the former position." *Rodriguez v. La Mesilla Constr. Co.*, 1997-NMCA-062, ¶20, 123 N.M. 489, 943 P.2d 136. The doctrine precludes "parties from deliberately changing positions according to the exigencies of the moment," and prevents them from "playing fast and loose with the courts." *New Hampshire*, 532 U.S. at 750. Importantly, the doctrine has been consistently applied to administrative proceedings, and is known in this context as administrative estoppel. *See, e.g., Muellner v. Mars Inc.*, 714 F.Supp. 351, 357 (N.D. Ill. 1989) ("The truth is no less important to an administrative body acting in a quasi-judicial capacity than it is to a court of law.").

The threshold requirement that Chesapeake succeed in establishing its position that COG's permit application is defective has not yet been met. However, should Chesapeake successfully convince the Division that COG's permit was improperly issued because COG's wellbore will penetrate 40-acre tracts in which COG has no interest, Chesapeake would be estopped from then maintaining its APD's *despite the fact* that Chesapeake wellbore would penetrate 40-acre tracts in which Chesapeake had no interest. Judicial estoppel is supported by "general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings." *Risetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 601 (9th Cir. 1996). In these interests, the Division should not allow Chesapeake to potentially violate the doctrine of judicial (i.e., administrative) estoppel and consume Division resources promoting conflicting positions from the same nucleus of operative fact.

IV. Chesapeake's Case Will Be Rendered Moot

A non-operating interest owner's application seeking the cancellation of the operator's drilling permit is a fair indication that the non-operator will resist participation in the operator's well. Correspondingly, COG has been compelled to seek the force pooling of Chesapeake's interest in the S/2 S/2 of Section 11. (Case No. 14365; *Application of COG Operating LLC for designation of a non-standard spacing unit and for compulsory pooling, Eddy County, New Mexico*).

Case No. 14365 is scheduled for examiner hearing on August 20th and following the expected pattern, will likely result in the issuance of an order consolidating all unjoined interests in each of the 40-acre tracts comprising the 160-acre nonstandard unit in the S/2 S/2 of Section 11.[1] Long-established case

[1] Chesapeake has filed no competing application.

law holds that the typical compulsory pooling or unitization order gives the operator the right to make reasonable use of any tract within the unit. *See, e.g.,* Reamer v. Gold Oil Corp., 664 S.W.2d 456, 81 O&GR 237 (Ark. 1984); Nunez v. Wainoco Oil & Gas Co., 488 So.2d 955, 91 O&GR 246 (La. 1986); Texas Oil & Gas Corp. v. Rein, 534 P.2d 1277, 51 O&GR 64 (Okla. 1974); Dunn v. Southwest Ardmore Tuyliop Creek Sand Unit, 548 P.2d 685, 54 O&GR 515 (Okl. Civ. Applicant.1974); Delhi Gas Pipeline Corp. v. Dixon, 737 S.W.2d 96, 99 O&GR 606 (Tex.App.—Eastland 1987, writ den.

With that, all of Chesapeake's issues in Case No. 14323 will be rendered moot and it would be a waste of the Division's time and effort to consider them at all.

Wherefore, COG Operating LLC requests the Division enter its order dismissing Chesapeake's Application in this matter and providing such other relief as deemed appropriate.

Respectfully submitted,

MONTGOMERY & ANDREWS, P.A.

By: _____

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was e-mailed to counsel of record on the 6th day of August, 2009 as follows:

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