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

APPLICATION OF CHESAPEAKE ENERGY CORPORATION FOR CANCELLATION OF A PERMIT TO DRILL ISSUED TO COG OPERATING LLC, EDDY COUNTY, NEW MEXICO	DE NOVO CASE NO. 14323
APPLICATION OF COG OPERATING LLC FOR DESIGNATION OF A NON-STANDARD SPACING UNIT AND FOR COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO	DE NOVO 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. 14366
APPLICATION OF CHESAPEAKE ENERGY CORPORATION FOR CANCELLATION OF A PERMIT TO DRILL ISSUED TO COG OPERATING LLC, EDDY COUNTY, NEW MEXICO	CASE NO. 14382

MOTION TO DISMISS CASE NOS. 14323 AND 14382 FOR FAILURE TO PROVIDE NOTICE OF NEW ISSUES

COG Operating LLC, ("COG"), by and through its undersigned attorneys, Montgomery & Andrews, P.A., moves the Commission or Commission chairman issue its order dismissing the Applications of Chesapeake Energy Corporation ("Chesapeake") in Case Nos. 14323 and 14382 for failure to provide requisite notice to affected parties of new issues raised by it. Alternatively, Chesapeake should be prohibited from pursuing the new matters it has improperly raised. In support, COG states:

BACKGROUND FACTS

On May 1, 2009 and August 11, 2009, in Case Nos. 14323 and 14382, Chesapeake filed Applications that seek rescission of APDs previously approved by the BLM for COG's Blackhawk "11" Fed Com Well No. 1-H and Blackhawk "11" Fed Com Well No. 2-H. COG had accomplished the permitting work necessary to horizontally drill these wells to the Abo/Wolfcamp formation on adjoining non-standard spacing units and special project areas comprising (1) 160-acres in the S/2 S/2 (the "1-H" well) and (2) 120 acres in the NE/4 SW/4 and N/2 SE/4 (the "2-H" well), both in Section 11 T16S R28E, Eddy County, New Mexico. Copies of Chesapeake's Applications are attached as Exhibits A and B. The wells are only permitted at this point and drilling has not commenced.

In the case of the 1-H well, COG owns or controls 100% of the working interest in the S/2 SE/4 of Section 11 and since this dispute began, has obtained the participation of at least one other working interest owner (MacDonald) in the S/2 SW/4. Chesapeake also owns a working interest in the S/2 SW/4 of Section 11, as does Devon Energy. Chesapeake has not committed its interest to the well. A substantially identical situation exists on the acreage dedicated to the 2-H well.

In sum, Chesapeake's Applications assert that the APD's for the two wells were improperly certified by COG and should not have been approved by the BLM because portions of the proposed wellbores will traverse acreage where, at the time, COG had no interest. Chesapeake provided notice only of its original Applications (Exhibits A and B, attached) to COG and the other working interest

owners in the subject acreage. The docket advertisements were similarly limited.[1] Chesapeake's Applications contain no allegations that obtaining approved APD's results in waste or the violation of correlative rights. Chesapeake does not seek approval of its own APD's and it has no plans or proposals drill on the subject acreage. For the reason that Chesapeake made application to the Division for the rescission of the APD's, COG reached the logical conclusion that Chesapeake did not wish to voluntarily participate in the drilling of the two wells. Accordingly, COG made separate applications in Case Nos. 14365 and 14366 for the force-pooling of Chesapeake's interests.[2]

Introduction of the New Issue

Following a Division hearing on the merits, Chesapeake sought to introduce a new issue into the proceedings that is beyond the scope of its original Applications. It has attempted to do so without providing notice to all affected parties. Due process is violated as a result.

The first of these Applications in Case No. 143232 came up for hearing before one of the Division's examiner's on August 20, 2009, which resulted in the issuance of Order No. R-13154-A on September 21, 1009. The order cancelled the BLM's APD for the 1-H well for the stated reason that COG had no interest in the S/2 SW/4 of Section 11 where a portion of the horizontal wellbore would cross. However, COG clearly established by undisputed evidence at the hearing

[1] Additionally, the stated proximity to the geographic reference point in the advertisements is in error.
[2] All four Applications were subsequently consolidated by the Commission Chairman's order of October 13, 2009.

that it did indeed have the participation of an interest owner in each of the subdivisions to be traversed by the wellbore. These circumstances, in our view, mandated the denial of the Chesapeake's Application. Consequently, by letter of September 23, 2009, COG promptly sought correction of Order No. R-13154-A and the Division's reinstatement of the APD to conform with the evidence. (September 23, 2009 correspondence and attachments, Exhibit C, attached.)

COG's September 23rd request resulted in a post-hearing conference held on September 29th with the hearing examiner and counsel to discuss the matter. When counsel for COG pointed-out the evidence of voluntary well participation by one of the working interest owners in the S/2 SW/4 (Mr. MacDonald), Chesapeake objected to reinstatement contending for the first time that Mr. MacDonald would be prevented from making the election to participate in COG's well because, in Chesapeake's opinion, a 1998 operating agreement deprived him of that authority. Chesapeake did not raise this issue at the August 20th hearing on the merits and did not introduce an operating agreement into evidence. The substance of the post-hearing conference is set forth in counsel's October 2, 2009 letter to the examiner (Exhibit D).

Following the post-hearing conference, on October 6, 2009, Chesapeake filed its "Motion To Supplement The Record With Additional Evidence Including A Joint Operating Agreement" (Exhibit E, attached), in which it offered "Supplemental Argument". In short, Chesapeake sought to interject a new issue into its case:

"MacDonald did not have the right to sign COG's well proposal letter because he relinquished his executive rights and operating rights which are controlled by Chesapeake as the operator under the JOA."[3]

(Motion to Supplement The Record, pg. 4, para. 14 a.)[4] Notably, neither MacDonald nor Devon were notified of Chesapeake's October 6, 2009 motion.

Chesapeake now asks the Commission to revoke the voluntary election of a working interest owner to participate in COG's Blackhawk 11 Fed. Com 1-H well. It further asks the Commission to declare that only Chesapeake, as operator of the Morrow well, may make the election to voluntarily participate or refuse to participate in the Abo/Wolfcamp wells on behalf of the other interest owners under the JOA. To do so, it seeks to have the Commission interpret the provisions of the 1998 joint operating agreement.

These issues are not properly before the Commission. Chesapeake is attempting to introduce new, substantive disputes into the proceeding and asks for relief that is far beyond the scope of its original Applications and notice. Without question, the rights of Mr. MacDonald, an interested party, will be adversely affected if Chesapeake is allowed to pursue such a remedy. Devon is similarly situated. Chesapeake, however, has failed to notify or otherwise apprise Mr.

---

[3] Under the JOA, Chesapeake is the operator of a Morrow formation well in the W/2 of Section 11. The SE/4 is not subject to the JOA.

[4] Subsequent to Chesapeake's post-hearing Motion To Supplement The Record With Additional Evidence Including A Joint Operating Agreement, COG elected to file its Application For Hearing DeNovo in the matter and there were no further proceedings at the Division.

McDonald or Devon of the new relief it seeks, thus depriving them of fundamental due process.

Affected Parties Are Entitled To Notice of All Actual Issues Before The Commission

"Administrative proceedings must conform to fundamental principles of justice and the requirements of due process of law. A litigant must be given a full opportunity to be heard with all rights related thereto." *Uhden v. New Mexico Oil Conservation Commission*, 112 N.M. 528, 530, 817 P.2d 721, 723 (1991). "The essence of justice is largely procedural." *Id.*

An important requirement of procedural due process of law is that of notice to affected parties of the issues to be determined. *See, e.g., In re Laurie R.*, 107 N.M. 529, 534, 760 P.2d 1295, 1300 (Ct. App. 1988) ("Procedural due process requires notice to each of the parties of the issues to be determined and opportunity to prepare and present a case on the material issues"). As the New Mexico Supreme Court has held, the notice procedures required by the Oil and Gas Act, §§ 70-1-1 et seq. and the Division's rules, 19.15.1 through 19.15.39 NMAC, must be followed to the letter. *See Johnson v. New Mexico Oil Conservation Commission*, 1999-NMSC-021, ¶ 18, 127 N.M. 120, 978 P.2d 327 (citing *Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶ 5, 125 N.M. 786, 965 P.2d 370 (concluding that an administrative agency "is required to act in accordance with it own regulations."); *see also Giangreco v. Murlless*, 1997-NMCA-061, 123 N.M.

498, 943 P.2d 532 (holding that statutory notice requirements require strict compliance).

The relevant statutory notice provision in the Oil and Gas Act is contained in Section 70-2-23. Section 70-2-23 imposes a "reasonable notice" requirement for all of the agency's hearings. This section provides, in pertinent part:

> Except as provided for herein [i.e., exceptions for emergencies], before any rule, regulation or order, including revocation, change, renewal or extension thereof, shall be made under the provisions of this act, a public hearing shall be held at such time, place and manner as may be prescribed by the division. The division shall first give *reasonable notice* of such hearing . . ..

NMSA 1978, § 70-2-23 (emphasis added).

The definition of "reasonable notice" is fleshed out in the Division's rules. Section 70-2-7 of the Oil and Gas Act provides that the Division "shall prescribe by rule its rules of order or procedure in hearings or other proceedings before it under the Act." NMSA 1978, § 70-2-7. It is pursuant to the authority conferred by this section that the Commission has adopted its rules establishing notice requirements for hearings before the Division and Commission.

The notice requirements for an adjudicatory proceeding are found at 19.15.4.9 NMAC. In pertinent part, notice must include "a reasonable identification of the adjudication's subject matter that alerts persons who may be affected if the division grants the application." 19.15.4.9.A(6). It follows from this language that where a party seeks to inject a new issue into a proceeding, notice to affected persons alerting them to the new issue is required before the issue is properly before the Commission or Division. This rule finds support in New

Mexico case law. *See, e.g., Werner v. Wal-Mart Stores, Inc.*, 116 N.M. 229, 861 P.2d 270 (Ct. App. 1993) (holding that it would be unfair to make a ruling without giving plaintiff an opportunity to prepare her presentation to the court on the matter where an issue was raised sua sponte by the district court without notice to plaintiff); *In re Application of Oppenheim*, 2007-NMSC-022, ¶ 32, 141 N.M. 596, 159 P.3d 245 (holding that adequate due process was afforded where Board went to great lengths to assure that litigant knew what issues were being considered and was given every opportunity to provide an explanation); *but see National Council on Compensation Ins. v. New Mexico State Corp. Comm'n*, 107 N.M. 278, 283-84, 756 P.2d 558, 563-64 (1988) (would-be participant need only have notice of the hearing, not each issue that may be considered).

Where the fundamental notice requirements of the Oil and Gas Act and its implementing regulations are not met, any order entered as a result of such a proceeding is rendered null and void as to the affected persons. *See Johnson, supra*, ¶ 31. Accordingly, failure to provide proper notice of all substantive issues to affected persons in this adjudication risks having any resulting order deemed void as against those persons. These circumstances warrant dismissal of Chesapeake's Applications.

Wherefore, COG Operating LLC requests the entry of an order dismissing Chesapeake's Applications in this matter or, alternatively, prohibiting Chesapeake from pursuing the new issues it has improperly raised.

Respectfully submitted,

MONTGOMERY & ANDREWS, P.A.

By: _____

J. Scott Hall
Attorneys for COG Operating LLC.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was e-mailed to counsel of record on the 12th day of February, 2010 as follows:

W. Thomas Kellahin
Kellahin & Kellahin
706 Gonzales Road
Santa Fe, NM 87501
tkellahin@comcast.net

James Bruce, Esq.
P. O. Box 1056
Santa Fe, NM 87504
jamesbruc@aol.com

Earl E. Debrine Jr., Esq.
Modrall, Sperling, Roehl, Harris & Sisk, PA
P.O. Box 2168
Albuquerque, NM 87103-2168
edebrine@modrall.com

_____
J. Scott Hall

00161609