

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

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

Case No. 14558  
Order No. R-7900-C  
De Novo

APPLICATION OF MARBOB ENERGY CORPORATION  
(NOW COG OPERATING LLC) FOR VERTICAL  
EXPANSION OF THE BURCH-KEELY UNIT,  
EDDY COUNTY, NEW MEXICO

COG OPERATING LLC RESPONSE TO MOTION FOR PARTIAL STAY

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COG Operating LLC (COG) responds to the Motion for Partial Stay filed by ConocoPhillips Company (ConocoPhillips) by stating both the Director of the Oil Conservation Division (OCD) and the Oil Conservation Commission should deny the Motion. In support of denying the Motion, COG states as follows:

1. ConocoPhillips failed to follow the requirements of OCD Rule 19.15.4.23.B in that it did not file or deliver to counsel of record a proposed stay order with the Motion as required by the rule.

2. ConocoPhillips failed to meet the requirements for a stay of an agency decision during an administrative appeal. The Court of Appeals in *Tenneco Oil Co. v. NM Water Quality Control Commission*, 105 NM 708, 736 P.2d 986 (NMCA 1986) established the conditions that must be considered in determining if a stay will be granted for an order of an administrative agency: "These conditions involve consideration of whether there has been a showing of : (1) a likelihood that applicant will prevail on the merits of the appeal; (2) a showing of irreparable

harm to the applicant unless the stay is granted; (3) evidence that no substantial harm will result to the other interested persons; and (4) a showing that no harm will ensue to the public interest.” *Tenneco* at 710 and 988.

ConocoPhillips only attempts to make an assertion on one of these points when it claims any drilling close to the 5,000 foot mark will “indisputably impair and injure” ConocoPhillips. Presumably this statement is intended to address the second condition, irreparable harm, but it fails. It is a mere assertion and not a showing of irreparable harm. *Tenneco* requires more: “Mere allegations of irreparable harm are not, of course, sufficient. A showing of irreparable harm is a threshold requirement in any attempt by applicants to obtain a stay.” *Id.*

ConocoPhillips should have submitted affidavits in support of its request, but it did not do anything other than merely offer to demonstrate at the hearing that its proposal for drilling restrictions is appropriate. In that case, the Director and Commissioners also should wait for the hearing to consider the stay.

The Court of Appeals in *Tenneco* also said, “However, in addition to a showing of irreparable harm, to obtain a stay of administrative action pending appellate review, an applicant must make a showing as to the other three conditions.” *Id.* The other three conditions required by the *Tenneco* decision are not even addressed by ConocoPhillips. Perhaps that is because its proposed restriction would mean no drilling would take place in the area which would either be a waste of the resource (as testimony in the hearing and the Order of the Division support) or it could result in the area being drained by wells in ConocoPhillips’ deep unit and, therefore, violate COG’s correlative rights. The restriction would cause harm to COG and to the public’s interest in preventing waste and upholding correlative rights and these factors are to be considered by the Director and Commissioners in exercising their discretion to grant or deny a request for a stay. *Id.*

The remaining condition to consider according to the *Tenneco* decision is the likelihood of ConocoPhillips prevailing in this matter. *Id.* Again ConocoPhillips does not address the issue at all—it does not explain why it did not prevail before the Division, why it offered no evidence,

and what evidence, if any, it intends to bring forth in the future to support its opposition to the unit expansion. Again, the failure to make a showing of the conditions set forth in *Tenneco* justify denying the Motion.

3. The Motion should also be denied because it covers all wells regardless of the specific depth of the well, its pressure, and the porosity factors in the formation where it will be drilled, or even whether it is a vertical or horizontal well. It draws no distinctions based on the facts associated with each well. The proposed stay is overly broad and is not supported by any facts in the record. ConocoPhillips should bring its case as a challenge to individual wells so that an analysis can be made on the facts associated with each proposed well. ConocoPhillips should raise those concerns in response to applications for permits to drill (APDs) for wells in the expansion area of the unit.

4. The Motion also misconstrues the nature of Order No. R-7900-C. The Order addresses only the vertical expansion of the unit boundary and is consistent with Statutory Unitization Act, Sections 70-7-1 to 70-7-21 NMSA 1978, which allows the Oil Conservation Division to determine the vertical limits of a unit. ConocoPhillips is in error when it asserts that, “[t]he Division order permits Applicant to drill....” Gaining authority to drill is a separate process under OCD Rules. Thus, ConocoPhillips’ claim that COG presented “no evidence” regarding drilling or fracturing, while not correct, is not required for the pending case. Testimony on fracturing was offered by Ken Craig of COG. See, Hearing Transcript in Case No. 14558, October 28, 2010, page 49. ConocoPhillips is attempting to change the basic nature of the case, setting the limits of a unit, into an examination of drilling methodologies in hopes of having the Oil Conservation Commission set vertical buffers for all well locations. ConocoPhillips should make that argument in a petition for rulemaking where other parties impacted may participate in a full hearing on the novel proposal for non-drilled buffers along vertical ownership lines. Establishing such a precedent without general notice is not appropriate.

5. Finally, the Motion should be denied because granting it would cause the Director or the Commissioners to exceed the scope of the matter in front of them. During the hearing Ramon Reyes of COG testified that Exhibit 11 indicates that from west to east within the Burch-Keely

Unit the expansion area changes from an addition of over 550 feet to an addition of only 260 feet. Case No. 14558, Hearing Transcript, October 28, 2010, page 29. The ConocoPhillips proposed restriction of no wells within 330 feet above the 5,000 foot mark would reach into the designated unit area existing prior to the expansion of the vertical boundary in this case. Under the guise of a stay in a de novo appeal, ConocoPhillips would, in effect, be introducing restrictions in unit areas approved years ago. The Partial Stay would reach areas in the Burch-Keely Unit not at issue in the expansion application and would result in an order beyond the matters in the application.

### CONCLUSION

The points above indicate there are many reasons for the Director and Commissioners to deny the Motion for a Partial Stay. It is a matter of discretion for the Director and the Commissioners and in this case ConocoPhillips has not begun to meet the requirements to obtain a stay. The stay should not be granted.

Respectfully submitted this 9th day of May, 2011.

Beatty & Wozniak, P.C.



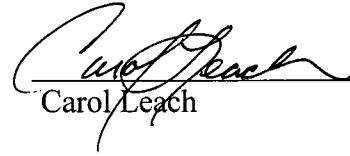
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ATTORNEYS FOR COG OPERATING LLC

CERTIFICATE OF SERVICE

I certify on the 9<sup>th</sup> day of May, 2011, I sent notice of this filing to counsel of record in this proceeding.

  
Carol Leach