NEW MEXICO ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT

BILL RICHARDSON
Governor
Joanna Prukop
Cabinet Secretary

Lori Wrotenbery
Director
Oil Conservation Division

January 6, 2004

Mr. David Catanach
Hearing Examiner
Oil Conservation Division
Energy, Minerals and Natural Resources Department
1220 S. St. Francis Drive
Santa Fe, NM 87505

Hand delivered

Re: Case No. 13142
Application of the New Mexico Oil Conservation Division for an Order Requiring Maralo, LLC to Remediate Hydrocarbon Contamination at an Abandoned Well and Battery Site; Lea County, New Mexico.

Dear Mr. Catanach,

Enclosed please find the Oil Conservation Division's draft order in the above-captioned case. For your convenience, the factual findings in the draft order include references to the testimony or exhibits supporting the finding.

Very truly yours,

Gail MacQuesten
Assistant General Counsel

ec, with enclosure:
W. Thomas Kellahin, kellahin@earthlink.net
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Draft Order
Submitted by the OCD
January 6, 2004

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

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

CASE NO. 13142
ORDER NO. R-

APPLICATION OF THE NEW MEXICO OIL CONSERVATION DIVISION, THROUGH THE ENVIRONMENTAL BUREAU CHIEF, FOR AN ORDER REQUIRING MARALO, LLC TO REMEDIATE HYDROCARBON CONTAMINATION AT AN ABANDONED WELL AND BATTERY SITE; LEA COUNTY, NEW MEXICO.

ORDER OF THE DIVISION

BY THE DIVISION:

This case came on for hearing at 3:47 p.m. on November 20, 2003, at Santa Fe, New Mexico, before Examiner David R. Catanach.

NOW, on this ____ day of January, 2004, the Division Director, having considered the testimony, the record, and the recommendations of the Examiner,

FINDS THAT:

(1) Due public notice has been given, and the Division has jurisdiction of this case and its subject matter.

(2) The applicant, the New Mexico Oil Conservation Division ("the Division"), seeks an order requiring Maralo LLC ("Maralo") to remediate hydrocarbon contamination at an abandoned well and battery site located in Unit A, Section 36, Township 25 South, Range 36 East, Lea County, New Mexico ("the site").

(3) Maralo LLC is the operator of record for the site. [Tr. 42]

(4) The Division and Maralo appeared through counsel and presented evidence. Surface owner Jay Anthony also appeared through counsel and presented evidence.

(5) The contamination issue first came to the Division's attention in October, 1999, when surface owner Jay Anthony filed a complaint with the Hobbs District Office. [Tr. 8-9; Ex. 1]

(6) An environmental inspector from the Hobbs District Office investigated the site in October 1999 and found "asphalty material" in an area surrounding a former tank battery associated with the Humble State Number 3 well. [Tr. 9; Ex. 1]

(7) Subsequent investigations found chunks of asphalt ranging from smaller pieces up to softball size or larger covering an area that had been cleared. It appeared that the material had been spread across or disked across the area. [Tr. 14, 36; Ex. 5 photos]

(8) In addition to the area surrounding a former tank battery, the site also contained three pits, with hard, asphaltic oil rims around each pit. It appeared that the pits had been covered or buried at some point in time, but that the oil had resurfaced around the rims. One pit, located to the south of the former tank battery, was approximately 75 feet square. Two other pits were located to the west of the former tank battery and were approximately 150 feet square. [Tr. 13-14, 18; Ex. 6]

(9) In November 1999, the environmental inspector from the Hobbs District Office wrote to Maralo LLC, requesting that Maralo perform an investigation to determine the extent of contamination at the location and submit a site assessment and/or remediation plan. [Tr. 10; Ex. 1]

(10) Maralo did not conduct an investigation or submit a site assessment or remediation plan in response to that letter. [Tr. 11]

(11) Water samples taken by surface owner Jay Anthony from a water well located adjacent to the former tank battery at the site showed elevated chlorides. Mr. Anthony submitted the results to the Division. [Tr. 11-12]

(12) The Division's Environmental Bureau then conducted its own sample of the well water and found chloride contamination above the New Mexico Water Quality Control Commission standard. The sample did not confirm any petroleum contamination of the water. [Tr. 13]

(13) In April 2001, after testing the well water, the Division sent a second letter to Maralo requesting that they submit an abatement plan pursuant to 19.15.1.19 NMAC (Rule 19). Rule 19 focuses on prevention and abatement of water pollution. [Tr. 15, 46]

(14) Maralo did not submit an abatement plan in response to that letter. [Tr. 15]

(15) The Division expanded its investigation to possible soil contamination in the area of the former tank battery and the three pits located in the tank battery area. [Tr. 16]

(16) In July 2001, the Division took one soil sample from the surface of the tank battery area and five soil samples from four different locations in the pit areas. The soil samples taken from the pit areas were taken at various depths ranging from the surface to a depth of approximately eight feet. [Tr. 16, 18-20; Ex. 3]

(17) In June 2002, the Division drilled two boreholes for soil samples. One of the boreholes was located in the "North area" near the tank battery, and the other borehole was located in the "Southwest area" in one of the pits. Samples were taken at depths ranging from two feet to approximately 28 feet. [Tr. 17, 28; Ex. 4]

(18) In March 2003, surface owner Jay Anthony hired a private company to evaluate soil contamination at the site. The company drilled two new boreholes, taking samples at various depths to a final depth of approximately eighty feet. One of these boreholes was located near the borehole drilled by the Division in the "North area." The other borehole was located to the south. These two boreholes were not drilled in the pit areas. [Tr. 17, 32-33; Ex. 5]

(19) The soil samples taken in the three investigations were tested for volatile organic compounds, total petroleum hydrocarbons ("TPH"), and chlorides. [Exs. 3, 4, 5]

(20) All soil samples showed relatively low levels of the volatile organic compounds benzene, toluene, ethylbenzene, and M, P, O-xylene ("BTEX"). [Exs. 3, 4, 5]

(21) The Division uses a three-tiered system for evaluating acceptable levels of total petroleum hydrocarbons (TPH), based on the depth to groundwater, the distance to water wells, and the distance to surface water bodies:

a) In a high-risk area, the maximum acceptable amount of TPH is 100 milligrams per kilogram.

b) In a moderate-risk area, the maximum acceptable amount of TPH is 1000 milligrams per kilogram.

c) In a low-risk area, the maximum acceptable amount of TPH is 5000 milligrams per kilogram. [Tr. 21]

(22) The Division would apply the 5000-milligrams per kilogram standard to this site, based on the depth to groundwater in the area of approximately 190 feet. [Tr. 22, 84]

(23) The three-tiered system for evaluating acceptable levels of TPH was developed in 1993 for use in closure of unlined pits as well as for remediation of subsurface spills and

releases. Prior to 1993, the guidance level of TPH allowed by the Division was 100 mg/kg in all circumstances. [Tr. 21, 23]

(24) The highest levels of TPH were found in a sample taken at a depth of 0 to 12" in the area of the former tank battery: 35,700 mg/kg. [Tr. 24; Ex. 3]

(25) All but eight of the 27 remaining soil samples showed levels of TPH exceeding 5000 mg/kg. Three of the 27 remaining samples showed levels of TPH exceeding 20,000 mg/kg. Samples exceeding the 5000 mg/kg level were found as deep as 40 feet. Although the two samples taken at 80 feet did not exceed the 5000 mg/kg standard, they did show significant levels of TPH: 2860 mg/kg and 1370 mg/kg. [Exs. 3, 4, 5]

(26) None of the 28 soil samples showed significant levels of chloride. All samples found levels of chloride well below the state groundwater standard. Samples taken in the 2001 investigation, which tested samples from the surface to a depth of approximately 8 feet, showed chlorides at less than 10 mg/kg or less than 50 mg/kg. [Ex. 3, 4, 5; Tr. 25, 29,35]

(27) By letter dated April 22, 2003, the Division rescinded its prior request for a remediation plan under Rule 19 because it did not have a clear link between the chlorides found in the water taken from the well and the contamination at the pits and battery site. [Tr. 46-47; Ex. 9]

(28) Instead, the Division's April 22 letter requested a plan for remediation of the site to cure contamination caused by a violation of 19.15.5.313 NMAC (Rule 313), which provides, in relevant part, that "[w]ells producing oil shall be operated in such a manner as will reduce as much as practicable the formation of emulsion and basic sediments. These substances and tank bottoms shall not be allowed to pollute fresh waters or cause surface damage." The Division cited Rule 313 because it appeared that oily materials and tank bottoms had been placed in the pits and the area surrounding the tank battery, and were causing surface damage. [Tr. 47; Ex. 9]

(29) To date, Maralo has refused to submit a remediation plan. [Tr. 47-49; Ex. 10]

(30) The Division's application for a remediation order expanded the basis for the order to include allegations of a violation of 19.15.5.310 NMAC (Rule 310), which provides, in relevant part, that "[o]il shall not be stored or retained in earthen reservoirs, or in open receptacles."

(31) The Division's expert hydrologist testified that, in his opinion, the pits at the site contained oily material, most likely waste oils and possibly tank bottoms. He based his opinion on the following:

a) The high levels of TPH found in the soil samples taken from the pits;

b) The thick rims of asphaltic material surrounding the pits, which suggest a large amount of hydrocarbons in the pits;

c) His observations of similar pits at tank battery locations in Lea County. [Tr. 36-38, 80]

(32) The Division's expert hydrologist testified that, in his opinion, the pits at the site were not used for produced water. He based his opinion on the following:

a) Division water samples from the relevant formation (the Jalmat-Yates-Seven Rivers) show significant levels of chloride: 5000 mg/kg. He acknowledged, however, that wells producing from the same formation may have different levels of chloride. [Tr. 55]

b) Typically, chlorides concentrate up towards the surface because they wick up to the top three feet and form a salty crust. They would also be found in the soil profile. They would not evaporate or dissipate.

c) He would expect to find elevated levels of chloride in the soil if produced water with any significant chloride content had been placed in the pits.

d) None of the soil samples from the pit areas (or the areas surrounding the tank batteries) showed significant chlorides. Soil samples taken from the surface to an 8-foot depth in the pit areas showed negligible chlorides. [Tr. 37-38, 74-75, 80]

(33) The Division's expert hydrologist testified that, in his opinion, the source of the asphaltic material found in the area of the tank battery was either tank bottom material that had been disked and spread on the site, or leaks and spills around the tank batteries. He based this opinion on the following:

a) The location of the asphaltic material in the vicinity of the tank batteries;

b) The large amount of asphaltic material found at the site.

c) Observations of other tank battery sites in Lea County. [Tr. 38]

(34) The Division's expert hydrologist testified that the low levels of BTEX indicated that hydrocarbons had been in the area for some period of time. It was not possible, however, to pinpoint the time when the hydrocarbons had been introduced at the site. [Tr. 38]

(35) The Division's expert hydrologist disagreed with the suggestion made by Maralo's counsel that a pipeline leak could have caused the contamination at the site because a pipeline leak would not have created the rims of hydrocarbons surrounding the pits, or the high asphaltic contamination spread out over the site. No evidence of a pipeline leak was introduced by any party. [Tr. 75]

(36) The Division does not issue permits for tank batteries or pits, or keep files on tank batteries or pits. Information on their operation, if available, is found in the well file associated with the property on which they are located. [Tr. 39]

(37) The tank battery and pits at this site are located on the same lease as the Humble No. 3 Well., which is located at or near the battery site. [Tr. 39-40]

(38) The original operator, Ralph Lowe, drilled the well in 1944. Maralo Inc. became operator in 1974, some time after Mr. Lowe's death. Maralo Inc. later changed its name to Maralo LLC. Maralo LLC is the current operator of record for the Humble No. 3 Well. [Tr. 40, Ex. 11]

(39) Mr. William B. Hunt, retired operations manager for Maralo, testified as follows regarding the operation of the site:

a) He started work with Mr. Lowe in 1955 working on a drilling rig and worked his way up to assistant production foreman. [Tr. 90-91]

b) He was not familiar with the operations at the site of the Humble State #3 prior to 1955. [Tr. 102]

c) In 1974, when Maralo Inc. was formed, he began to work for that company. [TR. 91]

d) From 1955 to 1981 he was responsible for 50 or 60 wells in the area. [TR. 95]

e) During that time period, he would check the site of the Humble State #3 if something caught his attention. [Tr. 97]

f) The tank battery at the site was used for oil from the Humble State No. 3 well and the Shell State "A" well. [Tr. 101, 104]

g) When the tanks ran over, the company would pick up the oil and put it back into the tank. [Tr. 94]

h) Tank bottoms were never put into the pits or disposed of at the site. [Tr. 94]

i) Until 1968, the pits at the site were used for produced water from three wells: the Shell State A, the Humble State #3, and the Humphries. In 1968 the company began using a non-producing oil well, the Humble State No. 1, as a disposal well for produced water. [Tr. 93, 100, 106-107]

j) He believed the chlorides in the produced water were low, because the water would freeze, and the company had trouble separating the oil and the water. [Tr. 92-93]

k) When the pits developed an oily buildup, the company would have a vacuum truck pick it up and put it back into the tank or haul it away. [Tr. 93]

l) Maralo never used the pits. [Tr. 95]

m) In 1981 Mr. Hunt's job changed from production to drilling, and he moved to Midland. [Tr. 99-100, 104]

n) Maralo plugged and abandoned the Humble Well No. 3 in 1988. [Tr. 90]

o) After 1981, Mr.Hunt had no responsibility for overseeing this well, so he had no responsibility for the well for the last seven years of its operation. [TR. 100]

(40) Maralo admitted that the pits had been used for the disposal of produced water, and that the water contained hydrocarbon emulsions and oil. [Tr. 93]

(41) Maralo did not deny that the oil and emulsions caused the surface damage at the site.

(42) According to correspondence from Maralo and Maralo's attorney, Maralo remediated the site by disking in 1993. [Tr. 44-45; Exs. 7, 8]

(43) Maralo's theory, developed through Hunt's testimony and cross-examination of the Division's expert hydrologist, was that the contamination at the site was caused by prior operator Ralph Lowe. According to Maralo's testimony, leaks and spills caused the contamination at the site of the former tank battery, while disposal of produced water containing hydrocarbon emulsions caused the contamination in the pits. [Tr. 53-61, 65, 76-77, 93-94, 101-102]

(44) Surface owner Jay Anthony testified that he moved to the area in 1985, and recalls seeing a large tank battery site with signs of spills and oily dirt running though the location. [Tr. 110-111]

(45) Mr. Anthony testified that he is not able to use the site, because plants will not grow on it. [Tr. 113]

(46) From the evidence presented, hydrocarbon contamination exists at the pits on the site. The contamination was caused by oil being put into the pits (under the Division's theory) or as the consequence of using the pits for produced water containing oil and hydrocarbon emulsions

(as admitted in Maralo's testimony). Under either causation scenario, there has been a violation of Division rules:

a) 19.15.5.310.A NMAC (Rule 310A) provides, in relevant part, "Oil shall not be stored or retained in earthen reservoirs, or in open receptacles."

b) 19.15.5.313 NMAC (Rule 313) provides, in relevant part, "Wells producing oil shall be operated in such a manner as will reduce as much as practicable the formation of emulsion and basic sediments. These substances and tank bottoms shall not be allowed to pollute fresh waters or cause surface damage."

(47) From the evidence presented, hydrocarbon contamination exists at the former tank battery on the site. The contamination was caused by improper disposal of tank bottoms (under the Division's theory) or by spills and leaks (as admitted in Maralo's testimony). Under either causation scenario, there has been a violation of Division rules:

a) Rule 313 provides in relevant part that tank bottoms shall not be allowed to cause surface damage.

b) A leak or a spill of oil at the tank battery would constitute a "release" as defined in 19.15.1.7.R(3) NMAC. Division rules provide that "the responsible person must complete Division approved corrective action for releases which endanger public health or the environment. Releases will be addressed in accordance with a remediation plan submitted to and approved by the Division or with an abatement plan submitted in accordance with Section 19 of 19.15.1 NMAC." 19.15.3.116.D NMAC. "Responsible person" is defined by rule as "the owner or operator who must complete Division approved corrective action for pollution from releases." 19.15.1.7.R(5) NMAC.

(48) An order requiring Maralo to remediate the contamination at the site is within the authority of the Division for the following reasons:

a) Maralo is the operator of record for the site.

b) The Division's regulations make the operator responsible for location cleanup, 19.15.3.101.L NMAC (Rule 101L), requiring the operator to "take such ... measures as are necessary or required by the Division to restore the location to a safe and clean condition." 19.15.4.202.B(3)(d) NMAC. This responsibility exists independent of proof of any other rule violation.

c) Requiring the operator of record to remediate hydrocarbon contamination at the site is within the broad powers of the Oil Conservation Commission, and the Division, to prevent waste, and protect the environment

from waste associated with oil and gas operations. See NMSA 1978, sections 70-2-2, 70-2-3(B), 70-2-6, 70-2-11(A), 70-2-12(B)(21) and 70-2-12(B)(22).

d) Neither the Oil and Gas Act nor the regulations enacted pursuant to that Act limit responsibility to the entity operating the site at the time the act or acts causing the initial contamination occurred.

e) Neither the Oil and Gas Act nor the regulations enacted pursuant to that Act impose any statute of limitations on the Division's ability to order remediation.

f) Regardless of whether Maralo, or a prior operator, introduced the hydrocarbons to the soil at the site, the hydrocarbons exist in the soil now and continue to contaminate the soil and cause surface damage at the site.

IT IS THEREFORE ORDERED THAT:

(1) Thirty days after entry of this order, Maralo LLC shall submit to the Environmental Bureau of the Division for its approval a work plan to delineate the lateral and vertical extent of the hydrocarbon contamination existing at the site of the tank battery and pits located in Unit A, Section 36, Township 25 South, Range 36 East, in Lea County, New Mexico and to remediate the contamination found;

(2) Within six months after the Environmental Bureau's approval of the work plan, Maralo LLC shall complete remediation of the site in accordance with the work plan; and

(3) Jurisdiction of this case is retained for the entry of such further orders as the Division may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

LORI WROTENBERY
Director

SEAL

KELLAHIN & KELLAHIN
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January 6, 2004

HAND DELIVERED

Mr. David R. Catanach, Hearing Examiner
Oil Conservation Division
1220 South Saint Francis Drive
Santa Fe, New Mexico 87505

Re: **Maralo's proposed order**
NMOCD Case 13142
Application of the Division for an order requiring Maralo, LLC to remediate hydrocarbon contamination at an abandoned well and battery site (Jay Anthony Complaint), Lea County, New Mexico

Dear M. Catanach:

On behalf of Maralo, LLC, and in association with Rick Strange, Esq, please find enclosed our proposed order for you consideration in this matter.

Very truly yours,

W. Thomas Kellahin

CC:
Gail MacQuesten, Esq.
Attorney for the Division
David Sandoval, Esq.
Attorney for Jay Anthony
Rick Strange, Esq.
Attorney for Maralo, LLC.

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

APPLICATION OF THE NEW MEXICO OIL CONSERVATION DIVISION, THROUGH THE ENVIRONMENTAL BUREAU CHIEF, FOR AN ORDER REQUIRING MARALO, LLC TO REMEDIATE HYDROCARBON CONTAMINATION AT AN ABANDONED WELL AND BATTERY SITE; (Jay Anthony Complaint) LEA COUNTY, NEW MEXICO

CASE 13142

MARALO, LLC'S
PROPOSED
ORDER OF THE DIVISION

BY THE DIVISION:

This case came on for hearing at 8:15 a.m. on November 20, 2003, At Santa Fe, New Mexico, before Examiner David R. Catanach.

Now, on this ___day of December, 2003, the Division Director, having considered the testimony, the record, and the recommendations of the Examiner,

FINDS THAT:

(1) Due public notice has been given and the Division has jurisdiction of this case and the subject matter.

SUBJECT MATTER AND PARTIES

(2) The Division's Environmental Bureau Chief ("EBC"), as the applicant, seeking a Division order requiring Maralo, LLC. ("Maralo") to remediate alleged soil contamination based upon its claim that Maralo is the current operator and violated Division Rules 310 and 313 and therefore is the responsible person to remediate low risk level soil contamination at the tank battery facility at the former Humble State Well No. 3 site located within Unit A of Section 36, Township 25 South, Range 36 East in Lea County, New Mexico.

(3) Maralo claims that it complied with Division Rule 310 and 313 and that it is not the current operator of this facility and is not a responsible person because it ceased all operations on the Humble State Well No. 3 site in 1988 and plugged the well and abandoned the site all in accordance with the Division rules applicable at the time.

(4) Jay Anthony, appeared with counsel, as the owner of the surface within Unit A of this section in support of the applicant. This case was filed by the EBC based upon a compliant filed on October 6, 1999 by Mr. Anthony.

ELEMENTS OF PROOF

(5) This case is the first time such a case has come to hearing before the Division and constitutes a "precedent". **(See Transcript page 76 lines 9-13)** Based upon a review of the testimony of Mr. William Olson, EBC' expert witness, the Division is adopting the following "Elements of Proof" that:

a. there is soil contamination at the former tank battery facility for the abandoned Humble State Well No 3, located in Unit A of Section 36, T25S, R36E, Lea County, New Mexico; **(See Transcript page 47, lines 5-9)**

b. the levels of soil contamination are in excess of current applicable standards; **(See Transcript page 28, lines 22-24)**

c. the soil contamination was caused by placing "tank bottoms" in the pits associated to the Humbler State Well No. 3; **(See Transcript page 36, lines 24-25 and page 37, lines 1-10)**

d. the soil contamination constitutes a violation of Division Rule 313; **(See Transcript page 50, lines 19-23)**

e. Maralo is the current or most recent operator of the former tank battery associated with the Humble State Well No 3. in Unit A of this section; **(See Transcript page 40, lines 4-17)**

f. Maralo is the "responsible person" for the soil contamination and should be required to remediate the contamination. **(See Transcript 66, lines 17-19)**

FACTUAL BACKGROUND

(6) This action concerns an abandoned oil and gas production facility located at the former site of the Humble State Well No. 3 at which all the equipment has been removed, but the site was not remediated in accordance with current Division rules and guidelines. **See EBC's response to Maralo motion to dismiss.**

(7) The EBC submitted evidence demonstrating that:

a. there are the remains of 3 unlined surface pits and 2 tank battery pits (only one pit is associated with the Humble State Well No. 3) within Unit A; **(See located plat attached to EBC Exhibit 3)**

b. the tank battery pit associated with the Humble State Well No. 3 appears to have been used for containment of emulsions, basic sediments and tank bottoms (collectively "tank bottoms"); **(See Transcript page 36, lines 24-25 and page 37, lines 1-10)**

c. it is not now possible to determine the use of the 3 unlined surface pits or the volumes of produced water and associated hydrocarbons disposed into these pits; **(See Transcript page 38, lines 15-18; page 14, lines 17-19 and page 43, lines 14-21)**

d. it is not now possible to determine when the 2 tank batteries were used; **(See Transcript page 38, lines 23-25 and page 43, lines 14-21)**

e. laboratory analyses of soil samples from the various pits contain up to 25,400 parts per million (ppm) of total petroleum hydrocarbons (TPH); up to 0.179 ppm of benzene; up to 0.432 ppm of ethylbenzene, and up to 0.921 ppm of xylene evidencing low risk level of shallow soil contamination; **(See EBC Exhibit 3 & 4 and Transcript page 21, lines 21-24; page 22, lines 19-21; page 62, lines 5-25 and page 63, lines 1-18)**

f. There is no evidence that the abandoned water well located within Unit A has been contaminated by hydrocarbons; **(See EBC Exhibit 7 and Transcript page 11, lines 5-10)**

(8) Maralo submitted evidence by direct testimony and cross-examination demonstrating that:

a. On July 23, 1945, Ralph Lowe drilled the Humble State Well No. 3 at a location 660 feet FNL and 660 feet FEL (Unit A) of Section 3. **(See EBC Exhibit 11)**

b. Ralph Lowe installed 3 unlined surface pits that, in accordance with the custom and practice of the industry, were used for surface disposal of produced water and associated hydrocarbons; **(See Transcript page 92, lines 11-17 and page 102, lines 15-21)**

c. Ralph Lowe installed 1 tank battery, with multiple tanks, two of which were associated with the Humble State Well No.3 but at all times relevant to this matter, Ralph Lowe and therefore Maralo properly disposed of "tank bottoms" associated with the Humble State Well No. 3. **(See Transcript page 93, lines 10-25; page 94, lines 1-25; page 95, lines 1-7 and page 104, lines 15-23)**

d. It is not possible to produce oil without also producing associated water. **(See Transcript page 55, lines 1-20)**

e. On May 1, 1968, Division issued Memorandum 2-68 advising all operators that no exceptions would be granted to Order R-3221 that prohibited any further disposal of produced water into unlined earthen pits after January 1, 1969. **(See Division Memorandum 2-68)**

f. In 1968, in accordance with Division Order R-3336, dated November 9, 1968, Ralph Lowe converted the Humble State Well No 1, located 1980 feet FNL and 1980 feet FEL (Unit G) of Section 3 for the disposal of produced water from the Humble State Well No. 3 and the 3 unlined surface pits were no longer used; **(See Transcript page 93, lines 6-12)**

g. Despite that fact that it is not possible to determine if the soil contamination was caused by tank overflow rather than improper tank bottom disposal, the EBC has assumed that the cause was improper tank bottom disposal. **(See Transcript page 65, lines 1-16)**

h. On April 19, 1974, Maralo, Inc. became the operator of the Humble State Well No 3; **(See Transcript page 40, lines 16-17)**

i. From 1974, Maralo continued to use 2 tanks at the tank battery site to temporally store produced oil from the Humble State Well No. 3 until July 7, 1982 when no further fluids were placed in this tank; **(See Transcript page 91, lines 14-22; page 93, lines 22-25; page 94, lines 1-25; page 104, lines 7-17 also see OCD well file)**

j. On October 15, 1988, Maralo plugged the Humble State Well No. 3, and cleaned the site all of which was approved by the Division. **(See Transcript page 42, lines 1-5, EBC Exhibit 11)**

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k. On April 1, 1994, Hal J. Rasmussen became the Division designated operator replacing Maralo; **(See OCD well File)**

l. It is not possible to produce oil and avoid the production of emulsions and basic sediments. **See Transcript page 53, lines 18-15; page 60, lines 10-13 and page 61, lines 1-25)**

m. The EBC admits that there is no evidence that Maralo ever used these surface disposal pits. **(See Transcript page 66, lines 1-3; page 79, lines 10-13)**

n. Despite evidence that the prior operator used these surface pits and the lack of evidence that Maralo did, it is the EBC's policy to "go after the current operator**". (See Transcript page 66, lines 4-25)**

o. At all times during Maralo's operations of the tank battery associated with the Humble State Well No. 3, Maralo operated in such a manner as would reduce as much as practicable the formation of emulsion and basic sediments "Tank Bottoms" **(See Transcript page 93, lines 13-25 and page 94, lines 1-9)**

p. At no time did Maralo store or retain oil in earthen reservoirs or in open receptacles; (**See Transcript page 92, lines 13-17)**

(9) The Division should find that :

a. Division Rule 310 provided that:

> "Oil shall not be stored or retained in earthen reservoirs, or in open receptacles."

b. Division Rule 313 provided that:

"Wells producing oil shall be operated in such a manner as will reduce as much as practicable the formation of emulsions and basic sediments. These substances and tank bottoms shall not be allowed to pollute fresh waters or cause surface damage." **(See Transcript page 53, lines 2-17)**

c. The EBC is attempting in this case to apply its "clean-up" guidelines adopted by the Division in 1993. **(See Transcript page 23, line 5-6)**

d. At all relevant times, the Division did not have rules or regulations concerning the registration, the installation or closer of tank batteries and their associated pits; **(See Transcript page 39, lines 6-12)**

e. It is no longer possible to determine when or how this material was placed in these pits; **(See Transcript page 43, lines 8-13)**

f. A review of Division files fails to disclose the exact location of pits and tank batteries; **(See Transcript page 39, lines 13-24 and page 68, lines 14-16)**

g. The EBC is no longer able to determine who caused this contamination. **(See Transcript page 69, lines 1-3)**

h. On October 28, 1988 the Division approved the plugging and abandonment of the Humble State Well No 3 and approved the site "clean-up". **(See Transcript page 42, lines 2-4)**

i. Rule 310 only precludes oil from being stored or retained in earthen pits but does not preclude the occurrence of hydrocarbons in these pits. The EBC appears to have abandoned its claim that Rule 310 was violated. **(See Transcript page 50, lines 19-23)**

j. Rule 313 only requires the operator of the facility to reduce as much as practicable the formation of "tank bottoms". **(See Transcript page 56 & 57)**

k. Maralo, while operator, operated this facility in accordance with Division's Rules 310 and 313; its operations were consistent with industry practices accepted by the Division during this period; and it properly disposed of "tank bottoms" associated with the Humble State Well No. 3. **(See Transcript page 54, lines 4-25)**

CHLORIDES:

(10) The EBC contends that the presence of hydrocarbons and the absence significant levels of chlorides in 3 unlined surface pits indicates that oil was stored in these pits rather than produced water. **(See Transcript page 37, lines 8-9 and lines 18-22)** but admitted that there is no evidence that Maralo ever placed any oil in any of these pits for any reason. **(See Transcript page 79, lines 10-13)**

(11) Maralo contends that these pits were only used by a prior operator for disposal of produced water that by necessity contains some hydrocarbons. **(See Transcript page 93 lines 13-25)**

(12) Maralo contends that produced water from the Humble State Well No. 3 had a lower level of chlorides than usual produced water. **(See Transcript page 92 lines 15-25 and Page 93, lines 1-5)**

(13) The Division should find that EBC has failed to sustain its "burden of proof" by failing to introduce substantial evidence to prove that Maralo did not comply with Division Rule 310.

TANK BOTTOMS:

(14) The EBC speculates that the hydrocarbon levels in the 2 pits associated with the tank batteries are the result of the improper dismissal of tank bottoms in violation of Division Rule 313. **(See Transcript page 15, lines 8-14 and page 47, lines 3-9)** but cannot tell when this was done. **(See Transcript page 38, lines 23-25, page 36, lines 24-25 and page 37, lines 1-10)**

(15) Maralo contends that the EBC failed to demonstrate that Maralo ever utilized any surface disposal pits. **(See Page 92, lines 11-14; and page 93, lines 6-12)**

(16) Maralo contends that the EBC failed to demonstrate that the levels of hydrocarbons in the 2 surface disposal pits which were tested are in excess of the level that would result from the customary industry practices for the use of these tanks. **(See Transcript page 76-78)**

(17) The Division should find that EBC has failed to sustain its "burden of proof" by failing to introduce substantial evidence to prove that Maralo did not comply with Division Rule 313.

RESPONSIBLE PERSON:

(18) The EBC contends that Maralo is the "responsible person" and should be ordered to remediate this soil contamination. (**See Transcript page 42, lines 15-18)**

(19) Maralo contends that while operator it operated the Humble State Well No. 3 in accordance with Division rules then applicable and therefore is not the operator of the facility responsible for the remediation of any soil contamination.

(20) The Division should find that:

a. Maralo ceased all operations on the Humble State Site No. 3, Unit A, Section 36, T25S, R36E, Lea County, New Mexico, in 1988, plugged the well and abandoned the site all in accordance with the Division's rules. Prior to abandonment, Maralo operated the site in accordance with all New Mexico laws and administrative regulations. The Division initiated this proceeding in 2003, fifteen years after Maralo abandoned the site, contending Maralo violated the **New Mexico Administrative Code Title 19 Section 15.5.310A (2000)** ("Rule 313") and **Section 15.5.310A (2000)** ("Rule 310A") based upon conduct that by a prior operator occurred as far back as the 40s.

b. the EBC is attempting to require Maralo to clean this alleged soil contamination in accordance with the Division's surface impoundment closure guidelines which were adopted by the Division after Maralo abandoned this site.

c. The Division should deny the EBC's application because it is an impermissible attempt to apply its rules retroactively. The Division is, in effect, punishing Maralo for conduct that was legal and in accordance with all applicable Division rules and regulations at the time it was committed. This violates Maralo's constitutional right to due process.

d. Maralo is not a responsible person for the soil contamination at this facility and should not be required to remediate the soil within Unit A of this section.

IT IS THEREFORE ORDERED THAT:

(1) The application of the Division's Environmental Bureau Chief should be denied.

(2) The Division retains jurisdiction of this matter in order to enter such additional order as may be determine necessary.

Done at Santa Fe, New Mexico on the day and year hereinabove designed.

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

LORI WROTENBERY
Director