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February 5, 2003

HAND DELIVERED

Mr. Michael E. Stogner
Chief Hearing Examiner
Oil Conservation Division
1220 South Saint Francis Drive
Santa Fe, New Mexico 87505

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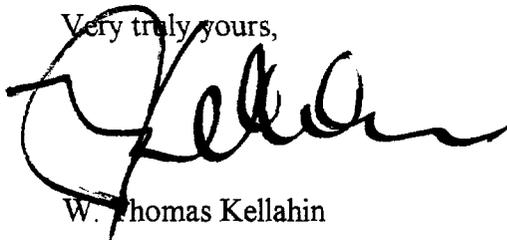
Oil Conservation Division

Re: Motion to Dismiss OPL as a "responsible person"
NMOCD Case No. 13004
Application by the Division to determine the
responsible party for alleged soil contamination
at the Gary Johnson site,
Lea County, New Mexico

Dear Mr. Stogner:

On behalf of Occidental Permian Ltd. ("OPL"), please find enclosed our Motion and Supporting Brief requesting that the Division dismiss OPL as a "responsible party" in this case which is current set for hearing by you on March 13, 2003.

Very truly yours,



W. Thomas Kellahin

Copies delivered to:
David Brooks, Esq. (OCD-attorney)
William Olson (OCD-Environmental Bureau)
J. Scott Hall, Esq. (Shell)
Paul Owen, Esq. (Samedan)
Carolyn Tillman, Esq. (OPL-attorney)
John Soule, Esq., (Scott-Douglas Law Firm, Austin, OPL Attorney)

**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 DETERMINING THE RESPONSIBLE PARTY OR PARTIES AND ORDERING THE RESPONSIBLE PARTY OR PARTIES TO CONDUCT DIVISION-APPROVED CORRECTIVE ACTION WITH RESPONSE TO A HYDROCARBON RELEASE (Gary Johnson Complaint), LEA COUNTY NEW MEXICO **CASE 13004**

**OCCIDENTAL PERMIAN LTD
MOTION TO DISMISS
OCCIDENTAL PERMIAN LTD AS
A RESPONSIBLE PERSON FOR THIS INCIDENT**

Occidental Permian Ltd. (“OPL”) moves that the Division (“OCD”) enter an order dismissing OPL as a potentially responsible person for this incident, and in support states:

(1) The alleged soil contamination on the Johnson property within the Moon “A” Lease is attributed by the OCD to the original 4-tank battery (“original tank battery”) located west of Johnson’s trailer and related unlined surface pits. Prior to January 1, 1962, Samedan closed the original 4-tank battery and related pits and constructed a replacement 3-tank battery (“replacement tank battery”) located south of Johnson’s trailer.

(2) The replacement tank battery was dismantled shortly after approval of the North Hobbs Unit, more than twenty (20) years before OPL became Unit operator. The alleged soil contamination is associated with the original tank battery only. None of the contamination is associated with the replacement tank battery and does not appear to be associated with the pits used in connections with the original tank battery. The original tank battery was dismantled and the associated pits were closed prior to 1962.

(3) OPL has been unit operator for less than three years and first became operator more than 40 years after the alleged contamination occurred. OPL did not cause or allow the alleged soil contamination to occur.

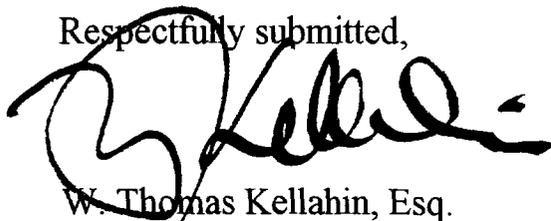
(4) The alleged soil contamination is related solely to the original tank battery and perhaps pits used in connection with that tank battery. Samedan dismantled the original tank battery and closed the associated pits prior to 1962, while it was operator of the Moon "A" Lease. The alleged pollution occurred more than 45 years ago when Cusack or Samedan operated the lease. Samedan is still a Division-approved operator of wells within New Mexico.

(5) OPL did not construct the pits or the original or replacement tank batteries. OPL never used the pits or either tank battery. OPL did not close the pits or dismantle the tank batteries. OPL has no responsibility for cleanup.

(6) OPL is not the "responsible person" for this alleged soil contamination.

Wherefore OPL moves that the Division grant this motion and thereby dismiss OPL as a "responsible person."

Respectfully submitted,

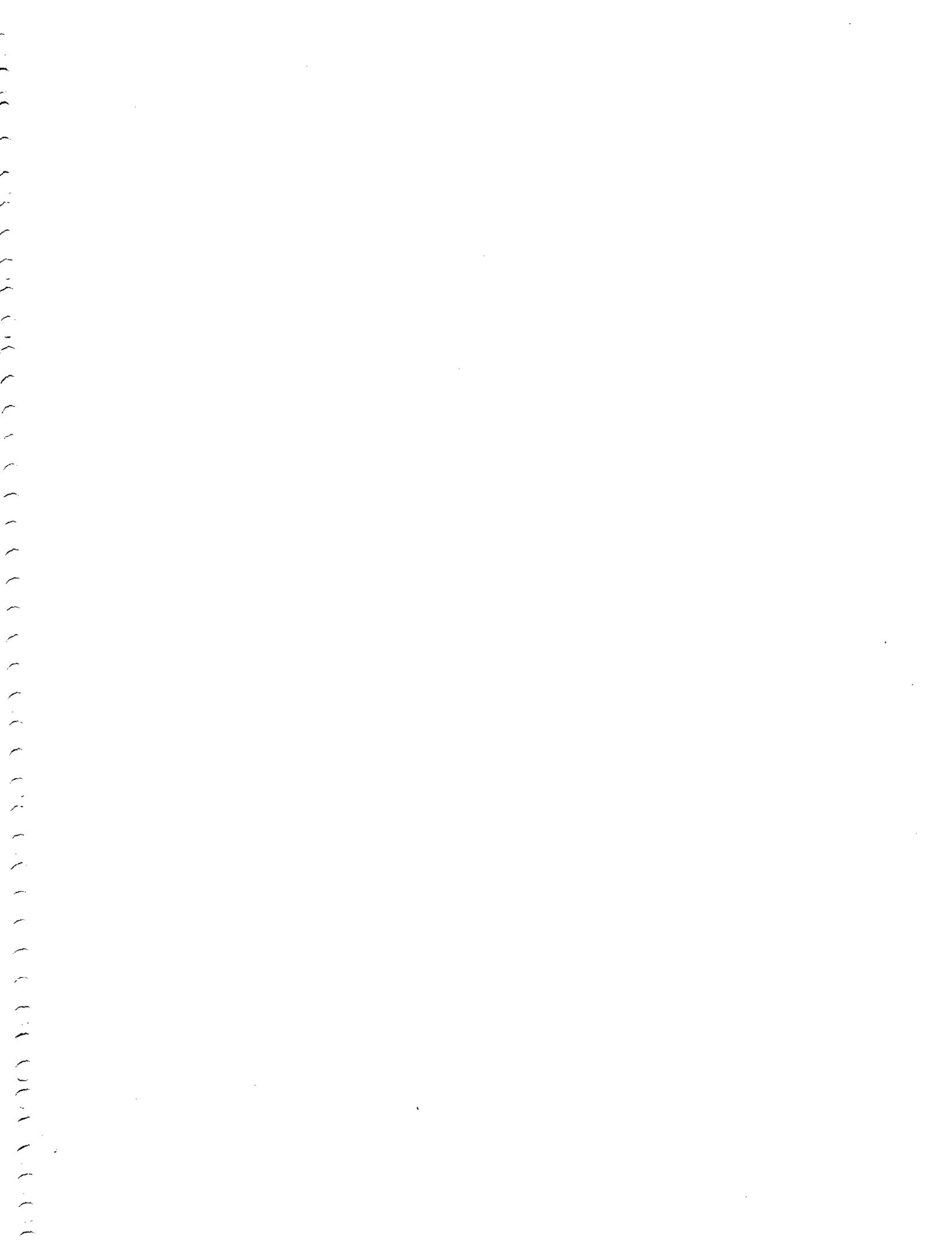


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**STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION DIVISION**

**APPLICATION OF THE NEW MEXICO OIL
CONSERVATION DIVISION, THROUGH THE
ENVIRONMENTAL BUREAU CHIEF, FOR AN
ORDER DETERMINING THE RESPONSIBLE
PARTY OR PARTIES AND ORDERING THE
RESPONSIBLE PARTY OR PARTIES TO CONDUCT
DIVISION-APPROVED CORRECTIVE ACTION
WITH RESPONSE TO A HYDROCARBON RELEASE
(Gary Johnson Complaint), LEA COUNTY NEW MEXICO**

CASE 13004

**BRIEF IN SUPPORT OF OCCIDENTAL PERMIAN LTD
MOTION TO DISMISS
OCCIDENTAL PERMIAN LTD AS
A RESPONSIBLE PERSON FOR THIS INCIDENT**

The brief is submitted by Occidental Permian Ltd. (“OPL”) in support of its moves that the Division (“OCD”) enter an order dismissing OPL as a potentially responsible person for this incident.

BACKGROUND

The alleged soil contamination¹ on the Johnson property within the Moon “A” Lease is attributed by the OCD to the original 4-tank battery (“original tank battery”) located west of Johnson’s trailer and related unlined surface pits. Prior to

¹ OCD investigation found no contamination of Johnson water well (Interview with Bill Olson, January 14, 2003 and related water analysis).

January 1, 1962, Samedan closed the original 4-tank battery and related pits and constructed a replacement 3-tank battery (“replacement tank battery”) located south of Johnson’s trailer. The replacement tank battery was dismantled shortly after approval of the North Hobbs Unit, more than twenty (20) years before OPL became Unit operator.

The alleged soil contamination is associated with the original tank battery only. None of the contamination is associated with the replacement tank battery and does not appear to be associated with the pits used in connection with the original tank battery. The original tank battery was dismantled and the associated pits were closed prior to 1962. Information regarding the replacement tank battery and subsequent unit operations is provided herein solely as background information and to ensure all known facts are available in historical context.

Prior to filing its application for hearing, the OCD made separate written demands of both Shell and Samedan requiring each to submit plans to investigate the extent of soil contamination related to the Moon “A” Lease. Both Samedan and Shell responded that they were no longer operating the Lease and identified OPL as the current operator of the North Hobbs Unit. The OCD then requested that OPL respond as to whether or not it is the “responsible party” to clean up the alleged soil contamination on the Moon “A” Lease. OPL responded that it is not. On January 13, 2003, the Division filed an application requesting that the Division Director call a hearing to determine whether Samedan, Shell and/or OPL are the “responsible persons.”

SUMMARY OF RELEVANT UNCONTESTED FACTS²

On January 3, 2000, Gary Johnson complained to the OCD about what appeared to be oil just beneath the surface near the west end of his trailer located in the W/2NE/4 Section 28, T18S, R38E, Lea County, New Mexico (known as the "Moon "A" Lease").

On January 25, 2000, OCD (Olson) sampled³ Mr. Johnson's water well and found no contamination (water analysis dated February 3, 2002). Olson concluded that there is highly weathered asphalt type oil near Mr. Johnson's trailer. Olson drew the conclusion that the land around the trailer is within the footprint of the original tank battery and associated pits on the Moon "A" Lease.

On June 25, 2002, Olson took 5 soil samples near Mr. Johnson's trailer, again within the area occupied by the original tank battery, which tested positive for the presence of hydrocarbons.⁴

There are 2 wells located within the Moon "A" Lease⁵ that may be associated with the original and replacement tank batteries and related pits:

- (1) The Moon "A" Well No 1. located 2310 feet FNL and 2310 feet FEL (Unit G) of Section 28 (now known as "NHU 28-321"); and
- (2) The Moon "A" Well No. 2 located 1315 feet FNL and 2310 feet FEL (Unit B) of Section 28 (now known as the "NHU 28-311")

Primary Production:

The original 4-tank battery, which is the location of the alleged soil contamination, was operated and closed by Samedan long before the North Hobbs Unit was ever formed. Two wells may be associated with the original tank battery: the Moon "A" Well No.1 was drilled and completed on February 13, 1935 and the

² See Factual Summary attached as Exhibit 1

³ See OCD Letter, 3/27/00, and Olson site plan, 1/25/00, attached as Exhibits 2A and 2B

⁴ See Olson site plan, 6/25/02, and sample data sheet, attached as Exhibits 3A, 3B, and 3C

⁵ See Locator Map attached as Exhibit 4

Moon "A" Well No.2 was drilled and completed on July 8, 1935 by J. P. Cusack, Inc. which was liquidated on January 15, 1951 and became Samedan Oil Corporation ("Samedan"). Cusack and Samedan operated these two wells on the Moon "A" Lease and used both the original and replacement tank batteries and related pits for primary production from the Grayburg/San Andres formations for more than forty-five (45) years. By January 1, 1962, Samedan abandoned the original 4-tank battery located west of where the Johnson trailer is now located and constructed a replacement 3-tank battery south of where the Johnson trailer is now located.⁶ Based on aerial photographs, the original 4-tank battery was dismantled and all pits were closed prior to 1962.⁷

The 3-tank replacement battery was operated and closed long before OPL became operator of the North Hobbs Unit. On July 2, 1979, the Moon "A" Wells No. 1 and No. 2 were contributed to the North Hobbs Unit operated by Shell Oil Corporation ("Shell"). The replacement tank battery associated with these wells was apparently closed and dismantled by Shell shortly after the North Hobbs Unit became effective (1980). Samedan continued to own the lease until July 1, 1999 when it assigned the lease and its interest in the Unit to The Prospective Investment and Trading Company, ("PITTCO").⁸

Apparently the replacement tank battery was not needed for unit operations because the aerial photographs clearly show that some time prior to the end of 1982, the replacement tank battery used by Samedan for primary production operations was dismantled.⁹

⁶ See hand drawn plat, dated 3/4/80, attached as Exhibit 5

⁷ See Aerial photos, attached as Exhibits 6A and 6B

⁸ See Samedan assignment effective 7/1/1999, attached as Exhibit 7

⁹ See Aerial photos, attached as Exhibits 6A and 6B

Secondary Recovery:

The North Hobbs Unit was formed pursuant to the New Mexico Statutory Unitization Act (1979, NMSA Section 70-7-1) and approved by the OCD by Order R-6198 (Case 6652) dated November 30, 1979 with an effective date of February 1, 1980. Shell's plan for the Unit was for the secondary recovery of additional oil by water injection from part of the Unit (a Pressure Maintenance Project that the Division approved by Order R-6198 (Case 6653), dated November 30, 1979.

Based on aerial photographs,¹⁰ some time prior to the end of 1982, the replacement tank battery used by Samedan for primary production operations was dismantled, apparently by Shell, the Unit operator. Thus, Shell used only the Moon "A" "wells" in the North Hobbs Unit Pressure Maintenance Project (waterflood), not the replacement tank battery.¹¹

As soon as the Unit facilities became operational in 1982, the Moon "A" wells were produced through new flowlines directly to a new central battery located away from the Moon "A" Lease.¹² The Moon "A" Well No. 2 was converted to water injection service on February 1, 1988.¹³ Shell operated this waterflood project for more than seventeen (17) years until forming a limited partnership with Amoco called Altura Energy Ltd. (Altura"). All Unit operations were transferred to Altura on March 1, 1997, and effectively on May 8, 2000, Occidental Petroleum Corporation bought Altura and changed its name to Occidental Permian Ltd. almost 40 years after the original tank battery associated with the soil contamination had been closed and dismantled.¹⁴

¹⁰ See Aerial photos, attached as Exhibits 6A and 6B

¹¹ See waterflood map showing status of site, 1979, attached as Exhibit 7

¹² See waterflood map showing status of site, 1979, attached as Exhibit 7

¹³ See Form C-103, attached as Exhibit 9

¹⁴ See Form C-104-A, attached as Exhibit 10

Tertiary Recovery:

Effective October 22, 2001, OPL converted the North Hobbs Unit into a Tertiary Recovery Project for the injection of CO₂ and water to increase oil recovery from areas west of and excluding the Moon "A" Lease and the wells located thereon.¹⁵ (See OCD Order R-6199-B dated October 22, 2001, Case 12722)

DIVISION JURISDICTION

The Oil Conservation Commission and the Oil Conservation Division (collectively "OCD") of the Energy, Minerals and Natural Resources Department have concurrent jurisdiction in New Mexico for the regulation of virtually all aspects of oil and gas operations in the state.¹⁶ The OCD is empowered to regulate the injection and disposition of water and to regulate the disposal of E&P wastes.¹⁷

These statutory charges to regulate the disposition of E&P wastes are the result of a 1989 amendment to the statutes that was enacted specifically in response to the June 1988 determination by the EPA to exempt E&P wastes¹⁸ from regulation under Subtitle C of the federal Resource Conservation and Recovery Act (RCRA).¹⁹

OCD RULES

The OCD alleges that the soil contamination at the Johnson trailer is tank bottoms, characterized as "weathered asphaltic type oil," constituting a potential danger to public health and the environment:

¹⁵ See Unit's tertiary Recovery Map, attached as Exhibit 11

¹⁶ See 1997 NMSA Sections 70-1-1 through 70-1-38

¹⁷ See 1979 NMSA Sections 70-1-12.B(14)(15)(21)(22)

¹⁸ See list of exempt E&P wastes, attached as Exhibit 12

¹⁹ RCRA was passed in 1976 to regulate solid wastes

OCD Rule 7 defines:

“88. TANK BOTTOMS shall mean that accumulation of hydrocarbon material and other substances which settles naturally below crude oil in tanks and receptacles that are used in handling and storing of crude oil, and which accumulation contains in excess of two (2%) percent of basic sediment and water; provided, however, that with respect to lease production and for lease storage tanks, a tank bottom shall be limited to that volume of the tank in which it is contained that lies below the bottom of the pipeline outlet thereto.[19 NMAC 15.A.7.73, 3-15-97]

OCD Rule 7 also defines:

“61. OPERATOR shall mean any person or persons who, duly authorized, is in charge of the development of a lease or the operation of a producing property. [19 NMAC 15.A.7.52, 3-15-97]

OCD Rule 116.D requires:

(a) “OCD Rule 116.D [19.15.3.166.D NMAC] provides:

D. Corrective Action. 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.”

(b) “OCD Rule 7.R(5) [19.15.1.7.R(5) NMAC] provides:²⁰

(5) Responsible Person shall mean the owner or operator who must complete Division approved corrective action for pollution from releases.”

In 1957, the Division issued Memorandum 32-57 prohibiting the disposal of saltwater in earthen pits after completion of saltwater disposal systems in the Hobbs area. Order No. R-1224 was issued in 1958 prohibiting the surface disposal

²⁰ This definition applicable for Order R-10766 and R-10767 adopted Rules 116 and Rule 19, dated February 13, 1997 in Division Cases 11352 and 11635.

of oil field brines in unlined surface pits in the Hobbs area after March 15, 1959. In addition, Memorandum 33-57 was issued to all operators in the Hobbs area prohibiting the disposal of waste oil or basic sediment in earthen pits in the Hobbs Pool area. The use of pits to store any oil or produced water on the Moon "A" Lease would have been unlawful after entry of these orders.

ARGUMENT

OPL did not violate any OCD rules. OPL has been unit operator for less than three years and first became operator more than 40 years after the alleged contamination occurred. OPL did not cause or allow the alleged soil contamination to occur. The alleged soil contamination is related solely to the original tank battery and perhaps pits used in connection with that tank battery. Samedan dismantled the original tank battery and closed the associated pits prior to 1962, while it was operator of the Moon "A" Lease. The alleged pollution occurred more than 40 years ago when Cusack or Samedan operated the lease. Samedan is still a Division-approved operator of wells within New Mexico. OPL did not construct the pits or the original or replacement tank batteries. OPL never used the pits or either tank battery. OPL did not close the pits or dismantle the tank batteries. OPL has no responsibility for cleanup.

Never before has the OCD sought to enforce its rules against an operator who did not construct, use, or close and dismantle the facility that was the cause of the alleged soil contamination. Never before has the OCD sought to enforce cleanup against someone who was not the operator when the contamination occurred. Never before has the OCD sought to require an operator to clean up contamination that occurred more than 40 years before that operator became operator. Had the OCD intended such an inequitable result, its rules would provide

that the current operator of a lease or unit is responsible for cleanup regardless of when the contamination occurred or who caused it. Instead, the OCD properly looks to the person who was operator when the contamination occurred and/or the person who caused the contamination.

In Texas, an operator in the position of Samedan, would be responsible for cleanup.²¹ In *Lone Star Salt Water Disposal Co. v. Railroad Comm'n of Texas*, 800 SW 2d. 924 (Tex.App—Austin, 1990), the operator who actually placed oil or oil and gas waste in earthen pits was held to be responsible for cleanup of the pits. The Court found that “[t]he evidence supports the Commission’s conclusion that Lone Star is responsible for cleaning the pits because it operated and controlled the system its last twenty-three years of operation.”

Samedan was the last, and perhaps only, operator to use the original tank battery and related pits and also closed those facilities. Any soil contamination that resulted from use of these pits and tank battery occurred while Samedan or Cusack was operator. OPL did not create or install either tank battery or the pits, did not use the tank batteries or the pits, did not dismantle the tank battery or close the pits and did not cause or allow any contamination to occur.

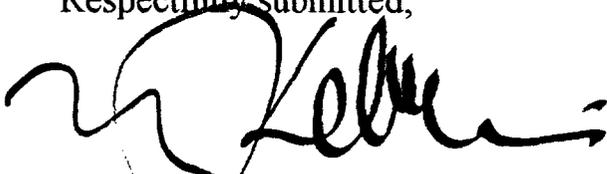
In the Lone Star case, the operator who caused the pollution, even though not the current operator, was held responsible for cleanup. The same result is appropriate in this case. Only the person who caused or allowed the contamination to occur should be held responsible for cleanup.

²¹ See *Love Star Salt Water Disposal Co. v. Railroad Comm'n of Texas*, 800 SW2n 924 (Tex. App.—Austin, 1990)
Occidental Permian Ltd.

CONCLUSION

The OCD's application, as it applies to OPL, is not supported by the facts and is contrary to applicable law. There is no statutory or regulatory authority for the OCD to hold the current North Hobbs Unit Operator, OPL,²² responsible for cleanup of this alleged contamination. OPL did not become operator until at least 40 years after the soil contamination occurred. OPL did not construct, install, use, dismantle, or close the facilities associated with the contamination. Just as Samedan is not liable for contamination or pollution caused by others after it was no longer operator,²³ OPL is not liable for contamination or pollution that occurred while Samedan (or Cusack) was operator.²⁴ OPL is not the "responsible person". The facts and law are clear. OPL is not responsible for any remediation or cleanup of contamination or pollution associated with the original 4-tank battery and related pits. In addition, since the replacement 3-tank battery is not the source of the alleged soil contamination, it should not be an issue in this matter. However, even if the replacement tank battery was properly an issue, OPL is not liable for it, either, for the same reasons stated above.

Respectfully submitted,



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²² OCD Rule 116.D [19.15.3.166.D NMAC] does not make the current operator the "responsible party."

²³ See Hicks v. Humble Oil & Refining Co. (Texas Court of Appeals, 1998, 970 SW2d 920)

²⁴ See Railroad Commission of Texas v. American Petrofina Company, Texas Court of Appeals, 1987, 572 SW2d 658

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