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October 14, 2003

Oil Conservation Division
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Re: 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 No. 13142; State of New Mexico Energy, Minerals, and Natural Resources Department Oil Conservation Division.

To Whom It May Concern:

Enclosed please find the original and three copies of Anthony's Response In Opposition To Maralo, L.L.C.'s Motion To Dismiss in the following matter, along with a self-addressed, stamped envelope. Please file the original and send back one endorsed copy in the envelope provided.

Thank you for your assistance in this matter and if you have any questions, don't hesitate to give me a call.

Sincerely,

David Sandoval

DS/vbs
Enclosures

RECEIVED
OCT 15 2003
OIL CONSERVATION DIVISION

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, L.L.C. TO REMEDIATE HYDROCARBON CONTAMINATION AT AN ABANDONED WELL AND BATTERY SITE; LEA COUNTY, NEW MEXICO

ANTHONY'S RESPONSE IN OPPOSITION TO MARALO, L.L.C.'S MOTION TO DISMISS

COMES NOW, Jay Anthony, by and through counsel, and sets forth his opposition to dismissal as follows:

I. INTRODUCTION

Jay Anthony is the surface owner of contaminated land in Lea County that is the subject of this remediation proceeding (the "Property"). Maralo, LLC ("Maralo") was the operator of the Humble State Well No. 3, the associated tank battery and pits located on the Property. An earlier investigation by the Oil Conservation Division ("OCD") found that the surface around the former tank battery is contaminated with highly weathered asphaltic type oil and that several backfill pits remain in existence. The pits were apparently used by Maralo for the disposal of emulsions, basic sediments and tank bottoms. The contamination was found to be result of Maralo's violation of OCD Rules 310 and 313.

Pursuant to Rule 313, the OCD ordered Maralo to submit a work plan to remedy the surface pollution. Maralo refused.

Maralo has now filed its Motion to Dismiss on the unsupportable basis that the OCD is without legal authority to require the remediation of existing contamination caused by past conduct.

Its request for dismissal is based on a faulty premise that the OCD is attempting to retroactively apply the Rules that have been violated by Maralo.

Maralo's Motion presents a direct attack on the OCD's very power and authority to perform its statutory functions. It presents an important question, the resolution of which will have a major impact on the OCD's ability to remedy pollution in New Mexico. The OCD must take a strong stand here, deny Maralo's dismissal motion, and clearly signal its intent to the public and the oil and gas industry that it will not be stifled in its attempts to address and correct existing contamination.

II.
SUMMARY OF ARGUMENT

1. The conduct prohibited by Rules 310 and 313 was illegal during Maralo's operation of the Humble Well. As such, whether the Rules should apply retroactively is a question that is not even before the Hearing Officer.
2. The rule against retroactive application is a mere presumption that can be rebutted by a showing of legislative interest or consistency with a statutory purpose. Even if the OCD was seeking to retroactively apply Rules 310 and 313 it is within its power and authority to do so.
3. Maralo fails to show a due process violation.

III.
ARGUMENT

A. The OCD Has Broad Power to Promulgate Rules and Regulations.

There is no dispute that "[a]dministrative bodies are creatures of statute and can act only on those matters which are within the scope of authority delegated to them." *In re*

Proposed Revocation of the Food and Drink Purveyor's Permit, 102 N.M. 63, 691 P.2d 64 (Ct. App. 1984). An "agency's authority is not limited to the express power granted by statute, but also includes those powers that arise from the statutory language by fair and necessary implication." *Howell v. Heim*, 118 N.M. 500, 504, 882 P.2d 541, 545 (1994). Further, the "authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or policy." *Public Service Co. v. New Mexico Environmental Improvement Board*, 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976). New Mexico thus allows much power to its administrative agencies.

The primary restriction on an agency's power is merely that it may not "amend or enlarge its authority under the guise of making rules and regulations." *Public Service Co.*, 89 N.M. at 228, 549 P.2d at 643. Maralo's attack on the OCD's authority is narrowly focused in this regard. That the OCD properly promulgated Rules 310 and 313 is not challenged. Neither does Maralo argue that the substantive coverage of Rules 310 and 313 is outside the scope of the OCD's regulatory authority. As such, the procedural and substantive validity of Rules 310 and 313 is not at issue.

Instead, Maralo merely argues that the OCD cannot apply its Rules retroactively. The argument appears to be a wholesale attack and not limited to Rules 310 and 313. Maralo's argument is that the OCD is completely without authority to promulgate any retroactive regulation whatsoever. This Response will show that retroactivity is not even an issue here since the conduct prohibited by Rules 310 and 313 was in fact illegal at the time that Maralo operated the well. Further, even if the OCD was attempting to apply these

Rules retroactively, it is fully within its power to do so.

B. There is no Retroactivity Here.

As was clearly shown by Staff's comprehensive archival research, the question of whether an OCD Rule may be properly applied retroactively is not even at issue. Staff has shown that the substantive coverage of both Rules 310 and 313 has been in place for decades and certainly during Maralo's operation which caused the contamination sought to be remediated.

The question of retroactivity is in actuality nothing more than a red herring. New Mexico has long and consistently recognized that a statute does not apply retroactively merely because some of the facts and conditions which are dealt with existed prior to the enactment. *Howell,* 118 N.M. at 506; see also, *Lucero v. Board of Regents of Northern New Mexico State School,* 91 N.M. 770, 581 P.2d 458 (1978) (allowing a statute providing tenure rights to teachers after their third consecutive year of employment to operate, even though plaintiff's years of consecutive service occurred prior to the statute's enactment); *State v. Mears,* 79 N.M. 715, 449 P.2d 85 (Ct. App. 1968) (allowing a statute to operate which provided credit for time spent in jail prior to conviction, even though defendant had been jailed prior to the statute's enactment, because defendant was convicted after the statute became effective).

Anthony commends Staff for their research and incorporates the arguments set forth in their Response. As such, rather than reiterate those arguments, Anthony will focus the remainder of this Response on showing that even if Rules 310 and 313 were newly promulgated, that the OCD would be entirely within its powers to apply them retroactively to correct existing contamination regardless of

when the conduct causing the contamination may have occurred.

C. *The Rule Against Retroactivity is Merely a Presumption.*

"New Mexico law **presumes** a statute to operate prospectively unless a clear intention on the part of the legislature exists to give a statute retroactive effect." *Coleman v. United Engineers & Constructors, Inc.*, 118 N.M. 47, 52 (1994) (emphasis added).

> The very statement of this proposition demonstrates (by the use of the word 'presumes') that it is a rule or canon of statutory construction **not an inflexible determinant of legislative intent.**

Swink v. Fingade, 115 N.M. 275, 283 (1993) (alterations in original) (emphasis added).

Maralo seeks to cement this mere "presumption" into a wholesale restraint on the OCD's rulemaking power. A studied analysis, however, reveals that the OCD is well within its powers to apply Rules 310 and 313 to Maralo and to the consequences of its conduct, regardless of when the conduct may have occurred.

In determining whether a statute or regulation may be properly applied retroactively, New Mexico law calls for a three-pronged inquiry as follows:

> The prospective application of a newly engaged act to [a preexisting and ongoing transaction] must ... be determined by [1] the words of the statute, [2] the legislature's intent in enacting the statute, and [3] by the public policy considerations which are evident from the statute.

Swink, 115 N.M. at 284.[1]

1. *Words of the Statute and Legislative Intent.*

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[1] This is similar to the balancing test enunciated by the D.C. Circuit in *Wholesale and Department Store Union v. Hurb*, 466 F.2d 380, 390 (D.C. Cir. 1972), quoted in *U.S. v. Harragansett Improvement Co.*, 571 F.Supp. 688, 696 (R.I.D.C. 1983).

Because legislative intent is primarily ascertained by considering the express language in a statute, the analysis under the first two prongs of the inquiry is necessarily intertwined. "When the wording of a statue is clear and unambiguous" a court "will give effect to the wording of the statute." *Meyers v. Western Auto*, 132 N.M. 675, 54 P.3d 79 (Ct. App. 2002).

New Mexico's Oil and Gas Act, NMSA §§70-2-1 et. seq., states that the OCD "is authorized to make rules, regulations and orders for the purpose and with respect to the subject matter stated in this subsection." §70-2-12B. The Act is silent, however, about whether the OCD has power to retroactively apply its rules and regulations. Maralo takes this silence as evidence of legislative intent against retroactive rulemaking power. Contrary to the conclusion sought by Maralo, legislative silence as to whether a statute or regulation can apply retroactively is not determinative. In fact, there is an abundance of authority for retroactive application even in the face of silence. See, e.g., *Howell*, 118 N.M. 500 (regulation applied retroactively in spite of a lack of express statutory power to enact retroactive regulations); accord, *State v. Mears*, 79 N.M. 715; *Lucero*, 91 N.M. 770. More analogously, the Comprehensive Environmental Response, Compensation and Liability Act of 1970 ("CERCLA"), with obviously similar statutory purposes of addressing pollution caused in the past, has consistently been held to apply retroactively even when Congress failed to specifically say so in the statute. *Franklin County Convention Facilities Authority v. American Premier Underwriters, Inc.*, 240 F.3d 534, 550-52 (6th Cir. 2000).

In contrast to Maralo's desire for an express statutory grant of retroactive power, the "words of the statute" analysis instead focuses on the entire substance of the statute and whether its purpose would be furthered by retroactive application of the regulation in question.

In light of the foregoing, a careful review of the Oil and Gas Act is in order. Section 70-2-12 enumerates the OCD's powers. Among those powers are several which clearly contemplate that future regulation will have an effect on prior regulation and past conduct. See e.g., §§70-2-12 (11) and (12) ("to determine whether a particular well or pool is a gas or oil well or a gas or oil pool, as the case may be, *and from time to time to classify and reclassify* wells and pools accordingly; to determine the limits of any pool producing crude petroleum oil or natural gas or both *from time to time redetermine* the limits"); §§70-2-12 (1), (2) and (15) ("to require dry or abandoned wells to be plugged in a way to confine the crude petroleum oil, natural gas or water in the strata in which it is found and *to prevent it* from escaping into other strata; *to prevent* crude petroleum oil, natural gas or water from escaping from strata in which it is found into other strata; to regulate the disposition of water produced or used in connection with the drilling for or producing oil or gas or both and to direct surface or subsurface disposal of the water in a manner *that will afford reasonable protection against contamination* of fresh water supplies designated by the state engineer"). (emphasis added).

The clear import of this statutory language is that the OCD is charged with an ongoing mission to regulate an industry and is empowered to address changing concerns. An obvious legislative concern and purpose of the Oil and Gas Act is addressing contamination, whether it be by prevention or remediation. If Maralo had its way and the OCD was indeed powerless to promulgate retroactive rules and regulations the very purpose of the Act would be frustrated and impossible to accomplish.

2. *Public Policy.*

The third prong of the retroactivity analysis involves consideration of public policy. This is a critically important factor in situations such as this where the conduct of a regulated industry may have

environmental consequences that will affect not only private landowners, but the public in general. The above analysis has relevance here as well. The OCD has been given authority to protect New Mexico's environment from the consequences of oil and gas drilling. This is a legitimate and important concern and duty of the OCD. It cannot be taken lightly.

Maralo seeks to undermine this mandate by arguing that the only Rules of concern and application to it, are those that were in effect at the time. That simply is not correct. First, as is well-stated by Staff, the fact that contamination remains on the Property strongly suggests that Maralo's operation was actually not in compliance. In addition, Maralo should not expect immunity from further regulation. As was stated by the court in *Colo. Dept. Of Public Health and Environment v. Bethell*, 60 P.3d 779, 785 (Colo. App. 2002):

> As a participant in a regulated industry, defendant should have recognized the risk of further regulation. Further, the public health risk from improper disposal of solid waste and the long-term threat to the environment outweigh defendant's financial interest.
>
> Thus, we reject defendant's contention that the regulations are retrospective.

Id. (citations omitted). This is consistent with the Sixth Circuit's analysis of CERCLA to the effect that, "legislation readjusting rights and burdens is not unlawful solely because its upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Franklin County*, 240 F.3d at 551.

New Mexico's public policy clearly outweighs any expectation by Maralo that it no longer should be liable for the lingering consequences of its operation.

D. There is No Due Process Violation Here

At the end of its dismissal motion, Maralo baldly concludes that the application of the Rules 310 and 313 would be in violation of its due process rights. Maralo fails, however, to conduct a specific due process analysis. It failure to do so is likely due to the utter weakness of the argument.

"When determining whether a statute or regulation violates due process [a court must] first decide what level of constitutional scrutiny to apply." *Howell*, 118 N.M. at 505, 882 P.2d at 546. That determination depends on what type of right is involved.

Maralo's alleged right is merely based on its generalized claim that it operated the well in compliance with existing law. This is purely an economic interest. As was noted by the Sixth Circuit Court of Appeals in holding that retroactive application of CERCLA did not violate due process:

> Legislative acts adjusting the burdens and benefits of economic life carry a presumption of constitutionality, and the burden of proving that the legislature acted in an arbitrary and irrational way is on the party complaining of the violation.

Franklin County, 240 F.3d at 550. As such, retroactive application "need only be rationally related to a legitimate state interest."[2] *Howell*, 118 N.M. at 505, 882, P.2d at 546.

Clearly, addressing existing pollution amounts to a legitimate state interest sufficient to comply with due process. The Sixth Circuit's analysis again provides guidance with the following language:

> Cleaning abandoned and inactive hazardous waste disposal sites is a legitimate legislative purpose which is furthered by imposing liability for response costs upon those parties that created and profited from those sites.

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[2] This is in contrast with legislation that effects fundamental rights. "When government deprives persons of fundamental rights, it must demonstrate that the law promotes a compelling or overriding government interest." *Howell*, 118 N.M. at 505.

Franklin County, 240 F.3d at 552. The application of Rules 310 and 313 to Maralo does not amount to a violation of Maralo's due process rights.

IV.
CONCLUSION

This Response has shown that Maralo's thinly argued Motion is unsupportable. Remediation may properly proceed.

Respectfully submitted,

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By: _____

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CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of the foregoing *Anthony's Response In Opposition to Maralo, L.L.C.'s Motion To Dismiss,* to be served by U.S. Mail on this 14th day of October, 2003 to the following counsel of record:

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