

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

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Oil and Gas 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; LEA
COUNTY, NEW MEXICO.**

CASE NO. 13142

**THE NEW MEXICO OIL CONSERVATION DIVISION'S RESPONSE TO
MARALO, LLC'S MOTION TO DISMISS**

The Oil Conservation Division (the "Division") respectfully asks the hearing examiner to deny the motion filed by Maralo, LLC ("Maralo") to dismiss it from the remediation of hydrocarbon contamination at Humble State Site No. 3. Maralo's argument that the Division is applying its rules retroactively is based on a misunderstanding of the facts: the rules Maralo says were enacted in 1982 have in fact been in place since 1935, years before the acts causing the contamination took place. Maralo's argument is also based on a misunderstanding of the law: even if the facts were as described by Maralo, those facts would not constitute an impermissible retroactive application of the law. In requesting that Maralo clean up the contaminated area, the Division is not "punishing " past conduct, but is requiring remediation of current, ongoing contamination.

Factual Background

This action concerns an abandoned oil and gas production facility located at the Humble State Site No. 3 in Lea County, New Mexico. All the equipment has been

removed, but the site was not remediated. There are the remains of pits, with asphaltic-type oil present at the surface of the pits. It appears they were used for containment of emulsions, basic sediments and tank bottoms. Laboratory analyses of samples of contaminated soils from the site 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.

Maralo's predecessor, Ralph Lowe, filed a notice of intent to drill the site in 1945. Maralo became operator of the site in 1974. Maralo filed its plug and abandon report in 1989.

The Division's Application requests an order requiring Maralo to submit a work plan and remediate the area, based on the violation of Division Rules 313 and 310A. The current version of division Rule 313 (19.15.5.313 NMAC) 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.

The current version of division Rule 310A (19.15.5.310A NMAC) provides, in relevant part: "Oil shall not be stored or retained in earthen reservoirs, or in open receptacles."

Rules 313 and 310A have been in place since the Oil Conservation Commission adopted the current rule structure in 1950. See Exhibit A, attached, a certified copy of Order No. 850, Case No. 189, adopting the 1950 version of the rules. Although both rules have been amended in the past half-century, the relevant language was present in the 1950 version of the rules. Exhibit B, attached, is a certified copy of Rules 310 and 313 as they appeared in 1950. The original 1950 version of Rule 310 contains the relevant language: "Oil shall not be stored or retained in earthen reservoirs, or in open

receptacles.” And the original 1950 version of Rule 313 contains the relevant language regarding surface damage: “Wells producing oil shall be operated in such a manner as will reduce as much as practicable the formation of emulsion and B.S. These substances and tank bottoms shall not be allowed to pollute streams or cause surface damage.” The 1950 version of the rules can be found at the Historical Services Division of the State Records and Archives Center in box serial No. 8898, Location 24-A-8.

The relevant language was even present in the rules adopted in 1935 after the formation of the Oil Conservation Commission, under an earlier numbering system. Exhibit C, attached, is a certified copy of the first four pages of Oil Conservation Commission Order No. 4, adopted in 1935. Rule 15 of the 1935 version provides, in part, “Oil shall not be stored or retained in earthen reservoirs, or in open receptacles.” Rule 16 of the 1935 version states “Wells producing oil shall be operated in such manner as will reduce as much as practicable the formation of emulsion and B.S. These substances and waste oil shall not be allowed to pollute streams or cause surface damage.” When the Commission adopted the 1950 version of the rules, Rule 15 became Rule 310, and Rule 16 became Rule 313. The 1935 version of the rules can be found at the Historical Services Division of the State Records and Archives Center in box serial No. 12888, Location 59-L-4.

Argument

Maralo summarizes its argument in its conclusion, where it states that due process “is violated when the Division enacts a rule and then seeks to enforce it retroactively by punishing a company for conduct that was completely legal and in accordance with all

applicable rules at the time it was committed.” Brief in Support of Maralo, LLC’s Motion, at page 6.

No factual support exists for Maralo’s argument. The rule prohibiting storage or retention of oil in earthen reservoirs or open receptacles and the rule prohibiting emulsion and basic sediments from causing surface damage have been in place since 1935, years before operations began at the site.¹ Obviously, the site was not operated in accordance with these rules because it bears the scars of open pits that still contain asphaltic material, and the surface is contaminated with petroleum hydrocarbons, benzene, ethylbenzene and xylene.

Because Maralo does not have the facts to support its theory, it is not necessary for the hearing examiner to reach the question of whether Maralo’s legal theory is correct. It is important, however, for the Division to clarify its position on this issue because it affects the ability of the Division or any agency to remediate existing conditions.

The Division is not “punishing” past conduct. It is requiring Maralo to remediate existing contamination. Although the contamination may be the result of past actions, it is a current threat and that contamination will continue to be a threat until the site is remediated. If the legislature passed a statute today requiring remediation, or if the Division enacted a rule today requiring remediation, application of that statute or rule to existing contamination would not be a “retroactive” application of the law. As the New Mexico Supreme Court has recognized, “a statute or rule ‘ ‘is not retroactively construed when applied to a condition existing on its effective date even though the condition

¹ Although Maralo’s motion seeks relief on the ground that the Division retroactively applied Rule 310A, its brief in support of the motion mentions both Rule 310A and Rule 313. This Response addresses both rules, although only Rule 310A is at issue in this motion.

results from events which occurred prior to the date.” ‘ “ *Howell v. Heim*, 118 N.M. 500, 506, 882 P.2d 541 (1994), quoting with approval from *Philadelphia v. Phillips*, 179 Pa.Super. 87, 116 A.2d 243, 247 (1955) quoting *Burger v. Unemployment Compensation Bd. Of Review*, 168 Pa.Super. 89, 77 A.2d 737, 739 (1951). Maralo’s interpretation of the law of retroactivity would prevent the legislature or regulatory agencies from ever remedying existing problems. In the context of environmental cleanup, the result would be that all existing contamination would be “grandfathered” in, with no remediation required.

Conclusion

Maralo’s motion to dismiss is not supported by the facts or the law. The Division respectfully requests that the hearing examiner deny Maralo’s motion.

RESPECTFULLY SUBMITTED,
this 7th day of October by



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Certificate of Service

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Gail MacQuesten

BEFORE THE OIL CONSERVATION
COMMISSION OF THE STATE OF
NEW MEXICO

IN THE MATTER OF THE HEARINGS CALLED
BY THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO FOR THE
PURPOSE OF CONSIDERING:

CASE NO. 189
ORDER NO. 850

RULES AND REGULATIONS

ORDER OF THE COMMISSION

BY THE COMMISSION:

After due notice and hearings in Santa Fe, New Mexico, on September 7, 1949, and November 1, 1949, the Commission finds that certain rules, regulations and orders should be adopted and others repealed.

IT IS THEREFORE ORDERED:

1. All rules, regulations and orders heretofore issued by the Commission are repealed and rescinded, effective January 1, 1950, except the following orders which are of a special nature and are not of statewide application, they being:

- a. All orders heretofore issued granting permission for specific unorthodox locations.
- b. Orders relating to approval of unit agreements No. 570, 583, 603, 602, 628, 629, 648, 655, 656, 676, 677, 684, 706, 717, 731, 737, 755, 759, 772, 774, 786, 794, 796, 836.
- c. Orders relating to Carbon Black Plants No. 650, 651, 724, 806.
- d. Orders relating to spacing in the Fulcher Basin Pool No. 541, 647, 748, 815.
- e. Orders relating to specific five (5) spot locations No. 733, 819, 826, 821, 828, 844.
- f. Order No. 799 relating to spacing in the Blanco Pool.
- g. Orders relating to specified pressure maintenance projects as follows:
 - (1) Loco Hills Pressure Maintenance Association, 339, 484, 498, 540, 562.
 - (2) Maljamar Cooperative Repressuring Agreement, 485, 495, 736, 793.
 - (3) Grayburg Unit Association, 659, 791, 802.
 - (4) Culbertson-Irwin Pressure Maintenance Project, 388.
 - (5) Langlie Unitized Pressuring Project, 340.
- h. Orders relating to pooling of interests in specified leases, No. 739, 780.
- i. Order No. 795 relating to a specific tank battery.
- j. Orders relating to dual completions on specified wells, No. 740, 750, 801, 810, 816, 829, 838.
- k. Order No. 831 rescinding the bonus discovery allowable.
- l. Order No. 779 relating to 80-acre spacing in the Crossroads Pool.
- m. Section 2 of Order No. 835, relating to gas-oil ratios.
- n. Order 846, establishing 80-acre spacing in Bagley-Hightower Pool.
- o. Order 33, relating to the proration plan for Monument Pool, Lea County, New Mexico.
- p. Order 398, relating to proration plan for Hobbs Pool.
- q. Orders No. 66 and 67, relating to carbon dioxide.

2. This order shall not affect in any way the validity of any statewide proration order heretofore issued.

certify that this is a true copy of the original document
In the custody of the State of New Mexico Records
Center and Archives.
DATE *Richard J. Lopez* 10-3-03

OCD Exhibit **A**
Case No. 13142
October 23, 2003

3. An exception from the rules and regulations hereby adopted is granted until March 31, 1950, as to all presently existing oil and gas wells that have been in the past and are presently operated or the products thereof utilized in a manner differing from the requirements herein, but in compliance with former rules and regulations. If during said period the operator of any such well files with the Commission an application for a permanent exception for such well from the requirements of these rules and regulations, the temporary exception herein granted shall continue in force until the Commission has acted on such application.

4. The following rules and regulations are hereby adopted, effective January 1, 1950.
DONE at Santa Fe, New Mexico, on this 9th day of December, 1949.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

I certify that this is a true copy of the original document
in the custody of the State of New Mexico Records
Center and Archives.

DATE

Melissa Halpern 10-3-03

THOMAS J. MABRY, CHAIRMAN

GUY SHEPARD, MEMBER

R. R. SPURRIER, SECRETARY

RULE 306. VENTED CASINGHEAD GAS

Pending arrangement for disposition for some useful purpose, all vented casinghead gas shall be burned, and the estimated volume reported on Form C-115.

RULE 307. USE OF VACUUM PUMPS

Vacuum pumps or other devices shall not be used for the purpose of creating a partial vacuum in any stratum containing oil or gas.

RULE 308. SALT OR SULPHUR WATER

Operators shall report monthly on Form C-115, the amount or percentage of salt or sulphur water produced with the oil by each well making 2% or more water.

RULE 309. CENTRAL TANK BATTERIES

Oil shall not be transported from a lease until it has been received and measured in tanks located on the lease. At the option of the operator, common tankage may be used to receive the production from as many as 8 units of the same basic lease, provided adequate tankage and other equipment is installed so that the production from each well can be accurately determined at reasonable intervals.

RULE 310. OIL TANKS AND FIRE WALLS

Oil shall not be stored or retained in earthen reservoirs, or in open receptacles. Dikes or fire walls shall not be required except such fire walls must be erected and kept around all permanent oil tanks, or battery of tanks that are within the corporate limits of any city, town, or village, or where such tanks are closer than 150 feet to any producing oil or gas well or 500 feet to any highway or inhabited dwelling or closer than 1000 feet to any school or church; or where such tanks are so located as to be deemed an objectionable hazard within the discretion of the Commission. Where fire walls are required, fire walls shall form a reservoir having a capacity one-third larger than the capacity of the enclosed tank or tanks.

RULE 311. TANK CLEANING PERMIT

No tank bottom shall be removed from any tank used for the storage of crude petroleum oil unless and until application for tank-cleaning permit is approved by Agent of the Commission. To obtain approval, owner shall submit Commission's Form C-117 reporting an accurate gauge of the contents of the tank and the amount of merchantable oil determinable from a representative sample of the tank bottom by the standard centrifugal test as prescribed by the American Petroleum Institute's code for measuring, sampling, and testing crude oil. Number 25, Section 5. The amount of merchantable oil shall be shown as a separate item on Commission Form C-115, and shall be charged against the allowable of the unit or units producing into such tank or pit where such merchantable oil accumulated. Nothing contained in this rule shall apply to the use of tank bottoms on the originating lease where owner retains custody and control of the tank bottom or to the treating of tank bottoms by operator where the merchantable oil recovered is disposed of through a duly authorized transporter and is reported on Commission Form C-115. Nothing contained in this Rule shall apply to reclaiming of pipe line break oil or the treating of tank bottoms at a pipe line station, crude oil storage terminal or refinery or to the treating by a gasoline plant operator of oil and other catchings collected in traps and drips in the gas gathering lines connected to gasoline plants and in scrubbers at such plants.

RULE 312. TREATING PLANT

No treating plant shall operate except in conformity with the following provisions:

(a) Before construction of a treating plant and upon written application for treating plant permit stating in detail the location, type, and capacity of the plant contemplated and method of processing proposed, the Commission in not less than 20 days will set such application for hearing to determine whether the proposed plant and method of processing will actually and efficiently process, treat and reclaim tank bottom emulsion and other waste oils, and whether there is need for such a plant at the proposed location thereof. Before actual operations are begun, the permittee shall file with the Commission a surety bond of performance satisfactory to the Commission and payable in the amount of \$25,000.00 to the Commission of the State of New Mexico.

(b) Such permit, if granted, shall be valid for 1 year, shall Commission at any time after hearing is had on 10 days' notice operator to an approved Certificate of Compliance and Authorize Form C-110, for the total amount of products secured from

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processed. Any operating treating plant shall, on or before the 15th day of each calendar month, file at the nearest office of the Commission, a monthly report on Commission Form C-118, which report when fully completed and approved by an authorized agent of the Commission, may be used to support a Commission Form C-110 for the net oil on hand at the end of the reported period. In no event shall Commission Form C-110 be issued for moving the products of a treating plant without supporting Commission Form C-118 being completed and approved.

(c) None of the provisions of this rule are applicable to the recovery of wash-in oil, creek oil, or pit oil where such oil is picked up and returned to the lease on which produced or where such oil is disposed of by owner to an authorized transporter and accounted for on Commission Form C-110. Before any person other than owner shall pick up, reclaim or salvage wash-in oil, creek oil, or pit oil, a permit to do so shall be obtained from owner or operator of lease and from the duly authorized agent of the Commission. Application for permit shall state the name and location of the lease, the number of well or wells from which the oil was produced, or the source of such oil and the name of the owner, operator or manager.

RULE 313. EMULSION, BASIC SEDIMENTS, AND TANK BOTTOMS

Wells producing oil shall be operated in such a manner as will reduce as much as practicable the formation of emulsion and B. S. These substances and tank bottoms shall not be allowed to pollute streams or cause surface damage. If tank bottoms are removed to surface pits, the pits shall be fenced and the fence shall be kept in good repair.

I certify that this is a true copy of the original document
in the custody of the State of New Mexico Records
Center and Archives.

DATE

Y. O. Klisa *10-3-03*

Melvin Balgoz 10-3-03

OIL CONSERVATION COMMISSION

OF NEW MEXICO

ORDER NO. 4

GENERAL RULES AND REGULATIONS GOVERNING THE CONSERVATION OF OIL AND GAS IN NEW MEXICO

INTRODUCTION

Pursuant to power delegated by an Act of the Twelfth Regular Session of the Legislature of the State of New Mexico, Chapter 72, Laws of 1935, especially the power delegated by Sections 9 and 10 thereof, the Oil Conservation Commission of the State of New Mexico, hereinafter designated as the "Commission", hereby and herein makes and promulgates the following general rules and regulations which are found by the Commission, after notice and hearing as required by law, held at Santa Fe, New Mexico, June 28th, 1935, to be reasonably necessary to prevent present and imminent waste of oil and gas, as defined by law, and otherwise to carry out the purposes of said Act. These rules and regulations shall become effective August 12, 1935.

RULE 1. SIGNS ON WELLS

Every well shall be identified by a sign, posted on the derrick pole, otherwise on a substantial post not more than twenty feet from the well, and such signs shall be of durable construction and lettering thereon shall be kept in a legible condition and large enough to be legible under normal conditions at a distance of fifty feet. The wells on each lease or property shall be numbered consecutively beginning with No. 1, unless some other numbering was adopted by the owner prior to the promulgation of these rules and regulations. Each sign shall show the name of the well, the name of the lease (which shall be different from the name of the well), the name of the lessee, owner or operator, and the section, township and range.

RULE 2. GENERAL SPACING RULES

Rules for the spacing of oil and gas wells are as follows:
"Wildcat" wells shall not be drilled closer than 330 feet from any lease or property line or less than 660 feet from any other well. "Wildcat" wells, according to the meaning used herein, shall be those which are located not less than two miles from any

commercial or potentially commercial oil or gas well, and that are outside the boundaries of proven oil or gas fields or areas that may be designated by the Commission. Plugged and abandoned wells shall not be considered in applying this rule.

The Commission may, after notice and hearing, grant exceptions to this rule, provided such exceptions will create neither waste nor hazards conducive to waste. Such exceptions may be granted when surface conditions render it impracticable without unreasonable expense to drill a well at a location in conformity with this rule, or when a separately owned tract is so small or so shaped that a location in conformity with this rule is impossible.

(b) The foregoing rule with reference to "Wildcat" wells shall also apply to all other wells, unless and until the Commission, after notice and hearing, adopts special rules for the spacing of wells in proven oil or gas fields or in areas that the Commission may designate.

RULE 3. WELL RECORD

During the drilling of every well, the owner, operator, contractor, driller, or other person responsible for the conduct of drilling operations, shall keep at the well a detailed and accurate record of the well, reduced to writing from day to day, which shall be accessible to the Commission and its agents at all reasonable times. A copy of the record shall be furnished to the Commission at its request, but shall be kept confidential, if the operator so requests in writing, for a period not to exceed ninety days after the completion of the well, provided that the report or data therein, when pertinent, may be introduced in evidence in any public hearing before the Commission or any Court, regardless of the request that the report be kept confidential.

If so ordered by the Commission, samples of drill cuttings shall be kept in the State by the owner of the well and shall be accessible to the Commission and its agents at all reasonable times.

RULE 4. DEVIATION TESTS

Whenever any well is drilled or deepened, tests to determine the deviation from the vertical shall be taken at intervals of not more than 500 feet. Directional surveys may be required by the Commission whenever in its judgment the location of the bottom of the well is in doubt.

RULE 5. PIT FOR SHALE DRILL CUTTINGS REQUIRED

During the drilling of any well, all clay and soft shale drill cuttings shall be accumulated in an adequate pit provided before drilling is commenced, in order to assure a supply of proper material for mud-laden fluid to confine oil, gas or water to their native strata.

DATE July 16, 1963

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RULE 6. STRATA TO BE SEALED OFF

Before any oil or gas well is completed as a producer, all oil, gas and water strata above the producing horizon shall be sealed or separated in order to prevent their contents from passing into other strata.

RULE 7. SHOOTING AND CHEMICAL TREATING OF WELLS

Wells shall not be shot or chemically treated until the permission of the Commission is obtained. Each well shall be shot or treated in such manner as will not cause injury to the sand, or result in water entering the oil or gas sand, and necessary precautions shall be taken to prevent injury to the casing. If shooting or chemical treating results in irreparable injury to the well or to the oil or gas sand, the well shall be properly plugged and abandoned. (See Rule 42.)

RULE 8. WATER SHUT-OFFS

All water shall be shut off and excluded by a method approved by the Commission from the various oil and gas bearing strata which are penetrated. Water shut-offs shall ordinarily be made by cementing casing or landing casing with or without the use of mud-laden fluid. Drilling shall not be resumed following the landing or cementing of each string of casing until proof is obtained satisfactory to the Commission of a proper oil and gas and water shut-off.

RULE 9. MUD-LADEN FLUID

Mud-laden fluid is a term used herein to designate any mixture of water and finely divided or colloidal material that remains in suspension for a long time. The mud employed shall have suitable physical and chemical properties to accomplish adequately the purpose for which such mud is used.

RULE 10. USE OF MUD-LADEN FLUID IN SETTING CASING

In order to seal off any oil, gas or water stratum during drilling, the owner shall, if the Commission so requires, run the casing and seat it in mud-laden fluid, which fluid shall fill the hole outside the casing to the top, where the level of said fluid shall be maintained.

RULE 11. PULLING OUTSIDE STRINGS OF CASING

In pulling any outside strings of casing from any oil or gas well, the space outside the casing left in the hole shall be kept and left full of mud-laden fluid of adequate specific gravity to seal off all fresh and salt water strata and any strata bearing oil or gas not producing.

Oil and Gas Conservation Law, Circular No. 1
Agency Historic Rules Coll.

RULE 12. ABANDONING WELLS

Before a well is abandoned, it shall be plugged in a manner which will confine permanently all oil, gas and water in the separate strata originally containing them. This operation shall be accomplished by the use of mud-laden fluid, cement and plugs, used singly or in combination as may be approved by the Commission. The exact location of abandoned wells shall be shown by a steel marker at least four inches in diameter set in concrete, and extending at least four feet above mean ground level.

RULE 13. BLOW-OUT PREVENTION

In drilling in areas where high pressures are likely to exist, all proper and necessary precautions shall be taken for keeping the well under control, including the use of blow-out preventers and high pressure fittings attached to properly anchored and cemented casing strings.

RULE 14. CASING REQUIREMENTS FOR OIL AND GAS PRODUCTION

Oil wells shall be completed with an oil string of casing which shall be properly cemented at a sufficient depth adequately to protect the oil-bearing stratum. Gas-producing wells shall be cased in a similar manner.

RULE 15. OIL TANKS AND FIRE WALLS

Oil shall not be stored or retained in earthen reservoirs, or in open receptacles. All lease, stock and oil storage tanks shall be protected by a proper fire wall, which wall shall form a reservoir having a capacity one-third larger than the capacity of the enclosed tank or tanks. Such tanks shall not be erected, enclosed or maintained closer than 150 feet to the nearest producing well.

RULE 16. EMULSION, B. S., AND WASTE OIL

Wells producing oil shall be operated in such manner as will reduce as much as practicable the formation of emulsion and B. S. These substances and waste oil shall not be allowed to pollute streams or cause surface damage.

RULE 17. USE OF VACUUM PUMPS

Vacuum pumps or other devices shall not be used for the purpose of creating a partial vacuum in any stratum containing oil or gas.

RULE 18. PROTECTION OF FRESH AND ARTESIAN WATERS

All fresh waters and waters of present or probable future value for domestic, commercial or stock purposes shall be confined to their respective strata and shall be adequately protected by methods