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

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION COMMISSION FOR THE PURPOSE OF CONSIDERING THE APPLICATION OF THE OIL CONSERVATION DIVISION TO ENACT A NEW RULE ESTABLISHING METHODS AND STANDARDS FOR THE PREVENTION AND ABATEMENT OF WATER POLLUTION ASSOCIATED WITH OPERATIONS OF THE OIL AND GAS INDUSTRY.

CASE NO. 11635
ORDER NO. R-10767

STATEMENT FOR THE RECORD

This statement is submitted by Chris Shuey, who offers the following written testimony:

1. My name is Chris Shuey. I was a member of the Rule 116 Change Committee ("Committee"), appointed by the Director of the Oil Conservation Division ("OCD" or "Division"), and testified in support of proposed amendments to OCD Rule 116 and in support of new OCD Rule 19 at the public hearing conducted by the Oil Conservation Commission ("Commission") on November 14, 1996.

2. I am submitting this STATEMENT FOR THE RECORD ("Statement") in the rehearing of Case No. 11635 in lieu of giving oral testimony because of a scheduling conflict that prevents me from appearing before the Commission.

3. I have reviewed the PRE-HEARING STATEMENT submitted by Mr. Kendrick on behalf of El Paso Natural Gas Company, Giant Industries Arizona, Inc., Marathon Oil Company and PNM Gas Services, the "Applicants" for this rehearing, including Exhibits 1 and 2 attached thereto. For the purposes of this Statement, I will confine my testimony to the modifications to Commission Order No. R-10767 proposed by the Applicants and reflected in Applicants' Exhibit 1. I have no objection to the modification to Rule 19.M(1) proposed by the Applicants in Applicants' Exhibit 2.

4. In preparing this Statement, I have reviewed the Committee's October 21, 1996,

report ("Committee Report"), which was submitted to the Commission by Committee Chairman Kellahin during the public hearing on Case No. 11635. I have also reviewed my notes and various papers generated by the Committee during its deliberations. Due to time constraints, I was not able to review the transcript of the Commission's hearing on this matter on November 14, so any statement made herein about what I or anyone else said at the hearing is based on my recollection.

5. Based on my review of relevant documents and my recollection of events at the November 14 hearing, I cannot support the Applicants' proposed modifications to the Commission's findings in Order No. R-10767, as set forth in Applicants' Exhibit 1 (identified in that exhibit as "Modification to Finding 8" and "Additional Finding 9"). My reasons are as follows:

a. The opening phrase of proposed Additional Finding 9 is simply incorrect. I did not give any testimony at the November 14 hearing, nor do I recall hearing any such testimony, that the Committee had recommended previous to the hearing or recommended at the hearing that there be "no distinction . . . made between. . ." facilities subject to Oil and Gas Act §70-2-12.B(21) and those subject to §70-2-12.B(22).

b. I do not recall that the Committee reached consensus to recommend that the Commission make an explicit finding that Rule 19 "apply equally to both B(21) and B(22) activities," as proposed in Applicants' Exhibit 1.

c. My recollection is that the Committee found a way to avoid making an explicit recommendation regarding the applicability of Rule 19 to the B(22) facilities. This was accomplished by crafting language for Rule 116.D. that was broad enough to allow the Division flexibility in carrying out its authorities under both the Oil and Gas Act for the B(21) activities and the Water Quality Act for B(22) facilities. The Committee's recommended language for Rule 116.D. ended up reflecting that objective:

> "D. CORRECTIVE ACTION: The responsible person must complete Division approved corrective action for unauthorized 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 Rule 19."

Committee Report at 11. The Commission eventually adopted this language, with only minor editorial changes.

d. This broad language came out of an extensive discussion that took place during the Committee's last meeting on September 12, 1996. I had supported a previous draft of Rule 116.D. that had explicitly separated abatement authorities between those applicable to the B(21) activities and those applicable to the B(22) activities:

> ". . .I support the notion that those oil and gas facilities covered by §70-2-12.B(22) of the Oil and Gas Act be regulated pursuant to the Water Quality Control Commission ["WQCC"] regulations, as proposed in Rule 116.D.(2). This approach is consistent with the statute. The few differences between the WQCC requirements and the new OCD corrective active requirements are minor and should not place an undue burden on the industry."

Memorandum from Chris Shuey to Tom Kellahin, September 12, 1996, at 2; attached hereto as **Shuey Exhibit 1**. My recollection is that some, if not all, of the industry representatives were uncomfortable with the explicit separation created by the earlier Committee draft that I had supported. I stated at the September 12 meeting that I could support the broader, more flexible language of Rule 116.D., provided that it did not interfere with the OCD's ability to enforce ground-water cleanups at facilities regulated by OCD pursuant to discharge plans required by the WQCC regulations, nor would inhibit OCD's permitting of B(22) facilities pursuant to Part 3 of the WQCC regulations. I said that I would be concerned that an explicit linkage of both B(21) and B(22) facilities in Rule 19 not only would negate the objective of maintaining OCD flexibility in requiring abatement, but also, and more importantly, could cloud and confuse OCD's authority to implement WQCC permitting requirements (i.e., discharge plans) at B(22) facilities required to abate water pollution pursuant to Rule 19. In agreeing to what I thought was a consensus compromise incorporated in the broad language in Rule 116.D., I deferred to the judgment of the OCD Attorney, Mr. Carroll, whose views on this subject are summarized in the record:

> "Mr. Rand Carroll . . . advises that in his opinion the OCC has the authority to:
>
> (1) regulate the B.(21) upstream E&P activities by revising Rule 116 and adopting either (a) the same standards and corrective action

> procedures set forth in the WQCC abatement regulations; or (b) its own corrective action procedures, guidelines and regulations which may be different from the WQCC regulations; with all review of abatement action being taken through the OCD-examiner hearing process; and
>
> (2) continue to enforce clean-up 'abatement' of B.(22) sites under the WQCC standards and the WQCC regulations with all review of abatement action being taken through the WQCC hearing process pursuant to the Water Quality Act authority referenced in Section 70-2-12.B.(22) NMSA (1978).
>
> Mr. Carroll's opinion relies in part on the WQCC Delegation of Responsibilities to the EID and OCD dated July 21, 1989."

Committee Report at 6. Against this background, I am now concerned that the Applicants' proposed additional finding backtracks on the intention of the consensus compromise that I thought the Committee had reached in crafting the language in Rule 116.D.

6. Notwithstanding the compromise that I thought I had agreed to as a member of the Committee, as a professional environmental analyst, I remain of the opinion that OCD should regulate B(22) activities pursuant to requirements of the Water Quality Act and WQCC regulations because that is what the statute mandates.

7. I believe that the findings stated by the Commission in support of its adoption of Order No. R-10767, authorizing creation of Rule 19, are legally sufficient or need not be clarified by the Applicants' proposed modification and addition. On the contrary, I believe that proposed Additional Finding 9 will confuse and confound the present record, and open the door to future challenges of OCD-approved corrective actions required pursuant to the WQCC regulations.

8. The relationship between the Water Quality Act and the Oil and Gas Act, and OCD's authorities and responsibilities under both, has long been a source of much debate and substantial confusion in the 16 years that I have followed oil and gas regulation in New Mexico. If the Commission believes that the findings to Order No. R-10767 are somehow inadequate, I recommend a different course of action than that proposed by the Applicants. I recommend that the Commission make a formal request of the Attorney General to review OCD's and OCC's authorities under both laws with respect to prevention and abatement of water pollution, and to issue an opinion based on that review. I am aware that an opinion of the Attorney General is not

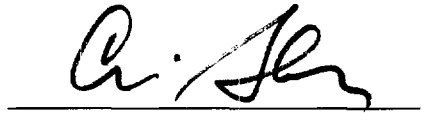
binding on any state agency. However, it would constitute an addition piece of information that the Commission could weigh, and one that might provide a "fresh" look at a question that has dogged many of us for too long. An opinion of the Attorney General might also indicate the need for legislative clarity in the two statutes, thus providing a basis for future legislation.

9. If the Commission is inclined to accept the Applicants' proposed modified and additional findings, I strongly recommend that another additional finding to added to the Order:

> "(X) In finding that Rule 19 should apply equally to both B(21) and B(22) activities, the Commission does not intend to affect or alter OCD's permitting responsibilities for B(22) activities carried out pursuant to the Water Quality Control Commission regulations. Neither does the Commission intend to affect or alter any water pollution abatements now being carried out pursuant to the WQCC abatement regulations or pursuant to an OCD-approved ground-water discharge plan."

The intent of this language is to make clear that the Applicants' proposed Additional Finding 9, if adopted by the Commission, does nothing to change OCD's current authorities and responsibilities with respect to discharge plans for oil and gas operations subject to §70-2-12.B(22) of the Oil and Gas Act. I offer this language only as an alternative; I remain of the belief that Order No. 10767 is adequate as written and there is no need for the Applicants' proposed amendments.

Respectfully submitted this 9th day of April, 1997, by



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Statement for the Record was transmitted by facsimile or sent by first class mail on this 9th day of April, 1997, to each of the following persons:

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SHUEY EXHIBIT 1

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MEMORANDUM

September 12, 1996

To: Tom Kellahin, Chair, and Members
OCD Rule 116 Committee

From: Chris Shuey, Committee Member

Re: **THOUGHTS ON MOST RECENT PROPOSALS**

I am prepared today to support the OCD's May 14, 1996, revised language for Rule 116.D. OCD's language in 116.D.(1)(b) is identical to the language proposed by Bob Menzie, on behalf of Marathon and the other industry representatives, in his letter of April 29, 1996.

The provisions of proposed Rule 116.D.(1)(b) will address a major gap in the OCD regulations -- the absence of enforceable requirements and standards for cleanup of water pollution. Filling this gap was my main goal when we began the Rule 116 process, and will go a long way toward ensuring that OCD's regulations implement the mandate of the Oil and Gas Act to protect public health, the environment and fresh water. That the industry representatives support the notion of the need to incorporate corrective action requirements in the OCD regulations is a significant and positive step in the ongoing improvement of the OCD regulatory program, and I commend their support for this principle.

I also continue to support the notion that the rule should have flexible provisions for addressing contamination of the vadose zone. This objective is addressed in proposed section 116.D.(1)(a), which OCD supports and industry apparently does not, at least at this time. I suggest we not get bogged down today on this issue, but simply agree to disagree and direct the Chairman to reflect that situation in this final report to the Commission.

Regardless of the outcome of the matter of protection of the vadose zone, I suggest that the Committee recommend that the Commission authorize the Committee to continue to work with OCD on revising the soil remediation guidelines. Dr. Don Neeper, representing New Mexico Citizens for Clean Air and Water, with whom I have consulted throughout this process, has expressed

interest in representing the environmental community in future work on the guidelines. That task should not be put off, but should follow the conclusion of this process.

Further, I support the notion that those oil and gas facilities covered by §70-2-12.B(22) of the Oil and Gas Act be regulated pursuant to the Water Quality Control Commission regulations, as proposed by OCD in Rule 116.D.(2). This approach is consistent with the statute. The few differences between the WQCC requirements and the new OCD corrective action requirements are minor and should not place an undue burden on the industry.

I have a two proposed wording changes and an additional comment for your consideration:

(1) **Rule 116.D.(1)(b)** -- ". . .the Director ~~may~~ will notify the facility owner/operator that he is a responsible person and that an abatement plan ~~may~~ will be required . . ."

Rationale: Once the Director has determined that a release has caused or is, with reasonable probability, about to cause water pollution in excess of the standards, and the pollution cannot be abated in one year, it seems at that point that corrective action should be mandatory. I cannot think of a reason why the Director would not order an abatement plan having made such determinations.

(2) **Rule 19.B.(1)** -- ". . . in Subparagraphs (2) and (3) below, through leaching, percolation, other transport mechanisms, or as the water table fluctuates."

Rationale: Dr. Neeper suggests including this additional phrase to cover contamination from vapor transport, and possibly other mechanisms.

Finally, I am assuming that OCD's proposed language will allow the Division to address, on a case-by-case basis, the cumulative effects of multiple releases to the same location or area. If members of the Committee agree with this assumption, I suggest we direct the Chairman to include such a statement in his report to the Commission. If members don't agree, I reserve the right to address this matter during a hearing on the proposed rule.

Because of my schedule, I was unable to give Tony Ristau's proposed changes considerable thought. Therefore, I will abstain from any discussion or votes on them. My apologies to Tony and the rest of the Committee.

I appreciate the opportunity to have served on the Committee and look forward to a positive outcome.