

STATE OF NEW MEXICO
NEW MEXICO OIL CONSERVATION DIVISION, CONSTITUENT AGENCY
OF THE WATER QUALITY CONTROL COMMISSION

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In the Matter of
PIETER BERGSTEIN d/b/a
"SALTY DOG, INC.,"
(OGRID 184208).

NM-OCD 2008-2A

**SETTLEMENT AGREEMENT &
STIPULATED REVISED FINAL ORDER**

The New Mexico Oil Conservation Division ("OCD") and Pieter Bergstein d/b/a "Salty Dog, Inc." ("Mr. Bergstein") agree to resolve the outstanding issues of the Administrative Compliance Order ("Compliance Order" or "Order") issued to Mr. Bergstein on May 18, 2008, identified as *NM-OCD 2008-2*, based on the terms and conditions specified in this **Settlement Agreement & Stipulated Revised Final Order** ("Stipulated Revised Final Order"). For purposes of this **Stipulated Revised Final Order**, Mr. Bergstein admits the jurisdictional allegations of this **Stipulated Revised Final Order** and consents to the relief specified herein.

I. BACKGROUND OF DISPUTE

A. Parties

1. The OCD is a division of the New Mexico Energy, Minerals and Natural Resources Department charged with enforcing the Oil and Gas Act ("OGA"), Chapter

70 Article 2 NMSA 1978. See NMSA 1978, Section 70-2-6(A). In addition to its duties under the OGA, the OCD is authorized to make rules, regulations and orders with respect to the Water Quality Act ("WQA"). NMSA 1978, Section 70-2-12(B)(22).

2. The Oil Conservation Commission ("OCC") is an entity created by NMSA 1978, Section 70-2-4 to enforce the OGA, and has concurrent jurisdiction and authority with the OCD. See NMSA 1978, Section 70-2-6(B). In addition to its duties under the OGA, the OCC is a "constituent agency" under the WQA. NMSA 1978, Section 74-6-2(K)(4).

3. The Environmental Protection Agency has granted primacy to the New Mexico Water Quality Control Commission, the Environmental Improvement Division and the OCD over the underground injection control program for Class III wells in the State of New Mexico. 40 CFR Section 147.1601.

4. Pieter Bergstein d/b/a "Salty Dog, Inc." operates the BW-008 discharge plan facility, a brine supply well in New Mexico, under OGRID 184208. The well is known as "Brine Supply Well #1." As noted at Paragraph 9 of the original Compliance Order, "[d]espite representations by Mr. Bergstein that he is the President of the "company" known as "Salty Dog, Inc.", no company by that name, or any variation thereof, is currently registered and in good standing as a corporation with the New Mexico Public Regulations Commission ("PRC")."

Pieter Bergstein d/b/a "Salty Dog, Inc."

Brine Supply Well #1

Settlement Agreement & Stipulated Revised Final Order: NM-OCD 2008-2A

Page 2 of 15

5. When a constituent agency determines that a person violated or is violating a requirement, regulation or water quality standard adopted pursuant to the WQA, or a condition of a permit issued pursuant to that act, the constituent agency may issue a compliance order requiring compliance immediately or within a specific time period, or issue a compliance order assessing a civil penalty, or both. NMSA 1978, Section 74-6-10(A)(1).

6. Any person who does not comply with the provisions of NMSA 1978, Section 74-6-5, including any regulation adopted pursuant to that section, or any permit issued pursuant to that section, shall be assessed civil penalties up to the amount of fifteen thousand dollars (\$15,000) per day of noncompliance for each violation. NMSA 1978, Section 74-6-10.1(A).

7. Any person who violates any provision of the WQA other than Section 74-6-5 NMSA 1978, or any person who violates any regulation, water quality standard or compliance order adopted pursuant to that act shall be assessed civil penalties up to the amount of ten thousand dollars (\$10,000) per day for each violation. NMSA 1978, Section 74-6-10.1(B).

8. For purposes of the WQA, "person" is defined to include "an individual or any other entity, including partnerships, corporations, associations, responsible business or association agents or officers...." NMSA 1978, Section 74-6-2(I).

Pieter Bergstein d/b/a "Salty Dog, Inc."

Brine Supply Well #1

Settlement Agreement & Stipulated Revised Final Order: NM-OCD 2008-2A

Page 3 of 15

9. On May 18, 2008, OCD issued Administrative Compliance Order NM-OCD 2008-02 to Mr. Bergstein (d/b/a "Salty Dog, Inc.") regarding his "Brine Supply Well #1." Allegations included but were not limited to operation without a permit, major releases in both 1999 and 2005 resulting in groundwater contamination, and numerous violations of WQCC Regulations and Permit Conditions. Civil penalties totaling \$66,000.00 were assessed. The factual allegations and legal conclusions set out in the original Order NM-OCD 2008-02 at *Paragraph Nos. 7 through 68 and 70 through 85* are hereby incorporated by reference.

10. United States Postal Service Records reflect that Mr. Bergstein received the Compliance Order by certified mail on May 23, 2008. Pursuant to the terms of the Compliance Order and to the WQA, Mr. Bergstein then had thirty (30) days from the date of receipt to either comply with the terms of the Order, or to formally request a hearing with the Water Quality Control Commission and submit an Answer in which specific denials to the allegations contained in the Compliance Order were to be articulated. The Compliance Order specifically provided that "[a]ny allegation of the Order not specifically denied shall be deemed admitted."

11. Mr. Bergstein did not submit a Request a Hearing with the WQCC and did not submit an Answer with specific denials of allegations prior to June 23, 2008, thirty (30) days after his receipt of the Order via certified mail. Pursuant to the WQA,

Pieter Bergstein d/b/a "Salty Dog, Inc."

Brine Supply Well #1

Settlement Agreement & Stipulated Revised Final Order: NM-OCD 2008-2A

Page 4 of 15

the Order therefore became final on that date, and all allegations contained therein have been deemed admitted.

12. The Compliance Order provides that if Mr. Bergstein fails to comply with the compliance schedule outlined therein, the OCD may take certain additional steps, including seeking additional penalties at a rate of \$25,000 per day of noncompliance with the Compliance Order (NMSA 1978, § 74-6-10(F)(1)), and requesting that the Division Director withdraw the discharge permit for the facility BW-008 (2004), pursuant to WQCC Rule 20.6.2.5101.I(1).

II. COMPROMISE AND SETTLEMENT

13. OCD has jurisdiction pursuant to the Water Quality Act, WQCC Regulations and NMSA 1978, Section 70-2-12(B)(22) to issue the Compliance Order and to enter into this **Settlement Agreement & Stipulated Revised Final Order**.

14. The parties have engaged in settlement discussions to resolve the outstanding issues addressed by the Compliance Order without the need for further compliance action or formal proceedings.

15. The parties agree to this **Settlement Agreement & Stipulated Revised Final Order** for the sole purpose of resolving the violations outlined in the Compliance Order identified as *NM-OCD 2008-02*. To this end, the parties have discussed, and agree to the following COMPLIANCE SCHEDULE, which is intended

Pieter Bergstein d/b/a "Salty Dog, Inc."

Brine Supply Well #1

Settlement Agreement & Stipulated Revised Final Order: NM-OCD 2008-2A

Page 5 of 15

to and hereby does amend the compliance schedule set forth in the original Administrative Order:

a. **PENALTY:** Mr. Bergstein shall pay the penalty amount as Ordered in NM-OCD 2008-02 of \$66,000.00. However, the OCD has agreed to accept payment of such penalty in the form of six (6) monthly payments of \$11,000.00 each.

i. The payment schedule will be as follows:

Payment 1: August 15, 2008;

Payment 2: September 15, 2008;

Payment 3: October 15, 2008;

Payment 4: November 15, 2008;

Payment 5: December 15, 2008; and

Payment 6: January 15, 2009.

ii. Any payment received by the OCD after the fifteenth of the month in which that payment is due is considered late and will be subject to an assessment of interest at the rate established for judgments and decrees under NMSA 1978, §56-8-4 (1993).

iii. Payments shall be made in the form of a certified check payable to the order of "THE STATE OF NEW MEXICO." Each payment shall be sent to the *attention of:*

**EMNRD-OCD
Attn: Wayne Price
1220 S. St. Francis Drive
Santa Fe, NM 87505**

iv. If Mr. Bergstein fails to pay the civil penalty as specified by Subparagraph a. and its subparts, above, Mr. Bergstein shall pay interest on the outstanding balance at the rate established for judgments and decrees under NMSA 1978, §56-8-4 (1993).

Pieter Bergstein d/b/a "Salty Dog, Inc."

Brine Supply Well #1

Settlement Agreement & Stipulated Revised Final Order: NM-OCD 2008-2A

Page 6 of 15

b. **SUBMIT PLANS/PROPOSALS FOR OCD APPROVAL:** Mr. Bergstein agrees that **within thirty (30) days** of the date of this Stipulated Agreement he will submit a comprehensive site plan to include the following specifications/proposals:

- i. Plan for removal of existing brine pond (including but not limited to specification of plan for digging out contaminated soil, disposition of pond contents, etc.);
- ii. Plan for construction of new tank battery at the brine pond location;
- iii. Plan for coating concrete pad and sump at the brine loading/unloading area (currently without adequate secondary containment) with epoxy;
- iv. Plan for survey (certified surveyor) of ground and top of monitor well casing elevations (mean sea level) at the brine pond area and installation of five new monitoring wells and one recovery well (or conversion of PMW-1 into a recovery well) at the brine pond area, including but not limited to specification of how wells are to be constructed with material specifications;
- v. Plan for survey of ground and top of monitor well casing elevations at the brine well area installation of three new monitoring wells and conversion of MW4 to recovery well (or if MW4 is not of adequate size for use as recovery well, installation of a new recovery well approximately 10 feet to the SE of the MW4 well), including but not limited to specification of how wells are to be constructed, with material specifications;
- vi. Plan for conducting aquifer pump tests of adequate duration at **both** Chloride plume locations to demonstrate the hydrogeology (aquifer characteristics and cone of depression and capture potential) of each recovery well.
- vii. Closure report regarding the removal of contaminated soil/soil staining and analytical data results in the shed near the brine well, and analytical soil sample data results for Total Petroleum Hydrocarbon (TPH) and

Pieter Bergstein d/b/a "Salty Dog, Inc."

Brine Supply Well #1

Settlement Agreement & Stipulated Revised Final Order: NM-OCD 2008-2A

Page 7 of 15

Chloride levels to confirm cleanup.

- viii. Plan for installation of a single boring with soil and water sample collection at discrete intervals to the water table with analyses for TPH and Chlorides in the playa lake area where previous contamination occurred.
- ix. Plan for installation of additional density gradient monitor wells at both the brine pond and the brine well locations, including but not limited to specification of how wells will be constructed, their location, depth setting, construction materials, etc.

** Note: All environmental sampling, analyses and QA/QC shall comply with USEPA accepted practices.*

c. **RESUBMISSION OF PLANS/PROPOSALS NOT APPROVED:** In the event that any of the above-described plan/proposal submissions, or any portions thereof do not meet with OCD approval, the OCD will advise Mr. Bergstein which plans/proposals are not approved and indicate the reasons therefore. Mr. Bergstein shall then resubmit the subject plan(s) for OCD review within thirty (30) days of notification of non-approval by the OCD. If the resubmitted plan(s)/proposal(s) still fail to meet with OCD approval, Mr. Bergstein will be considered to be in breach of this agreement.

d. **PERFORMANCE UPON APPROVAL OF PLAN/PROPOSALS:** Upon approval of each of the proposals submitted to the OCD for review (as described in Subparagraph b. and its subparts, above), Mr. Bergstein shall complete the specified tasks by the following deadlines:

- i. Remove the existing brine pond; dispose (provide waste manifests) of pond contents and any contaminated soil beneath the existing pond; construct new pad with secondary containment for tank battery and load out area; and install new tank battery within 180 days of OCD approval of plan.
- ii. Coat concrete pad and sump at brine loading/unloading station with epoxy within 60 days of OCD approval of

Pieter Bergstein d/b/a "Salty Dog, Inc."

Brine Supply Well #1

Settlement Agreement & Stipulated Revised Final Order: NM-OCD 2008-2A

Page 8 of 15

plan.

iii. Complete a survey (certified surveyor) of ground and top of monitor and recovery well casing elevations (mean sea level) at both the brine well and brine pond areas (both chloride plumes); install 5 monitoring wells and 1 recovery well (or convert PMW-1 to a recovery well) at the brine pond area; install 3 monitoring wells and 1 recovery well (or convert MW-4 to a recovery well) **within 30 days of OCD approval of plan.**

e. **STANDARD OPERATING PROCEDURES:** Mr. Bergstein shall submit a copy of the SOPs utilized by the contract entities performing any and all sampling, collection, testing and/or analysis relating to this site **within 30 days of the date of this Stipulated Revised Order.** Mr. Bergstein, and any of his employees, agents or contractors, shall at all times comply with United States EPA environmental laboratory analytical test methods, QA/QC, and sampling procedures.

f. **QUARTERLY MONITORING REPORTS:** Monitor wells shall comply with WQCC water quality standards. Once monitoring wells have been installed, Mr. Bergstein shall implement a quarterly monitoring schedule. The Quarterly monitoring shall include:

- i. For the first monitor well sample event, or baseline, analyses run on well samples, shall include metals, BTEX and general chemistry, with the potential for subsequent analytical test methods to be less comprehensive, depending on the baseline results.
- ii. Within thirty (30) days of the baseline, a piezometric surface map (mean sea level) to scale and isocon maps (i.e., BTEX, chlorides and any metals exceeding water quality standards) shall be submitted to the OCD in a basic report along with surveyed (≤ 0.01 ft) ground and top of casing elevations (mean sea level) with static water levels from the monitoring and recovery wells.
- iii. Quarterly submittals of data with a "Conclusions" section shall be submitted within thirty (30) days of the

Pieter Bergstein d/b/a "Salty Dog, Inc."

Brine Supply Well #1

Settlement Agreement & Stipulated Revised Final Order: NM-OCD 2008-2A

Page 9 of 15

quarterly sample event.

- iv. Quarterly sampling analysis shall be preceded by the collection of static water level measurements at all monitor well locations to be recorded, summarized and submitted to the OCD with water quality information. Recovery wells shall be turned off for a sufficient period of time in order to discern the natural ground water flow direction and hydraulic gradient across the site.
- v. A piezometric surface map shall be submitted at the onset of installation, activation, and achieving a steady-state pump rate condition in order to assess cones of depression from the dynamic pump systems. Daily, monthly and average recovery well flow rate information shall be recorded to assess ground water remediation. A summary of flow rate data shall be included in the basic report. The OCD shall be contacted within 72 hours of pump or treatment system failure, etc. Pumped ground water from recovery wells at the site are hereby approved for injection into the brine well. The pump rates at recovery wells needed for plume capture shall not be limited or constrained by storage and/or disposal problems at the facility.
- vi. A reduced monitoring schedule and/or closure may be requested in the quarterly basic report "Conclusions" section as monitoring data over time warrants or supports a request.

16. Mr. Bergstein acknowledges that the allegations in the Compliance Order were deemed admitted, and that the Compliance Order became final as of June 23, 2008, and further acknowledges that he may not file a Petition for Review challenging the allegations in the Compliance Order.

17. Pursuant to the original terms of the Compliance Order, if Mr. Bergstein fails to comply with the Schedule of Compliance articulated therein:

Pieter Bergstein d/b/a "Salty Dog, Inc."

Brine Supply Well #1

Settlement Agreement & Stipulated Revised Final Order: NM-OCD 2008-2A

Page 10 of 15

- a. the Director of OCD may assess an additional civil penalty of up to \$25,000 for each day of noncompliance with the Order. NMSA 1978, § 74-6-10(F)(1), and
- b. the Director of OCD may cancel the subject permit, BW-008 (2004), pursuant to WQCC Rule 20.6.2.5101.I(1).

Compliance Order at Paragraph 86.

18. The OCD now agrees not to pursue these additional enforcement and compliance actions provided for by the terms of the original Compliance order as described in Paragraph 17, above, if Mr. Bergstein agrees to and abides by the terms of this **Settlement Agreement & Stipulated Revised Final Order**, including the **Compliance Schedule** specified herein (*see* Paragraph 15 and its subparts).

19. In the unexpected event that Mr. Bergstein encounters shortages of labor or equipment, or other such unanticipated circumstances (including, but not limited to inclement weather, acts of nature, etc.), which, in the reasonable opinion of Mr. Bergstein, are likely to significantly disrupt or suspend the schedule of compliance set forth above, and affect the his ability to meet the established deadlines, then Mr. Bergstein shall notify the OCD in writing of such circumstances at least seven (7) days prior to the expiry of the deadline at issue, or, in the case of an emergency, verbally/by telephone as soon as he becomes aware of the circumstances, and provide the OCD with any and all evidence available to substantiate a request for an extension of the deadline(s) that is/are anticipated to be affected. The written

Pieter Bergstein d/b/a "Salty Dog, Inc."

Brine Supply Well #1

Settlement Agreement & Stipulated Revised Final Order: NM-OCD 2008-2A

Page 11 of 15

submission to the OCD and any supporting documentation shall be directed to Wayne Price, OCD Environmental Bureau, and should:

- (a) reasonably describe the circumstances likely to significantly disrupt or suspend the schedule, and if the circumstances include shortages of labor or equipment, describe the efforts taken by the Operator to obtain labor and equipment, and attach any and all documentation reflecting such efforts;
- (b) specifically identify which specific tasks are being affected and which specific deadlines are being requested to be adjusted; and
- (c) propose a reasonable, alternative deadline, which, in the reasonable and prudent opinion of the Operator, is necessary to accomplish the specific task, describe the basis for the selected new deadline and attach any supporting documentation;

20. Within ten (10) business days of receipt of any such notification of exceptional circumstances and request for deadline extension, as described in Paragraph 19 above, the OCD will provide Mr. Bergstein with a response in writing either denying the request or approving the request and assigning a new deadline date.

21. If Mr. Bergstein fails to comply with the Schedule of Compliance set forth within this Stipulated Revised Final Order (or any OCD-approved deadline extensions thereto), however, the following rights are reserved:

- a. the Director of OCD may assess an additional civil penalty of up to \$25,000 for each day of noncompliance with the Order. NMSA 1978, § 74-6-10(F)(I), and
- b. the Director of OCD may cancel the subject permit, BW-008 (2004), pursuant to WQCC Rule 20.6.2.5101.I(1).

Pieter Bergstein d/b/a "Salty Dog, Inc."

Brine Supply Well #1

Settlement Agreement & Stipulated Revised Final Order: NM-OCD 2008-2A

Page 12 of 15

III. OTHER TERMS & CONDITIONS

22. Enforcement. OCD retains the right to pursue any relief authorized by the Water Quality Act or WQCC Regulations for any violation not addressed herein. The OCD currently has no pending Water Quality Act enforcement actions or investigations against Mr. Bergstein. OCD retains the right to enforce the **Stipulated Revised Final Order** by administrative or judicial action, which decision shall be in its sole discretion. In the event that the OCD elects to file a judicial action to enforce the **Stipulated Revised Final Order**, the parties agree that the action shall be heard by the district court for Santa Fe County, which shall have exclusive jurisdiction over the parties and the Final Order, and they waive any right to challenge such jurisdiction in any forum. The laws of New Mexico shall govern the construction and interpretation of the Final Order.

23. Binding Effect. The **Stipulated Revised Final Order** shall be binding on the parties and their officers, directors, employees, agents, subsidiaries, successors, assigns, trustees, or receivers.

24. Duration. The **Stipulated Revised Final Order** shall remain in effect until Mr. Bergstein complies with its terms and conditions or it is terminated by written agreement of the parties.

25. Integration. The **Stipulated Revised Final Order**, together with the

Pieter Bergstein d/b/a "Salty Dog, Inc."

Brine Supply Well #1

Settlement Agreement & Stipulated Revised Final Order: NM-OCD 2008-2A

Page 13 of 15

original Administrative Compliance Order NM-OCD 2008-02 and any exhibits thereto (and in particular the paragraphs incorporated by reference, *infra*), which became final on June 23, 2008, comprise the entire agreement between the parties. The **Stipulated Revised Final Order** shall not be modified without the express written consent of the parties.

26. Reservation of Rights and Defenses. The **Stipulated Revised Final Order** shall not be construed to prohibit or limit in any way OCD from requiring Mr. Bergstein to comply with any applicable state or federal requirement. The **Stipulated Revised Final Order** shall not be construed to prohibit or limit in any way the OCD from seeking any relief authorized by the Water Quality Act for violation of any state or federal requirement applicable to Mr. Bergstein not resolved herein. The **Stipulated Revised Final Order** shall not be construed to prohibit or limit in any way Mr. Bergstein from raising any defense to an OCD action seeking such relief.

27. Waiver of State Liability. Mr. Bergstein shall assume all costs and liabilities incurred in performing any obligation under the **Stipulated Revised Final Order**. OCD, on his own behalf or on behalf of the State of New Mexico or any other agency of the State of New Mexico, shall not assume any liability for Mr. Bergstein's performance of any obligation under the **Stipulated Revised Final Order**.

28. Authority to Bind. The person executing this **Stipulated Revised Final**

Pieter Bergstein d/b/a "Salty Dog, Inc."

Brine Supply Well #1

Settlement Agreement & Stipulated Revised Final Order: NM-OCD 2008-2A

Page 14 of 15

