



New Mexico Energy, Minerals and Natural Resources Department

Bill Richardson
Governor

Joanna Prukop
Cabinet Secretary

Mark Fesmire
Division Director
Oil Conservation Division



October 7, 2009

Mr. Matthew Joy, Esq.
Jordan Biscoff & Hiser P.L.C
7272 E. Indian School Road
Suite 360
Scottsdale, AZ 85251

Attorneys for Agave Energy Company

Certified Mail No. 7009 0960 0001 0919 5730

**Re: Administrative Compliance Order—Agave Energy Company
Discharge Permit Renewal GW-050-1
Bitter Lakes Compressor Station**

Dear Mr. Joy:

The Oil Conservation Commission has issued the enclosed Administrative Compliance Order to Agave Energy Company (Agave) for violations of Discharge Permit Renewal GW-050-1 dated May 8, 2006.

As explained in the Order, Agave has the right to request an order hearing on the Order. If Agave does not file a Request for an Order Hearing within 30 days of the Order's receipt, the Order will become final. Agave may also confer with the Oil Conservation Division concerning settlement, regardless of whether Agave files a Request for an Order Hearing. To explore the possibility of settlement, contact Glenn von Gonten, Environmental Bureau, New Mexico Oil Conservation Division, 1220 South St. Francis Dr., Santa Fe NM 87505 or (505) 476-3488 or glenn.vongonten@state.nm.us.

During the Division's inspection of the Bitter Lakes Compressor Station on April 23, 2009, the inspector observed several sumps to be dirty and not properly maintained. The Division inspector also observed secondary containments that were dirty and containing fluids. Sumps and secondary containment systems are intended to catch releases and must be predominantly dry and clean. Sumps and secondary containment systems must be cleaned out frequently so that no fluids are being stored in them.

If you have any questions please feel free to contact me at sonny.swazo@state.nm.us or (505) 476-3463.

Matthew Joy, Esq.
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Sincerely,



Sonny Swazo
Assistant General Counsel, OCD

Ec: Mark Fesmire, Chairman, Oil Conservation Commission
Daniel Sanchez, OCD Enforcement & Compliance Manager
Gail MacQuesten, OCD Legal Counsel
Glenn von Gonten, Acting OCD Environmental Bureau Chief
Leonard Lowe, OCD Environmental Engineer

STATE OF NEW MEXICO
NEW MEXICO OIL CONSERVATION DIVISION

IN THE MATTER OF
AGAVE ENERGY COMPANY,

Respondent.

ADMINISTRATIVE COMPLIANCE ORDER

Pursuant to the New Mexico Water Quality Act (“WQA”), Chapter 74, Article 6 NMSA 1978, the Oil Conservation Division (“OCD”) issues this Administrative Compliance Order (“Order”) to Respondent Agave Energy Company (“Agave” or “Respondent”) for the Bitter Lakes Compressor Station.

I. FINDINGS OF FACT

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, § 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 WQA. See NMSA 1978, § 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, § 70-2-6(B). In addition to its duties under the OGA, the OCC is a “constituent agency” under the WQA. See NMSA 1978, § 74-6-2(J)(4).
3. Respondent Agave is an active domestic corporation doing business in New Mexico under SCC No. 1720713. Agave markets and transports petroleum products.

4. Agave operates the Bitter Lakes Compressor Station. The Bitter Lakes Compressor Station is a natural gas compressor station. The Bitter Lakes Compressor Station is located in the NE/4 NW/4 of Section 10, Township 9 South, Range 25 East, Chaves County, New Mexico.

5. On May 8, 2006, the OCD issued Discharge Permit Renewal GW-050-1 ("GW-050-1") to Agave for the Bitter Lakes Compressor Station pursuant to the WQA and the Water Quality Control Commission ("WQCC") rules.

6. Condition 9 of GW-050-1 states:

The owner/operator shall ensure that all above ground tanks have impermeable secondary containment (e.g., liners and berms), which will contain a volume of at least one-third greater than the total volume of the largest tank or all interconnected tanks. The owner/operator shall retrofit all existing tanks before discharge permit renewal. Tanks that contain fresh water or fluids that are gases at atmospheric temperature and pressure are exempt from this condition.

7. During an inspection of the Bitter Lakes Compressor Station on April 23, 2009, OCD inspector Leonard Lowe observed an unbermed above ground storage tank filled with liquid methanol.

8. OCD identified the violation to Agave in the initial discharge permit renewal that OCD sent Agave on May 28, 2009.

II. APPLICABLE STATUTES AND RULES

1. The WQA provides that the WQCC may require persons to obtain discharge permits from a constituent agency. See NMSA 1978, § 74-6-5.

2. For purposes of the WQA, "person" is defined to include corporations. See NMSA 1978, § 74-6-2(I).

3. 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. See NMSA 1978, § 74-6-10(A)(1).

4. If a person fails to take corrective actions within the time specified in a compliance order, the constituent agency may assess a civil penalty of not more than twenty-five thousand dollars (\$25,000) for each day of continued noncompliance with the compliance order, and suspend or terminate the permit violated by the person. See NMSA 1978, § 74-6-10(F)(1).

III. CONCLUSIONS OF LAW

1. The OCD has jurisdiction over Agave and the subject matter of this Order pursuant to NMSA 1978, Section 70-2-12(B)(22) and NMSA 1978, Section 74-6-10(A)(1).

2. Agave is a “person” for purposes of the WQA.

3. Agave is subject to GW-050-1.

4. Agave violated Condition 9 of GW-050-1 by not properly containing an above ground tank filled with liquid methanol. Condition 9 requires all tanks not containing fresh water or fluids that are gases at atmospheric temperature and pressure to have impermeable secondary containment which will contain a volume of at least one-third greater than the total volume of the largest tank.

IV. COMPLIANCE ORDER

Based upon the foregoing findings and conclusions, Agave is hereby ordered to comply with the following order:

1. Agave shall properly contain the above ground tank filled with liquid methanol within an impermeable secondary containment which will contain a volume of at least one-third greater than the total volume of the tank. Agave shall complete this requirement by November 16, 2009.

V. CIVIL PENALTY

1. Section 74-6-10(F)(1) NMSA 1978 provides that if a person fails to take corrective actions within the time specified in a compliance order, the constituent agency may assess a civil penalty of not more than twenty-five thousand dollars (\$25,000) for each day of continued noncompliance with the compliance order, and suspend or terminate the permit violated by the person.

2. If Respondent fails to timely comply with the foregoing Compliance Order requirements, the OCC may seek to assess a civil penalty of not more than twenty-five thousand dollars (\$25,000) for each day of continued noncompliance with the compliance order, and suspend or terminate the permit violated by the person.

VI. RIGHT TO ANSWER AND REQUEST A HEARING

1. Pursuant to NMSA 1978, Section 74-6-10(G), Respondent has the right to request a hearing to contest the Order.

2. An Order hearing shall be initiated by the filing of a Request for Order Hearing within thirty days after the Compliance Order is served. The Respondent shall file the original of the Request for Order Hearing with the WQCC, and serve a copy on the OCD. See WQCC Rule 20.1.3.400(A)(1) NMAC.

3. The Request for Order Hearing shall also serve as an Answer to the Compliance Order and shall:

- a. clearly and directly admit or deny each of the factual assertions contained in the Compliance Order; but where the Respondent has no knowledge of a particular factual assertion and so states, the assertion may be denied on that basis. Any allegation of the Compliance Order not specifically denied shall be deemed admitted;
- b. indicate any affirmative defenses upon which the Respondent intends to rely. Affirmative defenses not asserted in the Request for Order Hearing, except a defense asserting lack of subject matter jurisdiction, shall be deemed waived;
- c. be signed under oath or affirmation that the information contained therein is, to the best of the signer's knowledge, believed to be true and correct; and
- d. attach a copy of the compliance order.

See WQCC Rule 20.1.3.400(A)(2) NMAC.

VII. FINALITY OF ORDER

1. This Order shall become final unless the Respondent files a Request for Order Hearing with the WQCC within thirty days of receipt of this Order. Failure to file a Request for Order Hearing constitutes an admission of all facts alleged in the Order and a waiver of the right to a hearing under NMSA 1978, Section 74-6-10(G) concerning this Order. Unless the Respondent files a Request for Order Hearing the Order shall become final.

VIII. SETTLEMENT CONFERENCE

1. Respondent may confer with the OCD concerning settlement, regardless of whether Respondent files a Request for Order Hearing. The WQCC encourages settlement consistent with the provisions and objectives of the WQA and applicable rules. Settlement discussions do not extend the thirty day deadline for filing the Respondent's Request for Order Hearing, or alter the deadlines for compliance with this order. See WQCC Rule 20.1.3.700(B) NMAC. Settlement discussions may be pursued as an alternative to and simultaneously with the hearing proceedings. The Respondent may appear at the settlement conference itself and/or be represented by legal counsel.

2. Any settlement reached by the parties shall be finalized by a written, stipulated final order, which must resolve all issues raised in the Order, shall be final and binding on all parties to the Order, and shall not be appealable. If reached more than thirty days following the issuance of this Compliance Order, the WQCC must approve a stipulated final order.

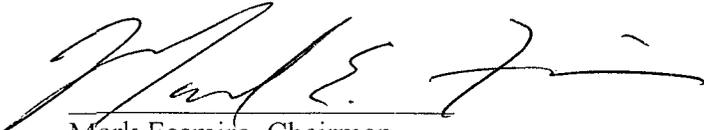
3. To explore the possibility of settlement in this matter, contact Glenn von Gonten, Environmental Bureau, New Mexico Oil Conservation Division, 1220 South St. Francis Drive, Santa Fe, NM 87505 or (505) 476-3488.

IX. COMPLIANCE WITH OTHER LAWS AND WAIVER

1. Compliance with the requirements of this Order does not relieve Respondent of the obligation to comply with all other applicable laws and rules.

X. TERMINATION

1. This Order shall terminate when Respondent certifies that all requirements of this Order have been met and the OCD has approved such certification, or when the parties have entered into a stipulated final order, which has been, if applicable, approved by the WQCC.



Mark Fesmire, Chairman
Oil Conservation Commission

COPY



STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

NEW MEXICO OIL CONSERVATION DIVISION,

Complainant,

v.

WQCC CASE NO. 09-08 (GO)

AGAVE ENERGY COMPANY,

Respondent.

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SETTLEMENT AGREEMENT AND STIPULATED FINAL ORDER

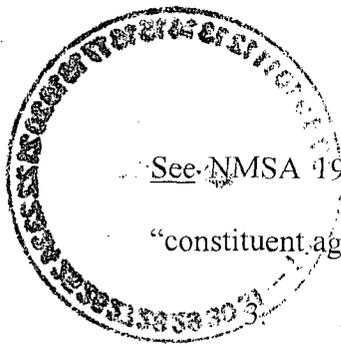
The New Mexico Oil Conservation Division (“OCD”) and Agave Energy Company (“Agave”) agree to resolve the Administrative Compliance Order issued to Agave on October 7, 2009 based on the terms and conditions specified in this Settlement Agreement and Stipulated Final Order (“Final Order”). For purposes of this Final Order, Agave admits the jurisdictional allegations of this 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).

Agave is an active domestic corporation doing business in New Mexico under SCC No. 1720713. Agave markets and transports petroleum products.

4. Agave operates the Bitter Lakes Compressor Station. The Bitter Lakes Compressor Station is a natural gas compressor station. The Bitter Lakes Compressor Station. Is located in the NE/4 NW/4 of Section 10, Township 9 South, Range 25 East, Chaves County, New Mexico.

5. On May 8, 2006, the OCD issued Discharge Permit Renewal GW-50-1 (“GW-05-1”) to Agave for the Bitter Lakes Compressor Station pursuant to the WQA and the Water Quality Control Commission (“WQCC”) rules.

6. Condition 9 of GW-05-1 states:

The owner/operator shall ensure that all above ground tanks have impermeable secondary containment (e.g., liners and berms), which will contain a volume of at least one-third greater than the total volume of the largest tank or all interconnected tanks. The owner/operator shall retrofit all existing tanks before discharge permit renewal. Tanks that contain fresh water or fluids that are gases at atmospheric temperature and pressure are exempt from this condition.

B. Alleged Violations

7. On April 23, 2009, the OCD inspected the Bitter Lakes Compressor Station. During the inspection the OCD inspector observed an unbermed above ground storage tank filled with liquid methanol.

8. The OCD identified the alleged violation to Agave in the initial discharge permit renewal that OCD sent Agave on May 28, 2009.

9. On October 7, 2009, the OCD issued an Administrative Compliance Order to Agave for the Bitter Lakes Compressor Station. The Administrative Compliance Order alleged that Agave violated Condition 9 of GW-05-1 by not properly containing an above ground tank filled with liquid methanol. The Administrative Compliance Order required Agave to properly contain the above ground tank filled with liquid methanol within an impermeable secondary containment which will contain a volume of at least one-third greater than the total volume of the tank. The Administrative Compliance Order required Agave to complete this requirement by November 16, 2009.

10. The Administrative Compliance Order provided that if Agave failed to timely comply with the requirements of the Compliance Order, the OCC may seek to assess a civil penalty of not more than twenty-five thousand (\$25,000) for each day of continued non-compliance with the compliance order, and suspend or terminate the permit violated by the person.

11. On or about November 2, 2009, Agave timely filed a Request for Order Hearing and Request for Stay of Deadlines set forth in Administrative Compliance Order Pertaining to Permit Renewal GW-05-1.

12. On or about November 13, 2009, the OCD and Agave agreed to extend the November 16, 2009 deadline in the Administrative Compliance Order to January 13, 2010 for purposes of settlement negotiations. The OCD and Agave waived the ninety-day hearing deadline requirements of NMSA 1978, Section 74-6-10(G) and 20.1.3.400(B)(1) NMAC.

13. On or about January 13, 2010, the OCD and Agave agreed to extend the January 16, 2010 deadline to April 16, 2010 in order to facilitate the on-going settlement negotiations of the parties.

14. On or about April 15, 2010, the OCD and Agave agreed to extend the April 16, 2010 deadline to May 14, 2010 in order to finalize a settlement agreement.

15. NMSA 1978, Section 74-6-10(A)(1) provides that 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..

16. 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 non-compliance for each violation. NMSA 1978, Section 74-6-10.1(A).

17. 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).

18. For purposes of the WQA, "person" is defined to include corporations. NMSA 1978, Section 74-6-2(I).

C. Mitigating Factors

19. Agave has complied with the Administrative Compliance Order regarding containment of the liquid methanol tank.

II. COMPROMISE AND SETTLEMENT

20. The OCD has jurisdiction pursuant to the WQA, WQCC Regulations and NMSA 1978, Section 70-2-12(B)(22) to issue the Administrative Compliance Order and to enter into this Final Order.

21. The parties have engaged in settlement discussions to resolve the Administrative Compliance Order without further proceedings.

22. The parties agree to this Final Order for the sole purpose of settling all violations alleged in the Administrative Compliance Order.

23. Agave denies the alleged facts and conclusions of law identified in Paragraphs 7, 8 and 9, above, and set forth in the Administrative Compliance Order, and does not admit any liability, fact or conclusion of law by entering into or complying with this Final Order.

24. Agave has placed the liquid methanol tank in secondary containment as required by the Administrative Compliance Order.

25. Agave agrees that it shall maintain the methanol tank in secondary containment whenever it is stationary and in use.

26. Because Agave complied with the requirements of the Administrative Compliance Order within the time frame provided for by the Administrative Compliance Order and extensions, the OCD will not seek the civil penalties that it may have sought under the Administrative Compliance Order had Agave not timely complied with the requirements of the Administrative Compliance Order.

III. OTHER TERMS AND CONDITIONS

27. Enforcement. The OCD retains the right to pursue any relief authorized by the WQA or WQCC Regulations for any violation not addressed in this Final Order. The OCD retains the right to enforce the 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 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 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. In any such action, Agave reserves the right to assert any defenses it may have.

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

29. Integration. The Final Order merges all prior written and oral communications between the parties concerning the subject matter of the Final Order, and contains the entire agreement between the parties. The Final Order shall not be modified without the express written consent of the parties.

30. Reservation of Rights and Defenses. The Final Order shall not be construed to prohibit or limit in any way the OCD from requiring Agave to comply with any applicable state or federal requirement. The Final Order shall not be construed to prohibit or limit in any way the OCD from seeking any relief authorized by the WQA for violation of any state or federal requirement applicable to Agave not resolved in this Final Order. The Final Order shall not be construed to prohibit or limit in any way Agave from raising any defense to an OCD action seeking such relief.

31. Mutual Release. The parties mutually release each other from all claims that each party raised or could have raised against the other regarding the facts and legal conclusions alleged above.

32. Waiver of State Liability. Agave shall assume all costs and liabilities incurred in performing any obligation under the Final Order. The OCD, on its own behalf or on the behalf of the State of New Mexico or any other state agency, shall not assume any liability for Agave's performance of any obligation under the Final Order.

33. Authority to Bind. The person executing this Final Order on behalf of Agave represents that s/he has the authority to execute this Final Order on behalf of Agave.

34. Disclosure to Successor-In-Interests. Agave shall disclose the Final Order to any successor-in-interest and shall advise such successor-in-interest that the Final Order is binding on the successor-in-interest until such time as Agave complies with its terms and conditions or it is terminated by written agreement of the parties.

35. Effective Date. The Final Order shall become effective upon the execution by the duly authorized representatives of both parties.

AGAVE ENERGY COMPANY



J.B. Smith
President
Agave Energy Company

5/14/10

Date



Mark Fesmire, P.E.
Director
New Mexico Oil Conservation Division

5/13/10

Date